Neutral Citation Number: [2020] EWHC 2438 (QB)

Case No: QB-2018-000795

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/09/2020

Before:

MR JUSTICE FREEDMAN

Between:

Dr Philip Comberg

Claimant

- and –

(1) VivoPower International Services Limited

(2) VivoPower International PLC

Defendants

Mr Edward Brown (instructed by **Hausfeld & Co LLP**) for the Claimant
Mr Charles Ciumei QC and Mr Owen Lloyd (instructed by **Scott + Scott UK LLP**) for the **Defendants**

Hearing dates: 4-6 March 2020, 9-12 March 2020, 17 March 2020.

Further written submissions: Court questions 16 June 2020, Schedule of response of the parties 24 June 2020, Claimant's note 30 June 2020 and Defendants' email 2 July 2020.

Further Court questions 15 July 2020, Claimant's response 16 July 2020 and Defendant's response 17 July 2020 (other emails not listed).

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Approved Judgment

Covid-19 Protocol: This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be Friday 11 September 2020 at 10.30am.

Mr Justice Freedman:

Contents (numbers refer to paragraph numbers)

I Introduction

1. This has been a hard-fought employment dispute. Dr Philip Comberg was or acted as Chief Executive Officer ("CEO") of VivoPower International PLC from January 2016. The Claimant is referred to as "Dr Comberg" and the Defendants are referred to collectively or individually as "VivoPower", except when there is a need to refer specifically to VivoPower International PLC which is referred to as "PLC". The reference to hard-fought is particularly to the two main combatants, namely Dr Comberg himself and Mr Kevin Chin ("Mr Chin"), the founder of an Australian company, Arowana International Inc, the holding company of VivoPower, namely. Despite the fact that there are a number of Arowana companies, the Australian entity is referred to as "Arowana".

2. Dr Comberg originally qualified as a German lawyer (at Bruckhaus before moving to work at Clifford Chance and then Freshfields Bruckhaus Deringer). He has since built a career in the solar power sector. Solar power is a sector which has experienced significant growth in recent years, but, at the same time, has been especially exposed to significant volatility in the face of changing political and market conditions. Accordingly, it presents high-risk/reward opportunities for entrepreneurs.

3. VivoPower are corporate vehicles established for the purpose of taking advantage of these opportunities. VivoPower is backed by Mr Chin, whose interest is held through a family trust. Mr Chin, who is an international entrepreneur, orchestrated the establishment of VivoPower and the recruitment of Dr Comberg as CEO in order to seek to exploit opportunities in the solar power sector. To this end, Dr Comberg left Germany and moved, with his family to establish VivoPower in London. Dr Comberg did so from January 2016 until his resignation and subsequent termination of his employment in November 2017.

4. VivoPower's business model is essentially acquisitive in that it seeks to identify and acquire renewable energy projects internationally and, using its own knowhow and experience, grows and exits from those projects in order to achieve returns. Mr Chin's strategy is to seek growth in a short window. The development and growth of VivoPower in the way envisaged by Mr Chin proved to be challenging. Prevailing political conditions impacted heavily on the sector in 2016 and especially the collapse of SunEdison Inc, the Brexit referendum result in the UK and the election of President Trump in 2016 who did not appear favourably disposed toward renewable energy. This was the backdrop to the listing of PLC in December 2016 which raised a sum of about $22 million, falling far short of Mr Chin's target of $80 million. They impacted heavily on the sector and produced a difficult and complex climate for start-up entities. As expressed by Mr Chin following the NASDAQ listing, *"solar went from darling sector when we launched SPAC to unfashionable post SUNE blow up."*

5. Mr Chin blamed Dr Comberg for numerous matters which he regarded as 'abject performance'. He has cited among other things, and by way of summary only, serious failures on the part of Dr Comberg which had caused or contributed to lack of immediate growth, investor lack of confidence, poor financial reporting, loss of trust and confidence of employees and of the board. In the summer of 2017, there were plans to replace Dr Comberg as CEO and in September 2017 he stepped down as CEO in the face of pressure from his fellow directors, but without resigning as employee save on 12 months' notice.

6. On Dr Comberg's case, the prevailing political conditions led to much less interest in the listing of PLC than otherwise would have been the case. Thereafter, having had a fraction of the interest that had been expected by Mr Chin, there was an inability to interest the investors and the share price continued to slide. On VivoPower's case, this was caused by poor performance on the part of Dr Comberg, particularly in a failure to interest investors.

7. In addition to the Service Agreement of Dr Comberg with PLC dated 4 August 2016, it is alleged by Dr Comberg that there were various oral fee agreements. Each of them is denied by VivoPower. They are as follows:

   (1) the Deferred Remuneration Agreement (as defined in paragraph 14 of the Amended Particulars of Claim ("AmPOC"))' under which there is a claim of monthly fees of £45,000 per month from January 2016 to August 2016 prior to the Service Agreement coming into effect on 1 September 2016. This claim comprises a sum of £360,000 (which equates, at an exchange rate of 1.25 dollars to the pound, to a sum of $450,000).

   (2) the Contract Term Agreement (as defined in paragraph 11 of AmPOC) under which there is a claim for the sum of $1 million. It is said for Dr Comberg that this was provided in exchange for the willingness of Dr Comberg to concede a demand that he be granted a 3-year service contract and instead had only a rolling one-year term.

(3) the Listing Fee Agreement (as defined in paragraph 17 of AmPOC) under which it is said that there was an agreement of VivoPower to provide shares to Dr Comberg of a value of $835,000.

8. These three agreements, unlike the Service Agreement, are said to be oral agreements. However, according to Dr Comberg, they are evidenced by three Independent Contractors Agreements ("ICAs) each made in March 2017. Dr Comberg does not sue on the basis of those agreements, but on the oral agreements. Indeed, the ICAs are not between Dr Comberg and VivoPower, but between a service company of Dr Comberg, Tiandi Consulting Limited ("Tiandi") of Guernsey and an Arowana company known as Arowana Global Services (Singapore) Pte. Limited ("Arowana Singapore"). Dr Comberg also makes alternative quantum meruit/restitutionary claims to the Deferred Remuneration Agreement and the Listing Fee Agreement. All of the claims are denied.

9. The other heads of claims are in respect of the Service Agreement and especially a claim for wrongful dismissal. In September 2017, Dr Comberg stepped down as CEO of VivoPower and gave 12 months' notice of termination of the Service Agreement. There were negotiations for an exit deal with solicitors on both sides. At the end of September 2017, Dr Comberg's monthly salary was paid, but at the end of October 2017, his monthly salary was not paid. He sent emails about this on 1 and 2 November 2017. He says that he asked his solicitors to pass on to VivoPower's solicitors the requirement that his October salary was paid. When payment was not made on 3 November 2017, he terminated the Service Agreement by delivering a letter in person to VivoPower's address in London contending that VivoPower was in repudiatory breach. There was subsequently correspondence, and in particular a letter of 17 November 2017 of solicitors acting for VivoPower who said that the termination was ineffective and themselves terminating the contract for repudiatory breach by reference to the termination email of 3 November 2017 and to performance issues under the Service Agreement in the nature of alleged misconduct and/or mismanagement.

10. The issues in the wrongful dismissal claim are first whether the termination of Dr Comberg was by reason of a repudiatory breach on the part of VivoPower or whether he summarily resigned as VivoPower contend. Second, if it was a repudiatory breach, there is a question as to whether in any event VivoPower was able to terminate summarily by reference to misconduct/mismanagement allegations, such as to restrict the damages caused by a wrongful dismissal. This involves appraising the vast amount of evidence that was led in this regard. There will also be considered Dr Comberg's case that VivoPower is precluded from so doing because of affirmation of the Service Agreement in particular by paying a bonus in June 2017 and paying monthly salary up to September 2017.

11. A further issue has arisen as to whether VivoPower has in fact compromised the misconduct/mismanagement allegations by accepting a Part 36 offer in respect of the counterclaim which referred to these allegations. There are further issues under the Service Agreement concerning the amounts due by way of damages if Dr Comberg was constructively dismissed and, further, sums due in any event including withheld

holiday pay. The damages issues include questions relating to bonus entitlements and an award of Omnibus shares.

12. The case lasted 8 court days, but there were in addition two reading days at the start, and also a gap of a further 2 working days during which closings were prepared and the skeletons were read. In this way, the 12 days allocated to the case were fully used. Dr Comberg gave evidence over a period of 4 days comprising about 2½ days of which one day was a particularly long day to complete his evidence. He was then called for a further hour to deal with cross-examination on quantum meruit. There was a short amount of evidence from his wife, Ms Ellen Comberg ("Mrs Comberg") and also from Alan Yuan of Lucas Technologies Inc who gave evidence from California by video-link.

13. The primary witness for VivoPower was Mr Kevin Chin whose evidence was given over a period of three days comprising about 2 days' worth of evidence. There was also just over a day of further evidence from (i) Mr Weatherley-White, the CFO of VivoPower who then replaced Dr Comberg as CEO, (ii) the non-executive directors Mr Peter Johann Sermol ("Mr Sermol") and Mr Edward Hyams ("Mr Hyams"), (iii) head of operations Ms Julie-Ann Byrne ("Ms Byrne"), (iv) the group financial controller appointed at about the time of the departure of Dr Comberg, namely Mr James Tindal-Robertson, and (v) Mr Matthew Stephen Davis who gave evidence from Australia by video-link.

14. In the course of preparation of this judgment, a note was sent to the parties seeking assistance about various of the claims such as the claim to Omnibus shares, holiday pay and aspects of the bonus payments. Instead of this leading to issues being clarified and confined, this generated a large amount of argument which has extended rather than reduced the areas to be resolved in this judgment. Some of the documents, but not all the emails, generated by the requests for assistance from the Court appear under the heading of this judgment.

II The history and background

15. Dr Comberg was highly valued by Mr Chin on recruitment. He was recruited as CEO in order to exploit opportunities in the solar power sector. He had a history in the relevant sector. He was previously engaged under a consultancy agreement entered into with Magnetar Solar (UK) Limited dated 10 September 2014, and a consultancy agreement with Magnetar Capital LLC dated 1 July 2015. On 7 August 2015, Mr Chin and Dr Comberg had their first telephone discussion about the solar power industry in general terms. On 16 September 2015, they met for lunch at a restaurant in Mayfair in order to discuss the possibility of working together. On 14 December 2015, Mr Chin sent to Dr Comberg an email outlining the role which he saw for Dr Comberg within the business venture. There were various indicators including a base salary of £540,000 per annum and various bonuses comprising key performance indicators (50%) of base for target performance score and 100% of base for maximum performance score and at least 20% of the taxed proceeds to be invested in shares in VivoPower International shares within 17 months. On 29 December 2015, there were put forward sponsor shares proposals in general terms involving a mix of shares acquired and shares provided to the same value.

16. The two VivoPower companies were incorporated on 1 February 2016. In the meantime, Dr Comberg had started to work in January 2016. That was before incorporation, and it appears that Arowana was discharging liabilities prior to incorporation. On 7 February 2016, a meeting took place between Mr Chin and Dr Comberg in Sydney at the Marigold Chinese restaurant. In mid-March 2016, Dr Comberg interviewed potential employees in London. He also had a meeting about his personal tax affairs with PwC in London which was paid for by Arowana. In April 2016, Mr Weatherley-White, who became the Chief Financial Officer ("CFO"), started to work for VivoPower although his formal start date was 13 July 2016. On 26 April 2016, Dr Comberg met with Mr Chin at the Bonnie Gull Seafood Shack in Fitzrovia, London.

17. On 12 June 2016, Mr Chin emailed Dr Comberg stating that he was targeting 15 July 2016 as a date to list PLC on the NASDAQ exchange. On 5 July 2016, Dr Comberg began negotiations with Mr Chin for VivoPower regarding the formal contract of employment. In the drafting of a service agreement, VivoPower was represented by Herbert Smith Freehills solicitors ("HSF") and Dr Comberg by Freshfields Bruckhaus Deringer solicitors ("Freshfields"). These negotiations culminated in the Service Agreement being signed on 4 August 2016. On 7 August 2016, VivoPower hosted the first team event at which Dr Comberg discussed the Rockefeller Habits to be implemented in due course.

18. There will be a section below about what Dr Comberg refers to as the Deferred Remuneration Agreement and how there was originally a monthly agreed rate of £41,666. In May-July 2016, this was varied to a sum of £45,000 per month retrospectively, apparently from 1 January 2016 even though VivoPower was not incorporated until 1 February 2016. Greater detail about this negotiation will appear below in the section about the Deferred Remuneration Agreement.

19. There will also be considered the way in which the negotiations almost appeared to break down over whether the length of the Service Agreement should be 3 years as sought by Dr Comberg or a rolling 12-month term as desired by VivoPower. These negotiations are relevant because it was in this context that according to Dr Comberg, there was agreement on the part of VivoPower to pay a sum of $1 million conditional upon the listing of PLC taking place. Greater detail about this negotiation too will take place below in the section about the Contract Term Agreement.

20. There will also be considered the communications between the parties as regards the possibility of Dr Comberg acquiring a shareholding and whether and in what respects this was a binding agreement and between whom. This too will be the subject of further narrative in the section about the Listing Fee Agreement.

21. On 25 August 2016, Dr Comberg finalised first drafts of the Term Sheets. This will be discussed further in the consideration of the various oral fee agreements for which Dr Comberg contends. On 1 September 2016, the employment of Dr Comberg under the Service Agreement commenced, albeit that he had been working before then since

at latest 1 February 2016 when the VivoPower companies were incorporated. He started work before then in January 2016.

22. On 2 November 2016, there was a board meeting approving the terms of the special purpose acquisition company and the listing. On 1 December 2016, Mr Russell Hoadley ("Mr Hoadley") began to work as Financial Controller at PLC, which would become the subject of criticisms of Dr Comberg as regards his appointment and his performance. On 29 December 2016, PLC was listed on the NASDAQ exchange. As noted above, a fraction of what had been expected to be invested was raised.

23. On 14 March 2017, Dr Comberg incorporated what he called his service company, Tiandi in Guernsey. On the next day was the first of the ICAs between Arowana Global Services (Singapore) Pte. Ltd ("Arowana Singapore") and Tiandi. The others were dated 28 and 30 March 2017.

24. On 19 March 2017, Dr Comberg met Mr Chin at the Caffe Concerto in Knightsbridge, London. He prepared a spreadsheet outlining a series of fees which he said were payable to him. On 29 March 2017, there was a further meeting between Dr Comberg and Mr Chin in Sydney. At that meeting, there was a discussion about the awarding of a bonus to Dr Comberg in respect of the period between 1 February 2016 and 31 March 2017. Subsequent documents describe this as a bonus, but VivoPower says that the bonus was in part a deferred remuneration for the months between 1 February 2016 and 31 August 2016. This will be considered in the section below about the Deferred Remuneration Agreement. Dr Comberg also says that it was agreed that there would be paid to him a sum of $835,000 which will be considered in the section about the Listing Fee Agreement.

25. On 17 May 2017, there was a meeting between Dr Comberg and Mr Chin in London at which it was said that various promises of payments were made. On 25 May 2017, there was published the Pearl Meyer report on executive compensation. On 7 June 2017, PLC's annual results were published. On 28 June 2017, there was paid to Dr Comberg a bonus of £630,000. On 3 July 2017, there was a board meeting at which PLC's financial information was discussed, which is the subject of allegations of misrepresentation against Dr Comberg referred to below. From that point onwards, it was suggested that he had lost the confidence of the board and particularly of Mr Chin and apparently the non-executive directors, Mr Sermol and Mr Hyams.

26. In the spring of 2017, there were controversies which were becoming more intense. They related especially to the demands of Dr Comberg under the various alleged fee agreements. They were not paid. There was a resentment on the part of Mr Chin that Arowana was investing heavily in VivoPower, whereas Dr Comberg had not invested at all. Dr Comberg was concerned about the failure of VivoPower to honour what he believed had been promises made to him.

27. From the start of July 2017, Dr Comberg seems to have become isolated. This can be seen from the emails of 3 July 2017 from which he was excluded. On 2 July 2017, Mr Chin writing to all of the directors including Dr Comberg felt that the Annual Return was too short on detail and that he would have extensive suggestions. On 3

July 2017 just after midnight at 12.45am, Dr Comberg wrote to Mr Weatherley-White saying that he had tried to call him with *"several things on the AR (Annual Report)"*, and the letter draft. He was attaching a second version of the letter with just a few amendments and some sections marked yellow. He said that he believed that the mark-ups needed more discussion and would speak later that day. He was confused about the status quo of the Board meeting. Later that day, there were emails critical of Dr Comberg and not copied to him including one sent at 12.55pm from Mr Sermol to Mr Chin, Mr Hyams and Mr Hui, also a director of VivoPower, being critical about Dr Comberg's work on the Annual Report. He felt that there was a misrepresentation as regards the US pipeline. At 8.29pm, Mr Hyams wrote that he had spoken with Mr Hoadley, the Financial Controller, and understood that Dr Comberg had had no involvement in the Annual Return and had left it to others.

28. On 7 July 2017, there was an email about the late filing of the Annual Report from Mr Chin to fellow board members but excluding Dr Comberg and referring to this as *"disgraceful and embarrassing to say the least…".* He organised a call with auditors to launch an investigation. On the same day, there were further emails exchanged from Mr Chin and Mr Sermol without Dr Comberg being copied in, about alleged poor project management and about the pressure that Mr Hoadley was feeling. On 9 July 2017, Mr Hyams wrote, not copying in Dr Comberg, being critical of Dr Comberg with the suggestion that he was not giving sufficient time and space to Mr Hoadley and requiring improvement in Dr Comberg's skills and behaviours. These allegations are considered below.

29. A month later, on 7 August 2017, Mr Chin sent an email to Dr Comberg to complain about the late filing of the Form 20-F and the issues with the Annual Report. He believed that there was a high risk that VivoPower's accounting and finance systems, people and process issues would derail the audit and financial reporting for Arowana, and felt that nothing had improved over the last 5 weeks when there had been recruitment to support Mr Hoadley. There was a need to give Mr Hoadley a warning with a view to 'exiting him' by the end of the month if his performance did not improve. On 9 August 2017, Mr Chin passed on the results of the PKF Audit with Dr Comberg. On the next day, there was an exchange of emails between Mr Chin, Mr Hyams and Mr Sermol regarding "*changes to leadership*".

30. Mr Hyams in his witness statement at paragraph 17 said that the Board took preparatory steps to remove Dr Comberg as CEO, including identifying legal advisers to assist the company *"in the event that we need to make changes to leadership."* On 10 August 2017, Mr Chin wrote to Mr Hyams and Mr Sermol identifying the key areas which became the misconduct/mismanagement allegations in this case, which will be considered later in this judgment. On 16 August 2017, the members of the Board excluding Dr Comberg shared ideas about potential recruitment firms to find a replacement for Dr Comberg. On 20 August 2017, Mr Chin wrote to Dr Comberg and referred to his *"deep diving into the mess that VivoPower's accounting, budgeting and financial reporting."* On 27 August 2017, Mr Chin referred to material errors in monthly board reports which were *"toilet paper"*.

31. From then until Dr Comberg agreeing to step down as CEO on 17 September 2017, there were numerous emails moving towards the removal of Dr Comberg as CEO. On 28 August 2017, Mr Hyams noted that Dr Comberg had been unwilling to focus

on building up processes and costs needed in the business and had simply had the mind of extracting as much personal cash as possible without proper regard to the business. Mr Hui believed that Dr Comberg had underpaid some key people and had moved from contributing value to the company to shifting value to himself regardless of the health of the business. On 5 September 2017, the Audit Committee met with Dr Comberg to discuss mismanagement issues arising out of findings of PKF. Mr Chin insisted on maintaining a board meeting fixed for 19 September 2017. There were negotiations about an exit for Dr Comberg and on 16 September 2017, Mr Chin emailed the non-executive directors saying that a process to terminate for cause (specifically negligence) was appropriate. If Dr Comberg resigned and forwent all entitlements other than backpay, then that may be considered by VivoPower. On the next day, Dr Comberg stepped down as CEO without terminating his employment, and Mr Chin wrote to the board saying that *"Philip had lost the team, the board and the key shareholders."*

32. When it came to negotiating an exit, Dr Comberg was prepared to forgo the fee agreements save for the deferred fee agreement and would take $450,000 referred to by Mr Chin as the "*backpay*". When Dr Comberg was prepared to agree to do this, the offer was withdrawn, it was said for regulatory reasons. Then Dr Comberg was willing to walk away without the claim for the *"backpay"*. VivoPower took matters a stage further. First, it sought to keep open a claim for damages for breach of contract which would prevent a walk away, invoking various requirements in order to compromise such a counterclaim. There were then intimated ways of limiting the scope of any such claim. Second, it decided not to pay the monthly payment of salary due on or about the last day of October 2017.

33. If these were the tactics, they did not bear fruit. First, Dr Comberg treated the withholding of the October salary as a repudiatory breach of contract. This will be considered below. Second, by this stage, Dr Comberg had moved law firm from Macfarlanes to Hausfeld & Co LLP ("Hausfeld"). In a letter of 10 November 2017, a claim of what might have amounted to about £3 million was intimated.

34. The reaction of VivoPower set a mark for this litigation. On 17 November 2017, Skadden, Arps, Slate, Meagher & Flom LLP ("Skadden"), who replaced HSF, replied in a letter of 62 paragraphs, making numerous very serious allegations against Dr Comberg, in which no fewer than 8 heads of claims were intimated at paragraph 25 and then developed in the paragraphs which followed. There was a detailed response in a letter from Hausfeld of 4 December 2017 and an even longer letter of 11 December 2017. There were then two letters from Skadden of 27 December 2017. The second letter was longer, comprising 132 paragraphs and was over 30 pages in length. The complaints were very wide-ranging and diffuse. Taken at face value, the communications of Skadden indicated that Dr Comberg was hopeless as a CEO, the source of all the problems of VivoPower. A counterclaim of about £46,000,000 was indicated together with other counterclaims of £1,415,000.

35. The number and length of these allegations has set a pattern in the litigation thus far. It is of very long letters about the performance of Dr Comberg. This pattern is then replicated in the pleadings and in the witness statements. This includes a long defence and counterclaim, with subsequent amendments. There have been numerous

rounds of Requests for Further Information being sought and of Further Information being provided of the various iterations of the defence and counterclaim. There was a 43-page response dated 22 June 2018, a 17-page response dated 7 August 2018, shorter responses dated 7 October 2019 and a further 20-page response dated 29 October 2019.

36. It may be said on behalf of VivoPower that there was so much egregious about Dr Comberg's performance that it is not possible to confine it to a small number of the most serious allegations. However, if in fact the allegations were so serious as to justify summary termination of his service agreement, then the presentation would have been improved by choosing the strongest points. That is not to say that all of the points cannot be before the Court, but as a matter of presentation, the selection of a few points at the forefront is usually of assistance in providing coherence and emphasis. If the most serious of the points are developed in such a way as to make an impact, then the alleged entitlement to terminate has a greater prospect of being established than simply by putting many tens of points.

37. So diffuse were the allegations at the outset of the trial that the Court requested VivoPower to identify in a note which of the breach allegations at paragraphs 55-119 of the Re-amended Defence ("the RAMD") are relied on by VivoPower as being of *'particular significance'*. A note headed "Defendants' Note on the Mismanagement Allegations" dated 7th March 2020 was lodged with the Court. That occurred after most of the cross-examination of Dr Comberg, but before the witnesses had been called for VivoPower. This has been of assistance to the Court in understanding the way in which the case has been formulated. However, it must also be noted that it was not formulated at an earlier stage, that is long before the trial. The effect has been that Dr Comberg has had to answer wide-ranging allegations, not knowing which would be the ones which would be emphasised. He has had to address the points made against him in detail which he has done so particularly in his first witness statement of 135 pages. The witness statement would have been unnecessarily long but for the fact that it is the inevitable corollary of the number of allegations against him and his desire to answer each of them as far as possible.

38. The days of cross-examination of Dr Comberg were focused more on the other aspects of the case. When the misconduct/mismanagement allegations were put, it was done more formulaically by putting the substance of the charge. There were so many allegations that not all of them were put, albeit that it is inevitable what the answers would have been had they been put since the case was dealt with so fully by Dr Comberg in his evidence, and generally Dr Comberg's oral evidence accorded with his written evidence. There was generally an inability to make any headway in cross-examination in rebutting Dr Comberg's answers to the allegations of misconduct and mismanagement.

39. This does not mean that Dr Comberg's tenure as CEO was an unequivocal success. It was not, but the question is whether this was due to breaches of contract on his part. There is a long way to travel from the feeling that a different CEO might have done a better job to proving misconduct or mismanagement sufficient to justify summary termination. For example, it does not follow from the poor performance of a company of an employee or from investor dissatisfaction that this was due to the misconduct or mismanagement of the CEO. There are also the difficulties of proof

that (a) a CEO should have concentrated on one area when he was concentrating on others, and (b) a CEO fell below a standard, when unlike in the case of various professions, there are less measurable standards. The relevant law will be considered below.

40. There are other indicators that the fall out owed more to a personal fall out between Mr Chin and Dr Comberg than to a reason to terminate summarily. The allegations in question, for example, poor investor presentation or failures in respect of financial budgeting and the presentation of information could have been made more directly against Mr Weatherley-White as CFO at the relevant time. That is not an answer to the position of Dr Comberg who bears some responsibility in respect of overseeing matters as CEO. However, when Dr Comberg was marginalised and ceased to provide the functions as CEO from September 2017 onwards, his replacement as CEO was Mr Weatherley-White. If the complaints had been so serious that they were capable of leading to summary termination of Dr Comberg's service agreement, then it was at lowest inconsistent with this that Mr Weatherley-White would be his successor. He too would have been implicated in these matters. The fact that he was not may be an indicator that the allegations were not as real or as serious as is now claimed.

41. The allegation in the correspondence that there was a counterclaim for many tens of millions of damages must be seen for what it is. If that was really believed to be the case, then there was every reason to pursue such a counterclaim, particularly where Dr Comberg had insurance against such allegations. In fact, at an early stage in the case, and at the instigation of the insurers who were backing the defence to counterclaim, a Part 36 offer was made on behalf of Dr Comberg in respect of the counterclaim in the sum of £100,000 plus costs. In one sense, it might be said to be unusual for Dr Comberg to have made this offer whilst fighting these issues in respect of the claim and resisting a defence to his wrongful dismissal claim that termination for breach was lawful. However, against a counterclaim of tens of millions of pounds, this compromise can be understood as an insurer which was assisting him to defend the counterclaim seeking to save unrecovered costs which might have been greater even in the event of success in the defence to counterclaim.

42. More significant is the position of VivoPower. If it had any conviction in these allegations, and knowing (at least on its case) that the allegations arose for determination at least as to liability in respect of the defence to the case of wrongful dismissal, it is noteworthy that it was prepared to abandon the counterclaim so relatively cheaply. One has to take into account the fact that VivoPower might have apprehended some significant quantum difficulties. Nevertheless, the compromise of the counterclaim is an indicator that VivoPower put forward a counterclaim of many tens of millions of pounds in which it lacked conviction. The inference is that the counterclaim may at least in part have been of a tactical nature intended to grind down Dr Comberg.

43. There are other indicators that show that the counterclaim may have been tactical. The allegation on which most money depended was of "destruction of shareholder value": see paragraph 2 of the RAMD, saying that the market capitalisation had fallen by about 50%, about £46 million. The biggest loss was caused by the collapse in value on the day of the listing of PLC from a listing price of $10.20 per share to

around $4.00 per share, when the listing price was determined ultimately by Mr Chin, and not by Dr Comberg who believed that the share price on listing was too high. The trading price was about $3.00 at the time of the termination of the Service Agreement of Dr Comberg. Two years later, the shares are currently trading around $1.00 per share, so it is not the case that PLC can allege that by removing the mismanagement of Dr Comberg, the poor performance was reversed. This might be an indicator that the reduction in shareholder value was not caused by Dr Comberg.

44. Dr Comberg has complained that the allegations are there to damage his reputation. That is a little circular in that it begs the question as to whether the allegations are well made, and therefore it does not necessarily help in this regard. There is an indication that there is some intention to go beyond the litigation itself in the opening skeleton at trial and developed at the hearing where it is said that if Dr Comberg succeeds in his claims on the alleged fee agreements, then he was "*personally responsible for and a party to very serious breaches of the Defendants' reporting obligations as a listed company on the NASDAQ exchange"* (paragraph 13). It is not only that, but *"the reality is that the greatest threat to Dr Comberg's reputation, future career, and potential standing as a company officer will come to fruition in the event that he is successful on any of his alleged fee claims"* (paragraph 14). It is of course entirely justified for VivoPower to make the point that the absence of these fee entitlements in accounts approved by Dr Comberg indicates that the fee agreements did not take place and/or to contend that there would be a breach of duty in not reporting them in the accounts. However, the way in which it was put seems to go well beyond that point and is directed to Dr Comberg's commercial reputation generally. This appears to be a warning to Dr Comberg that he will be damaged by this litigation if he continues in it beyond the amounts at stake between the parties.

III Approach to evidence

45. When considering the arguments, the disclosure and documentary record require particular scrutiny. Such evidence is likely to be much more reliable than the content of witness statements, prepared with the assistance of a legal team after the event and in the full knowledge of legal proceedings and intended to meet the pleaded case against them. This reflects the long-standing judicial approach to conflicts between written witness statements and contemporaneous accounts.

46. In *Simetra Global Assets Ltd & Anor v Ikon Finance Ltd & Ors* [2019] EWCA Civ 1413, Males LJ stated the following at paragraphs 48-49 under the heading "*The importance of contemporary documents"*:

> *"48. In this regard I would say something about the importance of contemporary documents as a means of getting at the truth, not only of what was going on, but also as to the motivation and state of mind of those concerned. That applies to documents passing between the parties, but with even greater force to a party's internal documents including emails and instant messaging. Those tend to be the documents where a witness's guard is down and their true thoughts are plain to see. Indeed, it has become a commonplace of judgments in commercial cases where there is often extensive disclosure to emphasise the importance of the contemporary documents.*

> *Although this cannot be regarded as a rule of law, those documents are generally regarded as far more reliable than the oral evidence of witnesses, still less their demeanour while giving evidence. The classic statement of Robert Goff LJ in The Ocean Frost [1985] 1 Lloyd's Rep 1 at p.57 is frequently, indeed routinely, cited:*
>
> > *"Speaking from my own experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a judge in ascertaining the truth. I have been driven to the conclusion that the Judge did not pay sufficient regard to these matters in making his findings of fact in the present case."*
>
> *49. It is therefore particularly important that, in a case where there are contemporary documents which appear on their face to provide cogent evidence contrary to the conclusion which the judge proposes to reach, he should explain why they are not to be taken at face value or are outweighed by other compelling considerations."*

47. Both *The Ocean Frost* and *Simetra* were cases concerning fraud, but the dicta in *The Ocean Frost* have been applied especially in commercial cases on times too numerous to mention.

48. In *Grace Shipping v Sharp & Co* [1987] 1 Lloyd's Rep 207 (Privy Council) Lord Goff said at p. 215:

> *"It is not to be forgotten that, in the present case, the Judge was faced with the task of assessing the evidence of witnesses about telephone conversations which had taken place over five years before. In such a case, memories may very well be unreliable; and it is of crucial importance for the Judge to have regard to the contemporary documents and to the overall probabilities."*

49. In *Gestmin SGPS SA v Credit Suisse (UK) Limited* [2013] EWHC 3560 (Comm) Leggatt J (as he then was) said this:

> *"19. The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. This is obvious where the witness is a party or has a tie of loyalty (such as an employment relationship) to a party to the proceedings. Other, more subtle influences include allegiances created by the process of preparing a witness statement and of coming to court to give evidence for one side in the dispute. A desire to assist, or at least not to prejudice, the party who has called the witness or that party's lawyers, as well*

> *as a natural desire to give a good impression in a public forum, can be significant motivating forces.*
>
> *20. Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. A witness is asked to make a statement, often (as in the present case) when a long time has already elapsed since the relevant events. The statement is usually drafted for the witness by a lawyer who is inevitably conscious of the significance for the issues in the case of what the witness does nor does not say. The statement is made after the witness's memory has been 'refreshed' by reading documents. The documents considered often include statements of case and other argumentative material as well as documents which the witness did not see at the time or which came into existence after the events which he or she is being asked to recall. The statement may go through several iterations before it is finalised. Then, usually months later, the witness will be asked to re-read his or her statement and review documents again before giving evidence in court. The effect of this process is to establish in the mind of the witness the matters recorded in his or her own statement and other written material, whether they be true or false, and to cause the witness's memory of events to be based increasingly on this material and later interpretations of it rather than on the original experience of the events."*

At [22]:

> *"In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."*

50. These passages were considered by the Court of Appeal in *Kogan v Martin* [2020] EMLR 4, confirming the general proposition that especially in commercial cases, the Court must adopt this approach. However, that is not to say that all the evidence including the oral evidence should not be taken into account. The Court of Appeal was there critical of a judge who said that he would take very little account of the oral evidence because of the documents. In the judgment of the court at 88-89 (Floyd, Henderson, Peter Jackson LJJ), it was stated:

> *"88. ...First, as has very recently been noted by HHJ Gore QC in CBX v North West Anglia NHS Trust [2019] 7 WLUK 57, Gestmin is not to be taken as laying down any general principle for the assessment of evidence. It is one of a line of distinguished judicial observations that emphasise the fallibility of human memory*

and the need to assess witness evidence in its proper place alongside contemporaneous documentary evidence and evidence upon which undoubted or probable reliance can be placed. Earlier statements of this kind are discussed by Lord Bingham in his well-known essay The Judge as Juror: The Judicial Determination of Factual Issues (from The Business of Judging, Oxford 2000). But a proper awareness of the fallibility of memory does not relieve judges of the task of making findings of fact based upon all of the evidence. Heuristics or mental short cuts are no substitute for this essential judicial function. In particular, where a party's sworn evidence is disbelieved, the court must say why that is; it cannot simply ignore the evidence."

IV The oral evidence

51. The primary oral evidence which requires appraisal is that of Dr Comberg and Mr Chin respectively. It is first necessary to consider the many witnesses who have spoken as to the inadequacy of Dr Comberg. It was an impressive cast list, and it appeared to be a forceful aspect of the case of VivoPower. However, that has been undermined by the oral evidence. Some witnesses have had difficulty speaking to their evidence in that it appears to have been prepared for them and has not been their own words. Other witnesses have been unable to justify the force of their feeling against Dr Comberg.

(1) Ms Byrne

52. Ms Byrne had a very limited role. She was a junior employee with limited experience. She held at the relevant time a back-office role as head of operations, mainly based in Ireland where she lived and coming to the UK for about four days each month. She had previously worked for Arowana in Australia in a junior role, and it appeared that she had a loyalty to Mr Chin, and her witness statement contained various criticisms of Dr Comberg's performance.

53. Examples of how words appear to have been put into her witness statement by others include the following:

    (1) Paragraph 17 where she spoke about how structure and management were vital in global business and for operational and management decisions had to be consistent in each location, it emerged in cross-examination that she had limited experience of transnational business having been previously focused on work in Australia. She was unable to demonstrate any significant multinational experience that would have given rise to the statement in this paragraph of her statement **[T6/908/21-T6/910/15]**.
    (2) Paragraph 29 and footnote 12 where she referred to an email dated 24 January 2016, despite this email not having been copied to her and having been written before the commencement of her employment. She said that she thought that it would be useful background context. She could not recall if she was shown that document by somebody else as being potentially relevant **[T6/913/13- T6/915/2]**. This reflected that documents and ideas were being presented to her to make her

witness statement more impactful, even though, in this instance, it pre-dated her employment in VivoPower.

(3) Paragraph 48 regarding booking flights on Lufthansa comprising over a page of the statement. She commented that Dr Comberg 'pushed' for flying with Lufthansa as if there was something wrong with this. In cross-examination, this criticism was dissolved as she recognised that Dr Comberg was entitled to decide what flight he took **[T6/917/19-T6/918/12]**. Here too, paragraph 48 looks as if it was prepared to somebody else's agenda.

(4) Paragraph 60 where she referred to the letter of Dr Comberg dated 3 November 2017 which she passed on to Mr Olmsted, save for which she had no further involvement in it. She quoted from its contents about how it referred to VivoPower not being entitled to enforce his post-termination restrictions. She said that she thought that this would be helpful to her witness statement, but that is rather hollow. The only cogent explanation is that VivoPower thought that her statement would be more impactful by referring to this to show in its view the true motivation for the termination.

54. The overall impression is that Ms Byrne had a limited role, and she was set up in the case to make criticisms of Dr Comberg which went beyond the level of her involvement. This was shown up in these instances in cross-examination. It did not appear as if Ms Byrne was culpable for these shortcomings, but they impact negatively on the weight of her evidence.

(2) Mr Sermol

55. Mr Sermol gave evidence as a non-executive officer since December 2016. His evidence was a searing attack on Dr Comberg's competence. If his evidence had been impressive, it would have spoken loudly against Dr Comberg. In fact, his evidence was far from impressive. It was extreme, partisan and imprecise. Examples are as follows:

(1) He said that Mr Weatherley-White was not an accountant and therefore could not be expected to fulfil the role as CFO and that *"he was thrown under the bus by Dr Comberg at the time of the annual report."* **[T7/1059/21-T7/1061/2]**, and especially at [**T7/1060/17-18]**. When pressed, he could not explain his point because he was not an accountant. The reference to being thrown under a bus said more about the animus of Mr Sermol than about Dr Comberg, and for the avoidance of doubt, I am satisfied that Dr Comberg was doing no such thing.

(2) He appeared to be criticising Dr Comberg for not having increased PLC's share price. He said that the fact that the share price had not gone up in the period between September 2017 when Dr Comberg ceased to be CEO and early 2020 was Dr Comberg's fault **[T7/1063/12-17]**. This was irrational. When pressed about it, he referred to the flight tickets purchased by or for Dr Comberg and to the location of the offices of PLC **[T7/1063/18-T3/1064/16]**. This culminated in his summarising *"the mindset of Dr Comberg. I mean, it was avoiding doing work."* He had travelled a long way from the original challenge to his criticism of Dr Comberg in respect of the share price.

(3) He referred in his witness statement at paragraph 24 to a telephone call of 3 July 2017 and a discussion about the draft annual report. When he was asked to recollect it in the witness box, he had a very vague recollection only of it. It seems unlikely that he recalled the call two years after the event when his witness statement was prepared, but not 2 years and nine months after the event when he was giving evidence.

(4) When asked about his email of 5 September 2017 to Mr Hyams about discussions of Mr Weatherley-White to take over Dr Comberg's job, he said that he did not know what discussions had taken place. He did not therefore confront the tenor of his email which appeared to indicate some knowledge (even indirect knowledge). Instead, he said that by that point, Dr Comberg was *"faking it"*. When asked by the Court what he meant by faking it, he said that he did not know how to describe the word. When it was said to him that "faking" can mean making out you are doing something to hide the fact that you are not doing it, he said *"that is the perfect context for it."* **[T7/1076/15-T7/1077/5]**. If that is what he meant, it was a very serious allegation, and he said nothing which justified it.

56. Mr Sermol said that *"it seemed as if Dr Comberg had absolutely no interest in the business whatsoever"* **[T7/1059/12-14]**. This evidence, like most of the strong things which he said, some of which are referred to above, say more about Mr Sermol's animus against Dr Comberg than they do about Dr Comberg's performance.

(3) Mr Hyams

57. Mr Hyams performed better as a witness than Mr Sermol, but the value of his evidence was very limited. He had been a non-executive director. He had been so unwell that it looked as if he would be unable to give evidence, but eventually he did attend, for which the Court is grateful. His evidence was rather vague, particularly how it was that the allegations went from concerns about capability to misconduct/gross negligence. His view as of 9 July 2017 was that the normal behaviours one would expect from a CEO seemed lacking and that some significant improvement in many of the skills and behaviours of the CEO was needed urgently. This indicated that it had not reached the end of the road, and that it was a capability concern.

58. He was asked about an email which he had sent to Dr Comberg on 9 August 2017 about how capability matters needed to be addressed with Mr Russell Hoadley about usually having a meeting with an employee to discuss capability issues. Yet in connection with Dr Comberg, by this stage, there were discussions of Mr Chin, Mr Sermol and Mr Hyams about preparatory steps to the removal of Dr Comberg. He was not able to explain how the matter went from capability issues to summary termination without any capability consultation procedures having been followed. The vague way in which he expressed himself was as follows **[T7/1003/17-T7/1004/16]**:

"Q. Did you understand that to be a capability issue or something else?

A. I could not determine whether it was capability, unwillingness to engage or a disciplinary matter. That is a matter of judgment that different people can take a different view on, I think, in this case. It was a complex set of issues. As I said, not very much was working well, you could point to one and say that was disciplinary; you could point to another and say that was lack of attention or dereliction or

something. It is a question of judgment as to how you think that is. But whatever it is, there was a loss of confidence in the board in Dr Comberg continuing, reflecting a loss of confidence in the staff, which means they were not responding to him properly or adequately and a loss of confidence from shareholders as well.

Q. You are saying you could call it this or you could call it that, but your judgment is what I am asking you about. In your judgment, are you saying this was a capability dismissal situation?

A. I am saying given his contract and given the situation, it is a disciplinary matter.

Q. It is not a capability matter?

A. Not by this time, no. I had endeavoured to assist it being resolved as if it was a capability matter, but by this time it was clear we had gone beyond that."

59. Mr Hyams gave the impression that he was not sufficiently involved to be able to answer the question, and the vague answers reflected this.

60. There were also matters of detail which had eluded Mr Hyams. The Court has some sympathy about his inability to know that 'ITCs' stood for Investment Tax Credits because acronyms can be confusing. However, when it was mentioned what they were, and that in September 2017 Dr Comberg had identified a strategy in relation to cash of the use of refinancing and ITCs, he did not recall it **[T7/1010/19-T7/1011/13]**. Further, he was asked to explain his evidence at paragraph 31 of this statement by reference to two thirds (2/3) of the maximum bonus and 100% of his salary for the period of February 2016 to March 2017 comprising a total sum of £630,000. His evidence was utterly confused as to what two thirds of the maximum bonus comprised and for which period, and what was the salary element called a bonus, and how the sum of £630,000 was calculated **[T7/1016/10-T7/1018/15]** and **[T7/1022/3-T7/1024/8]**. He was also unconvincing in respect of the alleged agreement with Dr Comberg that he had agreed to invest one half of the net proceeds of his bonus in shares in PLC. He referred to an agreement with Mr Weatherley-White in respect of the same, but he accepted in his oral evidence that there was nothing recorded which referred to any communication of this to Dr Comberg **[T7/1021/3-T7/1021/8]**.

61. In these circumstances, whilst there was a moderation in the evidence of Mr Hyams, which was lacking in the evidence of Mr Sermol, he was not particularly helpful in respect of the issues in the case.

(4) Mr Weatherley-White

62. A more revealing witness is Mr Weatherley-White. There is a question at the heart of this part of the case as to how it was that the dissatisfaction about Dr Comberg was in respect of financial management, yet apparently Mr Weatherley-White, despite being CFO, was not blamed. Far from it: he replaced Dr Comberg as CEO. His evidence is therefore of great importance. He was overall an unimpressive witness. He was highly defensive about himself, highly critical of Dr Comberg and evasive when it was suggested that any performance issues were, at least in part, down to him.

63. Particularly revealing parts of his evidence included the following:

(1) Mr Weatherley-White was the subject of criticism from Mr Chin for his financial reporting in a withering email of 22 November 2016, going to the heart of his job

as CFO. He admitted that it was his failure, but he did not admit that it was his failure and no-one else's **[T7/943/20-T7/945/15]**. The email had been addressed to him alone, which he accepted **[T17/945/16-18]**, yet in paragraph 31 of his witness statement, he sought to deflect criticism on to Dr Comberg by saying that the key drivers of revenue, costs and capital needs could only be established when the leadership team had developed a comprehensive business strategy. This seemed like an ex post facto way of seeking to deflect criticisms about his own shortcomings.

(2) Mr Weatherley-White admitted that Mr Hoadley had been appointed with his approval **[T7/940/6-9]**. He recognised that he was the line manager of Mr Hoadley, but the delay in respect of the budget was the fault of the business, before saying that he was responsible **[T7/946/3-15]**. In his first statement, especially at paragraphs 42-43 and 48, he sought to deflect blame from himself for a failure of supervision of Mr Hoadley to Dr Comberg for his failing to create effective systems and failing to supervise Mr Hoadley on the basis that they were both in London whereas Mr Weatherley-White was in New York. However, when cross-examined on how Dr Comberg was said by him to have been responsible for the late filings by Mr Hoadley, he sought to deflect blame by saying that he was only relying on what Mr Hoadley told him **[T7/951/17-T7/952/10]**. This evidence was unsatisfactory.

(3) Mr Weatherley-White in his statement at paragraph 40 said that Dr Comberg refused to prepare the CEO letter and he considered that the letter was *"somehow beneath him."* He therefore had to write it, and Dr Comberg just inputted a few amendments. However, an email of 2 July 2017 from Dr Comberg to Mr Weatherley-White referred to Dr Comberg having sought the letter from Mr Weatherley-White in the middle of June 2017. Rather lamely, he did not recall this **[T7/950/23-T7/951/16]**. Dr Comberg then wrote that he would provide input on the draft if he received it on the next day in what appears to have been a packed schedule, and he did. This was a very different picture from that set out in the statement of Mr Weatherley-White. It was also regular for the first draft to be delegated in this way, just as occurred with the statement of Mr Chin as chairman being delegated.

(4) Mr Weatherley-White came over as evasive in respect of his involvement in the termination of the role of Dr Comberg. He denied involvement, which may have been true in the narrow sense that he did not make the decision. However, he was involved with Mr Chin in seeking to obtain evidence about alleged shortcomings of Dr Comberg in September 2017. There was an exchange of emails on 19 and 20 September 2017 in which Mr Weatherley-White was saying that Dr Comberg had misrepresented information about cashflow in July 2017. Mr Chin asked Mr Weatherley-White whether there was sufficient evidence to rebut any possible claim by Dr Comberg that Mr Weatherley-White was responsible for the information **[T7/958/9-T7/960/17]**. Well before that by 5 September 2017, Mr Sermol wrote to Mr Hyams saying that Mr Weatherley-White had been asked to relocate to London and he thought that *"he knows the score, wants the job and wants Philip to fall on as many swords as he can. I'd do the same as Carl in his shoes."* In this broader sense, Mr Weatherley-White seems to have been

involved in the departure of Dr Comberg in helping to create a case and as positioning himself for the future.

64. Mr Weatherley-White came over as being accusatory of Dr Comberg when the criticisms which he made were unmeasured and largely self-exculpatory in respect of matters for which he had a responsibility. This goes to a fundamental weakness in the case for VivoPower. If the case were really about the blame for shortcomings in financial reporting, then Mr Weatherley-White ought to have been first in line to take it for financial misreporting. The fact that Mr Weatherley-White took over as CEO significantly undermines the genuineness or seriousness of the mismanagement or misconduct as against Dr Comberg.

65. Particularly probative was an email from Mr Hui of 22 September 2017 in respect of a contract for Mr Olmsted where he recommended that the standard should not be gross negligence, but negligence saying *"In general the acid test is if this clause had stood, would the issues encountered with Philip have led to grounds for dismissal (answer is NO, which is a problem)."* He went on to say that there was a defence that provided the executive believed the action or omission was in the best interests of the company, that was OK. He said, *"how can you prove he didn't believe what he will say he believed."* At this early stage, Mr Hui was indicating that he did not believe that any gross negligence was proven in respect of Dr Comberg nor that Dr Comberg had acted other than in what Dr Comberg believed to be the best interests of VivoPower. This appears to indicate that too high a standard was being set for Dr Comberg. It appears to show that a decision had been made to remove Dr Comberg as CEO without any prior investigation of his actions or opportunity to answer. When someone as integral as Mr Hui expressed those views, there is a question as to whether a case to contrary effect, and prepared with Mr Weatherley-White, was in his judgment contrived. Mr Hui was not called to give evidence.

66. This setting of too high a standard by Mr Chin was then reflected in an answer which Mr Weatherley-White gave in evidence to the Court at the conclusion of his evidence. The question and answer were as follows **[T7/988/10 – T7/989/12]**:

> *"Can you tell the court, by reference to that, of any impressions that you have of his management style?*
>
> *A. Yes. He is very entrepreneurial and very ambitious, and he takes on challenges with an expectation of great success and reward. He brings people together to fulfil those goals and holds them to very high standards. His reach is across many different companies at the same time, so his ability to spend lengthy periods of time is somewhat limited on any one issue, so he tends to be quite abrupt with his e-mails and, as you said, trenchant at times. So, he takes some getting used to. I think many people find it difficult to work with him, but many people find it very fulfilling to work with him. He looks for a very particular type of person to work with and, as a result, those that meet his expectations and find his working style to be compatible with theirs remain with him for many years and can be very successful. Others quickly realise that they are not going to be a fit and move on. So, he is a very strong personality. He is very bright and energetic. He can be very frustrating at times because he does have high expectations, but he is also fair and can work through conflicts in a reasonable way.*

JUDGE: Thank you. Does anybody have any questions arising out of that?

MR. BROWN: You describe a particular style. Presumably, you

would accept that Dr Comberg did not have that particular style that Mr. Chin looked for?

A. Correct."

67. This is a strong indicator that Dr Comberg did not fit the particular style of Mr Chin. It indicates that there were problems between Mr Chin and Dr Comberg, but that does not show that Dr Comberg was in breach of contract, nor that he was being called to account for falling below a reasonable standard of performance, let alone that there was a case for a summary termination. If there were standards which had not been adhered to by Dr Comberg, the indication would be that they were the very high standards and that Mr Chin did not believe that Dr Comberg had lived up to them. In fact, the indicator is that it was not the high standards which were the issue, for otherwise it is impossible to understand how Dr Comberg should be replaced by Mr Weatherley-White to fill his shoes, but some other concerns such as Dr Comberg not fitting in to the particular style of Mr Chin. Further, it is likely that Mr Chin reacted adversely to the requests of Dr Comberg for payment of the various fees which he claimed to be outstanding and to his not having invested in PLC, irrespective of whether Dr Comberg had a contractual obligation to do so.

68. Finally, as regards Mr Weatherley-White, the Court was told very little as to what happened subsequently, but within less than 18 months, Mr Weatherley-White too had left VivoPower. There were *"a lot of reasons. I had accomplished most of goals that I had set out to accomplish. Kevin and I had some disagreements about the strategy going forward. I wanted to continue to pursue solar development and I think he has the view that that is a capital-intensive industry, very slow to develop, and not necessarily the best profile for a public vehicle such as VivoPower."* **[T7/987/22-T7/988/5]**. In that rather elliptical answer, there was the inference that although the departure may have been amicable (that is not an issue in this case), there were disagreements about the way ahead and a decision on the part of Mr Chin that solar development was not the way ahead. This indicates that this went back to the adverse matters for the solar energy sector in 2016 which affected the listing and continued to affect investor confidence such that the share price continued to go down long after Dr Comberg's termination of his Service Agreement.

69. These are indicators tending towards an overall picture that Dr Comberg was not guilty of the levels of breach of contract contended for, but he did not fit what Mr Chin wanted. This may have been in part because he was claiming fees and terms of his contract which may have alienated Mr Chin and made him decide that he should be removed come what may. This is not decisive, but it forms a backdrop to the consideration of the individual breaches.

(5) Other witnesses for VivoPower

70. As regards the other witnesses, the Court makes the following assessments:

(1) The evidence of Mr James Tindal-Robertson: he gave evidence as a financial controller from a few working days prior to the cessation of the work of Dr Comberg. He was able to comment about various matters relating to the way in which Mr Hoadley had left matters and how he was able to improve matters. However, it was outside his knowledge and his experience (he had never been a CEO) as to the extent that any shortcomings which he inherited were the responsibility directly or indirectly of Dr Comberg.

(2) Mr Matthew Davis gave evidence in respect of the evaluation of Mercatus which had been put forward by Dr Comberg to VivoPower. There was a question as to whether the shortcomings of Mercatus should have become apparent to Dr Comberg at an earlier stage. He recognised that some of this was about hindsight. His analysis did not demonstrate that Dr Comberg was in breach of contract in not having recognised the problem at an earlier stage.

(3) Dr Richard Wilson Borry had been head of development, engineering and asset management at PLC. He gave a lengthy statement signed on 28 June 2019. The admission of his evidence was opposed, but on reflection, Dr Comberg did not oppose its admission as hearsay evidence. It carried very little weight, especially because of the impact of cross-examination on the evidence of other witnesses. It was not apparent why he would not at least attend a studio to be cross-examined other than that he had ceased to work for VivoPower. That is not a reason for criticising him, but it is a reason not to give his statement more than minimal weight. It was instructive that he gave evidence about the attempts of Dr Comberg to cause him to remain with VivoPower when he expressed an intention to leave in August 2017, and that Mr Weatherley-White was able subsequently to persuade him to stay.

(6) Appraising the evidence of Dr Comberg and Mr Chin

71. An important battle was between Dr Comberg's evidence and that of Mr Chin. There was so much in issue, and the witness statements were so carefully crafted on both sides that the guidance set out in *Gestmin* and other cases referred to above is as ever useful. It is therefore necessary to start with the contemporaneous documentary evidence and to examine the inherent probabilities. This speaks more against the evidence of Mr Chin than of Dr Comberg.

72. Dr Comberg throughout was giving first-hand evidence about his own performance, whereas Mr Chin in large part did not have that advantage. Mr Chin obtained a large part of the information from others who, as appears from the account of the witnesses referred to above, have given evidence which was often far more tentative than what had been written in their names and which sometimes undermined the allegations

which they made. To the extent that Mr Chin was dependent on them, his evidence could not be better than their evidence.

73. The importance of the documentary evidence has made it important to note the relative paucity of documents critical of Dr Comberg prior to June 2017, despite the fact that he had been providing services since the beginning of 2016 or at latest the start of February 2016. This is well demonstrated by a useful document prepared on behalf of VivoPower headed "chronology of complaint" which contains 6 pages from February 2016 to May 2017 (16 months) and 12 pages (some not complete) from June 2017 to September 2017 (4 months). There is reason to believe that by July 2017, it was Mr Chin who was leading the way to the departure of Dr Comberg. This puts the Court on guard as to whether and the extent to which the case against Dr Comberg was more a construct than something which grew gradually over a period of time.

74. Mr Chin was rightly characterised by Mr Brown for Dr Comberg as intelligent. He has enjoyed business and personal financial success in building Arowana International Limited ("**Arowana**"). Although he is based in Australia, he is far from a high-level, strategic Chairman of VivoPower and much more akin to a hands-on founder (reflecting his majority shareholding). The evidence demonstrates that Mr Chin is a driven man and is used to getting his own way. The evidence of Mr Weatherley-White referred to above is very revealing about the high standards which Mr Chin sets. It indicates a standard which may be higher than the standard reasonably expected of a CEO but would reflect the near perfection for which he craves. It was an experience watching him in Court on his computer apparently busy in formulating documents which may or may not have been connected with the court case: either way, in contrast to most observers who watch in court, the intensity of his concentration was a mark of the man, his drive and commitment.

75. Mr Chin dealt with what he perceived as the problem in respect of Dr Comberg from July 2017 onwards in the end by managing him out of the business. He succeeded in isolating him from the other directors and building up an atmosphere where they collected evidence with a view to implementing the strategy. This then led understandably to the directors saying that Dr Comberg had lost the confidence of the board. Having done that, the negotiating style was tough changing course from the payment of backpay to withdrawing $450,000 from the table and insisting that a claim should be preserved against Dr Comberg. He thereby came close to achieving a total walk-away and threatened to pursue a counterclaim whilst withholding the October salary. In fact, if this was a strategy for VivoPower, it failed to bear fruit due to Hausfeld coming on to the scene and agreeing to take forward the complaints of Dr Comberg.

76. Dr Comberg was a witness who was difficult to read at first. He was a master of the details of his case. He gave long answers with a level of detail bordering on the pedantic. He frequently sought to deconstruct questions so as to see how many parts there were within the question, and then to seek to answer each part of it. At first, the concern was that this was strategic so as to stifle any opportunity for effective cross-examination. The Court tried to shorten the level of detail in the answers, sometimes without success. In the end, it became apparent that in fact Dr Comberg had an

enormous command of the detail. The evident reason for his approach to the evidence was not to stifle the cross-examination, but because he was very worried that he was laying himself open to attack if he did not deal with each aspect of the question. He believes that he has been wronged by trusting assurances which, on his case, amounted to agreements. As he sees it, if he had been caught out in this sense, he did not wish to get caught out again or leave anything to chance in the questions and answers.

77. There was a very distinct contrast between Dr Comberg and Mr Chin. By contrast to the detail and precision of Dr Comberg's evidence and the textual exegeses which he carried out in his oral evidence, Mr Chin's evidence was frequently of a more general, practical and entrepreneurial nature. When detailed points were put to Mr Chin, departing from the thrust of what he wished to put over, he would regard such matters as points as for the lawyers.

78. In respect of the evidence relating to mismanagement/misconduct, I had a greater degree of confidence in the evidence of Dr Comberg than that of Mr Chin due to Dr Comberg's attempts to be precise in his answers. I had less confidence in Mr Chin because he was less precise. It seemed that Mr Chin, for whatever reason, rushed to a judgment about Dr Comberg from which he refused to be moved. He did not make enquiry of Dr Comberg about his perception, he set the agenda against Dr Comberg for his fellow directors and he drove through the termination of Dr Comberg's activities as CEO.

79. Despite this preference, in some respects, the evidence of both Dr Comberg and Mr Chin was unsatisfactory. It suffered from their becoming so partisan to their respective causes. They had total conviction in the rightness of their accounts, particularly of the oral fee agreements, as well as the wrongness of the evidence of the other. This has been taken into account in the analysis of the issues in the case, and sometimes accounts for conclusions which do not go as far as either of them contended.

80. Mrs Comberg's evidence regarding the events of 2 August 2016 is referred to elsewhere. It provides some evidence of Dr Comberg's reaction to his conversation with Mr Chin and is therefore relevant hearsay evidence of the actual conversation. Mr Yuan provided short evidence on one part of VivoPower's case regarding Dr Comberg's (disclosed and authorised) role at Lucis.

V The Service Agreement

81. The Service Agreement was made on 4 August 2016 between VivoPower International Services Limited, PLC and Dr Comberg. Dr Comberg agreed to be employed by VivoPower International Services Limited as CEO of PLC and to be a statutory director of PLC and VivoPower International Services Limited (Clause 3.1). The contract of employment began on 1 September 2016 and was to continue *"until determined by either party giving to the other not less than 12 months' written notice to expire at any time"* (Clause 3.2).

82. Under clause 4.1: *"The Executive shall comply with his fiduciary and legal duties during the continuance of his employment and, in particular shall:*

4.1.1 comply with the provisions of Part 10 of the Companies Act 2006 (a copy of which will be made available to him) including the: (A) duty to act within powers; (B) duty to promote the success of the company; (C) duty to exercise independent judgment; (D) duty to exercise reasonable care, skill and diligence; (E) duty to avoid conflicts of interest; (F) duty not to accept benefits from third parties; and (G) duty to declare interest in proposed transaction or arrangement;

4.1.2 faithfully and diligently perform: (A) the usual duties of a Chief Executive Officer; and (B) such other duties as may from time to time be assigned to him by the Board, whether those duties relate to the business or interests of the PLC Company or the Company or to the business or interests of any other Associate (and such duties may include holding any office or other appointment in or on behalf of any Associate or any other company for as long as the Company requires);

4.1.3 familiarise himself with and in all respects comply with: (A) all and any lawful and reasonable directions given by or under the authority of the Board; and (B) all relevant policies, rules and regulations of the PLC Company and the Company from time to time in force; and (C) all laws, codes of conduct, rules and regulations or listing rules relevant to the PLC Company, the Company and/or any other Associate or to him as a director of the PLC Company and the Company or as an office- holder of any other Associate.

4.1.4 exercise only such powers as are consistent with his duties and act only in accordance with the Articles of Association of the PLC Company or the Company (as appropriate), where his duties relate to the business or interests of an Associate, of that company;

4.1.5 use his best endeavours to promote the success of the PLC Company and the Company, each for the benefit of its members as a whole and, save where there is any conflict with the success of such company, the success of all Associates;

4.1.6 keep the Board promptly and fully informed (in writing if so requested by the Board) of his conduct of the business, finances or affairs of the PLC Company, the Company and any other Associate and provide such explanations as the Board may require;

4.1.7 promptly disclose to the Board full details of any knowledge or suspicion he has that any employee or officer (including the Executive himself) of the PLC Company, the Company or any other Associate has or plans to commit any serious wrongdoing or serious breach of duty or other act which might materially damage the interests of the PLC Company, the Company or its Associates or plans to leave their employment or to join or establish a business in competition with the PLC Company, the Company or any of its Associates (including details of any steps taken to implement any such plan); and

4.1.8 save where on authorised leave (for holiday or sickness or injury or other reason) and save as modified by the provisions of this Agreement where the Executive is placed on garden leave or suspended, devote the whole of his time, attention and ability during his agreed hours of work to the performance of his duties under this Agreement."

83. Under clause 4.2: *"The nature of the Executive's job is such that his working time is not measured or predetermined. The agreed hours of work of the Executive shall be normal business hours and such other hours as may be required for the proper performance of his duties under this Agreement."*

84. Under clause 4.3: *"The Executive shall perform his duties principally at the London office of the Company or at such place or places in the United Kingdom as the Board may from time to time reasonably determine. The Executive may be required to travel for work as reasonably required, the expenses for which he will be reimbursed in accordance with clause 8."*

85. Pursuant to the terms of the Service Agreement, VivoPower agreed to:

(1) pay Dr Comberg a salary of £540,000 per annum (Clause 5.1) to be *"payable by equal monthly instalments on or about the last day of each month"* (Clause 5.2).

(2) allow him *"to participate in such discretionary bonus scheme and other incentive arrangements as may be operated by the Company on such terms and at such level as the Remuneration Committee may from time to time determine, and always provided that the Executive shall have the right to participate in an "an annual bonus arrangement paying up to 150% of base salary for attainment of pre-agreed performance indicators (as set out in Schedule 1 of this Agreement). The Company reserves the right at any time before the relevant year to amend the terms of this bonus scheme (but not so as to reduce the Executive's maximum percentage bonus opportunity)."* (Clause 5.5). The Service Agreement included a Schedule with *"Key Performance Indicators"* ("KPIs") for the financial year ended 31 March 2017, but not for subsequent financial years.

(3) allow him to participate in a *"carried interest arrangement"* (Clause 5.6);

(4) pay him *"an amount equal to 10% of his base salary"* (that is £54,000) in lieu of pension contributions to be payable *"in annual monthly instalment[s] at the same time as salary is paid to him"* (Clause 6.1);

(5) enter him into private medical insurance and personal accident insurance schemes during the duration of his employment or, at Dr Comberg's election, pay contributions to his existing private medical insurance arrangements to a maximum of £1,800 per month (Clause 6.3). Dr Comberg elected to receive contributions to his existing private medical insurance arrangements at the maximum level permitted (£1,800 per month). (The way in which this was pleaded by VivoPower was that Dr Comberg elected to take this as additional salary in RAMD at paragraph 34. This was denied by Dr Comberg in his Reply at paragraph 40. In any event, VivoPower did not rely upon this as an instance of breach of contract or improper behaviour on the part of Dr Comberg e.g. at paragraph 54 of RAMD summarising the breaches);

(6) pay him *"30 days' holiday in each holiday year of the Company running from 1 April to 31 March" and allow him to carry forward holiday days "from one*

holiday year to the next where, for work-related reasons the Executive is unable to take holiday during the holiday year" (Clause 9.1); and

(7) pay Dr Comberg, in the event of the termination of the Service Agreement, in *"lieu of such of his entitlement under sub-clause 9.1 as has accrued (on a pro rota basis) in the holiday year in which the Termination Date falls but has not been taken or such holiday the Executive is entitled to under sub-clause 9.1 that has been carried forward in accordance with clause 9.1"* (the "Accrued Holiday Entitlement"). The Accrued Holiday Entitlement was to be calculated by multiplying the unused or excess entitlement... "by 1/260 of the Executive's salary at that time" (Clause 9.2). The "*Termination Date*" is defined in the Service Agreement as *"the date on which the employment of the Executive by the Company terminates"* (Clause 1.1.10).

86. Clause 5.3 provided: *"The Executive's salary shall be inclusive of any other sums receivable as directors' fees or other remuneration to which he may be or become entitled as the holder of offices or appointments in or on behalf of the PLC Company, the Company or of any of its Associates. To achieve this the Executive shall account for any such sums he receives to the Company and his salary shall be reduced by the amount of such sums (and the Executive hereby authorises the Company to make any such reduction(s))." Clause 5.7 of the Service Agreement provided: "in accordance with the Companies Act 2006, all remuneration payments and benefits due to the Executive (including any payment for loss of office) will only be payable if and to the extent that they are either consistent with the most recent remuneration policy approved by members of the Company pursuant to section 439A of the Companies Act 2006 or are separately approved by resolution of the members of the Company,"*

87. The Directors' Remuneration Report, including the Remuneration Policy, was approved by the Board (including Dr Comberg) by written circular on or about 28 July 2017. It was also part of the Annual Report of PLC for the year-ended 31 March 2017. The Remuneration Policy provides, inter alia, that *"The Remuneration Committee shall have discretion to determine the terms and level at which annual bonuses may be granted, including the minimum performance required for an annual bonus to be payable. The maximum annual bonus that may be awarded shall be determined by the Remuneration Committee in its absolute discretion."*

88. Under clause 6.1: *"In lieu of pension contributions, the Company shall pay the Executive an annual amount equal to 10% of his annual base salary under clause 5.1, such amount to be paid in equal monthly instalments at the same time as salary is paid to him."*

89. Under clause 8.3: *"The Executive hereby agrees that at any time during the continuance of his employment under this Agreement and on termination of his employment the Company shall be entitled to deduct from any sums due to the Executive (including salary, pay in lieu of notice, bonus, holiday pay or sick pay) any outstanding monies then owed by the Executive to the Company, including all outstanding loans or advances of salary made by the Company to the Executive (and any interest), any expense floats, any pay received for holiday taken in excess of the Executive's accrued holiday entitlement under clause 9, any sums paid on behalf of*

the Executive by the Company which have not been incurred by the Executive in the proper performance of his duties."

90. Under clause 17.2: *"Notwithstanding sub-clause 3.2 and without prejudice to its rights under the other provisions of this clause 17, the Company shall be entitled to terminate the employment of the Executive with immediate effect by giving summary notice if the Executive commits a repudiatory breach of this Agreement or if the Board reasonably considers that any of the events set out below occur or have occurred (whether or not such event would otherwise be a repudiatory breach):*
17.2.1 the Executive commits a serious or persistent breach of any material term of this Agreement;
17.2.2 the Executive is guilty of conduct (whether or not related to his employment or office) likely in the reasonable opinion of the Board to bring himself or the Company or any Associate into disrepute;
17.2.3 the Executive repeatedly neglects, fails or refuses to carry out any of the duties properly assigned to him under this Agreement; ... For the avoidance of doubt, in the circumstance of a termination pursuant to this clause 17.2 the Executive shall have no pro-rata entitlement to any bonus or carried interest arrangement in respect of that year."

91. Under clause 22.1: *"Each of the Executive and the Company, on behalf of itself and its Associates, confirms that this Agreement represents the entire understanding, and constitutes the whole agreement, in relation to its subject matter (save only for any terms implied at law or by custom) and supersedes any previous agreement between the parties with respect thereto (which shall be deemed to have been terminated by mutual consent)."*

92. Under clause 22.2: *"The Executive confirms that:*
22.2.1 in entering into this Agreement he has not relied on any representation, warranty, assurance, covenant, indemnity, undertaking or commitment which is not contained in this Agreement, or any document referred to in it; and
22.2.2 in any event, without prejudice to any liability for fraudulent misrepresentation or fraudulent misstatement, the only rights or remedies he has in relation to any representation, warranty, assurance, covenant, indemnity, undertaking or commitment given or action taken in connection with the entering into or performance of this Agreement are pursuant to this Agreement and, for the avoidance of doubt and without limitation, the Executive does not have any right or remedy (whether by way of a claim for contribution or otherwise) in tort (including negligence) or for misrepresentation (whether negligent or otherwise, and whether made prior to, or in this Agreement)."

VI The issues

93. The parties agreed a list of issues. I shall set out the list of issues, but I have re-ordered the same in order to make them closer to the order in which the matter has been argued at trial. In particular, the damages issues for wrongful dismissal are considered at the end e.g. bonus, share incentive scheme, holiday pay. The quantum meruit issues are woven into the consideration of the fee agreements. The Deferred Remuneration Agreement is considered before the Contract Term Agreement. The issues are as follows:

Service Agreement claims

(a) Dismissal

l. Did Dr Comberg summarily resign in breach of contract or was he wrongfully (constructively or actually) dismissed?

2. If Dr Comberg was constructively dismissed, did the dismissal occur: (i) on 3 November 2017 (acceptance by letter); (ii) shortly after 17 November 2017 (acceptance by conduct); or (ii) on 11 December 2017 (acceptance by letter)?

3. Did VivoPower have the right summarily to dismiss Dr Comberg at that time? In this regard:
3.1. VivoPower relies on the specific allegations of misconduct as pleaded in the Re-Amended Defence and clarified in responses to RFI.
3.2. Did VivoPower have the right to dismiss under clauses 17.2.1 to 17.2.3 of the Service Agreement or at common law on the ground of repudiatory breach of duty, gross misconduct or gross negligence?
3.3. Do the matters alleged justify in fact the exercise of that right?
3.4. Did VivoPower lose the right by affirmation?

4. What is the effect, if any, of VivoPower's acceptance of the Counterclaim Part 36 Offer on its defence to the Service Agreement Claims? Is VivoPower unable to rely upon any of its reasons for dismissal following the compromise of its Counterclaim?

(b) **Fee Agreements claims**

5. Did VivoPower and Dr Comberg enter into the Deferred Remuneration Agreement (as defined in paragraph 14 of the Re-Amended Particulars of Claim)? If so, is VivoPower indebted or liable in damages to Dr Comberg under the Deferred Remuneration Agreement?

6. Did VivoPower and Dr Comberg enter into the Contract Term Agreement (as defined in paragraph 11 of the Re-Amended Particulars of Claim)? If so, is VivoPower indebted or liable in damages to Dr Comberg under the Contract Term Agreement?

7. Did VivoPower and Dr Comberg enter into the Listing Fee Agreement (as defined in paragraph 17 of the Re-Amended Particulars of Claim)? If so, is VivoPower indebted or liable in damages to Dr Comberg under the Listing Fee Agreement?

8. If the Court finds that the parties did enter into the fee agreements, VivoPower nonetheless relies on the following defences (only):
8.1. clauses 5.3, 5.7 and 22 of the Service Agreement (the latter of which contains an entire agreement provision);
8.2. the parol evidence rule and the fact that the fee claimed is the same as that which appears in the ICAs (as defined in paragraph 12.2 of the Re-Amended Defence) between Tiandi and AGSS.

8.3. the judgment of the Singapore Court of proceedings involving AGSS and Tiandi (as defined in paragraph 19 of the Re-Amended Particulars of Claim) on 27 March 2018.
8.4. breach of specified statutory duties (s226B, 439 and/or 439A of the Companies Act 2006) and PLC's statutory reporting obligations such that the illegality principle precludes Dr Comberg's claim.

(c) Quantum Meruit

9. In the alternative to the Fee Agreements Claims, is Dr Comberg entitled to:
9.1. A quantum meruit payment from VivoPower in respect of the CEO Services (as defined in paragraph 28A of the Amended Particulars of Claim) arising either: i) pursuant to a contract between Dr Comberg and VivoPower or ii) as a response to unjust enrichment (on the basis particularized at paragraph 39 of Dr Comberg's Response to VivoPower's Request for Further Information of the Amended Particulars of Claim, namely unconscionability)?
9.2. A quantum meruit payment from VivoPower in respect of the Listing Services (as defined in paragraph 288 of the Amended Particulars of Claim) arising either: i) pursuant to a contract between Dr Comberg and the Defendants or ii) as a response to unjust enrichment (on the basis particularized at paragraph 39 of Dr Comberg's Response to the Defendants' Request for Further Information of the Amended Particulars of Claim)?

10. If Dr Comberg is entitled to payments on a quantum meruit basis, what amounts is he entitled to (i.e. the value of the CEO Services and/or Listing Services provided to the Defendants)?

(d) Quantum

11. If VivoPower wrongfully dismissed Dr Comberg, to what damages is he entitled (including by reference to salary and his 2018 and 2019 bonuses)?

(e) Dr Comberg's entitlement to Omnibus Shares pursuant to the Service Agreement

12. Was Dr Comberg entitled to an award of Omnibus Shares (as defined in paragraph 24.8 of the Re-Amended Particulars of Claim). If so, was VivoPower's failure to award Dr Comberg accrued Omnibus Shares a breach of clause 5.6 of the Service Agreement? To what damages is Dr Comberg entitled?

(f) Dr Comberg's entitlement to Accrued Holiday Entitlement pursuant to the Service Agreement

13. Is Dr Comberg entitled to Accrued Holiday Entitlement (as defined in paragraph 24.7 of the Re-Amended Particulars of Claim) pursuant to clause 9.2 of the Service Agreement? To what payments is Dr Comberg entitled?

(g) Interest

14. What, if any, interest is Dr Comberg entitled to?

(a) Service Agreement claims

Issue 1: Did Dr Comberg summarily resign in breach of contract or was he wrongfully (constructively or actually) dismissed?

(1) Dr Comberg's submissions

94. Dr Comberg says that VivoPower repudiated the contract of employment. The pleaded case of Dr Comberg is that it did so in one or more of three ways ("APOC" (paragraph 37), namely

> (1) contrary to Clauses 5.1, 6.1 and 6.3 of the Service Agreement, VivoPower failed to pay Dr Comberg his monthly salary for October which fell due on or about the last day of the month under Clause 5.2, and by its conduct confirmed that it had no intention of paying it. This was said to be in breach of the obligation under Clause 5.2 which provided as follows: *"The Executive's salary shall accrue from day to day and be payable by equal monthly instalments on or about the last day of each month."* It was referred to as the "Payment Repudiatory Breach";
> (2) it unilaterally removed Dr Comberg as a statutory director of PLC on 23 October 2017 in breach of the articles of PLC, and, in particular, paragraphs 84(d) and 84(g) therein: neither had the resignation taken effect *"in accordance with its terms"* nor had a *"notice in writing"* been served on Dr Comberg *"personally or at his residential address provided to the Company for the purposes of section 165 Companies Act 2006, signed by all the other directors stating that he shall cease to be a director with immediate effect"*; and
> (3) by letter dated 17 November 2017 it purported to accept a purported repudiation by Dr Comberg (which was itself a repudiatory breach of contract by VivoPower).

(2) The evidence

95. Following the 17 September 2017 meeting, it was agreed between Dr Comberg and VivoPower that Dr Comberg would go on leave. The terms of Dr Comberg's agreed leave were that he would "*continue to receive his usual salary and other contractual benefits*" (email from HSF to Macfarlanes dated 19 September 2017). Accordingly, although there was a variation of the Service Agreement regarding Dr Comberg's attendance at work, VivoPower's payment obligation was expressly preserved.

96. Mr Weatherley-White confirmed that VivoPower used same-day electronic payments provided through an outsourced payroll provider First Names Global Limited ("First Names") using the Real Time Information (RTI) feed, which was set up to run on the 28th day of the month. The effect of this system is that salary payments are made and received on the same day (in real time using the faster payment method). First Names queried whether any exceptions were required for September and none were made.

Thus, Dr Comberg received his September salary despite being on agreed leave and in accordance with the terms of his leave.

97. On 18 October 2017, there was an email communication regarding who had to be paid. Mr Weatherley-White stated: "*Philip is not resolved to my knowledge (I'm not in the loop) but no more payroll"*. Mr Tindal-Robertson communicated that instruction back to First Names, who, accordingly, withheld payment of Dr Comberg's October salary.

98. On 1 November 2017 at 11:31am, Dr Comberg queried the non-payment to Marina Tita (the HR manager) and Ms Julie-Anne Byrne (head of operations) saying that he had not received his October salary and that there appeared to have been an administrative oversight, and asked for confirmation that steps had been taken to rectify this. On 2 November 2017 at 4.23pm, Dr Comberg complained about the non-payment of salary by email to Ms Tita and Ms Byrne, indicating that he considered the non-payment to be an extremely serious breach of the terms of his employment. He asked to ensure that it was paid by no later than 5pm on 3 November 2017, and said that if he did not receive it, he would have no choice but to treat the failure to pay his salary as deliberate.

99. In evidence, Ms Byrne confirmed that she forwarded Dr Comberg's correspondence on to Mr Olmsted, VivoPower's legal counsel **[T6/920/10-11]**. Mr Weatherley-White confirmed that he was aware of Dr Comberg's objection at the time and discussed it with Mr Chin. He said that there were discussions with board members and it was decided not to pay Dr Comberg in the knowledge that Dr Comberg said that he was owed the payment **[T7/975/14-17]**. In his first witness statement at paragraph 200, Mr Chin said: ***"…PLC chose not to pay Dr Comberg his October salary*** *because the parties were in negotiations in relation to the terms of the termination of Dr Comberg's employment"* (emphasis added). In his oral evidence, Mr Chin said *"Let me clarify, sorry. It was not agreed at the 17 September meeting. So, we did not say we -- Dr Comberg did not agree to have his salary not paid in October."* **[T5/799/22]**

100. Mr Weatherley-White was of the view that VivoPower was not liable to pay **[T7/972/23 – T7/973/2]**. The evidence shows that VivoPower intentionally decided not to pay Dr Comberg the October salary and that it continued intentionally not to pay in the face of the protest of Dr Comberg that it was a serious matter not to pay him.

101. On 3 November 2017 at about 5.30pm, Dr Comberg arranged for a letter to be delivered by hand to the offices of VivoPower, a letter to the effect that he had not received his October salary despite twice raising the issue of his salary and providing a deadline. He said that the obligation to pay his salary was a fundamental term of his contract and that VivoPower was acting in repudiatory breach of his contract in not paying. He was therefore accepting that breach and treating himself as discharged from the post-termination restrictions ("the PTRs") in his contract.

102. Throughout this time, there were negotiations taking place on a without prejudice basis between HSF for VivoPower and Macfarlanes for Dr Comberg. Immediately following the letter of termination, it was stated by HSF to Macfarlanes that they had been discussing no payments from 4 October 2017 and mutual releases, but if there

was no agreement, then VivoPower may terminate the employment and pay Dr Comberg up to the time of termination.

103. The position for VivoPower at the time was that there was no reason for Dr Comberg to act in this manner when the parties were negotiating. The position of Macfarlanes for Dr Comberg on Saturday 4 November 2017 was that the settlement negotiations were not relevant. No agreement had taken place as regards not paying the salary during the period of negotiation.

104. Mr Taggart of HSF on 6 November 2017 said that there were *"perfectly justifiable reasons for the delay"*, and that payment was being made that day. He understood that Dr Comberg was prepared to waive a claim for back pay of $450,000 and for 12 months' salary and benefits in return for mutual release of claims. A resolution was proposed on 2 November on which Dr Comberg had been asked to take instructions because, if it had been accepted, the settlement agreement would have had an agreed termination date of 4 October 2017. HSF said that the lawyers would have to disagree about the respective understandings of the settlement negotiations. In fact, no payment was made on that date, but there was an email on 8 November 2017 within First Names about making a payment to Dr Comberg for his October salary. In fact, the October salary was never paid.

105. On 10 November 2017, Hausfeld, replacing Macfarlanes, wrote on behalf of Dr Comberg, seeking payment of outstanding moneys including the October salary. In response Skadden representing VivoPower instead of HSF, wrote on 17 November 2017 saying that Dr Comberg had no entitlement to any payments. In that letter, Skadden purported to terminate for breach on the part of Dr Comberg. The letter set out in detail allegations of misconduct and incompetence as a basis for termination. It also claimed to be entitled to terminate for breach because, it said, the termination of Dr Comberg of 3 November 2017 was ineffective.

(3) The case of Dr Comberg as regards repudiatory breach

106. It is said for Dr Comberg that the evidence demonstrates that VivoPower intentionally decided not to pay Dr Comberg. He states that an intentional non-payment of wages is usually a fundamental breach of contract entitling the employee to terminate for repudiatory breach.

107. The relevant law is as follows:

(1) In *R. F. Hill Ltd. v Mooney* [1981] IRLR 258, Browne Wilkinson J said:

"The obligation on an employer to pay remuneration is one of the fundamental terms of a contract. In our view, if an employer seeks to alter that contractual obligation in a fundamental way, such as he sought to do in this case, such attempt is a breach going to the very root of the contract and is necessarily a repudiation."

(2) In *Cantor Fitzgerald v Callaghan* [1999] ICR 639 at 649-650, Judge LJ said as follows:

"In reality it is difficult to exaggerate the crucial importance of pay in any contract of employment. In simple terms the employee offers his skills and efforts in exchange for

his pay: that is the understanding at the heart of the contractual arrangement between him and his employer.

…

In my judgment the question whether non-payment of agreed wages, or interference by an employer with a salary package, is or is not fundamental to the continued existence of a contract of employment depends on the critical distinction to be drawn between an employer's failure to pay, or delay in paying, agreed remuneration and his deliberate refusal to do so. Where the failure or delay constitutes a breach of contract, depending on the circumstances, this may represent no more than a temporary fault in the employer's technology, an accounting error or simple mistake, or illness, or accident, or unexpected events (see, for example, Adams v. Charles Zub Associates Ltd. [1978] I.R.L.R. 551). If so, it would be open to the court to conclude that the breach did not go to the root of the contract. On the other hand if the failure or delay in payment were repeated and persistent, perhaps also unexplained, the court might be driven to conclude that the breach or breaches were indeed repudiatory.

Where, however, an employer unilaterally reduces his employee's pay, or diminishes the value of his salary package, the entire foundation of the contract of employment is undermined. Therefore an emphatic denial by the employer of his obligation to pay the agreed salary or wage, or a determined resolution not to comply with his contractual obligations in relation to pay and remuneration, will normally be regarded as repudiatory." …

108. The submission of Dr Comberg is that the decision to withhold the October payment was intentional. That much is clear from any of the following matters, namely
(1) the communication of 18 October 2017 that there was to be no more payroll for Dr Comberg;
(2) the failure to pay on 28 October 2017, bearing in mind the standing order;
(3) the failure to pay at the end of October 2017;
(4) the failure to respond to the email of 1 November 2017, and the clear inference that this had received attention at a higher level than HR with a decision not to pay;
(5) the same failure in respect of the email of 2 November 2017 and the same inference, despite Dr Comberg's statement that he would treat non-payment as intentional; and
(6) the fact that despite the email of HSF of 6 November 2017, the October payment was never paid subsequently.

109. There was no excuse for non-payment. There was no agreement in respect of the same. It was not a misunderstanding in the course of the negotiations. The law indicates that an intentional decision to withhold payment is usually repudiatory. There was no reason why it was not repudiatory in the circumstances of this case.

(4) VivoPower's submissions

110. VivoPower submits that there was no breach of contract, and that if there was, it was not repudiatory. As regards no breach of contract, VivoPower submits that:

(1) The point of time for payment had not yet passed, such that there was not a breach. The wording of Clause 5.2 is that the payment had to be made "on or about" the end of the month. The employment was terminated for breach by delivering by hand the letter of 3 November 2017. A payment on or about the end of the month allowed for a payment within a longer period than an additional three business days after the end of the month.

(2) It has a counterclaim for the alleged breaches of contract and/or negligence of Dr Comberg. The counterclaim of VivoPower was settled for £100,000, which is comfortably more than the sum due for October's salary. It is therefore inferred that the counterclaim was well made out at least to that extent, and the effect of an equitable set-off would be to extinguish a claim for damages: see VivoPower's Opening at paragraph 119.2.

111. In the alternative, VivoPower submits that any breach of contract was not repudiatory for the following reasons:

(1) there was a belief on the part of VivoPower that it was entitled to withhold payment because of what was agreed in the negotiations between solicitors. If that was not the case, it was believed in good faith to have been agreed and that negates the existence of a repudiatory breach;
(2) the breach was contrived in order to avoid the PTRs and to break out of the negotiations between the parties which was inconsistent with a repudiatory breach.

(5) Discussion

(i) Was there a breach of contract?

112. The expression "on or about" must take its meaning according to context. It is intended to cover a minor payroll problem, and so that there should not be a breach of contract if there is a day or so without a payment. There is a difficulty in that the expression "on or about" is imprecise. Nonetheless, construing the contract in accordance with usual principles at the time that the contract was made, it cannot have been intended to allow for a delay of three days without any difficulty in the banking system. The only way in which this payment was not made by 3 November was by an instruction to the bank of VivoPower not to pay. Since each of these three days after 31 October were business days, it was no longer by close of business on 3 November "on or about" the end of October. There might be sales of goods or shipping cases where such words were capable of applying to a longer period of time, but there is no reason in the context of this case to find that it was so long. In my judgment, three business days, that is the whole of the banking hours of 1, 2 and 3 November does amount to a breach.

(ii) The argument of set-off

113. If the time for payment was due, then what of the argument that VivoPower was entitled to set off against wages the counterclaim for damages for breach of contract and negligence? At statute, it is generally necessary to have a contractual provision in order to have such a set-off. This is provided at sections 13 - 16 of the Employment Rights Act 1996. In the instant case, Clause 8.3 is as set out above allowing for deductions of outstanding moneys owed by Dr Comberg to VivoPower giving examples thereof.

114. In my judgment, the claim for damages for breach of contract and/or negligence is an unliquidated sum which does not come into any of the categories in Clause 8.3. They are for sums due all in the nature of specific sums and not in the nature of damages. It could be said that it is to apply to "any sums due to the Executive". However, the meaning of that is limited by the words thereafter. It is said to include numerous types of liquidated sums. There are no words such as "without limitation" or "without prejudice to the generality of the foregoing". The subsequent words therefore characterise and/or restrict the ambit of the words "any outstanding moneys then owed". In any event, the natural meaning of "any outstanding moneys then owed" is to refer to liquidated rather than unliquidated sums. I therefore conclude that any set-off of this kind could not have been included in the words of Clause 8.3. Absent such inclusion, there can be no equitable set-off against wages as a result of the Employment Rights Act 1996 sections 13-16.

115. If that is wrong, I conclude that no right to deduct has been proven on the facts. Contrary to paragraph 119.2 of VivoPower's Opening, it has not been proven by the settlement of the Counterclaim on the acceptance of the Part 36 offer. The offer of £100,000 was paid expressly without admission of liability: see the terms of the offer below. In any event, the offer was against a Counterclaim of about £27 million. In other words, it was a very small offer by insurers for a relatively negligible sum against the potential indebtedness, and it does not indicate an admission of any kind. There is therefore no basis to infer that if the case had gone to trial on the Counterclaim that there would have been a proven liability.

116. In any event, it is also too late to infer that there was a set-off because the set-off as pleaded was only the Counterclaim which has been settled, as has the set-off of the Counterclaim. RAMD now ends at paragraph 142, and the set-off and counterclaim have been abandoned by re-amendment. In any event, although I shall in due course consider the numerous allegations of breach of contract with a view to considering whether there has been proven an entitlement on the part of the VivoPower to terminate for breach, I shall find that the evidence does not prove a breach of contract. There is no evidence to show any loss caused by Dr Comberg to the extent of the October salary or at all. For all these reasons, the defence of set-off fails.

117. An alternative formulation occurred in the oral closing of Mr Ciumei QC to the effect that there was a breach of contract by not using the 50% of the bonus to pay for shares, and so there was an entitlement to the return of the 50% of the bonus. There are several reasons why this is a fallacious argument, namely

    (1) for the reasons set out above, there was no breach of contract in that there was no such promise on the part of Dr Comberg;

(2) had there been, he would not have had to return the bonus, and so the attempt to say that this was a deduction of the kind allowed for by Clause 8.3 must fail;

(3) at highest, there would have been a claim for unliquidated damages if loss had been suffered by VivoPower due to the failure to invest the shares. No loss was proven.

(4) further, the set-off was abandoned on the acceptance of the Part 36 offer and the removal not only of the counterclaim, but also the concomitant abandonment of the set-off.

(iii) Repudiatory breach

118. Repudiatory breach must be considered in the following senses, namely

(1) if there was a breach (that is the time for payment had lapsed and there is no defence of set-off), was the breach sufficiently serious to amount to a repudiatory breach;
(2) alternatively, if there had not been a breach because the latest time for payment had not arrived, was there an anticipatory breach or a renunciation of the contract of employment by conduct intimating an intention to treat the contract as at an end?

(1) Was there an actual repudiatory breach on the part of VivoPower?

119. The Court makes the following findings. The non-payment came about as a result of an intention on the part of VivoPower not to pay. The clearest evidence that it was intentional was the cancellation of the monthly debit order with First Names in mid-October. It is no answer that this occurred because of a belief that there would be a deal that the last salary payment would be for the month of September. There was no agreement to this effect with Dr Comberg. Further, when October came and went without such a deal, and when the emails of 1 November 2017 and 2 November 2017 were sent by Dr Comberg, this did not elicit payment or even a response prior to the deadline of 5pm on 3 November 2017 to the effect that there was a belief that no payment was required.

120. There was no basis for any belief that it was in order to withhold the October payment. The agreement in September 2017 was that payments of monthly salary would continue. There was no agreement in the course of subsequent negotiations to change that position. The unilateral expectation of one party to achieve a deal whereby the October payment would not have to be made is not a reasonable or sensible basis to withhold payment. There was no reason not to seek consent from the other party. It is to be inferred from the emails of Dr Comberg of the first three days of November 2017 that consent would not have been given.

121. The suggestion that there was a misunderstanding between solicitors in the negotiations does not excuse the position of VivoPower. If VivoPower believed that a settlement would ensue, that does not excuse the decision to withhold payment, or make the breach the lesser, absent agreement to defer the payment pending the outcome of the negotiations. VivoPower was acting without justification and adding to the pressure on Dr Comberg by its intentional and unilateral decision to keep him out of money. Nothing in the communications between HSF and Macfarlanes and in the correspondence of 6 November 2017, particularly of Mr Taggart of HSF, provides any basis for any belief that there was any agreement between the parties that the October salary could be deferred. It was suggested that in an email sent by Dr Comberg on 30 October 2017, he was indicating that he would leave without payment of his salary. This is an unsustainable reading of the email which reflected on the refusal of VivoPower to agree a full mutual non-litigation provision. In no sense was Dr Comberg suggesting that it was alright not to pay his salary. There was therefore no justification for terminating the monthly debit order for his salary nor for persisting in this non-payment in the face of the emails of Dr Comberg of 1 and 2 November 2020. It would also be wrong to say that the breach was not significant because there was no work being carried out after 17 September 2017: Dr Comberg remained bound by the duty of fidelity and thereafter the duty to honour his PTRs following termination.

122. It is also disturbing that there was no response to the emails of Dr Comberg of 1 November and 2 November 2017. This may not have followed the expectation of VivoPower that Dr Comberg would give in to the position advocated for by VivoPower in the settlement of the case. The evidence is clear to the effect that these emails were received and that there was a continuing decision not to pay. In my judgment, there was therefore an intentional breach of contract with no attempt to remedy the position. If Dr Comberg was in any doubt that the breach was intentional, it was apparent to him that it was intentional by 5pm on 3 November 2017, by which time neither was there any payment nor any explanation. This was not a case of procuring a result by a silence: rather it was an employee testing, as he was entitled to do, that the failure to pay was a refusal to pay. He did this by imposing a deadline which was short, but not unreasonable. It was done in the context of a continuing duty of trust and confidence of VivoPower to Dr Comberg against which the failure to respond to the emails of 1 and 2 November 2017 is to be judged. In these circumstances, Dr Comberg was entitled to a response: no explanation for the absence of a response has been given. The subsequent correspondence of solicitors provides no excuse: in any event, there was never an attempt to pay, and indeed the October salary payment remains outstanding.

123. This was a deliberate decision without cause. Applying the law set out above to the instant facts, I find that it was repudiatory. It has the hallmarks of an employer who was seeking to impose pressure on an employee to accept a termination on its terms. The indicators thus far had been that VivoPower would succeed in that object. It did not expect Dr Comberg to strengthen his resolve and to go to different solicitors who would enable him to bring a claim to Court.

Anticipatory breach/renunciation

124. If in fact, contrary to the above, the time for payment had not yet arrived, then the conduct of VivoPower in withholding the payment amounted to a renunciation or anticipatory breach of the contract. This is pleaded at paragraph 41.2 of the Amended Particulars of Claim where it was stated *"In the circumstances, VivoPower had by its conduct evinced an intention not to pay the October Payment due to Dr Comberg."* That occurred because the non-payment came even when Dr Comberg sought to make the end of the third business day the last time for payment. This is expressed in Chitty on Contracts 33rd Edition at [24-022] as follows:

"If, before the time arrives at which a party is bound to perform a contract, he expresses an intention to break it, or acts in such a way as to lead a reasonable person to the conclusion that he does not intend to fulfil his part, this constitutes an "anticipatory breach" of the contract and entitles the other party to take one of two courses."

125. In this context, Treitel on the Law of Contract 15th Ed. at [17-075] stated the following:

"Renunciation requires a "clear" and "absolute" refusal to perform. This need not be a refusal to perform at all; it is sufficient that one party intends to act in a manner "substantially inconsistent with his obligation", i.e. in a way which would amount to a substantial failure to perform which is the general requirement for the right to terminate for "actual" breach. Nor does a renunciation need to be express; it can take the form of conduct indicating that the party is unwilling, even though he may be able, to perform. A renunciation may even be inferred from silence where it is a "speaking silence", e.g. the previous conduct of a party in refusing to perform another related contract may give rise to the inference that he will refuse to perform the contract in question. His silence or inactivity can then be a renunciation of that contract unless he takes positive steps to dispel that inference. The conduct must indicate to the other party that the party alleged to have renounced the contract is about to commit a breach of it: an indication given to a third party of an intention to commit a breach at an unspecified time in the future has been held not to amount to a renunciation."

126. The question then is as follows, namely if the contractual time to pay had not yet elapsed, how is a silence a communication of an intention not to pay? More often, silence is equivocal. This was stated in *Stocznia Gdanska SA v Latvian Shipping Co [2002] EWCA Civ 889; [2002] 2 Lloyd's Rep 436* at [96] per Rix LJ as follows:

"I would also accept Mr Cordara's submissions about Latreefers' silence to the extent that they may go beyond the judge's analysis. The silence was not mere silence, it was overlaid with all that had gone before. It was a speaking silence. The difficulty with silence is that it is normally equivocal. Where, however, it is part of a course of consistent conduct it may be a silence which not only speaks but does so unequivocally. Where silence speaks, there may be a duty on the silent party in turn to speak to rectify the significance of his silence. The circumstances of this case demonstrate the importance of these principles. This was not a case where a party seeks to derive assent out of mere silence. These parties were in contractual relations, and the question was whether the yard should continue to perform in circumstances where Latreefers had made it clear that it did not want performance on the terms of the existing contracts. The yard needed to know where it stood."

127. In this case, there was no expressed renunciation to Dr Comberg. The question in the instant case is whether this silence spoke. In my judgment, it did speak, and it did so unequivocally. First, there was a breach of contract in failing to pay which might have been equivocal as to whether it was by accident or by intent. In the context of a continuing contract of employment, Dr Comberg was entitled to have clarification one way or the other. It was to that end that he wrote, in particular, the email of 2 November 2017. This was not a case of deriving assent from mere silence. There was a continuing duty of trust and confidence and a continuing non-payment with an apparent intention not to honour the contract. In my judgment, Dr Comberg was entitled to draw out VivoPower to find out if it was intentional. In these circumstances there was *"a duty on the silent party in turn to speak to rectify the significance of his silence"* in the above words of Rix LJ in *Stocznia*. Dr Comberg was entitled to infer that it was intentional when the non-payment continued and was not explained by the deadline set of 5pm on 3 November 2017. In those circumstances, whilst the primary finding is that there was a breach of contract by the time of the deadline, if there was not yet a breach by that stage, there was communicated an intention not to make the October payment. This was communicated by the combination of not paying at the usual stage by the banker's order, nor thereafter to pay in the face of the communications of 1 and 2 November 2017, nor to provide any explanation for the non-payment.

128. This is not a case of an expressed intention not to pay, but it is obvious against the background of electronic payments having been made on 28th of each month, the failure to respond to the emails of 1 and 2 November 2017 and the failure to pay by 3 November 2017 that VivoPower acted in such a way as would lead a reasonable person to the conclusion that it did not intend to pay the October salary. In my judgment, if, contrary to the foregoing, there was no breach of contract by the end of the third business day, there was an intention evinced by VivoPower not to pay the salary. It turns out that not only did the objective acts show that VivoPower did evince an intention not to pay, but as a matter of fact, it did at that stage not have an intention to pay. Indeed, the October salary has never been paid.

(iv) Conclusion

129. For all of the above reasons, the withholding of the payment for the October salary was a breach of contract. The time for payment had arrived, and the failure to pay by 5pm on 3 November 2017 was repudiatory. If, contrary to the foregoing, the time for payment had not yet arrived, the breach was an anticipatory breach of contract or a renunciation of the Service Agreement. It therefore followed that there was an entitlement to terminate the Service Agreement for repudiatory breach on 3 November 2017.

Issue 2: If Dr Comberg was constructively dismissed, did the dismissal occur: (i) on 3 November 2017 (acceptance by letter); (ii) shortly after 17 November 2017 (acceptance by conduct); or (ii) on 11 December 2017 (acceptance by letter)?

130. Dr Comberg accepted the breach, as he was entitled to do, by delivering in person the letter of 3 November 2017. It does not matter that thereafter by a letter of 6 November 2017, HSF indicated that it would make the payment for the wages. VivoPower never did in any event. The contract was terminated upon the hand delivery. However, if, contrary to the foregoing, Dr Comberg was not entitled to terminate on 3 November 2017 and so his termination on that date was ineffective, then what is the analysis? As noted above, on 17 November 2017, in a letter from Skadden representing VivoPower instead of HSF terminated for breach based on alleged misconduct/incompetence of Dr Comberg and/or renunciation. Ignoring at this stage the misconduct/incompetence basis, the October salary was never paid. If 3 November 2017 was too early, then by 10 November 2017 when Hausfeld wrote and/or by 17 November 2017 when Skadden wrote, it had long ceased to be 'on or about' the last day of October. Further, if there ever was an ambiguity about an intention not to pay (the evidence has shown that there was no ambiguity), this was apparent by the non-payment before Skadden's letter and was reiterated in Skadden's letter by the assertion that Dr Comberg was not entitled to the October salary.

131. On the premise that Dr Comberg was entitled to the October payment (and assuming for this purpose that VivoPower had no entitlement to terminate on the ground of alleged misconduct/incompetence), the following is the case. First, if there was no effective termination on 3 November 2017, the termination occurred thereafter by what was described by what Skadden acknowledged to be in the letter of 17 November 2017 at paragraph 21 as *"your client's repeated insistence that he is no longer bound by the terms of the Service Agreement, including the post-termination restrictions set out therein"*. A part of that repeated insistence was by Hausfeld's letter dated 10 November 2017 (especially at paragraph 12). Thus, VivoPower was not entitled to use any premature termination (it was not premature) on 3 November 2017 or the subsequent conduct to set up a renunciation on the part of Dr Comberg. Its termination for breach on 17 November 2017 was ineffective (assuming for this purpose that it had no entitlement to terminate on the ground of alleged misconduct/incompetence). On this premise, if there had not been a repudiatory breach, actual or anticipatory, by VivoPower by 3 November 2017, there was a termination by Dr Comberg on or before 17 November 2017. In this context, the letter of 11 December 2017 of Hausfeld is to be treated as confirmatory of the termination for breach by Dr Comberg.

132. For all these reasons, and subject to the misconduct/incompetence issue which will be discussed next, VivoPower was in repudiatory breach referable to the non-payment of the October salary, and Dr Comberg was entitled to terminate for repudiatory breach, which he did on 3 November 2017, alternatively by reference to the non-payment and VivoPower's letter of 17 November 2017, which Dr Comberg did on or before 17 November 2017 and confirmed by Hausfeld's letter of 11 December 2017. It would therefore follow that the starting point would be, subject to mitigation, that Dr Comberg was entitled to be put into the position as if he had served out his 12-month notice period. However, if Dr Comberg could have been dismissed whether due to his being in repudiatory breach or pursuant to the provisions of Clause 17.2 (the termination for cause clause) of the Service Agreement, then the damages for a wrongful dismissal could be wiped out. It follows that it is necessary to consider the arguments of VivoPower that Dr Comberg could have been dismissed.

Issue 3: Did VivoPower have the right summarily to dismiss Dr Comberg at that time?

In this regard:

3.1. VivoPower relies on the specific allegations of misconduct as pleaded in the Re-Amended Defence and clarified in responses to RFI.

3.2. Did VivoPower have the right to dismiss under clauses 17.2.1 to 17.2.3 of the Service Agreement or at common law on the ground of repudiatory breach of duty, gross misconduct or gross negligence?

3.3. Do the matters alleged justify in fact the exercise of that right?

3.4. Did VivoPower lose the right by affirmation?

(1) Introduction

133. The case of VivoPower is that Dr Comberg was in breach of his service agreement and that (1) as at 3 November 2017 and thereafter, it was entitled to terminate for breach, (2) as at 17 November 2017, it did terminate the Service Agreement for breach.

134. This arises because in the context of the negotiations leading to termination and thereafter, VivoPower has made numerous complaints about the alleged mismanagement of Dr Comberg, and it is its primary case that this has given rise to an entitlement to terminate the contract. The consequence of this would be that the claim for wrongful dismissal should be rejected: alternatively, if there was a technical wrongful dismissal, any damages would be nil or very low.

135. The term "breach" of the Service Agreement is a shorthand. It can refer to a repudiatory breach. If Dr Comberg was in repudiatory breach, then there was a right to terminate for breach. In the alternative, it can refer to circumstances where there was an entitlement under the Service Agreement to terminate due to the wording of Clause 17.2 even if this fell short of a repudiatory breach. The alternative to repudiatory breach is in the terms in Clause 17.2.1 – 17.2.3 that if the Board considered reasonably that various events had occurred which may not have been repudiatory including serious or persistent breach and repeated neglect of duty.

(2) The law regarding termination for mismanagement or incompetence

136. It is first necessary to consider generally the common law regarding termination for mismanagement or incompetence. There are various features which should be discussed at the outset.

137. First, it is necessary to consider what as a matter of law would entitle an employer to terminate for repudiatory breach in a case of mismanagement. Mismanagement or gross negligence can amount to grounds for termination even if falling short of dishonesty and other deliberate wrongdoings. It was said by the Court of Appeal in *Adesokan v Sainsbury's Supermarkets Ltd* [2017] ICR 590 as follows per Elias LJ:

"23. The focus is on the damage to the relationship between the parties. Dishonesty and other deliberate actions which poison the relationship will obviously fall into the gross misconduct category, but so in an appropriate case can an act of gross negligence.
24. The question for the judge was, therefore, whether the negligent dereliction of duty in this case was "so grave and weighty" as to amount to a justification for summary dismissal…."

138. Elias LJ in *Adesokan* quoted and followed *Sinclair v Neighbour* [1967] 2 QB 279 where Sellers LJ at p.287C said

"But whether it is to be described as dishonest misconduct or not, I do not think matters. Views might differ. It was sufficient for the employer if he could, in all the circumstances, regard what the manager did as being something which was seriously inconsistent - incompatible - with his duty as the manager in the business in which he was engaged."

139. To similar effect in the same case, Davies LJ said the following at p.289 B

"The judge ought to have gone on to consider whether even if falling short of dishonesty the manager's conduct was nevertheless conduct of such a grave and weighty character as to amount to a breach of the confidential relationship between master and servant such as would render the servant unfit for continuance in the master's employment and give the master the right to discharge him immediately."

140. The submission of Dr Comberg is that summary termination is reserved for very clear cases, and that the evidential burden in a gross negligence case is formidable. This overstates the position if it means anything different from the way in which it was expressed by Elias LJ in *Adesokan.* It is possible for acts of gross negligence to be treated as a species of gross misconduct.

141. Second, the submission was pitched too strongly to say that summary dismissal is not generally available at all in a capability situation. Reference was made to *Jackson v Invicta Plastics Limited* [1987] BCLC 329 (*"Jackson"*) at 346-347 where Peter Pain J said:

"Since the first of these cases was decided the law as to unfair dismissal has developed. The courts have not yet fully worked out how that legislation which is now embodied in the 1980 Act impinges on the common law. In my view, the tendency of that legislation must make it much more difficult to justify summary dismissal for incompetence."

142. It is of course more difficult to justify summary dismissal for incompetence than for an act of gross misconduct. It may be necessary to be a little cautious about a suggestion that the common law might travel in a different direction consequent upon statutory intervention. Peter Pain J was observing directions in 1987, but since then the House of Lords has observed how the statutory provisions and the common law are doing different things: see *Johnson v Unisys Limited* [2003] 1 AC 518. The

House of Lords there emphasised the different regimes and purposes of statutory employment law relating to the right not to be unfairly dismissed and the protections at common law. The one did not necessarily infuse the other. A submission that a term could be implied at common law into an employment contract consequent upon the statutory rights was rejected.

143. It is not necessary to develop this point, save to say that the issue in this case is not so much about incompetence per se, but whether allegations of repeated instances of negligence were proven. In my judgment, as a matter of law repeated acts of negligence are capable of so undermining the relationship between the employer and the employee as to justify summary dismissal. Everything depends on the facts of the case, and generalisations in this area may be unhelpful.

144. Thirdly, in *Jackson,* Peter Pain J went on to say as regards the title of Chief Executive at 347:

> *"There is the further difficulty in this case that the plaintiff was employed as a chief executive. The degree of skill required of a professional man or a skilled tradesman may be easy to define. Not so where the office is defined only by its title and denotes a job which may vary enormously as between one employer and another.*
>
> *Although the right to dismiss summarily for incompetence still survives, it is difficult to imagine circumstances in which the necessary evidence would be available in the case of a chief executive, who had recently been appointed. The employer would have to show that his continued employment would be quite impracticable because of the harm he was likely to do to the company."*

145. This can be qualified to an extent in that Dr Comberg was not taken on simply in the way many CEOs are because of management skills. He was experienced in the energy sector, and so this could inform as to a level of competence reasonably expected of him. Further, by the time that it is said that VivoPower was entitled to terminate, Dr Comberg had been with VivoPower for more than 1½ years: although that was not a long period of time, it was not the case of somebody who had only recently been appointed.

146. Fourthly, there is a statement of Peter Pain J in *Jackson* which has a particular resonance in the instant case. It is at [350] where he said*:*

> *"it is too facile to say that because the company did badly whilst the plaintiff was chief executive, the plaintiff was incompetent."*

147. There are submissions made by VivoPower to the effect that the alternative to termination for repudiatory breach allows for a termination which might not amount to a repudiatory breach. In my judgment, this does not affect the analysis in this case. The purpose of the introductory words about the opinion of the Board is intended to result in the employer being able to terminate where it appears reasonably to the Board that there has been a serious breach and the like even though on analysis there may not have been. As Mr Brown rightly submits, it is a limited power in that (a) it

depends on the opinion of the Board, and it does not suffice for example if it is the view of some directors without the involvement of the Board as a whole, and (b) it does not depend on some subjective whim in that the matters have to appear "reasonably" to the Board.

148. Insofar as is relevant to the instant case, the particular grounds in Clauses 17.2.1 - 17.2.3 would have to be of a serious nature. If a breach is serious or persistent of a material term or if there is repeated neglect or failure to carry out duties, that is likely to be repudiatory. It is possible that there will be some cases where it would fall short of repudiatory conduct, but it is unlikely to do so.

149. This is borne out by case law. In the case of *Stobart Group Limited v Tinkler* [2019] EWHC 258 (Comm), HHJ Russen QC, sitting as a Judge of the High Court, considered contractual provisions which sought to establish categories of conduct justifying summary termination. They included committing *"any serious breach" or "any gross misconduct, or any wilful neglect in the discharge of his duties"* or *"conduct tending to bring himself, the Company or any Group Company into disrepute".* The Judge said at [504]:

> *"I recognise that, in this case, the Company has to make good its pleaded grounds for summary dismissal based upon gross misconduct or conduct tending to bring either Mr Tinkler or the Company into disrepute and that the relevant language of clause 17.1 is not susceptible to a soft interpretation. Although each is a flexible concept, so far as the types of conduct that may fall within either are concerned, it is clear that they each have in mind misconduct which is either serious or sustained, in the sense of perpetrated wilfully in the face of a prior warning against it, or possibly both. I put it like that because "gross misconduct" is by its very essence repudiatory in nature. I can see there might be greater potential for argument as to whether the individual's conduct has in fact risked himself or his employer being brought into disrepute (though perhaps less so where the employer is a publicly listed company which should be expected to be governed in a manner partly addressed above) but, again, by definition it would need to be quite serious, when viewed objectively, to carry with it the risk of reputational damage."*

(3) The allegations of breach

150. It is convenient first to consider the breaches contained in the Note of the Mismanagement Allegations dated 7 March 2020, and then to consider the other allegations. It will be recalled that these are relied on as being of '*particular significance*'. The paragraph numbers are to the paragraphs in that Note.

(i) Misrepresentation of Cash Resources [3-4].

151. The allegation is that on 3 July 2017 Dr Comberg provided false information to a Board meeting, or failed to provide financial information relating to PLC, that PLC was likely to run out of cash well before the end of 2017. It is said that Dr Comberg stated that the cash inflows matched up with its cash outflows. When asked when PLC would run out of cash, he stated that the Board did not need to worry because he had arranged for the refinancing of the North Carolina sites which would close in September/October 2017. However, it was only thereafter that the Board learned that

PLC would run out of cash in 2017, absent external investment. This is denied by Dr Comberg. He says that the lack of cash in the business was a constant issue and had been discussed in earlier board meetings and presentations. Dr Comberg explained the issues in a presentation that he gave at a Town Hall meeting in June 2017. At the 3 July 2017 board meeting, Dr Comberg said that he discussed his earlier Town Hall presentation regarding cash issues within the business. Dr Comberg explained that at the time of the meeting cash inflows matched cash outflows but that there was a risk of capital running out by the end of the year.

152. In his first witness statement at paragraph 329, Dr Comberg said:

> *"At the Board meeting, I was asked by one of the attendees whether, at that point in time, the movements of money into the business were sufficient to meet the movements of money out of the business. I confirmed that at that time, they were sufficient. However, I also explained that this was unlikely to continue to be the case going forward given that PLC had a gap in its EBITDA forecast and revenues. I explained that this meant that the business would run out of capital before year end unless steps were taken to bring in capital, and there were plans underway to achieve this. In particular, I explained that the business had received initial notifications of interest from third parties including KeyBanc Capital Markets Inc. and Crayhill Capital Management LP to lend between USD 5 and 7 million secured against PLC's North Carolina assets. However, I explained that nothing had been agreed and there was much wore work to be done in order to secure capital before year end."*

153. It was put to Dr Comberg that Mr Chin in his statement had said at the meeting of 3 July 2017 that (a) Dr Comberg had told the board that the cash inflows matched the cash outflows, and (b) when asked by Mr Hyams when the PLC would run out of cash, Dr Comberg stated that the Board did not need to worry because he had arranged finance of the North Carolina sites which would close in September/October 2017.

154. There was a very detailed response from Dr Comberg **[T3/419/10 – T3/423/18]**. He referred to a presentation which he had given to an earlier town hall meeting where there was a slide which showed a gap in the EBITDA of the company at that point in time relative to forecast, and how much cash was required at that time. He referred to a project at that time in which Mr Chin and Mr Hui were involved in the US to raise cash called Triggerfish, and how they were fully aware of how much money had been spent and what was needed to spend to develop the project portfolio further. The cross-examination amounted to a formal putting of the case to the contrary. In the light of the very detailed answer of Dr Comberg and the major involvement of Mr Chin and Mr Hui in respect of project finance, it has not been shown that Dr Comberg misrepresented the position as alleged.

155. As for the recollection of Mr Hyams to the effect that Dr Comberg had stated that there was no need to worry about running out of cash, I am not satisfied that he picked up precisely what was said. Mr Hyams barely recalled the meeting of 3 July 2020, let alone the matter in dispute referred to above or the allegation that Dr Comberg had misled the meeting. He was taken to his email of the time and seemed

to have little recollection outside the document. I have referred above to Mr Hyams' inability to recall what investment tax credits were, despite the fact that, as Mr Chin accepted, one of the strategies of Dr Comberg at the time was to claim ITCs.

156. It should be noted by reference to documents as of 3 July 2017 that there were emails at that time sent between directors excluding Dr Comberg. There were criticisms made including how badly written the annual report was, how Dr Comberg had left that to others to write whereas a CEO should oversee this, how there were delays in processing a bonus and about inadequate investor presentation. It is of concern that all of this contact was taking place behind the back of Dr Comberg, and it begs the question as to why he was being isolated. If there was a desire to understand and rectify the position, then it would be expected that he would be contacted.

157. The precise alleged misrepresentation is difficult to prove absent proper minutes of the meeting of 3 July 2017. Evidently, the formal minutes are not a record of what occurred, but apparently a pre-prepared statement of what was expected to be resolved. Mr Chin in cross-examination accepted that the minutes were defective and that Dr Comberg had indeed raised both his refinancing ('Project Triggerfish') and the ITC strategy at the 3 July 2017 board meeting and as part of the Townhall meeting during the previous week. The fact of inaccurate board minutes essentially destroyed the credibility of Michael Russell's so-called review given that his brief was to review the accuracy of information provided to the board (which would obviously include information actually provided at the board meeting itself as opposed to the pre-prepared minutes).

158. In summary, the allegation of misleading the board has not been substantiated. On any account, it was a potentially serious allegation, especially if the misrepresentation was deliberate or reckless. Further, Dr Comberg has answered effectively and very specifically the allegation of misleading the Board. It is also apparent that there was by this stage a move against Dr Comberg, as evidenced by emails about him and not shared with him. Far from this showing that this was a reaction to the inadequate management of Dr Comberg, it appears to indicate that there had already started an attempt to undermine him which would become an attempt to oust Dr Comberg. In my judgment, having regard to how relatively sparse the criticisms were before this time, the inference is that in some way this was being orchestrated rather than a combined reaction. In my judgment, having seen the witnesses, it is more likely than not that by this stage Mr Chin wanted change and he was conducting this discussion behind the back of Dr Comberg. In my judgment, the allegations of breach of contract arising out of misleading the board are not established.

(ii) Failure to oversee financial accounting and reporting [5-7].

159. The contention of VivoPower is that as CEO of PLC Dr Comberg was ultimately responsible for VivoPower's financial accounting and reporting, and that during his tenure, the reporting was deficient. In particular, it is alleged that Dr Comberg failed

(1) to ensure the timely production of an accurate and useable budget for VivoPower [7.1];

(2) properly to deliver accurate and timely information to the Board, as a result of which the cash flow statement for July 2017 did not balance, and this persisted until he left office [7.2];

(3) to supervise adequately the process of preparing regulatory filings, notably the Annual Report and the SEC Form 20-F, which led directly to delay in filing the same for the year ended 31 March 2017 [7.3] and he did not meaningfully contribute to these reports; and

(4) to hire a financial controller in a timely manner [7.4].

(1) Failure to ensure the timely production of an accurate and useable budget for VivoPower

160. Mr Weatherley-White was responsible for the budget. There were reasons known to the Board at the time as to why it could not be produced until May 2017 rather than April 2017. Mr Weatherley-White reported these reasons to Dr Comberg who advised the board accordingly. Mr Weatherley-White said that was Mr Hoadley's fault **[T7/946/9-15]**. Mr Hyams described it as a "*corporate failure"* **[T7/997/9]**. No complaint was made by the Board at the time. Mr Chin and Mr Weatherley-White both agreed that the basic job of a CFO is to deliver timely and accurate financial information **[T5/834/3 and T7/930/16]**. This accordingly fell within the function of the CFO. It is of course the case that the CEO has a duty of overseeing these matters and providing appropriate supervision, but not of doing the CFO's job. It does not follow if a CFO does not perform their job timeously or competently that the CEO should necessarily be held to account. In any event, there is evidence that Dr Comberg did provide supervision of the CFO in the performance of his function.

161. In this instance, there is a further element on which hangs a tale. This failure is alleged against Dr Comberg. It is a basis for alleging that his dismissal was lawful or that he could have been dismissed lawfully, and before that, it was a basis for the counterclaim. There is no indication that Mr Weatherley-White was called to account for this alleged failure, and yet if there were fault, he would be expected to bear primary responsibility or at least as much responsibility as Dr Comberg. Instead, he went on to succeed Dr Comberg as CEO and gave evidence against him. This goes further than to show unequal treatment: it undermines the allegation against Dr Comberg. Taking everything into account, this allegation against Dr Comberg is not made out.

(2) Failure to deliver accurate and timely information to the Board, as a result of which the cash flow statement for July 2017 did not balance

162. There is an overlap with the previous discussion. This was the primary responsibility of the finance function. Dr Comberg as CEO supervised this with the board and gave instructions to Mr Pilotte and Mr Weatherley-White (as CFO) regarding management packs and weekly dashboards. Dr Comberg was not obliged to micro-manage the work of others. The relevant context was the establishment of a

new business with systems and controls being implemented over a period of time. Arowana provided resources to VivoPower for which it charged. When Dr Comberg ceased to work, that meant that he could not take any further steps.

(3) Failure to supervise the process of preparing regulatory filings, notably the Annual Report and the SEC Form 20-F leading to delay

163. Mr Hoadley as Financial Controller was responsible for the Annual Report. It was filed one day late by him by reason of an error on his part. **[T7/946/12]** The SEC Form 20-F was not filed late as an extension had been obtained. There were some emails at the time which were critical of the content of the Annual Report, suggesting that the CEO should have been more involved in their completion. Mr Hyams noted that, having spoken with Mr Hoadley, he understood that Dr Comberg had "*no involvement*" with the Annual Report prior to it being provided to the non-executive directors. However, this is not accepted by Dr Comberg. There was no evidence from Mr Hoadley and, having regard to his poor performance (so criticised by VivoPower as part of its case against Dr Comberg), any hearsay statement attributed to Mr Hoadley carries almost no weight. In any event, as noted above, Dr Comberg spoke with Mr Weatherley-White about the preparation of the Annual Report from mid-June onwards. Dr Comberg was critical of Mr Weatherley-White for having failed to deliver. In early July, he urgently pressed Mr Weatherly-White to work on the Annual Report so that Dr Comberg would have it in time to review it, and he did. The evidence of Mr Hyams was vague and his command of what was going on at the time (for example, the ITCs) was lacking.

164. Thus, the criticisms of Dr Comberg in this regard do not carry much weight. The Court prefers the evidence of Dr Comberg that he was involved in seeking to progress these matters. It is possible that another CEO might have been more involved and that with hindsight, it would have been desirable if he had been more involved. However, no breach of contract is proven, let alone a breach of contract of sufficient seriousness to entitle VivoPower summarily to terminate the Service Agreement.

(4) Failure to hire a Financial Controller in a timely manner

165. Dr Comberg was obliged to take reasonable steps to ensure that PLC engaged a financial controller who had sufficient experience and expertise. He did so by engaging Mr Hoadley through a recruitment process involving an external third-party recruiter (Comberg 1 paragraphs 237-247). It was a very extensive and thorough process. Mr Weatherley-White approved the appointment of Mr Hoadley **[T7/940/6-9]**.

166. Dr Comberg said that the business had not developed sufficiently to warrant a Financial Controller until August 2016 when the recruitment process commenced, and there is no evidence which demonstrates that this was wrong. The process took 3 months which is a usual time period.

167. Mr Hoadley appeared to be the best candidate (evidenced by his assessment score from the recruiter, Drax Executive Limited). To the extent that he proved inadequate at his job, it does not follow that this shows a negligent failure in recruitment. Many recruitment decisions do not live up to expectation, and it is not a corollary that those who took part in the process were negligent. Dr Comberg subsequently performance managed him. There will be further reference to complaints about mismanagement related to Mr Hoadley in the section below about mismanagement of employment matters.

(iii) Failure to invest his 2017 bonus in PLC and his subsequent retention of the same [10]

168. It is alleged at paragraph 99 of the Defence by Mr Chin that the bonus was provided on condition that half of the proceeds after tax would be used to purchase shares in PLC. It is said that Clause 5.5 provided for the source of the obligation, namely that it was subject to such terms as the Remuneration Committee may from time to time determine. It is said in paragraph 99 of the RAMD that the Remuneration Committee voted for a bonus but only on the condition that 50% of the net income received should be used to purchase shares in PLC. By not utilising his bonus as such, it is said that Dr Comberg is in breach of contract.

169. I am not satisfied from the evidence before the Court that there was an agreement to that effect for the following reasons, namely:

(1) The Directors' Remuneration Report refers to a bonus of £630,000, but it does not refer to the bonus being conditional as now contended for or at all.

(2) There is a note in the report that *"Philip Comberg and Kevin Chin intend to enter into a transaction whereby Philip Comberg acquires 610,000 founder and insider shares. It is expected that Philip Comberg and Carl Weatherley-White (CF) will purchase VivoPower shares at a level equivalent to 50% of the after-tax proceeds from the bonuses paid in connection with the 14 months ended 31 March 2017."* However, this note does not refer to an agreement, but to an intention and an expectation.

(3) It is VivoPower's case, and not that of Dr Comberg, that a part of the bonus is in respect of deferred remuneration. In other words, it is referred to as a bonus, but a half of it is in reality deferred remuneration. This instantly brings into question the nature of VivoPower's case to the effect that half of the bonus (after tax) was to be invested in shares in PLC. Did that mean half of the total sum said to be bonus or only a half of that (having deducted the half which was said to be in respect of deferred remuneration)? This uncertainty is evidence of the confusion generally of this aspect of VivoPower's case.

(4) In cross-examination **[T3/429/12 – T3/431/15]**, Dr Comberg acknowledged that he had referred to some taxation concerns of his about taking these shares and requiring tax advice. This was in respect of a note of Mr Nick Olmsted, general counsel who said in a note of 4 July 2017 *"Philip has expressed some concern relating to the description of his anticipated shareholdings in the annual report, partly due to tax considerations."* This was in the context of an intention and an expectation. If the agreement had been made at the time of or before the payment of the bonus on 28 June 2017, then the wording

would have been by reference to the agreement and the obligation on the part of Dr Comberg, and not an intention or an expectation, and the concern of Dr Comberg would have been too late. It is to be borne in mind that Mr Olmsted was counsel to VivoPower and not to Dr Comberg, and so would have been expected to use the language about a binding agreement, if there had been one.

(5) The case that was pleaded was not by reference to the genuineness of the intention or the expectation, as to which questions were asked of Dr Comberg **[T3/432/4 – T3/434/16]**. In any event, it is to be inferred that any such intention or expectation became overtaken by the fallout between Dr Comberg and VivoPower at latest from early July 2017.

(6) As noted above, there had previously been discussion falling short of agreement about the participation of Dr Comberg as a shareholder. It seems that this is more of the same, that is discussion which never became an agreement.

(7) There is not a statement from the Remuneration Committee imposing this condition, still less an assent by Dr Comberg to the same. In any event, albeit not required for the decision in view of the conclusions above, clearer words would have to be in Clause 5.5 that there can be condition attached investment of the bonus or part of it in the employer. In my judgment, a clause which refers to participation in a bonus *"on such terms and at such level as the Remuneration Committee may from time to time determine"* does not without more entitle the determination to be the payment of the bonus back to the employer albeit by way of shares.

170. In the circumstances, there has not been shown to be a breach of contract on the part of Dr Comberg in not using the proceeds of the bonus to invest. It is the case, however, that a part of the antagonism between Mr Chin and Dr Comberg was that Mr Chin had through Arowana made substantial investment into VivoPower which was not doing well, whereas despite intentions and expectations falling short of contracts, Dr Comberg had not done so.

(iv) Failure to manage the operations and functions of the Investment Committee [12]

171. VivoPower alleges that Dr Comberg failed to ensure engineering input was included in materials and information provided to the Investment Committee. This was both in respect of the process as a whole and then specifically in respect of engineering reviews undertaken in relation to the Cruzeiro and Chillamurra projects. He further failed to ensure submissions and disclosure to the Investment Committee were accurate, complete, up to date and not misleading. It was alleged that his failure to ensure the proper process was followed resulted in VivoPower pursuing inappropriate projects (notably the Tritec, ESA Solar and Cruzeiro projects). Indeed, Dr Comberg ordered the deal team to pursue the ESA project even after it was made clear that it was no longer a viable prospect. It was also alleged that Dr Comberg failed to ensure that the proceedings of the Investment Committee were conducted in a structured, organised fashion with effective interaction with personnel presenting projects before the Committee.

172. A large part of the evidence relied on by VivoPower in this regard was that of Dr Borry, especially as regards Cruzeiro project (paragraphs 47-52), Chillamurra project (paragraphs 53-60), Tritec Portfolio project (paragraphs 61-63) (see also Chin 1 paragraphs 111-113) and ESA Portfolio project (paragraphs 43-46) (see also Chin 1 paragraphs 114-115). Dr Comberg denied in detail these allegations. In particular, in his first witness statement, his denials were contained at paragraphs 374-376. He specifically set out evidence in respect of allegations relating to the Mercatus software platform at paragraphs 377-389. He then went on to answer allegations made in respect of the following projects, namely Tritec Portfolio project (paragraphs 392-397), ESA Portfolio project (paragraphs 398-405), Cruzeiro project (paragraphs 406-421) and Chillamurra project (paragraphs 424-431). There were more general matters relating to the criticism that engineering approval had not been provided before matters were put before the Investment Committee (paragraphs 422-423).

173. These allegations in my view never got off the ground for the following reasons, namely

(1) The key witness Dr Borry was not called to give evidence and nor was he tendered by way of video link. His evidence was therefore not tested. The reason given for this was that he was in the United States and he was retired and did not wish to engage with the process. Thus, at highest, only very limited weight can be given to his written statement.

(2) By contrast, there was extensive evidence from Dr Comberg contradicting the case of VivoPower who was barely cross-examined on these issues. The foregoing is not a criticism of Mr Ciumei QC. He must have recognised that there was no sensible basis on which Dr Comberg's views as to the viability of the specific projects (Cruzeiro, Chillamurra *etc*) could be demonstrated on the evidence before the Court to amount to misconduct or negligence, whether gross or otherwise, against Dr Comberg. To like effect, despite commendably thorough final written submissions, Mr Ciumei QC dealt with these allegations in a relatively short way in paragraph 148, which was high on generality and was incapable of demonstrating that the allegations of misconduct and gross negligence in this regard could be proven on the evidence.

(3) The problem about VivoPower's case in this regard is that it would have required a trial of perhaps double the length of time with more focused and detailed allegations and perhaps expert evidence in order to make good the points (albeit that expert evidence would be difficult to prove a standard against which this CEO stood to be judged for his work). It was instead led with a high level of generality. There was nothing to indicate that if the case had been approached in that different way that a different conclusion would have occurred.

174. In these circumstances, these alleged breaches of contract are not established.

(v) Dr Comberg failed to develop and manage investor relations [14]

175. In his first witness statement, Mr Chin at paragraph 155 said that Dr Comberg did nothing to address investor relations. However, in his evidence, Mr Chin alleged that Dr Comberg almost entirely neglected his responsibility to take steps to engage with investors and to create investor interest in the Group in order to improve the PLC's ailing share price following listing. It was also alleged that Mr Chin met Dr Comberg in April 2017 in order to agree a strategy for improving investor relations, yet Dr Comberg failed to act on that strategy; see Defence paragraphs 84.1 and 84.2.

176. The response was that Dr Comberg did take steps to engage with investors and to create investor interest in the Group. He travelled extensively and conducted roadshows for potential investors. He attended numerous investor meetings arranged by Roth, a bank, and Chardon Capital Markets LLC in March, June and July 2017, with Peter Guy on 29 July 2017. He engaged EnergyTech Investor to help PLC with its investor relations.

177. It is correct that Mr Hyams suggested coaching to adapt better Dr Comberg's presenting style to US investors. That was a constructive suggestion. Dr Comberg agreed to do it **[T7/995/12]**. That demonstrates Dr Comberg's commitment in this respect, not the opposite.

178. Mr Chin's case was pitched too high in his statement that Dr Comberg did nothing to address investor relations. Mr Chin wrote on 8 June 2017 to Dr Comberg and to Mr Weatherley-White about ways to address what had been a "horrible stock reaction". In cross-examination, he changed from nothing to "very little" to address the same. He had to meet the point that he would not have written to Dr Comberg and Mr Weatherley-White together with his suggestions if in fact Dr Comberg was not involved in investor relations **[T6/838/22-T6/839/23]**.

179. Investors were writing to complain about the drop in the share price. Mr Chin's desire to go ahead with the listing was an ambitious one in the light of the decline of confidence in the solar sector particularly following the election of President Trump, who was perceived as not being supportive of solar energy and renewable energy generally, and the collapse of SunEdison Inc. The objective of achieving investment in the order of $80 million was not and could not be achieved in that market. It appears perhaps with the advantage of hindsight that the business had been overvalued. After listing, the activities proved difficult given lack of liquidity in the shares. The timing of the listing and the amount which Mr Chin expected to achieve were not the brainchild of Dr Comberg.

180. The criticisms of shareholders thereafter reflect on these market conditions. It was very difficult to expect that they could be adequately addressed. It is necessary to see the criticisms in context. In addition to the context of the market generally and particularly the events of 2016 affecting the listing and the market price, there is what came after the period when Dr Comberg had ceased to be CEO. There is no evidence that the decline in the stock price was arrested. Mr Chin said that Mr Weatherley-White was engaged in investor relations, but there is no evidence that he did a better job than Dr Comberg or achieved better results.

181. None of this establishes a breach of contract. The task of engaging with investors was very difficult having regard to market conditions. Dr Comberg's primary responsibility was in respect of the running of the business rather than maintaining investor relationships. He did not neglect investor relationships, but the essence for the future of the business was to concentrate on the core of the business. In order to prove a breach of contract, it must be shown that Dr Comberg acted in this regard outside the judgment that was available to him about the conduct of the business generally, obliged, as he was, to exercise his own judgment as CEO. No breach of contract is established in this part of the case, let alone one capable of supporting a summary termination of the Service Agreement.

(vi) Dr Comberg's mismanagement of employment matters [16]

182. VivoPower says that Dr Comberg failed to attract, effectively manage and jeopardised the retention of key personnel and/or the dismissal of personnel whose retention was seriously averse to VivoPower's best interests. In particular, it is alleged that his deficiencies led to:

(1) the resignation of Mr Olmsted, the General Counsel of VivoPower on 15 July 2017;

(2) the resignation of Dr Borry, VivoPower's Head of Engineering, on 12 August 2017. It is alleged that there was a failure to coach or mentor him, and that he excluded Dr Borry from weekly executive calls until May 2017;

(3) a failure to monitor or address deficiencies in the work streams and performance of Mr Hoadley, the Financial Controller. It is said that Dr Comberg failed to provide adequate support for Mr Hoadley so as to ensure VivoPower's financial reporting and filings were effected in a proper manner; and

(4) a failure to take appropriate action in response to Mr Fleischer's repeated instances of misconduct by disciplining or dismissing Mr Fleischer, despite the concerns of Board members and other team members.

183. Dr Comberg denies these allegations. The first overriding point is that a decision of an employee to resign, like the appointment of a bad employee, does not necessarily show a breach of contract on the part of the CEO. Most people engaged in hiring at some stage appoint employees who do not perform well, but one has to be careful about the danger of hindsight.

184. As regards Mr Olmsted, and the suggestion that Dr Comberg's failings as CEO led to his resignation, this is a superficial case. It is based on taking at face value the matters set out by Mr Olmsted at the time. This has been refuted by Dr Comberg in his first witness statement at paragraphs 461-468. There has been no evidence of Mr Olmsted, and indeed there has not been contradicted the evidence of Dr Comberg that (i) Mr Olmsted did continue in some capacity, (ii) his criticisms occurred in the context of negotiation of a new employment agreement to which VivoPower could not agree, and (iii) until the removal of Dr Comberg from office, the negotiations were ongoing. In cross-examination, Dr Comberg provided detailed evidence of what appeared in his estimation to be the real reason for the dissatisfaction of Mr Olmsted, who wanted to combine being general counsel with building a commercial solar rooftop business for VivoPower, for which there was not enough finance available. Further and understandably, Dr Comberg did not believe that the two roles were compatible and there was a concern about paying him for both roles in any event **[T3/435/14-T3/437/14]**. The evidence of Dr Comberg was cogent and there is no reason to disbelieve it. It should also be added that there was a suggestion that Dr Comberg in some way erred in recruiting Mr Olmsted on a consultancy basis, but this was agreed with Mr Chin in July 2016. The case relating to Mr Olmsted is therefore not established.

185. As regards Dr Borry, the nature of the case was the same, that is to rely on his resignation letter and his evident dissatisfaction. Since he did not give evidence

despite providing a witness statement, he could not be cross-examined. He evidently would not agree to be cross-examined by video-link. By contrast, Dr Comberg gave detailed written evidence in his first witness statement at paragraphs 469-477. His real reason for wishing to resign was about dissatisfaction as regards his salary and benefits relative to other employees. Dr Comberg attempted to work on the matter before his removal. In the end, Dr Borry remained with VivoPower, and there is no reason to believe that Dr Comberg would not have been able to deal with this dissatisfaction. In cross-examination, Dr Comberg was able to defend a detailed account of the position which was convincing **[T3/437/15-T3/442/15]**. Dr Comberg dealt with this fully in his first statement at paragraphs 469-477. Here too, the allegation against Dr Comberg was not established.

186. Sensibly excluded from the Note about Mismanagement, but a part of the case against Dr Comberg, was an allegation of mishandling the retention of Dan De Boer, which resulted in a distracting non-compete dispute with a former employer. The recruitment was not mishandled. A proper procedure which included assistance from external legal counsel was followed. Mr De Boer did not consider that he was bound by non-compete restrictions given he did not sign the agreement that contained them. In any event, the complaint from his former employer was resolved quickly and with no payment being made given that it had no basis.

187. As regards Mr Hoadley's performance who did not perform well, VivoPower suggested that Dr Comberg did not help Mr Hoadley when he was struggling with his duties. Dr Comberg disagreed and said how he helped him **[T2/211/13-25]**. In his first witness statement, Dr Comberg gave detailed evidence as to how performance issues were managed in respect of Mr Hoadley (paragraphs 270-284). There was an example about a document that was about to be delivered before Mr Hoadley went on holiday, which Dr Comberg requested was done in an appropriately worded email dated 10 August 2017. This email shows the contrary of a failure to manage workload and performance. That said, a CEO could not be expected to be micro-managing a financial controller, especially where this was the primary responsibility of Mr Weatherley-White as his line manager. Ultimately, Mr Hoadley was managed out of the business in compliance with employment law requirements.

188. Mr Weatherley-White recognised that he was the line manager of Mr Hoadley, but the delay in respect of the budget was the fault of the business, whilst saying that he was responsible **[T7/946/3-15]**. His evidence to deflect blame in this way, when Mr Weatherley-White must bear at lowest the greater responsibility as line manager, is another unsatisfactory aspect of this evidence. This then goes back to the point that the retention and promotion of Mr Weatherley-White shows that the allegation of mismanagement is not established and/or that there was another agenda at play such that the decision to remove Dr Comberg was not due to misconduct/mismanagement.

189. As regards Mr Fleischer, Dr Comberg is not in breach of contract by reason of the misconduct of subordinate employees simply because he "recruited them". Mr Fleischer's appointment was approved by Mr Chin. There seems to be a danger of a double standard here. When the misconduct of Mr Fleischer arose, Dr Comberg addressed it by performance management and ultimately decided not to extend Mr

Fleischer's fixed term contract. There was a decision of the Board to manage him out for a settlement of less than £200,000, which was achieved by Dr Comberg.

190. None of these allegations against Dr Comberg of mismanagement of employment matters have been established as breaches of contract, let alone matters which might justify a summary termination of his Service Agreement.

(vii) Conclusion regarding Note on Mismanagement Allegations

191. This concludes the discussion regarding VivoPower's Note on Mismanagement Allegations. It is revealing that none of the allegations are made out, despite these being the allegations of 'particular significance'. If these allegations were not sustained, then the inference is that there were different reasons for the removal of Dr Comberg. This was not a case where there was a reasonable belief in these matters, because the relevant information was to hand, and it is not the case that after-discovered information would have given a different perspective. If Dr Comberg had been asked about these matters at the time, which he was not, then his detailed explanations would have been before the Board. This appears not to have been wished because from July 2017 onwards at latest, there was a determination to remove him, led by Mr Chin. It follows that this case does not raise an issue as to whether the case of *Boston Deep Sea Fishing v Ansell* (1888) 39 Ch.D. 339 applies in the context of allegations of negligence.

(viii) Consideration of other allegations

192. It is now necessary to consider other allegations. There is a useful summary of allegations in the Appendix to Dr Comberg's Opening, prepared by Dr Comberg prior to the oral evidence, and headed "Summary of Misconduct Allegations set out under "Particulars of Breaches": Defence paragraph 54 et seq. Most of the allegations there are in VivoPower's Note on Mismanagement Allegations. The omission of other allegations appears to indicate that they are not among the most significant.

193. There is a series of allegations regarding incurring travel expenses of $160,000 with little to show for it, but VivoPower has failed to specify which travel expenses are criticised: see Response [57] to Request [25] provided on 22 June 2018. There was a criticism about Dr Comberg's preference for flying Lufthansa, but that evaporated in the cross-examination of Ms Byrne as set out above. It was said that he incurred expenses for "luxury accommodation", but here too there was a failure to specify the same: see Response [58] to Request [26] provided on 22 June 2018. There was a challenge about expenses in respect of the Consumer Electronics Show and for a meeting with Roth where meetings were said to be 'unproductive'. Dr Comberg believed that this was all incurred as part of his performance of duties for VivoPower and that the meetings with Roth were productive. Mr Ciumei QC exercised sensible restraint by not including these matters in VivoPower's Note on Mismanagement Allegations. They do not take the case of VivoPower forward.

194. Other criticisms did not amount to breaches of contract or were not serious. Ms Byrne had difficulty in arranging calls with Dr Comberg, and her criticism of having to rearrange telephone calls was hardly unusual for busy executives **[T6/913/3-7]**. It was said by Mr Sermol that his suggestion of a Richmond office instead of a W1 building would have been appropriate. In fact, VivoPower moved to another W1 address. It was suggested that Dr Comberg had given the impression to Mr Chin of greater experience than he had, but this was barely developed. Dr Comberg stood by his account, and Mr Chin recognised that he had conducted his own due diligence. There was a suggestion that Dr Comberg arrived at a meeting in Australia in a limousine, but this had been organised by Ms Byrne and no complaint was made at the time.

195. There was an allegation of breach of contract in that Dr Comberg undertook work as a non-executive director for Lucis/NuBryte, but this was permitted under Clause 11 of the Service Agreement. It was said that he had misrepresented his role at Magnetar, but Dr Comberg's case was that his role had been explained accurately. Other allegations of breach are referred to in other parts of this judgment including the failure to take up a shareholding and/or the failure to invest a part of the net earnings of his bonus.

(ix) Conclusions

196. It is now necessary to step back from the detail of the allegations and the answers. Thus far, looking at each of the allegations, there have not been established breaches of contract on the part of Dr Comberg, and, if there were breaches, breaches not of the seriousness or persistence required for a summary termination under Clause 17.2 or a repudiatory breach of contract.

197. There has been noted the paucity of documents making allegations of mismanagement or misconduct against Dr Comberg up to June 2017. Mr Chin made criticisms of a constructive nature: that is in the nature of the hands-on way in which he operates. However, they are not in the nature of allegations. On the contrary, after over half a year, VivoPower entered into the Service Agreement with Dr Comberg. It would be expected that instead of the Service Agreement, there would have been a parting of the ways if there had been dissatisfaction. One of the complaints about the negotiating style of Dr Comberg was that he stated that if he did not get his own way, he would walk away. Mr Chin said that Dr Comberg could decide if he wanted to get on to the bus. It is evident that it would have been easy for Mr Chin to have said that things were not going as expected and to have taken Dr Comberg up on his threat to walk away. It is evident that whilst Mr Chin was not a pushover (hence getting his way on the 12 months' contract), VivoPower wanted Dr Comberg going forward and therefore entered into the Service Agreement on 4 August 2016. That displays that whatever controversy would subsequently occur, the relationship was sufficiently harmonious at this stage.

198. Likewise, the grant of the 100% bonus, mentioned first on 29 March 2017 and paid on 28 June 2017, which on paper depended on fulfilling key performance indicators, but in practice the bonus appears to have been arrived at without reference to the key performance indicators. It is right that this has generated controversy as to

whether some of it was deferred remuneration and as to whether some of the bonus was due to be repaid in return for a shareholding. However, the overall message remains the same. At face value, this indicates at least absence of serious dissatisfaction with Dr Comberg's performance at the time.

199. This sequence tells a story of allegations against Dr Comberg by Mr Chin starting in late June/July 2017 and of emails from the non-executive director containing criticisms for the Board members without Dr Comberg. The reason why many of the answers of Dr Comberg were not known at the time was because in the determination to remove Dr Comberg, the allegations were not put to him and he was not given an opportunity to respond. If he had been consulted, it would have been found out, by way of example, that (a) Dr Comberg had sought a first draft of the CEO letter for the Annual Report in mid-June 2017, and (b) when eventually he received it in early July, Dr Comberg had sent to Mr Weatherley-White his amendments. Likewise, in respect of the allegation of misrepresentation at the board meeting of 3 July 2017, Dr Comberg did not have the opportunity to give the answers which he has given in this litigation. The inference is that by this stage, Mr Chin had already started to exclude Dr Comberg and to consider his ultimate exclusion. In my judgment, despite this whole catalogue of allegations, VivoPower has failed to show that there was a breach of contract, let alone grounds to entitle VivoPower summarily to terminate Dr Comberg's Service Agreement.

200. In my judgment, in the middle of 2017, Mr Chin decided that he did not wish to have Dr Comberg as CEO. He sought to prove that his contract could be terminated and liaised with other board members to bring this about by gathering evidence and by stirring things so that Dr Comberg should become isolated. It is apparent from documents that there was an attempt to gather the relevant evidence, and indeed Mr Chin was concerned at one point that the allegations against Dr Comberg might be said to be matters which were for Mr Weatherley-White as CFO. He was clearly astute to the fact that the allegations would be shown to be hollow if in fact they ought to have been directed at Mr Weatherley-White who was about to be promoted to the position of CEO as successor to Dr Comberg.

201. There was also a revealing reference to Mr Hui, who did not give evidence, believing that whilst Dr Comberg was guilty of negligence, there was nothing to show that his was gross negligence. Likewise, the evidence of Mr Weatherley-White was revealing about the very high expectations of Mr Chin. It is easy to infer that this is likely to have gone beyond a reasonable benchmark for a CEO. This is his prerogative, but it does not mean that Mr Chin was entitled to procure Dr Comberg's summary removal if Dr Comberg did not achieve a gold standard or well above a reasonable standard.

202. Why did Mr Chin act in this manner? It is likely to be the unwillingness of Mr Chin to pay the sums claimed under the various fee agreements, and a sense of grievance that Dr Comberg should claim that he owed these moneys when PLC was in an acutely difficult financial position. This is separate from consideration of what sums were and were not due. It is also likely to be the case that Mr Chin was upset that Dr Comberg had not acquired shares in PLC: in other words, that he had not been prepared to share some of the gain, which at least at that stage involved sharing some of the pain. This too does not necessarily indicate that there was or was not a

binding obligation to acquire shares. It was also the case that VivoPower had very substantial problems both in terms of market sector affecting willingness to invest and the share price, as well as problems within, such as the financial function not working well and difficulties motivating investors and the like. This has then been converted into allegations. It is worth in this context bearing in mind the warning of Peter Pain J in *Jackson v Invicta Plastics* that poor performance of a company does not necessarily indicate poor performance of a CEO.

203. In addition to trying to create a case against Dr Comberg, the effect of the internal manoeuvring was designed to create a background against which Dr Comberg would resign and walk away. The way in which that was planned has been set out above. It worked as regards Dr Comberg stepping down as CEO, but it did not work as regards his being prepared to walk away for nothing. The arrival of Hausfeld on the scene then changed everything, and so this claim arose, not as a construct, but its possibility had been thwarted until then by a feeling that it was not realistic for Dr Comberg to take on VivoPower. That all changed, and hence the seeds of the litigation. For the reasons above, VivoPower has failed to establish that it had or would have had an entitlement to terminate the Service Agreement.

204. It might have been thought that the effect of numerous witnesses testifying to support the evidence of Mr Chin against Dr Comberg would be that at least some of the allegations would be sustained. Reference is made back to the section about the witnesses and to findings of numerous shortcomings in the evidence. Having taken all of the above into account, looking at the matter both by way of general overview as well as the very specific allegations, VivoPower has failed to prove the breaches of contract or any of them, let alone that breaches entitled it summarily to terminate the Service Agreement.

(x) Affirmation

205. The above renders academic the argument that VivoPower was precluded from raising the misconduct allegations because it had affirmed the Service Agreement particularly by accepting the employment payments up to September 2017. Nevertheless, I shall state briefly my conclusion. It is that there has not been an affirmation by the receipt of the wages for the following reasons:

(1) Although a decision whether or not to terminate for breach should be made promptly, the innocent party is entitled to reasonable thinking time. That must include the time which it takes to consider the breaches and whether they are sufficiently serious to amount to a basis for summary termination.

(2) The fact that there are numerous alleged breaches and that they have to be seen cumulatively means that the time required will be substantial.

(3) It would have been obvious from the fact that Dr Comberg was asked to step down as CEO and from the period of negotiation that his conduct was being investigated within VivoPower. Further, the involvement of HSF leads to the inference that his conduct was also the subject of legal advice. Although the time for negotiation is different from the time to explore the allegations, in reality they are not so separate that the time for negotiation is not a factor to

be taken into account in assessing what is a reasonable time to communicate a right to terminate. The right to terminate could have been reserved before the negotiations, but the fact that it was not done does mean that there was a waiver of the right to terminate.

(4) At the time when the last payment was made, namely in September 2017, the gap in time from the numerous matters alleged and the time of the payment of salary was not so long that there was a clear and unequivocal representation by making the payment that the Service Agreement would remain alive despite the alleged breaches of contract.

(5) More difficult in time considerations is whether a reasonable time for termination had elapsed by November 2017. In my judgment, the complexity of the matters in this case is such that a reasonable time had not elapsed.

206. Whilst that suffices, the position of VivoPower on this argument is made a little stronger by reference to clauses 23.2 and 23.3 of the Service Agreement and the waiver provisions. They do not preclude an affirmation by conduct, and for so long as the relationship continued on an active basis by Dr Comberg remaining CEO and by receiving salary, there may have been relevant conduct. However, that only takes the analysis to the end of September, and at that stage, the last alleged breaches were relatively recent and VivoPower was still entitled to thinking time. It is more nuanced about the period to November 2017, but the waiver clauses provide some assistance for the period when there were no potentially affirmative steps. In my judgment, even without the waiver clauses, the Court would not be inclined to say that it would have been too late for VivoPower to have terminated in November 2017, but its position is strengthened by the waiver clauses. Nevertheless, for all the reasons set out above, VivoPower had no entitlement to terminate summarily, and so its success in resisting the affirmation argument does not assist its ultimate position.

Issue 4: What is the effect, if any, of VivoPower's acceptance of the Counterclaim Part 36 Offer on its defence to the Service Agreement Claims? Is VivoPower unable to rely upon any of its reasons for dismissal following the compromise of its Counterclaim?

207. The effect of this issue is a point which, if correct, would have meant that none of these allegations about misconduct/mismanagement could have been put. Dr Comberg has submitted that the effect of the acceptance of the Part 36 offer of the Counterclaim is to prevent VivoPower from relying on the misconduct allegations as a defence to the claim. VivoPower submits that the effect was simply to compromise the counterclaim and that it did not affect the entitlement of VivoPower to rely on the misconduct allegations as a defence. Since this issue will be resolved against Dr Comberg's submission, it has been necessary to deal with the allegations about misconduct/mismanagement in the context of the defence to the claim.

208. Dr Comberg relies on the terms of the Part 36 offer as follows:

"Our client has been advised by this firm and Leading Counsel that the misconduct allegations that form your clients' Counterclaim are lacking substance and/or have been misdirected against him. They have also been constructed with the benefit of hindsight. They are, therefore, opportunistic. Further, the quantum that is sought appears to have been exaggerated and is unrealistic. As such, the Counterclaim is very likely to fail at trial as to liability, causation and quantum. Nevertheless, our client is mindful that litigants are expected to try to resolve disputes whenever possible under the Civil Procedure Rules. We are, therefore, authorised to make the following offer which is made pursuant to Part 36 of the Civil Procedure Rules and without any admission of liability (the "Counterclaim Part 36 Offer").

The Counterclaim Part 36 Offer represents a nuisance payment which has been made by our client in consultation with his insurer (under your clients' Directors and Officers insurance policy) in order to protect their positions by obtaining the automatic costs consequences set out in Part 36 of the Civil Procedure Rules. The nominal amount of the Counterclaim Part 36 Offer reflects the strong view of this firm and Counsel that the Counterclaim will fail in its entirety at trial."

209. Dr Comberg says that offer related to "*the Counterclaim*", and that the Counterclaim comprised paragraphs 38-119 and 126-129 of the Defence, which are repeated in the Counterclaim by paragraph 145 ("**the Misconduct Allegations**"). He submits that the effect of paragraph 145 of the Defence/Counterclaim is that the Misconduct Allegations should be read in to, and form part of, the Counterclaim.

210. Dr Comberg submits that the precise terms and context of the agreement in the present case are to settle not only the Counterclaim, but also the misconduct allegations. He submits that the offer was based on the misconduct allegations, expressly referring to "liability" (i.e. liability for breach of contract). He submits that there was a single counterclaim based only upon the Misconduct Allegations, that counterclaim was compromised, and, with it, the underlying allegations.

211. Dr Comberg is right to say that that which is settled is a question of contractual construction. In *Marathon Asset Management LLP v Seddon* [2016] EWHC 2615 (Comm) ("*Marathon"*), Leggatt J (as he then was) considered the principles that apply upon acceptance of a Part 36 offer which seeks to compromise particular allegations within claims. In *Marathon,* an employer brought claims alleging wrongdoing against former employees. One employee counterclaimed for remuneration due and the employer defended the counterclaim by relying upon the same allegations as set out in the claim (i.e. that the wrongdoing itself constituted a repudiatory breach of contract releasing it from the obligation to pay). The employees made a collective Part 36 offer to settle one particular claim against them ("the common design claim") but expressly excluded two other claims. The offer was accepted. The counterclaiming employee contended that on the proper interpretation of the Part 36 offer letter, the offer to settle the common design claim compromised all the allegations of wrongdoing on which Marathon's defence to the counterclaim was founded and, since those allegations had been settled, they could not be tried over again as a defence to the counterclaim.

212. Leggatt J rejected that interpretation of the Part 36 offer in those circumstances. He held that the approach to interpretation of Part 36 letters is the same as any contractual document. The aim is to identify what the language of the document, in its context, is reasonably understood to mean (see paragraph 12). The Judge concluded at paragraph 15: "*I do not accept [counsel for the employee's] submission that the usual effect of an agreement to settle a particular claim is to prevent a party to the settlement from thereafter relying on factual allegations which formed part of that claim in support or defence of some other claim.* ***In my view, it all depends on the precise terms and context of the agreement.*****"** (Emphasis added).

213. Applying contractual interpretation to the instant case, the terms of the offer were to settle the Counterclaim. The Counterclaim was independent of the Defence even though many paragraphs of the Defence were incorporated into the Counterclaim. The reference to liability is not telling in that the liability in the Counterclaim is a breach of contract claim. That is different from the way in which the alleged breach of contract appears in the defence, not for the purpose of setting up a liability with a consequent claim, but for the purpose of showing why the termination of contract was not unlawful.

214. In my judgment, the words of the offer are limited to the settlement of the Counterclaim. Dr Comberg did not state that the effect of the Counterclaim Part 36 Offer was to compromise entirely the "*misconduct allegations*". Indeed, that would have been inconsistent with the costs consequences of the Counterclaim Part 36 Offer which was expressly restricted to the costs of the Counterclaim, that is not the costs of the "*misconduct allegations*" more broadly. The section "Terms of the Counterclaim Part 36 Offer" referred solely to the Counterclaim. No reference whatsoever was made to the misconduct allegations within the Defence. VivoPower accepted the "Terms of the Counterclaim Part 36 Offer" (the "**Terms**"), not the introductory paragraphs or any other part of the letter. Pursuant to CPR 36.14, the Counterclaim was stayed on the basis of the Terms.

215. The words of the Part 36 offer by themselves and in context did not mean that the ability to use the allegations by way of defence was being given up. Eady J permitted the amendment, but she did so with reservations as to whether the defence would succeed. It is entirely understandable that she took that course so that the question of construction would be decided by the trial judge, who would be able to see the precise terms of the agreement in context. If Dr Comberg had wished the effect for which he now contends, then he could have added it to the terms of the offer, which he did not do. It would then have been expected that instead of an application to amend made before Eady J so long after the event that upon acceptance of the Part 36 Offer, there would have been an attempt to strike out the part of the defence as related to the misconduct allegations. If, in fact, it had been stated that the misconduct allegations in the defence were being settled as well as the Counterclaim itself, it is a matter of conjecture whether the offer would still have been accepted, but it would have added a wholly different set of considerations in deciding whether or not to accept the offer. For all these reasons, I am satisfied that the argument of Dr Comberg that all allegations relating to misconduct were settled, and not only the Counterclaim, must fail.

The Fee Agreement claims

216. It is now necessary to consider the three alleged Fee Agreements, namely
(1) the Deferred Remuneration Agreement;
(2) the Contract Term Agreement;
(3) the Listing Fee Agreement.

Issue 5: Did the Defendants and Dr Comberg enter into the Deferred Remuneration Agreement (as defined in paragraph 14 of the Re-Amended Particulars of Claim)? If so, are the Defendants indebted or liable in damages to Dr Comberg under the Deferred Remuneration Agreement?

217. The first head of claim is for deferred remuneration. The Service Agreement was dated 4 August 2016 and the employment commenced pursuant to Clause 3.2 on 1 September 2016. However, in November and December 2015 according to Dr Comberg, the services would be provided for VivoPower from January 2016 (the AmPOC paragraph 13). VivoPower pleads a positive case that in January 2016 (the

RAMD paragraph 17.1), Mr Chin and Dr Comberg discussed terms on which Dr Comberg would provide services "for the Group" from the start of January 2016. This would be to last until a formal service agreement.

218. By the RAMD, VivoPower admits that there was agreement in principle to a sum of £45,000 per month (varied from a lower sum at first agreed in January 2016 of £41,666 per month) and that Dr Comberg did not wish to be paid at that time, nor did he want to enter into an agreement for payment of fees at that time. He said that he did not wish to be paid at that stage so that he could avoid paying tax on it in Germany. It is not suggested that there was anything unlawful about this. VivoPower say that the tax affairs of Dr Comberg were up to him, and Arowana paid for him to receive advice from PwC at the time.

219. At paragraph 19 of the RAMD, VivoPower pleads that *"it is admitted that Dr Comberg asked and Mr Chin agreed in principle to increase the consultancy fee to £45,000 pcm in or about May-July 2016 and that this was meant to cover the 8 month period from 1 January until 31 August 2016".* Subject to that, Dr Comberg's case is denied, namely that there was an agreement in late July and early August 2016 for payment to be a sum of £360,000 comprising £45,000 per month, representing the eight-month period from January 2016 to September 2016, which must in context mean 1 September 2016.

220. Dr Comberg brings a claim for his deferred remuneration against VivoPower on the basis that this was payable at the termination of his employment. VivoPower says that it was not payable for the following reasons, namely:

(1) there was only an agreement in principle, and it never became a binding agreement;
(2) if there was an agreement, it was made before the incorporation of VivoPower which took place on 1 February 2016, and there was no concluded agreement with VivoPower;
(3) any agreement was made with Arowana International Limited ("Arowana"), which came to own 60.9% of the shares of VivoPower International PLC;
(4) there is no evidence of services carried out to this value, and in particular there is no evidence of any services at all in the month of January 2016;
(5) Dr Comberg was paid a bonus to compensate and/or remunerate him for his work for VivoPower before 1 September 2016: see the RAMD paragraph 138.3.

221. Despite the denials, these defences have various features which come close to admitting the position and include the following features, namely,

(1) there was some kind of agreement for Dr Comberg to provide services for VivoPower for the first 8 months of 2016, albeit that it was an agreement in principle only, albeit that there are differences when this was agreed;

(2) the monthly amount to be paid was agreed in principle and thereafter retrospectively increased to £45,000 per month;

(3) despite no binding agreement having been reached on VivoPower's case, in fact the moneys were paid through a bonus which included a sum to compensate and/or remunerate Dr Comberg for the services provided.

222. Each of the above alleged defences will now be considered.

(1) Agreement in principle only

223. It is said to be an agreement in principle. However, an agreement in principle can amount to a binding agreement. Sometimes, it is only in principle because there is no intention to create legal relations. Sometimes, it is in principle only because there are matters to be agreed which require negotiation and are more than minor details such as could be sorted out once a bargain is struck. There are cases where terms of economic significance are not agreed, but the parties do not intend agreement of those terms to be a precondition to a concluded agreement: see *Pagnan SPA v Feed Products Ltd* [1987] 2 Lloyd's Rep 601, both by Bingham J (as he then was) at first instance and by the Court of Appeal. Matters of detail which remain to be agreed may not stand in the way of an agreement coming into existence: see Chitty on Contracts 33rd Ed. paragraphs 2-120 and 2-121. In these cases, the Court would infer that the parties agreed to bind themselves to agreed terms, leaving certain subsidiary and legally inessential terms to be decided later.

224. In this case, there is no pleaded case of no intention to create legal relations. It would have been hopeless in this commercial context. Likewise, there are not identified any details remaining to be agreed. Nor is there uncertainty. Further, this is a case where the contract had been executed by the time of the dispute in the sense that the services had been provided and the monthly consideration had been fixed. It follows that this is a case where there was an agreement, and it was not simply an agreement in principle if that is supposed to indicate that there was no concluded or no enforceable agreement.

(2) Agreement before incorporation of VivoPower

225. The second named Defendant, PLC, was not incorporated until 1 February 2016. The first named Defendant, VivoPower International Services Limited ("International"), is a company incorporated in Jersey which was incorporated on 1 February 2016 and was registered as having an establishment in the UK on 5 April 2016. It follows that whether an agreement was made in November or December 2015 as per Dr Comberg or in January 2016 as per Mr Chin, this was prior to the incorporation of either VivoPower company each incorporated on 1 February 2016.

226. The point is rightly made by VivoPower that a pre-incorporation contract by itself does not confer rights or liabilities on a company which has not been formed. Thus, in the instant case, the fact that an agreement was made with Dr Comberg with the intention that he would provide services for VivoPower prior to the incorporation of VivoPower even by a person acting as its intended agent does not have any effect vis-à-vis VivoPower. However, as Chitty on Contracts 33rd Ed states at paragraph 10-

014: *"Where the company, after its incorporation… has agreed to modify the terms of the original contract, it will be easier to infer the making of a new contract."*

227. In this case, although there was no express novation of the original contract, there came about a contractual relationship as regards the deferred remuneration between Dr Comberg and VivoPower, having regard to the following:

(1) the agreement was for the benefit of VivoPower;
(2) it was fully executed in that services were provided for the whole of the time until 1 September 2016;
(3) there were regular discussions between Mr Chin, a director of VivoPower from its inception and Dr Comberg throughout the time of the provision of the services by Dr Comberg to VivoPower. Numerous discussions during this period have been identified above including the promise to modify the payment to £45,000 and to be retrospectively from 1 January 2016 at a time when VivoPower had been formed.
(4) the services were all provided in the expectation that there would be a contract of service of Dr Comberg for VivoPower which in fact was made on 4 August 2016 with a commencement date of 1 September 2016;

(5) it is a part of the case of Dr Comberg that it was agreed that the 8 months' pay would be made by way of deferred remuneration comprising £360,000 (the AmPOC paragraph 15), and the admission in paragraph 19 of the RAMD above referred to an agreement in principle to increase the consultancy fee to £45,000 per month to cover the 8-month period from 1 January until 31 August 2016;

228. Those circumstances suffice to show that the agreement was adopted by VivoPower after incorporation. Indeed, it substantially corresponds with the case as originally pleaded by VivoPower. It will also be discussed why the agreement from 1 February 2016 onwards was not an agreement with Arowana, but was with VivoPower, which is relevant also to the case that the Deferred Remuneration agreement was between Dr Comberg and VivoPower. This amounted to an agreement coming into existence through conduct after the incorporation, or to the extent that there was a pre-incorporation contract with Mr Chin or even Arowana, that it was taken over by VivoPower. There were numerous discussions where the contract was reiterated. A particular instance was the promise to pay retrospectively £45,000 per month with effect from January 2016 made in or about May-July 2016 which was an agreement between Dr Comberg and VivoPower. In my judgment, this was not simply the adoption of a promise made before the incorporation of VivoPower, but VivoPower entered into an agreement with Dr Comberg in the circumstances set out above.

(3) Was the agreement with Arowana?

229. For ease of exposition, it is said at the outset that the Court rejects the defence that Dr Comberg has sued the wrong person on the Deferred Remuneration Agreement for the following reasons:

(1) this is only pleaded as an issue in respect of the quantum meruit claim and not in respect of the contractual fee claim. This is prejudicial to Dr Comberg because had the point been taken expressly, he might have brought a claim against Arowana in the alternative. It follows that the matter could have been rejected on a pleading point which in the circumstances is not a technical point.

(2) the contracting party was VivoPower and not Arowana. The significance of Arowana is that there may have been an arrangement as between VivoPower and Arowana that the latter might have discharged the former's liability to Dr Comberg. However, any such arrangement did not affect the fact that the parties to the Deferred Remuneration Agreement were or became Dr Comberg and VivoPower, and not Arowana.

(1) Not pleaded that Arowana was the contracting party

230. The pleading point is that prior to re-amendment in November 2019, it was not said that the services were for Arowana. In particular, Dr Comberg's case relates to services provided to the Group (that is VivoPower)[1], and there was not a case pleaded at paragraphs 17 and following of the Amended Defence to the effect that the work or consultancy or employment prior to 1 September 2016 was or would be for Arowana. On the contrary, the discussions in late 2015 and January 2016 were about work to be carried out for the Group: see especially paragraph 13 of the AmPOC and paragraph 17.1 of the RAMD (discussions about a consultancy fee for work done for the Group prior to entry into a service agreement). The Group comprised the two VivoPower defendants and not Arowana.

231. In the RAMD, it was pleaded by way of re-amendment in the context of the quantum meruit claim that Dr Comberg was acting as a consultant to Arowana (VivoPower being the indirect beneficiary of the services): see paragraph 52G.1. That is wrong. VivoPower was the direct beneficiary: indeed, the services were provided for VivoPower: see Re-amended Reply and Defence to Counterclaim ("the Reply") at paragraph 72B.

232. It is then stated that Mr Chin and Dr Comberg had agreed in principle that Arowana would pay the consulting fee and not VivoPower. This was not pleaded in the very place where one would expect to see it in paragraph 17.1 of the RAMD, which continues to admit that work was done for VivoPower prior to 1 September 2016: see also paragraph 42.1 of the RAMD to the same effect. The contradictory nature of the defence as reamended is noted in the Reply at paragraph 72A. If there was something in the Arowana point, then it would have been expected that paragraphs 17.1 and 42.1 would have made that point from the inception, whereas in fact the point about Arowana being the recipient of the services is a new case in the context of defending the unjust enrichment claim.

233. It is no answer to say that it was in response to a new unjust enrichment claim since this was more of the same, namely that if there was no agreement with VivoPower,

[1] Paragraph 1 of the AmPOC and paragraph 5.8 of RAMD

then VivoPower received the benefit of services at its request. The statement that the services were for Arowana is not more of the same and contradicts the old case, which still remains at paragraphs 17.1 and 42.1, that the services were for VivoPower.

234. The procedural objection to this point being taken by Arowana is significant. Had it been raised that the true defendant was Arowana, and not just in respect of the quantum meruit claim, then Dr Comberg would have had to consider whether or not to sue Arowana. Indeed, if it had been pleaded for the first time in November 2019, he may have been able to take the point that this was too late as an amendment because bringing Arowana into the case for this purpose might jeopardise the trial date.

(2) The contracting party was VivoPower and not Arowana.

235. The starting point is that the pleaded case that the services prior to the Service Agreement under the Deferred Remuneration Agreement were provided for VivoPower is a strong indicator that the contract was with VivoPower and not with Arowana.

236. Further, although the contract was originally a pre-incorporation contract and therefore not one for which VivoPower is liable, its context was a liability incurred pending a service agreement, which at all material times from the incorporation of VivoPower was intended to be, and when made was, between Dr Comberg and VivoPower. The work undertaken by Dr Comberg appears to have been of the same kind before and after the time when the Service Agreement came into force. The fact that Arowana was the major shareholder of VivoPower does not make the work done for Arowana whether before or after the Service Agreement. The negotiation and agreement for deferred remuneration was at a time when a service agreement was being negotiated between Dr Comberg and VivoPower. It is not sensible that there should have been an agreement until 31 August 2016 with Arowana, and after then with VivoPower. Once VivoPower came into existence, the clear inference is that the services for VivoPower were at the request of VivoPower acting through Mr Chin. In those circumstances, the starting point would be that the forerunner of the intended service agreement, namely the Deferred Remuneration Agreement, was between the same parties, namely between Dr Comberg and VivoPower.

237. Dr Comberg relies on the documents in January 2016 between Mr Chin and him which did not refer to Arowana. In an email of the early hours of 22 January 2016, Mr Chin did not refer to Arowana, but to "Executive services agreement: -· engage PwC Legal to draft up UK contract with start date of 1 Feb". It was after this on 7 February 2016 that there was the Chinese restaurant meal and the agreement to defer the remuneration. By then VivoPower was in existence and the inference is that the agreement was between Dr Comberg and VivoPower acting through Mr Chin. Further, the term sheets which were prepared relating to the remuneration package referred to an entity called VivoPower of Luxembourg which became VivoPower, and not to Arowana. On the basis that these were services which were being provided for VivoPower, and a forerunner of services which would be provided under a formal service agreement, the services were not for Arowana. The fact that Arowana was

providing early payments for VivoPower does not alter the analysis other than possibly to create obligations between Arowana and VivoPower.

238. One source of evidence against VivoPower's case was Mr Hyams, referred to above where his evidence has been criticised. He said nothing about this point in writing, but orally at **[T7/1018/23 – T7/1019/2]**, he said the following:

"I think my recollection is that Arowana had an obligation to pay an amount prior to 1st February and covered payment in January 2016, and maybe a little earlier; and then the rest was covered by VivoPower".

239. Mr Chin decided that Arowana should pay *"in the first instance"* what he termed the advisory fee for *"Project Sunfish"* of £270,000 which would comprise 6 months at £45,000. This was analysed by Mr Byrne, the CFO of Arowana, in an email of 17 June 2016 when he wrote to Dr Comberg that it was best for him to raise an invoice on VivoPower Services (presumably referring to the First Defendant), and to be sent to him to be paid on behalf of VivoPower by *"awn"* (presumably referring to Arowana). This provides support for the notion that the contracting party being VivoPower irrespective of who would pay.

240. To contrary effect, on 20 July 2016, Ms Byrne assumed that Dr Comberg was *"engaged with Arowana and not VivoPower as yet"*: the response was that Dr Comberg's employment/residency/tax status would be sorted shortly. Ms Byrne was not directly involved in the discussions about Dr Comberg's status and nor was Dr Comberg involved in this correspondence.

241. A weakness of VivoPower's assertion that it was Arowana's liability is its alternative case that the payment of the bonus of £630,000 by VivoPower was as to £315,000 a payment of the deferred remuneration. Even allowing for alternative pleading, it is inconsistent that on VivoPower's alternative case, it discharged someone else's liability. Whether it was or was not paid, this plea seems to be premised on the liability being that of VivoPower.

242. There are some documents which appear to go the other way, but there is an explanation for each of them. On 2 August 2016, Mr Chin wrote to Mr Byrne confirming that VivoPower was *"not liable to (sic) any payments to Philip [Dr Comberg] for his work prior to 31 August 2016 which has been undertaken on a consultancy basis for Arowana"*. Following this, on 3 August 2016, Mr Byrne wrote to Marcum LLP, auditors to VivoPower, to the effect that the start date of Dr Comberg was 1 September 2016 and that until then, he was acting as a consultant to Arowana in establishing the VivoPower business and infrastructure. In email correspondence of 8/9 September 2016, when it was suggested that Arowana may be recording and paying past compensation for Dr Comberg (pre-September) under a consulting agreement apparently without reimbursement, Mr Byrne complained that *"the goalposts have moved again."*

243. If there came a time when Mr Chin had in mind that Arowana would take the responsibility to pay Dr Comberg without reimbursement from VivoPower, that did not mean that Dr Comberg agreed a contract with Arowana. He undertook to work for VivoPower prior to his formal written contract and for the payment to be deferred. That was an agreement for deferred remuneration with VivoPower and the internal

arrangements between Arowana and VivoPower as they would emerge were no reason why he should have been looking to Arowana for payment. The impact of Arowana being a shareholder of VivoPower is that there was a commercial sense in its discharging certain expenses of VivoPower in its early days. It may have suited Mr Chin to arrange matters with Arowana in this way. It may have been so that new investors were not put off by heavy operational expenses of VivoPower. It does not follow from this that the contract for services or of service of Dr Comberg was with Arowana rather than VivoPower. There is no indication of assent of Dr Comberg. Communications internally within Arowana or unilaterally by Mr Chin do not prove the contractual counterparty of Dr Comberg in the agreement to pay deferred remuneration.

244. A final point is that it is said that Dr Comberg did not include in the Annual Report for the year ended 31 March 2017 the liability of VivoPower to pay the Deferred Remuneration. His answer to this was that alongside the other disputed fees, he did not believe by then that he would get paid. If it is said that he did not do so because he realised that deferred remuneration was a liability of Arowana, he did not disclose this at a board meeting of PLC on 9 August 2016 in respect of a proposed contract with Arowana Inc. There were formal declarations of interests pursuant to sections 177 and 182 of the Companies Act 2006 particularly in that Mr Chin was a CEO and a director of Arowana and had compensation arrangements with Arowana. There was no declaration for Dr Comberg to the effect that he was providing services for and at the request of Arowana. He would say that if he had a contractual relationship with Arowana, this would have been declared, but his case is that the contractual relationship was with VivoPower.

245. When the evidence is considered in its entirety, Dr Comberg has proven his case that there was an agreement for deferred remuneration and that it was between him and VivoPower (and not Arowana). The opening points are powerful points to the effect that the agreement was made with VivoPower including that (i) the Deferred Remuneration Agreement was a forerunner of the intended service agreement, and the logic is that it was between the same parties, (ii) the services were provided for VivoPower as recognised by VivoPower in the pleadings, (iii) the alternative case of VivoPower that it had paid the deferred remuneration, even allowing for alternative pleading, significantly runs against its assertion that it was not a contracting party, (iv) there are documents which evidence that VivoPower was the party to the Deferred Remuneration Agreement, and those which do not are to in the context of arrangements of Mr Chin between VivoPower and Arowana, but not affecting relationship between Dr Comberg and VivoPower.

(3) Conclusion

246. This wrong party defence is a late argument at odds with the originally pleaded case. The case that Arowana was the contracting party is still not pleaded as a defence to the contractual claim, but only to the separate quantum meruit claim. An analysis of the evidence is to the effect that the liability was that of VivoPower and not that of Arowana. For all the reasons set out above, the Deferred Remuneration Agreement was between Dr Comberg and VivoPower, and this was unaffected by any arrangements between Arowana and VivoPower whereby liabilities of VivoPower might be met by Arowana. Dr Comberg was not a party to such arrangements. Mr Byrne did not want that offloading to occur, and Mr Hyams believed that the liability

at least from 1 February 2016 was that of VivoPower to Dr Comberg. Taking into account the totality of the points, the evidence points strongly to VivoPower being the party to the Deferred Remuneration Agreement and not being able to avoid liability by reference to Arowana.

(4) Was the deferred remuneration paid as part of the bonus in June 2017?

247. As noted above, the pleaded defence in the RAMD is that Dr Comberg was paid a bonus of £630,000 for the 14-month period ending 31 March 2017 as set out in the Annual Report at page 35, and the payment was made in part to compensate and/or remunerate Dr Comberg for his work for the Defendant before 1 September 2016 (the RAMD paragraph 138.3). The response in the Reply at paragraph 181 is to deny this allegation and to say that the payment of the bonus for the 14-month period ending 31 March 2017 has nothing to do with Dr Comberg's salary for services provided in the period prior to August 2016, which was covered by the Deferred Remuneration Agreement.

248. In my judgment, the documentary evidence strongly suggests that the bonus payment did not include the deferred remuneration. A payment of a bonus is prima facie exactly that rather than a mixed payment of bonus and deferred remuneration not in the nature of a bonus. The Form 20-F is very specific in showing what part was paid in respect of bonus and what part was paid in respect of salary. The sum of £630,000 was clearly paid in respect of bonus, that is $787,500. Further, the documents in July 2017 indicated that the deferred remuneration was outstanding. There was correspondence on 20/21 July 2017 between Mr Byrne and Mr Chin about payment said to be owed to Dr Comberg. Mr Chin asked Mr Byrne why this money was not accrued by VivoPower when it was known for months and asked him what had been agreed with Mr Weatherley-White. The latter wrote on 20 July 2017 that *"Philip's compensation is difficult to follow".* On 21 July 2017, in response to an email of Mr Chin subject *"[VivoPower] Philip backpay"*, which had sought an answer to the question *"Has Vivo paid this across to AWN [Arowana] yet?"*, the answer of Mr Byrne was *"No – this has not been paid. I don't believe that it has been accrued at VVP either, last discussion I had with Carl on this revolved around disclosure questions for VVP and Board considerations. I understood there were to be further discussions with you and PC to finalise."* If it had been paid with the bonus, then one would expect that it would have been said that it had been paid as part of the bonus.

249. To that effect, there was a revealing adverb in an email sent by Mr Chin to the non-executive directors who stated on 12 June 2017 that *"both Philip and Carl received bonuses covering the period from when they **effectively** started work for VivoPower"* (emphasis added). The word *"effectively"* appears to refer back to 1 February 2016 when VivoPower was incorporated and from when Dr Comberg was carrying out work for VivoPower. This does not refer to the bonus only being from the date of commencement of work under the Service Agreement, nor does it refer to the bonus including payment for salary before the commencement date under the Service Agreement. This email goes on to refer to the need to agree a percentage of after-tax bonus which they should invest in buying shares of VivoPower, which he was *"inclined to suggest at least 33% and ideally 50%"*. That would indicate that at that stage, there was no agreement as to the percentage. The email went on to say that he sought thoughts and that this could be minuted as a Remuneration Committee

item. This has to be seen in the context of an email of 9 June 2017 from Mr Hoadley to Mr Chin who referred to the bonus for Dr Comberg "**effective** from 1 February 2016 through to 31 March 2017" and Mr Weatherley-White "**effective** from 20 July 2016 to 31 March 2017" (again emphasis added). The context was not that this was a mixed payment but that it was a bonus for the whole of the period which started before the Service Agreement.

250. Further, the negotiations prior to termination of the employment of Dr Comberg included an offer of payment of $450,000 described by the solicitor for VivoPower, Mr Taggart, as "backpay". That was the same word which Mr Chin had used in his emails to Mr Byrne seeking information in July 2017. Whilst the negotiations may have been without prejudice at the time, privilege was lifted by the parties consciously. The question of privilege was fully ventilated at an interim stage when Mr Houseman QC represented Dr Comberg, and in most other respects, it has been maintained. At least this part of the negotiations was, by agreement, placed before the Court at the trial. The sum of $450,000 equated to the sum of £360,000 (£1 to $1.25), that is 8 months at £45,000 being the 8 months from 1 January 2016 to 31 August 2016. If it had been the case that these moneys had been paid in June 2017 as part of the £630,000 "bonus" payment, then there would be no good reason for agreement to pay the sum of $450,000 or for it to be characterised as backpay. It is of course correct that this was intended as an overall settlement, but the figures and the description "backpay" do provide some support to Dr Comberg's case.

251. Mr Chin suggested that the minutes of the Remuneration Committee showed that the money paid in June 2017 did include the deferred remuneration. This is problematic for VivoPower because VivoPower has not produced these minutes or an explanation as to why they have been unable to produce the same despite the same specifically being sought by Dr Comberg's lawyers in this litigation. In Hausfeld's letter dated 10 July 2019, Dr Comberg requested "*minutes of meetings […] including of the Remuneration Committee*". In response on 26 July 2019, VivoPower stated that they "*do not agree that any further disclosure is required*". In circumstances where the minutes have not been produced and without explanation, there is no reason to accept that those minutes say what Mr Chin suggests. Mr Brown appeared to suggest that the inference is that the minutes have been suppressed: if they exist, they must have been circulated at the time. *"We do say you should not believe the minutes story"* **[T8/1158/2-3]**. In the end, Mr Brown did not pitch his case as high as deliberate suppression **[T8/1159/10-17]**.

252. There is no reason in view of the failure to produce the minutes, and no explanation for this, to accept the evidence of Mr Chin about the minutes. It is therefore difficult to attach any credence to Mr Chin's evidence in this regard. All the documents before the Court point one way, and the preponderance of the evidence is to the effect that the deferred remuneration has not been paid and that no part of the bonus was a payment in respect of the same. Without the Remuneration Committee minutes, an assertion that they show that the bonus included deferred remuneration can be given very little weight. Thus, the Court unhesitatingly prefers the evidence of Dr Comberg over that of Mr Chin to the effect that the bonus payment was not paid in respect of the deferred remuneration. Thus, the evidence as a whole proves that the deferred remuneration was not paid and the defence that the deferred remuneration has been paid fails.

(5) Does the deferred remuneration include the month of January 2016?

253. The arguments that there was no agreement for the month of January 2016 are as follows:

(1) VivoPower was not incorporated until February 2016. Thus, neither were the conversations in late 2015 or in January 2016 with VivoPower nor was any work in January 2016 for VivoPower, albeit that it would benefit from it thereafter.

(2) Consistently with this and with Arowana paying pre-incorporation expenses, Mr Hyams' evidence was that in January 2016, any money was to be paid by Arowana.

(3) Having rejected the case that a part of the bonus paid in June 2017 was not paid in respect of deferred remuneration, the bonus paid of £630,000 was referable to the months of February 2016 to March 2017 inclusive, that is to say missing out January 2016.

(4) There is a paucity of evidence about actual work undertaken in January 2016, and indeed the evidence of Mr Chin was that the agreement for services to be done was made at some time in January 2016, that is not in advance of January 2016.

254. Nonetheless, the considerations which point in the other direction such that there was an obligation to pay for January 2016 outweigh these considerations. They are as follows:

(1) There is some evidence of work having started in January 2016 from Dr Comberg.

(2) As noted above, VivoPower has pleaded a positive case that Mr Chin and Dr Comberg discussed terms on which Dr Comberg would provide services "for the Group" from the start of January 2016: see the RAMD, paragraph 17.1.

(3) In the negotiations in May-July 2016, according to VivoPower, Dr Comberg asked and Mr Chin agreed in principle to increase the consultancy fee to £45,000 and that this was meant to cover the 8 month period from 1 January until 31 August 2016: see the RAMD, paragraph 19.

(4) The offer to pay "backpay" of a sum of $450,000 which corresponded with the sum of £360,000, that is 8 months at £45,000 per month, which again corresponds with the months of January to August 2016.

255. The effect is that the Deferred Remuneration Agreement was for all 8 months. Whilst in its inception, the agreement pre-dated the incorporation of both VivoPower companies, it was modified by VivoPower retrospectively in circumstances which showed that VivoPower had adopted the agreement for itself. Thus, the Court is satisfied on the basis of the evidence as a whole that the agreement was with effect from 1 January 2016. As noted above, the agreement was a binding agreement, and

it has not been discharged by payment or otherwise. Accordingly, Dr Comberg has proven a liability of VivoPower to Dr Comberg for the deferred remuneration in a sum of £360,000. It remains to be determined what form of order gives effect to this finding.

Issue 6: Did the Defendants and Dr Comberg enter into the Contract Term Agreement (as defined in paragraph 11 of the Re-Amended Particulars of Claim)? If so, are the Defendants indebted or liable in damages to Dr Comberg under the Contract Term Agreement?

(1) The evidence and submissions

256. The case of Dr Comberg is that VivoPower agreed orally to pay to him a sum of $1 million upon PLC being listed on the US Stock Exchange, which occurred on 29 December 2016. This was agreed in the course of the negotiations of the Service Agreement. Dr Comberg says that it was agreed in principle that his employment would be for 3 years, as he said was customary in Germany. However, during the detailed contractual negotiations between the parties' then solicitors (Freshfields for Dr Comberg and HSF for VivoPower), this was not agreed. HSF proposed a 12-month notice period instead of a 3-year fixed term. Dr Comberg says that it was then that in lieu of a 3-year contract, Mr Chin proposed and Dr Comberg accepted an arrangement whereby he would receive the above sum of $1 million.

257. There is documentary evidence to support the proposal of a 3-year contract. There was a draft service agreement that Dr Comberg proposed of a 3-year term comprising 2 years and thereafter terminable on 12 months' notice. In the version dated 26 July 2016, HSF revised this to 12 months. In a WhatsApp message, Mr Chin said that HSF had strong views about this. The strong views were expressed in an email on 26 July 2016 timed 09:19 from Paul Young (HSF) sent directly to Dr Comberg, referring to the need for a listed company to obtain shareholder approval for all payments that may be made to directors and that "*an effective three year term length ... [is] not standard in the UK for listed companies and are ones that we would envisage that the Company could have difficulty with obtaining shareholder approval for*."

258. In an email on 26 July 2016 at 11:30 pm, Dr Comberg responded to Mr Young (copying in Mr Chin). He stated: "*I have asked Freshfields to stop working on revising this until further notice as I do not want the company to waste lawyer fees on something that is not a basis for a deal*."

259. Dr Comberg said that there was a telephone discussion which he had with Mr Chin on 28 July 2016 agreeing to 2 years followed by a rolling 12-month contract. However, this provoked concerns among Australian investors.

260. By this time, Mr Chin had sought advice in relation to a three-year fixed term and other terms in the draft agreement from Australian lawyers. He says that he was concerned about Australian listing rules on the basis that VivoPower was a putative subsidiary of Arowana (which is ASX listed) and because an ASX listing of

VivoPower was a possibility. The advice was passed on by Mr Chin to Dr Comberg on 1 August 2016 at 07:41am (London or Nice time) with an explanation that a 3-year fixed term would not "*fly with Aussie investors*". Mr Chin said in his email that he was "*Happy to discuss and workshop*." Mr Chin also sent WhatsApp messages to similar effect to Dr Comberg: "*Unfortunately upshot is some of the provisions in draft contract are illegal under ASX listing rules - and furthermore will not fly with Aussie investors– ASX rules relevant because Vivo still a sub of Arowana International – some possible solutions but also some compromises which or may not fly from your perspective – happy to workshop to see if I can solve.*"

261. There were calls later that day between Mr Chin and Dr Comberg. Mr Chin then said that there were some possible solutions or compromises in a WhatsApp message on 1 August 2016. On 2 August 2016, HSF proposed a 2-year term terminable at any time by VivoPower on 12 months' notice. On that day, Mr Chin sent a WhatsApp message to Dr Comberg saying *"Forgot to mention this – basically doesn't matter if company pays – still have to gross it up by 45 per cent!"*, and then within a minute *"have a creative idea we can talk through in 1 hr and 10 min"*.

262. A conversation took place between Mr Chin and Dr Comberg. Dr Comberg said that on 2 August 2016, he took a call in his holiday home in France and that in exchange for his agreeing to the contract term of a rolling 12-month contract, there would be a payment of 1 million US Dollars shortly after PLC listed on NASDAQ. He said as follows in his first witness statement:

> *"77.The call took place and I recall it vividly as I was at my holiday home in France at the time with my family and it provided the breakthrough to the issue which was very much on my mind at the time. I took the call at my desk in my bedroom. Mr Chin suggested a workaround to the issue relating to the contract term whereby, in exchange for me agreeing to the Revised Contract Term, I would be paid USD 1 m shortly after PLC listed on NASDAQ (the "Contract Term Fee"). Mr Chin explained that the Contract Term Fee was just under twice my annual salary of GBP 540,000, so it compensated me for the fact that I would only have a 12 month rather than a three-year contract term.*
>
> *78. Mr Chin's suggestion was not ideal given that there was every chance that PLC would not list on the NASDAQ. Nonetheless, I agreed to Mr Chin' s proposal as the means of providing me with a degree of security in relocating my family from Germany to the UK."*

263. Dr Comberg says that he relayed this to his wife Mrs Comberg. As noted above, Mrs Comberg provided evidence that this was relayed. Mr Chin denied that this was the agreement and said that the creative idea referred to related to the payment and taxation of relocation costs. This was given limited support by the earlier WhatsApp message preceding the one about the *"creative idea"*. It was that the payment of the expenses would be by Arowana rather than by VivoPower. Mr Chin does not accept that it was agreed that Dr Comberg would be paid $1 million, but that he told Dr Comberg *"to get on the bus or you do not"* [**T4/605/24-25**].

264. Something did occur because on the next day 3 August 2016, Mr Young of HSF sent an email to Freshfields stating: *"Kevin has passed on to us the outcome of his recent discussions with Philip"*. Both sides are disparaging about the way that the other has maintained privilege over their communications with their respective lawyers. That may not be surprising. The Court had to rule in the course of the trial as to whether an inadvertent disclosure on the part of VivoPower gave rise to an implied waiver of all the communications between the then solicitors for VivoPower and the client. The Court ruled against the application. However, the application highlighted something which would have been obvious at all times, namely that any limited waiver of privilege might open up a far wider disclosure than would have been wished by either party.

265. There were communications both from Freshfields to HSF and from HSF to Freshfields progressing the matter on the basis of a 12-month notice period. Mr Chin made a note to himself which states: "*Rolling 12 mth term – fine*". There was no note from Dr Comberg, nor did he send a confirmatory email or chat message to Mr Chin. In cross-examination, Dr Comberg explained why there was no formal agreement in respect of the $1 million and why Dr Comberg did not ask Freshfields to draw up something **[T3/362/8-T363/10]**.

> *"Q. The $1 million which you say he had agreed to pay you on 2nd August, there was no formal agreement drawn up by either legal team involved in the contract negotiation, was there?*
>
> *A. Not -- yes, not at the time, because Mr. Chin said that he would take care of it and we would then figure out, or he said we then figure out how we get that done. And he referred to the fact that I was supposed to come to Australia about 10, 12 days later, in the middle of August, and we would then discuss the matter. Basically, he said, "I will make sure we can get this done and we can discuss details when you are in Australia."*
>
> *Q. You are saying it was at Mr. Chin's suggestion that the lawyers did not draw up a formal document; do I have that right?*
>
> *A. Mr. Chin's suggestion was exactly what I have just described. We did not talk about whether he would involve lawyers or not or when or what exactly. He said, "I will get this done and we can discuss when you are in Australia." This was a handshake agreement, and the details then how he would want to get that done to be presented to me when I was in Australia.*
>
> *Q. Why did you not ask Freshfields to draw something up?*
>
> *A. Because I wanted to wait what he wanted to discuss in Australia."*

266. The parties went on to agree a written Service Agreement on 4 August 2016 with a 12-month notice period. The Service Agreement was silent about the alleged Contract Term Fee. Whatever discussions took place on 2 August 2016, there is no contemporaneous documentary evidence to support the Contract Term Agreement.

267. In addition to relying on his evidence and that of Mrs Comberg, Dr Comberg relies on other subsequent communications. First, on 25 August 2017, Dr Comberg wrote Term Sheets. One of them was provided a sum of $1.5 million which was said to reflect the total of the Deferred Remuneration Agreement and the Contract Term Agreement. It is headed "Education business", it is a success fee for project work in Asia and it is to be replaced by a short contract replacing the term sheet and providing for a success fee "contingent upon the acquisition of a group of education colleges across the Asia Pacific region." The written evidence does not explain the apparently fictional language.

268. Second, there are ICAs, that is to say Independent Contractor Agreements between Arowana Singapore and Tiandi. The evidence of Dr Comberg is that there was a discussion in January 2017 during which he raised the outstanding fees, namely the deferred remuneration amount, the contract term amount and also (to be discussed below) the listing fee amount. The ICAs were dated 15, 28 and 30 March 2017 and signed by Karen Gillespie of Arowana and witnessed by Carleen Seeto of Arowana and forwarded by Mr Chin to Dr Comberg on 17 May 2017. Ms Gillespie did not give evidence, and given the number of witnesses for VivoPower, Dr Comberg says that the Court should draw an inference that she was not called because her account would favour Dr Comberg. The ICAs are relied upon not as agreements (Dr Comberg is not a party to them), but as evidence of the fee agreements on which Dr Comberg sues.

269. Mr Chin contends that the ICAs were in effect shams so as to enable Tiandi to borrow money from HSBC, evidencing its substantial means. VivoPower says that ICAs were inconsistent with the fee claims. There was a decision in the Singapore High Court to the effect that the fees were not payable as between Arowana and Tiandi. Dr Comberg's position is that this was between different parties, and has no bearing on the issue of the rights of Dr Comberg against VivoPower, whilst at the same time contending that this agreement corroborates the existence of the contract term amount between Dr Comberg and VivoPower: see Dr Comberg's opening skeleton paragraph 51 and 54.

270. Dr Comberg also relies on a spreadsheet which he provided in March 2017 in respect of the fee agreements where the $1 million was described as *"payment for changing contract term to rolling 12 months".* Mr Chin says that he did not accept the same and wondered where the money was expected to come from. Dr Comberg relies on his spreadsheet as evidence of the original agreement. He says that the remark of Mr Chin about the money is evidence that the fees were due, but in context, Mr Chin denied the agreement outright: see Chin 2 paragraphs 63-65.

271. Whatever is said about these subsequent communications, they are relied upon simply as evidence of the formation of the Contract Term Agreement which was made immediately before the execution of the Service Agreement. The pleaded case in the AmPOC is as follows:

"11. The Revised Contract Term was unacceptable to Dr Comberg for the reasons stated in paragraph 10 above. Mr Chin, therefore, agreed to compensate Dr Comberg for surrendering the three-year fixed term in exchange for the lesser benefit of a one-year notice period. In early August 2016, therefore, and before Dr

Comberg's service agreement with VivoPower was executed, in a telephone call with Dr Comberg, Mr Chin offered (and Dr Comberg agreed) that, in lieu of the three year fixed term, VivoPower and/or PLC would pay Dr Comberg a fee of USD 1,000,000 (the "Contract Term Fee") shortly after PLC listed on the NASDAQ (the "Contract Term Agreement").

12. The purpose of the Contract Term Agreement was to provide contractual entitlement [amended from "consideration" to "contractual entitlement"] for Dr Comberg so as to facilitate his agreement [amended from "agreeing" to "so as to facilitate his agreement"] to the Revised Contract Term, which was significantly to his detriment."

(2) Discussion

272. The evidence of Dr Comberg and Mr Chin is fundamentally at odds: an agreement to pay $1 million per Dr Comberg, and an agreement to pay some relocation expenses in a tax efficient manner per Mr Chin. It does not suffice in order for Dr Comberg to prove this part of the case if the Court prefers Dr Comberg's account to the extent of finding that there was a discussion about a $1 million payment. The question is whether he has proven that there was a binding agreement for VivoPower to pay this sum following a listing. In my judgment, Dr Comberg has failed to prove that VivoPower and Dr Comberg entered into the Contract Term Agreement.

273. The Court has had particular regard to various matters which appear to assist Dr Comberg's case including

(1) The corroboration of Mrs Comberg who came over as a self-assured witness. She herself is admitted to the German bar and has practised law in Germany. She also describes herself as a self-employed entrepreneur. She could therefore be expected to understand the subject matter. However, she was not a party to the conversation with Mr Chin. Her relevant evidence relating to the telephone conversation with her husband was hearsay. In view of the many matters which are inconsistent with the making of an agreement, there are significant doubts about what was discussed in the course of this conversation. Assuming for this purpose that it was a conversation about $1 million, then at best Mrs Comberg was relating whatever Dr Comberg's interpretation of the conversation was. She could not be expected to have been privy to the nuances of the conversation, and in particular about whether it was the seeds of an idea for negotiating an agreement for such a payment as opposed to an agreement there and then between VivoPower and Dr Comberg.

(2) There was an impasse between the parties at the end of July/early August 2016, and so the inference is that something significant led to its being broken such as enabled an agreement to be made on 4 August 2016. Mr Chin and Dr Comberg gave radically different accounts of what that was. Dr Comberg's account is a very substantial matter addressing directly the 3- year/1-year impasse. Mr Chin's evidence that the discussion was about removal expenses which broke the impasse, and that was given some limited support by the WhatsApp messages, but

it was not explained with any clarity how that would have been sufficient to have broken the impasse about the contract term.

(3) There is support to some million-dollar agreement by reference to the subsequent ICA which was signed by Ms Gillespie of Arowana. Ms Gillespie could be expected to have given evidence, particularly given the number of witnesses who did give evidence for VivoPower, yet she did not. The spreadsheet also provided some after the event confirmation, but there was a disagreement as to whether Mr Chin had or had not accepted the spreadsheet.

274. Despite these points, in my judgment, Dr Comberg, who bears the burden of proof, has not satisfied the Court that there was an agreement in the terms for which he contends. There is whole battery of points to contrary effect which makes it more likely than not that there was no Contract Term Agreement. The matters to which the Court has had regard include the following:

(1) In circumstances where a shareholder approval was regarded as not likely to come to a 3-year contract, the inference is that there would also be a problem if there was an obligation of VivoPower to pay $1 million after the listing. In view of the points about Australian shareholder disapproval being likely to a 3-year contract, the same is likely in respect of this package. It was not explained how that could be acceptable to shareholders. If a 3-year term could not be agreed without shareholder approval, it is not apparent how the $1 million clause could have been agreed without shareholder approval. On Dr Comberg's evidence, this would give rise almost to the equivalent of three years of basic salary payable in one-year subject to the listing taking place. There is no evidence of Mr Chin taking steps to check with his Australian lawyers whether the payment of $1 million would work with Australian investors. In short, such an arrangement, if made, would not have brought to an end the shareholder approval problem.

(2) There is no contemporaneous documentary evidence to support the case of Dr Comberg. There was nothing in the Service Agreement itself. There was no side agreement. Given how meticulous Dr Comberg has shown himself to be as a witness, and how important this issue was, it is difficult to understand why there was not at least a confirmatory WhatsApp message or text or email indicating something about it. There was not even an internal memorandum about it, or at least no such document has been produced. If Dr Comberg informed his solicitors about a deal in the terms which he describes, it seems unlikely that the deal would have gone through without something to protect Dr Comberg. If he did not inform his solicitors, it seems unlikely that he would have let it go without something in writing to protect himself at the time. The absence of any contemporaneous documentary evidence is a significant indicator against Dr Comberg's case.

(4) The cross-examination referred to above contains answers which are at variance with Dr Comberg's pleaded case. The reason why there was no document provided and why Freshfields was not asked to draw up something was because there were matters to be discussed, and this would happen in Australia later in the month: see **[T3/362/8-T363/10]** quoted at paragraph 265 above. The details were to be presented by Mr Chin and to be discussed. That begs the question as to whether there was a completed agreement made on 2 August 2017. The details

were not specified. Indeed, he said that he did not disclose this transaction to his fellow directors because he was waiting for details from Mr Chin **[T3/365/19-T3/366/17]**. This appears to indicate that the details had yet to be agreed. If there had been an agreement with some additional details to be agreed, there was no reason not to make that disclosure to the other directors. Yet there was no disclosure to them, which indicates that these were not mere details and that the agreement as a whole had still to be negotiated. There is no indication that there was any further meeting to discuss these matters or as to the outcome.

(5) If there was a discussion about a million dollars being payable to Dr Comberg rather than some arrangement in respect of the removal, in my judgment, it is more likely than not that it was couched in some terms falling short of a binding agreement. The timing of when the money would be payable other than after the listing was not stated. It could have been that it would depend on a successful listing, which might need to be defined. What other conditions would have applied? It is unlikely to have been a promise from VivoPower given the position taken by HSF in the UK and by lawyers in Australia as regards the legal difficulty about shareholder approval. If there was a promise at all, it is more likely to have come from the Arowana group, perhaps Arowana Singapore (as reflected in the ICA) in order to keep the matter away from VivoPower. However, here again, the absence of a term of the Service Agreement or a side letter or an email or message or WhatsApp or internal memo makes it unlikely that there was a contractual commitment whether from VivoPower or at all.

(6) Likewise, Dr Comberg did not inform PwC (who were providing him with tax advice at the expense of Arowana) about the fact that he would be receiving a payment of $1 million. He emailed PwC on 2 August 2016 at 17.35 to update them on his preparations to move to London, but there was no reference to the $1 million agreement in that email. If there was an agreement or to be an agreement, it would be expected that Dr Comberg would have referred it to PwC.

(7) When there were documents created thereafter, they were in significant respects inconsistent with the case now put forward by Dr Comberg. Those other documents as have been disclosed such as the Term Sheets and the ICAs do not contain confirmation which makes the point that there was an obligation of VivoPower to pay the sum of $1 million to Dr Comberg. There was no Term Sheet for $1 million dollars. It was subject to a written agreement being prepared, the services provided were about education in Asia, and there was no reference to the Contract Term Agreement. Further, in March 2017, the parties to the ICA were different as discussed above, and given the matters in the preceding paragraphs, this cannot be explained easily as if those were simply vehicles for the contracting parties in the current litigation. The services to be provided under each of the ICAs bore no relationship to the matters which were the subject of the alleged fee agreements. The spreadsheet on any view is a statement of Dr Comberg's case months later. Contrary to the submission on behalf of Dr Comberg, Mr Chin did not make any admissions in respect of the spreadsheet.

(8) There were no public documents evidencing that VivoPower agreed to pay Dr Comberg the sum of $1 million. The agreement has not been reflected in other

public filing documents such as the Form-20F, the Annual Report or the financial statements.

275. It is not for the Court to determine what exactly occurred. It suffices to find, as I do, that Dr Comberg has not proven the Contract Term Agreement. It is more likely than not that there was no Contract Term Agreement. The totality of the points in the preceding paragraphs make it improbable that the impasse referred to above was solved by an oral agreement of VivoPower to pay to Dr Comberg the sum of $1 million after the listing. It is more likely that Dr Comberg agreed to "get on the bus" not only without the benefit of a three-year contract, but without a contractual promise in the nature of the alleged Contract Term Agreement.

276. If in fact it is true that Dr Comberg anticipated a $1 million arrangement, then at highest this was to be negotiated and until either a written contract or much more had been agreed, there was no agreement. It is unlikely that there was any agreement involving VivoPower because of the difficulty about shareholder approval. If there had been, then this would have been likely to have been evidenced by documents at or before the time of the execution of the Service Agreement, but there were none. The subsequent agreements e.g. term sheets, ICAs and the like provide fictitious agreements, and the reason for the fictions have not been explained. It follows that they do not provide sensible payment mechanisms. The oral evidence of Dr Comberg in cross-examination led to answers inconsistent with his case at trial that there was an agreement to pay him $1 million after the listing.

277. Evidentially and legally, the entire agreement clause presents a further problem to a collateral agreement. One would expect that it would be a matter of concern to Dr Comberg, himself a man with a legal background, and who has shown himself to be a careful man throughout the trial. It seems more likely than not that whatever broke the impasse was not an agreement between Dr Comberg and VivoPower in the terms described or at all. Had it been, one would expect that Dr Comberg would have taken steps to get around the entire agreement clause. He did not. Leaving aside the legal analysis below of the entire agreement clause, this provides further factual evidence that there was no Contract Term Agreement.

278. Taking into account all these matters, the Court finds that there was no Contract Term Agreement.

(3) The legal effect of the entire agreement clause

279. The above is not the end of it. Even if there was an agreement between Dr Comberg and VivoPower, which has been rejected, the Court moves on to consider Clause 22, the entire agreement clause, which is set out above. This is in summary that the Service Agreement represents the entire understanding and constitutes the whole agreement in relation to its subject matter and supersedes any previous agreement with respect thereto.

280. In its submissions, VivoPower has submitted that the Contract Term Agreement was defeated by the above entire agreement clause. Such clauses, it was said preclude a contracting party from relying on a collateral contract. This was stated by Lightman J in *Inntrepreneur Pub Co v East Crown* [2002] 2 Lloyd's Rep 611 who observed at 614 (paragraph 7):

"7. The purpose of an entire agreement clause is to preclude a party to a written agreement from threshing through the undergrowth and finding in the course of negotiations some (chance) remark or statement (often long forgotten or difficult to recall or explain) on which to found a claim such as the present to the existence of a collateral warranty. The entire agreement clause obviates the occasion for any such search and the peril to the contracting parties posed by the need which may arise in its absence to conduct such a search. For such a clause constitutes a binding agreement between the parties that the full contractual terms are to be found in the document containing the clause and not elsewhere, and that accordingly any promises or assurances made in the course of the negotiations (which in the absence of such a clause might have effect as a collateral warranty) shall have no contractual force, save insofar as they are reflected and given effect in that document. The operation of the clause is not to render evidence of the collateral warranty inadmissible in evidence as is suggested in Chitty on Contract 28th ed. Vol 1 para 12–102: it is to denude what would otherwise constitute a collateral warranty of legal effect."

281. Lightman J at paragraph 8 followed *Deepak v. ICI* [1998] 2 Lloyds Rep 140, 138 (Rix J), affirmed [1999] 1 Lloyds Rep 387 where *"Rix J and the Court of Appeal held in that case (in particular focusing on the words "promises or conditions") that this language was apt to exclude all liability for a collateral warranty. In Alman & Benson v. Associated Newspapers Group Ltd 20 June 1980 (cited by Rix J at p. 168), Browne-Wilkinson J reached the same conclusion where the clause provided that the written contract "constituted the entire agreement and understanding between the parties with respect to all matters therein referred to" focusing on the word "understanding". In this case the formula used is abbreviated to an acknowledgement by the parties that the Agreement constitutes the entire agreement between them. That formula is in my judgment amply sufficient to constitute an agreement that the full contractual terms to which the parties agreed to bind themselves are to be found in the Agreement and nowhere else. That can be the only purpose of the provision."*

282. In *North Eastern Properties Ltd v Coleman* [2010] 1 WLR 2715 at paragraph 82, Longmore LJ said *"If the parties agree that the written contract is to be the entire contract, it is no business of the courts to tell them that they do not mean what they have said."*

283. In the closing submissions of Dr Comberg, it was submitted at paragraph 134 that *"VivoPower's argument is contrary to Supreme Court authority. In Rock Advertising Limited v MWB Business Exchange Centres Limited [2019] AC 119, Lord Sumption JSC considered whether an entire agreement clause could vitiate separate collateral contracts and said at [14]:*

> *"The true position is that if the collateral agreement is capable of operating as an independent agreement, and is supported by its own consideration, then*

> *most standard forms of entire agreement clause will not prevent its enforcement: see Business Environment Bow Lane Ltd v Deanwater Estates Ltd [2007] L & TR 26 (CA), at para 43, and North Eastern Properties Ltd v Coleman [2010] 1 WLR 2715 at paras 57 (Briggs J), 82-83 (Longmore LJ). But if the clause is relied upon as modifying what would otherwise be the effect of the agreement which contains it, the courts will apply it according to its terms and decline to give effect to the collateral agreement."*

284. This begs a question of construction as to whether the collateral agreement will be construed as operating as an independent agreement or relied upon as modifying what would otherwise be the agreement which contains it.

285. In my judgment, the Contract Term Agreement was not capable of operating as an independent agreement. It was on Dr Comberg's case an agreement which was collateral to the Service Agreement. The consideration for the service agreement was entering into the Service Agreement. It was said that the parties were at odds over the duration of the length of the Service Agreement. It is alleged that Dr Comberg threatened to walk away if there was not a three-year term, and then the dispute was resolved on the basis that there would be a one-year rolling contract, but instead the contract term fee would be paid by VivoPower to Dr Comberg following a listing of PLC. The consideration for that was said to be that in consideration for entering into a Service Agreement with the more limited contract term, it is alleged that VivoPower agreed to make the payment of $1 million following the listing.

286. It is then a question of construction of the entire agreement clause. In my judgment, the words in Clause 22 are wide saying both that (a) this was the entire agreement or understanding, and (b) it superseded any previous agreement with respect to the Service Agreement. It follows that any collateral agreement, in the words of Lightman J in *Inntrepreneur* became denuded of legal effect.

287. Mr Brown on behalf of Dr Comberg submitted that VivoPower is giving too wide a meaning to the words *"with respect thereto"*. This was, in his submission, *"a freestanding contract supported by its own consideration"* **[T8/1189/14-15]** and therefore not subject to the entire agreement clause. He pointed to the Deferred Remuneration Agreement by way of a helpful example, which he said was temporally outside the Service Agreement. It was in respect of the service or services prior to the Service Agreement. It had also been made months earlier and (save for the last month) the service or services had been carried out prior to the Service Agreement and entirely prior to the service agreement coming into operation.

288. Mr Brown submitted that the words *"with respect thereto"* had to be given a narrow meaning. The subject of the Service Agreement had not been defined, and therefore it was necessary to work out what the parties meant. The payment obligations were defined in Clauses 5 - 8. He said that what was agreed had nothing to do with the additional term. He was to get a finite sum of $1 million in the event of a listing, and that did not change the actual service that Dr Comberg had to provide. His service as CEO was entirely addressed in the contract. He said that it was close to the case of a person receiving a sign-on payment, but it was not this. Rather, it was a payment to remove a barrier to signing the service agreement and thus outside the Service Agreement.

289. As regards the Contract Term Agreement, the Court does not accept these submissions for the following reasons, namely

(1) It is "with respect" to the Service Agreement because it is a collateral agreement, whose consideration is entering into the Service Agreement. That is the classic consideration for a collateral contract. The removal of the barrier was precisely that: in consideration of Dr Comberg signing a contract without a three-year term and signing a rolling one-year contract, there was on Dr Comberg's case the $1 million promise. That is not a freestanding consideration. In the language of Lord Sumption in *Rock Advertising*, it is not "*capable of operating as an independent agreement and is supported by its own consideration".* The Contract Term Agreement is "*modifying what would otherwise be the effect of the agreement which contains it".*

(2) The pleaded case demonstrates that the consideration is not freestanding. At paragraph 12 of the Particulars of Claim before amendment, it could not have been clearer, namely that the purpose of the Contract Term Agreement was to provide *"consideration for Dr Comberg agreeing to the Revised Contract Term."* The change by way of amendment, no doubt with an eye on the entire agreement clause, was to *"contractual entitlement so as to facilitate his agreement to the Revised Contract Term"*. It is difficult to avoid the conclusion that a dilution of the original plea to refer to a contractual entitlement to Dr Comberg so as to facilitate his agreement to the Revised Contract Term changes the packaging only, but not the substance of the original plea.

(3) Whilst it was submitted that this was different from Clauses 5 - 8 of the Service Agreement being the amounts to be paid to Dr Comberg for serving as CEO of VivoPower, it is part and parcel of the package. It did not affect the term (Clause 3), but it compensated for the term by adding to the amount payable to Dr Comberg. He would have in addition to the salary in Clause 5 an additional payment in the nature of a further payment following a listing. The service provided was no different.

(4) It is not for nothing that this fee agreement has been referred to as *"the Contract Term Agreement"*: it captures its alleged origin and purpose. It is to provide compensation for the agreement to Clause 3 of the one-year rolling agreement and to forgo the three-year service agreement which was the sticking point. Thus, applying the relevant construction test as referred to by Lord Sumption in *Rock Advertising*, and the judgment of Lightman J in *Inntrepreneur* which was approved in *Rock Advertising* and adopted in many cases referred to in the speech of Lord Sumption, the entire agreement clause denuded the alleged service term fee.

(4) Conclusion

290. For these reasons, there was no Contract Term Agreement and Dr Comberg has not established the same. It follows that VivoPower is not liable to pay the sum of $1 million to Dr Comberg. If, contrary to the foregoing, there had been a Contract Term fee agreement, then it would have been denuded as a result of the entire agreement clause.

Issue 7: Did the Defendants and Dr Comberg enter into the Listing Fee Agreement (as defined in paragraph 17 of the Re-Amended Particulars of Claim)? If so, are the Defendants indebted or liable in damages to Dr Comberg under the Listing Agreement?

(1) Dr Comberg's submissions regarding the Listing Fee Agreement

291. Dr Comberg's case is that in the last week of April 2016, he agreed with Mr Chin at the Bonnie Gull Seafood Shack in Fitzrovia that VivoPower would pay him a fee for his services in relation to the listing of PLC on the NASDAQ exchange. He says that it was estimated that $1,666,666.67 would be paid as a one-third share of the fee which PLC would be charged by Arowana International. He says that its purpose was to give him equity in PLC at no extra cost to himself. Dr Comberg says that Mr Chin offered to remunerate Dr Comberg by paying him a share of the fee that would be paid to Arowana by PLC in relation to the listing of PLC on the NASDAQ exchange.

292. In opening (paragraph 59), it was accepted by Dr Comberg that the purpose of the Listing Fee was to enable Dr Comberg to purchase shares in VivoPower. In a memorandum of understanding of 4 February 2016, reference was made to Mr Chin having founded together with Mr Gary Hui and Arowana International Inc a special purpose acquisition company Arowana Inc. It stated that *"Dr Philip Comberg intends to invest personally or through an acquisition vehicle designated by him in the shares of Arowana Inc."* Mr Chin and Dr Comberg with Mr Hui and Arowana International Inc intended to use Arowana Inc as a special purpose acquisition company for the acquisition of another business. Mr Chin would transfer 330,000 founder shares and 86,100 escrow shares to Dr Comberg who would pay for the same in consideration of the sum of $861,000 for the escrow shares and $3960 for the founder shares, that is a total of $864,960.00. However, for legal reasons, it was stated that the transfer may only be possible in 2017. The case of Dr Comberg is that the Listing Fee Agreement was binding as to the payment of money, but that the expectation of the acquisition of shares as above was *"not contractual in nature."*

293. The Listing Fee Agreement was not documented at the time, and there was nothing in the Service Agreement about it, and no side letter or the like. Thereafter, there were sent to Mr Chin on 25 August 2016 several "term sheets". They are said to evidence the Listing Fee Agreement.

294. Dr Comberg says that there were documents in 2017 which provide evidential support for the Listing Fee Agreement. The listing took place in December 2016. Thereafter, Dr Comberg said, as noted above, that there was a discussion in January 2017 during which he raised the outstanding fees, namely the deferred remuneration amount, the contract term amount and the listing fee amount. Reference has been made to the ICAs, one of which was dated 28 March 2017 between Arowana

Singapore and Tiandi. The Particulars of Claim at paragraph 20 originally stated that the relevant parties had no intention of performing the terms of the ICAs, and that they did not affect, alter or extinguish the fee agreements including the Listing Fee Agreement. This was amended by the AmPOC (paragraph 20) that the relevant parties had no intention of performing the terms of the ICAs, save as a payment mechanism for the fee agreements. In paragraph 25 of the Reply, Dr Comberg said that the ICAs, which had different parties, were irrelevant to the claim other than to evidence the existence of the oral agreements.

295. Following this, on 29 March 2017, Dr Comberg says that Mr Chin agreed at a meeting to pay to him the sum of $835,000. This was said to be pursuant to the agreement of April 2016, albeit for a lesser sum, about one half of the same. The sequence was that the day before on 28 March 2017, Mr Chin emailed Dr Comberg providing a detailed spreadsheet of Arowana's transaction costs associated with the listing and details of Arowana's bonus pool. The documents which were then prepared were intended to be mechanisms to implement acquisition of shares with the agreed sum. The fact that this did not occur for whatever reason does not affect the fact that there was an agreed sum pursuant to the Listing Fee Agreement. It is on this basis that Dr Comberg brings his claim.

(2) VivoPower's submissions regarding the Listing Fee Agreement

296. VivoPower admits that there was a meeting on 26 April 2016 between Mr Chin and Dr Comberg at which there was discussed the possibility of Dr Comberg participating in the special purpose acquisition company ("SPAC") transaction as a sponsor. This involved Dr Comberg putting up his own capital through acquiring shares at a discounted entry price and that he would meet his share of the SPAC costs. In an email dated 19 June 2016, Mr Chin stated to Dr Comberg that *"the spirit of the deal is that each of the 3 co-founders are exactly on the same page in terms of risk and reward."* At the time when the matter was being discussed, it was on the basis, according to VivoPower's case, that the founders would be exposed to the same costs and financial risks and would share equally in any rewards, as Mr Chin wrote in an email of 20 August 2017.

297. Mr Chin says that there was no concluded agreement. There was a discussion as to how much may be received by Arowana International, but this would depend on Arowana International receiving a fee for its work on the listing. It would also depend on a successful listing of PLC. A hypothetical success fee might be $5 million in the event of a successful listing of PLC. Accordingly, he denies that there was a promise to share a third of the fees or a promise to pay $1,666,666.67 let alone a promise to have the money paid by PLC to Dr Comberg.

298. As regards the ICAs, VivoPower says that they were intended to have effect according to their terms. However, they involved different services, which were never performed, and invoices for those services which were never rendered. They also involved different parties, namely Arowana Singapore and Tiandi. A default judgment was obtained against Tiandi in Singapore in proceedings brought by Arowana Singapore on 27 March 2018 determining that no fees were payable under any of the ICAs. Mr Chin contends in evidence that the ICAs were required by Dr

Comberg as evidence to HSBC as to the resources of Tiandi. This is denied by Dr Comberg.

299. Mr Chin explained in his email that considering the available funds and the need to remunerate Arowana employees in an equitable manner, it was necessary to address the allocation of bonuses. As stated by Mr Chin in evidence, *"the focus is on the team, the team first, and we as leaders* [Mr Chin, Mr Hui and Dr Comberg] *should eat last, and that is what I meant in terms of squaring off who gets what between different sets of teams* **[T5/753/18-21]**".

300. However, there is no contemporaneous documentary evidence to prove this discussion which was the day after the ICA. Indeed within 2 days, there was a solicitors' letter of 31 March 2017, namely Mr Smith of Winston & Strawn LLP who circulated an assignment of a share transfer recording agreement of Dr Comberg to pay an aggregate of $820,449.14 to the Panaga Group Trust to acquire shares. There is a reference in the covering letter to the money being paid to Dr Comberg, but VivoPower say that this is an obvious typographical error, meaning that the money is to be paid by Dr Comberg as per clause 5 of the assignment agreement. Whatever is the case, this assignment agreement is evidence that any so-called listing fee was in the context of shares being acquired.

(3) Discussion

(i) The alleged agreement of 2016

301. The conventional way of testing a case is to start with the inherent probabilities and the contemporaneous documents and not with the demeanour of the witnesses: see *The Ocean Frost* above. In my judgment, the inherent probabilities go strongly against Dr Comberg's case. It is to be noted that the case of Dr Comberg as pleaded is that there was an agreement made in April 2016 and the amount was a variation in March 2017. It therefore follows that it is necessary to consider the evidence related to whether there was an agreement in 2016 first. Considering first the inherent probabilities, the alleged agreement is improbable for the following reasons:

(1) The central point is that from the start it was envisaged that there would be an agreement which would require Dr Comberg to acquire shares in PLC. There is a controversy as to whether the moneys required for his payment would be provided to him or whether it would come from his own resources. Assume as per the case of Dr Comberg that the moneys were to be provided to him, it makes no commercial sense that there was a binding agreement for him to be paid the money, but not a binding agreement as to how he was to use the money. Thus, the strong starting point is that until such time as the parties had reached a binding agreement as to the payment of moneys and the terms as to the shareholding, how it was to be acquired and on what terms, there was no agreement. This is contrary to Dr Comberg's case which is that it sufficed that there was a binding agreement as to the money, but not as to how it was to be used.

(2) From the start, the conversations were in the context of acquisition of shares. The memorandum of understanding of 4 February 2016, conceded by Dr Comberg to be non-binding, and not challenged as such by VivoPower, is about the acquisition

of shares by Dr Comberg. This preceded the conversation of 26 April 2016 at the Bonnie Gull Seafood Shack. However, it provided a context to that meeting. It is unlikely that that conversation gave rise to a commitment to pay a sum of money to Dr Comberg without participation in shares being a part of it. Something would have had to change in the dynamic of the negotiation for there to be a free-standing binding agreement for the payment of money without the acquisition of shares being part of it. No such change was identified.

(3) Just as the memorandum of understanding was non-binding, so the inherent probability is that anything which occurred on 26 April 2016 was non-binding. This was in part because this was a very early stage in the process, many months before the listing, and without knowledge as to how much money would be available.

(4) The case of Mr Chin that any figures then mentioned were hypothetical is more convincing than the case of Dr Comberg to the contrary. Contrary to that which is contended for by Dr Comberg, the word "hypothetical" or an equivalent did not have to be used for the figures to be hypothetical. In the context in which these figures were mentioned and without defining more about the shares to be held and the terms on which they were held and any obligations among the shareholders, this does appear to have been hypothetical.

(5) Indeed, not only would such terms have to be agreed but in the normal course, there would be a written agreement before such agreement would be made. This negotiation led to the Service Agreement. Yet the Service Agreement says nothing about the Listing Fee Agreement even though according to the case of Dr Comberg, it was agreed before the Listing Fee Agreement. It is not simply that it is not in the Service Agreement, but there is no side agreement in writing, nor any document, memorandum or note evidencing the agreement. It is said on behalf of Dr Comberg that this was a question of trust. This is very unconvincing in circumstances where the Service Agreement was negotiated with solicitors on both sides and a very detailed agreement was made including an entire agreement clause.

302. Mr Chin makes additional points, namely that the fees were contingent on raising a minimum amount of $80 million and/or on Dr Comberg providing "added value" and/or on moneys being available for distribution and/or on approval from a legal and governance perspective. These matters may not have been spoken about, as Dr Comberg responds, and they may not have been conditions express or implied. However, they are relevant not because they were discussed, but because they form part of the context as to why such discussions which took place in 2016 did not give rise to an agreement, and how any agreement would require these kind of issues to be confronted and negotiated. This is not a case of an improvident agreement: rather of an agreement which was never finalised, and which never came into existence either in 2016 or in 2017.

303. Dr Comberg describes the Term Sheets as documenting the Listing Fee Agreement of August 2016. They do refer to a shareholding which Dr Comberg is to have equal to Mr Chin and Mr Hui and being at least 28% of what is described as the

Carry Pool. The payment is to be a mixture of what is described of cash and the Carry Pool. The "Transaction" to which the Term Sheet refers is the transfer by Mr Chin of 412,286 Founder Shares to Dr Comberg". The Term Sheet specifically says that Dr Comberg will pay the price for those shares (price being defined as the price per share multiplied by the number of shares). Although it is correct that the Term Sheet says that Dr Comberg will set off "the Price" by assigning the "Carry Amount" in lieu of a cash payment, Carry Amount was defined. That was as Dr Comberg's share of the Carry Pool, being the amount of money that will be paid to/shared by Mr Chin, Dr Comberg and Gary Hui as well as others that have participated in the set-up of Arowana Inc, VivoPower Group and the first successful transaction on a solar project in North Carolina referred to as NC31 (which was 'currently' agreed to be at least $3.5million).

304. The terms of the Term Sheet were to be replaced by a contract describing the project opportunity and success fee between the parties. The language of the Term Sheets suggests that at least in part, Dr Comberg would not have to contribute to the price to be paid. It is obvious on the face of the Term Sheet Agreements that they do not contain the alleged Listing Fee Agreement, and it is not pleaded in the AmPOC at paragraphs 17-18 that they did. At highest, they are evidence that the parties were working towards the making of an agreement. There would have to be worked out among many things (i) the precise price, (ii) the amount of money to be paid or shared by each of the parties, (iii) the timing of when this would occur, a more precise definition of what was meant by the first successful transaction, (iv) what part would be the Carry Pool and what part would be paid in cash. Some of this would depend on the success or otherwise of the listing itself. This is not an academic point because the listing was nowhere near as successful as had been hoped (aspired to raise over $80 million, but actually raising only about $22 million, of which some was due to contributions by Mr Chin/Arowana entities and Mr Hui).

(ii) The alleged agreement of 2017

305. It is said on behalf of Dr Comberg that towards the end of March 2017, it was agreed that the amount to be paid was $835,000 or $850,000 instead of the previous sum of $1,666,667. It was submitted that this variation evidences a previous agreement. This argument does not have much force. If there had been an earlier agreement in 2016, then there would have to be a good reason for the variation, in this case, a reduction of about 50%. No good reason was identified. In my judgment, this is indicative that any figure discussed in April 2016 was hypothetical or non-contractual. Hence, Dr Comberg could not insist on the previous figure being honoured.

306. Dr Comberg says that he is able to advance his case by reference to the ICA dated 28 March 2017 which, he says, supports his case that there was an agreement for the payment of the sum of $835,000 between VivoPower and Dr Comberg. In my judgment, the ICA does not substantially advance Dr Comberg's case for the following reasons:

(1) it does not contain the same parties, and the parties, namely Arowana Singapore and Tiandi, appeared to be contracting in their own right as Company and Contractor respectively;

(2) the services to be provided were not bringing PLC to listing, but various services in South East Asia;

(3) there was to be an appropriate tax invoice for the services, but it was never intended that there would be any such services performed and thus no tax invoice;

(4) the sum payable under the ICA of $850,000 was only about one half of the sum said to have been agreed in April 2016.

307. In the Particulars of Claim as formulated at paragraph 20 and as amended, it was stated that the relevant parties had no intention of performing the terms of the ICAs. As noted above, before the amended case about the ICAs being a payment mechanism for the fee agreements, it was stated before amendment that the ICAs did not affect, alter or extinguish the terms of the fee agreements including the Listing Fee Agreement.

308. In early 2018, Arowana Singapore brought proceedings in Singapore against Tiandi to obtain a negative declaration that the ICAs had no effect. It obtained a default judgment when they were not defended. This is not treated as binding because the instant case is between different parties, and there is no indication that Tiandi submitted to the jurisdiction of the court in Singapore. However, if in fact the ICAs took the dealings between the parties any further, it would appear that they would substitute the parties and the nature of the obligations. These obligations were not fulfilled. More likely is that the ICAs were sham agreements for whatever reason, which does not form a solid basis for any claim. Dr Comberg relies on this ICA to bolster his position suing under the oral Listing Fee Agreement. It raises so many issues that in my judgment overall it does not bolster his position.

309. Mr Chin contended that the ICAs were sought by Dr Comberg to prove the worth of Tiandi to HSBC. Dr Comberg said that the agreements were not required for that purpose and they were not therefore bogus. Dr Comberg may be right, but the problem is that the agreements were bogus agreements in the respects set out above. There is no satisfactory reason why there was not simply a record of what had been agreed in April 2016 on the case of Dr Comberg. It is not an answer, if it be the case, that these were agreements prepared at the instigation of Mr Chin. Dr Comberg was well able himself with the benefit of his legal and commercial background and with the availability of solicitors who had and would act for him to be able to refuse to enter into an agreement that did not accurately set out a true picture. The Court therefore rejects the case that this was simply a mechanism for payment of a prior binding agreement.

310. There is a further problem about this analysis in the way in which the case has been put. The pleading is that there was an agreement in 2016 (the AmPOC paragraph 17), and that the matters took place in 2017 comprised simply the revision of the Listing Fee (the AmPOC paragraph 18) and the payment mechanism (the

AmPOC paragraphs 19, 20 and 21.2). However, any failure in the payment mechanism would not absolve VivoPower from their payment obligations: see the Reply at paragraph 46. It therefore follows that Dr Comberg's case is that there was a binding agreement made in 2016, which was varied in 2017. It follows that Dr Comberg must prove the existence of a binding agreement in 2016.

311. However, for all the reasons above, the discussions in April 2016 did not lead to a binding agreement. In short, Dr Comberg has been unable to prove that he entered into a binding Listing Fee Agreement in 2016. Further, the documents in 2017 do not provide evidence to support this agreement in that they raise more questions than they answer. The variation in the price in March 2017 could not produce an agreement unless there was already a binding agreement in 2016 on the basis of the case as pleaded. It is not surprising that the case is pleaded as such because the events of 2017 lack a coherence as regards the parties to the agreement and the terms of any agreement. Even if it were the case that an agreement could in theory have come into being even without an agreement in 2016, any case by reference to 2017 alone would be rejected for the same reasons, namely the failure to conclude an agreement as regards the shares to be purchased and on what terms. Hence Winston & Strawn's letter of 31 March 2017 referred to above, and the parties not concluding an agreement. This is why Dr Comberg is making a claim on an agreement which, he says, did not require him to use the money to purchase shares. However, the claim is flawed in that until and unless there was an agreement requiring and regulating the acquisition of shares and the terms attaching to that, there was no binding agreement between the parties.

312. Whatever took place at the meeting on 29 March 2017 may have been a step towards an agreement, but there was a lot more to do. Hence, Winston & Strawn was instructed in respect of transactional documents. There was a whole suite of documents to be agreed comprising (i) an Assignment Agreement- Panaga /Tiandi, (ii) Ordinary Share Power, (iii) VivoPower - CST instructions, (iv) copy of the Amended and Restated Registered Rights Agreement, (v) copy of the Amended and Restated Share Escrow Agreement, (v) draft share sale agreement - relates to assignment between Panaga, Tiandi and AGSS, and (vii) extract from the Trust Deed of The Panaga Group Trust showing settlor and beneficiaries.

313. In the closing submissions on behalf of Dr Comberg at paragraph 100, it was stated that the parties agreed the revised Listing Fee on the basis that the monies would be used to purchase the Panaga shares, pursuant to the transactional documents. Dr Comberg's closing submissions at paragraphs 106-115 described how the process was developed to bring the matter to documents which would in due course be executed. There were set out numerous communications, particularly involving Bree Oelling, a financial controller at Arowana, and Winston & Strawn. It is said that these agreements were to tie into money which may have been received in due course under the ICAs. This is not easy to follow in view of what was said in the AmPOC as regards the limited role of the ICAs.

314. Dr Comberg is able to make the point that the negotiations tend to provide more support to the notion that a large part of the money to be provided by Dr Comberg/Tiandi would be coming from Arowana or other sources. In other words, this part is contrary to the case of VivoPower and the evidence of Mr Chin that Dr

Comberg would have had to provide all the money himself. As to the commercial improbability of this case, Dr Comberg makes the point that it might have assisted in the credibility of Dr Comberg with investors that he had "skin in the game."

315. The way in which Dr Comberg seeks to meet this is to say that the amount to be paid was a free-standing agreement. Thus, any such agreed sum in late March 2017 was independent of whether there would be a binding agreement for the purchase of shares. What thereafter happened as regards the suite of agreements did not affect the amount which had been agreed. For the same reasons as set out above, it is commercially improbable for the parties to have agreed the payment of a sum of money without the structure of the shareholding agreements and the precise terms thereof. Otherwise, it would enable Dr Comberg to receive a sum of money without being an investor in PLC and having to continue to be an investor, that is to have "skin in the game".

316. The suite of documents was complex. It involved many persons (Mr Chin, Mr Hui and Dr Comberg, their corporate vehicles including in the case of Mr Chin Arowana companies and in the case of Dr Comberg Tiandi), Arowana International Inc and VivoPower. There were many obligations which had to be finalised: not least what part of the price would be cash and what part would be part of the sharing obligation. Various drafts of the agreement passed hands. There should be noted in particular documents dated 29 June 2017, 5 July 2017, 26 July 2017 and 18 August 2017. There were changes in the structure of the transaction. There were changes in the sums of money.

317. It is not necessary to go through each change. It suffices to say that, in my judgment, whatever progress had been made, the parties did not get to a binding agreement. This was not a case of an agreement which had been made orally and where the agreement in writing was simply confirmatory. Had that been the case, the suite of documents would not have been as complicated as it was, nor would the complexion be changing or evolving as was the case. A particular feature is that the notion in 2017 that the person to provide the benefit to Dr Comberg/Tiandi should be VivoPower does not make sense. If there was to be a sharing of fees paid by VivoPower to Arowana, then there was no reason for VivoPower to have to pay the money a second time. Further, the evidence appears to be that at least in large part Mr Chin and Mr Hui received reimbursement of costs and expenses and not a success fee, which goes against the notion that there should be equal sharing of a fee between Dr Comberg, Mr Chin and Mr Hui. It would be to treat Dr Comberg in a preferential and not a sharing manner.

318. In my judgment, on the basis of the entirety of the evidence before the Court, until the relevant written agreements had been agreed and executed as regards the shareholding of Dr Comberg/Tiandi, there was no binding agreement. In fact, what occurred is that as the matters appeared to progress, the parties fell out badly. The accusations of mismanagement/misconduct were made against Dr Comberg. Whether the accusations were justified or not, the parties fell out irreconcilably and the making of an agreement whereby Dr Comberg or Tiandi would become a shareholder fell apart. Since the cash and the shareholding arrangements were part and parcel of the same transaction, there was no Listing Fee Agreement.

319. It is the essence of Dr Comberg's case that the two aspects can be detached, that is to say cash and shares. For the reasons above set out, this is rejected. It is part of Dr Comberg's case that there was therefore an agreement made in April 2016 which was free-standing of the shares. This too is rejected. It is part of the case that there was a variation of the cash sum in late March 2017. For the reasons above, if there was such agreement, it was not independent of the shareholding agreement, and that was never agreed. The subsequent negotiating only emphasised the point that there was no overall agreement without the shareholding suite of documents being agreed. Finally, the nature of the documents envisaged signatures by the relevant parties. In my judgment, this is a case of the kind referred to in Chitty on Contracts 33rd Ed. at paragraph 2-124 under the heading: "*Stipulation for the execution of a formal document"* in which the usual position is stated first:

"The effect of a stipulation that an agreement is to be embodied in a formal written document depends on its purpose. One possibility is that the agreement is regarded by the parties as incomplete, or as not intended to be legally binding, until the terms of the formal document are agreed and the document is duly executed in accordance with the terms of the preliminary agreement (e.g. by signature). This is generally the position where "solicitors are involved on both sides; formal written agreements are to be produced and arrangements are made for their execution". Moreover:
"... [t]he more complicated the subject matter, the more likely the parties are to want to enshrine their contract in a written document, thereby enabling them to review all the terms before being committed to any of them."
The normal inference will then be that "the parties are not bound unless and until both of them sign the agreement".

320. For the purpose of completeness, it should be said that the paragraph in Chitty goes on to consider other scenarios. They include a possibility that such a document is intended only as a solemn record of an already complete and binding agreement. Another possibility is that there is a separate preliminary agreement at an earlier stage where one party begins to render services requested by the other so that a quantum meruit may become payable. In other cases, supervening events may lead to a waiver of the formal matters required to be done. It is a very fact specific matter. In this case, it is none of these matters. This is a case where the matter was being dealt with by lawyers, where there were a number of parties who had to agree, where there were so many issues to sort out and where it was envisaged that there would be a whole suite of documents to be signed that the usual applied. That is to say that there would be no agreement until everything was agreed and signed.

(iii) The entire agreement clause as regards the Listing Fee Agreement

321. This suffices to dispose of the alleged Listing Fee Agreement. However, if it were the case that there was still the possibility that there was an agreement, the question arises as to whether the entire agreement clause, Clause 22, impacts on it. The question is whether the agreement is independent of the Service Agreement. The argument of Dr Comberg is that the relationship of Mr Chin, Mr Hui and Dr Comberg was separate from the relationship of employer and employee. That would be like a shareholders' agreement standing separately from the contract of

employment. On that basis, although there would be something of an overlap in respect of the service provided under the Service Agreement and the Shareholders' Agreement, the argument would be that this was independent of the Service Agreement and therefore not affected by the entire agreement clause.

322. However, that is not the case of Dr Comberg. Dr Comberg's case is that he is entitled to the listing fee without having to acquire shares. In those circumstances, it is a part of his employment package. In closing written submissions at paragraph 76, it was stated on behalf of Dr Comberg: *"In common with the Contract Term Fee, the Listing Fee was simply another remuneration incentive offered by Mr Chin to Dr Comberg in order to deliver a particular outcome that was in VivoPower's interest, namely listing."* In that sense, the analysis above in respect of the Contract Fee Agreement applies: it was part of the remuneration, and it belonged to the Service Agreement, but it was not in the Service Agreement, and that contained the entire agreement clause.

323. There are further features. It is a part of the case of Dr Comberg that this money was payable by PLC and not from the other shareholders or Arowana from moneys received from PLC. Similarly, it is money to be paid even though there were no fees received by Mr Chin and by Mr Hui or their service companies. On the basis of Dr Comberg's case, this agreement is not in the nature of a shareholders' agreement. It is not independent of the Service Agreement. If established, it would have been a part of his remuneration package from his employer.

324. If taking a shareholding and contributing to the fortunes of PLC and sharing losses is taken out of it, then this is an agreement in respect of the part of the services which are the same as those provided under the Service Agreement. They are to enhance the business and reputation of PLC and to seek to obtain investment so as to take PLC through the listing and beyond. In my judgment, on the premise that there was no obligation to become a shareholder, this agreement is to be seen as an additional remuneration for the same services.

325. On the basis of the way in which Dr Comberg puts his case, the benefit of the Listing Fee was not independent of the Service Agreement. Accordingly, in addition to the other reasons for finding that Dr Comberg has failed to provide the existence of the Listing Fee Agreement, his case also fails due to the impact of the entire agreement clause. It is important to note that in this connection the entire agreement clause must be in respect of agreements made at or before the time of the Service Agreement. There is no pleaded case about an agreement made for the first time after the Service Agreement, only a variation thereof.

(iv) Conclusion in respect of Listing Fee Agreement

326. For all the reasons thus far considered, there was no Listing Fee Agreement. It should be noted that the failure of the Listing Fee Agreement is not of a technical nature. It is a much more fundamental failure caused by the parties never having concluded the essential ingredients of any Listing Fee Agreement which would be about the definition and terms of a concomitant shareholding. This is the answer to

the point raised by Dr Comberg in his closing written submission that the change of the fee shows that there was something to renegotiate. This is not true because as in 2016, the parties did not even get close to considering the terms of an agreement about a concomitant shareholding. Thus, this is in effect an attempt to have an enhanced remuneration for Dr Comberg to use at will. The parties did not come to such an agreement whether in 2016 or 2017, in an original agreement or in a variation, or at all. It follows that the claim for moneys under the so-called Listing Fee Agreement must fail. If, contrary to the foregoing, any agreement was to be treated as additional remuneration in the context of the Service Agreement, and was not dependent on agreement about the terms of a shareholding, then it fails in any event due to the entire agreement clause.

Issue 8. If the Court finds that the parties did enter into the fee agreements, the Defendants nonetheless rely on the following defences (only):

8.1. Clauses 5.3, 5.7 and 22 of the Service Agreement (the latter of which contains an entire agreement provision).
8.2. The parol evidence rule and the fact that the fee claimed is the same as that which appears in the ICAs (as defined in paragraph 15 of the Re-Amended Defence) between Tiandi and AGSS.
8.3. The judgment of the Singapore Court of proceedings involving AGSS and Tiandi (as defined in paragraph 19 of the Re-Amended Particulars of Claim) on 27 March 2018.
8.4. Breach of specified statutory duties (s226B, 439 and/or 439A of the Companies Act 2006) and PLC's statutory reporting obligations such that the illegality principle precludes Dr Comberg's claim.

327. The only agreement which has been found is the Deferred Remuneration Agreement. The question then arises as to what other defences there may be to it, and in particular:

(1) the authority of Mr Chin;
(2) the entire agreement clause: Clause 22.1;
(3) the parol evidence rule and the agreement between AGSS and Tiandi;
(4) the judgment of the Singapore court in proceedings between AGSS and Tiandi;
(5) defences under the Companies Act 2006.

328. As regards want of authority, it is far from clear how this is pleaded among the myriad of ways in which VivoPower seeks to avoid having to pay deferred remuneration. It is available to VivoPower to say that there was no authority in respect of a pre-incorporation agreement, but as discussed, the agreement was made after incorporation in the manner set out above. It has been discussed how the agreement was made with VivoPower and that the defence that it was made with Arowana fails. Insofar as VivoPower says that Mr Chin had no authority to make the agreement, he plainly had implied actual authority as chairman and director of VivoPower. It is compelling evidence that he signed the Service Agreement for VivoPower. VivoPower did not lead evidence to contrary effect. Failing this, Mr Chin was by virtue of his office held out as having such authority, and Dr Comberg evidently relied on it, thus giving rise to ostensible authority if there was no actual authority.

329. The entire agreement clause has been considered in greater detail in respect of the alleged Contract Term Agreement and the alleged Listing Fee Agreement, and the reasoning there applies here too. It is not necessary to set that out in any detail here because the answer is very clear. The Deferred Remuneration Agreement was an agreement which pre-dated the Service Agreement and was in respect of work done prior to the commencement of service under the Service Agreement. It related to the period prior to 1 September 2016. The Deferred Remuneration Agreement therefore did not relate to the same subject matter as the Service Agreement, and therefore there was no question of the Service Agreement superseding the Deferred Remuneration Agreement. Neither does it come within the *"subject matter"* of the Service Agreement nor was it *"with respect thereto."* It follows that the Deferred Remuneration Fee is not excluded as it covers a different temporal period from the Service Agreement, and is independent from it. As regards the references to Clauses 5.3 and 5.7, it is not apparent what this adds to the analysis.

330. The parol evidence rule is of no assistance to VivoPower because it was not a written agreement. VivoPower's reliance on any agreement between AGSS and Tiandi does not affect the Deferred Remuneration Agreement which pre-dated any such agreement. That was an agreement, insofar as it had any effect at all, between different parties, and has no bearing on the issue of the rights of Dr Comberg against VivoPower. Likewise, the default judgment of AGSS against Tiandi is between different parties and has no effect as between Dr Comberg and VivoPower.

331. VivoPower submits (opening submissions paragraph 95ff and also by its written submissions of 17 March 2020) that Dr Comberg is not entitled to enforcement of any of the fee agreements. In view of the findings above rejecting the Contract Term Agreement and the Listing Fee Agreement, this submission only needs to be considered as regards the Deferred Remuneration Agreement. VivoPower says the following, namely

(1) The Deferred Remuneration Agreement is contrary to sections 226B, 439 and/or 439A of the Companies Act 2006. At the material time, section 226B provided:

"Remuneration payments

(1) A quoted company may not make a remuneration payment to a person who is, or is to be or has been, a director of the company unless –

(a) the payment is consistent with the approved director's remuneration policy; or

(b) an amendment to that policy authorising the payment to be made has been approved by resolution of the members of the company.

(2) The approved directors' remuneration policy is the most recent remuneration policy to be passed by the members of the company in general meeting."

(2) The possibility of payments which Dr Comberg would or could receive and under the Deferred Remuneration Agreement is not included in the "components of

compensation" in the Remuneration Report within the Annual Accounts which the shareholders were invited to approve at the AGM.

(3) Section 226E of the Companies Act 2006 supplemented section 226B as follows:

"Payments made without approval: civil consequences

(1) An obligation (however arising) to make a payment which would be in contravention of section 226B or 226C has no effect.

(2) If a payment is made in contravention of section 226B or 226C—

(a) It is held by the recipient on trust for the company or other person making the payment, and

(b) In the case of a payment by a company, any director who authorised the payment is jointly and severally liable to indemnify the company that made the payment for any loss resulting from it."

(4) Given that Dr Comberg seeks a remuneration payment to be made by a company listed on NASDAQ, it is necessary for such payment to fall within section 226B(1). All the fees sought under the oral fee agreements by Dr Comberg are outside the scope of the approved directors' remuneration policy and so the alleged obligation to make such payments have "no effect".

(5) The Deferred Remuneration Agreement was contrary to sections 439 and 439A of the Companies Act 2006 given none of the alleged fees were within the scope of the members' approval of the directors' remuneration report or the directors' remuneration policy.

332. In my judgment, neither the provisions of s.226B or s.226E provide a defence to the claim under the Deferred Remuneration Agreement for the following reasons or any of them:

(1) The Deferred Remuneration Fee was agreed and was payable when PLC was not a listed company and related to services provided for it before PLC became a listed company. Section 226B is about listed companies and there is no reason why an agreement made for services to be provided (and indeed provided up to 31 August 2016 which was prior to the time when PLC became a listed company) should give rise to an obligation to make a payment in contravention of section 226B.

(2) Further or in the alternative, section 226D(6) of the Companies Act 2006 (pleaded in the Reply at paragraph 72D) disapplies s. 226B "… *in relation to a remuneration payment…made to a person who is, or is to be or has been, a director of a quoted company before the earlier of—*

(a)the end of the first financial year of the company to begin on or after the day on which it becomes a quoted company, and

> *(b)the date from which the company's first directors' remuneration policy to be approved under section 439A takes effect."*

The obligation to make the remuneration payments accrued prior to the end of the first financial year of the company to begin on or after the date when it became a quoted company and prior to the date from which PLC's first directors' remuneration policy to be approved under section 439A took effect.

(3) If there is an obligation for any payment to be consistent with the approved directors' remuneration policy, any payment (when made) will be consistent with the approved directors' remuneration policy. The Directors' Remuneration Report dated 28 July 2020 identified certain remuneration in general terms and authorised payment of "salary". It also stated *"In addition to the above, the Company is entitled to honour any contractual entitlement to compensation or benefits, and any cash or equity incentive awards, which is held by: (i) any current or former Executive Director on the effective date of this policy; or (ii) any employee or officer of the Group on the date they are promoted to the role of Executive Director. Appropriate disclosure will be made of any compensation paid (or similar) to an Executive Director pursuant to any such arrangements."* The obligation to pay the Deferred Remuneration Fee is within the entitlement to honour any contractual entitlement to compensation which the above report says that PLC was entitled to honour.

(4) If and to the extent that, notwithstanding the above, disclosure is required on payment following a judgment, this can be made.

(5) VivoPower's opening also stated that Dr Comberg was liable for losses caused by omissions from the Directors' remuneration report. This was claimed by reference to section 463 of the Companies Act 2006, but this claim based on dishonest concealment has to be pleaded (and it is not), and it has to be proven that the omission caused loss, which it did not (even if, contrary to the above, there was an omission). It also claimed (paragraph 101 of VivoPower's opening) that there was a breach of foreign law identifying provisions of foreign law which it was alleged had not been observed, which was not available to VivoPower absent a pleading and evidence of foreign law: the inability to pursue matters based on foreign law is referred to in the next full paragraph below. In view of the absence of expert evidence as to foreign law, this was withdrawn at the trial **[T1/26/7-12]**. Further, the related argument under sections 439 and 439A must fail in that the argument that there was a failure to comply with the provisions regarding the directors' remuneration report is not made out for all the reasons above.

333. It is not therefore necessary to deal with whether a failure to comply with section 226B and sections 439 and 439A render per se illegal or unenforceable the claim over and above the civil consequences in section 226E to which reference has been made (which might be the sole consequence, had they applied). However, it is far from clear that it does have such consequences. In the closing submissions on behalf of Dr Comberg at paragraphs 149-150, it was stated that the illegality defence had not been developed, particularly by reference to the constituent elements in *Patel v Mirza* [2017] AC 467, namely legal policy, other public policy and proportionality. The

submission in paragraphs 9 - 11 of VivoPower's submissions of 17 March 2020 comprises little more than a bare assertion that it should apply to protect shareholders against undisclosed remuneration agreements. It does not engage with those constituent elements nor explain why a failure to disclose an agreement made and performed prior to VivoPower becoming a listed company should give rise to a defence of illegality to the Deferred Remuneration Agreement. Given that this point does not arise on the findings above, the fact that VivoPower has hardly engaged with the point of illegality, and the fact that illegality does not arise in any obvious way such as to require the Court to rule, it is not necessary to say any more about illegality.

Issues 9 and 10: quantum meruit claims

9. In the alternative to the Fee Agreements Claims, is Dr Comberg entitled to:
9.1. A quantum meruit payment from the Defendants in respect of the CEO Services (as defined in paragraph 28A of the Amended Particulars of Claim) arising either: i) pursuant to a contract between Dr Comberg and the Defendants or ii) as a response to unjust enrichment (on the basis particularized at paragraph (39) of Dr Comberg's Response to the Defendants' Request for Further Information of the Amended Particulars of Claim, namely unconscionability)?
9.2. A quantum meruit payment from the Defendants in respect of the Listing Services (as defined in paragraph 28B of the Amended Particulars of Claim) arising either: i) pursuant to a contract between Dr Comberg and the Defendants or ii) as a response to unjust enrichment (on the basis particularised at paragraph (39) of Dr Comberg's Response to the Defendants' Request for Further Information of the Amended Particulars of Claim)?

Issue 10. If Dr Comberg is entitled to payments on a quantum meruit basis, what amounts is he entitled to (i.e. the value of the CEO Services and/or Listing Services provided to the Defendants)?

334. It follows from the above discussion that the alternative claim for a quantum meruit in respect of the services provided prior to the Service Agreement does not require determination. Since the conclusion as regards the contract is clear above, some of the next discussion becomes artificial. It may nevertheless assist if it is indicated briefly what the Court would have found either without an agreement as to the contractual sum or without a contract all. It would have been as follows:

(1) The services as de facto CEO were provided by Dr Comberg to VivoPower between 1 February 2016 and 31 August 2016. This was at the request of Mr Chin, and it was intended that Dr Comberg would be paid for the same.

(2) However, the continuing request for services from 1 February 2016 was from VivoPower and not Arowana for the reasons set out above, and the recipient of the services was VivoPower.

(3) Mr Chin as chairman and a director had either authority or appeared to have authority to request these services on behalf of VivoPower.

(4) If there had been a contract, but no agreed sum, then there would be a quantum meruit to be paid.

(5) The best evidence of the value of the services is the sum which was negotiated in the Service Agreement, and the sums previously canvassed between the parties, namely a sum of £45,000 per month as basic salary.

(6) If there had not been a contractual promise at all, this is a case where services were provided by Dr Comberg in circumstances where the recipient would have appreciated that they were not gratuitous, where they were freely accepted by the recipient, VivoPower who benefited thereby, such that it would be unjust for VivoPower to retain the same without paying for the value of the benefit.

(7) A quantum meruit claim in my judgment would satisfy the requirements set out by Lightman J in *Rowe v Vale of White Horse* [2003] 1 Lloyds Rep. 418 para 11 and approved by the Court of Appeal in *Chief Constable of Greater Manchester Police v Wigan Athletic Football Club* [2008] EWCA Civ 1449 at paragraph 38:

> *"...there are four essential ingredients to a claim in restitution:*
> *(i) a benefit must have been gained by the defendant;*
> *(ii) the benefit must have been obtained at the claimant's expense;*
> *(iii) it must be legally unjust, that is to say there must exist a factor (referred to as an unjust fact) rendering it unjust, for the defendant to retain the benefit;*
> *(iv) there must be no defence available to extinguish or reduce the defendant's liability to make restitution."*

335. In respect of the claim for a quantum meruit for the Listing Services referred to in paragraph 28B of the AmPOC, this is rejected. This is not a case where services were provided in consideration of an intended agreement. Insofar as Dr Comberg assisted in preparing for a listing, this was part of the work which he undertook for VivoPower under the Deferred Remuneration Agreement and the Service Agreement and for which remuneration was agreed. There were wide ranging services which Dr Comberg had to provide under the Service Agreement including finding investors and maintaining their confidence. There were also numerous tasks as chief executive in running and directing a business. Whilst as will be discussed there are issues as to how far the KPIs were or were not agreed, one of them under paragraph 3 of Schedule 1 to the Service Agreement was *"Investors: raising committed capital of US$50m for VivoPower or related vehicles".* For this purpose, it does not matter the extent to which the KPIs apply: the point is that this tends to show that the Listing Services were no different from the services provided under the Service Agreement. It therefore follows that the attempt to contend that "Listing Services" in paragraph 28B were separate from and not included within the services provided under the Deferred Remuneration Agreement and Service Agreement must fail.

336. There were, therefore, no services over and above that which was expected of Dr Comberg under the Deferred Remuneration Agreement/Service Agreement. Put another way, the benefit to VivoPower or value of such services was nothing over

and above what was being provided under the Service Agreement and before that under the Deferred Remuneration Agreement. This is not a criticism of the work undertaken by Dr Comberg: rather it reflects the fact that the work was undertaken by Dr Comberg under the Deferred Remuneration Agreement and then under the Service Agreement. It follows that it is not necessary to make a finding as to the value of such services in the event that they had been found to exist. Accordingly, the alternative to the alleged Listing Fee Agreement of the quantum meruit/restitutionary claim fails.

Conclusion thus far

337. It follows that the claim in respect of the Deferred Remuneration Fee is allowed for the eight months from 1 January 2016 to 31 August 2016. However, the claims in respect of the Contract Term Fee and the Listing Fee are dismissed. The precise way in which the claim for the Deferred Remuneration Fee should be expressed taking into account taxation should be clarified before the handing down of judgment. Having proven the Deferred Remuneration Fee claim, that subsumes the alternative claim to a quantum meruit in respect of the Deferred Remuneration Fee. The quantum meruit claim as an alternative to the Listing Fee Agreement is dismissed.

338. Dr Comberg claims the October payment: this is allowed. Once again, the way in which this is calculated to take into account the taxation treatment should be dealt with before hand-down of the judgment. The sum claimed is the monthly payment which had been paid in the preceding months of a sum of £51,300. This appears to comprise salary of £45,000, 10% of salary in lieu of pension contributions comprising £4,500 and payment in respect of medical insurance of £1,800. (There is a further discussion below in respect of medical insurance). This sum is due irrespective of whether there was a wrongful dismissal. Technically, there may also be an entitlement to three days pro rata in respect of November, or it could be subsumed into the figure for wrongful dismissal below. Consideration should be given to this by the parties whilst an order to give effect to this judgment is drawn up.

Issue 11: If VivoPower wrongfully dismissed Dr Comberg, to what damages is he entitled (including by reference to salary and his 2018 and 2019 bonuses)?

(1) Introduction

339. On the basis of the findings above, the wrongful dismissal took place on 3 November 2017, and so damages are payable until the end of the 12 months' notice given to 4 October 2018. The starting point is the sums of £45,000 plus payment in lieu of pension contribution of £4,500 per month. This has been mitigated by Dr Comberg and details have been provided about the mitigation. Dr Comberg took on a role which paid US$35,000 per month from January to June 2018 which was increased to US$37,500 from July to October 2018. He gives credit for these

amounts. The way in which the claim is expressed in the Closing Submissions of Dr Comberg (at paragraph 252) as follows:

"Dr Comberg claims £540,000 in respect of salary, £54,000 pension contributions in lieu under clause 6.1 and £22,600 private healthcare contributions under clause 6.3.2. Dr Comberg gives credit of $322,500 by way of successful mitigation. VivoPower of course bears the burden on mitigation and there is no suggestion that Dr Comberg has failed to take reasonable steps to mitigate."

340. It appears to be correct at the conclusion of argument that there is no argument about failure to mitigate. As noted below, there is an issue now taken in respect of private healthcare contributions to which reference will be made. It is apparent from these figures that the approach of Dr Comberg is to roll up the October payment and the wrongful dismissal damages to 4 October 2018. It would be preferable to have a sum for the October payment and then to have wrongful damages incorporating the whole of the November 2017 benefits and taking the position up to 4 October 2018. The parties are asked to do the relevant calculations based on these findings and to reflect this in a draft order.

341. On reviewing the case in preparation for this judgment and in seeking to write the sections about bonus, holiday pay, medical insurance and the Omnibus share scheme/EIS, it became apparent that the case as presented by the parties had been unsatisfactory. This led to a note sent out to the parties by the Court on 16 June 2020 seeking assistance. There then followed a schedule from the parties with their respective positions, which was served on about 25 June 2020. Subsequently, there was a 9-page note from Dr Comberg dated 30 June 2020 owing to the level of detail in VivoPower's answers in the schedule spanning about 19 pages. The Court sought further assistance on 15 July 2020 which led to the helpful production of accounts of PLC for the years from 1 April 2017 and 1 April 2018 and a commentary on behalf of Dr Comberg of 16 July 2017 and some further submissions by VivoPower dated 17 July 2020. This was all interspersed by several emails from Dr Comberg and VivoPower's Counsel respectively. This is not comprehensive of each and every communication. In the interests of brevity, I shall not list each of the communications. This has caused the need for very extensive and detailed consideration of these heads of claims. An example is the holiday pay claim which has condescended to interrogating documents for each day identified, and following this, Dr Comberg seeking to carry forward his holiday entitlement from the year prior to his termination, sparking not only arguments of principle, but also both parties making rival submissions about specific days in that year too. The intention to narrow the issues turned into their enlargement, as will be apparent in the next paragraphs of this judgment. It also extended the writing and preparation time of this judgment.

(2) Bonus

a. Introduction

342. Dr Comberg claims as a part of his damages the loss of a bonus. If he had remained in the employ of VivoPower throughout his 12-month notice period, he would have received, he submits, a bonus in respect of the financial year ended 31 March 2018 and to a pro rata bonus in respect of the next financial year.

b. Legal analysis

343. Dr Comberg submits that, subject to the terms of his contract, a wrongfully dismissed employee is entitled to claim the loss of what he would have earned in the event that he had remained an employee. He does not have to prove whether he would have been entitled to have challenged a failure to pay a bonus on the grounds of Wednesbury unreasonableness. His burden is less than that: to prove what on the balance of probabilities would have happened if he had remained an employee. This is borne out by the authorities.

344. The leading case about the correct approach is in *Horkulak v Cantor Fitzgerald* [2004] EWCA Civ 1287, especially at paragraph 56 per Potter LJ:

"It should be noted, in any event, that the "irrationality" test was applied by Burton J in considering whether an actual decision to refuse a bonus (at a time when Mr Clark was still employed) involved a breach of contract. In the present case there was no decision; breach of contract has been established and the sole issue is the amount of damages. In that context the emphasis is slightly different. As Burton J said [2000] IRLR 766, 775 … the court's task then is:
"to ... assess, without unrealistic assumptions, what position the employee would have been in had the employer performed its obligation. That will involve the court in assessing the employee's bonus, on the basis of the evidence before it, and thus to that extent putting itself in the position of the employer ..."
In that passage, he was summarising the approach adopted by Timothy Walker J in Clark v BET plc [1997] IRLR 348 (himself following Bankes LJ in Abrahams v Herbert Reiach Ltd [1922] 1 KB 477). In my view, the court is not required to undertake the unattractive task of setting a threshold of irrationality. If the company's obligation was to make a fair and rational assessment, the court's task is to decide how in practice it would have fulfilled that obligation…"

345. There is a particularly clear summary of the relevant law in Harvey's Industrial Relations and Employment Law at B1 paragraph 35 as follows:

"Where a court decides that there has been a breach of the implied term of trust and confidence (e.g. because no reasonable employer would have exercised its discretion in this way), how should damages be assessed? This question was considered by the Court of Appeal in Horkulak v Cantor Fitzgerald International [2004] EWCA Civ 1287, [2004] IRLR 942, [2005] ICR 402. The CA dismissed the argument that the court's approach should be to assess the damages on the basis of the lowest level of bonus that could have legitimately been awarded. Although this argument was said to derive support from the well-known decision of Lavarack v Woods of Colchester [1967] 1 QB 278, [1966] 3 All ER 683, the Court of Appeal refused to accept such an approach in this context. Instead, the court concluded that when dealing with such

cases the court was not obliged to assess the lowest bonus on a reasonable scale but was required to make an assessment, on reasonable assumptions, as to what level of bonus would actually have been awarded if the employer had complied with its good faith obligation. In so finding the Court of Appeal approved the approach to this question which had been taken by the High Court in both Clark v BET plc [1997] IRLR 348, QBD and Clark v Nomura, above. As Burton J pointed out in Clark v Nomura this means that the court's approach to the questions of liability and remedy are radically different. When considering liability – at least when applying the irrationality/perversity test – the court must not substitute its view for that of the employer. However, when assessing the level of damages, the court is required to place itself in the shoes of the employer and assess what would have happened if a bona fide exercise of discretion had taken place. (In Nomura an award of £1.35 million was made.)"

346. It therefore follows that there is a different approach in the context of wrongful dismissal from a case where an employee during the currency of their employment has not been awarded any or, in their view, any adequate bonus. In those circumstances, it is necessary to make a claim based on Wednesbury unreasonableness or the like to establish liability. If no or no proper discretion was exercised, then one moves on to what would have happened if a bona fide exercise had taken place. However, in circumstances where there has been a repudiatory breach, the exercise is simply to assess what level of bonus would have been awarded if the employer had complied with their good faith obligation. To the extent that VivoPower submits that the question is whether no reasonable employer would have treated Dr Comberg by not awarding him a bonus for the periods after the termination of his employment, that is not the correct test.

c. Issue whether KPIs are part of the bonus arrangement post-31 March 2017

347. It is then necessary to consider what was the nature of the obligation as a matter of construction of the contract. Dr Comberg says that under the contract there were KPIs which applied for the first year until 31 March 2017. The parties agreed that in subsequent years KPIs would be discussed between the parties at or shortly before the beginning of each year. There had not been a discussion before the beginning of the year commencing 1 April 2017. There is no complaint that this was not done. There is nothing in the Schedule containing the bonus arrangement to the effect that the KPIs applied other than in the first year ending 31 March 2017.

348. Dr Comberg's case at trial has been that absent agreement about the KPIs, there was an obligation to apply the KPIs for the next year or something no less favourable to Dr Comberg. This is either to read this as an express term or an implied term. In my judgment, there was neither an express nor an implied term to this effect. It is not a part of the express term. The KPIs were chiselled for a particular point of time. It was express that it was just for the year ended 31 March 2017, and not for any other period. Any other period depended on agreement between the parties.

349. Further, there is no basis for an implied term for the following reasons. The appropriate approach to implied terms is restrictive as made clear by the Supreme Court in *Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd and another* [2015] UKSC 72. A term will only be implied if it satisfies the test of business necessity or it is so obvious that it goes without saying: see paragraphs 17-18 of the speech of Lord Neuberger. Applying this to the case, there are the following reasons not to imply a term to this effect. First, the KPIs were for a particular point in time in the commercial life of VivoPower, and so there is no reason to imply that it would have application for subsequent years. Second, it is at odds with the wording of the contract to imply such a term when the Service Agreement specifically limits the KPIs in term to the year ended 31 March 2017. Thirdly, absent such an implied term, there would still be a discretionary bonus of up to 150% of salary: it would simply not have the same constraints as the KPIs. Fourthly, in these circumstances, there is no necessity to imply a term by reference to the KPIs, even if it were desirable for the employee to strive to make such an implication.

d. The pleaded case as regards the bonus after 31 March 2017

350. Although the Court has construed the Service Agreement as above and applied the law relating to implied terms, and it has done so without reference to the pleaded case of Dr Comberg, it appears that the above arguments raised at trial contradict the pleaded case of Dr Comberg. In particular, the following paragraphs of AmPOC are to be noted, namely

24.2 "that VivoPower agreed to "pay him "an annual bonus (...) paying up to 150% of base salary" and provide "other incentive arrangements" (Clause 5.5). The Service Agreement included a Schedule with "Key Performance Indicators" ("KPIs") for the financial year ended 31 March 2017. However, because the business was in its infancy, the KPIs were merely informative and not determinative of the bonus that Dr Comberg was entitled to. It was agreed between Dr Comberg and Mr Chin (on behalf of VivoPower), therefore, that the business would look at the KPIs in the light of how it had developed and, if the KPIs were inappropriate, they would be amended or dispensed with and whilst KPIs would be included in the Service Agreement, they would not necessarily be taken into account by the Group in setting Dr Comberg's bonus for the financial year ended 31 March 2017. The Service Agreement did not include KPIs for subsequent financial years;"

...

34. "As set out in paragraph 24.2 above: (i) the Service Agreement did not include KPls for the financial years ended 31 March 2018 or 31 March 2019; and (ii) KPls were not determinative for the financial year ended 31 March 2017. Dr Comberg's bonus for the financial year ended 31 March 2017, in fact, reflected the overall performance of PLC in the previous financial year. To the best of Dr Comberg's knowledge and belief, the 2018 Bonus and 2019 Bonus would have been set on the same basis."

351. It is also instructive to look at Dr Comberg's first witness statement at [65.1]:

"Mr Chin explained that 'Key Performance Indicators' ("KPIs") would need to be included in the employment contract. I said to Mr Chin that it was too early to set realistic KPIs given that the new business was in its infancy and, amongst other things, it was not clear if and when it would list or the exact amount that it would receive from the listing. I, therefore, said that it was premature to set KPIs which could only be developed once the fundamentals of the business had become clearer. Mr Chin said that he appreciated this problem and that it was necessary to include KPIs in my contract as shareholders would expect to see them there. In a call on 27 July 2016, we therefore agreed that KPIs should be included on an indicative basis but would not be relied upon for setting my bonus. In an email on the same date to Mr Chin, I noted that, "as discussed on the phone today [...] [the KPIs are] an indication and things may change over time as defined between Chairman/board and CEO and as everybody sees need and fit". In response on the same date, Mr Chin explained that this was "Fine" and in any event "this is what we do across all our companies as a protocol ie review and toggle KPIs annually".

352. I have not construed the Service Agreement by reference to this part of AmPOC or Dr Comberg's evidence. To have done so might have infringed the parol evidence rule and the effect of the entire agreement clause. In the event, there is no conflict between of the one part the construction of the express term and the rejection of the implied term, and of the other part the tenor of the pleadings and the evidence.

353. Nevertheless, and not by way of construction of the Service Agreement, the above extracts from AmPOC and from the evidence only reinforce the commercial sense in the Service Agreement in not providing for KPIs beyond the period to 31 March 2017. They probably explain as a matter of fact (and not construction of the contract) why there is no evidence of the bonus for the period up to 31 March 2017 being the result of giving percentage points by going through each of the KPIs: this does not seem to have occurred. If in fact there had been a tension between the bonus and the pleadings and the evidence, it would have been necessary to consider whether Dr Comberg would have been able to run a case contradicted by his pleadings and his own evidence. In the event, that has not arisen.

e. Submission of Dr Comberg if KPIs not agreed

354. The submission of Dr Comberg is that a bonus would have been awarded. First, it is said that since there had been a 100% award made for the year ended 31 March 2017, this informs as to the approach that would have been taken in the next years. That 100% bonus was despite the fact that VivoPower was a start-up company and had not enjoyed a successful listing in accordance with its expectations. Dr Comberg's case is that a 100% bonus one year followed by nothing the next year would be irrational without some very good reason for such a radical change from one year to the next. Second, his case is that even if the KPIs were not in force after 31 March 2017, they were still a yardstick, and thus, for example, financial performance is only one of a number of factors. In the contractual KPIs, they were only 33% based on financial performance, the other 67% on other performance indicators and 50% on an absolute discretionary basis subject to EBITDA forecasts being met. Thirdly, it is said that it would have been irrational to have chosen financial performance as the single criterion, and indeed to the extent that the contract provides other criteria, an employer is not entitled to override the contract: see *Dresdner Kleinwort Ltd v Attrill* [2013] IRLR 548. Fourthly, it is not right

simply to consider what Mr Chin would have done, since the Court has to make the difficult assumption, contrary to what in fact happened, that the dismissing employer would act as a reasonable employer and *"not one guilty of conduct amounting to constructive dismissal"*: see *Horkulak* at [71].

f. Submission of VivoPower and discussion

355. The submission of VivoPower is that a bonus would not have been awarded. In my judgment, if the contract had continued, there would not have been a bonus that would have been voted for Dr Comberg. Various matters fall to be considered:

(i) the poor financial performance of VivoPower in the financial year to 31 March 2018 and then in the first half of the year to 31 March 2019;
(ii) the absence of bonuses for other executives of VivoPower;
(iii) the fact that Dr Comberg was about to leave in any event and would have been on garden leave;
(iv) even although the allegations against him have not been sustained either as breaches of contract or as a basis for early termination, there was a tension between him and other members of the board/remuneration committee.

(i) Financial performance of VivoPower

356. The accounts which Dr Comberg has agreed should be admitted into the bundles show losses of millions of US dollars per annum in the relevant financial years to 31 March 2018 and to 31 March 2019. In the year ended 31 March 2018, it made a loss of $27.879 million. Its adjusted EBITDA for the year ended 31 March 2018 was a loss of $3.2 million compared to a profit of $18.6 million in the previous period. In the next year to 31 March 2019, the operating loss for the year was $5.4 million and there was a net loss of $11.223 million. Mr Brown on behalf of Dr Comberg sought to emphasise a growth of turnover from $32.25 million in the 14 months to 31 March 2017 to $33.65 million for the year ended 31 March 2018 to $39.04 million in the year to 31 March 2019. However, the chairman's report for 2018/2019 indicated that exponential growth was in the second part of the year by which time Dr Comberg's notice period would have expired. Further, it indicates that it was by the subsidiary Aevitas in Australia which was not managed by Dr Comberg (paragraph 59.3 of the Re-amended Reply). In any event, such growth was in the context of continuing very large losses.

357. It is difficult to obtain assistance from the directors' remuneration reports which are bland, but it is apparent that there were attempts to look for costs savings, especially after the departure of Dr Comberg. The Chairman's statement identified lean management practices and reduction in corporate and solar development overheads. Dr Comberg's reliance on the better position in the quarter of April – June 2019 accounts is not probative because the termination of the employment of Dr

Comberg at the end of the 12-month notice period would have been about 6 months prior to the commencement of that accounting period.

358. Whilst the Court has rejected the case that Dr Comberg misrepresented the position to VivoPower as to its financial information in July 2017, there is contemporaneous evidence of a very serious financial position of VivoPower at and from that time. Mr Chin explained in his evidence that VivoPower *"should have been dead in October 2017"*. (This is part of a more extensive quote set out below.) As noted above, it is a part of Dr Comberg's answer to the allegation that he misrepresented the position to the board on 3 July 2017 that he had not done so, referring to the Town Hall meeting a few days earlier. At that meeting, he produced a slide which showed a gap in the EBITDA of the company at that point in time relative to forecast, and how much cash was required at that time. He also stated at paragraph 329 of his first witness statement quoted in paragraph 152 above that the business was running out of capital and would do so unless large amounts of capital would be raised before the end of the year.

359. It is not an answer to say that this was a start-up company of an entrepreneur, namely Mr Chin, and so the financial uncertainty went with the territory. The uncertainty was there, but there was portrayed over this period a time of financial crisis. The evidence of Mr Chin was that he spent a lot of time on the financials over that summer. Dr Comberg would have done so but for his being marginalised. The accounts for the year ended 31 March 2018 contain reference to President Trump's proposed introduction of tariffs on imported solar panels into the US which triggered a sharp short-term increase in solar panel prices and hence increased development costs.

360. It would be expected that there would be a correlation between the foregoing and bonuses. Mr Chin stated at paragraph 208 of his first witness statement that VivoPower's financial performance did not justify making any bonus payments. Mr Brown cross-examined Mr Chin by reference to the KPIs, but the Court has held that the KPIs did not apply after 31 March 2017. Nonetheless, the response of Mr Chin is still relevant to the issue of what would have been paid. The exchange was as follows **[T5/801/11 – T5/802/15]**.

"Q. You tell us, at [paragraph] *208, the bonuses for these periods were not paid to any of VivoPower's executives or directors, because VivoPower's financial performance did not justify the making of such payments. You would accept, I am sure, that the remuneration committee was required to consider their bonus entitlements by reference to whatever is in their employment contracts; that is right, is it not?*

A. When you say "their", that is the employees as a cohort?

Q. Yes.

A. Yes, that is correct. But it has also got to take into consideration the financial position of the company. They cannot just pay bonuses if there is no money.

Q. We have agreed, I think, in this cross-examination, that the bonus criteria are effectively as set out in the KPIs in any particular employment contract in question; and I do not understand you to disagree with that proposition.

A. That is true, but then over-arching that, you know, every situation I have been involved in is that if the company cannot afford to pay it, then you do not pay. Consequences you may have staff leave and that is what has happened with Vivo. But this is a situation of turnaround, as I have mentioned before, and there has been episodes, and the reason Vivo still exists, it should have been dead in October 2017, the reason it still exists is by virtue of the really hard work of guys like Carl, et cetera. But also, you know, people not taking pay, I did not get paid my director's fee for a while. Arowana did not get paid shareholder loan interest. So, yes, you just cannot say, okay because the contract says bonuses are due, therefore pay it."

361. This exchange has to be considered carefully. First, the premise of the question is wrong, namely that the bonus criteria were set out in the KPIs, when in fact that was the position only in the year ended 31 March 2017. Second, it has to be considered whether the answer is saying no more than if there is no money, there will be no payment because the company cannot pay. Thirdly, Mr Chin has been found to be a witness whose evidence is not always reliable.

362. Despite the answer being unwrapped in this way, the answer still provides some assistance. Although the question was not directed to a purely discretionary bonus, and the answer may have been to the effect that even if there were an obligation, it could not be discharged (which would be wrong in law), the answer is still probative about the approach to a purely discretionary bonus. Mr Chin was emphasising that VivoPower was struggling financially. VivoPower was able to exercise its contractual discretion in good faith and rationally not to award a contractual bonus by reference to the performance of VivoPower. This would have been entirely consistent with its stated policy of reducing overheads which were not required to be paid in the context of the financial crisis of VivoPower.

363. Without in any way derogating from the finding that the KPIs did not apply, there is this significance in respect of the same. First, whilst Dr Comberg seeks at the same time to emphasise the background of the KPIs and the increasing turnover of VivoPower, the KPIs do not provide any support for a turnover based evaluation of success. The KPIs referred as to 33%, being 11% to achieving or beating pre-tax profit budget, 11% to return on interest and capital (ROIC) apparently envisaging a measure of net profit and 11% to margin, referring to EBITDA. As to the additional bonus amount of 50%, it was provided that this would not be paid if the allocated EBITDA budget was not met. This is not a benchmark because it has no application. However, it does indicate that the emphasis on turnover without looking at profit is not a correct appreciation of the emphasis of VivoPower.

364. The significance of financial performance is a matter contained in paragraph 34 of the AmPOC as quoted above, namely that *"Dr Comberg's bonus for the financial year ended 31 March 2017, in fact, reflected the overall performance of PLC in the previous financial year. To the best of Dr Comberg's knowledge and belief, the 2018 Bonus and 2019 Bonus would have been set on the same basis."*

365. All of this indicates strongly that if Dr Comberg had seen through his 12 months' notice period, VivoPower, acting lawfully and in good faith and without a constructive dismissal, in the exercise of its discretion would not have awarded a bonus either in respect of the year 2017/2018 or pro rata in respect of the year 2018/2019.

(ii) The absence of financial bonuses to other executives of VivoPower

366. Returning to paragraph 208 of Mr Chin's first witness statement, and his evidence that no bonuses were awarded to any of VivoPower's executive or other directors, this is a factor to be taken into account in that there do not appear to have been bonuses paid to any other executives at the relevant time. The weight to be attached to this point would have been greater if VivoPower had given evidence as to what bonuses were paid in the past, to whom and on what terms. Nevertheless, it still carries some weight to the extent that the absence of financial bonuses to other executives of VivoPower was not challenged by Dr Comberg. It is at least consistent with the evidence of the reaction to the financial crisis and the reduction of overheads.

(iii) Dr Comberg was about to leave the Company

367. Under Clause 18.1 of the Service Agreement, an employee is entitled to participate in a bonus even if placed on garden leave. In circumstances where the bonus contained what Mr Brown referred to in his written closing as a "contractual straitjacket", such as a guaranteed bonus scheme, this would have a particular application. However, in this case, as noted, KPIs had not been agreed other than for the period up to 31 March 2017. There was simply a discretionary bonus of up to 150% of salary. On the basis of looking at the position if there had not been a constructive dismissal, it is considering two financial years. The first year (2017-2018) would have included the second half, that is a time which followed the time of Dr Comberg's service of his notice to terminate. The first half of the second year (2018-2019) would have been when (but for the termination in November 2017) Dr Comberg was serving his notice to terminate. Even if Dr Comberg had served his notice to terminate, the second half of the financial year 2018-2019 would have been after the expiry of his contractual notice. Once Dr Comberg had given a notice of termination, VivoPower would have had no need to incentivise Dr Comberg for future performance. That is a further indicator that VivoPower would not have awarded a bonus. The decision that Dr Comberg would not have been awarded a bonus does not depend on the termination of his employment in that, in my judgment, such was the financial crisis, that no bonus would have been granted even if Dr Comberg had not been about to leave VivoPower. However, this point reinforces and provides an additional or alternative reason for concluding that no bonus would be paid.

368. In the course of written submissions after the hearing, it was suggested for Dr Comberg that but for the constructive dismissal, Dr Comberg might have gone back to work. It was even mentioned for the first time that this was consistent with a right to work, although this was not developed. Nothing turns on the argument that Dr Comberg would have returned to work in view of the finding that no bonus would have been awarded for the reasons set out thus far. Nevertheless, I shall still consider the point that Dr Comberg would have returned to work. In my judgment, Dr Comberg would not have returned to work even assuming that VivoPower had acted at all times in good faith and in accordance with its contractual obligations. Dr Comberg had agreed to step down as CEO, he had been replaced as CEO and he had agreed not come to work. Those are factual matters which make it unrealistic that Dr

Comberg would have returned to work following failure of a negotiated exit. The undeveloped reference to a right to work does not sit well with the express garden leave clause which prima facie negatives such a right. In my judgment, Dr Comberg would not have been asked to return to work and he would not have done so. It follows that in addition to the decisive point about not awarding a bonus at a time of financial crisis, and the fact that Dr Comberg being about to leave VivoPower, the fact that he would not have been at work in the period of the notice of termination would have added to the reasons for not awarding a bonus. In any event, even if there had been a return to work, no bonus would have been awarded for the other reasons referred to above.

(v) Effect of tension between the other directors and Dr Comberg

369. It is clearly the case that the other directors of VivoPower were not well disposed at this time toward Dr Comberg. The probability is that this would have made the Remuneration Committee and the board decide not to award any bonus to Dr Comberg. However, it is necessary to be cautious here because of the point made by Mr Brown by reference to *Horkulak* that the question is what a reasonable employer would do, "*not one guilty of conduct amounting to constructive dismissal*". This is by itself a difficult assumption, as Potter LJ said in *Horkulak,* in the sense of having to act on a counterfactual.

370. There is reason to believe in respect of this employer that in the numerous communications behind the back of Dr Comberg in July 2017 and thereafter, the minds of his colleagues became affected against him because of these communications. For the purpose of assessing whether a bonus would have been paid, it would be too simplistic to assume that separately Dr Comberg lost the confidence of each of his colleagues at senior level. It is more likely that Mr Chin decided that Dr Comberg was dispensable and that this influenced the colleagues who, for their own reasons, became alienated from him.

371. Despite this, there is a more nuanced point. The approach of Dr Comberg's case in this regard is binary. The allegations of breaches of contract against Dr Comberg entitling VivoPower to terminate have not been made out. This appears to lead Dr Comberg to assume that the corollary is that a reasonable employer would have appreciated that he was therefore a very good employee and would have wished to reward him with a bonus as occurred in 2017. That is not a necessary corollary of the findings that he was not in breach of contract. It does not follow that an employer would therefore regard him as a very good employee.

372. Further, it does not follow that at a time when VivoPower was in a financial crisis, it would have wished to have rewarded in line with the previous year or to have provided any bonus. Even without finding him culpable in any way, VivoPower would have decided not to pay a bonus in the very adverse financial conditions in the trading years to 31 March 2018 and the trading year to 31 March 2019 (bearing in mind that the contract of employment would have terminated on or about 3 October 2018).

(vi) Aspects of the case of Dr Comberg

373. Before concluding this section, there are two aspects of the case of Dr Comberg which require further consideration. The first point is to advert to a contradiction between the way in which Dr Comberg's case was put in opening and in closing as regards the bonus. This is in addition to the contradiction between the construction of the KPIs and the pleaded case and evidence quoted above to opposite effect. This contradiction is in respect of whether the claim was for damages on the basis that (a) on the balance of probabilities a bonus would have been paid, or (b) Dr Comberg has lost a real and substantial chance that he might have been awarded a bonus. The loss of a chance is referred to in paragraphs 150-155 of Dr Comberg's opening. However, Dr Comberg's closing is not on the basis of a loss of a chance. It is on the basis of the *Horkulak* approach above to say what a rational employer acting in good faith would on the balance of probabilities have done.

374. This was expressed in the written closing at paragraph 257 as follows:

> *"In the present case, the fact of percentage assessments are built into the KPIs in the Service Agreement upon which the discretion falls to be exercised. Another way of putting the point, the Court can simply decide, on the balance of probabilities, that the bonus would have been awarded at any percentage level up to 150% pursuant to the KPIs.* ***That is not the same exercise as reaching percentage assessment representing a lost chance.*** *"* (emphasis added)

375. In oral submissions, Mr Brown said the following in answer to a question from the Court at **[T 8/1217/23 – T 8/1218/12]**:

> *"Judge: Then, employers are used to applying key performance indicators, what is the court supposed to do?*
>
> *MR. BROWN: The court has to do the best it can on the evidence. So, look at the key performance indicators. Assuming you are against me and you are not persuaded that the performance is itself strong, nevertheless, has Rockefeller Habits been rolled out, 2% of bonus, answer, yes. I do not have time to go through all of them. You do it in a broad brush fashion, but ultimately you say, "Doing the best I can, I am satisfied that the bonus would be X." It is a rough and ready exercise as damages quantifications are.* ***It is not loss of a chance exercise.*** *It is really somehow the court exercising the decision that the employer has failed to on the evidence it has."* (emphasis added)

376. Having considered the law, in my judgment, the analysis without a loss of a chance is the correct one. This follows from the quotations above in *Horkulak* and in *Nomura v Clark* and from Harvey to the effect that the court must put itself in the shoes of the employer and "*reach a conclusion,* ***on the balance of probabilities****, as to what would have occurred had the employer complied with its contractual obligations..."* per Burton J in *Nomura v Clark..."* at paragraph 40 (emphasis added)

377. It follows that this is not a loss of a chance case, but if, contrary to the foregoing, it had been treated as a loss of a chance case, then on the evidence before the Court, it would have been found that there was no real or substantial chance that a bonus would have been awarded by an employer complying with its contractual obligations.

378. The second point is that a part of the oral argument on behalf of Dr Comberg is that on the basis that the KPIs applied, the Court would have to make its own assessment in respect of each of the items. This could have been done in respect of the financial criteria because of the losses, but there is a lack of information as regards any other criteria, even allowing for what Mr Brown described as the "rough and ready" nature of the quantification of damages. In the event, the decision of the Court is that this was a discretionary bonus up to a maximum of 150% of salary, and that in the events which occurred, an employer complying with its contractual obligations would not have awarded a bonus in respect of the financial year to 31 March 2018 or the first half of the next financial year.

(vii)**Conclusion as to bonus**

379.The Court must consider the position on the basis of what VivoPower would have done acting rationally and in good faith and not constructively dismissing Dr Comberg. In my judgment, in the context of the financial crisis affecting VivoPower at the relevant time, no discretionary bonus would have been paid in respect of the year to 31 March 2018 or the first six months of the next year. The financial losses of VivoPower would have been the over-riding consideration. It would have occurred even if Dr Comberg had not given notice of termination and even if there had not been a tension between him and the remuneration committee and/or Mr Chin. That suffices for the conclusion that VivoPower would not have awarded a bonus. If that did not suffice, the conclusion that VivoPower would have awarded a bonus is the result of all the circumstances. In addition to the financial crisis, there was the absence of a need to incentivise an employee who was about to leave and who would not have been doing any work for VivoPower during his notice period. In all the circumstances, Dr Comberg would not have received a bonus for the years 2017-2018 or for the first half of the year 2018-2019.

(3) Medical insurance

380. Dr Comberg claims the sum of £1,800 as part of his claim for the October payment, and damages for wrongful dismissal to include £1,800 per month for the next 11 months. This reflects the payments which were made as a matter of course. There is evidence of a payslip for the seventh month since September 2016, that is for March 2017 showing a sum for the month of £51,300 (which includes the sum of £1,800). This payslip shows an aggregate for the seven months of £359,100 which comprises £51,300 per month and therefore evidences a payment of £1,800 per month in respect of medical insurance.

381. By reference to Clause 6.3.2 set out above, Dr Comberg submits that VivoPower was required to pay up to £1,800 per month for Dr Comberg's private medical insurance. This was a contractual entitlement and it was paid each month up to September 2017. At no stage did VivoPower require evidence as to the amount expended by Dr Comberg in respect of medical insurance.

382. In submissions after the close of evidence, VivoPower says that since no details about the medical insurance have been produced, there should be nothing

payable in respect of medical insurance. It is also said that there has been no evidence adduced as to whether this has been mitigated by medical insurance from Dr Comberg's new principal/employer.

383. Over the period of the employment of Dr Comberg, this sum was paid every month. There has been no attempt to recoup moneys already paid. There is no plea that it was improper of him to take this money. There is no plea that the sum claimed of £51,300 per month either as debt for October or in damages thereafter is excessive (subject to mitigation). There was no cross-examination on this subject. There is no evidence to the effect that his medical insurance cost less than £1,800 per month, and at this stage, it is too late to query it.

384. This is not affected by the fact that VivoPower asked for information regarding his medical insurance by way of a Request for Further Information ("RFI") seeking details of his private medical arrangements and whether he received the sums into his personal bank account: see requests 22 and 23 of a RFI of his Reply and Defence to Counterclaim. Dr Comberg objected to the request on the grounds of proportionality and relevance, and the matter was not pursued. Further, there was not a plea that the moneys received were excessive or simply putting Dr Comberg to strict proof of the amount of his medical insurance.

385. Dr Comberg has also expressed the matter that he had a contractual entitlement in the sum of £1,800 per month. That may be the case, but it is not necessary to make a ruling about that in view of the above reasoning.

386. Further, without a pleaded case of failure to mitigate, information was sought as to whether Dr Comberg had mitigated this element of his loss in his contracts with Vion X. The relevant agreements contain large sections apparently related to compensation, which had been redacted (beyond the monthly fee) due to confidentiality. If this had been a pleaded issue, then evidence would have been given about it at the time. In any event, the answer provided on behalf of Dr Comberg is that if the redacted parts had related to medical insurance being provided, then there would not have been redaction, and Dr Comberg did not have any payment of his medical insurance after his contract with VivoPower had been terminated.

387. In my judgment, on this basis that there is no evidence to the effect that Dr Comberg was not entitled to a sum of £1,800 per month for so long as it was paid, Dr Comberg is entitled to maintain his claim both in debt for the October payment and in damages thereafter by reference to the sum of £1,800 per month: see Dr Comberg's Note in Reply dated 30 June 2020 paragraph 33.

Issue 12. Was Dr Comberg entitled to an award of Omnibus Shares (as defined in paragraph 24.8 of the Re-Amended Particulars of Claim). If so, was VivoPower's failure to award Dr Comberg accrued Omnibus Shares a breach of clause 5.6 of the Service Agreement? To what damages is Dr Comberg entitled?

(1) Introduction

388. A head of claim is the Omnibus Shares payment: see AmPOC (paragraph 44.8). The premise is of that but for the wrongful dismissal, Dr Comberg would have been awarded benefits conferred on employees until the expiry of his notice period, namely 4 October 2018. He claims damages in a sum of £540,000 which he says is the value of that which he has lost.

(b) **Statements of Case**

389. The relevant parts of the pleadings were as follows:

(i) AmPOC

"24. Pursuant to the terms of the Service Agreement, VivoPower agreed to:

24.8. grant Dr Comberg the right to participate in a share scheme referred to as a "carried interest arrangement" in Clause 5.6. The relevant share scheme was, in fact, the "Omnibus Equity Incentive Plan" (the "Plan"). The exact number of shares is yet to be determined, however, Dr Comberg estimates on the basis of draft documentation in respect of the Plan that his entitlement was to approximately 75,000 shares equal to 100% of his base salary (£540,000) in 2017 (the "Omnibus Shares")."

(ii) RAMD

"37. Paragraph 24.8 is denied, save as follows:

37.1. Clause 5.6 of the Service Agreement is admitted, as to which see above;

37.2. An Equity Incentive Plan was approved by shareholders of PLC in 2017 ("EIP");

37.3. The EIP is administered by the Remuneration Committee which determines awards and their terms and conditions;

37.4. Dr Comberg was aware of the EIP and its provisions and the fact that it was superseding the carry plan, and participated in the process of review, discussion and approval of the EIP. The EIP provides that all decisions under the EIP or relating to awards are "within the sole discretion of the [Remuneration] Committee" and are "final, conclusive and binding" upon all participants (clause 4(d)). Eligibility under the Plan is limited to eligible persons "who have entered into an Award agreement" or otherwise "received written notification from the [Remuneration] Committee or from a person designated by the [Remuneration] Committee" that they have been selected to participate in the Plan (clause 6);

37.5. There was no obligation to grant equity to Dr Comberg under the EIP;

37.6. Dr Comberg never entered into an Award agreement under the EIP, nor was he notified in accordance with the EIP;

37.7. Given Dr Comberg's breaches set forth below and lack of effective contribution to the business of the Group, no such award would have been made by the Remuneration Committee in the proper exercise of its discretion. Further or alternatively, once Dr Comberg had given notice of the termination of his employment, it would have been a proper exercise of its discretion for the Remuneration Committee to decide not to make any award to Dr Comberg."

(iii) Reply

"*50. Sub-Paragraphs 37.2 to 37.6 are admitted. The EIP refers to the same scheme as the Plan that is referred to in paragraph 24.8 of the Particulars of Claim. The EIP was only approved in around July 2017 at a meeting of the Board of PLC and at PLC's Annual General Meeting in around September 2017. Dr Comberg abstained on the vote in respect of the EIP given that Mr Chin and Dr Comberg had previously designed a carry plan which had been developed up to the stage of a draft plan being prepared by PwC and the EIP was, among other things, less tax efficient than the carry plan. Dr Comberg left the Group before the relevant discretion was exercised.*

67. *Sub-Paragraph 37.7 is denied. As set out below, the alleged breaches were only raised after Dr Comberg resigned and in retaliation to the Repudiation Notice and are, in any case, baseless. It is denied that it would have been a proper exercise of discretion to decide not to make an award once notice of termination had been given by Dr Comberg."*

(2) The evidence

390. Dr Comberg says that he is entitled to the Omnibus Shares payment. He quantifies this as the sum of £540,000, equivalent to his annual salary. His first witness statement refers to the Pearl Meyer Review and Equity Incentive Plan at paragraphs 120-123. He says that an Equity Incentive Plan ("EIP") was implemented on 28 July 2017. It was in the place of a carried interest arrangement, which is a term used in clause 5.6 of his service agreement. He says that he did not receive any equity under it.

391. However, this is very unspecific. It does not explain the nature of his entitlement, and when and how it would have arisen. His statement does not say that if he had remained an employee to 4 October 2018 that at a certain point, he would have received some equity, what equity and on what terms. He does not say whether it was an absolute or a discretionary entitlement, and if the latter, why the discretion would have been exercised in his favour.

392. The evidence for VivoPower addresses this head of claim only in passing. In his first witness statement, Mr Chin at paragraph 211 simply said that no Omnibus shares had been granted to VivoPower's executives or directors and therefore no additional VivoPower shares (whether under the Omnibus or any other long-term incentive programme).

393. This is then commented on by Dr Comberg in his second witness statement at paragraph 78 to the effect that it was not an Omnibus share scheme (which was

his pleaded case), but rather the EIP. He then referred to records in the year ended 31 March 2019 referring to the grant of awards under the EIP in the year ended 31 March 2019. He says that this was *"including during the period that I would have remained employed by [VivoPower] but for its repudiatory breach of the Service Agreement."* This too is rather elliptical in that it fails to specify when during the year ended 31 March 2019 the awards were made: only marginally over the first half of that financial year was during the period when he would have been employed, that is to say between 1 April 2018 and 4 October 2018.

394. This was barely supplemented by other evidence. The VivoPower witnesses did not give evidence about what they received and when they received such shares. There was very little said in oral evidence. There was rather more in the written submissions, but it was all far from clear what was being said by either Dr Comberg or VivoPower.

395. In cross-examination, Mr Chin confirmed that he had approved the finalisation of VivoPower's EIP and that this became a part of compensation for executives. The questioning went on as follows **[T6/816/9 – T6/817/12]**:

"Q. ...E11, 3212. If you can look at the second paragraph on the bottom, in the directors' remuneration report, it records there: "The remuneration committee shall have discretion to determine the maximum value of an award that may be made under the Plan", and that is a reference to the Equity Incentive Plan, is it not? A. Yes.

Q. "It is currently expected that the maximum value that may be awarded under the plan will be 100% of salary." Do you see that?

A. Yes.

Q. You need to go back to E10, 2811. So that I can identify this document for you, 2810 is the front page, this is the Pearl Meyer Equity Incentive Plan design final, this is the document 23 that you approved. Do you see that? A. Yes.

Q. If we look, please, at 2811, you see in the sixth bullet point: "There will be 16 participants split into four tiers 3 ...(reads to the words)... 100% base salary." Do you see that? A. Yes.

Q. If you can turn, please, to 2814, and you see there that Philip Comberg CEO is a tier 1, is he not? A. Yes.

Q. We know that Dr. Comberg's allocation, had he received one 10 under this plan, would have been shares to the value of 100% of his salary; that is right, is it not?

A. That is correct, RSUs and PSUs."

396. In re-examination at **[T6/870/22-T6/871/16]**, Mr Chin said:

"*Q. Can we look in E19…5534…you were asked about the share scheme this morning. This is the written resolution of the remuneration committee, in relation to*

the shares scheme. …if you look at 5536, the date of that is 6th August 2018. You were not on the remuneration committee by this time.

A. Correct.

Q. Can I direct you to the bottom of 5534, you can see tier 1, which in your evidence earlier you had said would have included Dr. Comberg, 100% of base salary. But if you go over the page, the final bullet point, says the number of shares granted in 2017 will be calculated using the IPO share price of US$10.20. What does that actually mean, in terms of the bonus you get; are you able to help us with that?

A. It means two things: one is obviously that is the price of the IPO; two is from an economic perspective. These are effectively deeply out of the money options; so, not worth anything."

397. In the course of writing this judgment, assistance was sought as to what was being said. This has led to more specificity, but there have been challenges that this ought to have been in the form of the pleadings and the evidence.

398. Dr Comberg and VivoPower are critical of each other. VivoPower says that it was for Dr Comberg to prove his case. If the position is not clear, that is his fault for not pleading the case and having detailed evidence to prove it. Dr Comberg says that VivoPower should refute the claim because it had the knowledge of how the scheme worked. VivoPower knows what would have been awarded in the period when he would have continued in the employ of VivoPower but for the wrongful dismissal, that is to 4 October 2018. It was submitted for Dr Comberg that the evidence of Mr Chin at paragraph 211 of his first witness statement barely grapples with this claim. The Court would have been in a better position to consider this material if it had been more specifically addressed by both sides in the pleadings and/or the witness statements.

(3) The submissions of Dr Comberg

399. Dr Comberg relies first on VivoPower's Annual Report for the year ended 31 March 2017 which states that *"the Remuneration Committee shall have discretion to determine the maximum value of an award that may be made under the Plan. It is currently expected that the maximum value that may be awarded under the Plan will be 100% of salary*" [**E11/3212**]. At that stage, it was said that awards may require the participant to pay a price for the shares or enable the participant to receive the shares for nil cost. It was suggested then that the Remuneration Committee may determine that awards should be subject to various performance measures. Further *"the Remuneration Committee shall have discretion to determine the length of the performance period that shall apply to any performance conditions."*

400. In June 2017, Pearl Meyer made an equity recommendation of 25% RSUs and 75% PSUs. There was to be an annual grant of RSUs to 'step vest' over a 4-year period, 25% per annum, no performance conditions beyond still being employed by VivoPower. There was to be an annual grant of PSUs to 'cliff vest' at the end of a 4-year period. The PSUs would be subject to EBITDA Growth per annum and Return on Invested Capital per annum over a four-year period. At threshold,

40% of shares will vest, with full vesting occurring at stretch performance. It appears that the actual allocation of 100% was made in June 2017 (prior to Dr Comberg's dismissal). A Pearl Meyer '*Equity Incentive Plan Design – Final*' presentation dated June 2017 **[E10/2810-2815]** states that "*The 2017 share grant for each tier will be as follows: - Tier 1 – 100% base salary*". The number of shares granted in 2017 will be calculated using the IPO share price of $10.20 (page 2). Page 5 states that Dr Comberg was in Tier 1. Page 6 states: "*These are the agreed 2017 grant sizes for each tier of participants: Tier 1 100%*".

401. The terms of the Omnibus Incentive Plan are set out in Appendix A to the Second Defendant's Notice of AGM to be held on 5 September 2017 **[E11/3292-3319]**. The Omnibus Incentive Plan was adopted and approved at that AGM as confirmed by the Written Resolutions of the Remuneration Committee of the Second Defendant dated 6 August 2018 **[E19/5535]**. Dr Comberg claims damages reflecting PLC's Omnibus Equity Incentive Plan ("**EIP**"), either as the "*carried interest arrangement"* referred to in clause 5.6 or an "*other incentive arrangement"* within the meaning of clause 5.5.

402. Dr Comberg then says that the reason why he was not notified of an Award was because of the wrongful repudiation of his service agreement. The suggestion that he would not have been entitled to an Award because of his breaches has been shown to be wrong by the fact that he was not in breach. He is therefore entitled to the value of the Award as damages.

403. The amount claimed is £540,000 by reference to VivoPower's Annual Report for the year ended 31 March 2017 and the actual allocation made in June 2017, namely 100% of salary. It was submitted in the schedule on behalf of Dr Comberg that there is sufficient evidence to discharge the burden of proof in respect of Dr Comberg's entitlement to shares representing 100% of salary (£540,000). It was submitted that VivoPower's position is only that the shares would not be allocated because of poor performance; however, the documents demonstrate that the allocation decisions had already been made.

404. Dr Comberg said that it would be "wholly unfair" for Dr Comberg's entitlement to be reduced by reference to the matters referred to in VivoPower's closing (e.g. a resolution of the Remuneration Committee in August 2018: see Closing paragraph 175). This evidence appears, in his submission, to be *"contrived"* to reduce the claim, but was not pleaded, or referred to in opening or addressed by any of the Defendant's witnesses (including the Remuneration Committee witnesses) or in documentary evidence and could not be tested in cross-examination. As the *prima facie* entitlement to shares corresponding to 100% of salary is clear, the burden shifted to D to demonstrate why that sum should not be paid and that burden has not been discharged.

(4) The submissions of VivoPower

405. VivoPower says the following:

(1) There was no binding carried interest arrangement or other incentive arrangement whilst Dr Comberg was an employee.

(2) He was not entitled to any award because of his breaches of contract, and VivoPower would have and would have been entitled as a result not to make an award.

(3) No award was made in respect of the other executives until February 2019, which was after the period when his 12 months' notice would have expired, that is to say after 4 October 2018.

(4) The arrangement was only discretionary, and it would not have been awarded to him because he was on a notice period and there was no reason to give it to him. Some parallel is made to the claim to a loss of a bonus.

(5) It has not been demonstrated that he had any right to participate in the scheme. The Remuneration Committee has never resolved to award him any shares and he has never entered into an Award agreement with PLC.

406. In any event, if there was an entitlement, the amount of damages is not £540,000, but is much less for the following reasons:

(1) The 100% of salary was a starting point in the calculations for Band 1 employees. However, the same was subject to detailed agreements, as can be seen from those relating to Mr Weatherley-White. The award agreements for Mr Weatherley-White and Mr Russell (CEO after Mr Weatherley-White) were disclosed on 2 March 2020 ([**E19/5496**], [**E19/5522**], and [**E19/5543**].

(2) Assuming that Dr Comberg had been entitled to participate in the scheme, he would only have done so on the terms specified in the Remuneration Committee's August 2018 resolution. The Remuneration Committee resolved to make various awards of Restricted Stock Units ("**RSUs**") and Performance Stock Units ("**PSUs**") by a written resolution dated 6 August 2018 [**E19/5534**].

(3) That resolution specified that: (i) the Awards were divided into PSUs and RSUs (split 75%-25%) – (see Resolution 1 on [**E19/5535**] and the breakdown of the various Awards in Schedule B to the Resolution [**E19/5538**]); (ii) the PSUs were to vest at the end of the four fiscal years ending 31 March 2021, provided that the participant had been continuously employed by VivoPower during this period [**E19/5538**]; and (iii) the share awards were to be made against the 2016 stock listing price [**E19/5534**], Note 5 (and see [**E19/5538**]: "*Price per share for award $10.20*").

407. More fully, Schedule B contained the following notes:

"¼ (one quarter) of the RSUs granted shall vest on each of the following dates: (i) 1 June 2018, (ii) 1 June 2019, (iii) 1 June 2020, (iv) 1 June 2021, in each case subject to the terms and conditions of the Incentive Plan and the Restricted Stock Unit Award Agreement.

The PSUs granted shall vest in their entirety at the end of the four fiscal years of the Company commencing on 1 April 2017 and ending 31 March 2021, provided that the participant has been continuously employed by the Company during such period and subject to the other terms and conditions of the Performance Stock Unit Award Agreement."

408. On this basis, Dr Comberg's entitlement to Omnibus Shares would not have vested prior to the expiry of his notice period save in respect of a quarter of the Restricted Stock Units. VivoPower submits that given the share issue was calculated by reference to the listing price and given the current share price, Dr Comberg's loss is said to be £3,562.94.

(5) Discussion

(i) The unsatisfactory evidence

409. The unsatisfactory way in which this aspect of the case has been dealt with by both Dr Comberg and VivoPower has been set out above. Dr Comberg's case is unsatisfactory because he has not set out how and when and on what terms he says that he ought to have been awarded shares under the EIS. He appears to recognise that in fact his entitlement was only in the year ended 31 March 2019 and following and as a result of the Written Resolutions of the Remuneration Committee of 6 August 2018.

410. They both suggest solutions which are untenable. Dr Comberg says that since VivoPower has not set out in evidence the nature of its case until after the close of the evidence, the Court should operate on the basis that that original plan was implemented and that he would have received an award in shares equal to 100% of his salary. That is unrealistic because his entitlement depended on an exercise of a discretion by the Remuneration Committee, and as he set out in his Reply, it was put into effect in the terms which were awarded to a large number of employees on substantially the same terms in the year ended 31 March 2018.

411. It was then for Dr Comberg as Claimant to prove this case, and he could not do so simply by relying on the position in 2017. His pleaded case was that the time for the exercise of the discretion had not arisen at the time when he left VivoPower (Reply paragraph 50). His second witness statement (paragraph 78) recognises that his entitlement is by reference to the award that was made in the year ended 31 March 2018.

412. Further, by the time of the second witness statement, the parties had been communicating through their respective solicitors as regards the documents which had been granted under the EIP. By the time of trial, in Bundle 19, Dr Comberg had various documents including the Written Resolutions of the Remuneration Committee of 6 August 2018 and the grant of the FSU and the PSU shares to other employees. It was apparent from the Written Resolutions that the entitlements to shares depended upon years of service and that the price per share would be treated as $10.20.

413. There was nothing odd about this. The Resolutions of the Remuneration Committee followed features of the equity recommendation of Pearl Meyer including an equity mix of RSUs and PSUs, a 'step vest' in respect of the former over a period of 4 years, and a 'cliff vest' at the end of the four year period. It was also from that report that the IPO share price of $10.20 was being used, despite the steep reduction in the value of the shares since the IPO. Further, there were to be 16 participants in different tiers. All of this had consequences that the value of the EIS for an employee being granted the shares in 2018 just before his termination date would be worth little because of (a) the "step vest" in the case of the RSU's, (b) the absence of any PSUs, and (c) the use of the share price of $10.20.

414. It therefore follows in the cross-examination of Mr Chin that there was an entitlement to a sum equivalent to salary was not based on a sound premise if it meant that Dr Comberg would become entitled to shares to the value of his salary. In re-examination, the reference to RSUs and PSUs and to something being worth little was an answer which reflected the points made in the paragraph immediately above. In these circumstances, Dr Comberg is unable to prove his case by reference to an award which was due to be the same as one year's salary.

415. Likewise, VivoPower is to be criticised by the dismissive way in which the matter was considered in the first witness statement of Mr Chin at paragraph 211 to the effect that no Omnibus shares had been granted. Dr Comberg was right to answer that in paragraph 78 of his second statement to say that EIS replaced Omnibus shares. Further, it was also unsatisfactory to say that Dr Comberg would not have been granted any shares. He ought to have set out the position as it was subsequently set out in the closing submissions of VivoPower at paragraphs 172-175. However, this does not open the door to a submission on the part of Dr Comberg to say that absent properly addressing the matter in evidence, VivoPower *"cannot now complain if the damages are calculated by reference to Dr Comberg's clear entitlement to equity equivalent of 100% of his salary"* (paragraph 264 of his closing submissions). There was no such entitlement: it is based on a false premise. It also ignores the fact that it is for Dr Comberg to establish his claim.

416. Despite neither party addressing the matter as ought to have done, the documentary evidence is before the Court from which the level of the entitlement can be reached. The submission of VivoPower is rejected to the effect that since Dr Comberg has not addressed properly the source of his right and the timing and value of it that he ought to be awarded nothing. So too is the submission of Dr Comberg rejected to the effect that he ought to be awarded the equivalent of

100% of salary in default of VivoPower not addressing the matter adequately in pleadings and witness statements. It therefore falls to the Court to evaluate the evidence and to consider the value of the EIS award.

(ii) Is Dr Comberg entitled to damages at all under this head?

417. The following arguments of VivoPower are rejected. First the assertion that the entitlement did not accrue until the award and the relevant agreement was made, and in this case in February 2019, when the other relevant employees still at VivoPower received their awards and entered into their agreements. In my judgment, the right accrued at the point of the approval of the Remuneration Committee or within a short period thereafter sufficient to implement it by the making of an award and an agreement. This point was in effect conceded by VivoPower, and rightly so, in the course of the schedule of the respective submissions of the parties prepared after the conclusion of the trial and in response to the Court's questions.

418. Second, whilst the award was discretionary, there are distinctions from the bonus. The bonus involved money being paid over there and then, whereas this was an award of shares, vesting mainly in the future and in return for the continuation of employment. It therefore follows that the circumstances of financial crisis which militated against a cash bonus did not prevent the grant of shares. Further, in the case of the cash bonus, there is no evidence to show that a bonus was being given to other employees. Here the evidence is that 16 employees in different tiers were getting the share benefit, and on the same terms. There has not been identified any substantial reason for distinguishing Dr Comberg from other employees if he had stayed.

419. Thirdly, the response of Mr Chin at paragraph 211 of his first witness statement does not assist VivoPower. The denial by reference to breaches of contract is answered by the rejection of the assertions that Dr Comberg was in breach of contract. Further, the assertion that it would have been legitimate not to make an award by reason of Dr Comberg's earlier on-notice resignation has no support in Mr Chin's evidence or the documents. Indeed, there are provisions preserving the rights under Clauses 5.5 (bonus) and 5.6 (separate carried interest arrangements) during garden leave. The fact that he had given notice to terminate the Service Agreement would affect very substantially the worth of the award (no PSU and only the first quarter of the RSU). However, it did not provide a reason in principle to exclude him altogether.

(iii) Valuation

420. It therefore follows from the above that Mr Chin was correct to say that the award would have been relatively small to the sum of £540,000 claimed. It relates only to one quarter of the RSU shares. The number of shares is to be calculated on the basis of being acquired at the listing price of $10.20. VivoPower says that the sum was £3,562.94. It is inadequate for VivoPower to

have provided this figure at this stage, and then not to say how it has been calculated. Dr Comberg himself could have worked out a figure based on the information which he had. However, the Court is prepared in principle to consider a calculation by Dr Comberg of a sum arising from the way in which the matter has been calculated. It does not necessarily follow that the sum is to be calculated as at today's date. There is an argument to the effect that it might be calculated a reasonable time after 6 August 2018, say the time when termination would otherwise have taken place, namely 4 October 2018 or some other time. When providing figures to express the judgment, the parties should express the appropriate finding on the basis of the findings above.

(iv) Alleged unfairness/contrivance

421. Despite the criticism of VivoPower, there are various reasons why there has been no ultimate unfairness. Dr Comberg does not have an argument to the effect that the starting point is the sum of £540,000, such that the way in which the matter was presented in the closing of VivoPower is unfairly and belatedly subtracting from what would otherwise be a tenable measure of damages. That simply is not tenable. It ignores the limited entitlement at all times. Dr Comberg has to base any entitlement on the basis of one quarter of the RSU shares alone, and on the basis of the shares being acquired at the listing price.

422. The suggestion is made that this has been contrived to reduce the claim, and that this is a case which could not be put because the matter was not set out in the pleadings, witness statements and the like. In my judgment, this is not an arguable proposition for the following reasons, namely,

(1) There has been followed through something in 2018 by the Remuneration Committee along the lines initially proposed by Pearl Meyer. That is not a contrivance.

(2) If there was an attempt to avoid having this altogether, then VivoPower might have decided to abandon this altogether until after the court case, or the Written Resolutions of the Remuneration Committee to be postponed until after the time when the notice would have expired, namely after 4 October 2018. The fact that this was not done is inconsistent with a contrivance.

(3) VivoPower was not doing this with regard only to Dr Comberg. It was for 16 people, who did not include Dr Comberg because he was no longer an employee. Indeed, it was this feature of a benefit for all these employees who would have included Dr Comberg that leads to the conclusion that it would not have been rational to exclude Dr Comberg if he had still been an employee. However, the value of this right would have been very limited for the reasons set out above.

(4) A yet further point against contrivance is that as regards the RSUs, the first-year end was in June 2018. The reason for this may have been to take the first anniversary of the Pearl Meyer report/the 2017 AGM adopting it. In any event, it was retrospective rather than taking the first anniversary of each award or of the August 2018 Written Resolutions. If VivoPower had wished to use belt and braces to exclude Dr Comberg, that would have done it. The

fact that it was backdated to that extent is contrary to the thesis of a contrivance to prevent Dr Comberg from having a share. It might be said that there were other arguments, but by this stage the parties had served statements of case, and if a contrivance was being sought, there was no shortage of advice available to procure a contrivance of this kind. It was not done.

423. If, contrary to the foregoing, there was a point to be taken in this regard, then the point would have had to be developed by Dr Comberg on the basis of the material which it had including the numerous documents in bundle E19 relating to the EIS and the RSUs and PSUs. It was not done. Even now at this stage, it is simply an assertion that it was contrived, but there is nothing in this point, and thus it is not unfair to deal with the matter in this way.

(v) Conclusion

424. The VivoPower Annual Report for the year ended 31 March 2017 and the Pearl Meyer report of June 2017 did not give rise to a right in favour of Dr Comberg. However, the position was different once the Omnibus Incentive Plan was adopted and approved at that AGM as confirmed by the Written Resolutions of the Remuneration Committee dated 6 August 2018.

425. The assertion of Dr Comberg that he can ignore what became of these rights by the time that they were adopted by VivoPower is rejected. The assertion by reference to the Pearl Meyer report that the entitlement is to be a year's salary there and then is fallacious. It is necessary to consider the documents as and when they were awarded in August 2018. The documents show that the rights had to be earned by continued employment. That was not going to happen on the basis that Dr Comberg was then within weeks of leaving, but as regards the RSUs, he was able to take advantage of the first quarter because he was an employee beyond 1 June 2018. However, his entitlement to the full 100% depended upon being in employment until 2021, which was not going to arise since he had given 12 months' notice of termination to expire on or about 4 October 2018.

426. It follows that there is an entitlement, but the entitlement is limited. Dr Comberg is given the opportunity to say whether he agrees the sum of £3,562.94 in the valuation section, and if he does not, what he says that it should be. This is not an opportunity to re-argue the case, but simply about the computation of the damages under this head. That would then need to be expressed in the draft order.

Issue 13. Is Dr Comberg entitled to Accrued Holiday Entitlement (as defined in paragraph 24.7 of the Re-Amended Particulars of Claim) pursuant to clause 9.2 of the Service Agreement? To what payments is Dr Comberg entitled?

427. The claim for holiday pay is unsatisfactory. It would be expected that this head of claim would not be controversial, or, if the subject of an argument, limited to a discrete issue. In fact, each and every day of holiday pay has been argued without the case ever having been properly pleaded and without being addressed at least directly in evidence.

428. The way in which it has developed needs to be set out:

(1) there is a claim for the Unpaid Holiday Entitlement, with no particulars of number of days identified: see AmPOC (paragraphs 24.6 (Clause 9.1), 24.7 (Clause 9.2) and 44.9);
(2) this claim is denied: see RAMD (paragraph 139);
(3) Dr Comberg led no evidence in his witness statements of the details of the holiday entitlement;
(4) in the opening submissions dated 24 February 2020, Dr Comberg claimed 19 days of holiday pay, applying the contractual formula in Clause 9.2 and seeking a sum of £39,461.54 comprising £2,076.92 per day. There was no reference to a table now relied upon at E7/2042.1;
(5) the 19 days was calculated by reference to a proportion of the number of holidays allowed for the year of termination until the time of termination. Using 17 November 2017 as the termination date, this was 19 days (231/365 days). In fact, that was the termination date on VivoPower's case, whereas Dr Comberg's date was 3 November 2017 which would comprise 18 days (217/365 days). The Court has found for Dr Comberg in respect of wrongful dismissal and the primary case that the termination date was 3 November 2017. Further, the 19 days failed to take into account holidays actually used during the current year. Dr Comberg acknowledged that 5 of the 19 days had been used, and so his claim was for 14 days (13 days on the basis of a termination date of 3 November 2017) unused holiday entitlement;
(6) in his concluding submissions and without cross-examination, VivoPower raised issues by reference to documents with regard to the number of days of leave which had been used by Dr Comberg such as to deny his claim in part: see closing submissions at paragraph 176.

429. On 16 June 2020, the Court sent a note to the parties asking (among other things) questions about holiday pay in the hope that there would be some common ground and restricting the issues for the Court to consider. In fact, this only led to an expansion of the areas of disagreement. In what appeared at first to be helpful, the parties set out submissions in a schedule form. There were a number of pages from Dr Comberg and many more pages from VivoPower including as regards holiday a day by day response to the days of holiday said by Dr Comberg not to have been taken. This then led to Mr Brown on behalf of Dr Comberg saying the following on 25 June 2020:

"The Defendants' submissions are replete with argument, new factual allegations and submissions which were never made at trial and go far beyond the scope of the Court's queries (and)…advance substantial new factual and legal

submissions…The way that the Defendants have approached this gives rise to unfairness and prejudice to the Claimant."

430. This only tells a part of the story. The problem is that VivoPower's response arises out of the unsatisfactory way in which the claim for holiday pay was made without any particularity in the pleadings or evidence in the witness statements. The problem for the Court is having to adjudicate about something which had very limited material only in written trial submissions at the start of the trial and in closing. In these circumstances, Dr Comberg is not in a position to refer to prejudice and unfairness: one way available to the Court was to ignore anything about holiday pay and say that Dr Comberg had not proven his case.

431. However, it is less prejudicial and unfair to receive the information which has been advanced and to do the best with that material insofar as this can be done fairly and always subject to the burden of proof being on Dr Comberg. Thus, when Dr Comberg asked the Court if there was a short-cut so that he might not have to answer the material advanced by VivoPower, the response of the Court was that there was no short-cut. The Court would decide what to do with the totality of the material which it had.

432. Dr Comberg says that since there is a prima facie entitlement to 19 days and it was not suggested by VivoPower that Dr Comberg had taken his annual leave, that VivoPower bears the burden of proof. That is not right. In the closing submissions of VivoPower, the 19 days was agreed mathematically, but VivoPower denied the entitlement to untaken holiday by taking issue with many of the dates. The burden of proof falls on Dr Comberg, and this has been largely ignored by not particularising the same in the pleadings or referring to the same in the witness statements. Dr Comberg's side cannot escape responsibility for not proving its case by blaming VivoPower who do not have responsibility for this situation.

433. In their written closing, Mr Ciumei QC and Mr Lloyd on behalf of VivoPower referred to various dates when Dr Comberg appeared to be on holiday:

(1) Attendance at the US Masters on 10 April 2017: however, it appears from his diary that he went to the US Masters for the weekend, but that he returned to New York on Monday 10 April 2017. Remarkably, despite the flight out being identified in the diary, Dr Comberg says that he did not attend the US Masters. The US Masters had finished on 9 April 2017: if he did go, which seems likely from contemporaneous communications, it seems likely that he would have returned to New York on 10 April 2017 for a full day of meetings including a breakfast in New York on 11 April 2017. In communications with Mr Weatherley-White on 10 April 2017, whereas it was intended that he would be in the office in New York in the afternoon, he said that he had gone on a private plane and would be in New York city much earlier. On balance, the probability is that this was not a holiday, even if he did go to the Masters, albeit that the position is not helped by the presentation of the case by Dr Comberg, and the fact that his

denial about going to the Masters is against the contemporaneous written evidence;

(2) As regards 20 April 2017, it is common ground that Dr Comberg attended a meeting at Behrens. He was permitted to act as a non-executive director with Behrens in his service agreement: see Clause 11. However, time spent on Behrens work must be counted as holiday in the sense that holiday might be time spent on vacation or time spent other than for VivoPower. Dr Comberg's diary says that this was a day of annual leave (and there is reference also to leave for 21 and 22 April without any business shown in the diary).

(3) As regards 28 June 2017, Dr Comberg's Geschaft calendar shows a meeting in Germany in respect of Behrens. His work calendar shows a board meeting in Germany.

(4) As regards 14 July 2017, although Dr Comberg had a meeting in a hotel in California with a company Lucis of which company he was a board director for one hour, the rest of the day was on VivoPower business. Although there was nothing in the diary to indicate this, the Court is prepared to accept that evidence. A one-hour meeting for another company does not make that day into a holiday. Further, Dr Comberg gave evidence that although he was still in California on 17 July 2017, he has identified some of his business on that day for VivoPower: see his first witness statement at paragraph 501.4

(5) In addition, there are identified in Dr Comberg's diary 10 days of holiday as approved dates of leave taken between 3 August and 25 August 2017 (3, 4, 9-11 and 21-25 August). Dr Comberg admits to 5 days but says that the other days were spent working. The diary entries reveal some weekly meetings of VivoPower, but there is nothing to indicate that Dr Comberg was working for VivoPower substantially during any of those 10 days. The odd email and telephone conversation does not contradict the fact that these were holiday, and there is little evidence of work activities on these days for the reasons set out far more fully in the schedule of responses of VivoPower to the issues of quantum. The closest that Dr Comberg would be able to show that he was working would be 21 August, but those activities are not so substantial that this was not another day of holiday.

(6) On this basis, I have come to the view that the ceiling of the claim must be not 19 days, but 18 days (that is to say on the basis of a termination on 3 November 2017 and not 17 November 2017). From that, on his case too there is to be taken away 5 days, so that his claim is for 13 days. Dr Comberg appears on the basis of his work calendar which shows the above 10 days taken as holiday. He has not proven that he has taken only 5 days of holiday, and not 10 days of holidays in August. I find that 20 April 2017 is to be treated as a day of holiday taken in that on that day Dr Comberg carried out work for other companies, and no specific work has been identified for VivoPower. Further, he appears to have taken off 28 June 2017. That then means that of 18 days potential holiday, there have been identified 10 days in August and in addition to that 20 April 2017 and 28 June 2017. This therefore comprises 12 days of holiday taken out of 18 days. It

follows that the number of days of holiday not taken during the period in question is 6 days.

434. It is not for the Court to drill even further down to investigate whether, and to what extent, that Dr Comberg was working for VivoPower during these days of holiday. If and to the extent that there was some limited work on these days, that does not render holiday days into a working day. It would not be surprising for a CEO to do limited work during a holiday without the day as a whole becoming a working day. The entitlement to 6 days of holiday is the best that the Court can do on the limited information available and bearing in mind the criticisms on both sides for the way in which they respectively have approached failure of Dr Comberg to lead evidence about the holidays and to plead a case with particularity and the way in which VivoPower has left its detail to the closing submissions.

435. This debate about the number of days of holiday not taken in the year of termination then led to a rather unexpected twist. In Mr Brown's note in response, for the first time, he formulated a way of expressing holiday pay by reference to the previous year's holiday entitlement, where he said that he was entitled to 11.5 days of holiday. This was not used additionally to the 14 days previously referred to but was in effect an alternative route to the 14 days. It involved 11.5 days of the prior year plus 2.5 days of holiday from the year of termination.

436. By a note dated 17 July 2020, VivoPower objected that this had not been pleaded, no evidence had been given and it was not the way in which it has previously been put even in the opening and closing arguments. Although its source was a document at [**E7/2042.1**], which was disclosed by Dr Comberg on 25 February 2020, this document had been also the basis of the 19-day claim, which had been subject to detailed criticism in the submissions of VivoPower. This therefore stimulated a yet further analysis of the previous year.

437. Should the Court allow this at this late stage? A problem here is that since this was not properly pleaded, accrued holiday entitlement could mean the year of termination or the previous year carried forward. It is nonetheless a very different way of putting the claim. It is also very confusing. One might expect that the claim that would be put on the basis of the note of 30 June 2020 would be a revision of the claim from 19 days to 30.5 days. Evidently, the claim is limited to 19 days. It is therefore said that on the basis that VivoPower had said that 14 out of 19 days of holiday had been used, that left a balance of 5 days which VivoPower accepted. Thus, if the 11.5 days from the prior year was added to the 5 days, then there would be in 16.5 days used. It followed that the difference between the two cases of 19 days and 16.5 days was only 2.5 days: see Dr Comberg's note of 30 June 2020 at paragraphs 28-29. However, this simply begs the question as to what it was that was inhibiting Dr Comberg from increasing his claim to 30.5 days, that is to say 19 days plus 11.5 days.

438. In my judgment, this alternative way of putting the case, should at the end of the day add nothing. The reasons for this are as follows:

(1) The Court was inclined to exclude this way of putting the matter on the basis that it is a different way of putting the case and there is no excuse for its not having been put this way. An answer to this is that there has been liberality extended to both parties, to Dr Comberg for being allowed to pursue it when it was not pleaded with particularity and nor was evidence led about it, and to VivoPower in allowing the matter to be developed by the many pages in the supplemental schedule which was not included in any earlier analysis.

(2) VivoPower refers to the contractual power to carry forward holiday pay in Clauses 9.1 and 9.2 which state:

"9.1 …Holidays may be carried forward from one holiday year to the next where, for work-related reasons the Executive is unable to take holiday during the holiday year. No payment shall be made by the Company (during the continuance of this Agreement) in lieu of holidays not taken except as required by law or as set out under sub-clause 9.2.

9.2 Upon termination of this Agreement for whatever reason the Executive shall be entitled to payment in lieu of such of his holiday entitlement under sub-clause 9.1 as has accrued (on a pro rata basis) in the holiday year in which the Termination Date falls but has not been taken ***or*** *such holiday the Executive is entitled to under sub-clause 9.1 that has been carried forward in accordance with clause 9.1…"* [emphasis added]

(3) The right is limited. The emphasis above of the word "or" is because the Clause, which was negotiated between the parties appears to require that either the claim is by reference to the time carried forward or the current year but not both. Whilst in some contexts, the word "or" could mean "and", in this context, there is no reason to interpret it as such. The employer wished to impose ceilings on the amounts of money to be paid in respect of holidays carried forward. Here it appears to have the following ceilings, namely; (i) only to be brought forward if unable to take holiday for work-related reasons, (ii) only carried forward to the next year, and (iii) an election of current year entitlement or days carried forward from the previous year. There is no reason not to interpret the word "or" as giving rise to an election. It is all part of the restricted nature of the entitlement. (This is in part consistent with the interpretation of Dr Comberg which does not seek to add the 11.5 days from the prior year to the 19 days of the year of termination. However, it is inconsistent by seeking to combine them subject to the ceiling of 19 days).

(4) In my judgment, it would require evidence to show inability to take holiday in the previous year. This is not shown simply by the table at [**E7/2042.1.**] It simply shows holidays not taken during the previous year. In my judgment, this has not been proven.

(5) If that is wrong, and the Court could assume it as implicit, then the Court as a matter of fairness should receive the list of documentary references indicating that Dr Comberg appeared to have spent some of the 11.5 days on holiday in addition to the 6 days recorded: see Mr Ciumei QC's note dated 17 July 2020 at paragraph 18. In particular, the following days appear to have been spent on the business of other companies of which he was a non-executive director, namely 20 September

2016, 16 and 17 November 2016 and half days on 25 January 2017 and on 22 March 2017 (Solar Century). Likewise, he went back to Germany on 14 December 2016 for a Behrens meeting the next day and then returned to London. This appears to be 1.5 days on Behrens business. There is also a flight which Dr Comberg took on Friday 4 November 2016 to Venice with his wife, which appears to be vacation. There are other questions which are raised in the note, but it is not necessary to go through these. This would indicate about 6.5 days at least of the 11.5 days of additional holiday, such that this claim could not be more than 5 days. It would therefore follow, on the basis that this was an alternative claim to the holiday claim in respect of the year of termination, that this was not capable of increasing the claim for holiday pay.

439. In these circumstances, even if this different way of putting the holiday entitlement is permitted at this stage, it does not add anything. First, the point of construction is a good one that a party cannot seek to recover both the days from the previous year and the year of termination: there is an election. Second, it has not been proven that the amount of the holiday entitlement carried forward (if there was an entitlement) was greater than the holiday entitlement in the year of the termination. Thirdly, it has not been proven that these days had to be carried forward, namely that there was an inability to take the holiday in the preceding year.

Conclusion

440. The conclusion is that Dr Comberg has proven 6 days out of the 19 days which he has claimed in respect of holiday pay. The parties are requested to calculate how in money terms that is to be reflected in the order to be drawn up to reflect this finding.

Issue 14: What, if any, interest is Dr Comberg entitled to?

441. The Court will return to this question of interest as a consequential matter arising out of this judgment. The issue is not only the rate, but also the periods for which any interest should be awarded.

VII Conclusions

442. There has been a myriad of areas of disagreement between the parties. A full summary of the findings would occupy many pages. Without being comprehensive, it might be useful to summarise in very brief form the following conclusions, namely that

(1) there will be judgment to Dr Comberg for damages for wrongful dismissal;

(2) the defence of VivoPower that it was entitled to dismiss Dr Comberg in any event whether on the grounds of repudiatory breach or under the terms of the Service Agreement is rejected;

(3) the damages for wrongful dismissal are by reference to loss of salary subject to Dr Comberg's mitigation, but there is no loss of bonus. The damages include loss of Omnibus/EIS Shares, but they are limited both as regards the numbers of shares and their value;

(4) there will be judgment for Dr Comberg for Deferred Remuneration under the Deferred Remuneration Agreement;

(5) Dr Comberg's claims under the alleged Contract Term Agreement and the alleged Listing Fee Agreement are dismissed;

(6) Dr Comberg's alternative claim for a quantum meruit to the claim in respect of the Listing Fee Agreement is dismissed;

(7) Dr Comberg is entitled to the October payment;

(8) Dr Comberg received £1,800 per month in respect of medical insurance and also an amount towards his pension: those sums are to be built into his outstanding salary and Dr Comberg's damages for wrongful dismissal.

(9) Dr Comberg is entitled to 6 days of Accrued Holiday Entitlement.

443. The parties are asked to express in money terms the effect of the various findings and to seek to agree a draft order to give effect to the findings of the Court. It remains to thank Counsel and all those involved in the preparation of the case for the assistance which they have given to the Court.