Neutral Citation Number: [2022] EWHC 1036 (Ch)

Case No: BL-2020-MAN-000047

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
BUSINESS LIST (ChD)

Manchester Civil Justice Centre
1 Bridge Street West,
Manchester M60 9DJ

Date: 6 May 2022

Before:

HHJ MARK CAWSON QC
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between:

STOBART CAPITAL LIMITED	**Claimant**
- and -	
ESKEN LIMITED (FORMERLY KNOWN AS STOBART GROUP LIMITED)	**Defendant**

- -
- -

Hugh Sims QC and Anna Littler (instructed by **Clyde & Co LLP)** for the Claimant
Richard Leiper QC (instructed by **Rosenblatt**) for the Defendant

Hearing dates: 28-31 March and 1 April 2022 (by MS Teams)

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Approved Judgment

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

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HHJ CAWSON QC

HHJ CAWSON QC:

Introduction

1. This case concerns a management agreement dated 22 September 2017 made between the Claimant, Stobart Capital Limited ("**SCL**") (1) and Esken Limited (then known as Stobart Group Limited) ("**Esken**") (2) ("**the Management Agreement**").

2. SCL claims that the sum of £4,601,816.04 is due and payable by Esken under the Management Agreement by way of retainer, transaction and management fees. It is SCL's case that a notice served by Esken on 12 March 2019 purporting to terminate the Management Agreement pursuant to clauses 8.2 and 8.3 thereof ("**the Termination Notice**") was invalid and ineffective to do so, and that the Management Agreement continued thereafter with the result that retainer fees continued to accrue.

3. Esken maintains that it was entitled to terminate the Management Agreement pursuant to clauses 8.2 and 8.3 thereof, and that the Termination Notice did validly and effectively terminate the Management Agreement. It is Esken's case that no monies are due and owing from it under the Management Agreement, but rather that monies are due and owing by SCL to Esken in respect of retainer fees paid when SCL was in breach of its obligations under the Management Agreement and had failed to provide any consideration for the same, and for expenses borne by Esken on SCL's behalf, which Esken seeks to recover by way of counterclaim.

4. The principal shareholder in SCL is Andrew Tinkler ("**Mr Tinkler**"), the former Chief Executive Officer ("**CEO**") of Esken, who, having stood down as CEO of Esken, was subsequently removed as a director thereof in contentious circumstances that have given rise to other litigation involving Mr Tinkler and Esken and others, as referred to below, against the background of which the present proceedings have been brought and pursued.

5. Although the case was due to be heard face to face in open court, one of the Counsel involved tested positive for Covid 19 the week before the trial was due to commence. As a result, it was necessary to hear the case remotely using MS Teams. Hugh Sims QC and Anna Littler appeared on behalf of SCL, and Richard Leiper QC appeared on behalf of Esken. I am grateful to them for their helpful written and oral submissions.

6. Whilst Mr Sims opened the case on behalf of SCL before Mr Leiper opened the case on behalf of Esken, the parties were agreed that as the central issue in the case is as to whether Esken was entitled to serve the Termination Notice, in respect of which the burden of proof fell on Esken, it was appropriate that Esken's witnesses be called to give evidence before SCL's witnesses. In closing, Mr Leiper addressed the Court before I heard from Mr Sims, with Mr Leiper briefly replying thereafter.

Background

7. Esken is a company incorporated in Guernsey, which, together with its group of subsidiary companies operates an infrastructure and support services business within the energy and aviation sectors.

8. Mr Tinkler was the CEO of Esken for nearly 10 years between 21 September 2007 and 1 July 2017.

9. By late 2016, Mr Tinkler and Esken had agreed that after approximately 10 years in the role of CEO, Mr Tinkler would stand down as CEO in order to enable a new CEO to be appointed, but that Esken would benefit from arrangements that would enable it to continue to make use of Mr Tinkler's entrepreneurial skills and ability to propose beneficial value-creating acquisition and investment opportunities to Esken.

10. As recorded in a number of contemporaneous documents, including a document produced in late 2016 entitled *"An outline of a new valuation creation platform for Stobart"*, it was proposed that Mr Tinkler should, on standing down as CEO, perform two roles, firstly an executive role within Esken, and secondly a role outside Esken originating and developing business ideas in a variety of ways. As the latter document expressed matters at the time it was prepared, it was then anticipated that Mr Tinkler would divide his time between:

> *"- a part time executive role (with a title to be agreed), making him available to the Group to share and develop new ideas and initiatives, ensure complete continuity and actively assist with the transition to a new CEO; and*
>
> *- a sustainable, long-term role originating and developing business ideas in a variety of ways, as an adviser, investor, consultant, non-exec or even broker, to suit the situation, with his primary focus on the Group but able also to work independently."*

11. This latter document further referred to the fact that in the course of his discussions with Mr Tinkler, the proposed new CEO of Esken, Warwick Brady ("**Mr Brady**"), had referred to the concept of a *"Value Creation Board"* as a means of retaining Mr Tinkler's involvement, thus: *"ensuring continuity and the flow of value-creating ideas"*. Further, the document refers to Ian Soanes ("**Mr Soanes**") having proposed: *"the formation of 'Stobart Capital' to meet these requirements, providing a sustainable, hopefully long-term platform for value creation, benefiting all stakeholders."*

12. Mr Soanes was, at this time, a self-employed financial consultant with corporate finance expertise, who had provided such expertise to Esken.

13. In the event, SCL was incorporated on 10 May 2017. Although the structure was not quite as envisaged by the documentation referred to above and other earlier documentation recording the parties' intentions, SCL was incorporated to fulfil the role of *"Stobart Capital"* as proposed by Mr Soanes.

14. On incorporation of SCL, Mr Tinkler and Mr Soanes were appointed as directors thereof, on the basis that they would act as executive directors, and shares were issued in the share capital of SCL such that Mr Tinkler held 501 Ordinary "A" Shares representing 50.01% of the voting rights, Mr Soanes held 499 Ordinary "B" Shares representing 49.99% of the voting rights, and Esken held 250 Ordinary "C" Shares representing a 20% option on a change of control which carried no entitlement to income, capital or votes, until conversion into "A" and "B" Ordinary Shares.

15. It is Esken's case, as expressed most clearly in the evidence of John Coombs ("**Mr Coombs**"), that it regarded Mr Soanes, with his corporate finance expertise, as a key part of any arrangement between itself and SCL.

16. On 11 May 2017, it was formally announced that Mr Tinkler would be standing down as CEO of Esken, and that SCL had been formed with a view to Mr Tinkler splitting his time between Esken, of which he would remain an executive director, and SCL.

17. As foreshadowed by Mr Brady's earlier reference to a *"Value Creation Board"*, Esken established a Valuation Creation Committee ("**VCC**"), chaired by Mr Coombs, a non-executive director of Esken, to which it was intended SCL would report with value-creating investment proposals.

18. The VCC first met on 1 June 2017. The minutes thereof record Mr Coombs and Mr Brady as being present, and to those in attendance being Richard Laycock ("**Mr Laycock**"), a director of Esken and its Chief Financial Officer, Mr Tinkler, Mr Soanes, and Paige Cass ("**Ms Cass**"), Esken's Assistant Company Secretary, who recorded as *"taking minutes"*. Iain Ferguson ("**Mr Ferguson**"), a non-executive director of Esken and its Chairman, was recorded as having given apologies.

19. The minutes of this meeting recorded the following as having been agreed with regard to the terms of reference of the VCC, namely:

> "• *The VCC should consider the proposals before taking them to the Board, this should reduce the amount of time that the Board needs to spend on these items.*
> • *The VCC will deal with all Stobart Capital investments, plus others in scope.*
> • *The Board will make the ultimate decision, not the VCC.*
> • *It is likely that each Stobart Capital investment will have a board member from Stobart Capital and an observer from Stobart Group.*
> • *The membership of the Committee would be JC (Chair), WB and RL (finance) with IF (observer) and CoSec."*

20. Further, the minutes, amongst other things, identified at paragraph 3 thereof: "*New deals in the pipeline"*. These included *"Project Wright – Flybe"*, in respect of which Mr Soanes was referred to as having summarised the position, suggesting the investment could be around £50m. Further, reference was made to a battery storage project, and a project to use a wood drying facility.

21. There was a further meeting of the VCC on 14 June 2017. It is apparent from the minutes thereof that the terms and basis of the arrangements between Esken and SCL remained under discussion.

22. On 1 July 2017, Mr Tinkler stood down as CEO of Esken, albeit, as envisaged, remaining as an executive director thereof, and Mr Brady was appointed in his place.

23. There was a further meeting of the VCC on 3 July 2017. It was agreed thereat that there should be certain revisions to the terms of reference, and again it is apparent that the terms and basis of the arrangements as between Esken and SCL remained under discussion. It is to be noted that Mr Brady is recorded in the minutes of this meeting as

having referred to *"the scope and focus paper"* and as having noted that *"the priority target is one or two larger projects such as Project Wright rather than 10 small projects."*

24. At a subsequent meeting of the VCC on 25 July 2017, the terms of reference of the VCC were formally approved. The terms and basis of the arrangement as between Esken and SCL still remained under discussion. As indicated by an email dated 1 August 2017 from Mr Soanes to Mr Coombs, the lead in these discussions on behalf of Esken was taken by Mr Coombs, and on behalf of SCL by Mr Soanes.

25. Progress in respect of the discussions was reported to the Board of Esken in a document headed: *"Value Creation Committee & Stobart Capital update for Stobart Board – July 2017"*, and also by way of emails from Mr Coombs to members of the Board, including an email dated 18 August 2017. It is to be noted that:

    i) The former document anticipated that SCL would perform three separate roles, of which the first would be the *"main activity"*, namely:

        "- Act as a Private Equity Manager; identifying new deals, leading negotiating, forming a syndicate, leading DD & the transaction, representing new shareholders on the Board & leading implementation of a new strategy, leading an exit.
        - *Act as a Corporate Finance Advisor for SG, finding deals that will be fully acquired outright by SG, which have a strong strategic fit and can be immediately absorbed into an operating division and managed internally*
        - *Act as a Retained Advisor to SG & the CEO, providing ad hoc commercial & financial modelling & other advice."*

    ii) The email dated 18 August 2017 referred to the fact that: *"The overall agreement gives SC an initial period of 5 years, with the option for both sides to renew beyond then, the committed retainer fee from Group is £0.5m/y for this period, so our minimum financial exposure in setting up SC is £2.5m, if we change our mind we are still committed to paying this, if they want to terminate early the fee is reduced. The fee can be thought of as covering the absolute base cost of running SC, excluding Ian's & Andrews costs or any deal related costs, by paying this fee we give them confidence that they can pay the critical bills."*

26. There was a further meeting of the VCC on 24 August 2017.

27. In September 2017, Mr Tinkler's service agreement with Esken was amended to reflect the fact that he would be spending only 50% of his time working for Esken, with the balance of his time being committed to SCL.

28. In anticipation that a formal agreement would be entered into shortly thereafter, on 4 September 2017, Esken paid £300,000 in respect of a retainer fee for the period from May 2017 to October 2017, at the rate identified in Mr Coombs' email dated 18 August 2017, and subsequently reflected in the Management Agreement.

29. Under the umbrella of the arrangements between Esken and SCL, by early September 2017, a further investment opportunity had been identified in Airportr, a company

providing luggage collection services for air passengers. On 7 September 2017, Esken made an investment of £2m in Airportr in respect of which Esken subsequently paid a transaction fee to SCL as invoiced in an amount of £120,000 on 10 November 2017.

30. On 22 September 2017, Esken and SCL entered into the Management Agreement, and on the same day SCL and Stobart Brands LLP entered into a Licence Agreement for the use of the Stobart brand for the duration of the Management Agreement, with provision for a period of run-off thereafter.

31. The Management Agreement defined SCL as *"the Manager"*, and Esken as *"Stobart Group"* or *"SGL"*, and included the following relevant provisions.

32. The Management Agreement included, by way of recitals, the following *"Background"* which, pursuant to clause 1.2.1, was expressed to form part of the Management Agreement:

> *"(A) SGL has the objective of entering into value-creating acquisitions, investments and initiatives (the "**Investment Objective**") which will be pursued and overseen by a committee of the board of Stobart Group known as the Value Creation Committee "**Investment Objective**"*
> *(B) The Manager has agreed to provide SGL with certain services in order to assist it to achieve its Investment Objective on the terms of this Agreement.*
> *(C) It is expected that aspects of this Agreement will be incorporated into legal Agreements between the Manager, SGL and potentially other parties relating to particular Investments or Acquisitions.*
> *(D) The Manager may be advised by and may delegate the provision of some of the services to be provided hereunder to, one or more of its Associates in accordance with the terms of this Agreement."*

33. Clause 1.1 included the following definitions:

i) *"Acquisition"* as meaning *"an acquisition by SGL (or members of its Group) pursuant to this Agreement of 100% of the shares in a company."*;

ii) *"Confidential information"* as meaning *"all information disclosed (whether in writing, orally or by another means and whether directly or indirectly) by a party to the other party whether before or after the Effective Date including information relating to the disclosing party's products or services, customers or suppliers, operations, processes, plans or intentions, product information, know-how, trade secrets and other intellectual property, market opportunities, business affairs, financial information and other confidential information"*;

iii) *"Effective Date"* as meaning *"the date of this Agreement"*;

iv) *"Fee(s)"* as meaning *"the fee(s) agreed to be paid from time to time by SGL (or an SPV as appropriate) to the Manager for the Services as provided in clause 4 and the Schedule"*;

v) *"Group"* as meaning *"in respect of a company the ultimate holding company of that company and each subsidiary of that holding company"*;

vi) *"Investment"* as meaning *"an investment made by SGL (or members of its Group) pursuant to this Agreement to acquire less than 100% of a business or 100% of the shares of a company."*

vii) *"Investment Objective"* as having *"the meaning set out in the Background"*;

viii) *"Management Fee"* as having *"the meaning set out in the Schedule"*;

ix) *"Performance Fee"* as having *"the meaning set out in the Schedule"*;

x) *"Retainer Fee"* as having *"the meaning set out in the Schedule"*;

xi) *"Services"* as meaning *"the services set out in clause 3, as amended from time to time by agreement in writing between SGL and the Manager"*;

xii) *"SPV"* as meaning *"a special purpose vehicle through which the investment is made by SGL alongside third-party investors"*;

xiii) *"Transaction Fee"* as having *"the meaning set out in the Schedule"*;

xiv) *"Transaction Opportunities"* as having *"the meaning set out in clause 3.1.1"*; and

xv) *"VCC"* as having *"the meaning set out in the Background"*.

34. Clause 2 dealt with the appointment of SCL as *'Manager'*:

i) By clause 2.1, SCL agreed to provide the Services (as set out in clause 3), for the duration of the Agreement, subject to the termination provisions set out in clause 8.

ii) In providing the Services, it was provided by clause 2.3 that SCL would: *"at all times be subject to the overall policies, supervision, review and control of [Esken] who may give to [SCL] general or specific directions relating to any matter which is the subject of this Agreement"*.

iii) Clause 2.4 expressly provided that SCL undertook to Esken that:

> *"2.4.1 it owes a duty of care to [Esken];*
>
> *2.4.2 it shall act in good faith and shall exercise all the due skill, care and diligence that would be expected of a person experienced in dealing with and providing services equivalent to the Services, and shall operate in accordance with good market practice in providing the Services;*
>
> *2.4.3 its conduct of business on behalf of [Esken] shall comply with all applicable rules and requirements and every law or regulation for the time being binding on [Esken] (unless the Manager could not reasonably be expected to know the law or regulation was binding on [Esken]); and*

> *2.4.4 save as expressly set out in this Agreement, it acknowledges that [Esken] shall not be liable for any acts or omissions of the Manager or its agents or Delegates."*

35. Clause 3 defined the Services that SCL was to provide to Esken, and mirrored in its terms the update provided to the Esken's Board referred to in paragraph 25(i) above, by setting out three functions: (A) Investments and Acquisitions (as defined); (B) management; and (C) corporate finance and consultancy.

36. In respect of function (A), Investments and Acquisitions, SCL's obligations were expressed as being:

> *"3.1.1 identifying and originating Acquisition and Investment opportunities which meet the Investment Objective ("Transaction Opportunities");*
>
> *3.1.2 discussing and reviewing Transaction Opportunities proposed or originated by [Esken];*
>
> *3.1.3 appraising and evaluating Transaction Opportunities and reporting to the VCC in accordance with the procedure set out in clause 3.8 in order for it make (sic) a recommendation to [Esken] as to whether or not [Esken] should pursue a Transaction Opportunity with a view to concluding an Acquisition or Investment;*
>
> *3.1.4 developing Transaction Opportunities approved by the VCC and representing [Esken] in discussions with third parties to progress them;*
>
> *3.1.5 working with [Esken] and its legal and other advisers as appropriate in order to execute Transaction Opportunities approved by the VCC; and*
>
> *3.1.6 assisting with the appointment of, working with and coordinating the activities of providers of due diligence and other transaction execution services but not (unless specifically agreed in writing) providing such services to [Esken] itself."*

37. So far as Transaction Opportunities were concerned, the Management Agreement provided for Esken to have a right of first refusal, and made provision as to how Transactions Opportunities were to be presented, setting out a process in clause 3.8, as follows:

> *"3.8 [Esken] shall have a right of first offer ("**ROFO**") in relation to any Transaction Opportunity developed by the Manager.*
>
> *3.8.1 The Manager shall invite [Esken] to consider a Transaction Opportunity before making an invitation to third party investors. The Manager shall present*

> *an overview investment paper ("Overview Paper") (which is expected to be the first stage of a three stage VCC approval process, followed by a detailed proposal and a final, pre-investment confirmation) relating to the Transaction Opportunity to the VCC. The Manager shall undertake its own initial due diligence, at its own cost, to prepare the Overview Paper. The Overview Paper shall include sufficient detail in relation to the Transaction Opportunity to enable a reasonably prudent investor to make an informed decision as to whether or not to progress with an investment;*
>
> *3.8.2 if the VCC indicates that it wishes to proceed with the Transaction Opportunity within 10 Business Days of receipt of the Overview Paper referred to in clause 3.8.1, the Manager shall seek to execute the Transaction Opportunity including, where appropriate, by introducing third parties and making invitations to third parties to invest.*
>
> *3.8.3 It is expected that prior to the conclusion of the second phase of the execution of the transaction, when a detailed proposal is presented to the VCC, [Esken] will make a commitment to fund the costs associated with the execution of the transaction as described in clause 3.10 below."*

38. In respect of function (B), management, SCL was to provide on-going management and advisory services in relation to Investments that had been made by Esken pursuant to the Management Agreement (clause 3.1.7). The precise nature of the services was to be determined on a case-by-case basis according to the circumstances and agreed between Esken (or the relevant member of its Group) and the Manager at the time of completion of an Investment, but was to include the various services set out in clauses 3.1.7.1 to 3.1.7.4, which included, by way of example, representing the interests of Esken on the board of the investee company as a non-executive director (clause 3.1.7.1).

39. In respect of function (C), clause 3.1.8 provided that SCL was to provide: *"general corporate finance and consultancy services, which may not be connected with an identified Transaction Opportunity, in a manner and to an extent commensurate with the payment of the Retainer Fee, of which one quarter shall be regarded as payment for services provided under this paragraph"*.

40. The following further provisions of clause 3 are of relevance, namely:

    i) Clause 3.2 provided that Esken should keep SCL informed of any changes to its Investment Objective and its investment priorities and the sums available for investment from time to time.

    ii) Clause 3.3 provided that:

> *"3.3 For the duration of this Agreement, all Investments made by [Esken] after the Effective Date (and which are not Acquisitions) shall be considered Investments for the purposes of this clause 3 and clause 4 and it is the intention that these shall be managed by the Manager pursuant to this Agreement unless otherwise instructed by [Esken] or agreed by [Esken] and the Manager. It is anticipated that Acquisitions will be managed by [Esken] in the ordinary course of its business."*

iii) Clause 3.6 set out certain agreed limitations on the scope of the Services to be provided by SCL, and stated that the duties were not to include:

a) "any specialist advice or services required by SGL in relation to accounting, taxation or legal advice" (clause 3.6.1); and

b) *"any act which may constitute an authorised or regulated activity in the UK for the purposes of the Financial Services and Markets Act 2000 or which may require the Manager to undertake any activity for which it is not authorised or regulated in any jurisdiction."* (Clause 3.6.3).

iv) Clause 3.12 provided, in relation to Investments, that SCL should provide Esken with: *"fair value written valuations of the Investments for accounting purposes as at 31 August and 28 February throughout the duration of this Agreement. The valuations shall be provided no later than 21 days after the end of the relevant period"*.

41. In consideration of SCL performing the Services, Esken was required by clause 4.1 to pay to SCL the Fees set out in the Schedule to the Management Agreement. However, this was subject to a proviso that where an investment was made by an SPV, all fees, with the exception of the Retainer Fee, should be payable by the SPV,

42. The Schedule to the Management Agreement provided for four categories of fee:

i) "*Retainer Fee"* – an annual payment to SCL of £500,000 payable quarterly in advance;

ii) *"Transaction Fees"* – being fees paid to SCL for the successful completion of an Investment or an Acquisition set according to the value of funding committed by investors as set out by *"value band"* as listed in the Schedule, as well as fees for the successful disposal of an Investment. The value bands as so listed were as follows:

Value band	**Fee, per annum**
up to £5 million	£100,000
£5-10 million	2.0%

£10-25 million	1.0%
above £25 million	0.67%

iii) *Management Fees* – an annual fee paid to SCL "*for the management of each Investment made pursuant to*" the Management Agreement, quantified as the sum of the elements corresponding to each *"value band"* as set out in a table in the same terms as that applying in respect of Transaction Fees.

iv) *Performance Fees* – to be agreed between SCL and Esken in respect of each Investment on a case-by-case basis.

43. Clause 4.3 dealt with the position where in Investment is made through an SPV such that the proviso to clause 4.1 applies, and provided as follows:

> *"If an Investment is made by [Esken] alongside third party investors via an SPV, such that those third parties benefit from the provision of Services by the Manager, [Esken] and the Manager shall use their reasonable endeavours to achieve an agreement between the Manager and either the members of the investor group or the SPV which reflects the application of the terms set out above to the aggregate investment so that a Transaction Fee or a Management Fee, as the case may be, is charged on the aggregate investment and paid by all of the investors."*

44. Clause 4.3 requires some explanation, especially in relation to its interaction with clause 4.1. Clause 4.1 states in terms that Esken shall pay SCL the Fees set out in the Schedule, provided that where an Investment is made by an SPV, <u>all Fees</u> (bar the Retainer Fee) are payable by the SPV – i.e., rather than being payable by Esken. Clause 4.1 thus expressly provides that where an Investment is made by an SPV, no Fees liability attaches directly to Esken even though Esken might be involved therein, it being anticipated that the SPV would pay the Fees set out in the Schedule to the Management Agreement. However, the SPV would not be a party to the Management Agreement, and so clause 4.3 sought to impose obligations on SCL and Esken to both use their reasonable endeavours to achieve a further agreement, pursuant to which SCL would be paid the equivalent aggregate Fees, either the SPV or the group of investors in question, the Fees being calculated as set out in the Schedule to the Management Agreement.

45. Whilst clause 3.4 provided that Esken was entitled to use third party advisors either in addition to or instead of SCL, it went on to provide that SCL would only be entitled to the relevant Fees in amounts proportionate to "*any part of the Services provided by [SCL] in relation to [the] Investment*", potentially down to zero:

> *"Nothing in this Agreement shall prevent or restrict [Esken] from appointing or working with any corporate finance advisers,*

> *funds, banks or other third parties. For the avoidance of doubt, notwithstanding [Esken's] engagement with any other third-party advisor, a proportionate amount of all applicable fees as set out in the Schedule shall remain payable to the Manager in respect of any part of the Services provided by the Manager in relation to an Investment made after the Effective Date. For the avoidance of doubt, the proportion of fees payable shall be zero where the manager has not provided any Services in respect of an Investment."*

46. Clause 4.7 provided that:

> *"In committing to the Services, the Group may, at its option, provide such infrastructure and support services as reasonably requested by the Manager to facilitate the performance by the Manager of the Services. This may include, but is not limited to, licence fee for occupation of certain office space of the Group and IT support services. The costs payable shall be agreed between the parties under separate agreement."*

47. Clause 8 deals with the period of appointment as Manager and the termination of the Management Agreement, and provided that:

> *"8* ***Period of Appointment and Termination***
>
> *8.1 Except where terminated in accordance with clause 8.2 or clause 8.3, this Agreement and the appointment of the Manager hereunder shall continue in force until terminated:*
>
> *8.1.1 by [Esken] by giving 12 months' notice of termination, such notice not to be given before the expiry of four years from the Effective Date; or*
>
> *8.1.2 by the Manager by giving 12 months' notice of termination.*
>
> *8.2 This Agreement may be terminated by either Party with immediate effect from the time at which such notice is given if:*
>
> *8.2.1 an order has been made or an effective resolution passed or order made for the winding-up of the other Party (except a voluntary winding-up for the purpose of reconstruction or amalgamation upon terms previously approved in writing by the first Party) or a liquidator or similar officer has been appointed in respect of the other party or of any of the other Party's assets or the other party enters into an arrangement with its creditors or any of them or the other party is or is deemed to be unable to pay its debts;*

8.2.2 the other Party ceases or threatens to cease to carry on its business or substantially the whole of its business; or

8.2.3 the other Party has committed a material breach of its obligations under this Agreement (whether or not, for the avoidance of doubt, such breach would otherwise be a repudiatory breach) and (where such breach is capable of remedy) fails to remedy such breach within 28 days after receiving notice requiring the same to be remedied.

8.3 This Agreement may be terminated immediately:

8.3.1 by [Esken] if [Esken] is required by any relevant regulatory authority to terminate the Manager's appointment; or

8.3.2 on the liquidation of [Esken] resulting from the passing of a resolution to wind up [Esken]; or

8.3.3 by [Esken] if there is a change of control of the Manager whereby the beneficial interest in more than 50% in aggregate of the A shares and B shares in the capital of the Manager cease to be held by the prevailing shareholders as at the Effective Date; or

8.3.4 by [Esken] if any competitor of [Esken] holds the beneficial interest in more than 25% of the share capital of the Manager.

in which events, unless otherwise stated in this Agreement, [Esken] shall be liable to pay the Manager all fees that would have been payable up to and including the first date on which the Agreement could be terminated pursuant to clause 8.1.1.

8.4 Any termination of this Agreement shall be without prejudice to: (i) any claim by either Party against the other for any breach of the terms hereof committed prior to such termination; and (ii) the completion of transactions already the subject of a binding contract prior to the date of such termination and the payment of any Fees then due."

48. Clause 9 dealt with the consequences of termination and provided as follows:

"9 CONSEQUENCES OF TERMINATION

9.1 Upon termination, [Esken] will pay or, in the case of fees due from an SPV, endeavour to support the Manager in the recovery of the payment by an SPV, of the accrued Fees and expenses to the date of termination (if any).

9.2 For the purpose of calculating the accrued Fees:

9.2.1 except as set out in clauses 9.2.2 and 9.2.3 the date of termination shall be considered to be no earlier than 5 years from the Effective Date;

9.2.2 in the circumstances set out in clause 8.1.2 or 8.3.1 the date of termination shall be considered to be twelve months from notice of termination being given; and

9.2.3 in the event of termination by [Esken] pursuant to clause 8.3.3, 8.3.4 or clause 8.2 because the Manager and not SGL is in default in the manner described in the sub-sections of that clause, the date of termination shall be considered to be the later of the actual date of termination or 12 months from the Effective Date.

9.3 It is envisaged that Fees other than the Retainer Fee will be the subject of separate agreements which will provide for, among other things, termination arrangements and the consequences of termination."

49. Clause 17 dealt with confidentiality and, so far as relevant, provided that:

"17.1 During the Term and after expiry or termination of this Agreement for any reason, neither party:

17.1.1 may use Confidential Information for any purpose other than the exercise of its rights or the performance of its obligations under this Agreement;

17.1.2 may not disclose Confidential Information to a person except with the prior written consent of the party disclosing the Confidential Information or in accordance with clauses 17.2 and 17.23; and

17.1.3 shall make every effort to prevent the unauthorised use or disclosure of Confidential Information, including by restricting access to Confidential Information.

17.2 During the Term, the party receiving the information may disclose Confidential Information to any of its directors, other officers, employees, professional advisers, lenders to and potential lenders (each an Authorised Recipient), to the extent that disclosure is necessary for the purposes of this Agreement, or in the case of disclosure to lenders or potential lenders, for the purposes of a related financing transaction.

17.3 Where disclosure of Confidential Information is made to an Authorised Recipient, the receiving party shall ensure that the Authorised Recipient is subject to obligations equivalent to those set out in this clause 17."

50. The Management Agreement also contained fairly standard additional boilerplate clauses in respect of variation and waiver (clause 12), and entire agreement (clause 13).

51. There were further meetings of the VCC on 11 October 2017 and 1 November 2017.

52. On 2 November 2017 SCL received regulatory approval from the Financial Conduct Authority ("**FCA**"), and Mr Tinkler became CF30 approved person.

53. There were further meetings of the VCC on 20 December 2017, 8 January 2018 and 24 January 2018. Esken places reliance upon the fact that the minutes of these meetings show Mr Soanes as taking the leading role on behalf of SCL in reporting to the VCC with regard to investment opportunities, and in particular Project Wright relating to Flybe (i.e., Flybe Group Plc and its operating subsidiaries) and indeed with regard to the general furtherance of Project Wright, including the development of financial models.

54. On 19 February 2018, Mr Soanes resigned as an employee of SCL, and on 24 February 2018, Mr Soanes resigned as a director of SCL. Although Mr Soanes resigned as an employee of SCL, he subsequently established in proceedings brought in the Employment Tribunal that he had been constructively dismissed, effectively by Mr Tinkler's actions.

55. Prior to his resignation, Mr Soanes sent an email dated 17 February 2018 to Mr Brady saying, amongst other things: *"If I were you I would make me in charge of all SCL projects on a day-to-day basis on behalf of* [Esken] *so that SCL reports to you through me (once VCC has authorised project).* [Mr Tinkler] *would enjoy that! It would show* [Mr Tinkler] *which of you was calling the shots!"*

56. On 18 February 2018, Mr Ferguson emailed Mr Brady with regard to Mr Soanes's impending resignation, and having commented on the difficulty in resurrecting a working relationship with Mr Tinkler, observed that: *"Ian moving on will be simpler for us too----we can get SC to focus on Project Fort supporting Nick and you /Nick can progress Project Wright using Barclays and Nyras BUT not* [SCL] *or* [Mr Tinkler]. *We can then work out later if we can offer Ian S other work etc."*

57. Towards the end of a lengthy email dated 19 February 2018 (11:13 AM) from Mr Coombs to Mr Brady, Mr Coombs commented on the Retainer Fee payable to SCL under the Management Agreement saying: *"My recollection is that we are obligated to pay an annual management fee which would be £1.4m/y, carry we are not obligated to pay although SC may try to dispute this. I think we should have a proper discussion on the future of SC & the role you want them to play going forward, we may need to untangle ourselves."*

58. In a further email sent later that day (17:54) to Mr Brady and Mr Ferguson, Mr Coombs raised the question as to whether Esken wanted to continue with the arrangement *"with just Andrew"* (i.e., without Mr Soanes) or whether it would prefer to try and *"terminate now"*. The email identified that there was a further 4 ½ years of exposure to retainer fees under the Management Agreement, but that there was a right to terminate under clause 8.2.2 or clause 8.2.3 if the grounds set out therein could be satisfied. The email observed that Mr Coombs considered that without Mr Soanes, the SCL team was *"sub scale"*, lacking his critical set of corporate finance skills, and thus would not be able to

function as Esken needed it to. The email questioned the ability of Mr Tinkler to find a replacement, as well as questioning the ability of *"the two junior guys"*.

59. In paragraph 41(b) of his witness statement, when commenting on Mr Soanes's resignation, Mr Coombs originally said: *"I saw no prospect of SCL being able to provide any services in the absence of Mr Soanes and [Esken] needed properly to consider how and whether to untangle itself from the relationship with SCL."*. In qualifying this in giving oral evidence, Mr Coombs revised the reference to *"no prospect"* to *"very little prospect"*.

60. SCL relies upon the above email exchanges, and further conduct on the part of representatives of Esken as evidence of Esken having devised at an early stage, and having carried into effect a scheme or plan to extract itself from the Management Agreement in order to avoid its obligations thereunder. Thus, so it is alleged, Esken subsequently rebuffed attempts by SCL to convene meetings of the VCC, and failed to cooperate in number of other respects.

61. On the other hand, it is Esken's case that Mr Soanes's departure did, in fact, have a dramatic effect on SCL's ability to perform its obligations under the Management Agreement such that no future projects were progressed to the stage of being advanced to the VCC, and the level of work carried out pursuant to the Management Agreement was such that by the time of the service of the Termination Notice in March 2019 at least, the position was that SCL had ceased to carry on its business or substantially the whole of its business so as to entitle Esken to terminate pursuant to clause 8.2.2 of the Management Agreement, and/or had committed a material breach of its obligations under the Management Agreement which was incapable of being remedied, so as to entitle Esken to terminate pursuant to clause 8.2.3 of the Management Agreement.

62. Esken points to the fact that there were no further meetings of the VCC after a meeting held on 22 February 2018. However, it is to be noted that, by email to Ms Brace (Esken's Company Secretary) dated 29 March 2018, Mr Coombs directed that he wanted it minuted that VCC meetings should only be convened in the future if requested by SCL, when previously they had been held monthly. The email went on to state that: *"Just at the moment, we need to avoid saying or doing anything that suggests we are not going to use them"*. SCL relies upon this as demonstrating that a decision had already been taken to dispense with SCL as soon as practicable and convenient.

63. Esken's position is that, thereafter, no VCC meetings were in fact requested by SCL to consider new projects, and the that only request made by SCL related to an inappropriate request much later in 2018 that the VCC be convened to deal with issues concerning a future possible investment in Airportr.

64. Whilst following Mr Soanes's departure in February 2018, SCL did carry out further work in respect of Project Wright/Flybe in March and April 2018, as referred to in paragraph 57 of his first witness statement, his involvement in Project Wright came to an end in April 2018.

65. There is an issue between the parties as to the work actually done by SCL pursuant to the terms of the Management Agreement after Mr Soanes's resignation which I will return to consider in some detail when considering below Esken's claim that it was

entitled to terminate the Management Agreement pursuant to clause 8.2.2 and/or clause 8.2.3.

66. On 14 June 2018, Mr Tinkler was dismissed as an employee of Esken and removed as a director thereof. On 15 June 2018, Esken commenced proceedings against Mr Tinkler alleging that he acted in breach of his fiduciary duties as a director of Esken ("**the Fiduciary Duty Claim**").

67. On 30 June 2018, Esken paid SCL the sum of £150,000 in respect of the Retainer Fee due for the period May to July 2018.

68. Esken's Annual General Meeting ("**AGM**") was held on 6 July 2018, when Mr Tinkler put himself up for re-election to the Board. On 7 July 2018 it was announced that Mr Tinkler had been re-elected as a director of Esken at the AGM. However, the following day the Board of Esken, pursuant to a power in Esken's Articles of Association allowing for the removal of a director on the unanimous vote of the other directors, removed Mr Tinkler once more as a director. Mr Tinkler challenged this decision to so remove him in the Fiduciary Duty Claim.

69. So far as SCL is concerned, there was one particular project concerning Whitemoss, a hazardous waste landfill site in Skelmersdale, Lancashire ("**Whitemoss**") which was discussed with Stobart Energy Limited, a subsidiary of Esken, albeit never advanced to the VCC. This project was mentioned by Mr Brady to Mr Coombs in an email dated 20 August 2018. In an email in response Mr Coombs said: *"Interesting, so they have made a deal proposal to you, must be the first since Feb? Shame because it will start to reduce our ability to argue the (sic) have substantially ceased business."* He went on to suggest that: *"This will muddy the water!"* This latter email is relied upon by SCL as providing an insight into Esken's thinking and as showing that Esken did not really want SCL to perform.

70. The Appendix to SCL's Skeleton Argument, as updated to 24 March 2022, refers to a number of other documents/communications which are said to evidence a strategy to terminate the Management Agreement early and to avoid or reduce fees payable to SCL. These include:

    i) An email from Mr Brady dated 18 May 2018 stating that *"Stobart Capital* [is] *not working out"*, and also making reference to Mr Tinkler's dismissal.

    ii) An exchange of at least five Telegram messages between Mr Brady and Mr Soanes on 7 June 2018 which are said to demonstrate continuing cooperation between Esken and Mr Soanes as to how to work against SCL, with Esken also later providing/formalising a loan to Mr Soanes in October 2018 in order to fund his Employment Tribunal claim against SCL.

    iii) A Telegram message dated 6 August 2018 from Mr Soanes to Mr Brady asking for contact details of Esken's Solicitors, Rosenblatt, suggesting that: *"I'll make contact and try to meet them as soon as possible. This is a vital window when we can apply maximum pressure to make SCL appear a liability not an asset to get him* [i.e., Mr Tinkler] *to walk away from it"*.

iv) Discussion of a strategy under the codename *"Operation Overlord"* through a WhatsApp group and other communications, in which various codenames associated with the Normandy landings were given to individuals and entities such as Mr Tinkler (Rommel), SCL (Normandy), Esken (Eisenhower), and Mr Soanes (Montgomery). Particular reference is made to:

a) A WhatsApp message sent by Mr Brady on 9 August 2018 saying: *"I am in South Africa on a Game Farm so you* [Mr Soanes] *and John Coombs need to come up with a robust plan quickly for SC";*

b) A document circulated on 12 August 2018 titled *"Operation Overlord"*.

These documents were only disclosed last December in the *"Fraud Claim"* referred to below, and are said by SCL to provide stark evidence of a strategy to terminate. Complaint is made that they were not disclosed in the ordinary way in the present proceedings notwithstanding SCL's allegation that a strategy existed.

v) WhatsApp communication between Mr Brady and Mr Soanes on 3 September 2018 and 2 October 2018.

vi) Email correspondence between Mr Brady and Nick Dilworth ("**Mr Dilworth**"), Esken's Group Commercial Director, on 10 December 2018 in which Mr Brady said: *"Can you let me know where we got with Stobart Capital termination? I want to be able to terminate the tenancy so they move out of Stratford Place as it really is becoming a confidentiality issue with them."*

vii) Further documentation disclosed in the Fraud Claim relating to *"Operation Neptune"*, including one particular document that set out the *"background"* to Operation Neptune in terms of it being: *"… in Stobart Group's interest to end Stobart Capital. As long as Stobart CapitaL and the Management Agreement continue to exist there is a liability, potential for further legal action, a leak risk and a nuisance …"*

viii) An email dated 17 January 2019 sent by Mr Coombs to Mr Brady and Mr Ferguson forwarding the Operation Neptune document.

71. One of the grounds on which Esken claims to be entitled to have terminated the Management Agreement relates to the way in which SCL performed management services in respect of Airportr. I will return to the allegations in this respect in due course, but in support of its case that Esken frustrated the convening of VCC meetings, SCL relies upon what is alleged to be the failure of Esken to convene a meeting of the VCC in response to a *"VCC Update"* prepared by SCL in respect of Airportr in or about October 2018. The Executive Summary to this document reported that whilst there had been some encouraging developments at Airportr since the last time that the VCC had been briefed, growth been disappointing, and this document sought to explain Airportr's management's explanations as to why performance had been poor, as well as explaining areas of product development and growth. As made clear by the Executive Summary and by the *"Request of the VCC"* set out at paragraph 5 of this document, SCL wished to understand the VCC's view as to whether Esken was interested in

participating in the next funding round, and if this was not the case, as to the share price that Esken would advise Airportr to go to market with.

72. SCL's position is that Esken, and in particular Mr Coombs as Chair of the VCC, ought to have facilitated the holding of a meeting of the VCC, or at least reverted with Esken's views in respect of the matters raised, which it did not do. On the other hand, it was Mr Coombs' evidence that in producing this document, SCL has simply failed to do the job that it was supposed to do, and to formulate a strategy or specific proposals in respect of the steps that it would advise Esken to take and that, in essence, he did not engage with the document that had been produced, and the request that was contained within it, because he did not consider that it was his job to tell SCL what to do. Mr Coombs cited this as an example of SCL's inability to perform properly without the input of Mr Soanes or somebody with knowledge and capabilities.

73. The document produced by SCL in or about October 2018 was subsequently supplemented in January 2019, but again there was no substantive engagement by Esken, the VCC, or Mr Coombs therewith.

74. The Fiduciary Duty Claim was heard by HH Judge Russen QC over 11 days in November 2018 in the London Circuit Commercial Court, with judgment being reserved until 15 February 2019.

75. On 14 November 2018, Flybe Group Plc launched a sale process in respect of its share capital that led to Esken, shortly thereafter, forming a consortium to bid pursuant to this process using Connect Airways Limited ("**Connect**") as an SPV for that purpose, Connect being jointly owned as to 40% by DLP Holdings S.á.r.l (a company wholly owned by funds managed by Cyrus Capital Partners LP ("**Cyrus**"), 30% by Esken, and 30% by Virgin Travel Group Ltd (a wholly owned subsidiary of Virgin Atlantic Limited) ("**Virgin**").

76. Neither Esken nor Connect referred back to SCL in respect of this bid or sought its Services in connection therewith under the Management Agreement, and Esken relied upon the services of Barclays Bank Plc ("**Barclays**") as well as Mr Soanes, in the case of Mr Soanes for a consideration of the equivalent to the retention fee payable under the Management Agreement.

77. In the course of Mr Brady giving evidence at the recent trial of the Fraud Claim, the following exchange took place with regard to Mr Soanes and Flybe:

> *"Mr Justice Leech: Can you just explain to me why the modelling* [i.e., the original modelling done by Mr Soanes in relation to Flybe] *was so important in this case? Was it a question of he just had acquired sufficient knowledge to be able to interrogate the numbers. Was it around price or was it –*
>
> *Mr Brady: So basically, you know, the Flybe opportunity had arisen very early on, and he* [Mr Soanes] *had been involved in all the modelling, the business case, the investment case behind it, right, and, of course, the model – even when you get consortium members, like the Cyrus and Virgin Atlantic, the business model is effectively in essence the core of the investment case, and it was his model, right, and that's why he was so important…"*

78. On 15 November 2018, the day after the launch of Flybe's sales process, Daniel Sofaer ("**Mr Sofaer**"), an accountant and investment manager employed by SCL, included the following in an email to Mr Tinkler:

> *"Craig* [Paterson, another employee of SCL] *has crunched the numbers on the Orville model* [a reference to the earlier model produced in respect of Project Wright]*, he'll get something over to you soon. In summary, it's semi-close Profitability and slightly higher on cash predictions. This will be a mixture of sound predictive modelling and coincidence - as a few things have shifted since we built it."*

79. On 11 January 2019, it was announced that Connect had made a cash offer for Flybe Group plc at a price of 1p per share. RNS Number 8538M issued in connection therewith referred to the fact that Cyrus, Virgin and Esken had committed to make available a £20m bridge loan facility to support Flybe's working capital and operational requirements, and security was granted in respect of this facility shortly thereafter, and duly registered at Companies House.

80. Later the same day, Mr Tinkler acquired 12.23% of the issued share capital of Flybe Group plc at a price of 3.7p per share.

81. Apart from any difficulties that there might have been in obtaining shareholder approval, difficulties encountered by Flybe Group Plc with its bankers prevented it from proceeding with the cash offer made by Connect on 11 January 2019. As a result, an alternative arrangement was agreed whereby pursuant to the terms of a Share Purchase Agreement dated 15 January 2019 ("**the SPA**"), Connect agreed to buy the shareholdings held by Flybe Group plc in its trading subsidiaries, Flybe Ltd and Flybe.com Ltd, on terms that provided for the introduction of cash as envisaged by the offer made on 11 January 2019.

82. In the meantime, Mr Tinkler had, on 14 January 2019, obtained from Flybe, via Jeremy Barnes ("**Mr Barnes**") of Falco Regional Aircraft Ltd ("**Falco**") confidential term sheets relating to the financial position of Flybe. It was Mr Tinkler's evidence that, seemingly at some point thereafter, he was contacted by Flybe's financial adviser, Evercore, and offered a meeting with Evercore and Flybe's Chairman and CEO at which he says that he: *"offered support to the company as a shareholder if it needed to undertake an equity raise in circumstances where the Connect option fell away for any reason."*

83. On 1 February 2019 Mr Brady, on behalf of Esken, informed Mr Sofaer of SCL that SCL was no longer required to manage the Airportr investment, Mr Brady citing as the reason for dispensing with the services of SCL the matters now relied upon by Esken in respect of the Airportr investment as entitling it to terminate the Management Agreement as referred to below, based upon SCL's handling of the management of Esken's investment in Airportr, and specifically an alleged lack of attendance of appropriate representatives of SCL at Airportr Board meetings and their performance thereat.

84. As is reported in RNS Number 9133O dated 4 February 2019, on 1 February 2019 Flybe received a: *"very preliminary, short and highly conditional outline contingency proposal from Mr Tinkler which evidences a capital injection and replacement of the*

funding provided by Connect Airways Limited ("the Preliminary Proposal")." This RNS went on to state that the Preliminary Proposal did not contemplate an offer for the whole of Flybe or any other acquisition structure, and that the Board of Flybe understood that the capital injection proposed would only be provided by Mr Tinkler if the SPA did not complete. The RNS further recorded that the Board of Flybe did not consider that the Preliminary Proposal offered the certainty required to secure the future of Flybe.

85. As reported in a subsequent RNS Number 5782Q dated 20 February 2019, on 19 February 2019, Flybe received: *"a preliminary and highly conditional outline contingency proposal from an investor group led by Bateleur Capital LLC and Mesa Air Group Inc, with indicative support from* [Mr Tinker] *and other un-named institutional shareholders (together, the "Investor Group") for a capital injection and replacement of funding provided by* [Connect] *(the "Indicative Proposal")"*.

86. This RNS went on to state, amongst other things, that:

    a) The Indicative Proposal was conditional on and subject to a significant number of items, including being subject to completion of the SPA not occurring, it being stated that Flybe was bound by the terms of the SPA to complete if the conditions thereto were satisfied or waived by Connect.

    b) The Indicative Proposal was conditional on CAA consent and agreement being reached with Flybe's credit card acquirers, banks, lessors and others, and the publication of the prospectus and the passing of a *"whitewash"* resolution.

    c) Flybe had drawn down the first £15m of the £20m secured committed credit facility announced on 15 January 2019, with the sums utilised thereunder being repayable not later than 22 February 2019.

    d) In the circumstances, Flybe's Board did not believe that the Indicative Proposal was executable in the timeframe required to enable Flybe to continue to trade, and thus that it continued to regard the arrangements entered into with Connect Airways as being the only viable option available to provide the security and business needs to continue to trade successfully.

87. It was Mr Tinkler's evidence and position that he made the Preliminary Proposal, and aligned himself with the Indicative Proposal, not to compete in any sense with Esken, but to provide a fall back or alternative should Connect not proceed with the SPA if, for example, one of the shareholders in Connect decided not to proceed, and in order to prevent Flybe entering into administration thereby prejudicing Mr Tinkler's position as a shareholder.

88. Esken's position, on the other hand, is that, at the time, Flybe's Board saw the Preliminary Proposal and/or Indicative Proposal as an alternative, and Mr Tinkler's support for the latter as being an attempt to leverage his position. Esken relies, amongst other things upon;

i) The fact that the institutional shareholders recorded as supporting the Indicative Proposal along with Mr Tinkler included Hosking Partners LLP ("**Hosking**"), and Mr Tinkler and Hosking between them held almost a third of Flybe's share capital;

ii) Mr Tinkler having been reported in the press as supporting an effort to eject Flybe's Chairman and to investigate the proposed sale to Connect, a move that had been initiated by Hosking on 16 January 2019 through a solicitors' letter to Flybe's Board questioning Flybe's directors' compliance with their duties.

iii) Mr Tinkler having been reported in the press as publicly decrying the Connect offer as *"an insult to the aviation industry."*

89. In the event, Flybe did, shortly after the making of the Indicative Proposal, proceed to complete the SPA and the sale to Connect. This left Flybe Group Plc itself with no significant assets, and its share capital was subsequently sold to Connect at a price of 1p per share.

90. In between the making of the Preliminary Proposal and the making of the Indicative Proposal, on 15 February 2019, HH Judge Russen QC handed down judgment in respect of the Fiduciary Duty Claim, finding in favour of Esken.

91. Prior to February 2019, SCL had shared premises with Esken at 15 Stratford Place, London W1C 1BE, with SCL occupying an assigned space thereat, and with various meeting rooms being shared. Esken's claim for expenses includes a claim for expenses in connection with SCL's use thereof. In February 2019, SCL moved out of these premises.

92. On 12 March 2019, Esken served the Termination Notice on SCL. The Termination Notice set out a number of matters that were said to amount to material and irremediable breaches that entitled Esken to terminate the Management Agreement. In particular, it was alleged that:

i) SCL had acted in breach of its duty to act in good faith in failing to disclose to Esken the fact that Mr Tinkler had made a competing bid for Flybe, an allegation not pursued in the present proceedings;

ii) Mr Tinkler had misused confidential information belonging to Esken relating to Project Wright in deciding to purchase shares in Flybe on 11 January 2019, again an allegation not pursued as such in the present proceedings;

iii) SCL had failed to perform the Services required of it under the Management Agreement, and in particular had failed to put forward any Transaction Opportunities since 2017 whilst continuing to charge an annual retainer fee, it being alleged that this amounted to a breach of its duty to act in good faith.

93. Further, it was maintained by the Termination Notice that Esken was entitled to terminate the Management Agreement with immediate effect pursuant to clause 8.2.2 thereof on the basis that SCL had, to all intents and purposes, ceased to carry on substantially the whole of its business.

94. The Termination Notice alleged that the provision of Services by SCL under the Management Agreement had substantially diminished since at least early to mid 2018, that no Services had been provided in connection with any identified Transaction Opportunity since Project Wright had come to an end in March 2018, and that the only services that SCL had provided over this period were in connection with SCL's management of Airportr, which itself had been brought to an end on 14 February 2019 such that as at the time of the service of the Termination Notice, SCL was not providing any of the Services to Esken and had failed to show any sign or intention to provide any such Services.

95. The present proceedings were commenced on 15 May 2020. The most recent iteration of SCL's case is in its Re-Amended Particulars of Claim dated 28 October 2021. Esken's Defence and Counterclaim was served on 20 July 2020, and its most recent iteration is Esken's Re-Amended Defence and Counterclaim dated 9 November 2021.

96. In November 2020, Mr Tinkler commenced proceedings against Esken seeking to set aside the Order made pursuant to HH Judge Russen QC's judgment dated 15 February 2019 on the grounds that it had been obtained by fraud ("**the Fraud Claim**"). The Fraud Claim was tried before Leech J in London in February 2022, and judgment remained reserved at the time of the hand down of this judgment. It is agreed between the parties that the issues in the Fiduciary Duty Claim and the Fraud Claim do not directly concern the issues in the present case, and it is agreed that I should make my own determination as to the reliability of witnesses without reference to any findings in those proceedings or the Fiduciary Duty Claim, and on the basis of the evidence before me.

97. There is one qualification to this that I should mention. Mr Sims, on behalf of SCL, has suggested in the course of the present proceedings that Mr Brady and Mr Coombs have sought to suppress documentation relating to Operation Overlord and Operation Neptune that had been disclosed in the Fraud Claim, but not the present claim. I understand that an allegation that these documents were supressed is a matter at the heart of the Fraud Claim, and I am invited by Esken to steer away from making any findings in respect thereof out of a concern that doing so might embarrass Leech J in the determination of the Fraud Claim. I mindful that if these matters were at the heart of the Fraud Claim they would have been gone into in considerably more detail than they have in the present case, where they have only been of peripheral significance. I do not consider that the resolution of the present case turns upon the determination of this issue, or that the result of it is otherwise materially affected thereby. In these circumstances, I consider that the appropriate course is to steer away from making any findings in connection therewith.

The Claim, and the Defence and Counterclaim

98. Against the above background, I turn to consider the Claim and the Counterclaim.

The Claim

99. The claim is premised on the basis that the Termination Notice was invalid and ineffective, and that the Management Agreement has continued on the basis that Esken can only determine it by 12 months' notice given not less than 12 months before the expiry of four years from the Effective Date, i.e. 22 September 2017.

100. SCL thus claims retainer fees at a rate of £125,000 plus VAT per quarter totalling £3,236,413.04:

    i) As invoiced, but unpaid to 30 April 2020 totalling £1,050,000;

    ii) As invoiced up to 22 September 2022, £1,436,413.04.

101. Further, SCL claims that the transaction entered into by Esken with Flybe through Connect in January 2019 was an *"Investment"* within the scope of the Management Agreement as a result of which, pursuant to clauses 3.3 and 4 of, and the Schedule to, the Management Agreement, SCL is entitled to a transaction fee of £1,288,000 plus VAT applying the scale provided for in the Schedule to the Management Agreement in a like manner to that applied by Mr Soanes in making his claim to the Employment Tribunal following his resignation from SCL. It is SCL's case that the Flybe transaction was, in substance, the fulfilment of Project Wright that had fallen within the scope of the Management Agreement, and in respect of which SCL had, whilst it employed Mr Soanes, carried out, amongst other things, a significant amount of modelling work.

102. In response to the claim for this transaction fee, apart from maintaining that the transaction in January 2019 was a distinct transaction from Project Wright as worked on by SCL, Esken relies upon clause 4.1 of the Management Agreement that provides that where investment is made by an SPV, then all fees with the exception of the retainer fee shall be payable by the SPV. On this basis, it is denied that Esken can be liable for anything.

103. In response to this latter argument, SCL, by way of its Amended Reply and Defence to Counterclaim alleges that clause 4.1 of the Management Agreement is subject to an implied term (because it is both obvious and necessary for business efficacy) that Esken would (being in a unique position to do so) procure an agreement with the SPV to pay SCL's fees and that, should it fail to do so, Esken would be liable itself to pay the fee. This is said to be supported by clause 4.3 of the Management Agreement and the obligation thereunder on the part of Esken and SCL, where investment is made by Esken along with third party investors by an SPV, to use their reasonable endeavours to achieve an agreement between SCL and the investor group or the SPV.

104. Apart from any breach of the alleged implied term, it is SCL's case that Esken is in breach of clause 4.3 of the Management Agreement in having wholly failed to use any reasonable endeavours to achieve the agreement provided for thereby.

105. In addition to a transaction fee in relation to the Flybe transaction, SCL also seeks payment of a transaction fee of £100,000 plus VAT (£120,000) in respect of a further investment made by Esken in Airportr after SCL had ceased to manage the same. Liability for this is disputed by Esken on the basis that the Management Agreement was by then at an end, but also on the basis that the provisions in the Management Agreement relating to the payment of the transaction fee only related to the initial investment, and not further investments made during the course of the management of the initial investment.

106. Further, so far as Airportr is concerned, SCL seeks an unpaid management fee for the period between 7 September 2017 and 14 February 2019 in a sum of £172,603 (inclusive of VAT). Esken disputes that this sum is due relying upon the alleged

breaches of the Management Agreement concerning SCL's management of the Airportr investment that are also relied upon as supporting Esken's entitlement to terminate the Management Agreement set out in its Counterclaim.

Defence and Counterclaim

107. The essence of Esken's defence to the claim is that it was entitled to determine the Management Agreement by the Termination Notice served on 12 March 2019 pursuant to the provisions of clause 8.2 and/or 8.3 of the Management Agreement.

108. The case as put in Esken's Re-Amended Defence and Counterclaim differs somewhat from the grounds as relied upon in the Termination Notice itself. Four separate heads of alleged breach of the Management Agreement are relied upon as entitling Esken to terminate the latter, as set out in paragraph 35 et seq of the Re-Amended Defence and Counterclaim. It will be necessary to consider in turn the respective heads in detail, and how exactly the case is pleaded. However, the respective heads can be summarised as follows:

i) **The Project Fort Breaches** – These allegations concern work carried out by SCL in late 2017/early 2018 in connection with a potential investment in Airline Services Ltd which never in fact proceeded. The allegation was that representatives of SCL were responsible for a fundamental double counting error in analysing revenue figures. The basis of the case was that this double counting error had been made at a comparatively early stage of the due diligence process, and that had it been spotted when it is said that it should have been spotted, substantial costs of a wasted due diligence exercise would have been saved. It was alleged that SCL's actions amounted to a breach of clauses 2.1 and 2.4.2 of the Management Agreement, and it was alleged that the breach was material and irremediable, thus entitling Esken to terminate pursuant to clause 8.2.3 of the Management Agreement. However, it was SCL's case in reply that the double counting error only took place at a very late stage of the due diligence exercise, and that it was quickly picked up on, such that there was no breach or loss. Under cross examination, Esken's witnesses were unable to gainsay SCL's case, or prove that any mistake had been made at an early stage of the due diligence process as alleged. Consequently, in closing, Mr Leiper on behalf of Esken realistically abandoned this Project Fort head.

ii) **Transaction Opportunities and Corporate Finance Breaches** – The essence of the case as pleaded is that when Mr Soanes resigned, Services to Esken under the Management Agreement ceased, such that by 12 March 2019 this state of affairs had been in place for over a year, and that particular failures identified in paragraph 41 of the Re-Amended Defence and Counterclaim constituted breaches of clauses 2.1 and 2.4.2 of the Management Agreement. Again, it is alleged that these breaches were material and irremediable, thus entitling Esken to terminate pursuant to clause 8.2.3. Further, essentially the same facts are relied upon as entitling Esken to terminate pursuant to clause 8.2.2 on the grounds that SCL had ceased to carry on its business or substantially the whole of its business.

iii) **The Airportr Breaches** - In managing Esken's Investment in Airportr, SCL caused John Story ("**Mr Story**"), a businessman of some experience, to be

appointed as a non-executive director of Airportr. The essence of the allegations under this head are that having been appointed as a non-executive director of Airportr, Mr Story failed to attend four board meetings, sending Mr Sofaer in his place, and further that the Board of Airportr, in or about January 2019, raised with Esken that Mr Story had failed to play an active role in the business, and that his attendance at board meetings had added no value. On this basis, it is alleged that, in the circumstances, there was a breach of clauses 2.1 and 2.4.2 of the Management Agreement, and that there was also a breach of clause 3.12 of the Management Agreement through a failure to provide biannual fair written valuations of Esken's investment in Airportr. Again, it is alleged that these breaches were material and irremediable, thus entitling Esken to terminate pursuant to clause 8.2.3.

iv) **The Flybe Breaches** – The case as advanced under this head is rather differently put than in the Termination Notice in that it is not alleged that SCL was obliged to disclose to Esken the fact of any competing bid by Mr Tinkler for Flybe, and no complaint is made as such in respect of the use of Confidential Information belonging to Esken in respect of Mr Tinkler's purchase of shares in Flybe on 11 January 2019. Rather, it is alleged that:

a) Mr Tinkler's involvement in the Preliminary Proposal and the Indicative Proposal in February 2019 meant that he was to be regarded as a *"competitor"* of Esken such that Esken was entitled to terminate pursuant to clause 8.3.4 of the Management Agreement because a *"competitor"* of Esken held *"the beneficial interest in more than 25% of the share capital of [SCL]"*.

b) It is to be inferred that Mr Tinkler made use of Esken's Confidential Information (as defined in the Management Agreement), being information disclosed as part of Project Wright and/or Project Blue, and did so other than for a purpose permitted under clause 17.1.1, and insofar as SCL complied with the obligations of clause 17.3 of the Management Agreement vis-à-vis Mr Tinkler, it failed to enforce such obligations by taking appropriate steps to enjoin and/or otherwise prevent Mr Tinkler from making use of the Confidential Information. On this basis it is alleged that SCL acted in breach of clause 2.4.2 of the Management Agreement. Again, it is alleged that these breaches were material and irremediable, thus entitling Esken to terminate pursuant to clause 8.2.3.

109. Esken maintains that the breaches that it relies upon entitle it to recover Fees that it had paid under the Management Agreement prior to the termination thereof on the basis that the consideration for the same had failed. Esken thus seeks to recover by its Counterclaim the £300,000 less VAT, i.e., £208,333 that it paid in respect of retainer fees for the period from February to July 2018.

110. Further, by its Counterclaim, Esken raises a claim in respect of a licence granted to SCL to use its office space and make use of its office facilities as referred to above, as well as in respect of the provision of general IT services, and making various payments on SCL's behalf. The amount claimed was £373,530.61, but no particulars were provided. However, the claim in respect of these items was particularised in a schedule served by Esken comparatively recently, in respect of which SCL served a counter schedule.

Whilst I heard evidence in respect of these items, I was informed during the course of closing submissions that there were discussions between the parties with a view to narrowing the issues concerning these items. I was subsequently informed that agreement had been reached such that the only matter left outstanding is a claim made by Esken in the sum of £50,772.59 relating to a recharge of the cost of helicopter flight costs. I will return to this in due course.

Witnesses

SCL

111. SCL called Mr Tinkler and Mr Sofaer.

112. So far as Mr Tinkler is concerned, there were aspects of his evidence that have caused me a more general concern as to the reliability of his evidence. In particular:

i) Mr Tinkler was cross examined with regard to the email dated 15 November 2018 in which Mr Sofaer reported that Mr Paterson had *"crunched the numbers"* on the Orville model. Mr Tinkler's response was that this was merely a routine update because it was SCL's role to monitor opportunities on a rolling basis. Further, he suggested that he paid no heed to the email because he was in the middle of the trial of the Fiduciary Duty Claim. However, there are, as I see it, a number of difficulties with this:

a) Mr Sofaer's email dated 15 November 2018 did not simply refer to Mr Paterson having crunched the numbers on the Orville model, but attached various documents relating to other matters for Mr Tinkler's attention, and raised a number of questions with regard to another potential transaction. By then Mr Tinkler was some four days into the trial of the Fraud Claim. I consider it inherently unlikely that Mr Sofaer would have sought to raise these issues with Mr Tinkler if Mr Tinkler was paying no heed to emails at the time. Further, not only did Mr Sofaer send his email dated 15 November 2018, but Mr Paterson emailed Mr Tinkler the following day setting out the results of his number crunching exercise, and including a comparison of the relevant model as against Flybe's 2018/2019 half year results. Mr Tinkler again suggested that he did not recall receiving this email given that he was not really tending to his emails over that period. I found Mr Tinkler's explanations, and his attempts to distance himself from Mr Sofaer's email dated 15 November 2018, and Mr Paterson's email dated 16 November 2018 to be unconvincing. Mr Tinkler may have been distracted by the obviously very serious and intense trial that he was involved in, but I do not accept that he would not have picked up on what he was being told by both Mr Sofaer and Mr Paterson with regard to Flybe's performance.

b) SCL had been removed from the Flybe project, and so there was no good reason to be monitoring or *"crunching the numbers"* in respect of Flybe other than for SCL's/Mr Tinkler's own benefit, and if a monitoring exercise was being carried out for Esken's benefit as suggested by Mr Tinkler, then one would expect there to be documentary evidence to show this, and there is no such evidence;

c) Mr Sofaer's email refers to Mr Paterson crunching the numbers and testing the figures against the model, rather than simply assessing results to report to Esken. The contents of Mr Pattison's email sent to Mr Tinkler following day bears this out.

The impression that I am left with is that Mr Tinkler deliberately downplayed the significance of Mr Sofaer's email dated 15 November 2018, and also Mr Pattison's email dated 16 November 2018, in his evidence recognising that they were potentially damaging to SCL's case in the light of his involvement in respect of Flybe in early 2019 in demonstrating his continuing interest in Flybe.

ii) I did not find Mr Tinkler's evidence and explanation that his making of the Preliminary Proposal and his support for the Indicative Proposal was simply to provide a fallback if Connect did not proceed with the SPA to be convincing. The documentary evidence concerning, amongst other things, Mr Tinkler's obtaining of the confidential term sheets on 14 January 2019, the involvement and role played by Hosking in challenging the Board of Flybe, Mr Tinkler's alignment with Hosking, and the press reports do, to my mind, suggest that rather more was going on. I consider this particularly so given Mr Tinkler's purchase of shares on 11 January 2019 which, as I see it, can only have amounted to Mr Tinkler betting against the Connect deal proceeding. I will return to this aspect of the case further below.

113. I consider that I must, therefore, treat Mr Tinkler's evidence with some caution.

114. So far as Mr Sofaer is concerned, I found him to be a good cogent witness, who provided clear and cogent answers to the questions that were put to him. There is one aspect of his evidence that is seriously challenged by Esken relating to the work that he says was being carried out after Mr Soanes had resigned in February 2018. In re-examination, Mr Sofaer was taken to a list of ongoing projects dated 21 November 2018 ("**the November 2018 Project List**") that had been produced for MJ Hudson Advisors Ltd ("**MJ Hudson**"), an entity authorised and regulated by the FCA for whom SCL acted as Appointed Representative. Mr Sofaer was asked about this by Mr Leiper having said under cross examination that the November 2018 Project List was not an exhaustive list.

115. Mr Sofaer was asked: *"Can you assist with just recalling, to the best of your ability, how many other things you are looking at, roughly speaking, on a weekly or daily or monthly basis at about this time?"*. He responded: *"Me personally, I'd say at least 10 a month. The other guys in the team would also -- that is not on my list, this is the team, so we had John Story, Abdullah, Craig, they would probably be doing about the same. So a significant number of projects would be considered, but for brevity's sake I only sent MJ Hudson these, but a significant number."* A further explanation was then provided by Mr Sofaer in response to a question from me.

116. Mr Leiper on behalf Esken invites me to reject this evidence. He submits that SCL was well aware of the case that it had to meet, and inconceivable that this evidence would not have been advanced in his witness statement, rather than emerging in re-examination, if it was true. Further, it is submitted that there is not a scrap of evidence to support Mr Sofaer's evidence that some 40 or so opportunities were being examined every month.

117. However, Mr Sofaer had explained at paragraph 50 of his witness statement that the list of projects provided to MJ Hudson was not exhaustive and that: *"there were multiple smaller potential acquisition targets which SCL identified and/or developed on behalf of Esken between the period of Mr Soanes' departure and the Notice."* Further, there is some force in the point that disclosure in the present case has been conducted by reference to limited keywords which may well not have picked up upon documentation relating to preliminary work on smaller projects.

118. Having regard to the quality of Mr Sofaer's evidence taken as a whole, I am simply not persuaded that Mr Sofaer would have made up under cross examination evidence in relation to the work being carried out by SCL that he knew to be false. However, I do note that this evidence of his was directed at the position in November 2018. A number of significant events took place thereafter including that by early 2019 the individuals who Mr Sofaer refers to as having worked with had all ceased to work for SCL, and SCL had given up the office accommodation in London that it had shared with Esken.

119. Reliance is placed by Esken on the fact that SCL has not called to give evidence Mr Story, or Ben Whawell ("**Mr Whawell**"), the former CEO of Stobart Energy, both of whom are now involved with Mr Tinkler in his current venture Svella Plc. Esken submits that adverse inferences ought to be drawn from the fact that they were not called.

120. Mr Leiper reminds me of the correct approach to the drawing of adverse inferences in a situation such as the present, as exemplified by the approach of the Court of Appeal in *Wisniewski v Central Manchester Health Authority* [1998] PIQR 324, as helpfully explained by Cockerill J in *Magdeev v Tsvetkov* [2020] EWHC 887 (Comm) at [147]-[154], namely:

    i) The Court is entitled to draw adverse inferences from the absence of a witness who might be expected to have material evidence to give on an issue in an action. This is a power, not a rule, and is not to be lightly undertaken.

    ii) Such inferences may strengthen another party's evidence or weaken the evidence adduced by the party who might reasonably have been expected to call the witness.

    iii) The Court should consider whether any credible explanation has been given for a witness's absence.

    iv) It should also consider the practical context of the relevant trial, including whether any limitation was imposed on the number of witnesses, the overriding objective, and the shifting evidential world which is a trial.

121. There is no issue between the parties as to the appropriate principles to apply.

122. As to Mr Story, Esken submits that he could clearly give very relevant evidence on issues which are central to the case. Particular reference is made to the fact that Mr Sofaer had said in paragraph 36 of his first witness statement that Mr Story undertook day-to-day management *"akin to the role that Mr Soanes had performed*." This is something that Mr Story might have been expected to confirm. It is said that no explanation has been provided as to why Mr Story was not called, and that there is no

reason to think that he could not have been called bearing in mind his continuing business relationship with Mr Tinkler.

123. In response, it is said on behalf of SCL that it was not considered that Mr Story could really assist with regard to the alleged Airportr Breaches given what are said by SCL to be the vague and unparticularised way that the case is put in respect of them. So far as the alleged Transaction Opportunities Breaches are concerned, this, it is said, was covered by the evidence of Mr Sofaer, and it was considered that there was little point in calling another witness to say, essentially, the same thing.

124. On the basis of Mr Sofaer's evidence as to the role played by Mr Story in the day-to-day management of SCL, and that it was Mr Story who was nominated by SCL to serve on the Board of Airportr, then whatever the strength of the alleged Airportr Breaches, I do consider Mr Story to be a witness who might have been expected to give evidence as to the nature and extent of the work being carried out by SCL after Mr Soanes' departure that went beyond that which Mr Sofaer has been able to give. These have always been key issues in the case, and in the circumstances, I consider that it is appropriate to draw certain adverse inferences from the fact that Mr Story has not been called to give evidence. I will comment further on the significance of this when dealing with the allegations of breach.

125. So far as any failure to call Mr Whawell is concerned, I consider that less significance is to be attached to this. At the relevant time, he was the representative of Stobart Energy with whom SCL was dealing, so whilst he may be in a position to comment upon the particular projects, namely Whitemoss, Syn2Gen and Skelton Grange that were introduced to Stobart Energy, albeit not to Esken and the VCC, it is less clear that he could be of any real assistance in relation to wider issue as to the work being done by SCL after Mr Soanes's resignation.

Esken

126. Esken called Mr Brady, Mr Coombs and Mr Dilworth.

127. So far as Mr Brady is concerned, I found him to be a generally honest witness, who answered questions put to him quite truthfully. However, I do have a concern that some of his evidence as contained in his witness statement is rather less reliable, with a tendency to overstate Esken's case. Thus, for example:

    i) In paragraph 21 of his witness statement, Mr Brady dealt with the alleged Project Fort breaches explaining that SCL took the EBITDA included in a KPMG vendor due diligence report, and then added the value of two contracts which it was believed would be added imminently, and in doing so he alleged that SCL had failed to properly scrutinise the figures in the KPMG report. Notwithstanding that SCL's evidence was to the effect that this could not have been the case, and that any error had crept in at a late stage of the due diligence process as ultimately accepted by Esken as the case progressed, Mr Brady clung on to maintaining the allegation under cross examination despite being unable to demonstrate by reference to any documentation how the error had occurred and how he had come to say what he had in his witness statement.

ii) In paragraph 43 of his witness statement, Mr Brady asserted, amongst other things, that neither he nor the Board of Esken had any knowledge of any opportunity relating to Whitemoss. However, having been taken under cross examination to Mr Coombs' email dated 20 August 2018, he was constrained to accept that he and other members of the Board did have knowledge thereof and had had that knowledge at the relevant time.

iii) Mr Brady concluded paragraph 57(k) of his witness statement by saying: *"However, it remains the case that there was never any strategy to terminate the Management Agreement or to avoid paying the SCL fees."* However, under cross examination, having been taken to documentation suggesting to the contrary, Mr Brady accepted that this was not correct and involved an *"oversight",* and he accepted that there was a strategy, to try to get out of the Management Agreement without paying more than had to be paid, albeit that it was his evidence that there was nothing underhand about this [Day 3/133:14 – 134:21].

128. To the extent identified, and in particular in relation to what is said by Mr Brady in his witness statement, I do consider that I need to exercise some caution in respect of Mr Brady's evidence.

129. So far as Mr Coombs is concerned, he did have a tendency to avoid questions that he was being asked, and to make long argumentative statements in favour of Esken's case. Further, there are parts of his evidence that were more in the nature of expert opinion evidence rather than admissible factual evidence, in particular when Mr Coombs made reference to Mr Soanes's corporate finance expertise, and the performance to be expected of SCL following Mr Soanes's departure by reference to business practice. I therefore treat this evidence with some caution.

130. Whilst I will have to consider the significance of this further in due course, what came across from Mr Coombs' evidence, despite some reluctance to admit this, was that, once Mr Soanes had resigned, he did not really want the Management Agreement to succeed, and had identified the failure of the Management Agreement as a way of Esken being, as he put it in paragraph 41(b) of his witness statement and in email correspondence in February 2018, able to *"untangle"* itself from its relationship with SCL in circumstances in which Esken's Board's relationship with Mr Tinkler was also souring.

131. Thus, for example:

i) Despite Mr Coombs expressing the view that, absent Mr Soanes or somebody with corporate finance experience equivalent to that of Mr Soanes, there was very little prospect of SCL being able to provide the Services that it ought to provide pursuant to the Management Agreement, he never took up this point with SCL at the time;

ii) On 29 March 2018, Mr Coombs asked Ms Brace to minute that the VCC would only be convened to review investment proposals at the request of SCL, while saying at the same time that Esken needed to avoid saying or doing anything to suggest the Esken was not going to use SCL.

iii) A consideration of the email correspondence from October 2018 onwards does, as I read it, show Mr Coombs giving inconsistent explanations as to why a meeting of the VCC would not be convened when Mr Sofaer was seeking one. Further, if Mr Coombs' complaint was that SCL was not doing its job by providing the requisite level of information and advice in reporting to Esken in respect of a further investment in Airportr, then it is not obvious why Mr Coombs could not have informed Mr Sofaer that he considered such to be the case.

132. Again, whilst I shall have to consider the significance of this in due course, there is further evidence that Mr Coombs set out to make life difficult for SCL and bring about circumstances in which SCL's ability to perform the Management Agreement was hindered. In particular, I note:

i) Mr Coombs' email to Mr Ferguson and Mr Brady dated 17 January 2019 attaching the Neptune note in which there is reference to obtaining Mr Soanes's assistance in seeking to achieve the termination of SCL's FCA authorisation.

ii) Further, under cross examination, Mr Coombs accepted that there was some form of strategy to tie up Mr Tinkler in multiple different pieces of litigation, including Mr Soanes' Employment Tribunal claim in order to put as much pressure on him as possible with a view to getting him (and thus SCL) to capitulate.

133. So far as Mr Dilworth is concerned, I am satisfied that he was an open and truthful witness, who did his best to assist the Court, readily recognising the error made in respect of Esken's formulation of the Project Fort Breaches allegation, once the difficulties with Esken's case had been properly considered by him.

"Material breach" and "breach capable of remedy"

134. As we have seen, clause 8.2.3 of the Management Agreement entitles a party to the Management Agreement to terminate the same by notice having immediate effect where the other party has committed a *"material"* breach of its obligations under the Management Agreement and (where such breach is capable of remedy) it fails to remedy such breach within 28 days after receiving notice requiring the same.

135. Esken has never served any notice requiring any breach to be remedied, and so, in respect of each of the breaches alleged, it must be demonstrated that the breach is *"material"* and that it is incapable of the remedy pursuant to a notice to remedy.

136. The parties are agreed as to the appropriate principles to apply, although differing as to the proper effect of applying those principles.

Material breach

137. As to *"material breach"*, Mr Leiper refers to *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (trading as Medirest)* [2013] EWCA Civ 200 as authority for the proposition that for breaches to be *"material"*, they are likely to need to be *"substantial"* (but not repudiatory, cf. clause 8.2.3 itself). In this case, Jackson LJ at [126] said this:

> *"I must consider what "material breach" means in the context of clause 28.4.1 of the conditions. In my view this phrase connotes a breach of contract which is more than trivial, but need not be repudiatory. Clause 28.4 has the drastic effect of allowing [Compass] to cancel a long term contract on one month's notice. Having regard to the context of this provision, I think that "material breach" means a breach which is substantial. The breach must be a serious matter, rather than a matter of little consequence."*

138. This is entirely consistent with *Gallaher International Ltd v Tlias Enterprises Ltd* [2008] EWHC 804 (Comm) relied on by Mr Sims, where Christopher Clarke J at [764] said this:

> *"…Materiality has to be assessed in the context in which the question arises which, here, is the possible termination of a five year agreement. In order for a breach to be material it does not have to be repudiatory: Dalkia Utilities Services Plc v Celtech International Ltd [2006] EWHC 63 (Comm). In Phoenix Media Limited v Cobweb Information, Unreported, 16th May 2000, Neuberger, J, as he then was, said: "Materiality involves considering the following: the actual breaches, the consequence of the breaches to [the innocent party]; [the guilty party's] explanation for the breaches; the breaches in the context of TEL Agreement; the consequences of holding TEL Agreement determined and the consequences of holding TEL Agreement continues". I respectfully regard that as a helpful check list."*

139. Mr Sims relies upon this latter authority as demonstrating that the consequences of breach are an important consideration, as are the terms and duration of the contract itself.

140. Further, Mr Sims submits that failure contemporaneously to notify the other party of the matters complained of as being in breach may count against the same being properly viewed as material, or such as to justify immediate termination, cf. *Tele2 International Card Co SA v Post Office Ltd* [2009] EWCA Civ 9. I consider that this must be correct, although all will depend on the circumstances.

Capable of remedy

141. As to whether a breach is *"capable of remedy"*, the leading authority is *L Schuler AG v Wickman Machine Tool Sales* [1974] A.C. 235. At [249], Lord Reid said this:

> *"The question then is what is meant by the word 'remedy'. It could mean obviate or nullify the effect of a breach so that any damage already done is in some way made good. Or it could mean cure so that matters are put right for the future. I think that the latter is the more natural meaning. The word is commonly used in connection with diseases or ailments and they would normally be said to be remedied if they were cured although no cure can remove the past effect or result of the disease before the cure took place. And in general it can only be in a rare case that any remedy of something that has gone wrong in the performance of a continuing positive obligation will, in addition to putting it right for the future, remove or nullify damage already incurred before the remedy was applied. To restrict the meaning of remedy to cases where all damage past and future can be put right would leave hardly any scope at all for this clause. On the other hand,*

> *there are cases where it would seem a misuse of language to say that a breach can be remedied. For example, a breach of clause 14 by disclosure of confidential information could not be said to be remedied by a promise not to do it again."*

142. It is apparent therefrom that the emphasis ought generally to be upon putting matters right for the future. This case involved a clause in rather similar terms to the present clause 8.2.3, and concerned the grant by a German manufacturer to an English company of sole selling rights for panel presses, it being a condition of the agreement that the English company should visit the six largest UK motor manufacturers at least once in every week. An arbitrator determined that the scale of the breach was such as to make it a *"material breach"* and the issue was as to whether the breach was capable of remedy bearing in mind the damage already done by the failure to visit. Notwithstanding the inability to undo the effect of that that ought to have been done not having been done, the breach was held to be capable of remedy.

143. In contrast, Mr Leiper points to *Force India Formula One Team Ltd v Etihad Airways PJSC* [2010] EWCA Civ 1051 where, at [108], Rix LJ considered the basis on which the changing of a racing car's livery to remove the association with a sponsor was irremediable, saying that: "*the [marketing] genie cannot be put back in the bottle*". He also said this, drawing an analogy with the improper publication of confidential information:

> *"The judge concluded that any breaches of clauses 4.6 or 4.7 were remediable, in the sense that Force India "could have put matters right", either by changing the Team Name back to Etihad Aldar Spyker F1 Team and/or by reverting to the previous livery and removing the Kingfisher logo. However, in my judgment, these were not remediable breaches. The closest analogies are with the publication of confidential information or the publishing of advertising matter not containing a party's name: one releases information which should be kept confidential, the other broadcasts a product in an inappropriate way. Looking at the matter pragmatically and not technically, I think that a proper marketing campaign is, generally speaking, all of a piece."*

Was the Termination Notice effective to determine the Management Agreement?

Introduction

144. I consider that it is first necessary to consider whether the Termination Notice was effective to determine the Management Agreement as at 12 March 2019 before then turning to consider what sums, if any, are due to SCL under the terms of the Management Agreement in the light of my finding as to the status of the Management Agreement.

145. As the alleged Project Fort Breaches are no longer relied upon, I shall consider the three other heads of alleged breach in turn. I consider it appropriate to first consider the alleged Airportr Breaches as my determination of this issue may potentially impact on my findings in respect of the alleged Investment Opportunities Breaches.

Alleged Airportr Breaches

Esken's Case

146. In paragraphs 44 and 45 of the Re-Amended Defence, Esken pleads that following its investment in Airportr in 2017, SCL was required, pursuant to clauses 3.1.7 and 3.3 of the Management Agreement, to manage this investment on Esken's behalf and that in performance of that obligation, Mr Story was appointed to sit on Airportr's Board to represent Esken's interests.

147. The conduct said to constitute breach of SCL's obligations under the Management Agreement is set out in paragraph 46 of the Re-Amended Defence, where it is alleged that:

> *"46. Around the end of January ~~2018~~ 2019 the Defendant received feedback that Mr Story had not attended a number of Airportr meetings at which he was expected; had not played an active role in the business and that his attendance at meetings added no value. As a result, on 1 February 2019 Mr Brady on behalf of the Defendant notified Daniel Sofaer on behalf of the Claimant that the Defendant would be managing its investment in Airportr directly and that it would appoint an alternative representative to the Airportr board in place of Mr Story. Further, prior to February 2019, the Claimant failed to provide regular updates to the Defendant in respect of Airportr as well as valuations of the business and input into the Defendant's participation in Airportr's round of funding in early 2019."*

148. It is then pleaded in paragraph 47 of the Re-Amended Defence that this conduct constituted:

i) A breach of SCL's obligation to perform the Services in clause 2.1 of the Management Agreement (by reference to the Services required by clause 3.1.7);

ii) A breach of SCL's duty to act in good faith in the provision of its obligations pursuant to clause 2.4.2 of the Management Agreement;

iii) A breach of SCL's duty to exercise all due skill, care and diligence that will be expected of a person experienced in dealing with and providing services equivalent to the Services pursuant clause 2.4.2 of the Management Agreement;

iv) A breach of SCL's duty to operate in accordance with good market practice in providing the Services, pursuant to clause 2.4.2 of the Management Agreement; and/or

v) A breach of SCL's duty to provide Esken with biannual fair written valuations of its investment in Airportr, pursuant to clause 3.12 of the Management Agreement.

149. In support of these allegations, Esken relies, in particular, upon the following evidence:

i) Paragraph 34 of Mr Brady's witness statement, where he said:

> *"Mr Randal in particular told me that Mr Story's contribution to the board was zero and that things had been better when Mr Tinkler had attended board meetings but they had been unimpressed with SCL's contribution after Mr Tinkler stopped being involved. As a result of what Mr Dilworth and I had been told by Mr Darby, I called Airportr's chairman, Chris Samler and he confirmed to me that Mr Story missed numerous board meetings and that, frankly even when he attended board meetings, his input was negligible and there was no value added to his being there."*

Mr Leiper submitted that whilst this evidence was challenged on the basis that there were no notes of these conversations, there is no reason to question Mr Brady's evidence in this respect.

ii) Paragraph 26 of Mr Dilworth's witness statement where he said:

> "*I also met with Mr Samler on 14 March 2019 in relation to general matters as I was by then overseeing the Airportr investment on behalf of the Company. I followed up that meeting with an email to Mr Brady on 18 March 2019 and made reference to comments made to me by Mr Samler in relation to Mr Story who, he told me, had attended board meetings infrequently and that Mr Story and those at SCL generally were 'not grown ups'. In addition to those comments, without being able to recall precise details, I recall that Mr Darby and Mr Samler made off the cuff comments indicating that there did not seem to be much point from a commercial point of view in SCL's involvement with Airportr and that Mr Sofaer was out of his depth to such an extent he could not contribute in any meaningful way to the business."*

Mr Leiper submits that Mr Dilworth's evidence was unchallenged, but it is right that under cross examination he accepted that he had not sought to validate or investigate the matters that he had been told (Day 3/101 – 102).

iii) Mr Sofaer's own evidence at paragraph 5 of his second witness statement in which he said:

> *"My role as the SCL attendee at board meetings was to listen, articulate any important issues to the rest of the SCL team, ensure that Esken were not blindsided by anything discussed or resolved at board level and convey the views to Esken (if appropriate)."*

It is submitted by Mr Leiper that this shows that Mr Sofaer appears to have perceived his role in attending board meetings as being entirely passive, such that it is easy to understand why Airportr told Esken that Mr Sofaer could not contribute in any meaningful way to the business. It is said that whilst this is not a criticism of Mr Sofaer himself in that he had no previous board experience, it is a criticism of his seniors within SCL for permitting him to take the position (even as an alternative) without proper instruction. In this context, Mr Leiper submits that it is significant that this was the only investment that called for management under the Management Agreement, and that Mr Sofaer's evidence was that the management of this investment was the only substantial project that he undertook for Esken up to the alleged termination of the Management

Agreement. It is said by Mr Leiper that this gives some sense as to how little was otherwise being done.

150. It is submitted by Esken that it is striking that Mr Story has not been called to give evidence in relation to these matters, and that SCL's evidence on these issues is unsatisfactory and unhelpful, amounting to little more than vague assertions by Mr Tinkler and Mr Sofaer that they had *"only heard good things"* of Mr Story without providing any further particularisation.

151. Esken rejects the suggestion that SCL's involvement with the Airportr investment was terminated not because of any sense of genuine concerns, but in order to simply cut SCL out as part of the strategy of bringing about circumstances in which the Management Agreement could be terminated. Mr Leiper refers to the fact when this was put to Mr Brady, he rejected this suggestion saying:

> *"yes, we did want to cut out SCL and we wanted to manage it ourselves because (a) we generally thought that would be better. It wasn't just about the money, right? We genuinely believed we were going to put in Airportr and we would do a much better job - and by the way, we did do a much better job"* (Day 2/123:20-25).

SCL's case

152. On behalf of SCL, it is submitted that it is necessary to focus on Esken's pleaded case, and the point is taken that, in respect of paragraph 46 of the Re-Amended Defence, there is no actual plea that the feedback was true. Mr Sims submitted that this was a pleading *"in vacuo"*, as emphasised by the fact that Mr Dilworth had accepted under cross examination that he had not sought to verify the feedback said to have been received from Airportr. It is submitted that, on this basis, the case fails at the first hurdle.

153. As to the final sentence of paragraph 46 of the Re-Amended Defence, and the allegation that SCL had failed to provide regular updates in respect of Airportr, as well as valuations of the business and input into Esken's participation in Airportr's round of funding in early 2019, Mr Sims refers to paragraphs 32 of Mr Sofaer's first witness statement in which particulars are provided of various updates provided to Esken/the VCC in January 2018, May 2018, October, November and December 2018, Mr Sofaer making introductions, and Mr Sofaer preparing a company valuation after receiving accounts for February 2019.

154. In addition, Mr Sims refers to paragraph 34 of Mr Sofaer's witness statement in which he sets out the difficulties that he said that he had in getting Esken to engage in late 2018/early 2019 in respect of key decisions, matters that were explored in cross examination of Mr Brady, Mr Coombs and Mr Sofaer himself. Mr Sims points to an email from Mr Sofaer to Mr Story dated 5 February 2019 setting out the chronology of events from Mr Sofaer's contemporaneous perspective. Mr Sims submits that an analysis of the relevant exchanges, and the responses of Mr Coombs in respect thereof show Esken seeking to set SCL up for a fall. He submits that this is further demonstrated by an email exchange between Mr Tinkler and Mr Brady on 1 February 2019 from which it is said to be clear that Mr Brady was accusing Mr Sofaer of failing to attend the meeting with Airportr when, in fact, he had never been asked to attend this meeting as explained by Mr Tinkler in evidence.

155. Mr Sims points to the absence of witnesses from Airportr to support the allegations.

156. Mr Sims, on behalf of SCL, then responds to the pleaded allegations of breach in paragraph 47 of the Re-Amended Defence as follows:

i) As to subparagraph (a), this is said to be a non sequitur on the basis that the allegation in this subparagraph is that Services were not provided, but that that is not the conduct alleged that is said to support the allegation.

ii) As to the allegation of breach of the duty to act in good faith alleged in subparagraph (b), Mr Sims relies upon Paragraph 8.2 of CPR PD16 for the proposition that where what is in effect wilful default is alleged, proper details or particulars of it should be provided. Mr Sims' point is that there is simply nothing within paragraph 46 that sets out the factual basis upon which the allegation of failure to act in good faith is based, and he submits that the allegation must fail on this basis alone.

iii) As to subparagraph (c) and the alleged breach of the duty to exercise all due skill, care and diligence, Mr Sims submits that if such an allegation is to be maintained, then, as he put it in closing *"they would have to have had some specific alleged failings rather than just generalised attempts at a smear."*

iv) As to subparagraph (d) and the alleged breach of the duty to operate in accordance with good market practice, Mr Sims makes the same point as he made in respect of subparagraph (c), also making the point that there is no independent evidence as to market practice, or as to how SCL is said to have fallen below it.

v) As to subparagraph (e), it is SCL's case that the provision by SCL of valuations and input into potential funding is dealt with by Mr Sofaer in his evidence, and that it is apparent therefrom that Mr Sofaer provided Esken with sufficient information to enable Esken to sign off on its accounts (which was the purpose behind clause 3.12 of the Management Agreement) even if it might be argued that the information fell short of what was contemplated under clause 3.12.

Finding in respect of the alleged Airportr Breaches

157. I agree with Mr Sims that it is necessary to focus upon Esken's case, and the pleaded allegations as to breach as this is the case that SCL came to Court to meet, and which it has sought to address in the evidence prepared for trial.

158. So far as the evidence is concerned, whatever Esken's views as to the quality of the Service provided pursuant to the Management Agreement in respect of the management of the Airportr investment, in particular as trenchantly expressed by Mr Coombs in evidence, SCL did clearly provide management services in connection with the Airportr investment as referred to in paragraph 27 et seq of Mr Sofaer's first witness statement, with paragraphs 32 to 35 dealing with the position after Mr Soanes's resignation, and the work done being evidenced by the documentation noted in the marginal notes to these paragraphs of Mr Sofaer's first witness statement. This work effectively continued into January 2019 as evidenced by an internal update note considering restructuring options in connection with Airportr sent to Mr Tinkler and Mr Story under

cover of an email dated 4 January 2019 in which Mr Sofaer complained: *"I've been continuing the chase to get a VCC date, still nothing. I must have chased well over 10 times by now. Presentation attached is intended for internal use only."* Further, under cover of an email dated 9 January 2019, Mr Sofaer sent to Ms Brace a copy of the Board Update prepared in October 2018, together with an *"Addendum to VCC Note Jan 2019"* that Mr Sofaer had prepared with an update on Airportr's funding requirements, and by which he sought guidance as to how this might best be taken forward suggesting that he would be in a position to speak to Mr Brady the following day.

159. I will consider when dealing below with the alleged Transaction Opportunities and Corporate Finance Breaches SCL's case that Esken, from the time of Mr Soanes's reresignation, had a plan or strategy to bring about the determination of the Management Agreement so as to avoid paying sums due thereunder to SCL and, if so, the effect thereof. However, it is fair to say that in relation to SCL's management of the Airportr investment, I am satisfied that Esken at least made life difficult for SCL in failing from October 2018 to engage with SCL in a way that might have been expected had Esken wished to get the most out of the Management Agreement. Thus, for example, if Mr Coombs was dissatisfied with the quality of the documentation being provided in relation to Esken's investment options concerning Airportr, I see no good reason why he could not have pointed out to SCL what was required, rather than adopting the approach that it was for SCL to work that out for itself. It may be that he had, justifiably or otherwise, little confidence that Mr Sofaer had the competencies to prepare what was required, but at least if the deficiencies has been pointed out, SCL might have had the opportunity of addressing the issue, if necessary, by bringing in outside assistance.

160. The Management Agreement, when entered into, clearly anticipated that there would be a measure of cooperation between SCL and Esken so that both parties could get the most out of it, even if Esken might not have been under any specific obligation in that respect. However, even if Esken was not subject to any specific obligation in that respect, it does seem to me that SCL's actual performance requires to be measured against any lack of cooperation on Esken's part.

161. I was informed by Mr Sims that it was not felt necessary to call Mr Story to deal with this allegation given the vague nature of the allegation that he had "*added no value"*. I regard this as an understandable position.

162. I accept that it is necessary to consider the alleged Airportr breaches by reference to the allegations of breaches set out in paragraph 43 of the Re-Amended Defence and Counterclaim.

163. As to subparagraph 47(a), I agree that, save perhaps with regards to the final sentence of paragraph 46, this does give rise to a non sequitur:

    i) As to the first sentence of paragraph 46, and any reliance there upon, the difficulty it seems to me is that this merely alleges that there had been adverse feedback without any case being advanced as to the truth of that feedback, and without any real particularisation as to the substance of the alleged adverse feedback. Further, as expressed, the allegation is one of failure to provide the Services, rather than one as to the quality of those services, and the evidence

demonstrates that Services were provided, whatever criticism Esken might have to make about the same.

ii) As to the final sentence of paragraph 46, the evidence that I have referred to above does show that SCL was, through Mr Sofaer, providing updates to Esken and providing input into Esken's participation in Airportr's round of funding in early 2019, or at least trying to do so, and this, to my mind, answers the point that SCL was not providing the Services in respect of the management of Airportr. A discrete point arises in respect of biannual valuations, which I deal with below.

164. As to subparagraph 47(b), it is, as I see it, impossible to discern from paragraph 46 of the Re-Amended Defence any factual basis for a plea that SCL acted in breach of the duty of good faith provided for by clause 2.4.2 of the Management Agreement. I agree with Mr Sims this is akin to an allegation of wilful default, which would, in any event, require to be properly particularised.

165. As to subparagraph 47(c), again, one has the difficulty that paragraph 46 does not, otherwise than in very general terms, specifically allege, or provide any particularisation, in relation to any specific conduct complained of by reference to which it can be considered whether or not SCL did act in breach of the duty of skill, care and diligence under clause 2.4.2 of the Management Agreement. I consider that, properly analysed, it is simply an allegation that feedback had been provided to the effect that there was some unparticularised deficiency in respect of Mr Story's attendance at Airportr board meetings, and his contributions thereto. I do not consider that I can properly make any finding of breach of clause 2.4.2 on the basis thereof. Further, I do not consider there to be anything in the final sentence of paragraph 46 with regard to the provision of updates etc., to add to the case of breach of duty of skill, care and diligence. As I have already said, updates etc. were provided, and it is not particularised how they, or the frequency of their provision, might have given rise to any breach of the duty of skill, care and diligence.

166. As to subparagraph 47(d), in my judgment similar issues arise as in the case of subparagraph 47(c) in respect of the allegation of the breach of duty to operate in accordance with good market practice, with the additional point that there is no cogent or admissible evidence before the Court as to what good market practice would have required.

167. As to subparagraph 47(e), there may have been a breach of clause 3.12 of the Management Agreement in respect of the provision of biannual valuations of the investment in Airportr. However, the evidence is to the effect that information was provided that enabled Esken to produce its accounts, which would appear to have been the purpose of clause 3.12, and there was no contemporaneous complaint on the part of Esken in respect thereof. In the circumstances, I am unable to conclude that any breach that might be capable of being established was *"material"* for the purposes of Clause 8.2.3 of the Management Agreement, or that if it was, it was a breach that was not *"capable of remedy"*.

168. In the above circumstances, I am unable to conclude by reference to Esken's pleaded case that there has been any *"material"* breach of the terms of the Management

Agreement in respect of the alleged Airportr Breaches, and therefore I do not consider that it is open to Esken to rely upon these breaches in support of the Termination Notice.

Alleged Transaction Opportunities and Corporate Finance Breaches

Esken's case

169. It is again necessary and important to begin with Esken's pleaded case as set out in paragraphs 40 to 43 of the Re-Amended Defence.

170. The factual background against which the breaches alleged in paragraph 43 are to be considered are set out in paragraphs 40 – 42 of the Re-Amended Defence, which said as follows:

> *"40. Mr Soanes had not only been a major shareholder (49.99% of the voting rights) and director of the Claimant; he had also been the major driving force on behalf of the Claimant in its identification of Transaction Opportunities and presentation to the VCC thereof. He had given notice of his resignation as an employee to the Claimant on 19 February 2018; and resigned from the office of director on 24 February 2018. When he did so the overwhelming majority of the Claimant's performance of its Services to the Defendant under the Management Agreement ceased.* [Emphasis added]
>
> *41. In particular:*
>
> *(a) No VCC meetings took place after 22 February 2018 – such that from this point onwards the Claimant did not present any Transaction Opportunities and/or report to the VCC.*
>
> *(b) The Claimant did not present any 'Overview Papers' to the VCC and/or to the Defendant generally after 22 February 2018, pursuant to clause 3.8.1 of the Management Agreement.*
>
> *(c) Following the departure of Mr Soanes, the Claimant did not have an FRC-regulated person (as Mr Tinkler had informed the Defendant) and so was unable to provide the Defendant with approved financial reporting.*
>
> *(d) After March 2018 the Claimant did not provide any general corporate finance or consultancy services.*
>
> *(e) Notwithstanding the above, the Claimant continued to charge the full Retainer Fee.*
>
> *42. By 12 March 2019 this state of affairs had been in place for over a year."*

171. The alleged breaches are then set out in paragraph 43, where is it alleged that the *"failures"* identified in paragraph 41, including their duration over a year, constituted a series of breaches as set out in subparagraphs (a) to (d), as to which:

i) In subparagraph (a) it is alleged that these matters constituted a breach of SCL's obligation to perform the Services in clause 2.1 of the Management Agreement

(by reference to the Services required by clauses 3.1.1, 3.1.3, 3.1.6, 3.1.8 and 3.8.1);

ii) In subparagraph (b) it is alleged that these matters constituted a breach of SCL's duty to act in good faith in the provision of its obligations, pursuant to clause 2.4.2 of the Management Agreement;

iii) In subparagraph (c) it is alleged that these matters constituted a breach of SCL's duty to exercise all the due skill, care and diligence that would be expected of a person experienced in dealing with and providing services equivalent to the Services, pursuant to clause 2.4.2 of the Management Agreement; and

iv) In subparagraph (d) it is alleged that these matters constituted a breach of SCL's duty to operate in accordance with good market practice in providing the Services pursuant to clause 2.4.2 of the Management Agreement.

172. Further or in the alternative to its case as to material breach, Esken, in paragraph 56 of the Re-Amended Defence alleges that, by reason of the matters referred to in paragraphs 40 to 42 and 44 to 46 thereof, by 12 March 2019, SCL had ceased carry on its business, or alternatively substantially the whole of its business, for the purposes of clause 8.2.2 of the Management Agreement, thus entitling Esken to terminate the Management Agreement pursuant to that provision irrespective of any ability to terminate pursuant to clause 8.2.3.

173. Esken's case at trial as to material breach was put on a rather different basis to that pleaded in paragraphs 40 to 43 of the Re-Amended Defence, as encapsulated by paragraph 14 of Mr Leiper's Closing Note, were he submitted: *"It is abundantly clear that during the currency of the [Management Agreement] SCL did not simply perform poorly, it had reached the point in March 2019 of having given up on providing any work for Esken."* In other words, rather relying on a continuing state of affairs as from the time of Mr Soanes's resignation in February 2018 up to 12 March 2019 and the service of the Termination Notice as suggested by its pleaded case, the focus at trial was on the position as reached as at 12 March 2019.

174. Esken relies upon a number of matters in support of its contention that the point had been reached by 12 March 2019 that SCL had given up on providing any work for Esken, including the following:

i) Mr Tinkler's own evidence as to what he described himself as doing. Particular reliance is placed upon the fact that Mr Tinkler accepted that he did not devote 50% of his time to SCL, saying that it was *"probably 25% if that"*, going on to describe his work as being that he: *"did quite a bit of work at the weekends, and looking at the model for Flybe and that, but other than that, I was paying Mr Soanes and the other team to do some work, but they would usually put it past me before it was signed off."* This is relied upon as showing that Mr Tinkler saw his role as supervisory, with the work, including identification of new transaction opportunities, being left to others, Esken suggesting that this may well be a reason why opportunities were not generated by SCL.

ii) At the time that the Management Agreement was entered into, the team at SCL apart from Mr Tinkler, comprised Mr Soanes, Mr Sofaer, Abdullah Raj ("**Mr**

Raj") (another Investment Manager), and Mr Paterson, with Mr Story being employed on a part-time basis initially, and full-time from January 2018. On the other hand, by the end of December 2018, Mr Soanes had left in February 2018 with no attempt having been made to replace him, Mr Story (who may have stood in for certain of Mr Soanes' roles but without his corporate finance expertise) had reverted to working part-time for SCL, Mr Paterson had left in November or early December 2018 without any attempt to replace him, and Mr Raj left at the end of December 2018 without any attempt to replace him. This left Mr Sofaer as the only person involved on a full-time basis.

iii) It is submitted that the evidence shows that SCL was severely under resourced, and that it is no answer that staff could have been brought in on an ad hoc basis, because that never happened, and in any event, staff would only be taken on once a transaction opportunity had been identified and worked up to a certain degree, and that never happened.

iv) Reliance is placed on Mr Sofaer having said that the management of the Airportr investment was the most substantial project he undertook, and said that if this was the most substantial single piece of work that he did throughout his employment, then this must raise questions as to what exactly he was doing, and how this could possibly have occupied his time.

v) Further, it is submitted on behalf of Esken that it is necessary to compare what was going on in Q4 2017 with what was going on in Q4 2018. In Q4 2017 there were three VCC meetings, there was consideration of an opportunity with Laundrapp, there was extensive work in relation to Airportr and Project Wright, and there was substantial work on Project Fort. On the other hand, in Q4 2018, there were no VCC meetings, and whilst the November 2018 Project List has been produced, Esken submits that this included the Whitemoss project which had an end date of 30 September 2018, included two projects that related to potential personal investments of Mr Tinkler, and referred to other matters that it is suggested are not referred to elsewhere in SCL's evidence, or anywhere else in the trial bundles. Esken places reliance upon the fact that there is evidence that substantial work was, however, being undertaken at this time to set up a new Plc to be *"funded and led"* by Mr Tinkler, which Esken maintains was being kept under the radar. It is submitted by Esken that attempts by Mr Tinkler, in evidence, to suggest that SCL was doing no less work in Q4 2018 than it had done in Q4 2017 simply did not reflect the reality.

vi) It is submitted that SCL well knew that the case against it was that it was simply not performing services under the Management Agreement, yet despite having every opportunity to produce evidence to the contrary, the evidence produced as to what was actually being done in the latter half of 2018 is *"remarkably light"*, with work on Project Wright not extending beyond April 2018, and any work done on Project Park not extending beyond mid June 2018.

vii) Reliance is placed by Esken on the fact that the only identified work done after June 2018 was work identified by Stobart Energy, namely Whitemoss, Sny2Gen and Skelton Grange, in respect of which there is no evidence of work extending into Q4 2018.

viii) Esken submits that there is no evidence that any work at all was done in January, February or March 2019, when Mr Tinkler had become busy with Flybe, at least after Mr Sofaer sent his Addendum Note on 9 January 2019.

ix) As referred to above, Esken invites me to reject the evidence given by Mr Sofaer in cross examination with regard to the steps taken by SCL to identify opportunities, which I have already commented upon, and will return to below.

175. In the light of the above, Esken maintains that the evidence is overwhelming in demonstrating that it was entirely justified in terminating the Management Agreement by the Termination Notice:

i) Under clause 8.2.2, because SCL had by March 2019 ceased or threatened to cease to carry out its business or substantially the whole of its business; and/or

ii) Because SCL's failure to do any meaningful work was a *"material"* breach of its obligations (including the duty to act in good faith (clause 2.4.2)) and, by that date, was incapable of remedy, thus justifying termination under clause 8.2.3.

176. So far as remediability is concerned, and the application of the authorities referred to in paragraphs 141-143 above, it is Esken's case that the breaches alleged were incapable of remedy given that the protracted failure to identify opportunities, on the basis that missed opportunities will have gone for ever, and the ability to put matters right for the future would simply have been impossible to achieve in 28 days given what is said to have been Mr Tinkler's evident abandonment of SCL. As to this, Mr Leiper points to the failure to recruit anybody to replace Mr Soanes, Mr Story (when he ceased to work full time), Mr Raj or Mr Pattison leaving a company incapable, it is said, of providing Services to Esken.

SCL's case

177. SCL's case in response to Esken seeks to address the core pleaded allegation in paragraphs 40 and 42 of the Re-Amended Defence that, following Mr Soanes's resignation in February 2018, the overwhelming majority of SCL's performance of its Services to Esken under the Management Agreement ceased, and that by 12 March 2019 this state of affairs had been in place for over a year.

178. It is submitted by SCL that there is no proper basis for this case, and that there is clear evidence that SCL continued to perform significant Services under the Management Agreement after Mr Soanes's resignation, and into 2019. Specifically, SCL identify:

i) The further work on Project Wright following Mr Soanes' resignation, and that this continued until Esken decided on or about 22 March 2018 not to proceed with the then proposed acquisition of Flybe, with some further work being done in April 2018 notwithstanding this.

ii) The continuing work on managing the Airportr investment referred to above that extended into January 2019, and effectively until Esken made clear on 1 February 2019 that that it no longer required SCL to provide Services under the Management Agreement in connection with the Airportr investment.

iii) Work on potential new Transaction Opportunities, including Whitemoss (Project Wallace), Skelton Grange, Syn2Gen, and Project Park. As to these:

a) Whilst in respect of the first three of these projects, the work was principally carried out for Stobart Energy, the definitions of *"Acquisition"* and *"Investment"* in the Management Agreement specifically encompassed acquisitions and investments by group companies such as Stobart Energy, and so the work fairly and squarely fell within the scope of the Management Agreement.

b) Further, in respect of Whitemoss, a draft VCC proposal was prepared by SCL and, despite having denied that such was the case in his witness statement, Mr Brady and other members of Esken's Board, including Mr Coombs as Chair of the VCC, were aware of the work being carried out in respect of this project as evidenced by Mr Coombs' email dated 20 August 2018.

c) As to Skelton Grange, a project that was dealt with by Mr Raj rather than by Mr Sofaer, there is evidence of Mr Raj having been in email contact with Stobart Energy in connection therewith as late as 18 September 2018. It is SCL's case that this project was ongoing at the time that Esken purported to terminate the Management Agreement, and Mr Tinkler says in his witness statement that the project was handed back to Esken thereafter. In his first witness statement, Mr Sofaer says that when Mr Raj left, the project was *"handed over"* to *"the rest of the Stobart Capital team"*, albeit that after December 2018, he was the only remaining member of the team, apart from Mr Tinkler.

d) Reliance is also placed upon what Mr Sofaer says in paragraph 50 of his first witness statement, where he stresses that the November 2018 Project List was not exhaustive as referred to in paragraph 117 above. As referred to in paragraph 115 above, under cross examination, Mr Sofaer provided a more detailed explanation as to the position at the time of the preparation of this list, which I have commented on in paragraphs 116-118 above.

179. SCL submits that its efforts in performing the Management Agreement after the resignation of Mr Soanes require to be viewed in the context of:

i) Mr Coombs' evidence that the Management Agreement was anticipated to provide for one big, and one small investment opportunity per year; and

ii) What SCL submits was a deliberate strategy or plan instituted following Mr Soanes's resignation to create the circumstances in which Notice of Termination could be given pursuant to clause 8 of the Management Agreement, the strategy including the blocking of the holding of VCC meetings and a general reluctance to engage in taking the Management Agreement forward.

180. As to this latter contention, in its Skeleton Argument/Written Opening for the trial, Mr Sims and Ms Littler rely upon the authorities to the effect that in the absence of an express term requiring the parties to cooperate with one another, a duty to do so should

be implied, and they further refer to authorities concerning relational contracts, and the ability of the Court to imply duties of good faith into the same, and to the effect that a contractual party is estopped from relying on a breach of contract if they have, by their own actions, caused the breach. However, Mr Leiper, on behalf of Esken, fairly takes the point that SCL has not pleaded any implied term or implied duty of good faith, or any estoppel of the kind mentioned, and these arguments were not developed by Mr Sims in closing.

181. However, as touched upon in dealing with the alleged Airportr Breaches, I do consider that it is open to SCL to argue that the measure of its performance of the Services provided for by the Management Agreement requires to be judged as against any acts on the part of Esken that can be shown to have impeded or otherwise affected such performance. I will return to consider this further when considering whether this particular basis for serving the Termination Notice is made out.

182. SCL addresses the particular matters set out in paragraph 41 of the Re-Amended Defence as follows:

i) As to subparagraphs (a) and (b), and the allegation that no VCC meetings took place after 22 February 2018, and that thereafter SCL did not present any Transaction Opportunities and/or report to the VCC, and did not present any *"Overview Papers"* to the VCC and/or to Esken generally after 22 February 2018, it is SCL's case that the Management Agreement did not provide for any minimum numbers of VCC meetings to be held, or Transaction Opportunities to be presented etc.. It is said that the relevant clauses of the Management Agreement relied upon by Esken merely provided a mechanism by which Transaction Opportunities might be presented and advanced, and no more than that. The starting point is clause 3.1.1 and the identification and origination of Acquisition and Investment opportunities which, when identified and originated could then be progressed as provided for by clauses 3.1.2 to 3.1.6. It is submitted that the evidence demonstrates that SCL was working properly under the terms of the Management Agreement towards bringing Transaction Opportunities to Esken as provided for by the Management Agreement, and that was all was required of it.

ii) As to subparagraph 41(c), and the complaint that after the departure of Mr Soanes, SCL did not have an FCA regulated person so that it was unable to provide Esken with approved financial reporting, it is said that Mr Tinkler himself became the relevant FCA regulated person within a matter of days of Mr Soanes resigning, albeit that this was suspended in or about October 2018 in the light of allegations made during the course of the Fiduciary Duty Claim. However, SCL relies upon the more fundamental point that clause 3.6.3 of the Management Agreement expressly provided that SCL's duties should not include any act which might constitute an authorised or regulated activity. On this basis, it is submitted that there can have been no obligation on the part of SCL to have an FCA regulated person. In response to this, it is Esken's case that it was understood between Mr Coombs and Mr Soanes that SCL would have an FCA regulated person to provide approved financial reporting. However, SCL submits that this does not square with the entire agreement provision within the Management Agreement.

iii) As to subparagraph (d) and the alleged failure after March 2018 to provide any general corporate finance or consultancy services, SCL says that it is incumbent upon Esken to demonstrate that there were corporate finance or consultancy services in relation to particular matters that ought to have been provided, and that generalised allegations of this kind get Esken nowhere. The position would be different, it is said, if particular services had been asked for and not provided.

iv) As to subparagraph (e), and the allegation that notwithstanding the matters alleged in subparagraphs (a) to (d), SCL continue to charge the full Retainer Fee, SCL's position is that that would, in any event, depend upon the matters alleged in the subparagraphs (a) to (d) being established as constituting breaches of the Management Agreement, which have not been.

183. On the above basis, it is SCL's case that Esken cannot make out the breaches alleged in subparagraphs 43(a) to (d). Specifically:

i) There was no breach of the obligation to perform the services in clause 2.1 of the Management Agreement, particularly given the matters referred to in sub-paragraphs 182(i) and (iii) above.

ii) Subparagraphs 43(b) and (c) fail to particularise how the matters alleged in paragraph 41 are said to give rise to any breach of the duty of good faith pursuant to clause 2.4.1 of the Management Agreement, or the duty to exercise due skill care and diligence pursuant to clause 2.4.2 of the Management Agreement, but in any event the matters referred to in paragraph 182 above are relied upon as showing that there was no breach of these duties.

iii) Subparagraph 43(d) again fails to particularise how the matters in paragraph 41 are said to give rise to any breach of the duty to operate in accordance with good market practice pursuant to clause 2.4.2 of the Management Agreement, but in any event there is no properly admissible evidence as to what good market practice would comprise, and the matters referred to in paragraph 182 above are relied upon as showing that there was no breach of this duty.

184. It is SCL's case that even if any breach is established and is found to be a *"material"* breach, then it was remediable.

185. As to materiality, SCL points to the fact that, on Esken's pleaded case, the state of affairs complained of had been in place for over a year, yet Esken took no steps to terminate within that period. It is submitted that this points against any breach alleged in paragraph 43 of the Re-Amended Defence being material.

186. It is submitted that, in any event, the breaches were remediable. As to the whether the breaches relied upon were capable of remedy, particular reliance is placed upon the extract from the speech of Lord Reid in *L. Schuler v Wickman Machine Tool Sales* (supra) at 249 referred to in paragraph 141 above. Mr Sims submits that the facts of that case are on all fours with the present case to the extent that there is, he submits, a clear analogy between the consequences of the breach of the obligation to visit motor manufacturers in that case, and any failure to present Transaction Opportunities in the present case. As referred to above, Mr Leiper submits that any such breaches were not capable of remedy because Transaction Opportunities will have been lost for ever, but

Mr Sims's response is that that is the same as the business that would have been lost out on as a result of the failure to visit the motor manufacturers in *Wickman Tools*. Mr Sims submits that this turns on the question as to whether remedy means obviating the breach so that matters are put right for the future, or nullifying it so that damage already done as a result of the breach is in some way made good, or whether it means cure so that matters put right the future. Mr Sims submits that Lord Reid's passage is authority for proposition that the former meaning should generally be taken to be the correct meaning of *"remedy"* to apply in respect of a provision such as that presently under consideration.

187. It is SCL's case that rather than serving the Termination Notice, Esken ought, if SCL is found to have been in breach as alleged, first to have given notice to SCL to remedy the breaches, which it could have done within 28 days by taking any necessary steps to ensure that it was providing the Services, albeit that it might have taken somewhat longer to actually come up with Transaction Opportunities.

188. As to the alternative way that Esken puts its case under this head, namely its reliance on clause 8.2.2 of the Management Agreement on the basis that SCL had, by 12 March 2019, ceased or threatened to cease to carry on its business or substantially the whole of its business, SCL submits that on a proper analysis of the facts, as considered above, this was not the case in that SCL was still seeking out Transaction Opportunities etc., and carrying on business.

Finding in respect of alleged Transaction Opportunities and Corporate Finance Breaches

189. It is necessary first to consider SCL's further contention that there was a plan or strategy to terminate the Management Agreement and avoid paying fees to SCL, and if there was any such plan or strategy, the consequences or effect thereof.

190. Ultimately, as referred to in paragraph 127(iii) above, having originally denied that there was any such plan or strategy, under cross examination Mr Brady accepted that what he had said to this effect in paragraph 57(k) of his witness statement was not correct. I am satisfied that the evidence is to the effect that, following Mr Soanes's resignation, Esken did determine that it should seek to get out of, or disentangle itself from, the Management Agreement if it could do so given the obligation to pay an ongoing Retainer Fee for a considerable period of time. However, the evidence is to the effect that, at that time, it was unable to satisfy itself that it had the grounds to terminate the Management Agreement, and so embarked on a plan or strategy of effectively sitting back and seeing whether or not SCL was capable of performing its obligations under the Management Agreement, with a view to terminating the Management Agreement when and if circumstances permitted.

191. Further, as I have concluded in paragraph 130 et seq above, Mr Coombs' position, following Mr Soanes's departure, was that he did not, in reality, want the Management Agreement to work, and wished to *"untangle"*, as he put it, Esken therefrom, such that he did not thereafter do anything to help to make the Management Agreement work, and sought to make SCL's life more difficult.

192. This is, as I have already touched upon above, evidenced by:

i) The email correspondence in February 2018 in which Mr Coombs spoke in terms of untangling Esken from the relationship;

ii) The instruction given on 29 March 2018 that meetings of the VCC should not be convened unless SCL requested them;

iii) The email dated 20 August 2018 in which he considered it a *"shame"* that SCL had come forward with a proposal in respect of Whitemoss, because this muddied the water and made it more difficult to argue that SCL had substantially ceased business;

iv) The correspondence with Mr Sofaer between October 2018 and January 2019 in relation to Airportr's funding round; and

v) The Project Overlord and Project Neptune documentation.

193. Further evidence in relation to a plan or strategy is provided by the matters referred to in paragraph 70 above.

194. However, I agree with a submission made by Mr Leiper that Esken's motives are, as such, irrelevant if, in fact, circumstances arose in which Esken was entitled validly to terminate the Management Agreement.

195. The position might potentially be different if it was open to SCL to argue that Esken was itself in breach of the terms of the Management Agreement, and SCL could show that Esken's own breach had caused the circumstances that had put SCL in breach or otherwise in circumstances in which the grounds existed to serve a termination notice, such as under clause 8.2.2.

196. As I have mentioned above, in SCL's Skeleton Argument/Written Opening, it was argued that in the absence of a term requiring the parties to cooperate with one another, a duty to do so should be implied. On this point, Mr Sims and Ms Littler refer to Lewison, The Interpretation of Contracts, 7th Edn., at 6.135, where it is suggested that: *"Where performance of the contract cannot take place without the cooperation of both parties, it is implied cooperation will be forthcoming."* This does of course depend upon the implication of such a term into the Management Agreement. As this short extract from Lewison (supra) itself reflects, the implication of such an implied term depends upon it being necessary to imply the term – see e.g., *Yoo Design Services v Iliv Reality Pte* [2021] EWCA Civ 560 at [50] per Carr LJ.

197. However, there is no plea on SCL's part that the Management Agreement contained an implied term requiring cooperation, let alone any plea that any such implied term was breached in any particular way with causative effect. It was raised for the first time in SCL's Skeleton Argument/Written Opening. In these circumstances, I do not consider that this is an argument that it is open to SCL to run, if it does still seek to do so.

198. In any event, and perhaps more fundamentally, I find it difficult to see that an implied term of this kind could or ought to be implied on the present facts, in that I do not consider that the implication of such term is *necessary*, whether in order to make the Management Agreement work or as a matter of obviousness. It always remained open to SCL to identify and submit Transaction Opportunities to Esken/the VCC, and so long

as it did so, it would, as I see it, have been entitled to Retainer Fees, and there would have been nothing that Esken could have done to prevent SCL from doing so unless grounds existed to terminate the Management Agreement, even if it ignored such Transaction Opportunities as were presented to it.

199. As further indicated above, an alternative way that SCL put its case in its Skeleton Argument/Written Opening was that the Management Agreement was a relational contract of the type into which the Courts will readily imply a duty of good faith – see e.g., *Alan Bates & ors v Post Office Ltd* [2019] EWHC 606 (QB) at [725]. However, again, there is no plea that Esken was subject to a duty of good faith, and no plea as to Esken having acted in breach of such a duty of good faith. Thus, again, to the extent that SCL still relies upon this argument, I do not consider it to be an argument open to SCL to pursue. In any event I consider that there would be considerable difficulty in successfully establishing that Esken was subject to an implied duty of good faith in circumstances in which the Management Agreement had expressly imposed a duty of good faith on SCL pursuant to clause 2.4.2 of the Management Agreement, that had not imposed any corresponding such duty on Esken, and in circumstances in which there was nothing that Esken could practically do, absent an ability to terminate the Management Agreement, to prevent SCL from presenting Transaction Opportunities and thereby earn its Retainer Fee.

200. The most that SCL can, in my judgment, get out of the plan or strategy that Esken might have pursued is that if Esken's actions did demonstrably make SCL's life more difficult than if Esken had acted in a more cooperative way towards the Management Agreement and its performance, then I consider that SCL's own performance requires to be measured against the corporations it was in fact receiving from Esken. However, the implementation by Esken of its plan or strategy did not prevent SCL from proposing Transaction Opportunities, and even further working up the same, such that, so long as it did this, it would be difficult for Esken to complain, particularly bearing in mind the expectation expressed by Mr Brady that there would only be one big project and one small project realistically put forward each year.

201. Thus, in short, I do not consider that the plan or strategy that I have found was adopted by Esken, of itself, provides an answer to Esken's claim that there were breaches of the Management Agreement that entitled it to terminate the latter pursuant to clause 8.2.3, or that it was open to Esken to terminate pursuant to clause 8.2.2 on the ground that SCL had ceased to carry on its business or substantially the whole of its business, if the facts established that to be the case. However, it might explain why more was not done or achieved by SCL, and thus might potentially excuse certain conduct that might otherwise been regarded as amounting to a breach of the Management Agreement.

202. Having regard to how the case of breach is put in paragraph 43 of the Re-Amended Defence and Counterclaim, based upon the facts identified in paragraph 41 thereof, I am not satisfied that a material breach, or indeed any breach of the terms of the Management Agreement has been established on the facts for, essentially, the reasons advanced by SCL as set out in paragraphs 182 and 183 above. In short, I do not consider that the facts pleaded in paragraph 41, to the extent established, lead to the consequence as pleaded in paragraph 43, at least without more, even if the matters pleaded in paragraph 41 had been *"in place for year"*, as pleaded in paragraph 42.

203. In any event, even if *"material"* breaches have been established as pleaded in paragraph 43, I consider that the better view is that such breaches would potentially have been capable of remedy on the basis that, on the authority of *L Schuler v Wickman Machine Tools Sales* (supra) per Lord Reid at 249, the key consideration is whether matters could have been put right for the future, rather than necessarily being obviated or nullified.

204. However, even if it is right that Esken has not made out its case that it was entitled to terminate pursuant to clause 8.2.3 of the Management Agreement, I am satisfied that Esken was, by the Termination Notice, entitled to terminate the Management Agreement pursuant to clause 8.2.2 thereof on the basis that SCL had, by 12 March 2019, ceased or threatened to cease to carry on its business or substantially the whole of its business.

205. As to this, I consider the key consideration to be the following:

i) As at 12 March 2019, not only had no Transaction Opportunities been identified over and above those referred to above, none of which were advanced to the VCC, by 12 March 2019 at least there was no real prospect of anything further being advanced.

ii) Mr Soanes had resigned in February 2018 and had not been replaced. Whilst there is some evidence that Mr Story did perform some of the functions that Mr Soanes had previously carried out, he lacked Mr Soanes's corporate finance expertise and, in any event, had ceased to work full-time for SCL by the end of 2018, without being replaced. Further, there is no evidence of any part-time work carried out by Mr Story having achieved anything in 2019.

iii) Mr Raj and Mr Paterson had left SCL by the end of 2018 and had not been replaced.

iv) By 1 February 2019, SCL had ceased to manage the Airportr investment. Whilst it might not be open to Esken to successfully claim that SCL had acted in breach of the terms of the Management Agreement in relation to the management of this investment, the fact of the matter is that by early February 2019, SCL's involvement in the management of this investment had ceased.

v) Whilst I have accepted Mr Sofaer's evidence that, as at November 2018 when the November 2018 Project List was sent to MJ Hudson, other projects were being looked at such that the four members of the team were looking at about 10 potential projects per month, by March 2019, matters must have been very different. Mr Sofaer was the only employee left, and there is no evidence that, at that time, he was carrying out any significant work in respect of any projects or potential projects.

vi) The only evidence of any project still being pursued as at 12 March 2019 is in respect of Skelton Grange. As already touched upon, in paragraph 47 of his witness statement, Mr Sofaer says that this project was dealt with by Mr Raj, but handed back by him to the *"rest of the team"* in December 2018. However, by the end of the year, the rest of the team, apart from Mr Sofaer, had left, and there is no evidence that Mr Sofaer worked on this project. The most recent documentary evidence relating to this project is an email dated 4 September

2018 referring to a site visit by Mr Story the following day. Whilst there is reference in SCL's evidence to this project being handed over to Esken following the service of the Termination Notice, the evidence does not support there being anything of substance to hand over in any event.

vii) There is no evidence of any involvement by Mr Tinkler to advance or promote the business of SCL in early 2019. To the contrary, Mr Tinkler was concerning himself, with his own personal interests, in respect of Flybe.

206. In all the circumstances, I am driven to conclude that by 19 March 2019, SCL had, in reality, ceased to carry on its business, or substantially the whole of its business, and was in fact doing nothing of substance, with no plans to do so.

207. I am satisfied that, in these circumstances, Esken was entitled to serve the Termination Notice pursuant to clause 8.2.2 thereof, and that the effect thereof was to terminate the Management Agreement as at 12 March 2019.

Alleged Flybe Breaches

Introduction

208. In view of my finding in relation to clause 8.2.2 of the Management Agreement, that in reliance thereupon it was open to Esken to validly and effectively serve the Termination Notice, it is not strictly necessary for me to consider whether Esken was entitled to terminate the Management Agreement on this additional ground. However, in case I should be wrong in respect of my conclusions in respect of clause 8.2.2 of the Management Agreement, I do consider these further alleged breaches and the effect thereof.

Esken's case

209. Esken's pleaded case, as set out in paragraph 48 et seq of the Re-Amended Defence is that, in February 2019, it was involved as part of the consortium in a potential bid for the acquisition of Flybe, which was described as a *"distinct commercial arrangement"* from the earlier Project Wright that had involved SCL. Esken pleads that SCL was not instructed to provide any services in relation to *"the potential February 2019 acquisition"*, and then pleads the making by Mr Tinkler of the Preliminary Proposal, and his involvement with the Indicative Proposal.

210. It is then alleged in paragraph 52 of the Re-Amended Defence and Counterclaim that in relation to Mr Tinkler's conduct in respect of the Preliminary Proposal and the Indicative Proposal:

> *"(a) it is to be inferred,* [that Mr Tinkler] *made use of the Defendant's Confidential Information (as defined under the Management Agreement), being information disclosed to the Defendant as part of Project Wright and/or Project Blue, and did so other than for a purposes (sic) permitted under clause 17.1.1; and/or*
>
> *(b) personally became a competitor of the Defendant for the purposes of clause 8.3.4."*

211. Esken then alleges that insofar as SCL complied with the obligations of clause 17.3 of the Management Agreement vis-à-vis Mr Tinkler, it failed to enforce any such obligations by taking appropriate steps to injunct and/or otherwise prevent Mr Tinkler from making use of the Defendant's Confidential Information contrary to the terms of the Management Agreement in circumstances in which it was aware of Mr Tinkler's intention to do so, Mr Tinkler being its sole director, majority shareholder and controlling mind.

212. It is further alleged that SCL failed to disclose to Esken Mr Tinkler's intention to make unauthorised use of its Confidential Information once it was aware of the same.

213. The matters referred to in paragraphs 211 and 212 above are then alleged by Esken to amount to a breach by SCL of its duty to act in good faith in the performance of its obligations pursuant to clause 2.4.2 of the Management Agreement, to amount to a breach of SCL's duty to exercise all the due skill care and diligence required pursuant to clause 2.4.2 of the Management Agreement; to amount to a breach of SCL's duty to operate in accordance with good market practice pursuant to clause 2.4.2 of the Management Agreement, and/or to amount to a breach of the "Implied Enforcement Term". i.e., an implied term alleged in paragraph 24 of the Re-Amended Defence and Counterclaim to the effect that the obligation on SCL under clause 17.3 of the Management Agreement extended to taking all reasonable steps (alternatively taking reasonable steps) to enforce such obligations.

214. Further or in the alternative, in paragraph 59 of the Re-Amended Defence and Counterclaim, it is alleged that *"at the point when Mr Tinkler became a competitor of"* as previously pleaded, the conditions of clause 8.3.4 of the Management Agreement were satisfied.

215. In paragraph 60 of the Re-Amended Defence and Counterclaim, it is alleged that on 12 March 2019, Esken was entitled to terminate the Management Agreement immediately pursuant to clause 8.2.2 and/or 8.2.3 and/or 8.3.4 thereof, and that it did so.

216. In support of the contention that Mr Tinkler had become a competitor of Esken within the meaning of clause 8.3.4 of the Management Agreement, and that his involvement in respect of Flybe in early 2019 was not simply to provide a fallback in the event that the Connect proposal, and the SPA, did not proceed to completion of the latter, but rather concerned or involved a rival proposal, Mr Leiper, on behalf of Esken, the relies upon the following:

    i) Mr Sofaer's email dated 15 November 2018 referring to Mr Pattison's number crunching exercise in respect of the Orville model referred to in paragraph 78 above;

    ii) The acquisition by Mr Tinkler of 12.23% of the issued share capital of Flybe Group plc at a price of 3.7p per share on 11 January 2019, against the background of the Connect offer at 1p per share, as demonstrating that Mr Tinkler was betting against the Connect proposal proceeding in the sense of the Connect proposal failing, or Connect being forced to increase its bid significantly;

iii) The obtaining by Mr Tinkler of Flybe's confidential term sheet in the circumstances referred to paragraph 82 above;

iv) Mr Tinkler's meeting with Evercore and Flybe's Chairman and CEO following Evercore's approach as referred to in paragraph 82 above;

v) The making of the Preliminary Proposal, and Mr Tinkler's involvement in, or at least support for the Indicative Proposal;

vi) The fact that Mr Tinkler had aligned himself with the other major shareholder, Hosking, in supporting the Indicative Proposal meaning that the latter was supported by almost one third of Flybe's shareholders;

vii) Newspaper reports that Mr Tinkler had supported an effort to eject Flybe's Chairman and investigate the SPA that had been initiated by Hosking on 16 January 2019 through a solicitors' letter to the Board of Flybe, which letter had questioned the Flybe's directors' compliance with their duties;

viii) Newspaper reports that Mr Tinkler had described the Connect offer as *"an insult the aviation industry";*

ix) What is said to be a failure on SCL's part to disclose documentation relating to Mr Tinkler's dealings in respect of Flybe in early 2019. Mr Leiper describes this as a *"baffling absence of documentation"* from which he invites the Court to draw the inference that had disclosure been provided, it would have supported Esken's case and undermined that of SCL.

217. As to SCL's contention that Flybe was bound to complete the SPA if Connect required it to do so, and had got itself into a strong position by advancing significant funds on a secured basis at about the time of the entry into the SPA, Mr Leiper responded that the Board of Flybe would always have been obliged to consider alternative proposals, and potentially to run with them if more advantageous to Flybe, even if that might have involved a breach of any earlier agreement with Connect, and that both the Preliminary Proposal and the Indicative Proposal involved an advance of funds that would have discharged any liability to Connect.

218. Mr Leiper submits that whilst expressed only to apply if the Connect deal did not complete, the Board of Flybe received and considered the Preliminary Proposal and the Indicative Proposal to determine whether they were viable alternatives, and that the practical effect of them was to challenge the existing deal and seek to displace it, albeit unsuccessfully. This is why, so it is said, Mr Brady and Mr Coombs, in giving palpably honest evidence to this effect, expressed outrage as to Mr Tinkler's conduct.

219. On this basis, it is submitted on behalf of Esken that it is clear that Mr Tinkler was involved in seeking to advance an alternative course of action for Flybe, as an alternative to the Connect Proposal and completion of the SPA, and had thus become a competitor of Esken in his own right.

220. As we have seen, clause 8.3.4 of the Management Agreement provides that it may be terminated immediately by Esken: "*if any competitor of* [Esken] *holds the beneficial interest in more than 25% of the share capital of* [SCL]".

221. Esken submits that as a matter of true construction or interpretation, and applying the usual objective approach to be applied in construing or interpreting a written document, the word *"competitor"* in clause 8.3.4 would extend to somebody who had placed himself in the position that Mr Tinkler had placed himself in concerning Flybe, and that the alternative construction suggested by SCL that would limit the construction to rival business organisations, rather than extending it to individuals such as Mr Tinkler, is to be regarded as a *"creative construction"*.

222. Further, Esken argues that the fact that Mr Tinkler might have ceased his competitive activity by 12 March 2019 is irrelevant on the basis that what is said to be the vice exposed by Mr Tinkler's conduct was his preparedness to put himself in a competitive position, and having done so he had become a *"competitor"*.

223. As to confidential information, it is submitted on behalf of Esken that it is highly likely that in making his offers, Mr Tinkler relied upon Esken's Confidential Information (as defined), which is said to be described in detail in paragraphs 36-37 of Mr Coombs' witness statement. In essence, Mr Coombs refers in those paragraphs to information concerning the model produced by SCL, and in particular, Mr Soanes, whilst working on Project Wright, and it is said that Confidential Information relating thereto is highly likely to have been deployed by Mr Tinkler in respect of his activities in early 2019 so far as Flybe is concerned.

224. In evidence, Mr Tinkler suggested there was a confidentiality agreement in place between SCL, Esken, and Cyrus dating back to Project Wright, which Mr Tinkler had suggested provided that certain confidential information at least in respect of the relevant model belonged to SCL. However, Mr Leiper submits that this holds no water when the relevant agreement is considered, the relevant agreement being a standard nondisclosure agreement in which SCL is acting as agent to Esken which is delivering information to Cyrus. It is thus said that the agreement does not have the effect contended for by Mr Tinkler.

225. In closing, Mr Leiper pointed to the fact that Mr Tinkler accepted in evidence that SCL could not use the relevant model for a purpose that was going to be competitive to Esken.

SCL's case

226. Mr Sims, on behalf of SCL, criticises the way that Esken's case is pleaded in paragraph 48 of the Re-Amended Defence and Counterclaim, and in particular the assertion that in February 2019 Esken was involved, as part of a consortium, in a potential bid for the acquisition of Flybe. He submits that this is inconsistent with the fact that by 15 January 2019 there was a binding share purchase agreement in place (the SPA), and so in this context the Preliminary Proposal and the Indicative Proposal, and Mr Tinkler's involvement therewith, can only properly be regarded as a fallback position, or a *"hedge"*, in case the SPA did not proceed to completion.

227. Mr Sims emphasises that the Preliminary Proposal was only a preliminary and highly conditional outline contingency proposal, and that the Indicative Proposal was, as its name suggests, purely indicative. In no sense were either of these proposals a bid rivalling that of the Connect consortium. Thus, it is said that, in so far as the pleaded case as to Mr Tinkler becoming *"a competitor"* is based simply upon these matters,

and what was revealed by the RNSs, the case, in so far as it relies upon clause 8.3.4 of the Management Agreement, at least as pleaded, is clearly not made out.

228. So far as the allegations concerning the use of Confidential Information are concerned, again Mr Sims criticises the way that the case is pleaded, submitting that in paragraph 52(a) of the Re-Amended Defence and Counterclaim, one has a bare generalised allegation of an inference of misuse of confidential information in respect of the Preliminary Proposal and the Indicative Proposal. It is submitted that there is a failure to identify the Confidential Information alleged to have been misused or identified contrary to CPR PD 16, paragraphs 7 and/or 8.25 and that, under cross examination, both Mr Brady and Mr Coombs acknowledged that Esken's contentions as to the misuse of Confidential Information were *"speculative"* – see in particular Mr Coombs at Day 3/55:25 – 56:14. Further, it is submitted that the evidence in relation to misuse of Confidential Information is directed more at the purchase of shares by Mr Tinkler on 11 January 2018, rather than at his involvement in the Preliminary Proposal or the Indicative Proposal, which now forms the basis of Esken's pleaded case. So far as the latter are concerned, it is submitted that the key information that Mr Tinkler might have relied upon would have come from general public sources, or information provided by others, such as the confidential term sheet obtained through Mr Barnes of Falco, or potentially from the meeting that Mr Tinkler held with the Chairman and CEO of Flybe.

229. So far as any Confidential Information relating to the model or models is concerned, it is submitted that no convincing explanation has been offered as to why any such Confidential Information would be material for the purposes of making the Preliminary Proposal or being involved in supporting at least the Indicative Proposal, and that it was not really put, save in generalised terms, to Mr Tinkler under cross examination how the model or models might have been relevant for this purpose.

230. As to the nondisclosure agreement entered into between SCL, Esken and Cyrus, it is submitted on behalf of SCL that there was logicality as to Mr Tinkler's evidence in respect of this, given that when a model is worked up by SCL, it may well have proprietary know-how, some of which might well belong, in terms of confidential information, to SCL rather than Esken, and on this basis there will be confidential information *"on both sides"*. Mr Sims points to the fact that there were three counterparties to the relevant nondisclosure agreement, namely SCL, Esken and Cyrus.

231. On the basis of these various matters, and particularly perhaps bearing in mind the failure to particularise the Confidential Information that is said to have been misused, and to explain how it was misused, Mr Sims submits that Esken's case in respect of the misuse of Confidential Information is simply not made out, and therefore it cannot properly be said that SCL acted in breach of the terms of the Management Agreement in failing to take steps to prevent Mr Tinkler from misusing the same (even if the Implied Enforcement Term is to be implied), or failing to disclose the use of the same to Esken.

232. Reverting to the definition of *"competitor"*, SCL submits that on any proper objective construction, what is being referred to here is a rival in the industry or industries in which Esken operates, and Mr Sims referred in closing to the evidence that Mr Brady gave in respect of Esken's trade competitors.

233. Further, Mr Sims pointed to the terms of the Management Agreement against which clause 8.3.4 thereof requires to be construed, submitting that it is necessary to bear in mind what the Management Agreement was all about, namely SCL providing services to Esken to try and identify Transaction Opportunities over which Esken would have a right of first refusal. This in itself recognised that it was entirely likely that both SCL and those associated with SCL would, in those circumstances, be acquiring interests within the market sector within which Esken operated. That in itself could not, it is said, make SCL a competitor.

234. It is submitted that in considering whether Mr Tinkler was a competitor, one is concerned with an objective exercise and on that basis, it is *"nonsensical"* to say that he became a competitor simply because of an involvement in or indication of support for a capital injection to provide shareholders with a fall back or hedge if the deal did not complete. Further, it is submitted that opposing a deal as a shareholder does not, on any objective basis, make one a competitor, and nor does giving oral support to indicative proposals.

235. In short, therefore, SCL submits that neither the alleged Flybe Breaches nor the proper application of clause 8.3.4 of the Management Agreement entitled Esken, on 12 March 2019, by the Termination Notice, to determine the Management Agreement.

Finding in respect of the alleged Flybe Breaches and clause 8.3.4 of the Management Agreement

236. So far as the use of Confidential Information by Mr Tinkler is concerned, I agree with Mr Sims that it is necessary to focus on Esken's pleaded case, and its case, in contrast to that advanced in the Termination Notice, that the misuse of the Confidential Information was concerned with Mr Tinkler's making of the Preliminary Proposal, and his involvement in or support for the Indicative Proposal. Consequently, the mere fact that at some point on or after 15 November 2018, when he received Mr Sofaer's email of that date, Mr Tinkler might have given consideration to the relevant model, and had it in mind in his approach to Flybe, is, as I see it, beside the point if Confidential Information relating thereto was not in fact used for the purposes of the formulation of the Preliminary Proposal or for the purposes of Mr Tinkler's involvement with the Indicative Offer.

237. So far as use of confidential information is concerned, Esken's case is, as the Re-Amended Defence specifically pleads, founded on inference, and as Mr Brady and Mr Coombs accepted under cross examination, based on speculation. Even apart from any technical pleading objection as to a failure to particularise the Confidential Information said to have been misused, the position is that it has not really been explained by Esken what aspects of the model produced in respect of Project Wright, and what Confidential Information exactly in relation thereto, might have assisted Mr Tinkler in respect of the Preliminary Proposal and the Indicative Proposal. Further, it is fair to say that the case that Mr Tinkler had misused Confidential Information in some *relevant* respect was only put to him in very general terms.

238. In these circumstances, I am simply unable to satisfy myself on the balance of probabilities that Mr Tinkler did, in putting forward the Preliminary Proposal and supporting the Indicative Proposal, use or misuse Confidential Information derived from the model produced in respect of Project Wright for that purpose. I bear in mind

that a considerable amount of information would have been in the public domain from, amongst other things, the RNS issued on 11 January 2019 following the making of the Connect proposal. Further, Mr Tinkler was clearly obtaining highly relevant information from other sources, and in particular the confidential term sheet supplied by Mr Barnes of Falco that provided up-to-date financial information from Flybe itself, and also the meeting that he held with Evercore and Flybe's CEO and Chairman.

239. I do also bear in mind that, as suggested by the evidence of Mr Brady at the trial of the Fraud Claim referred to in paragraph 77 above, the model produced for the purposes of Project Wright may have been informative for the purposes of the Connect proposal. However, the detail of any Confidential Information in respect of the model must, as I see it, be distinguished from simply some generalised idea of streamlining Flybe's business model, and it is necessary also to bear in mind that the model is likely to have required not inconsiderable refinement as to detail of routes etc. to reflect changes between the bringing to an end of Project Wright, and early 2019, when the Connect proposal was put forward, and Mr Tinkler became involved in the way that he was. Further, there is force in Mr Tinkler's evidence that by January 2019 at least, *"it was all about the cash, what requirements the business needed to survive"* (Day 3/166:6-9).

240. In all these circumstances, I do not consider that Esken's case as to breach based upon misuse of Confidential Information is made out.

241. As to clause 8.3.4 of the Management Agreement, and whether Mr Tinkler is to be regarded as having become a *"competitor"* of Esken for the purposes thereof, this does, essentially, raise a question of construction or interpretation of clause 8.3.4 and the meaning of *"competitor"* therein. The relevant principles are not controversial, the task being to ascertain the objective meaning of the words used set in the context of a reading of the whole of the Management Agreement, and with the background knowledge reasonably available to the parties at the time that the Management Agreement was entered into, excluding previous negotiations and declarations of subjective intent – see e.g. *Wood v Capita Insurance Services Ltd* [2017] AC 1173 at [10]-[13].

242. Considering the matter objectively, I am not persuaded that the definition of *"competitor"* was intended to be limited to a trade competitor, and I consider that it must be regarded as being capable of extending to any individual or entity that places his, her or itself in a position of competition to the activities of Esken. The wording of the provision is certainly capable of encompassing this wider meaning, and I consider that business common sense supports this wider meaning bearing in mind that the commercial objective of the provision must, as I see it, have been to protect Esken from finding itself in a continuing contractual arrangement under which it is obliged to pay a substantial retainer on an ongoing basis for a substantial period of time in circumstances where its counterparty is controlled by a person or entity that has acted against the interests of Esken in some competitive way that might have served to undermine the relationship between Esken and that counterparty, here SCL.

243. I unhesitatingly accept the evidence of Mr Brady and Mr Coombs that they were genuinely shocked by Mr Tinkler's activities in early 2019, although I appreciate that part at least of this related to the acquisition by Mr Tinkler of shares in Flybe which is not specifically pleaded as part of the factual background upon which the case as to *"competitor"* is based. Whilst I accept that I am concerned with what is an objective

exercise, this does, I consider, provide insight as to the effect of Mr Tinkler's conduct and as to the commercial purpose of clause 8.3.4 of the Management Agreement.

244. Although no specific reliance is placed upon the purchase by Mr Tinkler of shares in Flybe as supporting the case as to competition, I consider that Esken's reliance upon Mr Tinkler's making of the Preliminary Proposal and his involvement in the Indicative Proposal requires it to be viewed in context, including that these proposals came to be made against the background of the earlier share purchase, the obtaining of the Flybe confidential term sheets, the meeting with the CEO and Chairman of Flybe, Mr Tinkler's involvement with Hosking, and the various press reports as to Mr Tinkler's attitude and thinking.

245. I have already, in paragraph 112 above made certain findings in respect of Mr Tinkler's approach to the Preliminary Proposal and the Indicative Proposal. As is apparent therefrom, I am simply not persuaded that his actions were all about establishing a backup position, or hedge, in the event that the SPA did not proceed to completion, leaving Flybe exposed. Rather, I find that Mr Tinkler was actively seeking to leverage the position to his own advantage, and to establish his own position in respect of Flybe which, potentially at least, was liable to undermine the position of Esken by potentially throwing the Connect proposal, and completion of the SPA, off course.

246. One does, as I see it, have to ask as to why would Mr Tinkler have purchased shares at 3.7p as against the Connect offer price of 1p per share, and why would he have joined in criticism of the Flybe Board, and made the Primary Proposal and supported the Indicative Proposal having done so, had his objective simply have been to nobly provide a backup or hedge.

247. In the circumstances and having regard to what I consider to be the correct meaning of the expression *"competitor"* in clause 8.3.4 of the Management Agreement, I am satisfied that Mr Leiper is correct to maintain on behalf of Esken that Mr Tinkler had become a *"competitor"* of Esken within the meaning of clause 8.3.4.

248. Further, even though the SPA may have completed, and in that sense at least Mr Tinkler may have ceased to have be in a competitive position to Esken in respect of Flybe, I am further satisfied that this is an irrelevant consideration on the basis that, for the reasons advanced by Mr Leiper, once Mr Tinkler had become a competitor, then for the purposes of clause 8.3.4 of the Management Agreement, and having regard to the commercial purpose behind the provision, he remained one.

249. In the circumstances, I am satisfied that Esken was, in serving the Termination Notice, entitled to rely upon clause 8.3.4 of the Management Agreement as terminating the latter, albeit that the grounds that it sought to rely upon in the Termination Notice are somewhat different than those now advanced.

Conclusion in respect of the termination of the Management Agreement

250. It follows from the above that it is my finding that the Management Agreement was validly and effectively terminated on 12 March 2019 by the service of the Termination Notice.

Sums Claimed

251. As referred to in the summary of the Claim and the Defence and Counterclaim in paragraph 98 et seq above, various sums are claimed by the respective parties. These can conveniently be dealt with under the heads of: Retainer Fees, Airportr fees, Flybe fees and expenses claimed by Esken.

Retainer Fees

252. SCL claims Retainer Fees for all periods after 1 August 2018, the last payment made having been for the period from 1 May 2018 to 31 July 2018 on the basis that the Management Agreement still subsisted.

253. Esken's case is that SCL stopped performing its obligations under the Management Agreement from March 2018 onwards, but that nevertheless Esken paid Retainer Fees of £300,000 (inclusive of VAT) covering the period from February to July 2018. Esken submits that since SCL had ceased to carry out the whole of its business, the consideration for the monies paid failed, and thus that SCL is liable to pay back £208,333, being £300,000 less VAT, with the amount pro-rated for February 2018.

254. In the light of my findings above, the Management Agreement did determine on 12 March 2019, on the basis that by that date at least SCL had ceased to carry on its business or substantially the whole of its business for the purposes of clause 8.2.2 of the Management Agreement. However, I did not find that SCL had been in breach of the terms of the Management Agreement so far as the performance of its obligations were concerned as from February 2018 as alleged by Esken.

255. On this basis, I do not consider that Esken is entitled to recover any Retainer Fees that have been paid, and I consider that SCL is entitled to recover the Retainer Fees invoiced on 31 August 2018 and 6 December 2018 covering the period from 1 August 2018 to 31 January 2019, totalling £300,000 (inclusive of VAT).

256. This does leave the question of Retainer Fees for the period between 1 February 2019 and 12 March 2019 on which date the Termination Notice was served. However, I consider it likely that by this date the conditions of clause 8.2.3 of the Management Agreement were satisfied even though I do not consider that it has been established that they were satisfied prior thereto. On this basis I do not consider that any further Retainer Fees for this last period can be recoverable as the consideration for the same would have failed.

257. The net result is that I find that Retainer Fees of £300,000 are payable by Esken to SCL.

Airportr fees

258. SCL seeks unpaid Management Fees in respect of the period between 7 September 2017 and 14 February 2019 in the sum of £172,603 (inclusive of VAT), and a transaction fee of £120,000 (inclusive of VAT) in respect of a further investment made by Esken in Airportr in 2019 after the termination of the Management Agreement.

259. So far as Management Fees are concerned, Esken's case is that SCL simply failed to manage the investment, and so no fee is owing to it. However, as I have found against Esken so far as the alleged Airportr Breaches are concerned, it must follow, as I see it,

that Esken's contention that it is entitled to withhold payment on the basis of failings on the part of SCL must, itself, fail.

260. Although Esken sought to determine SCL's management of the Airportr investment on 1 February 2019, SCL was probably entitled to some notice, and on that basis, I consider that it was entitled to charge Management Fees up to 14 February 2019. On this basis, I find that Esken is liable to pay Management Fees in respect of the Airportr investment in the sum of £172,603 (inclusive of VAT).

261. In addition, SCL claims that it is entitled to a Transaction Fee in relation to a follow-on investment made by Esken in Airportr in 2019 after the Management Agreement and terminated on 12 March 2019.

262. SCL submits that such an investment on the part of Esken fell within the scope of clause 4.1 of the Management Agreement, and the relevant section of the Schedule thereto under the heading *"Transaction Fees"*.

263. On the other hand, Esken maintains that *"Acquisitions"* and *"Investments"* (as defined) as referred to in clause 3.1.1 only envisaged initial investments, and not follow-on investments. Further, Esken submits that a transaction fee cannot, in any event, be payable after the termination of the Management Agreement, and in circumstances where SCL did nothing to earn a fee.

264. I prefer Esken's submissions on this point. I note that the schedule to the Management Agreement refers to Transaction Fees applying in the case of: *"the successful completion of an Investment or an Acquisition"*.

265. I am satisfied that in talking in terms of completion of an Investment or Acquisition, the Schedule to the Management Agreement was intending to refer to the process under clauses 3.1.1 to 3.1.6 of the Management Agreement, rather than further investment opportunities arising out of the subsequent management of an Investment. I consider this to be supported by, for example, that clause 3.3 of the Management Agreement talks in terms of the fact that Investments made by Esken *"shall be"* considered Investments for the purposes of clauses 3 and 4 and to it being the intention that these *"shall be"* managed by SCL pursuant to the Management Agreement unless otherwise instructed or agreed, language that is hardly appropriate for a follow-on investment.

266. Further, and in any event, I consider that it must be right that if the Management Agreement has been terminated pursuant to clause 8 of the Management Agreement prior to the making of a follow-on investment, there can be no question of a Transaction Fee being payable in respect thereof. I consider this to be so particularly bearing in mind that clause 8.4 of the Management Agreement provides that termination should be without prejudice to the completion of transactions already the subject of a binding contract prior to the date of termination and the payment of any Fees then due, but does not provide any further than that.

267. I do not therefore consider that this Transaction Fee in respect of Airportr is recoverable.

Flybe Fees

SCL's position

268. As to fees in respect of Flybe, it is SCL's case that Esken is liable to pay Transaction Fees pursuant to clause 4.1 of the Management Agreement and the Schedule thereto in respect of Esken's investment in Flybe through the SPV, Connect, together with Virgin and Cyrus. Reliance is also placed on clause 3.3 of the Management Agreement which, as referred above provides that for the duration of the Management Agreement, all investments made by Esken after the *"Effective Date"* shall be considered *"Investments"* for the purposes of clauses 3 and 4.

269. In short, it is SCL's case that this investment in early 2019 was a reiteration of Project Wright, albeit in the different circumstances brought about by the announcement made by Flybe on 14 November 2018, and it is said that this investment followed on from a Transaction Opportunity introduced pursuant to clause 3.1 of the Management Agreement. Reliance is placed, amongst other things, upon the exchange between Leech J and Mr Brady at the trial of the Fraud Claim referred to in paragraph 77 above in which Mr Brady spoke in terms of the business model developed by Mr Soanes (whilst at SCL) being the core of the investment case for Esken's interest in Flybe in early 2019. It is said that this, and other evidence, scotches the case advanced by Esken that the Flybe acquisition was an entirely separate transaction from Project Wright.

270. In response to the claim for these Transaction Fees, Esken relies upon the wording in clause 4.1 of the Management Agreement that provides that where an investment is made by an SPV, all fees, with the exception of the Retainer Fee, *"shall be payable by the SPV"*, i.e., that Esken itself has no liability for the same.

271. In response to this, in its Amended Reply and Defence to Counterclaim, SCL prayed in aid clause 4.3 of the Management Agreement where it is provided that if an investment is made by Esken alongside third-party investors via an SPV such that those third parties benefit from the provision of *"Services"* provided by SCL, then Esken and SCL are obliged to use their reasonable endeavours to achieve an agreement between SCL and either the members of the investor group or the SPV *"which reflects the application of the terms set out above to the aggregate investment so that a Transaction Fee or a Management Fee, as the case may be, is charged on the aggregate investment and paid by all of the investors."*

272. It is said by SCL that Esken has failed to comply with its obligations under clause 4.3 with the result that no agreement has been reached for the payment of the Transaction Fee, which it is said would have been agreed in an amount of £1,828,800 (inclusive of VAT), applying the scale provided for in the Schedule to the Management Agreement in the way that Mr Soanes had done in the claim that he made to the Employment Tribunal, subject to some adjustment to reflect the actual amount of the investment in Flybe. Alternatively, it is submitted that it might be appropriate to apportion this figure between the period during which SCL was working on Project Wright (some 10 months), and the two months or so between Flybe's announcement on 14 November 2018, and the completion of the SPA, with the result that the relevant sum should be apportioned 80:20 so that SCL recoverable loss represents 80% of the above amount.

273. The alternative way that SCL puts his case is that clause 4.1 of the Management Agreement carries with it the implied term (because it is both obvious and necessary for business efficacy) that Esken would (being in the unique position to do so) *procure*

an agreement with the SPV to pay SCL's fees and that, should it fail to do so, Esken would be liable itself to pay the Transaction Fee, either by necessary implication or by reason of its failure to procure the necessary agreement. It is said that, without such an implied term, and unless clause 4.3 provides the solution, then SCL would be left without any recourse to any party for a Transaction Fee that the Management Agreement clearly provides it should have.

274. In his written Opening prepared for the trial of this matter when listed in January 2022, Mr Leiper took a pleading point in respect of SCL's reliance upon clause 6.3 of the Management Agreement and the alleged implied term, and the alternative formulation of the claim as one for damages for breach of the obligations thereunder. However, realistically, this pleading objection was not maintained by Mr Leiper at trial, leaving the point to be decided on its merits.

Esken's position

275. In response to SCL's case, it is Esken's case that no liability exists at all with regard to the claimant Transaction Fee for three key reasons, namely:

i) The 2019 investment in Flybe was not an *"Investment"* for the purposes of the Management Agreement, so as to attract a Transaction Fee. This is because the definition of *"Investment"* in clause 1.1 of the Management Agreement refers to an investment made *"pursuant to this Agreement"*. Reliance is placed upon the fact that it was Mr Tinkler's own evidence that SCL's involvement with the Flybe project *"came to an end following my removal from the* [Esken] *business"* (see paragraph 51 of Mr Tinkler's second witness statement), and as SCL did not participate in respect of the Connect deal at all, it cannot be said that the investment was made *"pursuant to"* the Management Agreement.

ii) The deal concluded via Connect in 2019 was very different in nature from the *"Project Wright"* work that had been carried out approximately a year beforehand by SCL, which had concluded by April 2018. It is said that this is demonstrated by, amongst other things, a presentation prepared by Barclays on 4 January 2019 which is said to highlight the differences between the Connect deal and the earlier structures considered in the earlier 2018 iteration of Project Wright.

iii) In any event, because Esken made the relevant investment via an SPV, no liability for Fees attached to Esken, that being the express wording of clause 4.1. Whilst the Management Agreement anticipates that the equivalent fees to which SCL would be entitled under the Schedule to the Management Agreement would be paid by the SPV, clause 4.3 thereof goes no further than requiring <u>both</u> parties to use *"reasonable endeavours"* to achieve such an agreement. Whilst SCL has alleged that Esken is in breach of clause 4.3 as well as the alleged implied term referred to above that Esken would procure an agreement with the SPV, there is no merit in these arguments because:

a) It does not lie in SCL's mouth to make any such allegations against Esken in circumstances in which the obligation under clause 4.3 is on both parties, and there is no suggestion, let alone evidence, of SCL discharging its own *"reasonable endeavours"* obligations;

b) The suggested implied term is simply not necessary for business efficacy, and nor is it obvious. Rather it contradicts clause 4.3, or at least seeks to extend the parties' obligations when the Management Agreement specifically chose to go no further than provide for *"reasonable endeavours"* obligations.

276. As to the reasonable endeavours obligation, in the course of closing submissions, there was some debate between the parties as to the appropriate approach. Esken's primary position is that it is plain that even had Esken used reasonable endeavours to obtain agreement from Virgin and Cyrus as to a basis upon which to pay a Transaction Fee to SCL, Virgin and Cyrus would simply not have been interested any such agreement because Mr Soanes was on board, and advice has been obtained from Barclays without the need for any further assistance from SCL, which had nothing further to offer by way of *"Services"*. In response thereto, Mr Sims suggested that the appropriate approach may be to analyse the matter in terms of a loss of chance, in other words because matters essentially depended upon the actions of third parties, it was appropriate to analyse matters in terms of the loss of chance, and that if it could be demonstrated that there was a substantial chance of having negotiated an agreement had Esken used its reasonable endeavours, then the Court ought to assess that chance and award damages by reference thereto. In response to this, Mr Leiper submitted that, on any view, there was no substantial or significant chance of any agreement being reached.

277. As to quantum of the claim, Mr Leiper sought to criticise the sum claimed by SCL on a number of grounds including that Mr Soanes's own calculation for the purposes of his employment claim involved a misreading of clause 4.3 of the Management Agreement, and a failure on the part of SCL to have regard to the terms of clause 3.4 of the Management Agreement in a situation where other advisers were instructed. Further, Mr Leiper pointed to the fact that it was Mr Tinkler's own evidence that by January 2019 Flybe had become *"a different scenario"* and was *"a totally different business"*, and that by then it was *"all about the cash it required"*.

278. Mr Leiper commented that given that the claim was for in excess of £1 million, the evidence submitted by SCL and its analysis thereof on the question of quantum was *"woefully underdeveloped"*.

Conclusion in respect of a Transaction Fee in respect of the 2019 Flybe investment

279. I am satisfied that the effect of clause 4.1 of the Management Agreement, read together with clause 4.3 thereof, is that, in the event that an investment was made with other parties through the use of an SPV, then no liability for a Transaction Fee attached to Esken pursuant to the terms of clause 4.1 of the Management Agreement, or the Schedule thereto. I consider that the language of clause 4.1 makes this perfectly clear by specifying that: *"the Retainer Fee shall be payable by the SPV"*, which is not, of course, in a contractual relationship with SCL.

280. Consequently, I consider that it would only be open to SCL to recover something akin to a Transaction Fee to the extent that it could demonstrate that Esken was in breach of the reasonable endeavours obligation provided for by clause 4.3 of the Management Agreement, or in breach of the alleged implied term to the effect that Esken was obliged to procure the SPV to pay the Transaction Fee, and that any such breach had caused loss.

281. However, in respect thereof, I consider the position to be as follows:

    i) As Mr Leiper points out, the obligation under clause 4.3 of the Management Agreement was an obligation on the part of both Esken and SCL to use reasonable endeavours. This does, to my mind, presuppose a situation where SCL was providing continuing *"Services"*, and both parties had an interest in concluding an agreement. However, I consider that Mr Leiper must, in any event, be right that it is hardly open to SCL to complain if it, itself, used no endeavours to procure the appropriate agreement at the relevant time because it was not involved in the process at that time.

    ii) Even if this is not right, and one adopts the loss of chance approach suggested by Mr Sims, I consider that the evidence is very clear to the effect that there would have been no substantial or significant chance of Esken procuring any agreement on the part of Virgin or Cyrus if it had used its reasonable endeavours, simply because there was no incentive or reason for Virgin or Cyrus to agree to pay anything to SCL given that SCL had nothing to offer at that stage. Consequently, even if breach of clause 4.3 could be established, it is, in my judgment, clear that SCL is unable to show that any such breach has caused any loss.

    iii) So far as the alleged implied term is concerned, I do not consider it appropriate to imply the term alleged in that I do not consider any such implied term to be necessary, whether to provide business efficacy or as a matter of obviousness. As I see it, the mechanism provided for by clause 4.3 of the Management Agreement is perfectly workable without it, and I agree with Mr Leiper that any such term is, on proper analysis, inconsistent with clause 4.3 given that the parties had, thereunder, settled for a reasonable endeavours obligation, rather than the absolute obligation provided for by the alleged implied term.

282. On this basis, it is not strictly necessary to consider whether, but for the effect of clauses 4.1 and 4.3 of the Management Agreement, the 2019 investment in Flybe fell within the definition of *"Investment"* for the purposes of clause 4.1 of, and the Schedule to the Management Agreement. However, I am satisfied that the disconnect between the work carried out by SCL on Project Wright, and the resurrection of Esken's interest in very different circumstances following Flybe's announcement on 14 November 2018 is such that, for the various reasons advanced by Esken, the 2019 investment cannot properly be regarded as having been made *"pursuant to"* the Management Agreement despite the wording of clause 3.3 thereof.

283. On this basis, I do not consider that a Transaction Fee is payable by Esken to SCL in respect of the investment made by Esken as part of the Connect consortium in early 2019.

284. Had I reached a different conclusion, I would have had considerable difficulty on the evidence in determining the correct amount of the Transaction Fee payable.

Expenses claimed by Esken

285. As I have indicated, the parties have helpfully agreed the figure payable in respect of all expenses claimed by Esken apart from the cost of helicopter flights.

286. As to the cost of these flights, Esken seeks to recover one half of the sum that was charged to Esken in respect of flights taken by Mr Tinkler in the period between 1 September 2017 and 1 May 2018 on the basis that:

    i) This was the period in which he was supposed to be spending 50% of his time on Esken work, and 50% of his time on SCL work; and

    ii) There was no way of identifying whether a flight was for one purpose or another, it being Mr Brady's evidence that Mr Tinkler would just appear in London for whatever business suited him in circumstances where there was no record of the purposes for the flight, and so Esken apportioned the cost 50:50.

287. The amount claimed is £50,772.59.

288. SCL has contested this claim maintaining that there are invoices that show that certain flights were charged directly to SCL, and on this basis a 50:50 apportionment on the basis contended for by Esken cannot be correct.

289. However, as Mr Leiper pointed out in closing, these latter invoices relate to a different period, dating from November 2018 onwards when Esken had ceased to pay for any of the invoices in any event. Thus, the invoices produced do not show that during the relevant period, Mr Tinkler had ensured that flights for the purposes of SCL work were charged separately and discharged by SCL.

290. Mr Leiper suggest that, as a sense check, it can be observed that quantum of the sum claimed over an eight-month period is equivalent to that which Mr Tinkler charged to SCL alone for a three-month period.

291. I take the point made by Mr Sims in closing that there may be some inconsistency between the figure of £50,772.59 claimed, which is, as I understand it, the figure of £42,310.49 plus VAT referred to in an email to Mr Brady dated 3 August 2018, and another schedule referring to a total of some £157,000 odd.

292. The evidence is not perfect by any stretch of the imagination, but I consider that the contemporaneous email dated 3 August 2018 does, just about, provide sufficiently cogent contemporaneous evidence as to the amount expended on flights incurred by Mr Tinkler, the issue being as to what proportion ought to be borne by SCL.

293. I bear in mind that it is Esken's complaint that Mr Tinkler did not spend the time that he ought to have spent on the affairs of SCL, and that he only devoted some 25% of his time thereto at best. Doing the best I can therefore on the figures, I conclude that SCL ought to bear 25% of the relevant figure of £84,620.97 plus VAT that forms the basis of the claim for £42,310.49 plus VAT, namely £25,386.30.

294. Consequently, I find that Esken is entitled to judgment in the sum of £25,386.30 under this head.

Overall Conclusion

295. It is my overall conclusion that:

i) The Management Agreement was validly and effectively terminated by the Termination Notice served on 12 March 2019;

ii) SCL is entitled to judgment in respect of outstanding Retainer Fees in the sum of £300,000 (inclusive of VAT) in respect of the period from 1 August 2018 to 31 January 2019;

iii) SCL is entitled to judgment in respect of outstanding Management Fees in respect of the Airportr investment in the sum of £172,603 (inclusive of VAT) in respect of the period from 7 September 2017 to 14 February 2019;

iv) Esken is entitled to judgment for £25,386.30 in respect of the cost of flights provided to Mr Tinkler, and to judgment in respect of such other expenses as may have been agreed between the parties following the conclusion of submissions.

v) No further sums are due and payable by either party to the other in respect of any Fees or otherwise save in respect of interest on the above amounts in respect of which I will, if necessary, hear further submissions.