



THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON SOUTH

BEFORE: EMPLOYMENT JUDGE MORTON (Sitting Alone)

BETWEEN:

Mr C Shaw

Claimant

AND

Commetric Limited

Respondent

ON: 15-17 November 2021 and 17-21 January 2022

Appearances:

For the Claimant: Mr N de Silva QC, Counsel

For the Respondent: Mr J Galbraith-Marten QC, Counsel

RESERVED JUDGMENT ON LIABILITY

1. The judgment of the Tribunal is that:
 - a. the Claimant's claim of constructive unfair dismissal under sections 94 and 95(1)(c) Employment Rights Act 1996 succeeds;
 - b. the Claimant's claim of breach of contract succeeds.
2. Remedy in respect of all aspects of the claim, including the Claimant's claim for holiday pay shall be decided at a separate hearing.

Reasons

1. By a claim form presented on 22 August 2019 the Claimant presented claims of constructive unfair dismissal, wrongful dismissal, unlawful deduction from wages and breach of s13 Working Time Regulations 1998. The claims were resisted by the Respondent.
2. At the hearing I heard evidence from the Claimant himself and from four witnesses for the Respondent: Mr Kulasingam, Mr Solheim, Mr Garyfallos and Mr Minkovski. Their respective relationships to the Respondent are described in my findings of fact. I was also provided with a witness statement from Mr Hakansson, but for reasons explained in the next paragraph he was unable to give oral evidence and I was therefore able to give little weight to his witness statement.
3. The full hearing commenced on 15 November 2021, having been listed to be heard in person. At the start of the hearing however I learned that the Respondent's witnesses were all in different jurisdictions (Sweden, Bulgaria, Greece and Montenegro) and for a variety of reasons, including, in Mr Minkovski's case, illness with Covid, had not been able to travel to the UK to participate in the hearing. It then became clear that as a result of the decision of the Patents Court in *Interdigital Technology Corp and ors v Lenovo Group Ltd and ors [2021] EWHC 255* it had emerged that in certain jurisdictions the permission of the local court would be required before a witness could give evidence in UK legal proceedings by video link. The process of obtaining permission had not been commenced in relation to the Respondent's witnesses as the problem had only just come to light. After some discussion it was agreed that the most practicable way to proceed would be to split the hearing, allowing a day for reading the documents and witness statements and a further day and half for the Claimant's evidence. The Respondent's case would then be presented on a later date when either the relevant permissions had been sought and obtained, or the witnesses had been able to travel to give their evidence, either in person or by CVP. That is how the case was conducted, with the Claimant's case in November and the Respondent's case, by CVP in January, by which time the Respondent's witnesses, with the exception of Mr Hakansson, had travelled to the UK. As there was no permission available for Mr Hakansson to give his evidence by video link, he did not give oral evidence.
4. As regards the CVP evidence, the witnesses all gave evidence clearly and could be seen and heard by all parties. The Tribunal was satisfied that each witness was giving evidence on their own account and there is no question that their evidence was interfered with in any way in the course of giving evidence.
5. I was also provided with a hard copy bundle of documents consisting of 991 pages, an agreed chronology and a cast list. The chronology was particularly

helpful, given the somewhat involved facts of the case and I was grateful to those who had prepared it.

The relevant law

6. Section 95 (1) (c) ERA provides for an employee to treat themselves as "constructively dismissed" in certain circumstances. The section states:

For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) F1. . . , only if)-

.....

the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

Lord Denning in *Western Excavating (ECC) Ltd v Sharp [1978] Q.B. 761* set out the relevant test as follows:

"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed."

In this case the Claimant relied only on the implied term of trust and confidence and not on any breach of the express terms of his contract. Under this term, the employer must not, without reasonable and proper cause, act in a manner calculated or likely to destroy or seriously damage the mutual trust and confidence between employer and employee. The distinction between a breach of trust and confidence and unreasonable conduct on the part of an employer, while real, is often a narrow one.

7. The following elements are needed to establish constructive dismissal:

- a. Repudiatory breach on the part of the employer. This may be an actual breach or anticipatory breach, and can also arise from a series of acts rather than a single one, but must be sufficiently serious to justify the employee resigning.
- b. An election by the employee to accept the breach and treat the contract as at an end. The employee must resign in response to the breach.
- c. The employee must not delay too long in accepting the breach, as it is always open to an innocent party to "waive" the breach and treat the contract as affirmed.

8. In *Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978* the Court of Appeal listed five questions that it should be sufficient to ask to determine whether an employee was constructively dismissed:

- a. What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?

- b. Has he or she affirmed the contract since that act?
- c. If not, was that act (or omission) by itself a repudiatory breach of contract?
- d. If not, was it nevertheless a part (applying the approach explained in *Waltham Forest v Omilaju* [2004] EWCA Civ 1493) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of the implied term of trust and confidence? (If it was, there is no need for any separate consideration of a possible previous affirmation, because the effect of the final act is to revive the right to resign.)
- e. Did the employee resign in response (or partly in response) to that breach?

The agreed issues

9. There was an agreed list of issues in the case, which is set out in the Appendix to this judgment. This list was provided at my request between the first and second parts of the hearing and I have treated it as having superseded the Claimant's particulars of repudiatory breach of contract provided at the commencement of the first part of the hearing. I have structured my conclusions according to that list.

Findings of fact

10. I make the following findings of fact on a balance of probabilities based on the written and oral evidence in the case. I have limited my findings to those that were necessary to enable me to decide the matters set out the list of issues. It has not been necessary to address every matter that was raised during the course of the evidence.

Background

11. The Respondent is a company specialising in media analytics. It was founded in 2005 by Mr Solheim, Anthony Burgess Webb and Hill & Knowlton Strategies.
12. The Claimant first worked with Mr Solheim in 1998 at a company called NETCOMS. In 2002 he joined Mr Solheim again to develop a business called 2B Ltd. This company was sold to Dow Jones in 2005 for \$4.5 million. The Claimant then remained with Dow Jones and Mr Solheim left to set up the Respondent. In 2007 Mr Solheim approached the Claimant to take over the running of the Respondent whilst he developed a new venture, CommEq Asset Management Limited ("CommEq").
13. The Claimant brings his claims as an employee of the Respondent. However, as a result of the history just outlined, his relationship with the Respondent itself and the other protagonists in the case (and in particular Mr Solheim) had a number of dimensions. The most relevant for the purposes of this case are outlined below.

- a. The Claimant joined the Respondent from the outset as its Chief Executive Officer (“CEO”). At the time of his resignation he was working under a service agreement dated 1 January 2016. He had however acted as CEO of the Respondent continuously from November 2007 to the point of his resignation on 28 March 2019, apart from a period between January 2014 and February 2016 when, at Mr Solheim’s request, he was focusing his efforts on CommEq;
- b. He was a director of the Respondent continuously from March 2008 until his resignation and was its sole director from 13 January 2016 to 22 February 2019 (the point at which Mr Garyfallos and Mr Hakansson were appointed to the board);
- c. He was a shareholder in the Respondent, owning 9% of the shares during the period of the matters giving rise to his claims;
- d. He was a shareholder in and a director of Sigmai, an artificial intelligence business, which had originally been founded to use trading technology created within CommEq. Sigmai acquired 33% of the Respondent in early September 2018 in exchange for a transfer of Sigmai’s assets. The Claimant stepped down as a director of Sigmai on 5 November 2018 in order to deal with a conflict of interest arising in relation to the acquisition.

14. At the time of the matters giving rise to the dispute Mr Solheim was:

- a. A 15.49% shareholder in the Respondent;
- b. The controlling shareholder of Sigmai (which in turn owned 33% of the Respondent);
- c. A director of Sigmai and its sole director from 5 November 2018 (the point at which the Claimant stepped down, Jesse Moore, Sigmai’s third director, having stepped down at around the same time).

It was the Claimant’s case that these factors made Mr Solheim the “controlling mind” of the Respondent, although he was not a statutory director during the period of this dispute. The Claimant asserts that Mr Solheim was a de facto or shadow director of the Respondent at the relevant times. He also asserted that Mr Kulasingam, a shareholder in the Respondent as well as an investor in Commeq and a substantial shareholder in Sigmai, was a de facto or shadow director.

Origins of the dispute

15. It was accepted by the Claimant that the relevant period for the purposes of the dispute was October 2018 to March 2019. However, I find that the origin of the dispute arose some time before the matters that formed part of this claim. The acquisition of shares in the Respondent by Sigmai in September 2018 brought a number of pre-existing tensions to the fore. The details of the deal were described in an email dated 6 September 2018 from the Claimant to Mr Solheim and Jesse Moore (still a director of Sigmai at that time) at page 144. The acquisition had also been the subject of a number of workshops in Sofia, Bulgaria, in August 2018 attended by representatives from both companies, including the Claimant.

16. The purpose of the deal appeared to be to reverse the position in which Commetric owned a large number of shares in Sigmai, and to provide Sigmai with much needed investment by giving it shares in Commetric, which was better placed to develop its assets. At the same time, Commetric would acquire what Mr Solheim described as some “missing value elements” including technology components, that would enable it to take off as a business. The Claimant described this in the email at page 144 as the “only way” to preserve Sigmai. I find as a fact that both the Claimant and Mr Solheim saw potential in the transaction as a means of working towards a sale of the Respondent for a significant sum in due course. Sigmai retained certain intellectual property assets, but the details of that are of marginal relevance to the dispute, save that the Claimant also had interests in the retained assets (Sigfin and Sanction). This is a further illustration of the complexity of the relationship between the various entities and individuals involved in the dispute.
17. There was evidence that there had been tensions in the financial relationship between CommEq, Sigmai and Commetric for some time. These were set out in slides prepared for a cross management team meeting in September 2016 (pages 100-111). A detailed discussion of the nature of these difficulties is beyond the scope of this judgment. However, I find as a fact that Mr Solheim and the Claimant had made significant financial gains from working together over a long period and intended a fruitful relationship to continue. They had complementary strengths and aptitudes and the potential for success was significant. So, unfortunately, was the potential for differences to emerge. Their business interests were intensely intermingled (as illustrated by the description at page 111) with a convoluted corporate structure presumably designed to manage costs and financial risk and deliver significant shareholder value over time. The complexity of the interrelationships between the various entities in which they were both interested, meant that it was critical that they were in broad agreement over matters such as risk management, personal levels of risk and investment, and the timescale in which the business would be developed and prepared for an exit. Mr Solheim referred to this as “close alignment”. The Claimant relied on this close alignment in support of his argument that Mr Solheim was at times acting as a shadow director or de facto of the Respondent, which is a matter I will return to. I also find on the basis of the evidence that was presented to me that at the beginning of the dispute there was an interdependence between the Claimant and Mr Solheim that gave each of them significant bargaining power in the relationship. Neither at that time answered to the other in a way that is typical of a relationship between employer and employee. The relationship had more the character of a business partnership.
18. Mr Solheim gave unchallenged evidence about the genesis of the Sigmai acquisition and the emergence of tensions during August 2018. The idea that Sigmai should sell assets to the Respondent in exchange for shares originated with Mr Solheim himself. Sigmai needed an injection of \$170,000 in cash in order to meet basic commitments such as staff salaries. This was discussed during the Sofia workshops. It was agreed that the Claimant

would put in \$50,000 and Mr Solheim the remaining \$120,000. There was a deadline for completing the transaction of 10 September 2018 when staff were due to be paid. The Claimant however changed his mind about the level of investment he was prepared to make and sought to reduce his commitment to \$30,000. Eventually Mr Solheim prevailed on him to stand by his initial commitment and the deal went ahead as planned. However, the Claimant's temporary change of position would I find have contributed to a certain amount of ill-feeling surrounding the transaction. Mr Solheim also gave unchallenged evidence that the deal was rushed towards the end, with not a great deal of time available for discussion with the other shareholders in both companies not all of whom were happy with the proposal or the limited time that had been available to evaluate it, particularly as it would result in a dilution of the shareholding of existing shareholders in favour of Sigmai (and thus indirectly of Mr Solheim, Sigmai's controlling shareholder). The Claimant was unavailable for a further workshop in Sofia in which communications to shareholders would have been agreed as he had committed to a holiday with his family.

19. I was not satisfied however that there was any evidence that the Claimant was coerced into the deal in the ordinary meaning of the word. The evidence was the contrary – that he was pushing it forward despite other shareholders expressing reservations. In cross examination he confirmed that he was instrumental in persuading the Respondent's shareholders that the deal was a good one. He pressed on furthermore, regardless of a conflict of interest – as shareholder in and director of Sigmai and sole director of and shareholder in the Respondent he was in effect on both sides of the transaction, a matter I return to below. At page 144, he explained to his fellow directors in Sigmai, Mr Solheim and Mr Moore, how the deal was beneficial to both sides. I find that if there were reservations, they were coming from the other shareholders and not from the Claimant himself. The Claimant may have felt that he was constrained by the limited routes available to achieve goals he and Mr Solheim had set themselves, but that is not the same thing as being coerced.

20. The acquisition agreement was signed on 8 September 2018. The following day the Claimant wrote to Mr Solheim as follows (page 150):

“Dag and others have raised with me last week the issue of control coming out of this transaction. While they maintain this in passing it is clear that with Sigmai representing a voting block of 1/3 and the current shareholding of CM with you as the largest shareholder, you would directly and indirectly control over 50% of Commetric.

While I don't foresee any real issues here, it could be regarded as a bit odd if we get into some strategic conversations with partners and perhaps give cause for larger minority shareholders to grumble. If Sigmai would be prepared to have non-voting shares (full economic rights) this would retain the shareholding balance that we've become used to and remove any potential control issues.

Let me know your thoughts.”

Mr Solheim replied the same day (page 150):

“Sigmai would never, ever have accepted non-voting shares, obviously. Nor is there a need to, as we are fully aligned and should be working for the same objectives. In any event the offer has now been made by Commetric and accepted by Jesse on behalf of Sigma so the deal is done....

as I know you appreciate, I would have been able to secure a majority vote in almost most EGM AGM settings already, without the Sigmai block. You separately granted me other ongoing authorities in respect of the Commetric management team. I have neither used nor threatened to use any of these powers. So this does not change the practical shareholder power structure significantly.

Voting rights

- to insist before terms were agreed, ie at the Hilton workshop, that Sigmai should have no voting rights, would have led to no deal.
- To suggest after the deal was agreed, that Sigmai should have voting rights removed, is really crazy:
 - since no voting constraints were documented in the deal, Commetric introducing such after the deal would constitute a clear breach of contract.
 - For you or I to support such post deal amputation of the rights of all that Commetric shareholders enjoy, that would be a clear breach of fiduciary duties as directors of Sigmai.
- Besides, I am a minority shareholder in Sigmai. It's not right to assume that I personally would represent Sigmai. So, it's just technically untrue to say “you would directly and indirectly control over 50% of Commetric”. as long as I am a director in Sigmai, if I cast a vote, but it could be another director, you, or Jesse or someone else in future, whomever casts the vote, we must do so in the best interest of Sigmai. Sigmai is biggest asset is now the Commetric shares. And Sigmai is the biggest shareholder of Commetric, obviously. I can see no misalignment of interest, and I see safeguards of fiduciary duties.
- I know you could counter that my large stake in Sigma might create a de facto, practical ability to drive any reasonable proposal through a Sigmai EGM. That's possibly true for the time being, but it was also true of my Commetric stake. Perhaps “plus ca change” is the right expression?

21. I find that this was an important statement of how Mr Solheim and the Claimant saw their respective positions at that time and that there were clear signs that there were differences. Just over a week later, when the Claimant was busy putting into effect the integration consequent on the transaction, there was a difficult exchange between them beginning with an email from Mr Solheim to the Claimant on 17 September (page 156). He wrote “It's obvious that you and I should work together on creating a plan for a £10 million+ Commetric exit in 2020. It's even more pressing and obvious that we work together on the immediate 8-week integration plan. Jesse will soon head to Canada. We need to lay the foundation now.” On pages 151 -154 there was a long email exchange in which the differences between the two were laid bare. In particular the Claimant questioned why the two companies (Sigmai and the Respondent) needed a single strategy. He also referred to a need “to move to a phase of reduced dependency. No more spaghetti”, which I understood to be a reference to the intermingling of corporate interests I have described above and his perception that this needed to be reduced.

22. Mr Solheim plainly saw things differently, replying “No. You misunderstand, but I know I have not provided enough information for you to judge. We can revisit after we meet face to face”. On page 152 here were references to a “Turf war” and to Mr Solheim’s perception that “You [the Claimant] hijacked the commercial strategy of Sigmai and as a result my huge investment this

year ended up largely going to Commetric". The Claimant strongly refuted that assertion and made counter accusations. Mr Solheim referred again, in aggrieved terms, to the proposal that Sigmai should take non-voting shares in Commetric. The picture that emerges is of two individuals with strong ideas about how they wished their respective business interests to develop, struggling to agree how to work together to achieve this. There is a degree of mutual suspicion, and a number of differences that appeared difficult to reconcile. Both of them said in evidence that the relationship was robust and characterised by outspoken exchanges such as the one at the top of page 152 "Turf wars: what are these? Do you mean between you and I? Hardly surprising. We come to business strategy from completely different spectrums. I from client requirements, you from tech possibilities. We are equally rude about each other's ignorance or refusal to engage in each other's areas."

23. The Claimant sets out his overall position in some detail on pages 153-154, saying:

"Christofer the simple issue is this, many many times your involvement and ideas dominate and leave little room for others. I am nearly 50 and you and I had the good fortune to sell a small software company to DJ [Dow Jones] which then I and others built that into a \$12 million business in three years. I've rebuilt Commetric twice and have a reasonable profile in the analytics industry. I have not drawn a proper cash salary for three years and that prospect is diminishing further over the next six months given the additional costs we have taken on. Meanwhile I've invested over £1,000,000 in our combined technology ventures over the last 10 years without any return.... Currently I'm living at the most expensive period of my life and Jane and I have decided that for health emotional and financial reasons we and I can't sustain this situation much longer and that includes our working relationship which I'm sure you know I find unduly stressful. That is why Riverhouse has a mandate to sell Commetric in the next year and as you know there are three conversations ongoing..."

24. In short, both the Claimant and Mr Solheim saw that they could still make money together, but wanted different things, causing differences to emerge about business strategy. In particular there were differences about the timing of a sale, with the Claimant wanting to explore this option earlier than Mr Solheim. There were also difficulties in their working relationship caused by the Claimant's perception that Mr Solheim tried to take too much control and (as later correspondence would confirm), Mr Solheim's perception that the Claimant was resistant to accountability and supervision.

25. Mr Solheim made this observation a few weeks after the transaction had completed, on 2 October, when he wrote the email at page 166–168 to Mr Kulasingam. Mr Kulasingam was also a shareholder in the Respondent as well as an investor in Commeq and a substantial shareholder in Sigmai. Mr Solheim had not communicated with Mr Kulasingam during the period leading up to the Sigma/Commetric acquisition. They then spoke on 1st October 2018 and the email summarises their discussion and expresses the view that profit margins in the Respondent were not where they should be (the emphasis appearing to have been on revenue growth) and that in Mr Solheim's view the Claimant would benefit as director of the Respondent from the formation of a

small shareholder group (SG) of which both Mr Solheim and Mr Kulasingam would be members. The suggestion of an SG had come from Mr Kulasingam, who had adopted the model in another company in which he had invested. Mr Solheim wrote:

“As we also talked about, the SG needs to offer complementary skills and experience, needs to be as diplomatic positive and constructive as possible. However it should demand regular information, including management accounts which should be distributed by the company to all shareholders. The SG should not be a board of directors, should not try to represent other shareholders....

I don't actually think the management team knows what the margin is...

Profitability needs to be increased to 5% within Q4 and 10% in Q1. That can be achieved, I think. I think they are flying blind in terms of profitability. It's important that the margin is decent and rising. A potential buyer would see Commetric as a low cost innovation centre, one that can contribute to margin improvements in their main business, through AI and automation, but also through low cost, high tech in Sofia.

I think we should now demand that Commetric immediately send whatever they have in terms of P&L actuals, 2018 budget, and cash flow, KPIs. Project profitability. We need to know what kind of financial data they have been using on a regular basis, so we should find out what they have NOW, DELIVERED THIS WEEK. That will identify deficiencies in process is. We should also ask for incentive programmes, especially sales commission..... We need to be diplomatic and respectful, but I think we should move fast”.

26. In cross examination Mr Solheim sought to say that the language he used did not convey a desire to take control of the Respondent by making demands of its director. He agreed that indirectly he could have mandated certain outcomes by calling an EGM and using company resolutions to require certain things to be done. But instead, he was choosing a more direct route, which he maintained was in the interests of the Respondent and its shareholders. I find that this approach was made possible by the intermingling of the various entities involved. It was recognised by the Claimant and others that in the end Mr Solheim could take control through his direct and indirect shareholding, particularly so with Mr Kulasingam's support. His short-circuiting of procedures would however, I find, have reinforced the Claimant's perception that Mr Solheim was trying to direct strategy and outcomes in the way that a director might. I return in my conclusions to the issue of whether this approach did in effect contribute to a state of affairs in which Mr Solheim was a de facto or shadow director.

27. Mr Solheim communicated the idea of the SG to the Claimant by email on 5th October 2018 (page 168a). The email put the proposal forward as an idea, subject to the Claimant's agreement. The Claimant did not resist the idea and acknowledged in cross examination that the company had needed more board members and better financial management. He said that he welcomed the idea of the SG. He expressed reservations about Georgi Ivanov, who was managing the finance function and agreed that he had needed to be replaced. There were clear difficulties within the Respondent's finances in that period, including the withdrawal of service by LexisNexis after the Respondent failed to pay invoices and the Claimant having to personally guarantee a loan of

£100,000. The Claimant accepted in cross examination that profit and loss accounts had not been produced regularly enough. A profit and loss account was produced on 14 October 2018, which omitted the costs associated with the Sigma acquisition. The Claimant accepted that this too would have caused considerable concern to the Respondent's shareholders and that the apparently poor state of the Respondent's financial record keeping contributed to the suggestion that the SG be established. It is clear then that at its inception the SG was welcomed by the Claimant and not at that stage seen by him as an interference with his role as the Respondent's director and CEO. Mr Solheim's evidence in cross-examination was that it was envisaged that the SG's role effectively evolved in stages. That reflected what he had said at page 167:

"Compensation:

- **None until January review, then possibly convert to paid Advisory Board (equity);**
- **then possibly convert to formal Board towards the end of 2019, depending on performance and relationships".**

28. After this initial approach on the SG issue, Mr Kulasingam asked for some reports from the Claimant about the Respondent's current financial situation and these were not forthcoming. This supported the shareholders' belief that normal management accounts were not being prepared for the company, which was a cause for real concern.
29. A shareholders' meeting then took place on 16 October in Sofia. The Claimant presented figures to the shareholders in the form of a six-month cash flow forecast (page 185b). This predicted an operating loss of £176,000 in Q1 of 2019, which the shareholders received with alarm. The Claimant was unable to give satisfactory answers when asked for an explanation and Mr Solheim formed the view that the figure was plainly wrong. He had understood that the Respondent would need a cash injection of around \$51,000 and the differential seemed inexplicable. Mr Solheim and Mr Kulasingam would later put forward the view that the Claimant had been deliberately dishonest in presenting the figures in question, which the Claimant robustly denied.
30. The following day Mr Minkovski joined the meeting and asked further questions that the Claimant could not answer. After the meeting Mr Minkovski spoke to Mr Ivanov about the assumptions underlying the forecast and came to the conclusion that it was the Claimant himself and not Mr Ivanov who had actually prepared the figures, which he examined and found to be replete with errors. The Claimant maintained that he had had input from Mr Ivanov but accepted in cross examination that the presentation and the figures that accompanied it were "a poor piece of work". Mr Minkovski was critical of both the Claimant's work and that of Mr Ivanov and said that he was able to produce a much better set of figures having spoken to Mr Ivanov and examined the underlying assumptions the Claimant had had used (page 229-230).
31. In cross examination Mr Minkovski said that the difference between the figures he produced and those that had been produced by the Claimant could not be

accounted for by those different assumptions alone. He also said that when presenting the figures at the meeting the Claimant had been oddly unconfident (the Respondent's witnesses were agreed that finances were not the Claimant's strong suit), but that he had always come to Mr Minkovski for figures in the past. He expressed the view that the Claimant had compiled a set of highly pessimistic figures with the objective of "scaring the shareholders", but when asked why the Claimant might have done that, he was unable to explain. However, Mr Minkovski had not seen an email at page 170g from Mr Ivanov to the Claimant dated 9 October in which Mr Ivanov expresses the concern that the Respondent was going to run out of money quickly once various costs paid by Sigmai were recharged to Commetric. Nor had he seen an email exchange between the Claimant and Mr Ivanov on 17th October 2018 (page 184 to 185) in which the Claimant said that Mr Solheim and Mr Kulasingam "did not fully believe my doomsday numbers!" The Claimant also referred in his evidence to the poor performance of Mr Ivanov in the finance role and what he referred to as lack of resource in the Respondent's finance department. The Claimant also maintained that he had wanted to present a "worst case scenario".

32. Having considered the evidence about the Claimant's motivations for producing the cash flow forecast on 16 October, I consider that the contemporaneous evidence is a more reliable indicator than witness evidence produced a long time after the event and with the benefit of hindsight. In my judgement, the contemporaneous evidence suggests that the Claimant is more likely to have produced the controversial set of figures incompetently or carelessly than deliberately. It seems to me more probable than not that the Claimant was aware that the finances were potentially in a mess, but that as normal management accounts were not being produced regularly, he did not have a true picture of the situation. He was therefore simply out of his depth when presenting figures he had compiled himself without the expertise to do so and knew that he was, which might explain his lack of confidence. In cross examination the Claimant also said that it was difficult to produce cash flow figures during "renewal" season because the situation was in flux. He maintained that he had presented poorly rather than having set out to mislead and on a balance of probabilities I find that that was the case. I find that he gave the shareholders genuine cause for concern about the Respondent's financial position, which were allayed once Mr Minkovski had got involved and produced a set of figures on a better-informed basis. However, the discrepancy between the two sets of figures clearly troubled Mr Solheim, who wrote to Mr Kulasingam, Mr Minkovski and Mr Burgess-Webb (another of the Respondent's shareholders) "This is the cash flow forecast Chris Shaw presented 2 weeks ago. Let's discuss briefly why this is so different (much worse) compared to the latest set. Chris sent me the CF email during the Skype meeting with Raj on the morning of the 16th" (page 234).
33. Mr Solheim maintained in cross examination that he had begun to question the Claimant's integrity at this point, but had not wished to put the Respondent at risk by committing his concerns to writing. He said he had discussed those concerns with Mr Kulasingam. Mr Kulasingam did not mention any such conversation in his witness statement, although he said in cross examination

- that Mr Solheim had told him that he was of the view that the Claimant had deliberately changed the figures. I find that the Respondent has shown that at the time the figures were presented, Mr Solheim was puzzled and concerned about them, but the evidence as a whole does not persuade me that a view was formed about the Claimant's honesty and integrity at that point. I return later in these reasons the objective question of whether the Claimant had acted dishonestly as this was an issue that was raised again by Mr Solheim and Mr Kulasingam in the period leading to the Claimant's resignation.
34. The Claimant sought the replacement of Mr Ivanov with Mr Minkovski a few days later on 23 October (page 22). I find that he had mixed feelings about this and may have done so in part against his will. However, I do not find that he was coerced by anyone into doing so – it was a question of his recognising albeit reluctantly, that Mr Ivanov was not up to the job that needed to be done to improve the Respondent's performance. The contemporaneous documents however (page 263) show that there was a difference of opinion about whether Mr Ivanov should lose his job and that what the Claimant had perceived as pressure from the SG to fire Mr Ivanov was one of the matters that led him to seek advice from Paul Hall, the Respondent's solicitor, about the powers of majority shareholders (I return to this in paragraph 41 below).
35. Around the same time a problem had emerged with the registration of Sigmaj's shares in Commetric, which was not completed promptly after the transaction, leaving the shareholders feeling exposed. On 10 October the Claimant was advised by Paul Hall, the company solicitor, that a conflict had arisen from the fact that he was both a director of the Respondent and a director/shareholder of Sigmaj (page 182). Whilst it remained unresolved the conflict placed the transaction at risk of being set aside. The normal process for avoiding the conflict – to have the transaction approved at a board meeting prior to the transaction being completed, could not be followed where a company had only one director.
36. I note that as a shareholder in both the Respondent and Sigmaj and a director of Sigmaj, Mr Solheim also had interests on both sides of the transaction (although he was not a registered director of the Respondent). It was the Respondent's case that the conflict and its consequences represented fault on the part of the Claimant and a breach of fiduciary duty on his part alone. In the particular circumstances of this case, I find that to be overly simplistic. Mr Solheim knew that the Claimant was a sole director. The transaction was completed in a hurry against a tight commercial deadline. I do not know what legal advice was sought beforehand, if any. It seems to me likely that neither the Claimant nor Mr Solheim addressed his mind to this somewhat technical legal point and the significance of it only emerged when Mr Hall was instructed to complete the formalities. Once notified of the problem the Claimant had to find a solution, which involved securing the agreement of a majority of the shareholders in the Respondent to approve the registration of the shares, which was achieved by 25 October. He informed Mr Hall accordingly (page 182). I note that on 22 October (page 760) the Claimant also wrote to Mr Kulasingam raising the conflict issue and asking for his input into how to resolve it, but not mentioning the connection to the delay in

registering the shares. Mr Kulasingam replied that he would call the Claimant the following day, but his evidence to the Tribunal was that he was unable to have a conversation with the Claimant and was therefore unaware of the reasons for the delay – the connection was not obvious to him from the email and he was not party to the email at page 182. Plainly there was incomplete communication between the parties about the issue and thus irrespective of the extent to which the Claimant was at actually fault over the conflict, the delay caused anxiety on the part of the Respondent's shareholders and contributed to the escalation of tensions.

37. On 31 October the Claimant sent the agenda for the first meeting of the SG (page 232). The meeting took place and further differences between the Claimant and Mr Solheim began to manifest themselves soon afterwards. The Claimant wanted Mr Hakansson to attend the next meeting – in a somewhat terse email at page 233 written on 1 November he referred to the need for transparency about any remuneration that had been offered to SG members and raised some issues about his own remuneration. He also wrote: "Thirdly I would insist that Magnus is present throughout the next call given that he has important contributions to make".
38. This provoked the following response from Mr Solheim in an email on 5 November (page 239):

"Just a quick note of explanation. The SG is a group of shareholders which is on the one hand recognising the promise of potential value creation and on the other hand worried and upset that the key financial management functions have not even been attempted. When that group asks you as CEO for meetings, you are not in a position to determine the agenda or "insist" on anyone attending. I hope that clarifies".

39. The Claimant responded:

"Naturally I refute the accusation that key financial management functions have not even been attempted. I would also remind you that when I took over the CEO ship from 2016, several shareholders, including you, participated in routine conference calls that I instigated following the issuing of a shareholder report throughout 2016 and 2017. At no time was there a suggestion that the finance function was under performing. While shareholders were reminded of these calls participation lapsed during 2017.

The tone of your note does clarify the intention of the SG, which, despite what you say, are clearly at odds with a 20 year working relationship".

40. The tension in the relationship was therefore mounting and the Claimant was sufficiently concerned about the extent to which he perceived Mr Solheim was seeking to exercise control that he sought advice from Paul Hall on the extent to which the holders of a majority of the shares in a company may exert influence over the company's management. Mr Hall wrote an email to the claimant on 9th November 2018 (page 260) advising as follows:

"As a general principle, the conduct of the management of the company is in the hands of the directors. It is the directors, and not the shareholders, who had the statutory duty to promote the success of the company, and if the members were to ask them to adopt A course which in their reasonable opinion might put them in breach of this duty then they would be justified in ignoring any requests from the members.

There is no general statutory duty to comply with the wishes of the shareholders in relation to the management of the company, other than pursuant to a resolution at a general meeting (see below).

Subject to this, the influence of shareholders on management matters its indirect, in that the shareholders have the right to remove and appoint directors, though this requires the convening of a general meeting and the circulation to all shareholders of representations by any director whose removal is proposed.

In addition, members holding at least 5% of the shares in the company may requisition the convening of a general meeting and may specify the text of a resolution.

41. The Claimant forwarded that advice to Mr Kulasingam on 12 November, in the context of an exchange of emails about the structure and remit of the SG (pages 262-263). He said:

“I have attached the advice Paul Hall gave me regarding the remit of the shareholder group - would be good to know if we are all on the same page here? Please note I requested this opinion with regard to the request by the SG that I fire one of our managers [Mr Ivanov]. See below.”

Mr Kulasingam replied:

“Ref your email below my plan is to discuss this with the other members of the SG and hence I'm putting the other members of the SG in the loop. You may recall that I told you that whilst I was happy to listen to your thoughts and proposals I would need to take it to the SG. Whatever the SG views are ultimately we may need to put issues to a shareholder vote in the event that the SG is unable to agree a way forward with you. Ultimately I am sure that we all want what's best for the company and to create a shareholder value and to that extent I hope we can reach a solution that is acceptable to the SG you without having to resort to a contentious shareholder meeting”.

Membership of the SG, copied into that email, consisted of Mr Kulasingam, Mr Solheim, Mr Burgess-Webb, Mr Garyfallos, and Goetz Van Groll. I find that in practice Mr Kulasingam acted as the SG's chair and main spokesperson.

42. On the same day the Claimant ceased to be a director of Sigmai and Mr Hall informed Mr Minkovski that the Sigmai/Commetric share allocation had been sent to Companies House on 26 October 2018 and acknowledged the following day (in fact the allotment of shares was finally registered on 28 November 2018). The Claimant also confirmed in his email to Mr Kulasingam that he agreed to the creation of a board of directors for the Respondent.

43. On 26 November there emerged a further issue that illustrated the difference of vision between the Claimant and the SG when the Claimant told Mr Solheim and Mr Kulasingam (page 267-269) that a Milan based company (SDG) and a company called West Inc had both made approaches with a view to investing in/purchasing shares in the Respondent.

44. On 30 November Mr Kulasingam circulated a key communication to the Claimant, Mr Minkovski and Mr Hakansson, in the form of the paper at pages 287-291, covering a range of issues including the establishment of a board of

directors and the future of the SG. The following points are pertinent to the issues in the case:

- a. The SG had concluded that a board of directors would be a better solution than only a shareholder group, but the suggestion had come from the Claimant himself;
- b. The purpose of the new board would be to ensure better governance and a better information flow to shareholders. The SG would be in receipt of the same financial information that Mr Minkovski would provide to the board (management accounts, KPI performance etc)
- c. The power to appoint or remove directors would lie with shareholders at EGMs and AGM's. This change to the way in which directors could be appointed would be codified in a change to the Articles.
- d. There would be an initial EGM on or around 10th January 2019 (in fact that meeting did not take place until later). The SG was proposing that the initial directors would be the Claimant, Mr Hakansson, Mr Minkovski, Mr Garyfallos (non-executive) and a non-executive chairperson to be appointed later.
- e. Certain decisions would need to be taken by a majority of the board. In particular and as regards the Claimant's responsibilities, a majority board vote would be required for the purpose of taking loans, signing revenue or marketing partnerships or discussing or seeking the sale of the Respondent. In practice I find that this would act as a fetter on the Claimant's discretion.
- f. The directors would have clear KPIs with the objective of driving shareholder value.
- g. Despite the creation of the board the shareholder group would continue and be renamed the shareholders liaison group (SLG) with Mr Kulasingam as its coordinator and acting as a liaison between the board and that group.
- h. The measures were described as "being taken to address/improve the current situation whilst addressing your objection that the SG was a body that had power without responsibility".

45. The Claimant and Mr Minkovski signalled their broad agreement (page 292), but the Claimant also signalled some reservations about the proposed codification of some of the measures in the Articles. He was privately unhappy about the recognition being given to certain shareholders and their ongoing ability to control certain areas of director responsibility through a process of mandatory shareholder approval. He was also concerned about the ongoing existence of the SLG even after the appointment of a board of directors, which he referred to in his evidence as "company management without responsibility, rather than governance".

46. Also on page 292 there was an email dated 3 December from Mr Solheim to the Claimant and Mr Burgess-Webb, which in my judgment was clearly sent in error to the Claimant and was probably intended for Mr Kulasingam. It read:

"1. It would be crazy for Chris to "own" these changes which are largely meant to police and control him/executives. 2. even if there were no conflict, Chris is useless at

briefing lawyers. His thinking is not crisp, he wastes a lot of time and ends up with something that does not work and then he does not read or think about the changes.”

The significance of this communication is in my judgement clear. Mr Solheim’s objective through the SG and the proposed changes to the Articles of the Respondent was to “police and control” the Claimant. Whether intended for the Claimant or not, once read by the Claimant the email would have been damaging to an already fragile relationship and would have been perceived by him as clear evidence of an intention to erode his role and his autonomy.

47. The Claimant subsequently briefed Mr Hall about the changes to the Articles and need for an EGM. Mr Hall’s advice, including advice that it would be better to include some of the proposed measures for the Articles in a separate “board protocol” was in an email dated 12 December 2018 at pages 307a-b. The discussion was taken forward by Mr Kulasingam, the Claimant having deduced from Mr Solheim’s email of 3 December that he did not want the Claimant to brief Mr Hall fully. A file note of Mr Kulasingam’s conversation with Mr Hall, dated 19 December, appears at page 307c. It included a paragraph that had not been included in the measures set out in Mr Kulasingam’s email of 30 November, namely that the Articles would be amended so that the approval of a simple majority of the shareholders was needed before the Claimant could discuss any sale of the Respondent or its business. The Claimant was aggrieved to see the file note refer to a measure that had not been the subject of previous discussion or agreement and that he saw, as fettering his ability to act both as CEO of the Respondent and as a director, in a way that was unusual and, he felt, undermining. I find that the Claimant was affected by this proposal as both the CEO and a director. In the context of the governance and management a company of the size and composition of the Respondent it is in my judgement artificial to try to draw a distinction between the two roles. On a day-to-day basis the Claimant was operating in both capacities simultaneously and what affected his ability to operate in one capacity would equally affect the other. He wrote to Mr Hakansson on 20 December describing the new proposal as “insulting and mad” and added “I’m nearly through here”. Mr Hakansson replied saying that he did not think the intention was to stop all discussion but to require shareholder approval for the precise structuring of acquisitions. He said “Think you are probably reading too much into this. Ultimately we all want the same thing”.

48. Mr Hall duly prepared draft Articles and a Board Protocol which Mr Kulasingam circulated for discussion on 21 December (pages 310-314). Shortly afterwards Mr Kulasingam sent an email to the SLG, the Claimant and Mr Hakansson as follows:

1 I had a very constructive and positive meeting with Sally [Costerton] yesterday. We covered lots of ground and I believe she now has a good picture of the current state of play of Commetric. She is keen to take on the role subject to discussions with others below and subject to agreeing comp terms.

2 I know she was going to speak to Misho [Mr Minkowski] today.

3 She also wants to speak to Chris and Magnus in the new year.

4 The one area we spent a considerable time talking about was around revenue/margin growth and the role of AI in the business. She wants to speak to CUS [Mr Solheim] in the new year to better understand how AI is going to be used within the company.

....

6 The one area that Sally (and I and no doubt others too) were keen to get early sight of is the business plan/strategy of the company going forward. This is obviously critical. Chris could you please send us an outline of your thoughts on this ASAP... this should be in bullet form format and does not need to be pretty in order for others to provide thoughts input into it ASAP.

.... let's get this wagon back on the road full speed ahead for 2019.

The Claimant felt undermined by this email. Sally Costerton had been identified as a possible non-executive chair of the Company. The Claimant felt side-lined by not being included in these initial discussions with Ms Costerton and demeaned as CEO and a director by being in effect directed by Mr Kulasingam to produce a business plan. He also took exception to the implication that the Respondent could be likened to a wagon that needed to be put back on the road.

49. After the Christmas break arrangements were begun towards the EGM at which revised articles would be adopted. However, a difference of opinion had developed between Mr Hall and Mr Kulasingam about the relationship between the Articles and the board protocol. In Mr Hall's attendance note of 19 December (page 307c) he had noted: "After some discussion it was agreed that the board protocol should not be referred to in the articles or approved by ordinary resolution because the shareholder group will in any event have a majority on the board and it was in nobody's interest to create a position which would be unduly restricted". Mr Hall drew attention to this point on 14 January (page 334) in an email to the Claimant that was copied to Mr Kulasingam and Mr Minkovski and attached revised resolutions. The revised articles and notice of EGM had been circulated beforehand. The Claimant had asked whether the board protocol needed to be expressly referred to and Mr Hall replied:

"I discussed the status of the protocol with Raj on the telephone. A document such as this is intended to be flexible and would not normally be referred to in the company's constitution. The amendments to the articles ensure that the members will control new appointments to the board (in addition to the new board members which they have already nominated) and their nominees therefore have control over the way in which the board will conduct itself irrespective of the precise terms of the protocol for the time being".

50. Mr Kulasingam replied (page 338)

"it is a requirement of the SLG that compliance with the protocol is a requirement set out in the articles. From memory, this is referred to in my annotations to the [missing word] Paul drafted after our last conversation",

to which Mr Hall responded, (page 345):

“I really do not think it's sensible or practicable to impose a document such as the proposed protocol upon directors by the articles. This is a general comment and not one of relevance to Commetric alone. However in the case of Commetric the shareholders have unusually taken very direct control over the composition of the board, and if they trust the people they are appointing then I imagine they should be willing to let the directors get on with managing the company without having to look over their shoulders all the time by reference to a flexible document such as the protocol. ... please can you reconsider this.”

Mr Kulasingam was however adamant.

“I realise the issues around the protocol being in the articles but the SLG have decided that this is what they want and the halfway house was to allow for the protocol to be amended by unanimous consent of the directors but have an obligation in the articles for compliance with the protocol”.

51. The discussion continued into 15 January (page 343-344). Mr Kulasingam had formed the view that the “halfway house” was the right approach, despite Mr Hall’s advice to the contrary. What emerges from this discussion is a determination by the SLG to exercise an unusually high level of control over the Respondent’s directors. Although Mr Kulasingam sought to argue that effective control was retained by the board because the board could decide to alter the terms of the protocol, I find that in practice this would have been difficult to achieve as the provision required a unanimous vote by a minimum of five directors. Furthermore, the composition of the board was in the hands of the shareholders by reason of the amendments to the articles which had reserved the nomination of directors to them and removed it from the directors themselves. I consider this to be an unusual arrangement that effectively placed the powerful shareholders in the company on all fours with its directors in certain critical matters. I also find that the effect of this particular state of affairs affected the Claimant both in his capacity as CEO of the Respondent and as one of its directors – as stated above, I consider that in the particular circumstances of this case it is artificial to draw a distinction when considering how the Claimant was affected by the conduct of the Respondent and the SLG. Mr Kulasingam sought to say that the measures put in place were reasonable in light of the shareholders’ concerns that the Claimant had a history of using numbers for his own benefit and his shortcomings in financial matters. I return to that point of view in my conclusions.

52. An issue then arose over the Claimant’s wish to employ Jesse Moore on a limited hours consultancy basis to take forward some discussions with Government departments about AI in media intelligence solutions. The Claimant thought that Mr Moore, until recently CEO of Sigmoid, had the right technical knowledge to conduct the discussions. However, Mr Solheim and Mr Kulasingam were adamantly opposed to the proposal and made their feelings known. There had been a falling out between Mr Moore and the technical lead at Sigmoid, Mr Uzinov, which appeared to be the background to these objections. The Claimant’s position was that the selection of a consultant to undertake work of this nature fell within the purview of his role as director and CEO of the Respondent and that the objections voiced by Mr Kulasingam and Mr Solheim represented unwarranted interference.

53. Mr Kulansingam explained his objections in an email on 7 February at page 398. They concerned historic tensions, the facts of which were not part of these proceedings and a conflict of interest involving one of the spin-off entities (Sigfin) for which the Claimant was expending some of his time. On the face of it these were legitimate and sensible objections. What is notable however is the tone in which they are expressed, given the respective roles of the Claimant and Mr Kulasingam. Mr Kulasingam wrote:

“I am writing to you regarding the proposal for CM to employ Jesse as an AI consultant. In short, this cannot be accepted and needs to be killed quickly. My reasons are as follows. Misho, Christofer, you and I know just how much time and energy has gone into finding a good consensus for a way forward. Reintroducing Jesse will be like pressing a reset button given the clear conflict of interest between any proposed role at Commetric and his role at Sigfin and past issues.... In conclusion reintroducing Jesse in anyway and to any degree would be very destructive so that is not possible and needs to be kicked into touch now.”

In my judgement Mr Kulansingam was telling the Claimant what to do in that email. He was giving him a direction.

54. On the same afternoon the claimant received an email from Mr Solheim (page 387-389) in which Mr Solheim explains his objection to the appointment of Jesse in trenchant terms:

“That you were proposing that Jesse should work for Commetric. That is completely unacceptable. The last time you tried to introduce him to Commetric I offered to help. You refused. It was a disaster. Now it's simply not possible. Nothing. Not even one hour. I will go nuclear if Commetric engages him in anyway. If Jesse is reintroduced to Commetric, then I would regard renewals of the feuding as a certainty. We are too brittle to weather that. The fights would envelop the board of Commetric. I would have to seek to have you replaced before the feuding gets too serious and it destroys Commetric. Jesse found the last feuding very stressful. I think the new ones would be much more so.”

55. I make two observations about this passage. Firstly, it forms part of a much longer email in which Mr Solheim describes the difficulties arising from the Sigfin spin off, which in his view were not going according to plan, but which his email implies remained something to which the Claimant was very committed. The Sigfin spin off was not a significant part of the evidence I heard in these proceedings and I therefore make no factual findings about it, save that it is clear from this email that it was contributing to the tensions between the Claimant and Mr Solheim and the fact that at this point they were pulling in different directions. But for the purposes of this dispute, Mr Solheim was wielding his power on this issue as explicitly as it was possible to do so, by threatening to have the Claimant replaced as CEO if he did not bend to Mr Solheim's will. I note at this point that if the Claimant was dismissed as CEO his directorship would end under clause 16.1.1 of his contract of employment (page 73). For that reason, in addition to those I have set out earlier in these reasons, I consider it to be artificial to make a distinction between the Claimant's role as CEO and roles as a director in the Company – the two positions stood or fell together. The reality at this point was that power was

leaching away from the Claimant in his capacity as both director and CEO in the complex web of relationships that he had with Mr Solheim and the other shareholders in the Respondent. His ability to act in the way that a CEO and company director would ordinarily expect to be able to act was being curtailed, both by the measures set out in the board protocol and by the forceful way in which Mr Solheim and Mr Kulasingam were expressing their views. The Respondent sought to say that the language used was typical of a robust working relationship that had endured over two decades. In my judgment things had gone beyond that at this point and Mr Kulasingam and Mr Solheim were acting together with the express purpose of exerting control over the Claimant's actions.

56. That the situation had in effect become a power struggle between Mr Solheim and the Claimant is further illustrated by the email from the Claimant to Jesse Moore at page 391, sent on 10 February. He was forwarding his response to Mr Solheim's email of 7 February in which he said, "I read your email in disbelief and I am very, very angry". He went on to accuse Mr Solheim, in effect, of reneging on the agreement the two of them had reached regarding the future of Sigfin. Leaving that aside, he forwarded the message to Mr Moore with this email:

"CUS email came in on Thursday - my reply on Friday in which I had to reveal a deeper update.

This is also part of a larger issue which I need to brief you on regarding a company called SDG group and a relationship with Commetric that is on the cards. CUS will blog (sic) that relationship but have spent two days with SDG leadership team. I see there is substantial value for either Commetric or some key individual in Commetric including yourself.

Returning to Sigmaj that company is out of money and still has not paid its debts. CUS is desperate to sell Commetric shares in order to sustain Sigmaj. I am with lawyers tomorrow morning following which I will call an EGM in Sigmaj in order to expose CUS. I will also contact some shareholders in CommEq with a view of calling an EGM in that company again to get CUS to explain/expose.

I'll give you a call in 20 minutes".

57. It was also put to the Claimant in cross examination that the disagreement about Jesse Moore arose out of discussions between the Directors of Sigmaj and Sigfin and did not relate to the Claimant's role as CEO of Commetric. I did not agree with that contention, firstly because the Claimant was no longer a director of Sigmaj at that point (he had stepped down in November) and secondly because he wanted to appoint Jesse Moore to work for the Respondent – not any other entity. I accept that the Claimant was still a shareholder of Sigmaj at the time and therefore still concerned with its success, but if the Respondent's premise was that the Claimant had to be acting in one capacity or another at any particular time and/or could only be motivated by one set of objectives, I refute that suggestion. The corollary of that, as Mr Galbaith Marten put to the Claimant in cross examination, was that Mr Solheim was not at any one time acting solely as a shadow director of the Respondent. The situation was more complex than that. It seems to me self-

evident that in a set of arrangements as convoluted as this one, the Claimant or Mr Solheim might well have had more than one set of concerns in mind when choosing a course of action. All the protagonists had a web of mixed motives in this case. Thirdly, the email at page 391 confirms that the Claimant was very much thinking about the future direction of the Respondent and that there might be a role for Mr Moore in that. In that regard he was in my judgement acting as CEO and director of the Respondent, even if not exclusively so.

58. On 10 February the Claimant forwarded to Mr Hall Mr Kulasingam's email of 7 February, complaining that the "SLG are asserting how I manage the Company on a micro-level" (page 399). He also suggested that Mr Minkovski was supplying the SLG with information.
59. On 11 February Mr Solheim responded to the Claimant's email of 8th February as follows (page 394):

"If Jesse is engaged or paid by Commetric to whatever degree and for whatever reason, then I will regard this attempt to rebuild trust as futile. That is not because I disrespect his abilities or dislike him, but mainly because I would regard further feuding as nearly guaranteed and escalations would not be containable".

60. The Claimant wrote to Mr Solheim and Mr Kulasingam on 12 February (page 405) asking them to stop what he referred to as "briefings" against him. He was alluding to the accusation in Mr Kulasingam's email of 7 February that costs that should have been met by Sigfin had been allocated to Commetric. He explained that this had not in fact occurred and he complained about the overbearing nature of the communications from the SLG, which he described at having been taken to "a new level".
61. Between 11 and 15 February the parties were corresponding about a face-to-face meeting to resolve their differences, which they proposed to hold on 25 February and which Mr Kulasingam said he hoped would clear the air (page 415). On the same page was an email from Mr Solheim to the Claimant, suggesting that the appointment of Ms Costerton as non-executive chair of the Respondent should be postponed until the disagreements between the Claimant and the SLG were under control. The email contained the following passage:
- "It seems to me clear that the face-to-face meeting on the 25th is our only realistic chance of finding a way forward. So, should that meeting not take place, or not deliver a significant improvement, what then? For six months we have sought measures to secure an adequate alignment and communication between the CEO and a group of shareholders representing more than 50%. The appointment of a board was the keystone of the plan; the only solution which seemed to both sides to have a chance of success. Accordingly, if that is now proving impossible, then our differences are essentially and for practical purposes irreconcilable, ie we need to replace the CEO now. That would fill me with sadness. It's not what I want. But we can't continue like this."**

Mr Solheim then suggested an approach that would involve the Claimant having his own legal representation (to achieve balance given that Mr

Kulasingam is a qualified solicitor). It was put to the Claimant that the email at page 415 was not a threat, seen in context, but an attempt to bring home to him the urgency of the situation. He did not accept that, given the previous correspondence at page 387-9. However, there was no evidence of any response from the Claimant other than the email at page 446 (14 February) in which he said that the email gave him much to think about, but that he would not be available on 25 February for a meeting. Mr Solheim replied:

“Fundamentally, it seems to me that the disagreements have arisen from a few root events. Your request that Commetric’s biggest shareholder give up the voting rights, could only have one effect on me, namely to raise concerns about alignment and information flows. When I sought the information you perceive that as interference or disrespect but it was neither. Since then we have been in a death spiral. The face to face meeting is as I see it the final chance to break that spiral and achieving a lasting truce.”

62. Mr Kulasingam reiterated that message the following day (page 465), but there had also been an exchange of emails between the Claimant and his wife, Jane Shaw on 13 February (page 423). Mrs Shaw wrote:

**“yes this is escalating for sure, but it seems you are on top currently. What are the rest of the emails, with all this legal presence stuff??
GET YOUR MEETING FIRMED UP WITH ITALY NOW.”**

The Claimant was, I find avoiding a meeting at that point and had an agenda of his own, which was to progress the discussions with SDG.

63. The Claimant signed the board protocol on 18 February (pages 470-472) and sent it under cover of a long email at pages 473-475, that was a response to Mr Solheim’s email of 13 February and rehearsed a number of the issues and grievances that characterised their business relationship at that point. It ended by proposing a meeting on 26 February. It was apparent from the email at page 517 (Mr Minkovski to the Claimant on 25 February) that Mr Kulasingam and presumably Mr Solheim had not been aware that the Claimant had signed the protocol and returned it – a point confirmed by Mr Solheim in cross examination. It also emerged during the Claimant’s cross examination that the version of the Protocol sent and signed by the Claimant was not the final version. Mr Kulasingam had circulated the final version to Mr Shaw and others on 31 January (pages 369-371) and a document showing the changes was at pages 372-374.
64. The key difference as far as the issue that then emerged was concerned, namely the appointment of additional directors, was whether the Protocol restrained the Claimant’s ability to appoint additional directors autonomously. The later version implicitly did restrain this ability by stating: “The Board shall in due course (at a date to be agreed between Chris Shaw and the SLG) consist of at least 5 directors and non-executive members”. Those words were missing from the version the Claimant signed and the Claimant’s case appeared to be that his ability as the Respondent’s sole director to appoint new directors was unconstrained even after he had signed the Protocol. The Claimant also relied on an email dated 15 January 2019 (page 580) in which Mr Minkovski had confirmed to him that he would be able to appoint new

directors at any time prior to the EGM. That was not contradicted by the wording of the version of the Protocol that the Claimant signed. It was not put to the Claimant that he had deliberately signed the wrong version of the Protocol and I find as a fact that he signed the version that he believed reflected the agreement that had been reached between him and Mr Solheim. I also find that he believed that he had the discretion to appoint additional directors until the EGM on the strength of the 15 January email.

65. At page 47 the Claimant announced his intention to appoint Mr Hakansson and Mr Garyfallos to the board of the Respondent, saying:

“While I take your point at the importance of establishing a constructive dialogue with the SLG/largest shareholder, in order to do that I propose this week to appoint both Magnus Hakansson and Spyros Garyfallos to the board of Commetric. This is in line with the plans set out by the SLG and it is appropriate now I have signed the board protocol that this is implemented. I think it is much more likely that we will find a resolution to SLG grievances as a board of three rather than one. I would also have like to appoint Mihail to the board however I have been advised by Paul Hall that as a board director he can't have conflict with other companies and this is obviously an issue given his work for both Sigma Ltd and Commeq Ltd. I would be grateful if this can be tabled as an agenda item to discuss with you as director of both companies as there are very real sensitivities here.”

He received no response to this email, which I find was not properly read, or read at all, by Mr Solheim or Mr Kulasingam at the time.

66. In fact, as an email from Mr Minkovski dated 22 February (page 479) confirmed, Mr Hakansson and Mr Garyfallos were appointed as directors of the Respondent with effect from 22 February but without their consent to be appointed at that stage, as they both made clear in their responses (page 480 and 484). Mr Garyfallos went further and said (page 480):

“I also made clear to Chris Shaw that I will accept the early appointment ONLY if the SLG approves. Chris can confirm that. I am aware there are discussions scheduled prior to the EGM and I hope this is a misunderstanding”.

67. News that the Claimant had acted to appoint Mr Hakansson and Mr Garyfallos as Directors was badly received by both Mr Kulasingam and Mr Solheim and resulted in the first references to legal action against the Claimant. Mr Solheim's said in cross examination that the Claimant had effectively undone the work intended by the creation of the protocol by upsetting Mr Garyfallos and Mr Hakansson. He had also offended Mr Minkovski by not appointing him on what Mr Solheim described as “spurious grounds”. He said he had felt “despair” at the Claimant's apparent willingness to agree one thing, but do something else.

68. Mr Hall offered to attempt to mediate in a face-to-face meeting involving Mr Solheim and the Claimant only, but this proposal was not acceptable to Mr Kulasingam, who insisted on being present at any meeting (page 497). Mr Kulasingam reiterated that it had been agreed that a five-person board would be appointed after a workshop had taken place at the end of March and Sally Costerton was ready to join the board. He said:

“I spent a considerable amount of time and energy working with shareholders and management to try and find ways of moving forwards and to protect and enhance shareholder value. After many months of frustrating effort and following a suggestion from the management team, the shareholder group decided to push for a formal board. That was your stated preference. You were unhappy with the shareholder group having “power without responsibility” so we agreed to fix that with a new board.

We agreed with management how that board would be set up. You are renegeing on that deal and things are spiralling out of control. The meeting next week is the final attempt to get us back on track without recourse to litigation”.

69. The Claimant sought to say that as neither Mr Solheim nor Mr Kulasingam had objected to his email of 18 February, he had understood that he had their consent, but this suggestion was firmly rejected by Mr Kulasingam on 22 February (page 492). The Claimant accepted in cross examination that he had made an error in assuming that the lack of response by the SLG to his email represented acquiescence on their part. Meanwhile Mr Solheim wrote to Mr Hall on 22 February (page 494) copying the Claimant and others and expressing the view that mediation could not work in the circumstances (although he still suggested a face-to-face meeting). He said:

“Accordingly, it now seems virtually certain that there will be no agreement on Monday/Tuesday, which, as previously explained, we saw as the last chance to save plan we had agreed with Chris. Today’s events illustrate how the gradual escalation of the feuding is likely to cause maximum damage to all the stakeholders including shareholders. As such, Raj and I think that the legal action now being planned must necessarily be a streamlined as possible narrowly focused on the gravest and easiest to prove breaches of fiduciary duties/conflicts and that the case should be pursued with the maximum energy and urgency”.

70. I find as a fact that at this point there had been no formal legal advice to Mr Solheim and Mr Kulasingam that they had viable claims against the Claimant. They had had informal consultations with one of Mr Kulasingam’s colleagues (as confirmed at page 520). However, the threat of litigation from both Mr Solheim and Mr Kulasingam was I find intended to put pressure on the Claimant. Mr Solheim’s evidence in cross examination (although not his evidence in chief) was that he and the other shareholders wished to prevent the Claimant selling the Respondent to SDG. They sought advice on whether legal proceedings could restrain him from doing that but were told they could not. I was sceptical about that aspect of Mr Solheim’s evidence, which was not in his witness statement, but be that as it may, the threat of litigation was repeated on 24 February (page 507) and 27 February (page 520). The Claimant asked at pages 507, 519 and 548 that Mr Solheim set out his grievances clearly, but this did not happen. I accepted the Claimant’s evidence that the level of hostility in the communications in this period were not typical of his working relationship with Mr Solheim. If they had been, I doubt the relationship would have lasted as long as it had done until that point. Mr Hall continued to offer to mediate, but the parties could not agree on the specific arrangements, particularly as Mr Kulasingam, unhelpfully in my view, was insisting on participating in any meeting.

71. In the meantime the Claimant was continuing his discussions with SDG in Italy, accompanied by Mr Hakansson, so this was not done clandestinely. However, it was done in breach of the protocol, both the version signed by the Claimant and the version he should have signed. He wrote what appeared to be an email to Simon Hicks of SDG on 24 February (pages 512-513), but I find that it was in effect a memo to himself, not sent to anyone. The document sets out the Claimant's view of matters at that point and his intentions for the Respondent. Several key points emerged from this email:

- a. The Claimant had confidence in the Respondent and its revenue and profits were increasing;
- b. He did not understand Mr Solheim's hostility (as he perceived it) but regarded Mr Solheim as excessively controlling ("It's clear – he wants a puppet");
- c. He had been hoping to present a proposal from SDG to Mr Solheim, but had had to revise the figures and did not think Mr Solheim was receptive at that point in any event;
- d. He had appointed two additional directors as he expressed it "in preparation";
- e. He would be leaving the Respondent, possibly with others (he mentioned Mr Hakansson) although he expected it "to get bloody as I clear my name";
- f. He had decided to leave Mr Solheim out of the picture with SDG;
- g. He had an alternative plan in mind and believed he could "add tremendous value".

72. I find as a fact that at this point – 24 February – the Claimant was seriously considering leaving the Respondent and joining forces with SDG, although it is implicit that that was predicated on his being able to arrive at an acceptable arrangement with SDG. The significant point from the perspective of this case was that the Claimant's intention to move on was already strongly developed at this point in time and that he knew that there would be strong opposition to his actions in engaging in discussion with SDG. It makes little difference that the note was not sent to Mr Hicks – it is still illustrative of the Claimant's state of mind at the time. I also find as a fact that the threat of litigation had been articulated by this point and that that was operating on the Claimant's mind at the time that he wrote the note. He said in cross examination that he had told Mr Hicks the day before that he might have to leave.

73. The Claimant also said in cross examination that whilst he was having thoughts about leaving the Respondent at that point, he decided that it would be better to "stick around" in order to see if the situation might improve. I note that at this point SDG appeared to be seriously interested in making a proposal to the Respondent. I find that the sequence of events – that the Claimant was trying to find a buyer for the Respondent, whilst Mr Solheim and the SLG were trying to prevent him doing exactly that, was a predictable consequence of the misalignment of objectives that emerged soon after the deal between Sigmair and the Respondent the previous autumn. However, the Claimant wanted to exit from the situation on the best possible terms – his motives and those of Mr Solheim and the SLG were first and foremost

commercial. At the same time the Claimant did want to understand the nature of Mr Solheim' grievances – these had been set out in only vague terms even when litigation was mentioned.

74. On 27 February Mr Solheim wrote to the Claimant (page 520), copying a number of others including Mr Kulasingam, Mr Minkovski, Mr Hall, Mr Hakansson and Mr Garyfallos setting out for the first time the suggestion that there had been dishonesty on the Claimant's part. He wrote:

“We are still taking legal opinion from both solicitors and two barristers. Our intended actions include a test of whether you as a director has acted dishonestly, that you have knowingly misinformed/misled shareholders in either Commetric or Sigmai or both. Prima facie there seems to be overwhelming evidence for multiple instances of that with the latest example this month when I understand that you informed several shareholders and potential directors that me show could not be appointed as a director because of a conflict of interest. That was immediately prior to your arranging the appointing of two individuals as directors without their consent.

That recent example of apparent misinformation is probably not the greatest example, though. In respect of some of the instances there may have been a prospect intention of personal benefit for you (which I'm informed does not need to be a financial gain), in which case the test may be for fraud or attempted fraud.

Barristers advice:

- **such cases should be reported to and investigated by police/SFO**
- **who will pass the case (s) to the CPS if they think there is a reasonable chance of conviction.**
- **A conviction, even for attempted fraud, would be**
 - **highly unlikely to lead to a custodial sentence**
 - **more likely to lead to a sentence of community service and barring from directorships”.**

That's the update in respect of criminal charges.

We are at an earlier stage in respect of considering litigation and I would not be able to pinpoint any particular areas, for both practical and tactical reasons. In any event, it might be better for Commetric that it's the Sigmai shareholders who asked the police to investigate if your behaviour has been dishonest (and possibly fraudulent) and that we delay any possible litigation.”

75. I find as a fact on the basis of the evidence presented to me that there was no basis for accusations of this gravity and that the threat of criminal proceedings was sabre-rattling, clearly intended to put pressure the Claimant in the ongoing struggle between him and Mr Solheim over the future of the Respondent.

76. The Claimant replied in restrained terms to Mr Solheim on 28 February (page 548) saying:

“Having carefully reread your email, and discussed my conduct with several colleagues who are close to events, I still have no idea of the specific action on my part that could give rise to such a claim and therefore I still hold out hope for a mediated settlement.

In the meantime we continue our preparations with the shareholder EGM on Monday and do our best to retain our focus on driving the business forward.”

77. The email of 27 February also caused the Claimant to write the following day to a number of the Respondent’s shareholders as well as Mr Minkovski, Mr Hakansson and Mr Garyfallos about what he describes as “a new low in his aggression against me personally”. He asked Mr Minkovski to make sure that the accusations were not made public (page 521) and said that the focus should remain on the continued growth of the Respondent. He was clearly concerned that the viability and profitability of the Respondent should not be put at risk by Mr Solheim’s actions. Mr Minkovski’s response was broadly supportive (page 521).

78. This correspondence took place in the run up to the scheduled EGM, which was due to take place on 4 March 2019. The Claimant was proposing that he, Mr Hakansson and Mr Garyfallos hold a board meeting immediately before the EGM and that they appoint Mr Minkovski as an additional director at that meeting. On 28 February Mr Garyfallos gave a measured and insightful response at page 537 saying:

“Hi Chris, these are my thoughts.

I am against any litigation or legal action towards you Christofer or any other director involved in the CM/CE group of companies and I will personally not support nor get involved to any such development. My personal view is that this situation is the outcome of poor or no flow of information, miscommunication and big egos.

My directorship appointment was problematic, as you know, and triggered the latest explosion; I somehow feel responsible I didn't see this coming. You are right, I did agree becoming a director. And yes I did offer more of my time starting on April...but the timing and circumstances of my appointment were not right. The SLG was notified but did not approve as I requested to you. The SLG unanimously opposed to the early appointment and for good reason. And SLG members who had previously supported you, felt it was not right. Misho felt confused and demotivated...

All in all, honestly I am not sure this board meeting is a good idea Chris.

I foresee a second explosion coming and we are not far from the point where everything will be out of control and irreversible. Don't take me wrong, I am trying to be constructive, extra careful and stay as neutral as possible. I'm happy to discuss further over the phone...”

Mr Hakansson replied the following day saying:

“I sort of agree with Spyros. And he will be more valuable in this overall process if he keeps his neutrality so I understand and agree with his position.

I'm also expecting a response from you re my directorship. This was not handled correctly and technically I don't think I am yet a director as I haven't signed a contract or have been presented with one.

Why did you so urgently want to have a board meeting on Monday? Perhaps the four of us can convene anyway but let's not call it a board meeting?”

79. Thus the two had misgivings about holding a board meeting and did not understand why there was a rush to do so, but Mr Garyfallos supported the appointment of Mr Minkovski (page 554) which he regarded as likely to be perceived as a placatory step, which is in fact how Mr Kulasingam took it. At page 555 there was an email from Mr Kulasingam dated 1 March 2019 approving the appointment and raising again the possibility of mediation as a solution to the difficulties, although the issue about who should be present at that meeting continued to cause an impasse.
80. Unfortunately, however on the same day Mr Solheim emailed the Claimant's wife, Jane Shaw (page 558). He said:
- "Dear Jane,
As you probably know, some of the shareholders, including I, feel obliged to legally challenge some of Chris's actions/communications. Processes are underway to do that. I would be very willing to summarise the circumstances, if you want a call. Just let me know.
Kind regards,
Christofer**
81. The Claimant took this badly and wrote to Mr Kulasingam, copying Mr Solheim and others as follows:
- "You are correct that three times over the last 10 days I proposed to you and Christofer a mediated settlement in an effort to provide a way out of the escalating situation. Each time these have been turned down by Christofer.**
- On the 24th Christofer confirmed that you and he were "proceeding with litigation" and I responded requesting the basis of such actions and suggesting that perhaps Tony Burgess Webb could be an effective mediator if available. I also asked if you and Christofer could suggest "alternative mediators". You and Christofer then responded to this ameliorating note with an email the 27th stating you have "overwhelming evidence" that I have acted dishonestly and fraudulently. The email contained threats to ruin my business career and even went as far as suggesting criminal proceedings. I replied on the 28th stating "I still had no idea of the specific actions on my part that could give rise to such a claim" and I again suggested the way out was for a mediated settlement.**
- As a lawyer you will know very well the distress and harm such threats and allegations can do to people, members of staff or work colleagues. Two days ago Christofer decided to ignore my request for evidence to support his allegations, and ratchet up the distress a stage further by writing directly to my wife."**
82. The Claimant reiterated in cross examination that he considered the email to be inflammatory and designed to maximise distress. His main concern was that Mr Solheim seemed to be indicating that he was willing to explain to Mrs Shaw what he had been unwilling to explain to the Claimant, namely the basis of his grievances against him. He said that this "crossed a line".
83. The background to the email to Jane Shaw, which Mr Solheim went on to explain to Mr Kulasingam on 3 March (page 564) was that Mrs Shaw had written requesting same day redemption of the full amount of her investment in CommEq's investment fund. For reasons that are not relevant to this judgment that posed difficulties and Mr Solheim decided to tell Mrs Shaw

personally that a same day request was not possible. She responded politely saying:

“Of course, I do not mind waiting 10 days if this was what was agreed in the investor agreement. However, I need total assurance forthwith that the full amount will be redeemed in the agreed time frame”.

In explaining the situation to Mr Kulasingam Mr Solheim said (page 566):

“Anyway, based on Jane’s second and courteous mail, I felt uncomfortable ignoring the elephant in the room, namely the conflict with Chris, which I presumed somehow triggered Jane’s redemption request. I thought Jane deserved an offer of information from me”.

In my judgement Mr Solheim's email to Jane Shaw on 1 March was gratuitous and unnecessary in the circumstances and would have inevitably led to distress to the Claimant, whether by design or not.

84. Mr Kulasingam however replied (page 564), copying various others including Mr Minkovski and Mr Garyfallos:

“Thanks for the clarification Christofer.

This is very helpful context and perhaps illustrates how Chris is using extraneous circumstances to leverage his position in Commetric and how he slants events to put himself in a favourable light whilst attacking both Christofer and me.

I have found his emails and actions increasingly aggressive, petulant and if not untrue certainly slanted in his favour.

I would advise you to take all his emails with a large dose of salt and any other ingredient that you feel appropriate”

85. I find that all the protagonists were in effect riding two horses at this point – not closing down the possibility of mediation altogether, but regarding each other with increasing levels of hostility and suspicion. However, all were sufficiently invested in the Respondent to continue to commit to its commercial success despite the increasing levels of anger.

86. On 4 March the Claimant wrote to a solicitor, Robin Chapman (page 568), from whom he had received some advice about how to move forward, saying:

“Many thanks indeed for your time yesterday.... great to see your brain whizzing round the problem!

However I've reflected overnight about the situation and I've decided that my objectives are different - I want out! I know these people too well - they will never leave me alone and will continue to make my life a misery.

So what's to be done? Essentially I'm looking for a significant settlement to leave... how does one play this?”

87. This was consistent with an email he had sent the previous day to Richard Beresford, a solicitor at McCarthy Denning (page 571a). He had been on the

point of proposing that Mr Beresford step in to mediate in the dispute, between him and Mr Solheim. However, from this email it is evident that he had changed his mind:

“I’ve reflected on this (and so has Jane...) and guess what... a leopard doesn’t change his spots....I don’t believe we can put a patch on Christofer’s controlling nature....

So I’ve decided to change the plan. I’m out of here and I want the best exit deal possible.

88. I find that at that point the Claimant intended to leave the Respondent provided he could negotiate a suitable exit package. He was considering his options, which was entirely understandable given his long history with the Respondent.

89. The Board meeting nevertheless took place the same day. The minutes were at page 583-4. The Claimant chaired the meeting which was attended by Mr Hall, Mr Hakansson, Mr Garyfallos and Mr Minkovski. The minutes recorded Mr Hall’s view that Mr Solheim was potentially acting as a shadow director and there may be a case for putting him on the board. There was an explanation of the forthcoming changes to the Articles and in particular the provisions for appointing and removing new directors. The board then voted on three transactions, including a partnership with SDG. The minutes record:

“SDG partnership - CS gave a brief background - introduced by Simon Hicks, discussion started late 2018, CS and MH visited them in Milan, they want to enrich their services and implement AI, machine learning. CS confirmed there are no discussions with SDG re any form of acquisition, allotment of shares or SDG getting a stake in Commetric. All members voted in favour of continuing the discussions with SDG for a potential partnership”.

In fact, the Claimant subsequently amended these minutes (see paragraph 98 below).

90. On 8 March the Claimant sent Mr Solheim and Mr Kulasingam a mediation proposal (page 588a-b) following the advice received from Mr Chapman on 4 March. The Claimant’s email contained in effect a counter-threat, mentioning possible defamation proceedings. He reiterated that Mr Hall would be willing to assist in a mediation and set out his objectives:

- **There are no emails in such vein again [a reference to the emails in which the claimants conduct and honesty were called into question]**
- **The board is left to carry out its duties and report**
- **A review of the terms of my contract at Commetric to provide for me greater security having regard to all the surrounding circumstances in which I now find myself**
- **In the alternative, a settlement for dismissal (actual or constructive).**

He also referred to a forthcoming strategy workshop on 28 March 2019 that was to be attended by the potential non-executive chair of the Respondent, Sally Costerton and insisted that the mediation be completed by that date. He also asked for written evidence of the grievances against him as these would form the basis of the mediation. Finally, he alluded to the illness of Mr

Solheim's father, who was gravely ill at this time. (I find that this meant that for a period of time Mr Solheim did not have a great deal of time to focus on the situation at the Respondent and appeared to leave much of the decision making to Mr Kulasingam).

91. Mr Kulasingam had meanwhile been canvassing the opinion of the other directors about his own proposal. He replied to the Claimant on 8 March (page 590) saying:

"I don't intend to respond to the accusations you have levelled against me (or the remaining contents of your email) which can easily proven to be incorrect. Referring to defamation and defamation lawyers are not helpful.

However I said I would come up with a mediation proposal. I am still working on that but I can tell you that it does not involve a lawyer being the mediator.

I will write you separately on this next week".

92. On 10 March Mr Kulasingam then circulated to Mr Minkovski, Mr Garyfallos and Mr Hakansson, a document entitled a "Way Forward Proposal". I find as a fact that this was preceded by a telephone call to each of them and the document reflects some of the discussion on that call, as stated by Mr Kulasingam at page 592. Mr Garyfallos confirmed in cross examination that during the telephone conversations on 10 March, Mr Kulasingam had also mentioned his concerns about the Claimant's honesty although this was not referred to in the Way Forward document itself. The proposal itself (pages 593-595) set out the background, beginning with a statement of Mr Kulasingam's personal concerns as an investor in the Respondent and asking the three directors to conduct a "situational analysis" by speaking to the members of the SLG and to the Claimant in their personal capacity, without involving lawyers (save that they could speak to Mr Hall for the purposes of clarification). The conversations should be conducted in confidence with no records kept. This should be followed by a joint but non-binding proposal as to the way forward.

93. A copy of this document was sent to the Claimant on 11 March. The Claimant objected to the proposal, reiterating (page 601) that there was a dispute, that he felt aggrieved at his treatment and that he proposed continuing to seek a mediator to resolve the issues. In cross examination he described the proposal and its methodology as demeaning.

94. I find that the written proposal itself was, at least as originally conceived and presented, relatively anodyne – on the face of it, it was an attempt to use the three directors to problem solve and "break the current impasse". But Mr Kulasingam's evidence about it in cross examination made it clear that the purpose of the process was to unearth evidence to support an argument that the Claimant's had acted dishonestly. The lack of record keeping, he said, was to ensure there was no paper trail that would be damaging to shareholder value in the future. I find that irreconcilable with the contemporaneous documents, including his email to the Claimant on 11 March (page 602) in which he said:

“I just want to make it clear that I have never accused you of fraud or dishonesty. Please do not impute anything that anyone else has written to you as also coming from me just because I was copied in or because of any nomenclature or other words used in the correspondence will stop... I have no desire to be party to any mediation as I don't have any dispute with you nor do I have the time to participate in such an exercise which I don't see has any value in the context of where we are”.

I find that email to have been disingenuous, given the previous correspondence and in particular the email of 27 February, from the contents of which Mr Kulasingam had made no attempt to distance himself. But at the same time, the email was inconsistent with the position as described by Mr Kulasingam in cross examination, which was that the “Way Forward” proposal was in reality a clandestine investigation exercise, designed to prove that the Claimant was dishonest. However, as Mr Kulasingam observed, the proposal was overtaken by events.

95. The Claimant then wrote to his three fellow board members on 13 March attaching a “partnership proposal” from SDG (page 609). The SDG proposal itself was at pages 760(a) - (f). It was clear that the effect of the proposal would be to move all of the Respondent’s sales staff and principal clients and revenue stream to SDG and to give the Claimant and Mr Hakansson shares in SDG in place of shares in the Respondent (page 706(i) makes this clear). That would not be the case for Mr Solheim and Mr Kulasingam. The Claimant said the was “the best I could get”, that he was aware of the sensitivities around the potential for an acquisition, that he personally would have benefited significantly and that Mr Solheim and Mr Kulasingam would have been taken aback by the proposal, which was clearly more advantageous to the Claimant than to them.

96. He did not therefore recommend it to the board of the Respondent. In his email to the board at page 609 he said:

“There is much to review here and there are, in my view, good parts and bad. I therefore propose to schedule a meeting tomorrow morning together our collective comments and so we can compile these into a summary email and send the proposal to the SLG.

My reading of the proposal is as follows:

It's more structural than we would like yet and in that, poses a question to Commetric (directors and shareholders) about exactly what type of company we are want to be; data/software or consulting.... my gut instinct is that we are not ready as a company or shareholding body to make the decision that is at the heart of this proposal (eg software or consulting), however given that we are currently struggling to exploit and manage the technology we have acquired from Sigmai there is no doubt that this question is timely for the board to address.

97. After the board meeting on 4 March, Mr Garyfallos had written a follow up email (page 577a) as follows:

“Indeed one of the agenda items of the board meeting was to vote on the SDG discussions. Chris gave us a brief background. Massive OPS, impressive clientele,

over 1000 staff; They want to enrich their services and spice it up with AI, machine learning etc. Introduction came from Simon Hicks. Apparently Magnus and Chris flew down to Milan couple of months ago to visit SDG's HQ they were both very impressed.

After the update, I told Chris this is a sensitive topic and we must be very clear on what we are voting for.

I asked Chris to confirm there are no discussions with SDG re any form of acquisition, allotment of shares or SDG getting a stake in Commetric.

Chris confirmed there are none.

I then asked Mlsho, who was taking the minutes, to specifically record the reason we are voting for.

The board unanimously voted in favour of continuing the discussions with SDG for a potential partnership.

98. The Claimant confirmed in cross examination that there had been a long and difficult conversation about SDG at the board meeting. He had in fact amended the version of the minutes at page 584 to read, on the subject of SDG, (page 613):

“SDG partnership - CS gave a brief background introduced by Simon Hicks, discussion started late 2018, CS and MH visited them in Milan, they want to enrich their client solutions by partnering with a provider of media analytics. CS confirmed that he had sent the initial views of key shareholders (RJ and CUS) to SDG to ensure any partnership proposal did not encompass acquisition and enabled CM to continue to grow independently. All members voted in favour of receiving a partnership proposal from SDG.”

99. I find that the Claimant was not surprised by the structure of the proposal that emerged from SDG. He conceded in cross examination that he had discussed the structure with SDG before the board meeting. It aligned with what he envisaged for the Respondent, but he knew that it did not align with the objectives of the SLG (unsurprisingly). Nevertheless, he did not give up hope of persuading his fellow board members that it was the right way forward. He was therefore not being fully honest and transparent with the board on 4 March when he said that there had been “no discussions with SDG re any form of acquisition, allotment of shares or SDG getting a stake in Commetric”. The Claimant’s strategy (in respect of which he was clearly not very hopeful of success) is set out in the email of 13 March from the Claimant to Mrs Shaw at page 621. This sets out a draft email to his legal advisor, which ends “it should be put to Christofer that to avoid a Commetric meltdown, he/shareholders pursue the SDG partnership (where Chris Shaw joined SDG UK which is rainmaker for Commetric via a VAR [value added reseller] agreement) that arrangement is best for Commetric shareholders and best for Chris Shaw. But it is very likely that CUS will likely blow up the proposed SDG deal”.
100. On 15 March the Claimant learned from Mr Minkovski that his fellow directors were seeking advice from Mr Hall about their obligations as company directors. The same day Mr Solheim became involved in the “Way Forward” proposal, and emailed Mr Kulasingam (page 633) seemingly suggesting a

questionnaire to be completed by the other directors as a means of impugning the Claimant's honesty.

101. There were two matters to be put to the directors, with four options as to the extent to which the Claimant had acted dishonestly in relation to each in his communication with shareholders and with the Board. The first was "the presentation of management accounts and financial projections made by Mr Shaw to the shareholders on 16 October 2018" and the second was the "board meeting of 4 March 2019 when Mr Shaw "asked for the board's approval for a negotiation with the SDG group".
102. On 17 March (page 638) Mr Solheim told the Claimant (and others) that he planned to attend a meeting with SDG on his own to investigate their proposal further as he did not understand the structure. He suggested an EGM if it were decided that the directors needed to be authorised to engage in further discussions. That was in my view a clear example of Mr Solheim acting as a de facto director of the company – ordinarily a discussion about a future commercial partnership would be conducted by a member or members of the board.
103. On 18 March Mr Minkovski, having received the "questionnaire" from Mr Solheim, replied by email at page 649 saying:

"1. I believe that on 16th October 2018 Chris presented CUS (I was on that meeting too) a cash flow projection that did not correspond at all to the company's financial situation at that time. I find this was done intentionally and can say you probably acted dishonestly towards Raj and you as shareholders. I have to use "probably" because by that time I was not in charge of Commetric financials and my opinion is based on conversations with colleagues and access to financial information I have received afterwards.

2. I have less information about the talks with SDG.... On 4th March 2019 Chris confirmed there is no equity or acquisition in their offer (just partnership) although such an option has been discussed before.... few days later we have received an offer that goes well beyond partnership. I assume (but have no evidence to support this) that this offer was discussed with Chris (as a single director) before we were appointed and the new articles adopted. Therefore, he should have informed us properly on this board meeting. He did not and I was surprised to receive this offer three days later. Therefore I could say he possibly acted dishonestly towards the other directors with the remarks that I may not have all the information and details."

I note in passing that Mr Minkovski was not in fact at the meeting of 16-17 October 2018. However, he went on:

"I want to emphasise that despite the above I am very much willing to work with Chris as our CEO and will do my best to avoid any police investigations or legal actions between shareholders and directors that will definitely destroy the company's value pretty quickly."

104. Despite the ongoing high level of tension, there was still a plan in place for the board and SLG to meet with Sally Costerton, on 28 March at the strategy workshop. A call was scheduled between the Claimant, Mr Hakansson, various others and Ms Costerton on 19 March. On 18 March Mr Kulasingam wrote to them (page 651a) requesting that they avoid discussing the situation

between Mr Solheim and the Claimant and confine their discussions to operational matters. He said that the SLG “hopes to put forward a proposal to resolve the existing tensions and issues in the next 24 hours and we believe that the tensions between Chris and Christofer will be resolved once this proposal is reviewed and accepted”.

105. There were a number of significant developments on 19 March:

- a. Mr Garyfallos sent an email on 19 March (page 652a) in advance of a call between the new directors and Mr Hall threatening to resign if what he described as “this abnormal situation” was not contained. He reiterated his support for the Claimant as the Respondent’s CEO and said that it was the view of all the stakeholders to whom he had spoken that week that the Claimant was the right man for the job. As for the suggestion that Claimant had been dishonest, he said “My personal view after a week of discussions with all key stakeholders, is while Chris's forecast on the cash flow has probably been dishonest, Chris has qualities vital for Commetric, has led the company during difficult times and is widely accepted being the right CEO for Commetric.” He added “Raj the attacks from both sides must stop now. This must be contained and put in a box. Commetric really needs some breathing space. If you have a way to bury the hatchet please do it now. You will have my full support.”
- b. The new directors had a conference call with Mr Hall a note of which was at pages 654-5.
- c. The Claimant’s lawyers, McCarthy Denning, wrote to the new directors, Mr Solheim and Mr Kulasingam (pages 656-7), asserting that the Respondent was in fundamental breach of the Claimant’s contract as CEO and that he intended to resign and claim constructive dismissal unless certain conditions were met. Those conditions included the lifting of the board protocol (or its amendment), Mr Solheim and Mr Kulasingam stepping back from acting as de facto directors, and an apology for “the baseless and defamatory allegations of dishonesty made by them, confirmation that they will not be repeated together with an offer of suitable compensation for the stress, hurt and damage to his reputation caused”. They asserted that if the conditions were not met, the Claimant would “seek full legal redress available to him for constructive dismissal and breach of contract”.
- d. Mr Kulasingam wrote to the Claimant (page 660) on behalf of himself and Mr Solheim, setting out the various concerns that had arisen over the previous six months and intimating that there was enough evidence of dishonesty to make a referral to the police or Serious Fraud Office. Nevertheless, he said:

“we believe it is clearly in the best interests to the Company and all its shareholders/stakeholders to attempt to find an internal resolution. We believe that the three other board members are best placed to suggest a mitigation

plan based on their investigations and their knowledge of Commetric and its stakeholders. Christofer and I (and other members of the SLG) will provide input into this mitigation plan. The mitigation phase will start now and you should expect a proposal in the next few days.”

- e. The Claimant and Mr Garyfallos had a telephone conversation of which the Claimant made a clandestine recording, The transcript was at pages 662-3. Mr Garyfallos told the Claimant that he and his fellow directors had been asked to complete the questionnaire and that Mr Kulasingam had said that if they did so he would have a way of bringing the difficulties at the Respondent to an end.

106. The following day, 20 March, Mr Kulasingam circulated under cover of an email (page 670) a document that he described as “a proposed concordat that sets out the terms on which the SLG propose to resolve the current impasse on the issues. I'm sending this to you in my role as chair of the SLG.” It was sent to Mr Minkovski initially with a request that he forward it to the other directors including Mr Shaw. The email was headed “Suspension Concordat”. In cross examination Mr Kulasingam suggested that he had merely put the document forward as a way out of the impasse and that he had not been acting on behalf of the Company when doing so. The covering email however said:

“I am sending this to you as the finance director of Commetric for you to share this with your fellow directors including Chris Shaw with a view to getting this signed as soon as possible. It has been drafted by me with input from other SLG members.

I look forward to hearing from you on this as soon as possible as time is short and I would like to get this signed this week if possible so we can all get on with other business”.

I find that the email was tantamount to a direction to Mr Minkovski to get the document signed as soon as possible.

107. The document itself was at page 709-712. It dealt not only with the Claimant’s role in the Respondent but with other legal entities that formed the backdrop to the dispute (Sigmai, Sigfin and CommEq). In essence it imposed a series of constraints on the Claimant’s conduct and actions as a condition of “suspending” legal action in respect of dishonesty on his part. Any breaches of the terms of the concordat had the capacity to reactivate the potential for legal action. The document also required the Claimant to establish a direct reporting line from Mr Minkovski as the Respondent’s FD to the SLG on all matters concerning the Respondent’s financial performance, KPIs, budgets, forecasts and supporting information. It also stated that Mr Solheim would desist from various forms of involvement with the Respondent provided the Claimant complied with the concordat.

108. The Claimant found the terms of the document to be wholly unacceptable – he described it in cross examination as “extraordinary”, “outrageous,” “shabby” and “unprofessional”. He regarded the proposal as demeaning and having the effect of demoting him in his role as CEO – “the role I was contracted to perform”, by requiring him to defer to Mr Minkovski on financial

matters. He was also dismayed that the document was circulated despite the letter from his solicitors of the previous day and despite his attempts to have the issues dealt with professionally in mediation.

109. It was put to Mr Kulasingam that the meaning and effect of the document was to attempt to control the Claimant by threatening him with criminal proceedings if he did not adhere to the concordat's terms. He disputed that, but in my judgment that was plainly the intention and effect of the document and the reason why Mr Solheim and Mr Kulasingam had been canvassing opinion about the Claimant's honesty. He also accepted on the basis of his own email at page 677 that he was aware of the Claimant's solicitors' letter when he circulated the Concordat and that he had chosen to ignore it. Paragraph 92 of his witness statement was plainly misleading on that point. I also find disingenuous his description of the concordat in cross examination as a "settlement agreement" with "everyone moving on in peace", given that it left a Sword of Damocles hanging over the Claimant in the form of the ongoing threat of legal action.

110. The Claimant described the concordat as "the last straw". In fact he did not resign until just over a week later, following the strategy workshop on 28 March. In the interim he continued to take legal advice, resulting in a draft email at page 684, which he shared with Mrs Shaw on 21 March. In the draft email the Claimant threatened to resign if he did not receive a satisfactory reply to his solicitors' letter. His email to Mrs Shaw read:

"Richard thinks that they believe we will not follow through.

Suggested draft from Richard. Let's have a think and I'll try to get more information from Simon. No reply from Giorgio.

Of course if I resign then SDG deal is off for Commetric. Weird."

111. Mrs Shaw wrote an email setting out the pros and cons of resigning (page 685-686), which clearly suggests that the Claimant was wavering at that point, considering holding out for a deal with SDG and weighing up whether he would be better off staying or going. There was in fact a meeting taking place between Mr Solheim and SDG representatives in Oslo on the same day. The existence of the email at page 685, albeit not written by the Claimant himself, indicates that he was still weighing up the intention to leave the Respondent that he had first expressed on 4 March and was considering whether to treat the Concordat as the last straw or, as Mrs Shaw put it, to "play puppet" in order to secure the deal with SDG. Mr Solheim reported back on 22 March in his meeting with SDG (page 697) and the Claimant wrote an email to Simon Hicks saying "pigs might fly," indicating that at that point he realised that a deal with SDG that was palatable to both him and Mr Solheim, was out of reach.

112. The strategy workshop took place on 28 March and the Claimant resigned on notice, by letter written the same day and emailed the following day, with his resignation to take effect on 12 April. He resigned as a director of the

Respondent with immediate effect. His resignation letter at page 704-705, identified the following matters as having led to his resignation:

- a. The fact that the letter from his solicitors of 9th March had been ignored and that contrary to responding to the proposals set out in it the Respondent had made matters worse with the production of the concordat;
- b. The fact that three of his fellow directors had been canvassed as to their opinions on his honesty and that reportedly one or more had stated that they believed he was dishonest;
- c. His exclusion from contributing to the drafting of the protocol and the failure to consult him about its drafting or its adoption;
- d. The fact that he was threatened with dismissal if he did not sign the protocol;
- e. The use of the protocol in a way that made it impossible and untenable for him to perform his role as CEO, the role he was contracted to perform;
- f. continuous and increasing bullying and harassment from Mr Solheim and Mr Kulasingam who appeared to be acting as de facto directors of the company;
- g. false and unsubstantiated allegations and threats of legal action regarding his conduct and propriety which he regarded as clearly designed to intimidate particularly as the allegations had not been formally or properly put to him by the Respondent in a way that would have enabled him to respond;
- h. Allegations of dishonesty in connexion with claiming expenses for a trip to New York which included work for both the respondent and Sigfin;
- i. The canvassing of opinions on his honesty and the production of the concordat.

Submissions

113. I was provided with very helpful detailed written submissions by both Counsel, which they supplemented with oral submissions. They both addressed, by reference to the same case law, the tests for establishing whether a person is acting as a shadow or de facto director and were agreed that the statement of the law on constructive unfair dismissal set out in *Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978* is the starting point for an employment tribunal. I will include further reference to the submissions as necessary in my conclusions.

Conclusions on the issues

Shadow or de facto directors

114. The first question in this case is whether the Respondent to the action, the company, is in fact liable for the actions on which the Claimant relies in asserting that he has been constructively dismissed. Without that liability the Claimant's claims, which can only be brought against the Respondent, must fail. The question is put as follows in the list of issues: is the Respondent

company liable for the acts and/or omissions of either (or both) Christofer Solheim ("CUS") and Raj Kulasingam ("RK"). This will require determination of the question whether either (or both) of them acted as shadow or de facto directors of the Respondent:

- a. Did the Claimant customarily act in accordance with directions or instructions given by CUS and/or RK and if so, which directions or instructions are relied on?
- b. Did CUS and/or RK assume the status and function of a director so as to make themselves responsible as if they were directors, and if so how?

115. The test is explained in counsels' submissions - there was no disagreement between the parties on the legal position on shadow and de facto directors. On shadow directors they both cited from *Re Hydrodam (Corby) Limited* [1994] 2 BCLC 180 in which the High Court held: "*To establish that a defendant is a shadow director of a company it is necessary to allege and prove: (1) who are the directors of the company, whether de facto or de jure; (2) that the defendant directed those directors how to act in relation to the company or that he was one of the persons who did so; (3) that those directors acted in accordance with such directions; and (4) that they were accustomed so to act. What is needed is, first, a board of directors claiming and purporting to act as such; and, secondly, a pattern of behaviour in which the board did not exercise any discretion or judgment of its own, but acted in accordance with the directions of others*".

116. On de facto directors they both took a view that Mr Galbraith Marten expressed as follows: "*A de facto director is someone who assumes responsibility to act as a director, although never actually appointed as such. There is no single, definitive test for determining whether a person is a de facto director. The question in broad terms is whether they assumed the status and function of a director so as to make themselves responsible as if they were a director (Holland v Revenue and Customs; Re Paycheck Services 3 Ltd [2010] UKSC 51). It is necessary to prove that they undertook functions in relation to the company which could properly be discharged only by a director; it is not sufficient to show that they were concerned in the management of the company's affairs or undertook tasks in relation to its business which could properly be performed by a manager below board level (Re Hydrodam (Corby) Ltd).*"

117. As I noted at the start of the judgment, the main participants in the dispute were closely connected by a convoluted web of relationships. I also noted that at the outset of these reasons, Mr Solheim and the Claimant were conducting themselves more like business partners than individuals in a hierarchical relationship and as their interests diverged they became locked in a power struggle, in which Mr Kulasingam lent his support to Mr Solheim rather than to the Claimant. Mr Solheim effectively revealed his state of mind at the beginning of December 2018, with the email at page 292, which declared his intention to "police and control" the Claimant by means of the board protocol. In pursuit of that objective, he and Mr Kulasingam did in my judgment

overstep the bounds of the influence they enjoyed as shareholders and conducted themselves as shadow or de facto directors. I make that finding on the following grounds:

- a. From as early as 2 October when Mr Solheim mooted the idea of shareholder group, he envisaged a significant role in terms of receipt of management information (page 166-168 and paragraph 25 above) and active oversight by the group that would become the SLG. The intention in my judgment was to have the Claimant as CEO of the company (and to some extent as a director) become answerable to shareholders in a way that was atypical and would normally characterise the relationship between a CEO and the board;
- b. The pressure exerted on the Claimant to dismiss Mr Ivanov, albeit that the Claimant did not fully bow to this pressure but decided on a change of role rather than dismissal, was not pressure that would ordinarily be directly exerted by shareholders as it was in this case;
- c. The email from Mr Solheim to the Claimant of 5 November 2018 (paragraph 38) was a clear attempt to pull rank on the Claimant and control his behaviour in a way that was unusual for a shareholder and closer to the kind of communication a superior might issue to a subordinate, or the board might give to a CEO (albeit perhaps not in these terms);
- d. The content of the board protocol and the control that it gave to shareholders, including Mr Solheim and Mr Kulasingam over certain matters that would ordinarily be the province of company directors (paragraph 44). The intent behind this – as referred to above, was made explicit in the email of 3 December (paragraph 46). It does not seem to me to be relevant whether Mr Kulasingam was merely replicating an arrangement for “reserved matters” as he had encountered in practice. The fact is that the shareholders were given a high level of influence that placed them on all fours with directors over certain critical decisions and processes (such as receipt of management information and the appointment of directors).
- e. The exclusion of the Claimant from a discussion between Mr Kulasingam and Sally Costerton (paragraph 48) – a discussion that would ordinarily be conducted by a CEO or members of the board and the prospective chair, rather than a shareholder;
- f. Mr Kulasingam’s direction to the Claimant to prepare a business plan following that discussion (paragraph 48 and page 310). His expression “let’s get this wagon back on the road” also conveyed the sense that he was intent on exercising control and giving direction to the other participants in the Respondent;
- g. The insistence by Mr Kulasingam on incorporating into the articles certain provisions that Mr Hall advised would be unduly restrictive and would give the shareholders an unusual level of control over the composition of the board (paragraphs 50 and 51 and pages 338 and 345);
- h. The direct interference by Mr Solheim and Mr Kulasingam in the Claimant’s attempt to appoint Jesse Moore to undertake consultancy work (paragraphs 53 and 54 and pages 387-389, 391 and 398),

involving in Mr Kulasingam's case a direct instruction to the Claimant and in Mr Solheim's case, a threat to have the Claimant replaced as CEO if he proceeded with the plan;

- i. Mr Kulasingam's insistence on being present at any meeting at which mediation was attempted between the Claimant and Mr Solheim (paragraph 68). This in my judgment was both unhelpful and obstructive and conduct that might be expected of a director rather than shareholder;
- j. The threat by Mr Solheim and Mr Kulasingam to launch legal action against the Claimant. This was plainly a means of coercing him into running the Respondent in the way that they wished and was thus a measure (whatever its merits or demerits) that would be expected of a board member rather than a shareholder;
- k. The devising of the concordat as a means of controlling the Claimant and the way that he was running the Respondent. This was in effect an extension of the threat of legal action and an attempt to incorporate the threat of it into an agreement with the Claimant. Again leaving aside for the moment the merits of this course, it was in my judgment a measure that lay well beyond the normal range of shareholder influence.

118. In my judgment Mr Solheim and Mr Kulasingam were for these reasons acting as de facto directors of the company and at times as shadow directors. Accordingly, the Respondent was liable for their conduct towards the Claimant, and the Claimant's constructive unfair dismissal, based on their conduct towards him, is able to proceed.

The board protocol

119. The question of whether the Claimant was "required" to sign the board protocol was somewhat difficult. The suggestion of a protocol had in fact come from Mr Hall, as an alternative to certain changes to the articles that he had advised against. I have found as a fact that by the time the Claimant came to sign the protocol, he was losing the power struggle with Mr Solheim. Seen in that context, it is arguable that the Claimant was not signing the protocol voluntarily, but because he perceived that realistically he had no choice. At the same time, it was not the case that he had had no opportunity for input into it – there was consultation in the sense that drafts of the document were circulated for comment although his willingness to engage with the process had been undermined by the email from Mr Solheim at page 292. However, it was also clear from the evidence that the last word on how the document should be drafted and the decision that it should be referred to the Respondent's articles, lay with Mr Kulasingam. I have noted in my findings of fact (paragraph 47) that Mr Kulasingam inserted an important amendment to the terms of the protocol, with regard to the Claimant's ability to discuss the sale of the Respondent with third parties, after the protocol had been circulated for comment. The overall model of accountability that the protocol represented was therefore in my judgment imposed on the Claimant against a backdrop of increasing hostility from Mr Solheim and he was not happy with all of the constraints it placed on him and on the board of the Respondent.

120. As for whether this was a requirement that impacted on the Claimant in relation to his role as an employee (rather than solely as director), I find that the distinction cannot be drawn in this case. The two roles were inextricably linked for the reasons recorded at paragraphs 47, 51 and 55. Accordingly, the imposition of the board protocol had an impact on the Claimant in his employed role as CEO of the Respondent.
121. The next question is whether the protocol represented a repudiatory breach of the Claimant's contract of employment as CEO of the Respondent. The agreed issues that arise in relation to this question are whether the Respondent was reasonably and properly entitled to create and implement the protocol; whether the Claimant was consulted about and involved in the drafting of the protocol; whether the Claimant was threatened with dismissal if he did not sign the protocol and/or signed it under duress; and whether it was otherwise calculated or likely to destroy or seriously damage the relationship of trust and confidence between the Claimant (in his capacity as an employee) and the Respondent.
122. The term of the contract the Claimant relies on is the implied term of trust and confidence. In my judgment the Respondent was not acting in breach of that term by proposing a protocol – it was a legitimate tool that was intended to improve governance and accountability in the Respondent with the intention of enhancing shareholder value and getting the Respondent ready for a sale that would have realised that value. There is nothing improper in any of those objectives and the Claimant as CEO had no legitimate grounds for objecting to the creation of the protocol per se. I also found no evidence that the Claimant was threatened with dismissal if he did not sign the protocol – that threat was made, but in relation to other matters. I have concluded however in the previous paragraph that the Claimant's involvement in the drafting of the protocol was, in reality, limited. Whilst it would be going too far to say that his involvement was a sham, it has to be read against the background of Mr Solheim's email at page 292. The Claimant would have appreciated by that stage that Mr Solheim was intending to exert control and limit his capacity to exercise the freedom and responsibility he had hitherto enjoyed and that he would have expected to exercise as a director and CEO. I find that he had in effect seen the writing on the wall and concluded at the time that he had no real option but to go along with the new arrangements.
123. Whether in light of those facts the protocol was otherwise calculated or likely to destroy or seriously damage the relationship of trust and confidence between the Claimant and the Respondent I have found to be a finely balanced point. But I have concluded that there was a breach of the implied term given the basis on which the Claimant had been working hitherto, seen against the whole factual matrix. In my judgment the relevant facts included Mr Solheim's desire to control and micromanage the running of the Respondent at the expense of the Claimant's autonomy which he was now putting into effect with the help of Mr Kulasingam, by means of the protocol. In my judgement what tips the balance is the email at page 292 which admits to an intention to "police and control" the Claimant – an intention not compatible

with the implied term of trust and confidence in the contract of a CEO and Mr Kulasingam's unilateral alteration of the protocol after it had been circulated for comment. I also find that the Respondent failed to show that there was reasonable and proper cause for implementing the protocol in that manner. It was not the protocol itself that constituted a breach, but the manner in which it was put into effect.

Threatening legal proceedings February emails

124. The first issue was whether the tone and /or content of the emails of 22 February 2019 (page 494), 24 February 2019 (page 507) and 27 February 2019 (page 520) were calculated or likely to destroy or seriously damage the relationship of trust and confidence between the Claimant (in his capacity as an employee) and the Respondent. The second issue was whether CUS and RK had reasonable and proper cause to write to the Claimant in the terms they did when they did and the reason that they wrote to the Claimant. I was asked to determine (based on the information before RK and CUS at the time):

- a. *Whether the Claimant presented materially inaccurate financial data at the meeting which took place on 16 October 2018.* I made my findings on this issue at paragraph 32 where I concluded that the financial data was materially inaccurate, but that was due to carelessness or incompetence with figures rather than a calculated attempt to deceive.
- b. *Whether the Claimant acted in breach of the Board Protocol and/or instructions from the majority shareholders in his discussions with SDG re the possible acquisition of some or all of the equity of the Respondent.* My findings on this issue were that the initial discussions with SDG that involved equity participation preceded the finalisation of the protocol, but then continued after the protocol had been signed, and in breach of its terms (paragraph 71). The Claimant continued discussions with SDG over several months in the knowledge that a deal involving equity participation would not be palatable to Mr Solheim or the SLG. He ought not to have continued the discussions in breach of the protocol because he had agreed not to do so. I do not however consider that to have been dishonest conduct or conduct that would possibly warrant the threat of legal proceedings, still less criminal proceedings. The Claimant was perhaps overly optimistic, but in my view, he continued the discussions with SDG because he wanted to sell the Respondent more quickly than Mr Solheim and was hopeful that a deal would emerge that might be persuasive. That may have been a triumph of hope over experience, but it was not in, my view dishonest. I make no finding as to whether there was a breach of fiduciary duty involved – this was not an issue I was asked to determine.
- c. *Whether the Claimant acted in breach of agreement with the SLG and the Board Protocol (having regard to the fact that he had signed the version of 15 January 2019) by appointing Spyros Garyfallos and*

Magnus Hakansson as directors of the Respondent. My findings on this issue are at paragraph 64. Looked at objectively the Claimant was in breach of the terms of the final version of the protocol but not of the terms of the version he signed. I also find that he had grounds for believing that he was not acting outside his authority at the time in making the appointments (the email of 15 January from Mr Minkovski). That is clearly relevant to the extent to which he was in the wrong.

125. I am asked to answer two questions: were the emails that alluded to legal proceedings calculated or likely to destroy or seriously damage the relationship of trust and confidence between the Claimant (in his capacity as an employee) and the Respondent. The second issue was whether CUS and RK had reasonable and proper cause to write to the Claimant in the terms they did when they did. I note in answering these questions that the reference to legal proceedings escalated over several emails from a generalised allusion to an explicit threat of criminal proceedings based on allegations of dishonesty. In my judgement threatening an employee with legal proceedings without proper grounds for doing so is coercive and bullying conduct, and that is what those emails represented. I have found as a fact (paragraph 75) that there was no basis for accusations of criminal wrongdoing or the suggestions at page 520 that the Claimant might face an investigation by the police or the SFO and a potential custodial sentence. I have expanded on that finding in the preceding paragraph. The Respondent failed to provide any evidence that it had received advice that such an outcome was a possibility and I find that there was no such advice. Accordingly the email at page 520 represented a clear and egregious breach of the implied term, designed to coerce Mr Shaw into bending to Mr Solheim's will by means of a baseless threat.

RK's email of 19 March 2019

126. The next question is whether the tone and/or content of the email sent by RK at page 660 was calculated or likely to destroy or seriously damage the relationship of trust and confidence between the Claimant (in his capacity as an employee) and the Respondent. My conclusions on this question are the same as those I have reached in relation to the preceding question and for largely the same reasons. There are however two additional factors that I am asked to consider in relation to whether Mr Kulasingam had reasonable and proper cause for his actions (I have already made my findings concerning the financial data presented in October 2018): (1) whether the Claimant misled the Respondent's other directors at the board meeting which took place on 4 March 2019 when telling them that there were no discussions with SDG re any form of acquisition, allotment of shares or SDG getting a stake in the Respondent; and (2) whether the investigation process was reasonable and whether SG and MM were entitled to conclude that the Claimant had probably acted dishonestly in relation to these matters.

127. In answer to the first of those questions, I have found as a fact that the Claimant was not transparent with his fellow directors about whether the SDG proposal was likely to involve equity participation, when this was discussed at the board meeting on 4 March. He knew that it almost certainly would.

However, in my judgement this did not constitute reasonable and proper cause for a threat to make a reference to the police/SFO. That in my judgment is an absurd and inflammatory response. Moreover, it was simply not the case that this threat was backed by legal advice, so the threat involved a falsehood. Nothing the Claimant did could have constituted reasonable and proper cause for that.

128. As for the investigation, the manner in which it was carried out was also absurd. I do not condone the Claimant's lack of transparency, but there was commercial logic to it – he was trying to get SDG to the table and Mr Solheim himself was interested in SDG to the extent that he attended a meeting with them in Oslo. But even if the Claimant had been dishonest in the way suggested, the cloak and dagger investigation was entirely misconceived as a way of responding. If there were genuine concerns out the Claimant's honesty, these should have been put to him in the context of a properly constituted disciplinary process. He was the Respondent's CEO – an employee, entitled to due process that was compliant with the ACAS Code. None of that happened. The Claimant was never given, in spite of numerous requests, clear answers about what Mr Solheim's grievances were. Instead, his fellow directors were presented with a set of auto-suggestive questions and invited to impugn the Claimant's honesty with a view to substantiating the threats that had already been made. This was the very opposite of a good governance process and utterly flawed as a means of addressing allegations of misconduct.

129. I am fully aware of the distinction in a case of constructive dismissal between the question of whether there has been a repudiatory breach and the question of whether a fair process has been followed. Addressing both points, I conclude that Mr Kulasingam's email represented a further breach of the implied term and the investigation process that followed was not on any measure a reasonable process.

Undermining the Claimant in his role as CEO- 3 December 2018 email

130. On the question of whether the email at page 292 concerns the Claimant in relation to his capacity as an employee of the Respondent, or solely in some other capacity it is clear to me that this email affected the Claimant as both CEO and director. I have already concluded at paragraph 123 that the email at, which admits to an intention to "police and control" the Claimant expresses an intention that is not compatible with the implied term of trust and confidence in the contract of a CEO. With the exception of Mr Solheim's assertions at page 292 as regards the Claimant's competence to deal with the procedures involved, the Respondent produced no evidence to support the contention that the Claimant could not be trusted with them and accordingly no evidence for the assertion that there was reasonable and proper cause for Mr Solheim's email. I do not furthermore accept the proposition that the terms of the email were justified by the forthright nature of the relationship between the Claimant and Mr Solheim. The email is more than a frank and forthright statement and represents a fundamental expression of distrust in the

competence of the Claimant that is not supported by evidence. It therefore amounts to a further breach of the implied term.

Emails re: Jesse Moore (pages 387-9 & 394)

131. The question here is whether Mr Solheim's views about the Claimant's desire to hire Jesse Moore and/or the way in which they were expressed calculated or likely to destroy or seriously damage the relationship of trust and confidence between the Claimant and the Respondent. This involves a determination of whether Mr Solheim had reasonable and proper cause to object to the hiring of Jesse Moore and to do so in the way that he did. In my judgement Mr Solheim did have a legitimate reason for being concerned about the involvement of Mr Moore, given a history of poor relations between Mr Moore and Mr Uzinov. It does however seem to me that this was an issue that fell squarely within the Claimant's sphere of responsibility as CEO. It was therefore undermining of the Claimant for Mr Solheim to become involved. However, I do not think his initial intervention amounted to a breach of the implied term for two reasons. Firstly, he had legitimate concerns based on recent events. Secondly Mr Solheim and Mr Shaw had worked together for a very long time and Mr Solheim was probably used to speaking his mind. I do not find a breach of the implied term in the emails at pages 387-9 and 394, although the phrase "I will regard this attempt to rebuild trust as futile" did cause me concern and the email was ambiguous as to what the reference to "trust" actually meant.

Email of 13 February (page 415)

132. Reading this email as a whole, it was describing the state of play between the Claimant and the SLG at the time, putting forward potential solutions and describing possible consequences if the differences could not be bridged. Most of that is unexceptionable, even if forcefully expressed. However, it also contains a threat to remove the Claimant from his role as CEO immediately if the differences could not be bridged. In principle the removal, after due process, of a CEO whose vision does not align with properly conceived business objectives as set by the board of directors is a potential outcome in a dispute of this kind. The threat of immediate removal of a CEO and director by a group of shareholders is not in my judgment legitimate or well-founded and the way that the threat is expressed is in my judgement incompatible with the implied term. Again, as to whether nature of the relationship between the Claimant and Mr Solheim and in particular their tendency to communicate with each other in candid and robust terms neutralised the repudiatory effect of this particular communication, I consider that it did not. In the overall context of the facts at that time, it was a repudiatory breach of the Claimant's contract to threaten him with immediate removal, bearing in mind that the combined voting power of the SLG could have led to a decision to remove the Claimant as a director at an EGM, so the threat was real.

The Way Forward proposal

133. This issue here was whether the proposal attached to the email at page 596 and the effects of its implementation were calculated or likely to destroy or seriously damage the relationship of trust and confidence between the Claimant and the Respondent. This requires me to determine whether Mr Kulasingam had reasonable and proper cause to ask the Claimant's fellow directors to review the situation as it existed at that time and to propose a way forward. In effect I have addressed these questions in paragraphs 126-128 and in my findings of fact at paragraphs 92-94. There was nothing wrong in principle with Mr Kulasingam seeking a way forward out of the difficulties between the Claimant and the SLG. But the manner in which the proposal was put forward and implemented was in my judgment calculated or likely to destroy or seriously damage the relationship of trust and confidence between the Claimant and the Respondent by focusing on and seeking to unearth evidence of dishonesty, when the suspicions of dishonesty were unfounded and the intention of the process was to coerce the Claimant into complying with the wishes of the SLG by holding a threat over his head.

Contacting the Claimant's wife

134. The issue here was whether the tone and/or content of the email at page 566 was calculated or likely to destroy or seriously damage the relationship of trust and confidence between the Claimant and the Respondent, taking into consideration all of the circumstances in which the email was sent, including the emails from the Claimant's wife set out at pages 564 – 565 requesting the immediate redemption of the full amount of her investment. My findings of fact in relation to this matter are at paragraphs 80-83. In my judgement there was no reasonable and proper cause for Mr Solheim to write to Mrs Shaw in this way. As I noted at paragraph 83, his action in doing so was gratuitous and would inevitably have caused distress to the Claimant for the reasons I have cited, in particular the offer to provide details to Mrs Shaw that were being denied to the Claimant himself. Mr Solheim's explanation – that there was an "elephant in the room" and Mrs Shaw deserved an offer of information from him, was fanciful and self-serving. On the basis that Mrs Shaw was bound to show the email to her husband, the content of the email was a clear breach of the implied term in the Claimant's contract of employment.

Co-directors lack of support and collusion

135. The next issue is whether Magnus Hakansson, Spyros Garyfallos and Misho Minkovski failed to support and protect the Claimant, in particular by Mr Garyfallos and Mr Minkovski colluding in the inquiry that followed the Way Forward proposal, and/or by sending the emails at pages 540 and 559 expressing concern at the speed and process of their appointment as directors of the Respondent. The Claimant's fellow directors, who were appointed as directors only a matter of weeks before the Claimant resigned, were in a difficult position as a result of the ongoing power struggle between the Claimant and Mr Solheim and found themselves caught in the middle.

Dealing with the issues in chronological order, Mr Hakansson and Mr Garyfallos were in my view entitled to express concern at having been appointed as board members without being specifically asked beforehand. Even if this had been a result of a genuine misunderstanding on the Claimant's part, and it is not clear that that was the case, they were entitled to feel aggrieved. As I observed at paragraph 78, Mr Garyfallos set out his objection in measured and insightful terms in his email at page 537. He had good reason to express himself as he did and there was no breach of the implied term in his having done so. Nor was there any breach on the part of Mr Hakansson in his email at page 559, which referred to Mr Garyfallos's email and his own reservations about the speed of events. In any event they were not in my judgment under any duty to "support" a fellow director in these circumstances – they could make up their own minds which course of action was best for the Respondent. Company directors are expected to think independently and act in the best interests of the company, not their fellow directors. They are of course obliged to act lawfully towards the company's employees, but their decision not to go along with the Claimant's plans unquestioningly and to object to being appointed to the board prematurely (as they saw it) was well founded and not unlawful and did not constitute a breach of the implied term of trust and confidence that formed part of the Claimant's contract of employment.

136. On the question of collusion with the "Way Forward" proposal, I note first that Mr Hakansson declined to participate. Mr Garyfallos did participate in the process, but had serious misgivings about it despite his observation that the Claimant "has probably been dishonest" in relation to the cash flow forecast. He however expressed those misgivings in the email at page 652a alongside an unqualified expression of support for the Claimant as CEO. Mr Minkovski, who also participated in the process, expressed his support for the Claimant as CEO at page 649. I have already concluded that the allegations of dishonesty were not well founded and the manner in which they were put to the Claimant and dealt with by the Respondent represented a breach of the implied term. It seems to me that the expression of support for the dishonesty allegation by Mr Minkovski and Mr Garyfallos did form part of that breach, notwithstanding their declarations that they would continue to support him in his role as CEO. If I had found that the Claimant had been dishonest in the way alleged by the Respondent, the case of *Hilton v Shiner Ltd* [2001] IRLR 727, to which Mr Galbraith Marten referred me, might have been relevant as authority for the proposition that there could be no breach of the implied term where a genuinely held belief in dishonesty was accompanied by a willingness to continue to employ the individual in question. But that case does not apply where the dishonesty allegation is not well founded, as I have found here. Accordingly I find that Mr Garyfallos and Mr Minkovski contributed to the repudiatory breach of the Claimant's contract as CEO by their willingness to be drawn into an obviously flawed process and to impugn the Claimant's honesty.

Attempting to impose the concordat

137. On the question of whether the proposed concordat at pages 677-678 was calculated or likely to destroy or seriously damage the relationship of trust and confidence between the Claimant and the Respondent my unhesitating conclusion is that it was. The key sections of the document were paragraphs "D" and "E" on page 680. It is first made explicit that "Subject to items 17 to 19 below, all charges and reports to authorities (including police and SFO) that Chris has acted dishonestly as a director of Commetric will be suspended indefinitely and all information relating to the same shall not be shared with any third party that has not already seen that information". However, the document then states that in accordance with items 17 to 19, those "Suspension of Dishonesty Actions" would be lifted if the Claimant breached any of his obligations in the concordat and either the breach could not be rectified, or if rectifiable, was not rectified within 7 days. Equally problematic in my view was the provision that stated that the suspension would also be lifted if the claimant were to take legal or similar action against the Respondent, any other group company or any shareholder or director of the Respondent or group company.

138. In my judgment this was an utterly misconceived attempt to control the Claimant by threatening to report him to the police if he did not behave in certain specific ways, including by taking steps to assert his own legal rights. I found it difficult to comprehend the role of Mr Kulasingam, a practising lawyer, in producing such a document. Given that I have found that the threats were baseless, it is difficult to imagine a clearer breach of the implied term in the contract of the CEO of a company.

Last straw

139. It follows from the preceding paragraphs that I am satisfied that the matters that the Claimant's contract was repudiated in a number of ways, culminating in the concordat, which represented a repudiatory breach in and of itself as well as the last straw. To summarise, I have found the following repudiatory breaches of the Claimant's contract as CEO:

- a. the email from Mr Solheim to the Claimant of 3 December 2018;
- b. the controlling manner in which the board protocol was put into effect;
- c. the escalating threat to institute legal proceedings against the Claimant;
- d. Mr Solheim's email of 13 February 2019;
- e. Mr Kulasingam's email of 19 March 2019;
- f. the "Way Forward" proposal and the involvement of two of the Claimant's fellow directors in it, together with their expressed view that the Claimant had been dishonest;
- g. the decision by Mr Solheim to write to the Claimant's wife;
- h. the terms of the concordat.

I have also found that the breaches were perpetrated by Mr Solheim and Mr Kulasingam acting as shadow/de facto directors of the Respondent and in relation to sub-paragraph (f), by two of the Respondent's directors. Accordingly, the Respondent is liable for those breaches.

Resignation

140. The remaining question is whether the Claimant resigned in response to a repudiatory breach of contract by the Respondent, or for some other reason. I am asked to consider the precise date on which the Claimant decided to resign, and his reasons for doing so as expressed in his resignation letter at page 704.

141. I have found as a fact that the Claimant first expressed an intention to leave in the unsent email to Mr Hicks on 24 February. My findings as to the Claimant's state of mind at that time were at paragraphs 75-76. I have also found (paragraph 89) that by 4 March this intention had evolved into an intention to leave provide he could negotiate a suitable settlement package. When he resigned on 28 March, his resignation letter cited a number of reasons for leaving the Respondent's employment – I have set these out at paragraph 115. Not all of his reason for resigning stand up to scrutiny. I have found that he was able to contribute to the content of the protocol and he was not threatened with dismissal if he did not sign it. But I have found that the other matters on which he relies did occur in the way that he described. I have also found that the concordat was itself a breach of the implied term as well as constituting the final straw in a course of conduct that seen as a whole (and in some instances individually) represented repudiatory breaches of his contract as CEO.

142. As for the Claimant's motives, I was satisfied that although he had previously hung on in the hope of negotiating an exit on beneficial terms and in the hope that a suitable deal might be negotiated with SDG, he was in the end driven out of the Respondent's employment by the conduct towards him of Mr Solheim and Mr Kulasingam, acting as de facto/shadow directors. The fact that the letter from his solicitors had been ignored – a decision taken by Mr Kulasingam - in conjunction with the attempt to impose the concordat, led him to decide that the situation was no longer tolerable. The delay of one week as described in paragraph 114 and the Claimant's decision to serve a brief period of notice, did not amount to a waiver of the breaches on which the Claimant relied and he did not in all the circumstances delay too long before resigning in response to the attempt to impose the concordat.

143. I find therefore that the Claimant's claim of constructive unfair dismissal succeeds. The Claimant's claim in respect of the balance of his six-month notice period also succeeds. The Respondent has not conceded the Claimant's entitlement to holiday pay and that matter will be held over to the remedy hearing.

144. The matter has been listed for remedy on 21 March 2022. The parties are to indicate immediately if this date is no longer suitable, or if a hearing is no longer necessary.

Employment Judge Morton
Date: 7 March 2022

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Appendix

Agreed list of the issues in the case

Shadow / de facto directors

1. Is the Respondent company liable for the acts and/or omissions of either (or both) Christofer Solheim (“CUS”) and Raj Kulasingam (“RK”). This will require determination of the question whether either (or both) of them acted as shadow or de facto directors of the Respondent:

- c. Did the Claimant customarily act in accordance with directions or instructions given by CUS and/or RK and if so, which directions or instructions are relied on?
- d. Did CUS and/or RK assume the status and function of a director so as to make themselves responsible as if they were directors, and if so how?

Board Protocol

2. Was a requirement placed on the Claimant that he sign the Board Protocol over the period early January to February 2019?

3. If so, was that a requirement that impacted on the Claimant in relation to his role as an employee (rather than solely as director)?

4. If it impacted on the Claimant in his role as an employee, did it amount to a repudiatory breach of the Claimant’s contract of employment as CEO of the Respondent? In particular:

- e. Was the Respondent reasonably and properly entitled to create and implement the Board Protocol;
- f. Was the Claimant consulted about and involved in, the drafting of the Protocol;
- g. Was the Claimant threatened with dismissal if he did not sign the Protocol and/or did he sign it under duress;
- h. Was it otherwise calculated or likely to destroy or seriously damage the relationship of trust and confidence between the Claimant (in his capacity as an employee) and the Respondent?

Threatening civil and/or criminal proceedings

February emails

5. Were the tone and /or content of the emails of 22 February 2019 [495 – 497], 24 February 2019 [507] and 27 February 2019 [520] calculated or likely to destroy or seriously damage the relationship of trust and confidence between the Claimant (in his capacity as an employee) and the Respondent?

6. This will require determination of whether CUS and RK had reasonable and proper cause to write to the Claimant in the terms they did when they did and the reason that they wrote to the Claimant. The Tribunal is asked to determine (based on the information before RK and CUS at the time):

- i. Whether the Claimant presented materially inaccurate financial data at the meeting which took place on 16 October 2018;
- j. Whether the Claimant acted in breach of the Board Protocol and/or instructions from the majority shareholders in his discussions with SDG re the possible acquisition of some or all of the equity of the Respondent;
- k. Whether the Claimant acted in breach of agreement with the SLG and the Board Protocol (having regard to the fact that he had signed the version of 15 January 2019) by appointing Spyros Garyfallos and Magnus Hakansson as directors of the Respondent.

RK's email of 19 March 2019

7. Was the tone and/or content of the email sent by RK at [660] calculated or likely to destroy or seriously damage the relationship of trust and confidence between the Claimant (in his capacity as an employee) and the Respondent?

8. This will also require determination of whether RK had reasonable and proper cause to write to the Claimant in the terms that he did when he did. The Tribunal is asked to determine (based on the information before RK at the time):

- l. Whether the Claimant presented materially inaccurate financial data at the meeting which took place on 16 October 2018;
- m. Whether the Claimant misled the Respondent's other directors - Magnus Hakansson, Spyros Garyfallos and Mihail ('Misho') Minkovski - at the board meeting which took place on 4 March 2019 when telling them that there were no discussions with SDG re any form of acquisition, allotment of shares or SDG getting a stake in the Respondent; and
- n. Whether the investigation process was reasonable and whether SG and MM were entitled to conclude that the Claimant had probably acted dishonestly in relation to these matters.

Undermining the Claimant in his role as CEO

3 December 2018 email [292]

9. Did this email concern the Claimant in relation to his capacity as an employee of the Respondent, or solely in some other capacity?

10. If the former, was the tone and/or content of this email calculated or likely to destroy or seriously damage the relationship of trust and confidence between the Claimant and the Respondent?

11. This will require determination of:

- o. Whether CUS had reasonable and proper cause to request that the Claimant (in his capacity as an employee) not be responsible for overseeing changes to the Respondent's Articles of Association; and
- p. The nature of the relationship between the Claimant and CUS and in particular whether it was common for them to communicate with each other in candid and robust terms.

Emails re: Jesse Moore [387-9 & 394]

12. Were CUS's views about the Claimant's desire to hire Jesse Moore and/or the way in which they were expressed calculated or likely to destroy or seriously damage the relationship of trust and confidence between the Claimant and the Respondent?

13. This will require determination of whether CUS had reasonable and proper cause to object to the hiring of Jesse Moore and the way in which he did this.

Email of 13 February [415]

14. Was the tone and/or content of this email calculated or likely to destroy or seriously damage the relationship of trust and confidence between the Claimant and the Respondent?

15. This will require determination of:

- q. Whether CUS had reasonable and proper cause to suggest that the Claimant be removed as CEO if their on-going difficulties were irreconcilable; and
- r. The nature of the relationship between the Claimant and CUS and in particular whether it was common for them to communicate with each other in candid and robust terms and in any event, whether it was appropriate for CUS to communicate in that way at this time.

The Way Forward proposal

16. Was the proposal attached to the email at [596] and the effects of its implementation calculated or likely to destroy or seriously damage the relationship of trust and confidence between the Claimant and the Respondent.

17. This will require determination of whether RK had reasonable and proper cause to ask MH, MM and SG to review the situation as it existed at that time and to propose a way forward.

Contacting the Claimant's wife

18. Was the tone and/or content of the email at [566] calculated or likely to destroy or seriously damage the relationship of trust and confidence between the Claimant and the Respondent?

19. This will require consideration of all of the circumstances in which the email was sent, which may include the emails from the Claimant's wife set out at [564 – 565] requesting the immediate redemption of the full amount of her investment.

Co-directors lack of support and collusion

20. Did Magnus Hakansson, Spyros Garyfallos and Misho Minkovski fail to support and protect the Claimant, in particular by Mr Garyfallos and Mr Minkovski colluding in the inquiry that followed the Way Forward proposal, and/or by sending the emails at

[540] and [559] expressing concern at the speed and process of their appointment as directors of the Respondent?

Attempting to impose the Concordat

21. Was the proposed Concordat at [677-678] calculated or likely to destroy or seriously damage the relationship of trust and confidence between the Claimant and the Respondent?

22. This will require consideration of the terms of the concordat and the circumstances in which the proposal was made including the views expressed by Misho Minkovski at [649] and Spyros Garyfallos at [652a] and their actions.

Last straw

23. If the matters referred to at 2-22, above, did not give rise to a repudiatory breach of contract when viewed in isolation, do they when some or all of them are taken together?

Resignation

24. Did the Claimant resign in response to a repudiatory breach of contract by the Respondent, or for some other reason? This will require consideration of the precise date on which the Claimant decided to resign, and his reasons for doing so as expressed in his resignation letter at [704].