Neutral Citation Number: [2020] EWHC 2787 (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: 20 October 2020

Before :

MR JUSTICE FREEDMAN

- -

Between:

Dr Philip Comberg

Claimant

- and -

(1) VivoPower International Services Limited

(2) VivoPower International PLC

Defendant

- -
- -

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: **11 September 2020**

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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 Tuesday 20 October 2020 at 2.00pm.

MR JUSTICE FREEDMAN:

I Introduction

1. This is a judgment about consequential matters following the hand-down of the judgment in this matter Neutral Citation Number [2020] EWHC 2438 (QB) and detailed written and oral submissions. A specific issue has arisen about how to express and calculate the amount of the mitigation of losses for wrongful dismissal. The remaining matters relate to costs.

II Is credit to be given for mitigation gross or net of taxes?

2. After the judgment was handed down in draft and prior to the formal hand-down on 11 September 2020, a discrete point arose for the first time as to whether the credit in respect of the mitigation of damage is to be on the gross sums received or on the net sum after tax. The particular moneys are those which were the subject of a consultancy agreement between VionX Energy Corporation ("VionX") and a company owned by Dr Comberg incorporated in Guernsey, namely Tiandi Consulting Limited ("Tiandi"). It had appeared from the way in which the case had been conducted the gross sum would be credited: see the opening skeleton of Dr Comberg dated 24 February 2020 at para. 148 which identified the gross sums and said that credit would be given.

3. In the draft judgment, the parties were asked to apply the usual principles of calculation of damages in a wrongful dismissal so as to take into account the tax treatment of the moneys. These principles are well established, and it seemed likely that the parties would be able to do straightforward computations.

4. By a letter sent on 10 September 2020 from Hausfeld & Co LLP for Dr Comberg to Scott + Scott UK LLP for VivoPower, it was said for the first time that the relevant sums to be deducted for mitigation were net sums after the application of UK tax, despite the fact that the monies received in the Channel Islands were exempt from tax. The reasoning was as follows:

"(i) Whilst his service company does not pay tax on receipts given it is a Guernsey registered company, advice obtained from PwC confirms he is liable to pay tax at the rate of 45% on bringing monies out of Guernsey and into the UK.

(ii) He does not have any use for the VionX monies in Guernsey. He does not live in Guernsey and as such does not have any reason or need to spend the monies in Guernsey.

(iii) His principal place of residence is in the UK where he and his family incur most of their living and other expenses. In circumstances where his access to other sources of liquid capital is limited, **he has transferred some VionX monies from his Guernsey account into the UK and on which he paid tax in the UK.** The remaining monies are held in his Guernsey account pending transfer into the UK when it will be taxed at the abovementioned rate. (emphasis added)"

5. It was submitted on behalf of Dr Comberg at the hearing on 11 September 2020 that all of the mitigated losses should be treated as being subject to UK tax either on the basis that some of the moneys had been transferred or that they would be transferred, and in either case, UK tax is payable by him on remittance to the UK. It was submitted on his behalf that he is not like a very rich person who did not require the money for his needs. Since he would be remitting all of the money, the mitigation should be by reference to the net sum of the remittances on the basis that they would be transferred to the UK and there taxed.

6. It was submitted on behalf of VivoPower that Dr Comberg had conceded the position in the opening skeleton argument that the gross sums were to be treated as mitigation, and that if this point were to be run, it ought to have been pleaded and the subject of evidence. Neither was the case. The Court did not have the information on which to make any judgment other than to deduct the gross sums.

7. Having heard argument, I reserved judgment. On 17 September 2020, I sent a note to the parties referring to this issue and I quoted from the letter of Hausfeld & Co LLP. I then wrote in the following terms, namely:

"(2). VivoPower has already said that it is too late for this information to be provided because it should have been provided before. Although I am sympathetic to that submission, it would be unsatisfactory to punish Dr

Comberg for his failure to act earlier, and the lateness of this can be corrected in costs.

(3). In any event, the information in the letter is inadequate in that it fails to provide information about the following:

(i) how much money was paid brought out of Guernsey to the UK out of the consultancy money received by Tiandi;
(ii) in respect of such money, when was each and every sum received by Tiandi, identifying the same;
(iii) in respect of each such sum, how much was brought into the UK and when and how and into which account;
(iv) has tax been paid on the amounts which have been paid into the UK and when?

(4). In order for this information to be useful, it will be necessary to have supporting documents including (but not necessarily comprehensively) the accounts of Tiandi showing the payments received, the transfers to the UK so as to show when they were made, and how those moneys have been treated for tax purposes in the UK. It is important for Dr Comberg prove that it is these consultancy moneys and not other moneys of Tiandi which have been remitted to the UK, for otherwise it may be that the moneys brought into the UK have been derived from sources other than VionX. It may be that VivoPower would have further directions as to how to deal with this aspect of the case, which can be added.

(5). Further, for the purpose of writing my judgment, although I have been told what the relevant principles of law are to the effect that money remitted to the UK from Guernsey will be taxed in the hands of the recipient, it would be helpful to be referred to the tax provisions to that effect. It would also be helpful to understand what the tax status of Dr Comberg is so that it is understood why he is not taxed on the receipt of the money in Guernsey. This ought to be a

straightforward exercise given that the Court has been told that he has been acting on the advice of his adviser PwC.

(6). In the first instance, I should wish a response from the parties about the way forward. What directions would they jointly consider are appropriate? To the extent that there is no agreement (and it is hoped that they will cooperate so as to agree directions as far as possible), what is in issue? What directions are not agreed, what is sought and what is resisted? I should ask the parties to provide a joint response by 4pm on Monday 21 September 2020."

8. There was no joint response because nothing was agreed. On 21 September 2020, Hausfeld & Co LLP indicated that it wished to put in evidence of about 3-4 pages to deal with these points. Scott + Scott UK LLP for VivoPower said that the evidence went beyond what the Court had suggested and in any event expressed reservations about the approach taken by the Court on the basis that the Court should not sanction an attempt to re-open the case between the hand-down of a judgment in draft and the finalisation of the order. This was inconsistent with the principle of finality of litigation. Such opportunity should be reserved for a truly exceptional case. There was nothing exceptional about this case: the information could have been deployed before and during the trial, and it was now too late.

9. The Court responded to these submissions through my clerk on 22 September 2020 saying, "The Court will consider such material as it receives from both parties both procedurally and substantively in order to seek to do justice between the parties."

10. On 23 September 2020, Hausfeld & Co LLP submitted letters from PwC and Dr Comberg and a bundle of three documents about the treatment of tax. The letters presented an account that was in one material respect different in emphasis from the email of Hausfeld & Co LLP of 10 September 2020 quoted above. The letter from PwC stated that "he has not had to remit any **significant** amounts relating to VionX income (emphasis added)" as he had available sums that did not attract UK taxation, particularly income prior to UK residence on which German tax was paid. The only sum which he remitted from the VionX income was a sum of £10,000 which was transferred to the UK on 3 August 2018 and on which tax was paid at a rate of 20% as a basic rate taxpayer.

11. PwC stated that Dr Comberg intended to transfer the remaining VionX income into the UK in due course, principally to buy a residential property in London, where it was his intention to spend the medium term. His remittances to the UK would be taxable on the principles in section 809F of the Income Tax Act 2007. This was confirmed in a letter of Dr Comberg dated 23 September 2020. He says that even if he did not purchase a property in London, he would nonetheless need to transfer the entirety of the VionX earnings into the UK and would do so and tax would be payable on it. He has not done this thus far since he has had other funds available and his funds are now near to being exhausted. His intention is to transfer the money to the UK within the next 18 months. He has been transferring sums to the UK of between £195,000 and £250,000 over the last two to three years. If he were to move back to Germany, there are similar remittance rules.

12. The use of Tiandi was on the advice of or with the approval of PwC. It is not suggested that there was anything unlawful or illegal about this structure. However, it is apparent that its purpose was to save tax. Otherwise, the consultancy could have been with Dr Comberg in London. There was a difference. In the event that the money was to be paid to Dr Comberg in London, he would have been taxed on that money in the UK in the usual way. In Hausfeld's letter of 10 September 2020, it was stated on behalf of Dr Comberg that what occurred in respect of the money received by Tiandi is that he would remit moneys received in the Channel Islands to the UK where he lived. When he did so, he would be taxed on those remittances as if the money had been earned originally in the UK.

13. Following this, there were submissions in writing made on behalf of VivoPower dated 29 September 2020 headed "Defendants' Note on Consequential Matters" prepared by Mr Ciumei QC and Mr Lloyd, and a response on behalf of Dr Comberg in an email dated 30 September 2020 prepared by Mr Brown.

III Discussion

14. The starting point is that Dr Comberg must give credit for the moneys received by way of mitigation. If there is no tax payable on the same, he must give credit for the gross sums received, because there is by definition no net sum. However, if they are subject to tax, then he needs only give credit for the net sum received.

15. In the instant case, when the money is received in the Channel Islands, there is no tax payable. If it is brought into the UK, tax is payable on the remittance. However, it is now between 2 years and more than 2½ years since the money was received in the Channel Islands and it has not been brought into the UK save for a sum which was regarded by PwC as not "significant", namely a sum of £10,000 that is to say less than

5% of the gross sums received. There is a rather stark contrast between that information recently provided and the information contained in the letter of 10 September 2020, namely that Dr Comberg brought "some VionX monies from his Guernsey account into the UK." Given that this sum was not significant, it would have been more satisfactory if the small sum had been identified rather than there being an impression that a significant sum had been remitted.

16. It follows that as at the time of this judgment, the position is that no tax liability has been incurred on the VionX moneys save for the £10,000 brought into the UK more than 2 years ago. There is no obligation on the part of Dr Comberg to bring the money in to the UK. If he were to be allowed to treat the mitigated moneys as subject to tax, it would be in circumstances where tax may never be incurred. It would also be on the basis of a statement of intention about something some time off in respect of moneys received more than two years ago.

17. I have come to the conclusion that in respect of any moneys other than the £10,000, the gross sums should be credited. I have reached this conclusion for substantive, alternatively, procedural reasons.

18. The substantive reason is that Dr Comberg properly, with the assistance of PwC, arranged his tax affairs so that he could receive the gross sums without being taxed. He did so in order to save tax: otherwise, he would or could have received the moneys in the UK and paid tax on the remittances. The consultancy arrangement through Tiandi was in order to minimise his liability to tax. He has been under no compulsion to pay tax on the moneys received by Tiandi or remitted to him in the Channel Islands. In my judgment, his benefit is that he did not incur a liability to tax at the point of receipt of the moneys. Further, save for the sum of £10,000 remitted, he has not incurred a liability to tax over the last 2-2½ years because he has chosen to organise his affairs not to bring the money into the UK. As of now, the gross sums comprise his benefit. The fact that years after receiving the moneys, he may choose to remit the moneys to the UK and incur tax is his election.

19. The references in submissions to Dr Comberg not being like a Russian oligarch and requiring these moneys in order to discharge his outgoings is very imprecise. He may not be like a Russian oligarch, but that is a rather extreme submission which does not actually indicate how well-endowed he may have been. Dr Comberg has been incurring annual expenditure in the UK of £195,000-£250,000 without the need over more than 2 years to remit the moneys from the Channel Islands into the UK. This indicates very substantial resources elsewhere. In an email of 26 June 2017, Dr Comberg has described various properties owned by him or members of his family of considerable value. Further, he is about to receive a substantial sum as a result of this judgment. It may be that some of those moneys remain available to him even if there is a deduction

in his costs awarded and even if he does not make full recovery of his outlay after an assessment. All of this casts doubt on the assertion that he will be remitting the moneys in the Channel Islands to the UK. Further, and in any event, having the benefit of such properties and indeed money in the Channel Islands, it may be that he would be able to borrow and would not be dependent on remitting the moneys from the Channel Islands into the UK. It follows that there is a superficiality about the assertion that Dr Comberg would be bringing the money from the Channel Islands into the UK within the next 18 months. At very least, it leads to significant inquiry in order to test the bald assertions.

20. It is not necessary to make a judgment as to when tax paid should be taken into account and as to the time between receipt and remittance when it might be that the credit need only be for the net sum. It suffices to come to a conclusion on the facts of the instant case where the circumstances are as follows:

(1) a tax structure had been set up so that at the point of receipt of the consultancy monies, there was no obligation to pay tax, and tax would not necessarily become payable;

(2) in the period of over two years later, the money still remained in the Channel Islands, and tax had not become payable over those years;

(3) at the point of judgment, if Dr Comberg had to give credit for something less than the gross sums, he stood to receive a potential windfall in the event that he continued to act in a way that would not lead to a liability to tax;

(4) Dr Comberg has asserted as to his intentions of how he would use the money in the future many months from now, but he is free to change his plans and is not compelled to use the money in this way; and

(5) at the point of the judgment, it depended on how Dr Comberg used the money as to whether tax would become payable in respect of the same, such that if the net sum only were deducted, Dr Comberg could elect to have the benefit of the continued.

21. In my judgment, since the money was not remitted at the time of receipt or within the last two years and more, and/or there is no obligation to remit them at any time in the future, the Court ought to hold that Dr Comberg should not be entitled to make a deduction based on some possibility about the future within the election of Dr Comberg. The principle is to reflect how the loss was felt, and if there is mitigation but a concomitant liability to taxation, then the loss is usually reflected by giving credit for the net loss. That is not to say that where there is no liability to pay tax due to the taxation structure set up by a claimant that a putative net sum can be set up because of how that claimant and may choose to deal with the money at some time years after the receipt of the money. In my judgment, that does not reflect how the loss was mitigated at the time.

22. Dr Comberg in an email of 30 September 2020 by Mr Brown his Counsel says that it is not a principle of mitigation that a claimant must demonstrate that the relevant loss had occurred at the time of the judgment, and "this often involves a degree of projection into the future and determination as to what is likely to happen not simply what has in fact happened at the date of judgment." That proposition is within sensible limits true, but in this case, it is sought to open up speculation of a kind that is not warranted. The only reality is that Dr Comberg set up a structure designed not to make him liable upon receipt of the money in the Channel Islands, and which he has used to his advantage over the last two years or more with the effect that he has legitimately avoided tax. There is no certainty as to what is to happen in the future, and it lies entirely within the say-so of Dr Comberg as to whether he will transfer all or part or none of these moneys into the UK. In those circumstances, his loss should be assessed on the basis of that structure, namely that he should give credit for his gross receipts.

23. If, contrary to the foregoing substantive reasoning, the Court is required to predict the future of what Dr Comberg will do with the money, then the matter needs to be looked at procedurally. It would only then be fair that the assertions in the letters of Dr Comberg and PwC are not treated at face value but be subject to scrutiny. It has already been seen how different in degree is the statement in the letter of Hausfeld & Co LLP of 10 September 2020 about some of the moneys being remitted and the true position being that the monies are so small that have been remitted over a period of over two years is not "significant". It would follow that for these matters to be investigated properly, it would be legitimate to seek wide-scale disclosure about how Dr Comberg organises his affairs and all the assets available to him, and the most tax effective way in which he might organise the purchase of a property. It would then be just to give an opportunity for cross-examination of Dr Comberg. Likewise, the matters set out in the letter of PwC might be challenged by other expert evidence, and again an opportunity for cross-examination might be appropriate.

24. A procedural objection was taken by VivoPower after my note was sent that this additional material ought not to be admitted because it was wrong in principle to allow

further material after the judgment had been sent in draft in view of the principle of finality of litigation. They invoked an appeal in respect of ancillary relief where a wholly new argument going much more to the heart of the case than the instant argument was raised for the first time by one of the parties after the draft judgment had been handed down in draft: see *AR v ML* [2019] EWFC 56. Mostyn J took the view that it was contrary to the principle of finality to open up the case after the judgment had been handed down in draft. The case could not be opened up because of material which was not placed before the judge, but which could have been: see para. 14.

25. Despite this line of authority, I was willing in principle to explore whether tax had been incurred or paid on the monies paid under the consultancy agreement. That was consistent with other parts of the judgment where I kept open the ability to adjust the figures to take into account taxation. I was also mindful of the fact that in the course of the case after evidence, I had permitted further information to be provided about various subjects as set out in the judgment. That included bonus, shares and holiday pay. It worked to the advantage of both parties (depending on which issue) to decide the matter not according to the burden of proof, but with the knowledge of the relevant facts.

26. In this case, the matters have gone beyond that which was contemplated about what had happened in respect of the consultancy moneys which were received by Tiandi in 2018. They include projected expenditure years after the moneys from consultancy were received, that is projected even now. They open up predictions about the future and some months or more into the future. I have admitted the evidence de bene esse for the purpose of the substantive analysis thus far, and have found that save as to the £10,000 on which tax was paid, it would not give rise to anything other than an obligation to give credit for the gross sums received. If I were wrong about that, and the material contained in the letters of PwC and Dr Comberg were capable of giving rise to a different result, then I would disallow the information on the basis that the new issue would give rise to the need for considerable further inquiry. Dr Comberg through the email of Mr Brown says that there has been disclosure of Dr Comberg's financial affairs. However, it seems unlikely that no further documentation would be required to deal with the submission that Dr Comberg needed to have access to all of his offshore money in order to meet possible expenditure in the UK in the future. Further and in any event, the letters of Dr Comberg and of PwC would legitimately give rise to the need for (a) VivoPower to have the opportunity to respond by letters and/or witness statements and/or expert evidence, and (b) VivoPower to have the opportunity to cross-examine Dr Comberg and possibly the relevant people at PwC. This was material which could have been advanced in the course of the case. It did not take place, and in my judgment, it would be too late to allow it to take place at this stage. There has to be finality in litigation. This is of an order which is qualitatively and quantitatively different from the answers to the questions sought after evidence and before the release of my draft judgment.

27. In fact, when the big picture is seen, Dr Comberg through his lawyers was right in the first approach to give credit for the gross earnings. The substantive way of looking at the matter is clearly right. It would have been unproductive to go to great lengths to seek to present an alternative picture by documents and witness evidence which was most unlikely to take the case in a different direction. In the end, the justice of the case meets with the same result whether looked at substantively or procedurally.

28. Without in any way affecting the principle, the Court is willing to make an allowance for the tax paid on the £10,000 remitted to the UK, and to reduce the gross sum by £2,000 paid in tax. In my note to the parties, I had raised the question as to whether any remittance was necessarily derived from VionX. It has been asserted that the moneys in the account from which the £10,000 was remitted to the UK were derived solely from the VionX moneys. It also coincides roughly in time as to when the moneys were received and when they were remitted. It is proportionate in respect of such a small sum to find that it is proven adequately that the moneys remitted were originally paid from the consultancy, and that no more is required to prove that one was derived from the other.

29. In the context of this issue, an entitlement to £2,000 net is in my judgment an insignificant finding in favour of Dr Comberg when it comes to the costs of this issue. Overall, the finding on this issue is in favour of VivoPower, and this will inform the question of the costs of this issue when this will arise for determination. I shall leave that until the other issues of costs have been considered.

IV Costs: who is the successful party?

30. The first question as regards costs is to identify which party is the successful party, if one can be identified. The reason for this is the general rule that the unsuccessful party pay the costs of the successful party in CPR 44.2(2) as follows:

> "(2) If the court decides to make an order about costs –
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> (a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but
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> (b) the court may make a different order."

31. In this case, Dr Comberg and VivoPower respectively each claim to be the winning party. Dr Comberg says that:

(1) he is the party who is going to be the recipient of money;

(2) although the sum claimed is not the totality of the sum claimed, it is still a very substantial sum of money;

(3) the claims where he has succeeded have occupied a large part of the hearing, particularly the wrongful dismissal claim and the deferred remuneration claim.

32. VivoPower says that:

(1) the success is only about 20% of the claim: in other words, VivoPower has succeeded in resisting about 80% of the claim;

(2) the contract term fee and the listing fee claims have failed as has the quantum meruit claim relating to the listing fee work;

(3) the very substantial claims of the bonus and the Omnibus share claim (save as to about 10% of it) and most of the controversial aspects of the holiday pay agreement have failed.

33. In my judgment, Dr Comberg is the successful party. I have come to that view for the following reasons:

(1) in my judgment, the most significant part of the claim has been the claim for wrongful dismissal. This claim involves not only the question of resignation/dismissal, but also the ability to dismiss for breach. I have accepted the submission that this occupied more time of the trial and more of the pleadings and witness statements than all the other aspects of the case. I am also satisfied that the combination of the wrongful dismissal claim and the deferred remuneration claim accounted for the majority of the trial and the claim as a whole.

(2) a part of the wrongful dismissal claim in its wider sense comprised the allegations of misconduct/incompetence. After the settlement of the counterclaim, these matters were dealt with entirely in respect of the claim. A determination against Dr Comberg could have been harmful to his reputation. It was important to Dr Comberg to obtain a determination in his favour, but

especially so because of the potential damage if those allegations against him had been upheld.

(3) there was a substantial amount of time in respect of the oral fee agreements, but less (even together) than the wrongful dismissal claim in its wider sense as described above. Each of the three oral fee agreements involved a similar time and evidence to each of the other oral fee agreement claims.

(4) the bonus claim, the Omnibus share agreement and the holiday pay claim did not take much of the time of the trial, and indeed it was the paucity of evidence in respect of these heads of claim which led to the questions being asked during the process of my writing the judgment.

34. It follows that the fact that the claim was unsuccessful in quantum terms as to a large part of it and that significant parts of it were unsuccessful altogether do not affect the overall identification of Dr Comberg as the successful party. Dr Comberg relies on cases where the recipient of the cheque is identified as the winning party. They contain dicta to the effect that the Part 36 regime provides a method for the paying party to protect itself. It has often been said that it would affect certainty if it were thought that the ultimate recipient of the cheque would not be regarded generally for this purpose as the successful party.

35. I therefore take that into account in this case as helping to identify the successful party. It is important to add that this is not a case where the cheque was for a small amount. It is for considerably less than the claim as a whole, but it is a large sum of money comprising very roughly in the region of £700,000. Those claims where there has been failure to achieve more include the bonus claim and most of the EIS share claim, but the time spent and evidence was very limited. I shall discuss the failure of the contract term fee and the listing fee claims shortly. At this stage, it suffices to say that the combination of success on the wrongful dismissal claim in its wider sense and the deferred remuneration claim combined with the size of the sum awarded (which is not a minor sum even in the context of the sums claimed) make Dr Comberg the clear winner.

V Costs: particular circumstances to take into account

36. It is then necessary to consider all the circumstances when making an order as to costs as is set out in CPR 44.2(4) as follows:

> "(4) In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including –
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> (a) the conduct of all the parties;
>
> (b) whether a party has succeeded on part of its case, even if that party has not been wholly successful; and
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> (c) any admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply."

37. Further, as regards the conduct of the parties, the following matters are referred to at CPR 44.2(5) as follows:

> "(5) The conduct of the parties includes –
>
> (a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the Practice Direction – Pre-Action Conduct or any relevant pre-action protocol;
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> (b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
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> (c) the manner in which a party has pursued or defended its case or a particular allegation or issue; and
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> (d) whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim."

38. Further, as regards issue-based costs orders, the following appears in CPR 44.2(6) and 44.2(7):

> "(6) The orders which the court may make under this rule include an order that a party must pay –
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> (a) a proportion of another party's costs;
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> …
>
> (c) costs from or until a certain date only;
>
> …

(e) costs relating to particular steps taken in the proceedings;

(f) costs relating only to a distinct part of the proceedings; and

…

(7) Before the court considers making an order under paragraph (6)(f), it will consider whether it is practicable to make an order under paragraph (6)(a) or (c) instead."

A Effect of success being partial only

39. The first matter to consider is whether there should be an issue-based costs order/a deduction of a proportion or part of the costs of Dr Comberg to reflect those issues on which Dr Comberg has been unsuccessful.

40. Dr Comberg says that there should be no issue-based costs order/deduction for the following reasons:

(1) the starting point is that he, as the successful party, should have all of his costs;

(2) there should be no departure solely because he has not succeeded on all of the issues and claims. This is a usual incidence in a complex commercial dispute and this employment is at least close to being such a dispute. It is a departure from the general rule even to make an order deducting costs from a successful party: see White Book Vol 1 at notes 44.2.13 and 44.2.18;

(3) VivoPower could have protected itself with an effective Part 36 payment or Calderbank which it did not do; and

(4) the issues on which Dr Comberg lost cannot be described as unreasonably brought.

41. VivoPower says that there should be an issue-based costs order/deduction for the following reasons:

(1) the areas on which Dr Comberg has lost have been very substantial comprising about 80% of the amount of the claim in terms of quantum;

(2) a very significant part of the time of the action have been taken up with the issues relating to the alleged contract term agreement and the listing fee agreement and the listing services quantum meruit;

(3) the claims which Dr Comberg lost, whilst having some common issues are to a large extent discrete of the other issues, and it follows that there would have been a very substantial amount of saving of court time and costs had those claims not been brought. There are complicated methods to give effect to this as identified under the headings Stages 1 and 2 in the skeleton on behalf of VivoPower; and

(4) the claims which Dr Comberg lost were unreasonably brought.

42. The Court has a broad discretion as to how to approach such costs, and in particular as to when to adopt an issue-based costs award. There is a useful set of propositions stated by the editors of the White Book Vol. 1 at 44.2.10 of assistance in respect of the exercise of the discretion of the court to adopt an issue-based costs order as follows:

> "Propositions that may be derived from the authorities and which may be stated with a degree of confidence are as follows.
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> 1. The rules themselves impose no requirement to the effect that an issue-based costs order should be made only "in a suitably exceptional case", and none is to be implied, although "there needs to be a reason based on justice" for departing from the general rule, and that the question of the extent to which costs of a particular issue are to be disallowed should be left to the evaluation and discretion of the judge, "by reference to the justice and circumstances of the particular case" (F&C Alternative Investments (Holdings) Ltd v Barthelemy (No.3) [2012] EWCA Civ 843; [2013] 1 W.L.R. 548, CA, at paras 47 and 49 per Davis LJ (a case where a proportionate costs order, made in relation to two issues on which the parties who had succeeded overall had not succeeded, was upheld)).
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> 2. The reasonableness of taking failed points can be taken into account, and the extra costs associated with them should be considered (Antonelli v Allen, The Times,8 December 2000, unrep. (Neuberger J); Sycamore Bidco Ltd v Breslin [2013] EWHC 583 (Ch); [2013] 4 Costs L.O. 572 (Mann J)).
>
> 3. Where the circumstances of the case require an issue-based order in the form of an order expressed by reference to the costs of the issue, that is what the judge should make; however, generally, because of the practical difficulties which this causes,

the judge should hesitate before doing so and, where practicable, the order should be expressed as a percentage or with reference to a distinct period of time (r.44.2(7)) (Multiplex Constructions (UK)Ltd v Cleveland Bridge UK Ltd[2008] EWHC 2280 (TCC); [2009] 1 Costs L.R. 155 (Jackson J) at para.72(iv)).

4. There is no automatic rule requiring an issue-based cost order in the form of a reduction of a successful party's costs if he loses on one or more issues (HLB Kidsons v Lloyds Underwriters[2007] EWHC 2699 (Comm); [2008] 3 Costs L.R. 427 (Gloster J) at para.10). The mere fact that the successful party was not successful on every last issue cannot, of itself, justify an issue-based costs order (J Murphy & Sons Ltd v Johnson Precast Ltd (No.2) [2008] EWHC 3104 (TCC); [2009] 5 Costs L.R. 745 (Coulson J) at para.10).

5. The courts recognise that in any litigation, especially complex commercial litigation but including personal injury litigation, any winning party is likely to fail on one or more issues in the case (possibly issues on which the losing party could have taken steps to protect himself, at least to an extent, to costs liability). That point is frequently made; see Budgen v Andrew Gardner Partnership [2002] EWCA Civ 1125 at para.35 per Simon Brown LJ; Travellers' Casualty and Surety Co of Canada v Sun Life Assurance Co of Canada (UK) Ltd [2006] EWHC 2885 (Comm), (Christopher Clarke J) at para.12; Goodwin v Bennetts UK Ltd [2008] EWCA Civ 1658, at para.13; Pindell Ltd v Airasia Berhad [2010] EWHC 3238 (Comm)(Tomlinson LJ) at para.12; Fox v Foundation Piling Ltd [2011] EWCA Civ 790; [2011] C.P.Rep. 41, CA, at paras 47 to 49."

43. In applying this to the facts of a particular case, Turner J in *Lyons v Fox Williams LLP* [2016] EWHC 2427 (QB) (not affected by an unsuccessful appeal at [2018] EWCA Civ 2347) added "In assessing a proportionate costs order the judge should consider what costs are referable to each issue and what costs are common to several issues. It will often be reasonable for the overall winner to recover not only the costs specific to the issues which he has won but also the common costs…"

44. There were particular cases to which Dr Comberg drew attention of assistance to the court including:

(1) *Fox v Foundation Piling Limited* per Jackson LJ [2011] EWCA Civ 790 at paras. 62-63, where Jackson LJ there said that there had been an unwelcome tendency to depart from the starting point in CPR 44.2(2)(a) which generated

uncertainty, and that an offer under CPR Part 36 provided protection where a claim was regarded as inflated. Cases of dishonest inflation were different.

(2) *AL Barnes Ltd v Time Talk (UK) Ltd* [2003] EWCA Civ 402 at para. 28, where Longmore LJ held:

> "In deciding who is the successful party the most important thing is to identify the party who is to pay money to the other. That is the surest indicator of success and failure."

(3) *Day v Day* [2006] EWCA Civ 415, at para. 30 where Ward LJ said:

> "I would go further and say that in a case like this, the question of who is the unsuccessful party can easily be determined by deciding who has to write the cheque at the end of the case."

(4) *Budgen v Andrew Gardner Partnership* [2012] EWCA Civ 1125, where Simon Brown LJ at para. 35 stated that the court could properly have regard to the fact that in almost every case the winner is likely to fail on some issues and it should be less ready to reflect that sort of failure in the eventual costs order than the more fundamental failure to make an offer sufficient to meet the true entitlement of the winner.

(5) *Sycamore Bidco Limited v Breslin and another* [2013] EWHC 583 (Ch), where Mann J said at para. 12 that the fact that a party has not won on every issue is not, of itself, a reason for depriving that party of its costs. One has to look at the matter globally and consider the extent, if any, to which it just to deprive the successful party of costs, referring to *Antonelli v Allen* The Times 8 December 2000.

45. The difficulties in making a percentage costs order have been noted in cases and the exercise has to be a broad brush one. The White Book refers to this at 44.2.8 as follows:

> "The difficulties inherent in making a percentage costs order have been noted by judges in a number of cases and it has been stressed that the exercise "has to be a broad brush one" (*Sycamore Bidco Ltd v Breslin [2013] EWHC 583 (Ch); [2013] 4 Costs L.O. 572*, (Mann J) at para.28). In a given case, it is unlikely (certainly in a case of any complexity) that measuring

> the amount of court time, the volume of documents, the number of witnesses, the time and effort of lawyer preparation and other indicia relevant to the incurring of costs devoted to one issue and that devoted to another will be a simple exercise. Such measures "can only be indicia to be taken into account"; the best that can be achieved "is an estimate which is necessarily going to be somewhat crude" (*SmithKline Beecham Plc v Apotex Europe Ltd (No.2) [2004] EWCA Civ 1703; [2005] F.S.R. 24, CA*, at paras 27 and 28 per Jacob LJ)."

46. I have come to the following conclusions:

(1) Although Dr Comberg is overall the successful party, this is a case where there should be some deduction from the costs because some of the matters where Dr Comberg has not succeeded are more than issues on the way, but are claims which account for a significant part of the overall costs even making allowance for common issues. Not only that, but the claims in respect of the contract term fee agreement and the listing fee agreement comprised about $1.8 million, that is far in excess of the amount awarded in this case. In other words, these unsuccessful claims were not only time consuming, but they were relatively large in amount.

(2) There are some issues where the Court ought not to be make a deduction to take into account the point that a successful party does not necessarily win on each point. It also takes into account that although some of the issues were very substantial in amount, the costs incurred were not great relative to the case as a whole. This includes especially those claims which were the subject of little evidence and where they became more developed in response to questions from the Court after the close of evidence (the bonus and the EIS share claim, albeit that Dr Comberg had limited success on the EIS share claim). This is even although the amount of the claim for the bonus and the larger part of the claim for the EIS claim which did not succeed were also significantly greater in amount than the claim which did succeed. In my judgment, those claims should be treated as a part of the recognition that the winning party is unlikely to succeed on every aspect of its claim and on the ability to have protection through Part 36 offers and on the fact that those

claims were not particularly time or evidence consuming. The claim to holiday pay only involved substantial work following questions after the conclusion of the oral hearing: on the one hand, there was no good reason for withholding this payment, and on the other hand, most of the contentious issues were resolved in favour VivoPower. This aspect too did not involve any large time prior to the preparation of notes from the parties, and the non-payment of the 6 days of holiday pay is a significant point going against VivoPower on this issue.

(3) The parts of the claim which do merit an issue-costs based order/a deduction from the overall costs are the claims relating to the alleged contract term fee agreement and the alleged listing fee agreement/the quantum meruit for listing services. I do not find that these claims were brought without any reasonable basis, but the result is very clear on the evidence. They are largely discrete, albeit that there is some overlap in that they depend on witnesses (Mr Chin and Dr Comberg) whose evidence on other issues has some relevance to the appraisal of these claims.

(4) VivoPower estimates 25% of the claim for these claims. From this, they deduct 5% of the costs referable to the costs of the deferred remuneration fee agreement, coming to a balance of 20% of the costs in its favour as regards the fee agreements and the quantum meruit in respect of listing services. Looking at the pleadings and the judgment, they do comprise a significant percentage of the claim as a whole. The evidence and the submissions in respect of the contract term agreement are summarised at paragraph 256 and following of the judgment and in respect of the listing fee agreement at paragraph 291 and following. There is to be added the quantum meruit claim at paragraph 333 and following, which comprised a significant part of the amended pleading, but little time at trial.

(5) A letter from Hausfeld & Co LLP dated 17 January 2020 referred to their assessment at that stage of the apportionment of Dr Comberg's costs as being more than 25% on the fee agreements and quantum meruit, and more than 70% notice period compensation (including misconduct) and accrued holiday

entitlement. There were also less than 2% on bonus and less than 2% on Omnibus/EIP scheme. It was said that a much higher percentage of disclosure was attributable to the misconduct allegations, but this apportionment was by reference to the pleadings and the witness evidence.

(6) There would need to be an adjustment downwards to take into account the deferred costs remuneration. VivoPower say that the issue about deferred costs remuneration accounts for 5% of the costs, but in my judgment, it was approximately equivalent to each of the other fee agreements (contract term fee agreement and the listing fee agreement/quantum meruit relating to listing fee) and so it is in very approximate terms about one third of the 25%.

(7) An issue-based costs order would involve an order for payment to VivoPower, and VivoPower's costs are said to be greater than those of Dr Comberg. There should be a deduction rather than an issue-costs based order for the reasons discussed above, and it is practicable to do so: see CPR 44.2(7). Instead of an issue- based costs order, there has to be a deduction for the costs of Dr Comberg which should not be paid. VivoPower says that there should also be deducted the costs of VivoPower which have been ordered to be paid if it was a split costs order. The assumption will be that VivoPower's costs on an assessment will not be significantly greater than those of Dr Comberg. VivoPower submits that this involves a doubling up to give a similar result to an issue-based costs order.

(8) Against this, where there is a departure from the successful party having the whole of the costs due to issues where the successful party failed, a question arises as to the extent that the costs might have been saved if those issues had not been raised. That is likely to be less than the percentage of costs on an issue since there are common costs e.g. the brief fee, the disclosure exercise, the witness statement exercise and other common costs. It may be for this reason that doubling up of costs as described above is perhaps a rarer order than simply a deduction by reference to the overall successful party's costs on

the issue on which it lost. In my judgment, there may be some scope for allowing a deduction greater than the amount of costs attributable to the issue to take into account the costs both ways, but this has to be tempered by the common costs issue. As noted above, a broad-brush approach is required.

(9) A question arises as to whether there should be a different order in respect of the issue about mitigation referred to at the start of this judgment. That will be considered below with the questions whether there should be any other adjustment in respect of costs issues, and whether there should be an order for indemnity costs.

B Costs of the issue about the treatment of mitigation losses

47. Although I have in this judgment followed the rubric of CPR 44.2(7) of avoiding costs of an issue both due to the difficulty of separating out an issue and of recognising that there will be smaller issues on the way on which a successful party may lose without a split costs issue, the position in respect of the treatment of mitigation losses is different. It is different for the following reasons:

(1) It is an issue which is quite discrete both in subject matter and in time. It only arose late in the case from 10 September 2020. It occupied a part of the hearing on 11 September 2020, which I estimate to be about 30% of the time on that day. It has occupied substantial work thereafter on the part of the Claimant (the letters of Dr Comberg and PwC) as is apparent from the matters with which I dealt in the first part of this judgment.

(2) Although there is an adjustment of £2,000 in favour of Dr Comberg, I have identified it, using PwC's expression, as not being "significant". It follows that the bulk of the mitigation is to be treated gross, such that this issue has been determined substantially in favour of VivoPower and against Dr Comberg.

(3) It was unfortunate that the letter of 10 September 2020 did not qualify how little money had been remitted. Although this is not an issue which requires an adjustment for conduct or indemnity costs, there is a need for caution about this kind of issue being raised at this stage. It is often the case that the first thoughts

are the best ones, and this was the case about the credit indicated in paragraph 148 of the opening trial skeleton for Dr Comberg of 24 February 2020.

48. The Court will take this into account by ordering that Dr Comberg will not be entitled to costs in respect of the mitigation issue from 10 September 2020 onwards including the part of the hearing referable to the mitigation issue and the work thereafter including the preparation of the letters, all until the hand-down of this judgment. In short, instead of Dr Comberg having 80% of these costs, there will be no order as to costs in respect of this issue from 10 September 2020 until hand-down of this judgment.

C Evaluation of conduct allegations and effect

49. That is not the end of the matter because there must be considered the effect of conduct issues. They could be reflected by an indemnity costs order or an adjustment by reference to conduct in CPR 44.2(4).

50. This has been a hard-fought employment dispute. Indeed, these were the opening words of the judgment. A distinction is to be made between issues where one party's evidence or case was preferred (even in vigorous terms) of the one part and issues where there is criticism about the conduct of the case or which should not have been raised at all of the other part.

51. The most serious criticism was the allegation that it was unreasonable for VivoPower to allege misconduct/incompetence.

52. Although I have been unimpressed by some of the witnesses and the evidence, this is not a case where the Court has generally made any findings of dishonesty or impropriety in and about the witnesses or the evidence generally. Witnesses were criticised in the Judgment, but not for making allegations which they knew to be false.

53. It frequently happens that allegations in a case are upon close examination roundly rejected. The many allegations which were made were refuted by Dr Comberg. His second witness statement in particular contains an impressive level of detail. It may have been thought that he would not be able to refute some of the allegations when they were made. It may then have been thought that Dr Comberg's account could be undermined in oral evidence. However, it turned out that his recall of detail in his statement was matched by his recall of detail in his oral evidence. The Court preferred this evidence despite the evidence to contrary effect by several witnesses on behalf of VivoPower. This does not by itself indicate that the allegations could not properly have been put in the first place. Dr Comberg's lawyers sought to encourage VivoPower to abandon the allegations of misconduct and incompetence. By the time of the trial, when Dr Comberg had provided in writing his detailed response to the allegations, it would have required the witnesses for VivoPower to perform well and Dr Comberg to perform

badly for any of the allegations of misconduct/incompetence to be made out. That did not occur. It still does not follow that propriety required that the allegations be abandoned at trial.

54. It is not to be inferred that the failure of VivoPower to establish this defence means that there was no basis to run this defence. Likewise, it could have been said that the singular failure of Dr Comberg to establish the alleged contract term and the listing fee agreements should never have been pursued. I do not accept that. It is what happens in many cases, and I do not accept that the clear defeats on any of these issues means that the allegations should never have been pursued. Further, to the extent that it is alleged that the rejection of the majority in size of Dr Comberg's claim indicates exaggeration, I do not find that Dr Comberg has exaggerated his claim. I have not found that Dr Comberg was acting in bad faith or had inflated his claims. He had arguments which he was able to advance about the heads of claim on which he did not succeed, but those have failed.

55. I was asked to have regard to the finding that the making of the Counterclaim for tens of millions of pounds followed by acceding to the Part 36 offer indicated a lack of conviction in the ability to get a judgment for large sums of money (J/41-42). However, this did does not indicate necessarily a lack of belief in the allegations of misconduct/incompetence as a defence to quantum in the wrongful dismissal claim. Further, although the Part 36 offer must have reflected a nuisance value, there is a tension about going so far as to say that there was a lack of belief in the veracity of something which has produced a settlement of the Counterclaim for £100,000 plus costs of about £240,000. Whilst none of this affects the rejection of the allegations of misconduct/incompetence, it does add to the unwillingness to accept the submission that VivoPower had no reasonable basis to pursue the allegations of misconduct/incompetence.

56. Another criticism which I do not accept is well made out is the suggestion that the fact that Mr Ciumei QC went through the allegations of misconduct/incompetence in what he at one stage described as a 'lightning' tour shows that it was improper for the allegations to be maintained. There were essentially two criticisms. First, Mr Ciumei QC did not give a fair opportunity to Dr Comberg to deal with the allegations. Second, Mr Ciumei QC must have known that the allegations were unsustainable and so he went through them in a formulaic way: VivoPower instead should have abandoned them. I reject these criticisms. Dr Comberg was given an opportunity to deal with the main allegations. He dealt with most of the allegations in writing in his first statement and in his second statement. He dealt with the major allegations orally and effectively. His answers were long, not in the event in order to stall, but to give a comprehensive account. It would have taken many days to have his comprehensive answers to each allegation. However, this was unnecessary because it was obvious that he came up to proof. It was palpably the case that he had either written his witness statements or provided the information from which they were composed. There was sufficient cross-examination for the process to have been fairly undertaken.

57. If there was an identified shortcoming, it was a regret that Mr Ciumei QC had that VivoPower had agreed to attempt to curtail the timetable. However, there has to be

proportionality in cases. The parties agreed the timetable, and this Court will not criticise parties for striving not to be disproportionate even if a more detailed approach to cross-examination could have been undertaken. That is subject to criticisms of fairness: there was no unfairness to Dr Comberg. If further time should have been allowed to cross-examine in respect of misconduct/incompetence, this has not come over to the Court as some cunning ploy of VivoPower to spend as little time as possible dealing with the misconduct/incompetence allegations. Further, it seems to the Court from what it has seen that it would have made no difference to the result if there had been more time allowed for cross-examination. For these reasons, these serious criticisms about VivoPower's conduct of the case are not made out.

58. It therefore follows that having rejected the most serious criticisms of conduct, there were still aspects of conduct of which I have been critical, and they stand to be considered. In my judgment, there are a number of matters where there is reason to be critical about the way in which various issues were fought by VivoPower. In particular:

(1) The allegations underlying the misconduct/incompetence were not sufficiently focussed. That made the case difficult to manage during the case (see the Requests for Information) and difficult to answer on the part of Dr Comberg: see paragraphs 35-37 of the Judgment.

(2) The way in which VivoPower made its points as regards US securities law was to the effect that Dr Comberg had to face regulatory consequences for not disclosing his entitlements under the three oral fee agreements. The way in which the case was put in this regard was criticised at paragraph 44 of the Judgment.

(3) There is also some concern about aspects of the evidence of some of the witnesses who did not appear able to speak to their witness statements as if some of the evidence was prepared for them and was not their own words: see paragraph 51 of the Judgment.

59. The most noteworthy in terms of the ability to meet the case was the failure to set out the allegations in a more coherent way so that the exact case could be properly understood. The allegations underlying the misconduct/incompetence were not sufficiently focussed. That made the case difficult to manage during the case (see the Requests for Information) and difficult to answer on the part of Dr Comberg: see paragraphs 35-37 of the Judgment. It was also more difficult to try.

60. In my judgment, the most appropriate way of dealing with this is to give an indication to the Costs Judge who may in due course be considering the reasonableness and proportionality of the costs incurred in dealing with this aspect of the case. It is likely that the lack of focus in the misconduct/incompetence allegations will have exacerbated the costs incurred. Dr Comberg spared no efforts in meeting these numerous allegations with painstaking preparation of very lengthy evidence. In my judgment, this was the corollary of the numerous allegations, and it seems proper and appropriate for Dr Comberg to have gone into such detail in order to defend himself. He would have had in mind the danger of missing out some allegations which might have been held against him, as well as the important reputational matters in meeting the criticisms. These observations should be drawn specifically to the attention of the Costs Judge if the matter is assessed. The issues of reasonableness and proportionality are ultimately for the Costs Judge alone. However, it seems to the Court that the exhaustive preparation and response to the voluminous and serious allegations of misconduct/incompetence in the disclosure process, in witness statements and in preparation of oral evidence (and for cross-examination) in order to refute the same appeared to be a proper, appropriate and necessary way to respond.

D Conduct: offers of settlement

61. It is next necessary to consider offers to settle by Dr Comberg. First, there is no relevant offer under the Part 36 regime which provided Part 36 protection in the events which have occurred. Such offers as have been made by Dr Comberg have been for a far larger sum than the sums awarded.

62. Secondly, whilst the court in its discretion is entitled to treat a Calderbank offer as relevant in terms of conduct, the offers in this case of Dr Comberg were not offers where Dr Comberg could say demonstrably that he did better than the offer at trial. There was an offer by Dr Comberg made on 10 November 2017 in a sum of just over one million pounds plus costs. The breakdown of the offer was by reference to the now successful claims (notice period salary, expressed as a clean break, and deferred remuneration). Nevertheless, it failed to allow anything for mitigation: it is not an answer that this could not arise because the time for mitigation had not yet arisen in that there was nothing at all that was provided for future reduction of the loss.

63. An offer was made on 10 February 2020 which was only a partial offer in respect of certain parts of the claim. It was an offer in respect of the claims to notice period, holiday pay and bonus of £1.2 million inclusive of costs to comprise 70% of the costs of the claim. It did not include the remaining claims including the shares and the three oral fee agreements and the remaining 30% of the costs. Whilst it might be said that with hindsight the offer had attractions, it is not possible to test it because the offer was inclusive of costs. Further, the offer left the trial still to be fought including the misconduct/incompetence allegations which were relevant at least to the share claim, and possibly to the oral fee agreements. In the exercise of the Court's discretion, the Calderbank offer did not offer a costs protection because the offer was inclusive of costs. Further, the offer was a partial offer which involved the continuation of the

litigation. It does not seem unreasonable to refuse such an offer which would still keep the trial open.

64. Thirdly, there is a question about the stage of the negotiations before Hausfeld & Co LLP was instructed. In my judgment, neither were they put into the form of a Part 36 offer or a Calderbank offer nor were they analogous to offers. At the time, they were without prejudice offers, and it would not have been appreciated that they could be opened up. They were never intended to be in full and final settlement of all claims. In any event, it is not even apparent that they were offers. They were more likely to be a precursor to an offer. They do not therefore provide costs protection.

65. As regards offers from VivoPower, it made no Part 36 offer. It also made no Calderbank offer in which the amount of the claim was offered plus costs. By making a costs inclusive offer, it is not possible readily to show whether Dr Comberg has advanced his position by rejecting or not accepting the offers. The most pertinent to consider was an offer of £1.5 million inclusive of costs, shortly prior to the trial. It now appears likely that Dr Comberg has done better than that by going on to trial in that he has an award of damages of close to one half of that amount and on the basis that he has the majority of his costs, this is likely to exceed the costs which were offered in the rolled up order. The fact that the offer was rolled up with costs means that it does not provide costs protection.

66. It has been said that Dr Comberg made unreasonable Part 36 offers of sums over £2 million plus costs which affected the ability to settle this matter. They did not have the advantageous consequences to a claimant of an effective Part 36 offer, but nor did they prevent VivoPower from providing its own protection.

67. It therefore follows that there is no reason to adjust the order of costs to take into account the offers of settlement. There was no effective costs protection made by either party. There is nothing about the conduct of the case as regards settlement of the case that should be reflected in the order as to costs.

E Conduct: notice to admit

68. Dr Comberg seeks to invoke a failure to admit facts pursuant to a notice to admit. In my judgment, this takes the case no further. It was tantamount to seeking admissions over every aspect of the case. That was not a real notice to admit. It is artificial then to say that to the extent that the recipient of the notice did not admit the facts on which it has lost that it acted unreasonably.

F Conduct: other matters

69. There were some matters as to conduct which in the scale of things are not sufficiently substantial as to give rise to any effect on the costs order. They included criticisms as to what was not in and out of letters before action which in part was making claims

against Mr Chin/Arowana rather than VivoPower before the formulation of the claim itself. There were matters relating to a proposed mediation which were said to be unsatisfactory. There was the way in which Dr Comberg had wanted to have redacted without prejudice material, and then opened it up. There may be something in the last criticism, but not sufficiently substantial, if it were analysed in detail and if there were findings against Dr Comberg, to warrant a deduction from costs by reason of conduct. There were also criticisms about the increase in the level of costs sought by Dr Comberg in the latter stage of the action. The criticism can only sensibly be considered in the assessment of costs, and it cannot be assessed as a free-standing matter going to conduct of the action.

G Conclusion on conduct

70. In my judgment, this is not a case to make adjustments separate from success on issues to order an adjustment in respect of conduct matters. There was concern about additional work which will have been caused by the unsatisfactory presentation of the numerous misconduct/incompetence allegations. To this end, I have found that it was justified for Dr Comberg to be meticulous in his response to these allegations. That may be related to a costs judge in due course albeit that it will be for that judge to make the ultimate findings on reasonableness and proportionality.

VI Basis of costs: indemnity costs?

71. I now consider indemnity costs. The law was referred to by Dr Comberg. In his skeleton argument, he particularly drew attention to the following:

(1) In *Excelsior Commercial & Industrial Holdings Ltd v Salisbury Hamer Aspden & Johnston (Costs)* [2002] EWCA Civ 879 Lord Woolf explained why guidance was of limited assistance:

> *"*In my judgment it is dangerous for the court to try and add to the requirements of the CPR which are not spelt out in the relevant parts of the CPR. This court can do no more than draw attention to the width of the discretion of the trial judge and re-emphasise the point that has already been made that, before an indemnity order can be made, there must be some conduct or some circumstance which takes the case out of the norm."

(2) Coulson J (as he then was) in *Noorani v Calver* [2009] EWHC 592 (QB)), summarised the position as follows:

> "Indemnity costs are no longer limited to cases where the court wishes to express disapproval of the way in which litigation has been conducted. An order for indemnity costs can be made even

> when the conduct could not properly be regarded as lacking in moral probity or deserving of moral condemnation. However, such conduct must be unreasonable "to a high degree". "Unreasonable" in this context does not mean merely wrong or misguided in hindsight."

(3) Tomlinson J set out more detailed guidance in in *Three Rivers DC v Bank of England* [2006] EWHC 816 (Comm). At [25] the Judge said as follows:

> "(8) The following circumstances take a case out of the norm and justify an order for indemnity costs, particularly when taken in combination with the fact that a defendant has discontinued only at a very late stage in proceedings: (a) where the claimant advances and aggressively pursues serious and wide-ranging allegations of dishonesty or impropriety over an extended period of time; (b) where the claimant advances and aggressively pursues such allegations, despite the lack of any foundation in the documentary evidence for those allegations, and maintains the allegations, without apology, to the bitter end; (c) where the claimant actively seeks to court publicity for its serious allegations both before and during the trial in the international, national and local media; (d) where the claimant, by its conduct, turns a case into an unprecedented factual inquiry by the pursuit of an unjustified case; (e) where the claimant pursues a claim which is, to put it most charitably, thin and, in some respects, far-fetched; (f) where the claimant pursues a claim which is irreconcilable with the contemporaneous documents; (g) where a claimant commences and pursues large-scale and expensive litigation in circumstances calculated to exert commercial pressure on a defendant, and during the course of the trial of the action, the claimant resorts to advancing a constantly changing case in order to justify the allegations which it has made, only then to suffer a resounding defeat."

72. The question is whether there is anything out of the norm about the conduct of VivoPower. I have found that this is not a case where allegations have been made without any reasonable cause or otherwise improperly. There is no reason to believe that the allegations were made in the knowledge and belief that they were fanciful The Court has to guard against hindsight reasoning. It is unnecessary to repeat the detailed points above.

73. I do not consider that VivoPower was acting unreasonably in bringing or pursuing the allegations such as to attract an order for indemnity costs. It is suggested that the failure or refusal of VivoPower to accede to Dr Comberg's request to withdraw the allegations of misconduct or incompetence at the end of the first week of trial was unreasonable.

It may have been apparent by this stage that it was going to be difficult for VivoPower to be able to succeed on the allegations, but that does not mean that it was unreasonable not to capitulate or that the persistence of VivoPower was unreasonable, let alone unreasonable to a high degree.

74. Attention is drawn on behalf of Dr Comberg to the part of the judgment in which I referred to the animosity of Mr Chin towards Dr Comberg and to an objective indicator that the allegations could not have been so serious given that Mr Weatherley-White succeeded Dr Comberg as CEO (J/40). Despite this, the judgment does not make findings that the allegations of misconduct/incompetence were run without a belief in their truth or that Mr Chin or other witnesses were lying. In my judgment, there has not been unreasonable conduct or conduct unreasonable to a high degree such as to attract an order for indemnity costs.

75. There are other matters which do not take the case outside the norm and/or are not sufficiently substantial in the context of the case as a whole to merit an indemnity costs order, even in part. The motive behind the non-payment of the salary is not the same as unreasonableness relevant to the basis of the assessment of the costs in this case. This non-payment of salary represented a relatively small part of the claim. It is not analogous to the non-payment of a bonus at the heart of the case in *Attrill v Dresdner Kleinwort Ltd* [2012] EWHC 1468 (QB), nor is the analysis about non-payment anything like the reasoning in that case, namely "the contractual rights of the employees were sacrificed on the altar of public perception" (para. 30). The same applies to the failure to pay the small sums of holiday pay. It may have been believed, albeit wrongly, that there would be a higher counterclaim and even a set off. I do not accept that there has been unreasonableness to a high degree in respect of the approach to settlement. Although I am critical about the US Regulatory law point and about some of the witness statements, they did not feature to a sufficient extent in this case such as to require an order for indemnity costs.

VII Overall conclusions on costs

76. The successful party is Dr Comberg. In my judgment, this is not a case where there should be a reduction in respect of costs for conduct. The proper way of dealing with the increased costs due to the unsatisfactory way in which the misconduct/incompetence arguments have been presented is properly met by the finding above that the exhaustive approach of Dr Comberg in meeting these serious allegations was necessary and justified. This may be related to the Costs Judge who may take it into account in the costs issue on any assessment.

77. In this judgment, there has been consideration of points intended to cause a departure from the starting point of the successful party being paid its costs. Many of them have not given rise to a reason to depart from the starting point for the reasons set out in detail above. However, a deduction is appropriate in respect of the issues of the contract term fee agreement and the listing fee agreement/the related quantum meruit claim. Here there has to be an assessment of the percentage of the time spent on these issues, whilst stepping back to consider the extent to which the costs have been increased as a result of these issues. In my judgment, the time spent on these issues, where VivoPower has succeeded is just over 15%. The doubling up contended for by VivoPower instead

of a split costs order would be excessive because it does not consider adequately the extent to which the costs have been increased as a result of these issues.

78. Further, the Court has to adopt a broad-brush approach as noted above in the way in which it makes its deduction. It also has to step back and reach an order which in all the circumstances appears to give effect to the justice of the case. In that regard, in a recent judgment of the High Court in an appeal, in *Terracorp v Mistry* [2020] EWHC 2623 (Ch) (6 October 2020), in an appeal in part against a decision on costs where the successful party had only achieved success in part, Miles J said the following at paragraph 98:

> "…while the extra costs associated with failed points need to be considered, the court still has to stand back and look at the matter globally and consider the extent, if any, to which it is just to deprive the successful party of costs (see the guidance given in the Sycamore case). The exercise is not mechanical, and it involves an element of discretionary judgment. The ultimate question is what the just costs order is."

79. My assessment of the just order for costs taking all the factors into account set out in this judgment is to order that Dr Comberg ought to have 80% of his costs to be paid on the standard basis if not agreed, save only for the costs of Dr Comberg relating to the mitigation tax issue between 10 September 2020 and the date of handing down of this judgment, where there is to be no order as to costs. This allows a deduction of more than the percentage of time on these issues about the alleged contract term fee agreement and the alleged listing fee agreement/quantum meruit. However, the deduction is not a doubling up because the additional cost incurred by these issues does not justify a doubling up. Further and in any event, having given detailed consideration, recognising the success of Dr Comberg, and making a deduction with a broad brush, a deduction of 20% is in my discretionary judgment one which does overall justice between the parties.

VIII Payment on account

80. I am satisfied that there should be an order for a payment on account. The amount of £1.4 million is sought. It was submitted out of a summary of costs in a one-page schedule of £2,193,533.40 inclusive of VAT. This is inclusive of costs and it relates only to the costs of the claim and not to the costs of the counterclaim which are separate. Dr Comberg is not registered for VAT, and is liable to pay the same. The sum of £1.4 million was predicated upon a submission that there should be a 100% award of costs, of which 75% should be on the indemnity basis. As a result of this judgment, the award is of 80% of the costs (save for the costs in respect of the mitigation tax issue from 10 September 2020), and all of the costs awarded are on the standard basis. In those circumstances, a lesser sum should be awarded as a payment on account of costs. In all

the circumstances of the case, I shall fix the payment on account of costs in the sum of £950,000.

IX The draft order

81. The parties are asked to amend the draft order so as to reflect the matters set out in this judgment. It is understood that matters like interest have been agreed, and it is expected that the matters in this judgment should enable the parties to complete the draft order.