Neutral Citation Number: [2025] EWHC 562 (Ch)

Case No: BL-2022-002009

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (Ch D)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 12 March 2025

Before :

MR SIMON GLEESON

- -

Between :

H&P ADVISORY LIMITED	**Claimant**
- and -	
BARRICK GOLD (HOLDINGS) LIMITED (formerly RANDGOLD RESOURCES LIMITED)	**Defendant**

- -
- -

Matthew Hardwick KC and Ryan Ferro (instructed by **Squire Patton Boggs (UK) LLP**) for the **Claimant**
George Spalton KC and Joshua Folkard (instructed by **Norton Rose Fulbright LLP**) for the **Defendant**

Hearing dates: 4-6, 9-12 and 17 December 2024

- -

APPROVED JUDGMENT

Mr Simon Gleeson :

1. It is common for investment banks to do substantial amounts of work for clients on an unpaid basis in the hope of securing appointments (and fees) on transactions. It is also common for the appointment process to be somewhat informal. This raises a number of difficult legal questions where – as here – an advisor believes it has been appointed whilst its client believes it has not.

2. I would like to record my gratitude to counsel involved for the clarity and efficiency with which the factual evidence was presented and examined, as well as their assistance with the applicable law. This case has involved the exploration of some contested areas of the law of unjust enrichment, and I am particularly grateful to the junior counsel involved, Mr Folkard and Mr Ferro, for their assistance in this area.

1. The Structure of this Judgment

3. The primary dispute of fact between the parties is as to the significance of the involvement of Mr Hannam in the transaction. I therefore begin by establishing the factual matrix, and go on in a separate section to consider Mr Hannam's involvement. I next consider Mr Hannam's argument that the interactions between him and the Defendant were such as to give rise to a contract between them. Mr Hannam's case was that if no such contract arose, he would nonetheless be entitled to a restitutionary *quantum meruit.* I therefore turn to his action for such an amount, considering in turn the questions of enrichment, expense, unjust factors and defences. In this section I also address the question of whether the Claimant's action is defeated on the grounds that they were risk-

takers. Finally, I consider the question of whether there was a separate contract that the Defendant would pay the Claimant's expenses in any event.

2.The Parties

2.1 The Claimant

4. The Claimant, H&P Advisory Limited ("H&P"), is a London-based boutique investment bank effectively founded by Mr Hannam in 2010. Mr Hannam, in his previous position as Global Co-Head of UK Equity Capital markets at J.P. Morgan, had been an extremely well-known specialist mining investment banker, and had led the team there which executed some of the largest Mergers and Acquisitions ("**M&A**") deals in that sector, including the US$38 billion BHP Billiton merger (for a fee of some US$36 million) and the US$90 billion Glencore/Xstrata deal (for a fee of US$100 million) as well as the successful defence of Rio Tinto Zinc against a takeover by BHP. H&P provided a range of general banking services but, prior to 2018 (being the material period), carried out very limited (if any) pure M&A work.

5. Mr Hannam's name is familiar to financial lawyers because he was the subject of a 2014 FCA Decision Notice relating to the disclosure of confidential information by those engaged in corporate finance business. He appealed that notice to the Upper Tribunal, and the combined decisions remain the basis for much legal advice as to the application of the market abuse regime in the context of corporate finance business. However, in those proceedings the FCA found in terms that Mr Hannam did not act "without integrity or dishonestly in making the disclosures" (FCA Decision Notice 5.6(c)). I therefore do not regard this

history as impeaching Mr Hannam's testimony in any way, or as any reason to question his bona fides.

6. Mr Hannam acquired Strand Partners, an FCA Authorised financial advisory firm, in 2010, changing its name first to Hannam & Partners and then to H&P Advisory. He was joined by Mr Passmore, another investment banker, in 2012. In the period with which we are concerned, Mr Passmore was H&P's CEO. The other dramatis personae from H&P were Mr Allen (an analyst and, from April 2018 onwards, Vice President in the Capital Markets team), Mr Ward (until May 2020 H&P's CFO) and Mr Nganou (an analyst in H&P's metals and mining investment banking team). All of these gave evidence.

7. Mr Hannam's reputation was as an equity capital markets specialist. He accepted in cross-examination that between 2013 and 2018 the only deal he worked on at H&P that "encompass[ed]" pure M&A work was its mandate for Sibanye Gold, and that M&A was "not H&P's speciality" as at 2018.

8. Like many small organisations with large ambitions, H&P frequently dedicated considerable time and resources to marketing. That involved the production of substantial and detailed pieces of work for which they were not – and did not expect to be – paid, in the hope they might win a mandate. One example of this was the "Strand Partners" presentation produced in May 2014 for Barrick, concerning a proposed merger of Barrick and Newmont to create a "'super major' gold producer". This presentation ran to 21 pages and contained detailed analysis of the individual Barrick/Newmont mines and their historic production figures and reserves. Mr Hannam agreed in cross-examination that a lot of work had gone into that presentation by the Strand Partners/H&P team, explaining

that it was the kind of classic work that a bank would do coming up with ideas for a potential client in the hope that it would get a mandate. This was entirely consistent with the views of both experts as to the way that mandates are generally sought and obtained in this market.

9. Mr Hannam had a long-standing relationship with Barrick, and seems to have been extremely close to its founder and former Chairman and CEO, Peter Munk.

2.2 The Defendant

10. The Defendant, now Barrick Gold (Holdings) Limited but formerly Randgold Resources Limited ("Randgold"), is a gold mining and exploration company headquartered in Jersey. It was formed by a merger between Barrick Gold Corporation ("Barrick"), a Canadian listed company, and Randgold, a UK listed company – a merger which produced what was then the largest gold mining company in the world. The transaction was announced to the market on 24 September 2018 and completed on 1 January 2019. It is certain events surrounding that merger which give rise to these proceedings.

11. Both Barrick and Randgold were very large mining companies. Barrick was a Canadian company which owned mines around the world which it operated with varying degrees of success – in particular it had struggled with the African mines which it owned. Randgold was a smaller (but still large) specialist mining company whose strength was the operation of mines in Africa. In the period prior to the merger Randgold was in better financial shape than Barrick – it had less debt and better positive cash flow – and the market therefore valued Randgold's shares at a significant premium to those of Barrick.

12. The CEO of Randgold at the time was Dr Bristow, who was acknowledged as an exceptionally able CEO of mining businesses. Dr Bristow gave evidence alongside two other Randgold employees: Mr Shuttleworth, who was Randgold's Finance Director and Mr Sebastiaan Bock who was its General Manager of Finance.

13. Mr Thornton was the Executive Chairman of Barrick prior to the Merger. He had had a successful career as an investment banker specialising in M&A at Goldman Sachs, where he ended up as Co-Chief Operating Officer. In 2012 he joined Barrick as Co-Chairman alongside Peter Munk as part of a succession plan, and became Executive Chairman on Mr Munk's retirement in 2014. He also gave evidence.

2.3 The witnesses and the evidence

14. There is a 19th-century feel to this action. There is no documentary record of the negotiations between the parties or of the agreement which is alleged to have been reached, and the only witness to one of the two relevant conversations was not called. Consequently there is a straightforward conflict of evidence between two individuals as to what passed between them at a particular moment, and whether those words gave rise to an oral contract or some other form of commitment.

15. I note as a preliminary point that I believe that all of the witnesses were doing their best to tell the truth as they saw it. This is not a case where the question is whether one of the witnesses is lying – the differences between them are matters of nuance, not substance. However, as Lord Pearce said in *Onassis v Vergottis* [1968] 2 Lloyd's Rep 403, witnesses:

> "… tend very easily and unconsciously to conjure up a legal right that did not exist. It is a truism … that with every day that passes the memory becomes fainter and the imagination becomes more active."

This is particularly true where the witness has a strong financial interest in the truth of one particular version of events as against another – as is the case here. The amount of money at stake is of great significance to the Claimant, but considerably less so to the Defendant.

16. The modern approach to oral evidence was succinctly set out by Leggatt J in *Gestmin SGPS v Credit Suisse (UK) Ltd* [2013] EWHC 3560 at paras 16-22. He concluded

> "In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts."[para 22].

17. The difficulty which the Claimant faces in this case is that there is – and was - no written agreement, and the evidence of the parties conflicts as to whether there was a verbal agreement. There is therefore a direct conflict of testimony.

18. This situation was considered by Leggatt J in *Blue v Ashley* [2017] EWHC 1928 (Comm): He said

> "65. It is rare in modern commercial litigation to encounter a claim, particularly a claim for millions of pounds, based on an agreement which is not only said to have been made purely by word of mouth but of which there is no contemporaneous documentary record of any kind. In the twenty-first century the prevalence of emails, text messages and other forms of electronic communication is such that most agreements or discussions which are of legal significance, even if not embodied in writing, leave some form of electronic footprint.…"

19. Finally, it is clear that the burden of proof "lies squarely" on a party alleging an oral agreement, and evidence several years after the conclusion of an alleged contract as to whether a person subjectively thought a contract had been concluded is "of limited value, even assuming it is admissible": *Moorgate Capital (Corporate Finance) Ltd v Sun European Partners LLP* [2020] EWHC 593 (Comm) at [75] & [77] (Peter MacDonald Eggers QC).

20. I also need to remind myself of the principle set out by Thornton J in *Smith v Secretary of State for Transport* [2020] EWHC 1954 (QB) at [40] that

> "b. A proper awareness of the fallibility of memory does not relieve judges of the task of making findings of fact based upon all the evidence. Heuristics or mental short cuts are no substitute for this essential judicial function. In particular, where a party's sworn evidence is disbelieved, the court must say why that is; it cannot simply ignore the evidence (Kogan v Martin [2019] EWCA Civ 1645 per Floyd LJ at paragraphs 88-89)."

21. As regards evidence, I should also note that a continuing rumbling complaint of the Claimant has been the position as regards disclosure, and the pre-trial disclosure process was protracted and acrimonious. This complaint resolved itself into two main issues. One was in relation to Mr Thornton. Mr Thornton (on US legal advice) had a policy of having his e-mails deleted from Barrick's corporate server. This resulted in e-mails relating to this matter being deleted. The deletion took place 18 months after the Wyoming proceedings (explained below) had come to an end and 11 months before the Claim Form in these proceedings was served. The other is a broader complaint about the integrity of the disclosure exercise carried out by the Defendant – in particular as regards communications between Barrick and their financial advisers, Klein & Co.. The Claimant says that this means that "particular caution will need to be exercised

in considering Randgold's version of events where there is no corroborating documentary record". However, I do not regard this argument as made out – throughout the process of cross-examination there was no indication that the documentary record (such as it was) was incomplete or defective, and at no point was there any indication that there might be any specific missing document. I therefore approach the witnesses on an even-handed basis.

3. The Facts

22. Mr Thornton and Dr Bristow appear to have first met in either 2014 or 2015, and it is agreed that in 2015 Dr Bristow made a proposal to Mr Thornton for the acquisition of Randgold by Barrick. In principle such a transaction would have required the payment of a premium by Barrick, since Randgold was at that time significantly more highly rated than Barrick. Analysis of this transaction done by Barclays for Randgold at the time suggested that a minimum premium of 15% would be required. Mr Thornton made clear then, and maintained consistently, his position that Barrick was not prepared to pay a premium for any merger, and that although he was positive about the idea of merging with Randgold, any such merger would have to be on a nil premium basis.

3.1 "Nil premium merger"

23. This term was the subject of a great deal of debate during the hearing, and it may be helpful to set out its significance. Where two companies are to merge, a "nil premium merger" occurs where neither pays a premium to acquire the other, and the merger is effected by a simple share-for-share exchange – thus if one company is worth 60 and the other 40, the shareholders of the first company will end up with 60% of the merged company, the shareholders of the other with

40%. The reason that the shareholders can be persuaded to forego a merger premium is that the two businesses together can realise significant synergies, and the economic benefit of those synergies will accrue to the former shareholders in the agreed proportions. This is relatively straightforward between two private companies, where the owners can agree the values between themselves. It is more complex between listed companies. With a listed company there may well be a significant difference between the asset value per share of a company and its share price. The most common reason for this is different investor expectations of future profitability – put simply, shareholders in a business with a net asset value of 100 who expect it to grow and improve its profitability will value that business considerably more highly than shareholders in a business with a value of 100 which expect its profitability to decline. A nil premium merger between two such companies would result in a transfer of net asset value from the holders of shares in the low-rated company to the holders of shares in the higher-rated company – to take a simple example, if in the example above the market value of the highly-rated company was 120 and that of the lower rated company was 80, shareholders in the lower-rated company would end up with a claim to only 40% of the assets and incremental profits of the merged company, despite having contributed 50% of the assets. This would be equivalent to the shareholders in the other company having received a premium. The consequence of this is that a nil-premium merger can only be effected between two publicly listed companies if the rating that the market places on their shares is sufficiently close to avoid such a de facto premium arising.

24. The relevance of this can be seen from a question and answer put to Mr Thornton

> "Q. In order to do a nil-premium merger, the share prices, as you said, Mr Thornton, have to be in some sort of relationship to each other and you said when you met Mr Bristow in 2015, they were miles away from that level. When, do you remember, did the relative share prices get to a stage where this might become possible?
>
> A. Well, actually, they came into line quite a bit before the period we are talking about. But at that stage, we were in the middle of selling many assets and sort of getting our house in order so I thought to myself this is not the time for us because we have too much on our plate. Let's put it off to another time. At this time we are talking about -- I would say they were just on the margin of acceptable."

25. The point here is that a nil premium asset sale – such as the sale of Barrick's African assets to Randgold which was at one stage proposed – could be done as a nil premium transaction at any time – the only requirement would be to establish a mutually agreed valuation of the assets to be transferred. A nil premium merger between the two listed companies, however, could only be done if the share prices of the two companies were within a narrow range of values relative to each other.

3.2 The Sequence of Events

26. The position of Barrick in 2015 was not auspicious. It had borrowed heavily to invest in two large mining projects which had been conspicuously unsuccessful. As a result, although it had a large portfolio of well-performing gold and copper mines, it was perceived as being exposed to increasing interest rates and declining gold prices and, more importantly, with a declining production profile resulting from a lack of new mining prospects. Broker commentary on it at the time revolved around who it might merger or partner with to resolve its issues.

27. There was some dispute about the nature and extent of communication between Mr Thornton and Dr Bristow between 2015 and 2018. I do not think that this is particularly relevant – as Mr Hannam's expert, Mr Harman, said in his report "it is inconceivable, in my experience, that two gold companies of this scale would not already have contact between them." However, it seems to be agreed that throughout this period Mr Thornton would accept only a "nil-premium" merger, and Dr Bristow would accept only a premium. The position was summarised by Dr. Bristow as follows

> "I knew this had pushed John closer to the idea of a merger with Randgold, but neither of us was prepared to move our position on the question of a premium. John did not want to be seen to be paying for a "rescue", but equally with the amount of debt that Barrick had I was not going to sell Randgold short."

28. Mr Thornton joined Barrick in 2012 as Co-Chairman alongside Peter Munk, and shortly after joining he was introduced by Mr Munk to Mr Hannam. It seems that Mr Munk regarded Mr Hannam as a trusted advisor, and during the period when Mr Munk and Mr Thornton were co-chairmen Mr Munk consulted Mr Hannam on at least one important strategic matter – a potential sale of African Barrick. However, Mr Thornton does not seem to have shared Mr Munk's view of Mr Hannam – his evidence is that he met Mr Hannam on occasion informally to "discuss business and (sometimes) geopolitics" in a way which "routinely took place for [him] with others in and around the industry". In November 2014 Mr Thornton appears to have been contemplating instructing Mr Hannam on the sale of a Zambian copper mine, but this transaction did not proceed. Mr Hannam clearly did other work aimed at Mr Thornton, but it does not appear to have led to transactional mandates.

3.2.1 January/February 2018

29. The bare facts of the events of January and February 2018 are broadly undisputed, but their significance is hotly debated. The Claimant says that in late January 2018 Mr Hannam had a telephone conversation with Mr Thornton in which Mr Hannam volunteered to speak to Dr Bristow about a merger of Barrick and Randgold, and Mr Thornton agreed. The Defendant denies that any such telephone conversation took place prior to Mr Hannam's first meeting with Dr Bristow, and suggests that Mr Hannam was freelancing. However, there is no doubt that a meeting between Mr Hannam and Dr Bristow took place in early February, in which a merger between Randgold and Barrick was discussed. It is not disputed that Mr Hannam spoke to Mr Thornton about such a merger on the 20 February. It is a tribute to Mr Hannam's abilities as an investment banker that Mr Thornton's evidence was that he listened to Mr Hannam because he perceived that he was very close to Dr Bristow, and Dr Bristow's evidence was that he listened to Mr Hannam because he perceived that he was very close to Mr Thornton.

30. The next written communication that we have following that meeting is an e-mail of 20 February 2018 from Mr Hannam to Mr Thornton with the subject "Reaching out", stating "I would like to meet or speak. I am not sure why we have stopped talking…", to which Mr Thornton replied with agreement to find a time to meet. Later that day, Mr Hannam sent Mr Thornton "a quick note". This was (literally) a one-page manuscript sketch summarising three growth options for Barrick, one of which was a merger with Randgold. Mr Thornton's response was

> "Yes, as you recall, I put this idea to MB the first time we [Mr Thornton and Dr Bristow] met at my home. He threw cold water on it. A year later he visited me with a pitch that had us buying them for a high premium with him becoming CEO of the combination and me as Chairman. I reminded him that I always liked the idea, but not with a big premium for him."

31. Mr Thornton and Dr Bristow then met in Miami in February 2018 (around the time of the BMO conference) and their witness statements record that they continued their earlier discussions about a potential merger between their companies.

32. Following this meeting, Mr Thornton and Mr Hannam continued to communicate, and met in London on 9 and 11 March 2018. In between these meetings, on 10 March 2018, Mr Thornton sent Mr Hannam an email requesting that Mr Hannam, "write me a succinct note which I can pass along to Catherine and others re: the messages that are not getting through". A document of this form was provided at the second meeting, and became known in these proceedings as "Letter 1". Mr Hannam and Mr Thornton appear to have discussed the draft during their 11 March 2018 meeting, following which Mr Thornton provided feedback by email and a further draft of the letter was provided.

33. In the meantime, on 7 March 2018, H&P provided Dr Bristow with a presentation containing a "storyboard" that set out a rationale for a Barrick acquisition of Randgold. This was focused on addressing Barrick's challenges, as H&P perceived them, through a merger with Randgold.

34. On the same day, Mr Hannam sent this storyboard to Mr Humphries. Mr Humphries was at this time an employee of Barrick. On 8 March 2018 Mr Humphries replied by sending Mr Hannam an internal Barrick presentation

under an e-mail stating "Ian // See attached. STRICTLY NOT FOR ONWARD DISTRIBUTION unless sanitised". This presentation compared Barrick's performance with several competitors and commented on Barrick's strengths and weaknesses. Later that day, Mr Allen forwarded the presentation to Mr Nganou under an e-mail stating "I am at training tomorrow morning so attached is the presentation and also the slides that Ian was sent by his mole in Barrick...".

35. H&P sent Dr Bristow a revised presentation on 8 March 2018 with a storyboard that had been amended by amending some of the comments on Barrick and apparently adding three new slides comparing Barrick to the same competitors as appeared in the internal Barrick document.

36. On 12 March 2018 Mr Hannam sent Mr Thornton a finalised version of Letter 1 together with a presentation dated 9 March 2018, which was based on the storyboard and presentations sent to Randgold on 7 and 8 March 2018. Mr Thornton then circulated Letter 1 within Barrick. Mr Hannam also forwarded Letter 1 and the accompanying presentation to Dr Bristow.

37. It is also agreed that around this time Mr Thornton proposed that, as an alternative to a full merger, consideration should be given to splitting Barrick into three separate vehicles. The idea seems to have been that one of these - the Copper mining businesses - could be spun out, a second – the African mines - sold to Randgold, whilst the third continued on as a listed geographically focussed gold mining specialist.

38. Mr Hannam addressed this idea in a second email to Mr Thornton on 18 March 2018 "Letter 2". This Letter benefitted from significant input from Mr

Humphries. Like Letter 1, Letter 2 was circulated within Barrick by Mr Thornton. Mr Hannam also forwarded Letter 2 to Dr Bristow on the same day.

39. The transaction structure described in Letter 2 was as follows

> "to split Barrick into three sister companies, held by a new Barrick holding company. The first sister company would be made up of Barrick's flagship Nevada assets (American Barrick), the second sister company would be made up of Barrick's copper assets (CopperCo), and the third sister company would be made up of Barrick's higher risk and low-cost production assets in emerging regions in the rest of the world (Barrick RoW). Randgold would merge with Barrick RoW …".

This structure was referred to throughout the trial as the "Three-Way Split".

40. These letters and presentations were addressed to and focused on Barrick. However, a draft of Letter 1 was sent to Dr Bristow for input, and Dr. Bristow asked Mr Shuttleworth to review it and to make contact with H&P to "work on filling the "Gaps"" in the presentation. This appears to have resulted in a call between H&P and Mr Shuttleworth.

41. It does not seem that any particular significance should be given to what appears to be an attempt to act for both sides of a transaction. The Defendant's expert, Mr Webb, observes in his report that

> "in seeking to promote a transaction which would require agreement between the parties (i.e. not a hostile takeover attempt), and where a bank has access to both parties, it is not unusual to seek input from the second party when presenting to the first, at least to confirm that there are no material errors in material being generated."

42. On 22 March 2018 Mr Hannam sent a third email ("Letter 3") to Mr Thornton, which focused on the Three-Way Split. Letter 3 was accompanied by a one-page presentation which set out a high-level structural diagram of the proposed

Three-Way Split and its advantages. Mr Hannam confirmed in cross-examination that at this point he was focussed exclusively on obtaining a mandate to act as financial advisor from Barrick – for example, in an e-mail of 21 March from Mr Hannam to Mr Thornton. Mr Hannam described himself as "your advisor", and Mr Hannam confirmed in cross-examination it was "100% right" that at that time he considered himself to be Barrick's advisor.

43. Given that the idea of Barrick and Randgold combining had been current in the market for years, it is unsurprising that during March 2018 Randgold received pitches from other banks relating to such a merger. In particular Jan Sanders of Gleacher Shacklock sent a note and presentation on the concept of a merger with Barrick to Dr Bristow on 13 March 2018, and Paul Knight of Barclays sent a note to Dr Bristow on 23 March 2018 regarding Barrick's appetite for a deal after a meeting with Barrick. However, both of these assumed a premium on merger.

44. By this time the project had acquired a name - "Project British Rail" – which had been dreamed up by Mr Hannam. All parties seem to have used this code name throughout the transaction.

45. On 29 March 2018, Mr Hannam sent Dr Bristow an email entitled "Project BR update 4" together with an updated slide deck, stating that his team had been focussing on modelling the assets owned by Randgold and the non-American gold assets owned by Barrick, i.e. those which would be acquired by Randgold under the Three-Way Split. A near identical email was sent to Mr Thornton a minute later. Randgold looked at the slide deck on 2 and 3 April 2018 and provided H&P with feedback.

46. At this point Mr Thornton was asking Mr Hannam to meet with his adviser, Michael Klein of M. Klein & Co. Mr Klein was, and had been for some years, Mr Thornton's trusted M&A adviser, and had clearly been working on the transaction for some time – on 12 March Klein & Co had provided Mr Thornton with a detailed deck considering various strategic options (including a Randgold merger and the three-way split) under the name "Project Ontogeny".

47. Mr Hannam and Mr Klein met in New York on 3 April 2018. Mr Hannam describes the meeting as having been "incredibly detailed", and involved a "two-day briefing".

48. Mr Hannam's evidence was that this meeting occurred because Mr Thornton had told him that Mr Klein would have to be Barrick's advisor in order to get the Board comfortable with the deal, that he and Dr Bristow had therefore agreed that Mr Hannam would act as adviser to Randgold, and that it would be necessary for him and Mr Klein to work together on the deal because "Mr Klein was not a mining specialist". He was therefore asked to brief Mr Klein. Mr Thornton accepts that he was keen for Mr Hannam and Mr Klein to meet to discuss the deal, but he does not accept the other statements which Mr Hannam attributes to him.

49. Mr Hannam's evidence is that at this point (he is unclear as to the precise timing) Mr Thornton told him that he would not be acting for Barrick, but that he would be acting for Randgold. He further says that this was confirmed to him at this time by Dr Bristow. I suspect that it is correct that it was at around this time that Mr Thornton told him that he would not be acting for Barrick. However, both Mr Thornton and Dr Bristow absolutely deny any such conversation – Mr

Thornton pointing out, not unreasonably, that it would be extraordinary for him to purport to appoint an advisor to a different company. I have no doubt that Mr Hannam believed that he was engaged in pursuing the transaction, and inferred that if he was not to advise Barrick he must therefore be advising Randgold, but I do not believe that he was appointed at this time to this role by Dr Bristow – if he had been, there would unquestionably be some documentary record of the appointment, since, as Dr Bristow testified, it would have been a significant appointment triggering various internal processes within Randgold. The alternative explanation – that Dr Bristow confirmed appointment to Mr Hannam but then simply forgot about it – I do not regard as at all plausible in the light of his other evidence as to his approach to issues of this kind.

50. It was at this point that the decision was taken within H&P to redesignate the project files internally from "Barrick" to "Randgold". However, it is notable that the "Barrick" files had been so designated not because there was any appointment in place, but because they had been opened in the hope of securing such an appointment. I think the same was clearly true of the relationship with Randgold at this time.

51. On 5 April 2018, Dr Bristow invited Mr Thornton to visit him at his home in Jackson Hole to discuss the potential transaction between the two companies. Dr Bristow forwarded this exchange on to Mr Hannam and asked Mr Hannam what his plans were. Mr Hannam – unsurprisingly – suddenly found himself planning to go to Jackson Hole with his girlfriend for that period. This was not entirely true – he had e-mailed Ed Humphries on 2 March to the effect that "Mark Bristow will be at Jackson Hole from 11-19 April and Ed it may be a

good idea if you visit with me.". However, it is clear from these exchanges that Dr Bristow felt that Mr Hannam's presence would potentially be useful, but he was not prepared to formally involve him.

52. Prior to the meetings in Jackson Hole, Mr Hannam sent a fourth letter "Letter 4" to Mr Thornton on 12 April 2018. Letter 4 sets out a market-driven rationale for the Three-Way Split to achieve a valuation re-rating, i.e. a change in the market perception of the valuation of Barrick's business. The letter summarises valuations of the three component companies comprising "New Barrick" ("American Barrick", "BarrickRand" and "CopperCo"). It also promises an updated H&P presentation ahead of the Jackson Hole meetings.

53. On 13 April 2018, an updated presentation was sent to Dr Bristow, and also to Mr Klein on 14 April 2018. Later on 14 April 2018, Mr Klein shared a short presentation with Mr Thornton comparing the Klein and the H&P figures on the Three-Way Split.

54. Much of what happened at Jackson Hole is disputed. The undisputed facts are that Mr Hannam and Mr Humphries arrived at Jackson Hole on the evening of Thursday the 12th and met Dr Bristow there. They ensconced themselves in Dr Bristow's guest apartment and commenced a period of intense work on the slide deck entitled "British Rail - Three Way Split and Merger Analysis". Mr Humphries left on Saturday 14th. Mr Thornton arrived at Jackson Hole on Saturday 14th and left on Monday 16th, spending most of that time with Dr Bristow discussing the merger. Mr Klein arrived on Sunday 15th and left early on the 16th, meaning that dinner on the 15th was the only time when all four participants discussed the merger.

55. The key event during the Jackson Hole meetings was the call on Tuesday 17th between Mr Klein and Mr Hannam, which took place after Mr Thornton and Mr Klein had left. It is accepted that Dr Bristow overheard this conversation – his version of events, which I find plausible, is that he went to see Mr Hannam in his guest apartment and walked in on a conversation being conducted on speakerphone which was already in progress. There are three versions of this call, which do not completely correlate. Mr Hannam's version is that Mr Klein was seeking to renegotiate the terms of the merger under discussion to incorporate a reverse premium – that is, a discount to the Randgold price – and he was robustly standing up for the interests of Randgold. Dr Bristow's evidence was that he was very angry – both because of what he understood was being said, and because he felt that the participants in the conversation were intruding on a negotiation which he perceived to be between him and Mr Thornton alone. Mr Thornton – who was not on the call – seems to have been taken by surprise by the vehement reaction of Dr Bristow to it, which would suggest either that he did not know that Mr Klein was to make the call or that he did not realise how the points to be made by Mr Klein would be received.

56. Although it is not directly relevant, having reviewed the evidence, it seems to me that the most likely explanation for this disagreement was simply that Mr Klein was pointing out that the share prices were not aligned, and that any transaction executed at current values could not be a nil premium transaction but would involve a premium or a discount – a point which would have been immediately obvious to him as an experienced M&A banker. However, if Dr Bristow heard what was said as a demand from Barrick to buy Randgold at a discount to market value, his anger becomes entirely understandable.

57. The result of all this was an e-mail from Dr Bristow to Mr Thornton on the 18th to the effect that Dr Bristow felt that the negotiations could not continue. This clearly came as a shock to Mr Thornton, who promptly arranged to call Dr Bristow one-on-one with no advisers present. This call seems to have put the transaction back on track.

58. Mr Thornton expressed his view a few days later in an internal Barrick e-mail of the 19th April that "The transaction had a near death experience in the past 24 hours because of poor performance from our advisers, in particular from Ian Hannam". His evidence was that "I decided at this point that I did not want Mr Hannam involved in the transaction at all".

3.2.2 The alleged "in-principle" fee agreement

59. It is during the meetings at Jackson Hole (but before the call with Mr Klein) that Mr Hannam alleges that an important conversation took place. Mr Hannam claimed in his first witness statement that on Friday 13 April 2018, during a conversation with Dr Bristow and Mr Humphries at Dr Bristow's guest apartment in Jackson Hole, Mr Humphries asked how H&P "would be paid for the deal". Mr Hannam then says that he proposed to Dr Bristow that H&P should be engaged to advise Randgold on any subsequent transaction with Barrick, and its fee should be:

> "a minimum of US$10 million with upside, as we were entitled to more. I said that in any event we should not be paid less than Michael Klein".

60. Mr Hannam's evidence was that Dr Bristow said that this seemed reasonable, but that he "needed to get Graham Shuttleworth comfortable with this", and that he would arrange a meeting with Mr Shuttleworth in London.

61. Mr Humphries, who on Mr Hannam's evidence was the only witness to this conversation, was not called and did not give evidence.

62. Dr Bristow states that he does not remember his discussions with Mr Hannam at this time in any detail, but says that he certainly would have remembered a conversation about an amount of that size – and doubly so if he had agreed to pay it. He also says that it is highly unlikely that he would have had any discussion with Mr Hannam about fees or agreed to retain H&P as an advisor at that point in time, since the deal itself was still only a possibility. He does recall asking Mr Shuttleworth to meet with Mr Hannam, but does not remember the purpose of that meeting to have been to discuss fees. This again is entirely plausible. The work that Mr Hannam's staff at H&P had been engaged in was financial modelling at the individual mine-by-mine level, and Mr Shuttleworth would have been the obvious person to assess that work.

3.2.3 The alleged "in principle" merger agreement

63. An important part of H&P's case as presented was that the Jackson Hole meeting was the critical point of the merger, and that it was at that meeting that Dr Bristow and Mr Thornton agreed their companies should merge.

64. Mr Thornton and Dr Bristow agree that at that time they were in broad agreement about the desirability of a merger between the two companies. This agreement was deepened by their meeting at Jackson Hole, at which they seem to have identified further synergies. However, at that point it seems to have been agreed on all sides that a nil-premium merger was impossible by reason of the difference in the market rating of the two shares. This explains why the discussion was two-headed. On the one hand, it seems to have been agreed that

a nil-premium merger, when and if market prices permitted it, would be the optimal solution. However, until that point, it made sense to consider other options. This is why the discussions at Jackson Hole seem to have focussed largely on the Three-Way Split.

65. Given this factual background, Mr Hannam's evidence that an in-principle agreement for a nil-premium merger between Barrick and Randgold had been formed at that meeting, such that "John and Mark shook hands on it. It was done and dusted" must be dismissed as wishful thinking.

66. It should be noted, however that, as Mr Thornton said in evidence, the point of the Three-Way Split was always to "let some oxygen into the room" – specifically, to take attention away from the – then impossible – full nil-premium merger, and to facilitate discussion about identifiable synergies in a different context. The work which H&P did in modelling different forms and structures of the three-way split undoubtedly facilitated this conversation. However, it is entirely understandable that even whilst they were ostensibly discussing the details of the three-way split, the parties should remember those conversations as feeding into their simpler and easier solution of a full merger.

67. After the Jackson Hole meeting and the subsequent hiatus, both Dr Bristow and Mr Thornton say that the next steps were to be due diligence on each other's assets, conducted by Barrick and Randgold personnel only, with no direct involvement of any investment banks. Dr Bristow's statement notes that "I remember John raised concerns about Mr Hannam to me and asked that we keep the planned due diligence to Barrick and Randgold people only."

3.2.4 The Non-disclosure agreement (NDA)

68. On 17 April 2018, Mr Allen of H&P emailed Mr Shuttleworth to ask if Randgold would enter into an NDA with H&P, with the stated purpose of "considering and evaluating the Confidential Information for the purpose of providing investment banking advice in respect of Project British Rail".

69. Mr Shuttleworth agreed to this, and the NDA was sent and signed. However this fact on its own does not show that any decision to appoint H&P (or any adviser) had yet been taken. The NDA had been requested by H&P in order to encourage Randgold to share detailed modelling information with it, and there would have been perfectly good reasons for Randgold to have entered into such an arrangement regardless of whether the recipient had been formally appointed or not. The act of the execution of the NDA proves nothing either way.

70. There are, however, indications that Randgold expected at that time to appoint H&P as an advisor. In an email dated 18 April 2018 to Dr Bristow, Mr Shuttleworth said:

> "Regarding the discussion about other advisors, having thought about it overnight, I think it would be helpful to bring in one of our core banks to run alongside Ian. This is a large and potentially very significant transaction, so there is certainly space for more than one advisor, and in particularly I would like to get input on the debt angle (cost, break fees, appetite, structure, etc). I believe the board would also welcome this too."

This seems to have been in the context of the proposed three-way split, in which Randgold would simply have been the purchaser of Barrick's African assets in exchange for newly issued shares. It also supports the point that Dr Bristow made in evidence that

> "After Jackson Hole, Graham and I were aligned that if Mr Hannam were to be involved, he could not be our main advisor.

> Our board would never have agreed to that. H&P lacked the capacity for this role."

3.2.5 The alleged fee agreement

71. On 22 April 2018, Mr Shuttleworth asked H&P to produce some slides that Randgold could include in the pack for its upcoming board meeting.

72. On 24th April Mr Shuttleworth and Mr Hannam met at H&P's offices in London. Junior staff joined the meeting for the initial discussion, but were then asked to leave. Mr Hannam's evidence is that during a part of the meeting when only Mr Hannam and Mr Shuttleworth were present, Mr Hannam told Mr Shuttleworth that he had agreed in principle with Dr Bristow an advisory fee for H&P of a "minimum fee of US$10 million which could be increased, but which in any event would not be less than what was paid to Michael Klein by Barrick".

73. Mr Hannam claims that Mr Shuttleworth agreed to this and "shook hands on it". After Mr Shuttleworth had left H&P's offices Mr Hannam states that he told Mr Allen and Mr Nganou that he had agreed a fee with Mr Shuttleworth of "US$10 million which could be increased".

74. Mr Shuttleworth denies this. He says that no such fee was agreed, nor did he have the authority to agree such a fee in that meeting, and that he would have considered it premature to discuss advisor appointments, scope of work or fees on any potential transaction at such an early stage.

75. H&P followed up this meeting on 24 April with a draft presentation for Randgold's board, along with a slide deck containing their credentials. This email does not record any agreement as to fees or H&P's appointment by Randgold.

76. Towards the end of April 2018, Randgold prepared for a due diligence exchange with Barrick. During the weekend of 28 and 29 April 2018 Mr Hannam and Dr Bristow exchanged emails. Dr Bristow expressed a high level of confidence in his team's ability to uncover weaknesses in the Barrick model, and Mr Hannam responded

> "I would love to have had my people involved with this week's work so we can understand it better.. I would love to be seeing your e mails with john so I can see his mind and compared to the back up plan or is it the main plan they are executing … Miss talking to you.. From a business point of view.."

77. On 23 April 2018, Barrick and Randgold entered into a confidentiality agreement. In early May, a small team of Barrick employees met with Randgold in London for initial due diligence discussions. Following this, on 4 May 2018, Mr Bock requested from H&P copies of their financial models for a number of Barrick mines outside of North America, which were provided on the same day. Mr Bock's evidence was that Randgold's modelling capability was far superior to that of H&P (as might be expected), and that what he actually wanted from this input was the underlying MineSpans data. The Claimant argues that the provision of these models was an essential contribution to the initial due diligence exercise – a claim which is hard to believe since the data contained in the MineSpans database is publicly available. Mr Bock's evidence was that the reason for asking for these models was simply that it saved him the time which would otherwise be needed to collect the relevant data.

78. On 8 May there was a Randgold board meeting. The Board may have been briefed on the possibility of a transaction, and the H&P April presentation (relating to the Three-Way Split) was included in the meeting documents.

However, according to the board minutes the transaction sems to have been merely noted as a possibility rather than discussed.

79. Following the London meetings, the Barrick and Randgold teams agreed to move to a more extensive due diligence phase commencing on 6 June 2018, involving site visits to Randgold's mines.

80. Dr Bristow and Mr Hannam exchanged emails on 9 May 2018 where Dr Bristow provided Mr Hannam with a copy of an email and attachments that he had shared with the Randgold board regarding the Randgold management's negative assessment of a potential asset purchase transaction with Barrick under variants of the Three-Way Split (itself sent on 6 May 2018). This included showing consensus analyst valuations of Barrick's mines provided by H&P as a comparison against Randgold's own figures.

81. On 13 May 2018, Mr Hannam and Dr Bristow again exchanged emails. Dr. Bristow and Mr Thornton had arranged to meet the following day, and Dr. Bristow's message was "Meeting Thornton in Miami Monday - any views/advice for me to consider ahead of the meetings". The next day, Mr Hannam sent Dr Bristow a draft of a letter that he suggested Dr Bristow send to Mr Thornton "Letter 5", which reused much of the content from Dr Bristow's 6 May 2018 email to the Randgold board. Dr Bristow indicates in his first witness statement that he did not request Letter 5 or send it to Mr Thornton. The ordinary explanation for Letter 5 would be that Mr Hannam was seeking to establish a purchase on a deal which he felt was slipping away from him.

82. There was a meeting between Dr Bristow and Mr Thornton on 14 May 2018, following which Dr Bristow reported back (on 16 May 2018): "Just got off the

phone with Thornton – he says we can based on our current comparatives do a merger". At this point the Three-Way Split was discarded and discussions focussed on the full merger. The Randgold board considered this at an extraordinary meeting on the 26th.

83. Randgold brought CIBC into the Merger in mid-May 2018, and an email was sent to Mr Shuttleworth by Oliver Ward of CIBC on 25 May 2018 attaching a proposed split of work between Randgold's advisors. The minutes of the Randgold board meeting of 26 May 2018 record the appointment of CIBC and the intention to appoint Barclays as joint financial advisors to Randgold, along with two law firms. Neither the work split nor the board minutes make any mention of an ongoing role for H&P, with the board minutes stating "It was noted that Hannam & Partners [sic] have given strategic advice on the transaction".

84. The board minutes also record:

> "[Randgold's] and [Barrick's] discussions earlier this year centred on [Randgold] acquiring certain non-US and non-Canadian assets of [Barrick], with [Barrick] retaining its North American assets. The approach has since changed with both [Randgold] and [Barrick] now considering a 'merger of equals' (zero-premium merger)."

And

> "The terms and structure of the transaction between [Randgold] and [Barrick] will require to be finalised however any deal that may arise should occur on a "nil premium merger of equals" basis."

85. The only other work done by H&P after that point was a 4 June 2018 set of slides covering the potential for valuation re-rating and potential synergies from a full merger. H&P emails show that they altered their focus from the Three-

Way Split to a vanilla merger in their presentations dated between 1 and 4 June 2018. There is nothing in the parties' disclosure showing that Randgold requested that this work be carried out; or that the 1 or 4 June 2018 presentations were distributed by H&P to either Barrick or Randgold. On 6 June Mr Hannam went to Washington for Mr Munk's memorial services, and he says he left a copy of the presentation for Mr Thornton, who was also at the services. Mr Thornton does not recall receiving such a package.

86. These presentations appear to have been freelancing by H&P. The witness statement of Mr Bock states that

> "I do not recall liaising with H&P concerning modelling requests at the end of June / beginning of July 2018, as I am told H&P claim. As I oversaw the financial modelling workstream on the deal, I would have been aware of any requests like this".

3.2.6 CIBC and Barclays

87. Mr Shuttleworth sets out the scope of work undertaken by CIBC and Barclays in paragraphs 7.9 to 7.12 of his first witness statement. It is clear that this involved numerous presentations between July and the announcement of the Merger in September 2018. However, CIBC's and Barclays' work continued from the announcement of the Merger in September 2018 until completion of the transaction in 2019.

88. From early August 2018, Randgold, via Mr Shuttleworth, engaged in lengthy email negotiations with CIBC and Barclays regarding their fees for the services they provided in connection with the Merger. The documents indicate that Mr Shuttleworth reached agreement on fees with CIBC and Barclays on 6 September 2018 following discussions with Dr Bristow and two of Randgold's

non-executive directors. The fees for CIBC and Barclays were agreed as follows:

i) CIBC: US$10 million base success fee and a US$4 million discretionary fee.

ii) Barclays: US$5 million base success fee and a US$3 million discretionary fee.

89. No such negotiations were entered into with H&P. To be fair, this is because H&P had not sought to enter into any such negotiations. There was some discussion within Randgold of the making of a one-off discretionary payment of US$2 million to H&P in recognition of Mr Hannam's efforts in acting as a go-between in the early stages. However, it seems clear that at no point did Randgold regard itself as contractually bound to H&P.

90. CIBC and Barclays provided draft engagement letters to Randgold for consideration on 3 August 2018 (signed on 21 September 2018) and 9 August 2018 (signed on 19 September 2018) respectively. CIBC's engagement letter indicates that its engagement was effective as of 17 May 2018.

3.2.7 Announcement and Aftermath

91. The transaction was announced to the market on 24 September 2018.

92. Directly before the transaction was announced, Dr Bristow sent a message to Mr Hannam thanking him "for your role in getting this past the early hurdles". Mr Hannam responded both before and after the announcement was made. Following this, H&P sent an invoice to Randgold for US$18,129,148 on 26

September 2018, reflecting their estimate of Mr Klein's success fee at ~0.1% of the value of the combined Barrick-Randgold entity, and reimbursement of the costs they claim to have incurred in connection with the Merger.

3.3. Practice Regarding Fees and Appointment in the Investment Banking Market

93. A necessary preliminary in respect of this case is to understand the relatively unusual practices regarding the negotiation and documentation of fee arrangements in the investment banking market.

94. Investment banks seek to "stay close" to their clients, and do so by providing them with considerable amounts of free advice and analysis on a continuing basis. The reason that they do this is that where a client enters into a transaction, it will usually appoint one or more financial advisers, and those financial advisers will almost invariably be remunerated by a payment calculated as a percentage of the value of the transaction concerned. One of the consequences of this arrangement is that when a client appoints a financial advisor, it will consider the fee to be paid to it in the light not only of the services which it will provide post-appointment, but the services which it has provided pre-appointment. Another is that it is extremely difficult to identify cases where financial advisers are paid on any other basis – it was broadly agreed between the experts that periodic fees, hourly rates or other mechanisms for calculating the remuneration of professional advisers were and are almost unknown in this market. The position seemed to me to be binary – either a firm was appointed as a financial advisor, in which case it got a proportion of the deal value, or it was not, in which case it got nothing.

95. Having said this, it is clear that there are loyalties between firms and advisors. If a particular firm (in this case, Barclays) was perceived by the client to have provided significant value over an extended period of time, when a deal came along it was more likely to be appointed to a financial advisory role. The consequence of this is that firms may deliver a lot of free work for a potential client over an extended periods in the hope that that client will see them in this way.

96. A concomitant of this approach is that the general approach to documentation of appointment could politely be described as lackadaisical. Mr Webb, the Defendant's expert, explained that the critical point for him as an investment banker would be a communication from the client – possibly as simple as an e-mail - confirming that "you are on the ticket". Thereafter, the negotiation of the formal appointment – apart from fees - would be a matter for back-office legal staff to arrange. I think it is clear that such an e-mail would not constitute a contract of any form – if only because practically all of the material terms would remain to be negotiated. However, I entirely accept that, once such an indication had been given, both parties would be proceeding on a common basis that the firm would be appointed, and would be remunerated on a percentage of deal basis, with the actual percentage to be agreed in due course.

4. The Role of Mr Hannam in the Transaction

97. The Claimant's case is that Mr Hannam initiated the entire transaction through a one-off stroke of brilliance, since in early 2018 he comprehended that

> "this was the point when [a merger] could be achieved, and in particular the vulnerability of Barrick and why Barrick needed this deal now in a way they might not have done a year and a half

> ago, required an understanding of the state of those companies and the industry. And it probability required somebody with the credibility and forcefulness to be able to express it to the two. That was the real contribution that was made"

98. On this basis the Claimant mounted a full-on attack on the truthfulness of the Defendant's witnesses. Its position was that because Mr Hannan had played a crucial role in the inception of the merger, and that this was well-known to both Mr Thornton and Dr Bristow, the fact that Mr Thornton and Dr Bristow's testimony was that, to the extent that they remembered it at all, they remembered Mr Hannam's role as peripheral, constituted "obfuscation and distortion of the factual record". It argued that the evidence of Mr Thornton and Dr Bristow was contradicted by the "detailed documentary record which attests to the nature and importance of the role of Ian Hannam and H&P to "broke" this merger from the first discussions in late January 2018 and 5 February to a "meeting of minds" on a nil premium merger on Sunday 15th April 2018".

99. The Claimant argued that Mr Hannam's major contribution was his realisation and promulgation in early 2018 of something which the management of Barrick and Randgold had unaccountably overlooked – that Barrick needed new mining prospects to develop, that its previous strategy of selling assets and paying down debt had left it short of such opportunities, and that a merger with another mining firm with such prospects would be a net gain. The idea that this was not well known to Barrick management or the market is fanciful, and is not pursued. However the Claimant's case was that Mr Hannam was unique in having perceived the execution of such merger as a matter of extreme urgency for Barrick. I do not think that this argument stands up – the evidence of Mr Thornton was that Barrick were perfectly well aware of the position as regards

their current and future output profile, realised the importance of addressing the issue, and were working on plans to do so – one of which involved the ongoing dialogue with Randgold. It is also clear from contemporary brokers' research that these issues were well-known to the equity market. I think it is probably correct that Mr Hannam had convinced himself of the urgency of Barrick entering into a significant transaction – a view not entirely untouched by self-interest in the hope of fees. However, I do not consider that this had any very great significance for anyone else.

100. The area where it is clear that Mr Hannam did make a contribution was to get the parties talking at all. Dr Bristow acknowledged at trial that Mr Hannam "certainly introduced us, you know, reintroduced us/introduced us", and that "no bank had ever tried to broker a deal between [him] and John Thornton in the way that Mr Hannam was now doing in February and March of 2018".

101. I have already dealt with the idea that the idea of a nil premium merger was an inspiration of Mr Hannam. It was not – it was simply a statement of the only terms on which Mr Thornton was prepared to effect a merger.

102. From at least February 2018, H&P acted as a "go between" between Mr Thornton and Dr Bristow. Mr Hannam was at that time in pursuit of a mandate from Barrick, and described his role as that of an "emissary on behalf of John Thornton". This, of course, raises the question as to whether his actions were conferring a benefit on Randgold, even though they were not aimed at them. The point here may be that in order to make a deal look attractive, it is necessary for it to be presented to the parties as beneficial to both of them, and it was a necessary consequence of this that the work which Mr Hannam was doing had

the effect of identifying benefits which would arise from the transaction for Randgold as well as Barrick.

103. It is also the case that at the very early stages where Mr Hannam was involved, an important factor was the presentation of the proposal internally within the two companies. Mr Hannam played a significant role in ensuring that the notes which he provided to Mr Thornton were reviewed by Dr Bristow. Perhaps more importantly, the Claimant accepts that even if Mr Hannam was trying to be mandated by both sides, he could only ever end up being paid by one of them – there is no such role in this industry as an originator who gets paid by both sides. H&P was (in Dr Bristow's words) "playing on both sides of the table" by presenting to both sides. The Claimant argues that by acting as a "go between" H&P was rendering a benefit to both Randgold and Barrick.

104. Both Mr Thornton and Dr Bristow acknowledged the utility and significance of H&P's acting as a "go between". Mr Thornton accepted that the meetings he had with Mr Hannam on 9 and 11 March 2018 were "important", that Mr Hannam seeking to put Mr Thornton and Dr Bristow in touch was a "helpful part of the process"; and that "of course" Mr Thornton was "happy" if Mr Hannam "could advance things with Bristow". Dr Bristow acknowledged in evidence that he "was definitely interested in understanding what Mr Hannam was getting or saying about John". Finally, the Claimant says – reasonably – that Randgold's internal discussions as to the payment of $2m to H&P as a "glorified introducer fee" indicate that they themselves regarded H&P's activities as having economic value to them.

105. Once Mr Hannam had held these initial meetings, it is clear that both Mr Thornton and Dr Bristow saw the usefulness of continuing to involve him in the discussions. The deal which they wanted to do – a full nil-premium merger – was regarded as unexecutable because of the difference between the ratings of the two companies as reflected in their share prices. This is why Mr Thornton, in an e-mail to Mr Hannam of 18 February, observed that "we need your creativity and inspiration". This is consistent with Mr Thornton's evidence that he wanted Mr Hannam to come up with other approaches and structures in order to "let some oxygen into the room".

106. Mr Hannam sent Mr Thornton a hand-written sketch on the 20 February along with a covering e-mail suggesting that a nil-premium merger with Randgold was the best option for Barrick. Mr Thornton replied

> "Yes, as you recall, I put this idea to MB the first time we met at my home. He threw cold water on it. A year later he visited me with a pitch that had us buying them for a high premium with him becoming CEO of the combination and me as Chairman. I reminded him that I always liked the idea, but not with a big premium for him.
>
> It still could make sense.
>
> On the other hand we have plenty to run, including very good news in Nevada and elsewhere. In addition it could make sense to spin off certain assets."

107. Mr Hannam continued to press the idea of a merger, and produced and sent a slide deck to Dr Bristow, which he subsequently discussed with Mr Thornton, setting out the merits of the Merger. The form of this document was – in effect – a "storyboard" designed to show the benefits of the merger.

108. I think Mr Thornton was entirely clear at this point that, since the primary obstacle to the merger was the relatively low rating of Barrick's shares, one way

to achieve the merger would be to persuade the equity markets to realise that Barrick's shares were underrated. Mr Hannam was the ideal man to address this issue – he was an equity market specialist whose expertise in the mining sector was unquestioned, and his view – as expressed to Mr Thornton, at least – was that the markets were not recognising some of the merits of Barrick. Mr Thornton therefore asked Mr Hannam to produce a note identifying "the key points re: Barrick that you think are not well known or understood". In response to this, Mr. Hannam produced the document referred to as "Letter 1". This set out the reasons why Barrick's shares were undervalued, and went on to explain how a merger with Randgold would create value and, in particular, result in an upwards rerating of the shares of the combined entity. This – along with a deck - was sent to Dr Bristow and Mr Thornton, and Dr Bristow asked Mr Shuttleworth to review the figures contained in it. The final form of the letter and presentation were sent to both on the 12th March, and Mr Thornton circulated it to his executive team with an injunction to "please study carefully".

109. It was accepted by the Claimant that the original idea of the Three-Way Split came from Mr Thornton. However, Mr Hannam produced a practical plan for its execution. This was set out in "Letter 2" , sent on the 18 March, and involved the demerger of Barrick into three separate entities – this would involve a "core" North American entity, a separate copper mining company, and the non-North-American mines being separated out into a new entity entitled "Barrick Rest of World", or "Barrick RoW". The basic argument was that the bulk of Barrick RoW's assets would be in Africa, and Barrick's relative historic lack of success in managing this portfolio of African mines was a significant factor in the equity market's undervaluation of its shares. Separation alone, of course, creates

nothing new, and the initial aim of the exercise may have been no more than to explore the relative valuations of the different entities.

110. From the Randgold perspective, it is clear that Dr Bristow was looking to expand Randgold's business, including by acquisition. Since his personal wealth was largely invested in Randgold shares, he was not interested in any acquisition (or other transaction) which did not confer substantial benefits on Randgold. However, it was clear to him that the Barrick RoW businesses could be attractive at the right price.

111. On 18 March Mr Hannam sent to Dr Bristow the text of Letter 2 and the accompanying Three-Way Split presentation, and Dr Bristow replied "I would take the global non-USA!!!! That's where [Randgold] would sit comfortably." This was a significant moment for H&P, since it suggested that there might be an executable transaction. It seems that a very great deal of work was done on this proposal by H&P, and the result was a new H&P deck along with a covering letter, entitled "British Rail – Three Way Split and Merger Analysis" which was sent to Mr Thornton and Dr Bristow. This is referred to as "Letter 3". A further letter and deck were circulated on 12 April providing more detailed analysis ("Letter 4").

112. It is accepted that, in the run up to and over the period of the Jackson Hole meetings H&P produced a very significant amount of financial analysis on the sorts of timescales that are familiar to investment bankers but incomprehensible to mere mortals (Dr Bristow acknowledged that H&P were "working day and night"), for the benefit of Randgold. In order to produce this analysis, it was necessary for H&P to purchase a license to access a commercially available

database called "MineSpans", a cost which they paid themselves. Both Mr Webb and Mr Harman suggested that the level of work being done by H&P for Randgold was such as would not normally be done by a normal investment bank for a normal client without a retainer. However, the fact pattern here was that a relatively small start-up investment firm was pursuing one of the largest deals in the industry – a deal which, if they won a mandate on it, would potentially catapult them into the firmament of established advisors, as well as bringing in the largest fee ever earned by that firm. In such circumstances, the question of what a typical firm would do for a typical client does not provide a useful yardstick.

113. The issue was raised as to the use and usefulness of the Letters. The Claimant suggested that these were essential tools used to persuade the executive management of Barrick of the merits of the merger. On the basis of Mr Thornton's testimony, this is clearly wrong. Mr Thornton was consistent in his evidence that there was strong opposition within Barrick to the acquisition of further African assets, but this opposition was amongst the board, not on the executive management team. At this point the Letters were only circulated to the executive management team, and it is not clear if they were ever at any point shown to the board, individually or collectively. It should also be clear that, if this was the position of the board, there would have been no need to persuade them of the merits of the Three-Way Split – especially if it resulted in the disposal of the existing African mines. I therefore do not consider these letters to have had any substantial impact on the course of the transaction.

114. Mr Hannam's position is that he always regarded the Three-Way Split as a second best option, and that he continued to press for the full merger. However, the analytical work that he and his team did was almost entirely concentrated on the Three-Way Split – unsurprisingly, since it was at that point the only executable transaction. This, I think, is why, in the minds of both Dr Bristow and Mr Thornton, Mr Hannam's input is remembered as having been exclusively in the context of the Three-Way Split.

115. A core part of the Claimant's case is that the meeting at Jackson Hole resulted in an agreement between Dr Bristow and Mr Thornton to execute a nil premium merger of the two entities – that "there was a foundational agreement that the parties should and could now move forward, for the first time in their respective histories, towards the consummation of a nil premium "at market" merger". The Claimant's position is that at this point the merger was effectively agreed, and that everything that happened thereafter was mere tidying up. Hence, it argues, H&P shepherded the deal from inception to effective execution.

116. This position, although it has a kernel of fact, is absurdly overstated. It is clearly true that the more time Dr Bristow and Mr Thornton spent discussing the position of their respective companies, the more attractive a nil premium merger appeared to them, as more and more synergies were identified. However, at the end of the Jackson Hole meeting such a merger was not capable of being effected due to the relative levels of the two share prices, and the Three-Way Split and merger was still the only executable transaction on the table. In these circumstances to describe the merger as having been effectively agreed at Jackson Hole is hyperbole.

117. I think it is very likely that by the time Mr Thornton and Dr Bristow parted at Jackson Hole, they were of the view that a straightforward nil-premium merger would be the optimal outcome, but that some sort of sale of the Barrick RoW assets to Randgold remained the only actually executable transaction. Thus on the 19th April Kathy Sipos of Barrick circulated to the Barrick executive team a presentation put together by Klein & Co addressing a strategic asset sale from Barrick to Randgold, and on the 23 and 24th April Mr Shuttleworth asked for a set of slides from H&P explaining the proposed transaction which could be used to brief the Randgold board on the 7th May, although his evidence was that these slides were not in fact used.

118. The reason for that may well have been that the rating differential between Barrick and Randgold's shares in the market was narrowing.

119. Mr Thornton and Dr Bristow had agreed to meet in Miami on 16th May, and Dr Bristow e-mailed Mr Hannam the day before that meeting asking him for his views. Mr Hannam produced a document which he sent to Dr Bristow in response – this is **"Letter 5"**. This largely took the form of a letter from Dr Bristow to Mr Thornton, which it is agreed was never sent.

120. When Mr Thornton and Mr Bristow met in Miami, Mr Thornton expressed his view that the difference between the Randgold and the Barrick share ratings was now sufficiently small that it would be possible to execute a nil premium merger. From this point on the idea of the three-pillar strategy was discarded, and the process of due diligencing and executing the merger was commenced in earnest on both sides. Thereafter the only involvement of H&P in the

transaction was to respond to some requests for information from Randgold and to hold a meeting with CIBC, the substance of which is disputed.

121. An important question in these proceedings is as to what Mr Hannam thought that the position was as between H&P and Randgold, and as between H&P and Barrick.

122. His evidence was roughly as follows. He had initially been seeking to advise Barrick. After the meeting with Michael Klein it became clear to him that Barrick was going to appoint only Klein & Co as its financial advisor. Dr Bristow therefore agreed with Mr Thornton that Randgold would appoint H&P as its advisor; effectively as 'compensation' for H&P 'ceding' the role of Barrick's financial advisor to Klein. There was then the telephone call between Mr Hannam and Mr Klein. At some point thereafter Dr. Bristow said or did something which gave Mr Hannam reason to understand that, in exchange for H&P doing nothing all summer but 'keeping quiet', it would be paid a minimum of US$ 10 million but not less than whatever Barrick agreed to pay Mr Klein. As Mr Hannam said in evidence "The understanding that I would go quiet now, because of fixing the problem with Michael Klein, someone would have to take the bullet, and I arrived in London totally with — fees was not my problem", and later confirmed that he was "100%" "expecting to do nothing all summer on this deal".

123. This idea was firmly rejected by both Mr Thornton and Dr Bristow in their oral evidence. Mr Thornton's evidence was unequivocal. His cross-examination went as follows;

> "Q …. What happened after this meeting is that you explained to Hannam that in order to keep the circle of advisers tight, Michael Klein would be Barrick's financial adviser, as he always was, and Hannam would be Randgold's financial adviser.
>
> A. No. No. I don't remember telling him anything about Michael Klein, but I certainly could have, but I would never presume to tell some other CEO in some other company you should hire Ian Hannam."

Mr Thornton further confirmed that he "never discussed" with Dr Bristow involving Mr Hannam in meetings for Randgold.

124. Dr Bristow's evidence was equally clear - "I don't recall that and I find it difficult that I would have said something like that, so categorically". He continued that "for us to appoint an advisor, it is a process. We don't just do it lightly … this was a process … we hadn't appointed him. We had no contractual arrangements". The following day, when asked "whose side" Dr Bristow thought H&P was on a Jackson Hole he responded: "I believe that he was trading the position, my Lord, as I indicated. It was at times confusing …".

125. Mr Hannam's evidence is that he believed that he had reached agreement in principle with Dr Bristow at Jackson Hole that H&P would be appointed as a financial advisor, that Dr. Bristow had communicated this to Mr Shuttleworth, and that the subsequent meeting which he had with Mr Shuttleworth was to finalise and formalise this arrangement. He says that he came away from that meeting convinced that H&P's appointment (and remuneration) had been firmly agreed.

126. One of the most difficult parts of this case is to explain the conduct of Mr Hannam after the conversation with Mr Shuttleworth. He appears to have trumpeted around the H&P office the fact that he had agreed a minimum $10 m

fee, such that a number of the H&P staff contemporaneously recorded the fact. However, he seems to have done nothing else. Mr Webb's evidence was that he would expect any investment banker in this position to have sent an e-mail or other follow-up communication almost immediately to confirm the conversation and to create a record of the fact. Mr Harman, the expert for H&P, does not dissent from this, emphasising that a bank in this position "will therefore seek certainty that the client it has opted to work with does indeed retain it as advisor", if only because "once a bank is working with a company on an M&A transaction, it will be conflicted from working with any other parties". I should emphasise at this point that the question here is not as to whether a retainer letter was actually executed – it is as to whether a retainer letter was ever even proposed. The documentary record indicates that H&P never even put forward a retainer letter, and the implication from this is that they did not in fact believe that they were retained.

127. Mr Hannam exchanged e-mails with Graham Shuttleworth on the 24th April and with Dr Bristow on the 28th, and in neither case does he make any mention of what would have been – for H&P - a momentous agreement. In the e-mail of the 28th – which is extraordinarily incoherent – Mr Hannam does say that, as regards the financial models of mines which his team had developed, "You have first dibs. I am not going to do this with any other client unless you release me or when this mandate come to a[n] end.". However, this phrase is buried in the middle of some rambling text, and it is unlikely to have been noticed by its recipient.

128. This e-mail does, however, go some way towards explaining why Mr Hannam was excluded from the transaction going forward. Mr Hannam says that Mr Thornton – who he describes as a "pinnicty vindictive self obsessed peacock" had

> "had security and compliance go through the e mails, phone records of Richard Williams. They were sure he was my source and that my models were too accurate. They were different from those that john had seen but they have regressed their models on mine and therefore believe I have a secret source as you know its off their own sec registered info to the market as yours is...".

129. This was partially true and partially untrue – there is no evidence that Mr Hannam ever spoke to Richard Williams regarding this transaction, but Mr Hannam did have a "mole" in Barrick, that being Mr Humphries, who we know provided him with confidential Barrick information. The combination of this and Mr Thornton's belief, as apparently expressed to the board of Barrick (and repeated in his evidence in this trial), that the upset to negotiations which had happened on the 17 April was the result of the conduct of Mr Hannam, meant that (as Mr Thornton confirmed in his oral evidence) he did not want Mr Hannam involved in the deal.

130. Dr Bristow's response to this e-mail from Mr Hannam was emollient, and focussed on the due diligence process. As regards Mr Hannam's observations about his modelling capability, he observed

> "Lets not get ahead of ourselves. You will get a great lesson of how to build models in detail and analyse risk when you see my team at work and the results they can deliver in just a few days".

131. This was supported by the evidence of Mr Bock, whose oral evidence was that Randgold's modelling capability in this regard was significantly more sophisticated than that of any investment bank.

132. Mr Hannam's response to this, on the 29th, indicated that he knew that he was not involved in the transaction. He said

> "I would love to have had my people involved with this week's work so we can understand it better.. I would love to be seeing your e mails with john so I can see his mind and compared to the back up plan or is it the main plan they are executing on.", and ended "Miss talking to you.. From a business point of view..".

133. In practice this was the end of Mr Hannam's involvement in the transaction.

4.1 Mr Hannam's Conversation with Dr Bristow

134. H&P do not argue that the conversation between Mr Hannam and Dr Bristow constituted a contractually binding agreement. However, the question of whether this discussion took place, and what its contents were, is potentially relevant to their claim in unjust enrichment, so it is necessary to consider it here.

135. Mr Hannam's account of the 'in principle' fee agreement in his witness statement was as follows:

> "On Friday, 13 April 2018, I remember the first day being a busy day working in the guest apartment … In the afternoon Mark [Bristow] came over to the guest apartment. Mark, Ed [Humphries] and I were standing around the kitchen table talking about the merger. Ed gave Mark some insights on how Barrick functioned operationally and his perception of the personalities involved and the operational management. Ed asked how H&P would be paid for the deal. I remember saying that it had taken a huge amount of work to get everyone to Jackson Hole. I told Mark that we should be making a minimum of US$ 10 million with upside, as we were entitled to more. I said that in any event we should not be paid less than Michael Klein was going to be paid, as we had done much more than he had to put the deal together. Mark Bristow replied that this seemed reasonable and was agreeable to him, but he needed to get Graham Shuttleworth comfortable with this …".

136. The Defendant noted that this was a different account from that which Mr Hannam had given in the Wyoming proceedings, in which he had claimed to be

suing on a contract entered into in Jackson Hole – presumably in order to ground the jurisdiction of the Wyoming courts.

137. Mr Hannam's oral evidence was vague on the details of the conversation, and at various times he changed his versions of when the conversation was held and what was said.

138. Dr Bristow's evidence, by contrast, was entirely clear. He said that he did not remember the conversation, but that he was sure that no such agreement was reached, because he would certainly have remembered if it had been. His evidence was that Mr Hannam might have brought up the issue of fees, but:

> "if he [Mr Hannam] had really tried to get a deal done and get engaged, I would have remembered", because "if he had brought up a fee and it was specific and it was an attempt to be engaged, I would have immediately included other members of my team; legal, the CFO. I would have done that. I do that all the time. And, you know, negotiation of fees is a process, you know, that we are very obsessed about…".

139. This evidence was strongly corroborated by the evidence of the fee negotiations which Randgold entered into with the advisors who were retained on the deal. Dr Bristow also said, entirely plausibly, that it is "highly unlikely" that he would have replied that a US$10 million fee seemed reasonable to him.

140. Mr Shuttleworth's evidence also strongly rejected the suggestion that Dr. Bristow had told him that he had entered into any such agreement in principle with Mr Hannam, although he agreed that it was "possible" that Dr Bristow called him to ask him to set up a meeting with Mr Hannam. His evidence was that he was sure that Dr Bristow had not said to him that he had agreed a US$ 10 million fee with H&P because

> "it is not the way we do business. We would never just accept a fee. As you know, the evidence that is suggested here is that it was not only a $10 million fee, but it would be at least the same as what would be paid to Michael Klein. I think it is incredibly unlikely that Mark or I would go to our board and say: we have accepted a deal where we are going to pay an unknown adviser a fee, equivalent to the fee that Barrick pays their adviser and we have no idea what that number is."

141. I am therefore in no doubt that Dr Bristow did not give Mr Hannam any indication at that meeting that he was, or was to be, engaged. I think that the fact that Mr Hannam had to argue otherwise in order to ground jurisdiction in the Wyoming proceedings has coloured his memory to that extent.

4.2. Mr Hannam's conversation with Mr Shuttleworth

142. This brings us to the second conversation – between Mr Hannam and Mr Shuttleworth – in which Mr Hannam says that the oral contract was concluded.

143. On 24 April Mr Shuttleworth went to H&P's premises to meet Mr Hannam and "the team". He met Mr Hannam, Mr Allen and Mr Nganou. After about 20 minutes, Mr Allen & Mr Nganou left, and there was a further discussion lasting another 20 minutes or so between Mr Hannam and Mr Shuttleworth alone. It is with this latter discussion that we are concerned.

144. Mr Shuttleworth's evidence as to this discussion was clear

> "Q. So taking that in stages. To be clear, you do remember Mr Hannam is correct that he brought up the topic of fees with you.
>
> A. Yes. I would describe it as he probably had some fee aspirations. I don't remember the numbers that were put on the table, I remember that there was an attempt to discuss fees which I very quickly just ––
>
> Q. I 'm going to come to that ––

A. —— dismissed just because it was not relevant to engage in a conversation on fees.

Q. Let me take it in stages. Just on the number. Now you don't recollect exactly what was suggested.

A. No.

Q. But can I suggest it was unlikely that Mr Hannam asked for less than the 10 million smallest fee that Alex Allen jotted down at {F3/1/2}?

A. I simply can't agree with you, because, as I have stated, I don't remember what was suggested.

Q. Okay, but just in terms of —— obviously it was a long time ago, and I'm just trying to explore likelihoods. But if Alex Allen and Ian Hannam were contemplating 10 million smallest fee on 17 April, it is not likely, is it, that he asked for less than that sum?

A. It is quite possible. He may have asked for 15, he may have asked for 20. I don't remember. As I say, it was an irrelevant conversation, because at that point it just wasn't relevant to be discussing fees. We had not decided what the deal was, we hadn't decided what the roles would be, we had not decided who was to be retained. So to have a conversation around fees in those circumstances was just not relevant.

Q. You do remember him bringing it up.

A. I do remember he mentioned some fee aspirations, yes.

Q. What I'm suggesting to you is that in this conversation, Mr Hannam asked for a minimum fee of 10 million, and an uplift which was not less than paid to Michael Klein.

A. As I say, I don't remember of specifics around what his fee aspirations were.

Q. Just exploring —— it is not your case you said "no, Mr Hannam, impossible, out of the question", is it?

A. No, that's not what I said. Just because I wasn't having a fee discussion . If I was having a fee discussion, I would have said "No, that's out of the question. How can you ask for that?" It just wasn't relevant to have a fee discussion, so it was just, "Yeah, we will talk about that some other time, it is just not relevant now". That's what that means.

Q. I think your best attempt to give the words you used are in your witness statement there, aren't you, as you explained when

> confirming this, it was something a bit more positive than that, wasn't it, "That's interesting we will think about it"?
>
> A. Again, one is being polite . You have met this person for the first time, you are at the very early stages of a transaction, you don't even know whether you are going to have a transaction, and he starts talking to you about fees, you just like "That's nice, let 's –– just not really –– something we are going to discuss now."
>
> Q. Let me explore it further . You didn't mention an alternative 2 million fee, did you?
>
> A. No, I did not.
>
> Q. You didn't say: "it is just unprofessional of you to be raising fees".
>
> A. No, I did not.
>
> Q. "That is interesting ." It was a relatively ––
>
> A. Just to be clear , my words are "something like", okay? So I can't remember exactly what I said, but I'm trying to portray the kind of conversation that I would have had which was just to dismiss the topic, because it wasn't relevant discussing."

145. By contrast, Mr Hannam's evidence on the 24 April 2018 meeting was unclear, vague and differed on some points from his witness statement;

> "A. I stated that, and we talked about fees in the market, we talked about what our expectation was, and I said that on the basis that there would be CIBC and Barclays in the ratio that I was expecting a minimum of $10 million fee, number one; number two, there would be no less than Michael Klein, and that's essentially what we agreed.
>
> Q. That's all you remember now?
>
> A. Correct. I know that when I came out of that meeting I briefed Alex Allen …
>
> Q. Did you refer to Jackson Hole in your discussions with Mr Shuttleworth?
>
> A. I 'm sure we talked about Jackson Hole at length prior to us –– prior to just him and me being alone.
>
> Q. What about when you were alone?

A. I can't recall."

146. The Defendant notes – justifiably – that this evidence makes no mention of the 'rider' that H&P's fee would be "subject to a pro rata upward adjustment in the event that the deal were to revert to the 3-pillar Strategy", as set out in the pleaded claim, or to the fact that Mr Hannam's witness statement had said "I then asked the team to leave the meeting … I told him [Mr Shuttleworth] that Mark [Bristow] had agreed this in principle at Jackson Hole but wanted Graham's confirmation …". I note that the Claimant accepts that the "upward adjustment" point which was pleaded is no longer sustainable given the evidence at trial.

147. It seems to me that the tension between these two accounts is not so great as to prevent them both being largely accepted. I have no doubt that Mr Hannam did set out his fee expectations to Mr Shuttleworth. I equally have no doubt that Mr Shuttleworth sought to be politely non-committal. Indeed, I think it is possible that he may well have given Mr Hannam the impression that he would relay his expectation levels back to Dr Bristow for further consideration. I have no doubt that Mr Hannam would have taken this as an indication that his proposals were acceptable. I have no doubt that Mr Shuttleworth was confident that he had not verbally committed to engaging H&P at that or any other fee level.

4.3 The "footprint" of these conversations

148. As Leggatt LJ said in *Blue v Ashley*, where there is a conflict of testimony over a verbal agreement, the correct approach for the court is to examine the "footprint" which the relevant interaction has left in the electronic record.

149. The starting point here is H&P's emails with Mr Shuttleworth. Mr Hannam's email to Mr Shuttleworth, sent in the evening of the day of their meeting on the 24th April, made no reference whatsoever to any agreement regarding H&P's fees. It focused on "a misunderstanding of where H&P's revenue has come from over the last 5 years" and set out Mr Hannam's vision for H&P's business. When this was put to Mr Hannam in cross-examination, he explained that "There was no doubt about Hannam & Partners being appointed, but [Mr Shuttleworth] said, 'Look, I need some colour'" – the implication being that although Mr Shuttleworth had decided to appoint H&P, he felt he needed more information about H&P to convince his board of the wisdom of the appointment.

150. Mr Shuttleworth's response to this e-mail was "Thanks Ian – it was good to meet up and important for me to ask the questions the board might ask of Mark [Bristow] and myself. It looks like you are off to a very good start". This is supported by the fact that earlier that night, H&P had emailed Mr Shuttleworth an "updated 'Board Pack' presentation as discussed in our meeting today". Mr Shuttleworth had responded asking Mr Hannam (inter alia): "[D]o you want to add a creds slide for H&P as the last appendix?", and such a slide was added. The Defendant argues that this points away from rather than towards the idea that Mr Shuttleworth had agreed to appoint H&P, since in such a case he would not have needed H&P to provide what was basically a pitch document.

151. Mr Shuttleworth's explanation for requesting this material is illuminating in this respect. His evidence was that

> "I remember my cynicism about H&P at this point, because I knew the Randgold board were going to be pretty sceptical about appointing them. The board were very experienced – we had

> Chris Coleman who is at Rothschild, and Andy Quinn who is ex-CIBC – and they knew exactly who Mr Hannam was and were aware of his reputation. They would've known that his boutique advisory firm was just that, and on a potential deal of this size they would have wanted to interrogate H&P's credentials."

152. These exchanges point away from rather than towards the idea that an appointment and a fee were agreed at the meeting. I therefore turn to the internal H&P materials.

153. There are two internal H&P documents on which the Claimant relies. One is a note made by Mr Allen of something said to him by Mr Hannam. The note reads "$10 million smallest fee". It appears to have been made on the 17 April – i.e. some days before the meeting between Mr Hannam and Mr. Shuttleworth.

154. There is a second note which Mr Allen says was made after the Shuttleworth meeting – this again is a note of something said to him by Mr Hannam. It appears to state: "Cant [sic] engage as would be [unclear] $10mm minimum fee". The Defendant points out that this does not reflect the terms which H&P claims were agreed by Mr Shuttleworth in the 24 April 2018 Meeting.

155. A third record is an exchange of emails between Mr Bell and Mr Nganou – both employees of H&P. Mr Bell had asked Mr Nganou to "summarise it in one word" the outcome of the meeting between Mr Hannam and Mr Shuttleworth on the 24th April, and Mr Nganou's response, timed at 23:11 on 24 April, was "US$10mm". Since it is accepted that Mr Nganou was not present at the part of the meeting where fees were discussed, this can only have been something told to him by Mr. Hannam.

156. H&P operated using familiar management structures, and in due course an internal memorandum was prepared to the New Business Committee (the "**NBC**

Memo") dated 30 April 2018 setting out the proposed business. This said that the proposed fee was "a preliminary fee of up to US$10mm as Financial Advisor paid on a basket of assets worth US$ 2-3bn". This appears to be a reference to the proposed Three-Way Split transaction.

157. Mr Allen suggested that this was simply a poor choice of words, and explained that "Ian [Hannam] was not responsible for drafting or involved in drafting these types of documents". The position therefore seems to be that this document was the result of a process of Chinese whispers.

158. The subsequent internal H&P communications exhibit similar degrees of vagueness as to what the proposed transaction actually was, or what the fees might be. Mr Ward, H&Ps finance director, testified that he understood that the agreement with Randgold was as Mr Hannam had stated, but, when the NBC Memo was put to him, replied "So then perhaps I did not read this note sufficiently carefully enough, but my understanding was it was $10 million and I'm pretty sure that the fees could be enlarged if the deal was to revert". On 25 June 2018, Mr Ward emailed Mr Passmore with draft cash flow forecast/summary for "Exco" stating "Will not mention [US]$ 250k work fee on British Rail not materialising nor that we have burnt 100k on costs incl data source". On 14 August 2018, Mr Ward emailed H&P's "Ex Co" mailing list discussing the cash flow problems then facing the firm. The only mention of Randgold was "[Ian Hannam] to please give status update and whether expenses recoverable". When Mr Ward was pressed in cross-examination on the point that he had never mentioned a US $10 million fee in a single email, his only evidence was that "I was speaking with Alex Allen, with whom I used to run

through the park, who had told me that the deal was happening, so I was aware there was a 10 million fee". This was not covered in Mr Allen's written or oral evidence.

159. I accept that it is unreasonable to expect the internal processes of a relatively small boutique start-up to have the degree of robustness that one would expect from a substantial institution. However, I think that the fact of this vagueness means that these internal processes do not provide any very significant "footprint" to buttress Mr Hannam's claims.

160. After the Merger was announced, none of H&P's internal communications stated that H&P would receive at least a US$ 10 million fee. This was accepted by Mr Hannam, who evidence was that

> "There is nothing, because at the moment I'm dealing internally with a fallout as the founder of a company that I have let down my partners and I have let down my partners and I have let down more particularly people who worked on the deal …"

161. The most important part of the "footprint", however, is the missing piece. At no point does H&P seem to have made any attempt to seek to agree an engagement letter with Randgold, or even seek to put together a draft engagement letter internally. Mr Hannam's explanation of this in his evidence was as follows:

> "Q. But the point is this: that if you thought you had an agreement, it was in your interests to reflect that in writing, for a number of reasons, not just certainty so that you could show it to my client, but for genuine practical reasons.
>
> A. I have done business in a certain way, which is from what I have seen the other banks did, that you have an agreement on a quantum of fee, you normally only really know what you're going to make the night before at the board meeting, if –– even then sometimes not till afterwards because of the performance fee, it can go on for a couple of months, and that essentially

> nothing is secure or safe, you know, the quantum, and it's why it is the way I do business, I 've always done business.
>
> There is no difference in this deal from any other deal on the fee side of the equation. Okay? We agreed what the minimum fee would be, we agreed that there was upside, and as we have seen the roles were changing, and I did make sure, you know, and we knew in what context there was discussion of fee, who are the two banks on the other side and who were the three on ours."

162. It is just plausible that this is an attempt by Mr Hannam to run the "grandee's defence" – that one is too important to trouble oneself with such administrative details, and cannot therefore be said to have intended their non-performance. However, Mr Passmore, who was the CEO of H&P, was precisely the man charged with ensuring that such administrative details were dealt with. H&P did have systems and processes in place for formal engagement and onboarding of new clients, and there was internal recognition within H&P of the importance of following these. Within H&P's disclosure there are at least 13 examples of formal engagement letters that were entered into between December 2010 and 2022, including letters personally signed by Mr Hannam. When asked about this in evidence, Mr Passmore confirmed that there was "[n]o attempt to reflect [the fee agreement] in an engagement letter". His evidence was that, although it was "commonplace" for H&P to enter into engagement letters, "I wouldn't say it was always our practice, it's still not always our practice".

163. By contrast, every advisor who acted on the merger concluded an engagement letter. This is consistent with H&P's own expert evidence that: "M&A advisors typically seek to sign an engagement letter with their client once active engagement begins on a prospective transaction … [A bank] will therefore seek certainty that the client it has opted to work with does indeed retain it as advisor".

164. There is no doubt that Mr Passmore knew that a retainer letter would have been necessary for H&P to produce research on the merger. On 20 April 2018, Mr Passmore emailed Mr Hannam stating: "Key is must be properly mandated and paid for by rand Gold [sic] in mandate letter … This is what covers us in terms of how and why we can write". This is a reference to the rule introduced by MiFID II that investment managers may only receive research relating to a public offering if it is paid for by an issuer client of the firm writing it (see FCA COBS 2.3A.19).

4.4 Did the Parties behave as if There Were a Contract in Existence?

165. Having examined the "electronic footprint" of these discussions, the next step is to examine the parties' subsequent behaviour. Did they act in a way which can best be explained by a belief that the contract had been entered into?

166. The Claimant relies on two substantial pieces of work which it says were requested by the Defendant after this meeting:

i) On 25 April, H&P say that they provided a pack of papers for Randgold's board, which represented a synthesis of substantial work conducted by Mr Hannam and the team at H&P since January. Mr Shuttleworth's evidence was that this was provided in response to a request which he had made prior to the meeting with Mr Hannam for a deck summarising H&P's earlier work on the three-pillar structure. The deck provided addresses only that structure.

ii) On 3 and 4 May, H&P say that they engaged in extensive modelling support and interactions with Sebaastian Bock from Randgold,

providing detailed financial models on a number of mining assets sourced from the McKinsey MineSpans database. On or about 9 May, H&P say that they worked with Randgold to prepare a report and set of financial models on a number of assets (including the Veladero Mine in Argentina; the Alturas feasibility project in Chile; and the Acacia operations in Tanzania). Here again, Mr Bock's evidence is that this was simply a request for public information which he knew that H&P had to hand through the MineSpans system. Mr Bock's evidence on this interaction was as follows

> "We regularly used investment banks to provide us with this kind of information when we were exploring possible deals. The reason we did this was to save ourselves time and to avoid having to collate the information ourselves. We then used the models provided by the banks from databases like MineSpans to verify the analysis we had been doing in-house which, in this case, fed into a note we were preparing for Randgold's board of directors about the feasibility of a transaction with Barrick. The key analysis was therefore carried out by Randgold, not H&P. They just provided us with some further information that they could access by virtue of their subscription to MineSpans."

167. A review of this "footprint", taken as a whole, can only conclude that it provides no support for the case put forward by the Claimant that, after the meeting concerned, the parties behaved in a way which is compatible with the alleged contract having been entered into.

5. Was There a Contract?

168. The question I have to ask is whether there was an oral offer and acceptance sufficient to create a contract. This question is to be determined objectively, not subjectively. I am not concerned with whether either Mr Hannam or Mr Shuttleworth intended to enter into, or believed that they had entered into, a

contract. The question that I have to answer is as to whether an objective observer would have concluded that an offer had been made and unequivocally accepted (*Chitty on Contracts*, 35th ed. (2023) 4-002), regardless of the state of mind of the parties.

169. It is clear to me, on the basis of his evidence, that Mr Shuttleworth had no intention of contracting with Mr Hannam. The question is therefore one as to whether an independent observer would have concluded from his words and conduct that he had in fact intended to do so – as Lord Reid (citing *Gloag on Contracts*) said in *McCutcheon v David Macbrayne Ltd* [1964] 1 W.L.R. 125 at 128 "the judicial task is not to discover the actual intentions of each party; it is to decide what each was reasonably entitled to conclude from the attitude of the other." Even if I accept Mr Hannam's evidence that he sincerely and genuinely believed that an agreement had been reached, I can only find that such a contract was in fact made if I accept that a reasonable observer would have concluded that that was Mr Shuttleworth's intention.

170. Having seen Mr Shuttleworth's demeanour as a witness, and having heard his evidence, I do not believe that he would have given any such impression. I believe him that his sole object during this part of the discussion was to avoid the conversation. I think it is clear that Mr Hannam did make an oral offer. However, in order for an offer to ripen into a contract, the acceptance must be clear, unequivocal and without qualification. I think it is entirely clear that that test was not satisfied here. The position is much closer to that in *Rees v Warwick* (1818) 2 B. & Ald 113, where a reply to an offer to the effect that "your order is receiving our attention" was held to be too indefinite to amount to an

acceptance. Consequently I do not believe that Mr Shuttleworth accepted Mr Hannam's offer, and that therefore no contract was formed at that point. Since it is not argued that there was any later point at which a contract might have been formed, I am therefore satisfied that no contract to provide investment advisory services was ever made between H&P and Randgold.

171. Finally, I note that even if the contract pleaded in the Claimant's case had in fact been made, the Claimant would not be entitled to the relief that they claim. The essence of the Claimant's version of the proposed agreement between H&P and Randgold is that Mr Shuttleworth, on behalf of Randgold, agreed that Randgold would pay a "minimum fee" of USD10m to H&P in respect of its advisory services in relation to the merger and subject to a pro rata upward adjustment in the event that the deal were to revert to the 3-pillar Strategy or such greater sum as would match the fee paid by Mr Barrick to Mr Klein.

172. The problem with this is that although it addresses the idea that the Claimant will be paid a fee, it is alarmingly non-specific about what its obligations might be. I think there are two possibilities - one is that H&P would be paid the amounts specified if it acted as financial adviser to Barrick throughout the course of the transaction, and the other is that the fee was simply to reflect Mr Hannam's role in putting the two sides together – in other words, as a thank you for work already done. In either of these events, I cannot see that there would be any claim for the amount specified in the pleadings. In the first case, the amounts would not be due because H&P did not perform its side of the contract, in that it did not act as financial advisor on the transaction. There might well be arguments as to the quantification of damages where a party is prevented from

performing its contractual obligations by the default of the other party, but these are not pleaded. In the second case the rule against past consideration would seem to invalidate the contract completely. It might be possible to make a case for some sort of damages claim based on the small amounts of work done by H&P after the alleged contract was entered into, but this would be a difficult quantification exercise subject to the ordinary rules on causation and mitigation, and, again, no such claim is pleaded.

173. I am therefore satisfied that no contract of the form pleaded was ever entered into, and that, even if it had been, no relief would have been available to the Claimant in these proceedings on the basis of its claim as pleaded.

6. Unjust enrichment

174. If there was no contract in existence, the Claimant presses a claim for a non-contractual *quantum meruit*. It is well-established that in considering such a claim, the court should approach the issue through the prism of unjust enrichment. This is an analytical framework which is applied across a number of different judicial remedies, and entails the application of a four-stage framework.

(1) Has the defendant in fact been enriched?

(2) Was the enrichment at the claimant's expense?

(3) Was the enrichment at the claimant's expense unjust?

(4) Does the defendant have a defence?

If the answer to the first three of these questions is 'yes' and the answer to the fourth question is 'no' then the claimant has a right to restitution. What this means is that the availability of common law remedies such as *quantum meruit* should be assessed by reference to this framework, and that is the approach which is applied here.

175. It is customary at this point to observe the importance of analytical clarity in unjust enrichment claims generally. Per Lord Reed in *Investment Trust Companies* (supra) at [41], referring to the four overarching questions identified in para [174] above:

> "If they are not separately considered and answered, there is a risk that courts will resort to an unstructured approach driven by perceptions of fairness, with consequent uncertainty and unpredictability. At the same time, the questions are not themselves legal tests, but are signposts towards areas of inquiry involving a number of distinct legal requirements. In particular, the words "at the expense of" do not express a legal test; and a test cannot be derived by exegesis of those words, as if they were the words of a statute".

6.1 Was there enrichment?

176. The Claimant maintains that the fact of enrichment here is self-evident – the Defendant entered into an extremely successful corporate transaction which they would not have entered into had it not been for the actions of the Claimant. The Defendant, however, advances an argument that in fact there was no such enrichment. They base this argument on the proposition that the basis of agreement between the Defendant and the Claimant was only established at the meeting on the 24 April 2018, and that it is only actions taken after that meeting which should be taken into account as enrichment resulting from the

establishment of that basis. They then provided a detailed analysis of these actions, seeking to establish that they were collectively of no more than a trivial benefit to the Defendant, and that, considered in the round, I should find that there was no enrichment.

177. The basis of the Defendant's argument is that the work actually done by H&P after the Jackson Hole meetings was as follows:

25 April 2018 pack of papers for Randgold's board

178. This presentation contained 30 slides, of which five were title or disclaimer slides. Save for slide 12, the presentation "simply reorganised the Three-Way Split analysis" in earlier presentations. Page 12 itself appears simply to have repurposed a slide from an earlier presentation, which had showed "BarrickRand on the global cost curve". This is no criticism of H&P, since Randgold did not request H&P to do anything new at that stage. Mr Shuttleworth's evidence is that he

> "asked H&P to provide us with a slide deck that we could include in the board pack for Randgold's next board meeting. My memory of this request was that we wanted a summary of some of the ideas we'd been talking about. What I was essentially asking for was a repurposing of H&P's existing decks - I was not asking them to do anything new".

179. The extent of the benefit conferred on Randgold by this presentation was therefore that "it likely saved them time and effort which they themselves would otherwise have expended in creating a briefing pack for the board". Mr Shuttleworth's oral evidence was that "It was our practice to share with the board the work that we had been discussing with investment bankers, so this was part of a normal process of keeping them informed about topics of

conversation that we were having." Mr Bock confirmed in his oral testimony that he and the Randgold team were working on an internal board presentation.

28 April 2018: a presentation revising the 25 April 2018 presentation

180. The presentation sent by H&P on 28 April 2018 is materially identical to that sent on the 25 April 2018 save for slide 15, which was amended following a request from Mr Bock to correct the figures presented to compare like with like. Mr Nganou confirmed in an email that the task of fixing the slide was "a 5min job".

3-4 May modelling support and interactions with Mr Bock

181. In response to requests from Mr Bock on 3 and 4 May 2018, H&P sent Randgold five MineSpans cash flow models for some (but not all) of the assets included the Barrick RoW asset group. Mr Bock's explanation of this in his oral evidence was that

> "[It] was quite normal for any investment bank to have this kind of information. This was public information, and we regularly used investment banks to provide this information for us, rather than to troll through a lot of documents and databases to try and pull it all together"

182. Mr Webb concludes that, "to the extent used", those MineSpans models would have conferred a real benefit on Randgold because "the process of assessing each asset from both a fundamental perspective (whether from MineSpans or another source) and a market view … is, in my experience, a helpful exercise prior to due diligence as it highlights areas of particular interest or concern which can then be examined when the other company's information is made available". However, his evidence is that this benefit was "short-lived" because

it "largely became obsolete once Randgold was able to assimilate the asset data …. and replace the MineSpans models". The MineSpans models were never carried across to any of CIBC's work product, and Mr Bock testified that Randgold "did quite significant modelling. My own view was that our models were quite −− very sophisticated, actually, and therefore, as a matter of fact, that's why we did not rely on the MineSpans models and we built our own models to give us the flexibility and also the kind of technical links between the different models we needed". He also confirmed that Randgold modelled the mines of competitors (including Barrick) as well as its own mines.

Alleged 9 May work on certain specific mining projects

183. Mr Bock's written evidence (on which he was not cross-examined) was that this did not happen, and there is no evidence of H&P providing this kind of assistance in the parties' disclosure. The 6 May 2018 update to the Randgold board appears to have used some of the figures provided by H&P on 4 May 2018 and H&P's historic consensus equity analyst valuations, but seems to have been entirely internally produced.

Letter 5

184. Letter 5 was an email sent by Mr Hannam to Dr Bristow on 14 May 2018, in which Mr Hannam set out the draft of an email for Dr Bristow to send to Mr Thornton.

185. Letter 5 was not requested by Randgold. Mr Nganou produced a first draft of it on 10 May. On 13 May Dr Bristow emailed Mr Hannam "Meeting Thornton in Miami Monday - any views/advice for me to consider ahead of the meetings",

and Letter 5 was sent to him by Mr Hannam in response. Dr Bristow never sent the draft text contained within Letter 5 to Mr Thornton, or anyone else.

186. It was put to Dr Bristow that, even if he had not forwarded Letter 5, he had nevertheless used it as "notes for argument" in the discussion with Mr Thornton. His evidence was: (a) "I don't believe I used it" and (b) "I think I was quite qualified to argue the full case with Mr Thornton, as I had done back in 2015". This seems plausible, since Letter 5 largely recycled much of the content of Dr Bristow's email to Randgold's Board, which Mr Bristow had sent to Mr Hannam on 9 May 2018, and Dr Bristow described it in his oral testimony as that "all [Mr Hannam] was doing was feeding back my view to me". When a similar proposition was put to Mr Hannam in cross-examination, he replied: "I totally agree that this letter was drafted with – as a result and the sharing of knowledge between myself and Mark Bristow".

187. Mr Hannam characterised Letter 5 under cross-examination as follows :

> "… [L]etter 5 was an email that was a briefing note that could be summarised as a helicopter pitch, a briefing note or followed up and edited immediately after the transaction by Mark Bristow to John Thornton."

188. The Defendant submits that this unsolicited "helicopter pitch" (which was never used) conferred no real benefit on Randgold. Indeed, they argue that Letter 5 was an attempt by H&P to seek to remain involved with the principal(s) and jockey for a position in the deal. That is not something for which Randgold should have to pay H&P.

End of June/beginning of July alleged liaising with H&P

189. The Defendant says that this alleged work simply did not happen. Mr Bock's evidence (which was not disputed in cross-examination) was:

> "I do not recall liaising with H&P concerning modelling requests at the end of June / beginning of July 2018, as I am told H&P claim. As I oversaw the financial modelling workstream on the deal, I would have been aware of any requests like this". There appears to be no correspondence between H&P and Randgold concerning financial modelling after 4 May 2018.

Meeting with CIBC on 13 July 2018

190. There a direct conflict of evidence about the reason for this meeting – Mr Hannam's evidence is that he was asked to see Mr Johnson to brief CIBC on work done to date, whereas the Defendant's evidence is that he was asked to meet Mr Hannam not to leak information about the proposed Merger.

191. By the time of this meeting CIBC had already been working on the deal for two months, and had already produced a draft presentation for Randgold's Board which extended over 81 pages. As Dr Bristow confirmed in evidence, CIBC did not need any briefing from H&P. Mr Webb's evidence was that

> "I cannot therefore see any value in asking H&P to brief CIBC, or how any briefing by H&P to CIBC would have benefitted CIBC or Randgold. CIBC would have had a much better handle on what was happening on the transaction than H&P, whose last piece of work was sent to Randgold on 4 May 2018".

It is hard to see how this meeting could have conferred any benefit on Randgold.

Work Done "For free"

192. A somewhat misleading sideshow was raised in this regard by the discussions as to whether the work done by H&P was "of a kind normally given for free", and it is necessary briefly to discuss this.

193. When applied to the particular context of investment banking, this is a difficult concept to construe, since it assumes that there are an identifiable group of services that an investment bank would not give for free. This may, in some circumstances, be true of some very large investment banks or some very eminent investment bankers. However, in the main, investment bankers, like teenage lovers, pour out their efforts, almost without limit and in response to the slightest encouragement, in the hope of reaching the nirvana of a mandate. The idea that there are an identifiable group of activities which such individuals would not do even if they believed that, by doing them, they could secure a valuable mandate, has the charm of both originality and novelty. It is clearly the case that any sensible investment banker will after a while decide that a particular mandate is no longer worth pursuing, on the principle of not throwing good money after bad. However, until that point is reached, as Pope wrote in his "Essay on Man", hope springs eternal in the human breast.

194. It was accepted by both experts that the way in which investment banking retainers are established is that there is an initial indication of appointment, followed by a detailed discussion as to fee levels, followed (sometimes at a very late stage) by the execution of a formal retainer letter. Importantly, there was also an acceptance that by the time even an initial indication of appointment has been given, a substantial amount of valuable work will already have been done, and the total fee level will reflect that work as well as work done subsequent to

the indication of appointment. Thus, the fact that valuable work has been done by an advisor prior to the initial indication of appointment does not of itself prove that there is an understanding between the parties that that advisor will be (or can expect to be) appointed and therefore remunerated. However, conversely, the fact that an advisor has done substantial work prior to appointment is not an indicator that that work will not be remunerated. The position is, of course, very different in other industries, as can be seen from the decision in *Countrywide Communications Ltd v ICL Pathway Ltd* [2000] CLC 324. However, it is impossible to set general principles here - each industry must be approached through its own customs and practice.

Conclusion on enrichment

195. The Defendant therefore says that only two of these pieces of work could possibly be said to have conferred any benefit on Randgold: (i) the 25 April 2018 pack of papers for Randgold's board; and (ii) the 3-4 May 2018 modelling support and interactions with Mr Bock. However, both pieces of work were merely updates to and/or the sending of work which H&P had previously carried out or obtained for Barrick. The real benefit conferred by those pieces of work was avoiding the opportunity cost of Mr Bock (and/or more junior Randgold finance staff) repurposing that work and/or searching for its underlying data. The Defendant submits that the objective market value of these services should be assessed at zero.

196. I do not find this argument persuasive. Even if I accept that everything done prior to Jackson Hole should be regarded as having conferred no benefit on Randgold, and even if I were to apply the absolute approach to value adopted

by Professor Beatson (in *The Use and Abuse of Unjust Enrichment*, 1991) that the provision of pure services can only constitute an enrichment where the defendant has been saved a necessary expense, I would find myself unable to conclude that the acts identified above conferred no benefit at all on Randgold – especially since Randgold had specifically asked for at least some of them. The Defendant's alternative value for these services - $125,000 – may well set a lower bound, but this is not zero. Consequently, I find that there was enrichment.

6.2 Was the enrichment at the expense of the claimant?

197. The Defendant sought at trial to argue that any enrichment it may have received from the Clamant had not been at the Claimant's expense. The basis of this argument was that the bulk of the work seems to have been done by two individuals - Mr Humphries and Mr Hanrahan – neither of whom were employees of HP at the relevant time, and one of whom was an employee of Barrick.

198. I think this argument is misconceived. I have no evidence as to the financial arrangements in place between H&P and Messrs Hanrahan and Humphries, but I decline to believe that they were working on a purely gratuitous basis. I think I am entitled to assume without evidence that when a man does really significant work for a firm, he does so either for reward, or in the expectation of reward. I do not know what H&P paid or promised either of these individuals, but I think I can be confident that they were paying or promising something, and the person responsible for providing that something would have been H&P. Consequently, I think that if H&P was obtaining work product from these individuals in order

to provide it to Randgold, whatever the terms on which it was obtaining that work from them, that work can be said to have been provided at their expense.

6.3 Is there an unjust factor?

199. The Claimant puts its case on unjust factors on two separate grounds – one being free acceptance and the other being failure of basis. I will deal with these in order.

6.3.1 Free acceptance

200. Goff & Jones, in *The Law of Unjust Enrichment* (10th edn, 2022) at [17-03]) ("**Goff & Jones**") describes the principle of free acceptance as follows

> "[A defendant] will be held to have benefited from the services rendered if he, as a reasonable man, should have known that the claimant who rendered the services expected to be paid for them, and yet did not take a reasonable opportunity open to him to reject the proffered services. Moreover, in such a case, he cannot deny that he has been unjustly enriched".

201. Goff & Jones goes on to emphasise (at [17-11]) that:

> "The defendant must know, or ought to have known, that the claimant expected to be paid (or remunerated in some other way) for his services. It is for the claimant to make this expectation clear to the defendant. Thus, there is no liability where a defendant freely accepts services which he was led to believe were being conferred gratuitously".

202. "Free acceptance" is a troublesome concept which has been to some extent tiptoed around by the judiciary. The brainchild of academic writers, it first appears (I think) in Professor Birks *Introduction to the Law of Restitution* (1985). It has been discussed in a number of cases, but rarely applied. The reason that it is problematic is that it has frequently been assumed to mean "voluntary acceptance", and to imply that any person who knowingly receives

goods or services must be liable to make restitution. To be fair, this is not at all what Birks meant. In his *Introduction* he explains the point as follows

> "the word "free" is only intended to emphasise the requirement, arguably implicit in the notion of acceptance even without the addition of any adjective, that the defendant must have had a choice whether to accept or reject, and must have had sufficient knowledge of the facts to make that choice a real one. A free acceptance occurs where a recipient knows that a benefit is being offered to him non-gratuitously and where he, having the opportunity to reject, elects to accept." (at p. 265).

203. I think that this makes entirely clear that when Birks speaks of "free acceptance", the thing being accepted is not the goods or services, but the offer – express or implied – of them. There is a separate and subsidiary discussion to be had as to when the delivery of goods or the performance of services necessarily implies without more an offer for payment of those goods or services, and in such cases knowing acceptance of those goods or services necessarily constitutes an acceptance of the offer to provide those goods or services for payment.

204. The problem with this analysis is that it is impossible to distinguish between the acceptance of an offer on such terms and the establishment of a basis which then fails. This is why Lord Burrows felt able to explain in *Barton v Morris* [2023] UKSC 3 that "free acceptance is not an unjust factor in English law" (at [230]), and that issues of this kind should be analysed as failure of basis. However he did not think that this made any real difference – he went on to say that addressing issues of this kind as a matter of failure of basis "makes no difference to the substantive law" (at [231]). I think that this is clearly correct. In both cases the investigation is the same – was the arrangement between the parties based on a reasonable assumption as to future facts which did not materialise (or which

evanesced)? It is also the position that is supported by the majority of academic commentators: see, in particular: (i) Virgo, *The Principles of the Law of Restitution* (4th edn, 2024) ("**Virgo**"), at p. 91; (ii) Burrows, *The Law of Restitution* (3rd edn, 2010), at p.334-339; (iii) Burrows, *A Restatement of the English Law of Unjust Enrichment* at p.3.

205. I think the reason that Lord Burrows felt it necessary to make the point about free acceptance is that over time the question of what it is that is being accepted has become confused, and a strain of thought had developed whereby acceptance of the thing provided, without more, might give rise to a remedy in its own right. This is explained by Day and Virgo in their note on the Court of Appeal decision in *Barton, Risks on the Contract/Unjust Enrichment Borderline* (2020) 136 LQR 349, where they explain the effect of this wider meaning of free acceptance:

> "failure of [basis] requires the claimant's condition for conferring the benefit to be shared by the defendant. For free acceptance, however, it suffices that the defendant is merely aware that the claimant expects to receive a quid pro quo for the benefit. Because the claimant need not have secured the defendant's agreement to that exchange, it follows that free acceptance rewards risk-taking …Thus, rather than respecting the parties autonomy, free acceptance cuts across it."

206. The implication here is that mere acceptance, without any kind of express or implied agreement, is capable of being an unjust factor. This is highlighted by the editors of Goff & Jones, who say (at [17-03]) referencing particularly *Benetti v Sawaris*,

> "Unfortunately, recent authorities recognising the principle of free acceptance have tended not to explain the point, assuming that because a benefit has been freely accepted, it must, therefore, be unjust for the defendant to retain it."

207. The point at issue here is at heart a very simple one – does the provision by one person of a benefit to another give rise to a restitutionary remedy in circumstances where no basis on which that benefit was provided can be found? The claimant argues that there is – that there may be cases where there is no shared basis of transfer, but the defendant's conduct leads a claimant reasonably to expect payment, and the claimant cannot have been said to have taken the risk that the defendant will not pay.

208. I think that Lord Burrows is clearly correct that the idea that mere receipt of a benefit creates a restitutionary liability unless there is a positive act of rejection by the recipient in advance of or during the receipt, is incompatible with English law. I have three grounds for this.

209. The first ground is simple logic. In a case of this kind, the first and most important issue is to identify why and on what basis the services concerned were supplied in the first place, and how it was that the provider came to form his certain expectation of payment. You cannot begin by assuming the expectation of payment. Services may be supplied in the expectation of payment, or merely in the hope of payment, but there must be some ground for this hope or expectation – it cannot be conjured out of nothing. If a supplier accepts the risk of non-payment, no injustice arises if he is not paid. However, it is impossible to say whether a supplier has accepted the risk of non-payment without examining the circumstances in which he came to form the expectation of payment in the first place.

210. It is clear that an expectation of payment can justifiably arise without any active acknowledgement of obligation by the payer – see *Lamb v Bunce* (1815) 4 M.

& S. 275. However, there is a world of difference between a man who does not act in a situation where he knows that his inaction will indicate a willingness to assume an obligation, and a man who does not act because he believes that he has no liability and, as long as he remains passive, will incur none. In the latter case, I do not think that it makes any sense at all to describe "free acceptance" as giving rise to any sort of liability. As Arden LJ said in the Court of Appeal in *Benedetti v Sawiris* [2010] EWCA Civ 1427

> "A person in general at least owes no obligation to take steps to desist from an activity on which he is currently engaged by reason only that it might lead him to benefit from the services being provided to him without his consent, express or implied."

211. The second ground is an (I think) unarguable proposition of English law - that freedom of contract necessarily implies the freedom not to contract. If a man decides not to contract with another, that other cannot, by unilaterally acting so as to confer a benefit on him, require him to pay for that benefit. As Bowen LJ said in *Falcke v Scottish Imperial Insurance Co Ltd* (1886) 34 Ch. D. 234, "liabilities are not to be forced on people behind their backs", and that:

> "… the general principle is, beyond all question, that work or labour done or money expended by one man to preserve or benefit the property of another do not according to English law create any lien upon the property saved or benefited, nor even, if standing alone, create any obligation to repay the expenditure". (at p. 248).

212. Mere receipt of a benefit is therefore, without more, not actionable. Something more than the mere receipt must therefore be needed before any legal obligation can arise. There have been various assaults on this proposition over time – in *Falke*, there was an attempt to have recourse to the law of maritime salvage, and in *Exall v Partridge* (1799) 8 TR 308 it was sought to argue that the mere receipt

of a benefit would justify the court in implying a request. They have been repelled, and the principle remains intact.

213. The third ground is that the action with which we are involved here is an action in restitutionary *quantum meruit*. As Birks points out, the action in *quantum meruit* is a development of the old action of *assumpsit*, which is based on a non-contractual promise to pay (Birks, *Unjust Enrichment*, 2nd Ed. at p. 288). The essence of *quantum meruit* is that where a person has induced another to confer a benefit on him through a non-contractual promise, and that non-contractual promise is not fulfilled, the courts may provide a remedy. It would be strange if that requirement for a non-contractual promise had evaporated completely.

214. It should be emphasised that this is not in any way connected with the idea of quasi-contract. *Assumpsit* is older than the modern law of contract – indeed it is older than the modern doctrine of consideration (this is explained by Professor Baker in his *Introduction to English Legal History* (5th ed. OUP 2019) at p.361-2).

215. A restitutionary *quantum meruit* therefore required, at its birth, some act which could constitute an assumption of liability. It is important to emphasize that there was never a requirement that there should have been an agreement between the parties – the question was simply whether the defendant had acted in such a way that he should be taken to have assumed an obligation (see *Warbrooke v Griffin* (1609) 2 Brownlow 254).

216. The Claimant puts two points in response to this analysis. The first is that there are policy grounds for rejecting Lord Burrow's simplification. The second is that, no matter how appealing the proposition put forward by Lord Burrows may

be as a matter of law and logic, the legal reality is that the English courts have in practice recognised a purely receipt-based form of free acceptance in a sufficiently large number of cases that I am effectively prevented from rejecting it as a free-standing legal ground for restitution.

217. As regards the first of these, the Claimant takes issue with the policy justification that Lord Burrows put forward for his view that free acceptance rewards "risk taking". It says that this is wrong, because (1) genuine risk takers could not establish the criteria for free acceptance, which is only engaged where the defendant "was or should have been aware that there was an expectation" of payment, and the defendant "had the opportunity to reject the services but did not do so"; and (2) even if they could, the solution is to calibrate a defence of risk-taking, rather than to abolish the principle altogether.

218. I do not accept either of these points. It is entirely wrong (as the facts of this case illustrate) to say that there is a bright line between risk-taking and expectation of payment. Even a potential client who was at once a psychologist, a metaphysician and a psychic could not pinpoint with accuracy the point at which the hope of payment in the mind of an investment banker turns into the expectation of payment, or the point at which the client's knowledge of a hope of payment crystallises into an intention to make payment. The only way that this can be resolved is to identify a point at which both can be said to have agreed that there will be payment - which is simply the establishment of a basis. I do not accept that there is any point arising earlier than such an (explicit or implicit) agreement at which liability can arise.

219. The second proposition requires a careful analysis of the state of the authorities, and I was, in consequence, presented with a more than usually bounteous cornucopia of decided cases.

220. It is unquestionably correct that free acceptance has been referred to in a number of decided cases. However, in a large number of them it has simply been referenced without being relied upon, and in a number of others the form of "free acceptance" that has been relied upon is indistinguishable from failure of basis.

221. The problem in this regard is that it is unquestionably correct that free acceptance is an *ingredient* of failure of basis – in the context of the provision of services, without a finding that the defendant has knowingly and voluntarily accepted a benefit, no case in failure of basis could ever be made out. Consequently a careful analysis of those authorities which reference free acceptance is required to try and establish whether they recognise a freestanding doctrine of receipt-based fee acceptance. A mere finding of free acceptance does not establish this on its own.

222. I also note that Lord Burrows does not propose the complete rejection of the idea of free acceptance. Even if it is not an unjust factor, the idea of free acceptance plays a significant part in the law of restitution – in particular, the fact that where free acceptance can be established, subjective devaluation cannot be applied to extinguish the value of the thing transferred and thereby negative enrichment. The discussion here is confined to the narrower point as to whether free acceptance without the establishment of a basis can constitute an unjust factor.

223. There are a group of early cases which are sometimes relied on in this regard. This group includes *Lamb v Bunce* ((1815) 4 M & S 275), *Weatherby v Banham* ((1832) 5 Car. & P. 228), *Paynter v Williams* ((1833) 1 Cr & M 810) and *Alexander v Vane* ((1836) 1 M and W 511). Professor Burrows (as he then was) explains this group of cases as follows "The central point is that, while in each the terms were not spelt out, … there was a loose bargain in the sense that the claimant was reasonably led to expect by the defendant that he would be paid for the services conferred" (Burrows, *The Law of Restitution* (3rd ed. 2010) at p.337).

224. This point is most clearly illustrated in *Lamb v Bunce* (1815) 4 M. & S. 275, where Lord Ellenborough CJ held that:

> "… if the parish officer stands by and sees that obligation [to treat paupers] performed by those who are fit and competent to perform it, and does not object, the law will raise a promise on his part to pay for the performance." (at p. 277).

225. A stronger case in this regard is *Alexander v Vane* (1836) 1 M and W 511, in which a person who had allowed another to promise in his presence to pay his debt to a third party was held to have implicitly accepted an obligation to reimburse the payer in the event that he was called upon to make payment. This again clearly constitutes the establishment of a basis.

226. Early modern cases which discuss the principle of free acceptance exhibit the same caution that Asplin LJ exhibited in *Barton* cited above. In *Countrywide Communications v ICL Pathway* [2000] CLC 324, Nicholas Strauss QC explained the difficulty of the issues

> "I have found it impossible to formulate a clear general principle which satisfactorily governs the different factual situations

> which have arisen, let alone those which could easily arise in other cases … There is a lot to be said for a broad principle enabling either to be recompensed, but no such principle is clearly established in English law … Beyond that, I do not think that it is possible to go further than to say that, in deciding whether to impose an obligation and if so its extent, the court will take into account and give appropriate weight to a number of considerations which can be identified in the authorities" (in 2000).

227. In *Becerra v Close Brothers* (unreported, 25 June 1999) at p. 27, a case based on free acceptance was put to Thomas J. He observed

> "To reach a concluded view on this question would involve an analysis of the many cases cited in the texts and articles to discern whether there was support in the authorities for the principle of free acceptance. Given the conclusions of fact to which I have come, that task is neither appropriate nor necessary. I will, assume therefore that there is in the law of restitution of England and Wales a principle of free acceptance".

228. *R (ex. p. Rowe) v Vale of White Horse DC* [2003] EWHC 388 (Admin) I think is authority against the idea of mere receipt as a ground of injustice. In that case Lightman J said

> "The Council cannot establish (in the language of Goff & Jones) that Mr Rowe should have known that the Council or other supplier of the sewerage service expected to be paid for them anything beyond what was already paid to the Council and TWA. It is scarcely open to the Council to dispute this fact since on its own case the Council was ignorant until 2001 whether it could charge for the services and this ignorance was the occasion for its silence on the whole question. Where (as in this case) for good reason the defendant as a reasonable person should not have known that the claimant who rendered the services expected to be paid or paid extra for them, as a matter of principle the third condition cannot be satisfied and no claim can lie in restitution"

229. In *Chief Constable of the Greater Manchester Police v Wigan Athletic AFC* [2008] EWCA Civ 1449, the trial judge held that a football club had freely accepted the benefit of extra policing provided by the local police force. The Court of Appeal overruled this finding on the basis that the club had been in

practice unable to reject the services, applying *Bookmakers' Afternoon Greyhound Services Ltd v Wilf Gilbert (Staffordshire) Ltd* [1994] FSR 723. Here again, the point at issue was that the mere supply of services was not, of itself, grounds for the application of the doctrine of free acceptance – the nature of that doctrine was not examined.

230. In *Sharab v Al-Saud* [2012] EWHC 1798 (Ch) at [68] a claim was made in free acceptance. However, the issue was as to whether the claim constituted "a claim made for restitution where the defendant's alleged liability arises out of acts committed within the jurisdiction" ("Gateway 16"). The court held that, because the activity concerned had occurred almost entirely outside the United Kingdom, no leave to serve out could be given. The question of the nature of free acceptance was not considered. Sir William Blackburne said

> "The essence of a claim in restitution (at any rate of the kind with which this case is concerned) is the conduct of the claimant which has enriched the defendant. There is no requirement that the defendant should even have requested the actions which have enriched him, although that will frequently be the case. It is sufficient that he has freely accepted them in circumstances which subject him to an obligation to make restitution to the claimant for their value: hence the notion of unjust enrichment. It follows from this that the focus is principally, although not exclusively, on the acts of the claimant."

The point about this paragraph is of course the meaning of the term "in circumstances which subject [the accepter] to an obligation to make restitution to the claimant for their value". Sir William's point is that free acceptance can give rise to liability in certain circumstances; those circumstances being where, taken in context, the acceptance could constitute an indication of an assumption of an obligation to make restitution. This is unquestionably correct. However, it

is hard to see this as anything more than a recognition that such an indication would give rise to a shared basis.

231. In *Professional Cost Management Group v Easynet* (unreported, 9 July 2012) HHJ Raynor QC (sitting as a High Court Judge) said "[I]t seems to me as a matter of principle that a *quantum meruit* claim will arise under the principle of free acceptance enunciated by *Goff and Jones*" [90]. However, in that case the key finding was that the recipient of the services had contacted the provider and asked in terms whether the provider expected to be paid for them (at para [45]). The provider's response was to the effect that it expected to be remunerated through continuing payments under the contract in place between the two parties (at para [48]). In fact, that contract was terminated shortly afterwards .The judge held in effect that the result of the conversation was that there was a common understanding between the claimant and the defendant that the defendant would receive payment as part of the continuing services provided under the contract (para [97] of the judgment), and that the termination of that contract shortly thereafter created an entitlement to a *quantum meruit*. This seems to me to be a clear case of failure of basis.

232. It was put to me that *Benedetti v Sawaris* [2013] UKSC 50 is Supreme Court authority for the existence of free acceptance as a ground of injustice. It is not. In *Benedetti* free acceptance was applied as an unjust factor by the Judge at first instance [574]. However, as Lord Reed pointed out in the Supreme Court (at [119])

> "Interesting and important as these issues as to the conceptual framework of unjust enrichment may be, they do not need to be decided in the present case, where there is no doubt that Mr

> Sawiris freely accepted Mr Benedetti's services on the basis that a reward would be provided. "

233. Perhaps more importantly, in the Court of Appeal Etherton LJ said

> "There is an academic debate as to whether, generally or in certain circumstances, the jurisprudential basis for the cause of action for a quantum meruit is so called "free acceptance" or failure of consideration. That does not matter in the case of Mr Benedetti's claim against Mr Sawiris since it is accepted by Mr Sawiris that, however so characterised, Mr Benedetti was entitled to payment for his services on a quantum meruit (subject to sums already received pursuant to the Revised Brokerage Agreement), and that characterisation does not affect the nature of any restitutionary relief to which Mr Benedetti is entitled." [143].

234. Arden LJ also pointed out that the principle of free acceptance would not apply on the facts of the case in any event, since the recipients of payments had had no opportunity to reject the benefit conferred.

235. *Diamandis v Wills* [2015] EWHC 312 (Ch) was an application to strike out (inter alia) a restitutionary claim based on free acceptance (para [82]). The claim was struck out on the basis that the relevant issues were addressed by the terms of the contract which existed between the parties. The applicability of the doctrine of free acceptance was not challenged, and the case decides nothing in respect of it.

236. In *Benourad v Compass Group* [2010] EWHC 1882 (QB) the court approved dicta of Christopher Clarke J in *MSM Consulting Ltd v United Republic of Tanzania* [2009] EWHC 121 (QB) to the effect that

> "The court is likely to impose [an obligation to make restitution] where the defendant has received an incontrovertible benefit (e.g. an immediate financial gain or saving of expense) as a result of the claimant's services; or where the defendant has requested the claimant to provide services or accepted them (having the

> ability to refuse them) when offered, in the knowledge that the services were not intended to be given freely"

This does not seem to me to be any authority for the idea of mere receipt as a ground of injustice – not least because, in the absence of an "incontrovertible benefit" (broadly, a money receipt), it is explicit that it is considering only situations where those services have been explicitly requested.

237. In *Harbour Fund III v Kazakhstan Kagazy* [2021] EWHC 1128 (Comm) [272] an argument in unjust enrichment was made based on free acceptance. Moulder J stated (at [245]): "The submissions did not address the criticisms of the principle referred to in Goff & Jones at 17-05 and I proceed on the basis that this represents the relevant law". However, she found that on the facts of the case there had been no opportunity for the recipients to reject the benefits concerned (at para. [270]), and that the claim in unjust enrichment failed in any event.

238. In *Gheewalla v Rasul* [2022] EWHC 3180 (Ch) Nicholas Thompsell (then sitting as a deputy) held that in a situation where the owner of a property portfolio knew that another person was managing that portfolio on her behalf, and that previous incumbent managers had been paid for their services, the owner was liable to pay a *quantum meruit* to that manger for his services. The issue of free acceptance was in that case considered as a defence, the specific point being that the owner argued that she was so under the influence of the manager (who was her uncle) that she could not in practice have rejected his services. The criteria for free acceptance therefore could not apply, since she had had in practice no opportunity to reject the services. The judge rejected this argument, and ordered a *quantum meruit*. It seems entirely clear to me that the

grounds for the decision in this case were that there was a common basis between the parties that the services provided would be paid for. Indeed, it is a paradigm of a case where the characterisation of the issue as free acceptance or failure of basis makes no difference to the outcome reached. It also seems to support Lord Burrows' view that wrapping free acceptance into failure of basis results in no change in the law.

239. In *Fenchurch Advisory Partners v AA* [2023] EWHC 108 (Comm) (handed down 24 January 2023, the day before *Barton v Morris*) Sean O'Sullivan KC, sitting as a deputy, said

> "The court is likely to order restitution where the defendant has received a benefit (e.g. a financial gain or saving of expense) as a result of the claimant's services; or where the defendant has asked the claimant to provide services, or the defendant accepted them (having the ability to refuse them) when offered, in the knowledge that the services were not intended to be given freely", citing *British Steel Corp v Cleveland Bridge and Engineering Co Ltd* [1984] 1 All ER 504, at [307] (failure of basis) at [309]-[310] and Goff & Jones: *The Law of Unjust Enrichment* (9th edn, 2016) at [16-08]-[16-09], at [311] (failure of basis) and *MSM Consulting*. In that case Christopher Clarke observed that "The court may well regard it as just to impose such an obligation if the defendant who has received the benefit has behaved unconscionably in declining to pay for it".

240. However, it seems clear that the basis of the decision actually reached in *Fenchurch* is a failure of basis. At [322] O'Sullivan KC said

> "In those circumstances, it seems to me that it would be unjust if the AA [the Defendant] was able to take the benefit of the work done by Fenchurch [the Claimant] paying for it, in the entirely unanticipated scenario in which no EL ended up being signed".

241. In *Barton v Morris* [2023] UKSC 3, a case in free acceptance was successfully made out at first instance. However, in the Court of Appeal Asplin LJ said (at [38])

> "I should also add that it is not clear to me that the judge was correct to refer to the claim in unjust enrichment as having arisen as a result of the doctrine of free acceptance. Although we were not addressed directly on this matter I note that: it is a doctrine about which there is much academic debate; it was not the basis for a claim in unjust enrichment considered by the Supreme Court in the Benedetti case, upon which the judge ultimately founded his reasoning; and it does not form the basis of my consideration of the claim in unjust enrichment".

(approved by Lord Burrows in the Supreme Court at [229]). In the Supreme Court the issue before the court was failure of basis only.

242. Finally, in *Mate v Andrew & O'rs* [2023] EWHC 238 (handed down a fortnight after *Barton v Morris*), it was held that where a family member had worked on getting part of a family farm released from planning restrictions, she had conferred a benefit on the other family members, there was unjust enrichment through free acceptance. However, this is another case where the term free acceptance is used to describe a factual situation where there was clearly a failure of basis – there was a clear agreement between the various parties that the work would be done and that payment was expected, and there was clear communication throughout as to the provision of the services.

243. It is suggested to me that, even if these cases do not, singly or together, establish the free acceptance for which the claimant argues, to the extent that they demonstrate a common assumption, I should not depart from that common assumption on the basis of *Police Authority for Huddersfield v Watson* [1947] KB 842. However, what Lord Goddard CJ said in that case was that

> "where the court has given a decision upon the construction or application of this Act another court should give a decision contrary to the decision already given, because there then would be two conflicting cases. (at p. 847-8)".

I clearly cannot and should not give a decision which conflicts with another decision given by this court. However, I am bound by decisions, not observations or statements of opinion. It is only correct to say that this prevents me from deciding that free acceptance is not an unjust factor if it could be shown that such a finding would conflict with any other decision reached by the court.

244. Having considered these authorities, I am satisfied that none of them are clear authority for the recognition of a purely receipt-based form of free acceptance. I am therefore satisfied that no separate cause of action for restitutionary *quantum meruit* arising out of a doctrine of free acceptance, and that Lord Burrows correctly stated the law in relation to unjust enrichment in *Barton*. I find this unsurprising.

245. Consequently, the question before me is as to whether the facts of this case give rise to the unjust factor of failure of basis.

6.3.2 Failure of Basis

246. The basic definition of failure of basis was set out by Professor Birks in "An Introduction to the Law of Restitution" (1989) p 223 and has since been cited with approval by Toulson LJ, with whom Black and Laws LJJ agreed, in *Sharma v Simposh Ltd* [2013] Ch 23 at para 24 and by Lord Burrows JSC in *Barton v Morris* at para [232]. That definition is that

> "failure of consideration or basis means that the state of affairs contemplated as the basis or reason for the payment has failed to materialise or, if it did exist, has failed to sustain itself".

247. This is amplified in Virgo as follows:-

> "Failure of basis occurs where the counter-performance, event or state of affairs which constitutes the basis for which the transferor of the enrichment had bargained has failed to materialize or to sustain itself. … The basis must be shared between the parties and cannot be established from the mere failure of the claimant's expectations, nor the imposition of secret conditions. The basis is to be determined objectively by reference to whether a reasonable person in the position of the defendant would have understood that receipt of the enrichment was conditional, rather than by reference to the subjective motives of the claimant. Any particular purpose or motive of the claimant in transferring the enrichment can, however, be taken into account in identifying the basis, but only if such a purpose or motive had been communicated to the defendant before the enrichment was transferred or any contract was made so that the defendant had an opportunity to object to it and so that the basis can be considered to be shared."

248. Goff & Jones put the point as follows:

> "…In accordance with the general principles that govern failure of basis as a ground of recovery, the basis must be ascertained by an examination of the dealings between the parties. The objectively understood joint basis of the transfer must be identified. It is not necessary to show that the defendant either knew, or ought to have known, that the claimant expected to be paid for his services, nor that the defendant freely accepted those services. As with the position in failure of basis more generally, there may be several conditions to which the transfer is subject." at [16-03]

249. The failed basis may be that the services will be paid for. The type of services performed may indicate the basis of the transfer. Goff & Jones (at 16-07) say :

> "[i]f the services are of a kind which would normally be provided free of charge, that suggests that the transfer is gratuitous; if, conversely, the services are of a kind not normally given free of charge, that suggests that they have been provided for on the basis that they are to be paid for. What is the norm in a particular industry may need to be shown by expert evidence". They go on to say that "While the value of services might possibly cast some light on the parties' understanding of the basis on which they are conferred, it is important here to avoid conflating two questions which must be kept distinct: first, what is the basis of transfer? Second, what is the quantum of enrichment?"

250. It should go without saying that the word "normally" in the above conceals a great deal of machinery. It is the norm in many professional service industries for participants to do some preliminary work for clients on a free basis in order to persuade the client to instruct them, and such arrangements may vary not only between professions but between different types of clients and firms within a single profession. The fact that A provided service X to B in the hope of a mandate, where C would not have provided that service to D without being paid, is very weak evidence indeed of injustice. The key point is to identify the intentions of the particular parties in the particular situation in which they found themselves, and the terms of the communication between them.

251. In *Barton v Morris* Lord Burrows held that there had indeed been a failure of basis. The issue was that both of the parties to the agreement had assumed at all material times that the property concerned would be sold at a particular price, and therefore had made no provision in their agreement for any other outcome. When the sale was therefore subsequently made at a lower price, there was a failure of basis, and the law of unjust enrichment was therefore called into play.

252. How, then, do we assess failure of basis? The principles were recently summarised by Lady Rose in *Barton v Morris* [2023] AC 684 at [78] ff., citing with approval Carr LJ in *Dargamo Holdings Ltd & Anor v Avonwick Holdings Ltd & Anor* [2021] 2 CLC 583 at [77] ff):

> "78….The core concept of 'failure of basis' is that a benefit has been conferred on a joint understanding that the recipient's right to retain it is conditional. If the condition is not fulfilled, the recipient must return the benefit (see Goff & Jones [*sc.* 7th edn, 2007] at 12-01). Whilst failure of basis ranks alongside the unjust factors of mistake, duress and undue influence as a factor negativing consent, it differs in that it is concerned with

> qualification of consent, as opposed to impaired or vitiated consent (see Burrows The Law of Restitution (3rd edn, 2011))…"

253. Failure of basis is commonly relied upon in the context of failed or anticipated contracts, in respect of which there is no difference in principle – as Barry J said in *William Lacey (Hounslow) Ltd v Davis* [1957] 1 WLR 932, 939

> "I am unable to see any valid distinction between work done which was to be paid for under the terms of a contract erroneously believed to be in existence, and work done which was to be paid for out of the proceeds of a contract which both parties erroneously believed was about to be made".

254. The question here is as to when – if at all – a joint understanding was reached between H&P and Randgold that they would be instructed as financial advisor and paid accordingly.

255. The fundamental problem which the Claimant faces is that the argument that they made a significant contribution to the parties by either initiating or reigniting the idea of a merger transaction relates primarily to Mr Hannam's activities before Jackson Hole, at which point he accepts that no "basis" had been established with Randgold. However, the Claimant's argument is that (1) investment banks frequently deliver real value to their clients in the hope of a mandate, therefore when an initial basis is established it will usually be after value has been delivered, (2) it is the common expectation of all parties in this market that, where a basis is established, it will be to the effect that the investment bank's remuneration will embrace work done prior to the establishment of the basis as well as thereafter, and therefore (3) where a basis is established, and fails, the claimant's claim will be for enrichment provided prior to the establishment of the basis as well as thereafter. Therefore, if he can demonstrate that a basis was established at any stage, that basis must embrace a

commitment to pay for services already received as well as services to be provided in the future.

256. In the context of the investment banking services market, I think that this is correct. It is somewhat complicated by the fact that in general the rewards paid to investment bankers are not attributed in this way, but expressed as a simple percentage of the value of a successful transaction. However, it does explain why the process of formally appointing investment bankers is generally left to a very late stage of a transaction – investment bankers and clients seem to share a common assumption that, provided their appointment is agreed at some stage, the time at which that appointment is communicated will not impact the quantum of their remuneration.

257. I therefore think that the Claimant is correct that, given the practices in this rather unusual market, it is perfectly reasonable for a claim in unjust enrichment for failure of basis to rely on value transferred before the basis was established. It is, of course, necessary to show a very close connection between the acts relied upon for the enrichment and the establishment of the basis. However, where the actions relied on and the basis established are in respect of the same transaction, that is not impossible.

258. For this purpose, I note that there is an overlap here between this sort of enrichment (what might be called "retrospective" enrichment) and the principles relating to disappointed risk-takers. It is clear that, in the sort of situation I have described, the provider of services is a risk-taker until the basis is established. However, the principles relating to disappointed risk-takers do not apply to gratified risk-takers. If an investment bank takes a risk in providing services to

a client, and the client subsequently confirms to the bank (in a non-contractual form) that it is "on the ticket", thereby establishing a basis between them, the investment bank is no longer a disappointed risk-taker.

259. This feeds through into the discussion on free acceptance. It is entirely reasonable for a person to accept services from another whilst he is in the process of deciding whether to employ that other, and such acceptance does not give rise to any legal obligation. However, once a positive decision to employ that other has been taken and communicated, the services accepted should be considered in accordance with the terms of that communication. If the terms of the assumption are that the other will be rewarded for services performed in the past as well as to be performed in the future, then a restitutionary obligation arises at that point in respect of those past services. If, however, the assumption is only to the effect that future services will be rewarded, then that other will be a disappointed risk-taker as regards those services, and will have no restitutionary claim to any *quantum meruit* in respect of them. It is also clearly the case that a basis may arise even where one of the parties did not intend that outcome if an objective assessment of their actions is that they could reasonably have been understood as an assumption of liability (as was the case in *Lamb v Bunce*).

260. I think the position in this case is as follows. If H&P had, in Mr Webb's words, been given the indication that they were on the ticket by Dr. Bristow at Jackson Hole, or by Mr Shuttleworth in London, then the conventions of the market in which they were operating would have indicated that that "indication", even if otherwise completely silent, would have constituted an assumption by Randgold

to remunerate H&P in respect of the totality of the services performed by them from initial contact to completion of the transaction, including those performed before the "indication" was given. If no such indication was given, then H&P are simply a disappointed risk-taker in respect of those services.

261. The key issue therefore comes down to one as to whether Randgold did give such an "indication". It seems to me to be entirely clear that Mr Shuttleworth was deliberately seeking to avoid entering into any contractual relationship with H&P, and that he succeeded in that aim. However, he (and Randgold) continued to treat H&P as a potential provider of services, and in effect encouraged them to continue provide free services.

262. The issue for Mr Shuttleworth when he had his meeting with Mr Hannam was as to whether H&P had any role to play in the transaction from that point on. Having had a look at the size of H&P's operation, he appears to have concluded that as the transaction moved into the execution phase, H&P had no useful role to play in that phase. He therefore seems to have concluded that there was no necessity for any formal agreement with H&P, but that they should receive some remuneration for their prior activities. The course of action which he should of course have undertaken – and which would have obviated the need for this negotiation – was to say that in terms to Mr Hannam. He did not do so. As a result Mr Hannam was left in a position of ignorance. I do not believe that Mr Hannam believed that he was definitely appointed – the absence of any attempt by H&P to even propose a retainer letter, much less finalise and execute one, is I think convincing proof of that. However if I ask the question as to what the position of a reasonable man in the position of Mr Hannam would have been, in

the context of the industry in which he was operating, it is that he would have known that he had not been formally mandated, but he had a legitimate expectation of involvement, and therefore of retrospective remuneration. It seems clear to me that this was also the expectation of Randgold. I am therefore satisfied that there was a basis of agreement in place between the parties, sufficient to give rise to an unjust factor when it failed. In effect, Mr Shuttleworth's silence had the same legal effect as the silence of the Parish Overseer in *Lamb v Bunce.*

263. A final point here is that raised by the Defendant, who argued that this finding would potentially have a chilling effect on the provision of professional services generally. The argument put forward was that since professionals generally, when seeking business, frequently seek to show off their capabilities by the provision of a certain amount of free advice, it would be dangerous for there to be a finding that the recipient of such services might subsequently find himself presented with what would be (in effect) a bill for them. I agree that this is a real issue. However, it is an issue which can easily by avoided by clear communication between the parties, and only appears significant in this case because of the highly unusual position as to the provision of free work on risk which pertains in the investment banking market. I also think, however, that the professional services market is no different from any other market to the extent that where one party confers services on another, and that other does not intend to pay for them, in circumstances where he knows or ought to know that the service provider expects to be paid, he is at risk if he does not make clear to the service provider that that is his intent.

264. I think that in a case of this kind there are three possible states of the world. One is where the service provider is providing free advice in the hope of engagement. The second is where the relationship between the two has grown sufficiently close that the adviser assumes that in due course they will be formally retained. At this point the client may well reason that, provided that they have not entered into a formal contract of retainer with the advisor, they can continue to receive the advice without incurring any commitment. However, this is precisely the point at which the law of unjust enrichment will intervene. If it can be established that (a) the advisor reasonably believed that he would in due course be engaged as a reward for the advice already provided, and (b) the client knew or should reasonably have known that that was the advisors belief, then at that point a common basis arises between them, and, if the client seeks to refuse to enter into the contract of retainer, a remedy in non-contractual *quantum meruit* will be available to the adviser. The third state is where a contract is entered into, at which point any *quantum meruit* claim will be contractual and based on an implied term.

6.4 Risk-taking

265. It is now necessary to deal with the question of whether the Defendant has a valid defence based on the fact that H&P were "disappointed risk-takers". As Professor Virgo says

> "It is a fundamental principle of the Law of Restitution that, where the claimant has taken a risk in transferring a benefit to the defendant, any restitutionary claim should fail". (Virgo 4th Ed. 2024 at p. 39).

266. The question of how this principle is incorporated into the logical structure of restitution theory is subject to debate. In particular, as Virgo highlights,

> "A key question … is whether the denial of restitution on the ground of the claimant having taken a risk that there might not be a valid basis for the transfer of a benefit should be dealt with in the definition of the elements of the claim or explicitly as bar to the claim".

267. The latter position, as advanced by F. Wilmot-Smith in '*Replacing Risk-Taking Reasoning*' (2011) 127 LQR 610 is simply an alternative way of putting the question of whether the basis for the enrichment was conditional or not – if a transferee is a risk-taker, then his transfer is not conditional, and there is no failure of basis.

268. Mr Hannam expressly accepted in cross-examination that, as late as 22 March 2018, H&P was working "at risk". It was put to him that Mr Passmore said of Project British Rail on 22 March 2018: "My reading of this having spoken to Alex [Allen] is that it is becoming a 'real' mandate", and Mr Hannam explained that this proposed mandate was "to go and see Michael [Klein] and work with Barrick on an agreed merger".

269. It is clear that the Claimant was a risk-taker at all material times, because it was operating in an industry where the gratuitous provision of substantial services is universal. This was confirmed by Mr Thornton's evidence, as an experienced investment banker:

> "Q. He was working extremely hard. He is producing material that you want him to produce?.
>
> A. This is not uncommon in the investment banking world, for investment bankers to be working extremely hard with a CEO or two with a notion that when it gets to a point where it's real, he hopes to get hired, because he has done all that work.
>
> Q. We are not at a pitch stage here now, are we? These are ideas that are getting real traction with you and your board.

> A. Yes, but what I'm explaining to you is, for better or for worse, in the investment banking world, it often goes this far before an adviser is signed on."

270. This reflects the objective evidence of what happened internally at H&P. As set out above, it was not until 18 April 2024 that H&P began to consider their engagement terms. A "New Business Memorandum/Conflicts Clearance Request" was not produced until 24 April 2018 and the meeting approving that request (and a US$250,000 "expense allowance" for that project) did not take place until 1 May 2018.

271. The "risk-taker" principle emerged in cases where services were rendered pursuant to agreements expressly 'subject to contract' (see *Regalian Properties plc v London Docklands Development Corporation* [1995] 1 WLR 212). In *MSM Consulting Ltd v United Republic of Tanzania* [2009] EWHC 121 (QB) Christopher Clarke J (at [171(d)]) derived the following proposition from previous authorities:

> " [T]he court may not regard it as just to impose an obligation to make payment if the claimant took the risk that he or she would only be reimbursed for his expenditure if there was a concluded contract; or if the court concludes that, in all the circumstances the risk should fall on the claimant."

272. The authorities presented to me related to cases where services had been provided on the basis that a contract would subsequently be entered into, but no such contract was in fact entered into. The courts have repeatedly held that where the risk that is taken relates to entry into a subsequent contract, no claim in *quantum meruit* can arise for services provided prior to that contract if the contract is in fact not entered into. This, of course, gives rise to a mirror image proposition – where a person takes a risk in relation to a contract which is subsequently entered into, any contractual *quantum meruit* claim which arises

on that contract is not affected by the fact of that risk-taking. If I provide services to a person at my own risk in the hope of a contract, and a contract does indeed eventuate, and that contract provides that I am to be paid for the services provided on-risk as well as for subsequent services, the fact that I was a risk-taker in respect of the pre-contract services has no bearing on the question of whether I can recover a contractual *quantum meruit* for them if the contract fails for other reasons. The barrier to recovery which applies to a disappointed risk-taker falls away if and when he becomes a gratified risk-taker.

273. The ordinary way in which a risk-taker becomes gratified is when the contract which he has been seeking to enter into is formed. However, I think a risk-taker can equally be gratified where a basis is formed between him and his counterparty – that is, where the counterparty does something which has the effect of accepting his tendered service so as to give rise to a basis of agreement between them. This need not be a contract, but it must be such as to give rise to an obligation enforceable in unjust enrichment. To revisit Birks' window-cleaner, if a window-cleaner begins to clean windows purely on the off-chance, and the owner comes out and encourages him to continue with a non-binding indication of preparedness to reward him, there may be a common basis between them which will ground an action for restitutionary *quantum meruit* even if no contract is ever formed.

274. I think that that is exactly the case here. A basis of agreement was formed between Mr Hannam and Mr Shuttleworth as a result of their encounter, the effect of which was that Mr Hannam's right to some recompense for his efforts on the transaction was formed. At that point, the fact that Mr Hannam had

initially been acting as a risk-taker ceased to be an obstacle to his action on that basis. I therefore find that the fact that Mr Hannam was acting as a risk-taker does not constitute an obstacle to his restitutionary action. The rule is not that a risk-taker is denied relief, but that a disappointed risk-taker is denied relief. Where a risk-taker's risk pays off, the relief to which he is entitled is to be decided by the analysis of the contract or the basis on which he sues.

6.5 Are there any valid defences?

275. The Defendant seeks to raise two defences – both relating to illegality. One relates to the position of Mr Humphries, and the suggestion that he was acting in breach of his obligations to his then employer by providing information to Mr Hannam. The other is on the basis that Mr Hannam personally, and H&P, breached their obligations as (respectively) approved and authorised persons under the Financial Services and Markets Act 2000 ("**FSMA**").

6.5.1 Mr Humphries

276. The Defendant seeks to raise a defence of illegality, based on the position of Mr Humphries. The relevant information seems to have been uncovered in discovery, and the relevant issues are not pleaded. It is accepted that Mr Humphries worked very closely with Mr Hannam during this period (being described by him in an e-mail, along with Mr Hanrahan, as "my in-house mining bankers". However, at almost all material times, Mr Humphries was employed by Barrick, and remained so until 1 May 2018. Mr Humphries also provided Mr Hannam with an internal Barrick presentation, entitled "Project Ore", which contained detailed information both about Barrick's assets and its strategic thinking. It is also true that Mr Hannam ran almost every relevant piece of H&P

work product past Mr Humphries on his iCloud address (as well as Mr Hanrahan), and Mr Humphries seems to have amended or authored these pieces. It is clear that the team at H&P knew of Mr Humphries involvement - Mr Allen referred to Mr Humphries in an internal H&P e-mail as Mr Hannam's "mole" in Barick. However, since Mr Allen's evidence was that he did not interact directly with Mr Humphries, the significance of this characterisation may not be very great.

277. Mr Hannam's position on this is that Mr Humphries position was exactly as it is represented, but that he had the consent of John Thornton to involve Mr Humphries in this way. His evidence was that Mr Thornton had told him in or around January 2018 that he

> "could speak to anyone at Barrick (except for its COO, Richard Williams). He was aware that, for example, I knew Ed Humphries who was the Head of Digital Transformation at Barrick and also Mark Hanrahan who was ex Barrick and ex McKinsey".

278. Mr Thornton does not recall this phone call, but was adamant that he would not have given Mr Hannam any such permission. The specific mention of Richard Williams is explained by the fact that Mr Williams (a longstanding contact of Mr Hannam who Mr Hannam had recommended to Barrick) was in the process of being dismissed by Barrick.

279. The Claimant argues that there cannot have been anything wrongful about the involvement of Mr Humphries and Mr Hanrahan, since their involvement was known to other senior managers at H&P, who would have been legitimately concerned by any taint of illegality. However, this is only true if those managers had known both of the identities and of the situations of those contributors.

Since Mr Humphries was always careful to use his icloud.com rather than his barrick.com e-mail address in these communications, an outside observer would have had no immediate way of knowing that he was an employee of Barrick unless they had been told so by Mr Hannam.

280. Mr Thornton's evidence was not that he would have objected to Mr Hannam speaking to Mr Humphries at all – he acknowledged in evidence that he was happy for Mr Hannam to speak with Mr Humphries "for purposes of improving the operations of the company". However he did say that he would have had a "big problem with" Mr Hannam speaking with Mr Humphries about the "merger" because "[t]he merger of the entire company was in its own category". The Claimant says that this cannot be correct, since Mr Hannam forwarded to Mr Thornton an email on 12 March 2018 that was (1) produced by Mr Humphries; (2) concerned with the merger; and (3) contained detailed quantitative information about Barrick (which in turn drew on information provided in the Project Oro presentation). However, the forwarded e-mail simply showed that it came from an Ed Humphries with an i-cloud address. Mr Thornton's evidence was that if he had realised that the Ed Humphries on the e-mail was the same as the Ed Humphries who was a current Barrick employee he would have "reprimanded Ian [Hannam] and I would have probably got rid of Ed Humphries". However, he explained that "the way I would have processed this was it clearly was a mistake" and then, "had I stopped to think about it more carefully, I would have said, "Wait a minute, maybe Ed has seen the entire letter [a reference to Letter 1]", in which case I'm very concerned" – even though Letter 1 appeared in the same email chain.

281. Mr Hannam also made no secret about Mr Humphries (or, for that matter, Mr Hanrahan) with Dr Bristow – he copied both Mr Hannam and Mr Humphries to multiple emails to Dr Bristow in respect of the merger, and Mr Humphries was taken by Mr Hannam to Jackson Hole, where he met Dr Bristow in person. However, there is no reason to believe that Dr Bristow knew of Mr Humphries' employment status, and it seems likely that Dr Bristow believed that he was simply one of Mr Hannam's staff.

282. Mr Hannam's position on the Project Oro presentation was that at the time that he received it (8 March 2018) he was still hoping to work for Barrick, was creating documents for Mr Thornton, and was "getting information on the operations on Barrick for Barrick". Given Mr Hannam's long track record of working for Barrick, and in particular his close relationship with the former Barrick chairman Peter Munk, it is unsurprising that Barrick employees would have been prepared to provide him with information.

283. It is entirely clear that Mr Hannam sent a very strange (and clearly untrue) email to Dr Bristow on 12 April 2018 when he said: "Leaving now to airport. // I intercepted Ed who was at heathrow on way to family and swapped him into ticket reserved for girlfriend…he can stay 24hrs. see you soon."

284. This e-mail was, however, an attempt to play into the elaborate fiction which had been created around the Jackson Hole meeting. The fact that Dr Bristow would be at Jackson Hole from the 11 to the 19 April was known to Mr Hannam in late March, since he e-mailed Mr Humphries on that date to inform him of the fact, to indicate that he planned to visit Dr Bristow there then, and to suggest that Mr Humphries come with him. Dr Bristow e-mailed John Thornton on 5

April to the effect that he would be in Jackson Hole, and said "I was going to suggest you try and get up for a few days - it would be great to have you and please feel free to bring the Family". Mr Thornton replied "Our youngest son, Elisha (14), loves Jackson Hole so, given half a chance, will be on the next plane". This was copied to Mr Hannam, along with the message "see below- what are your plans" Mr Hannam replied that he would be in Jackson Hole from Wednesday to Saturday, and "May fly the girlfriend for a long weekend..". It seems fairly clear that what was being planned here was not in fact a winter skiing break – not least because at the time proposed the ski season in Jackson Hole would have been over and the lifts closed. However, it seems to have been important to all the participants to maintain the pretence of informality.

285. The logic of this fiction is not hard to understand. If the fact that Mr Thornton and Dr Bristow were meeting privately were to become known, the market reaction would have been significant. In particular, since the obvious inference from the occurrence of such a meeting would have been that a merger was in contemplation and, since the conventional expectation was that such a merger would take the form of a bid at a premium by Barrick for Randgold, this would have widened the gap between the two share prices and probably made the nil premium merger impossible for the foreseeable future. It is therefore entirely understandable that the whole encounter was arranged as an (implausible) skiing vacation for those concerned. I do not regard this as in any way wrongful.

286. As regards any breach of obligations by Mr Humphries, the Claimant says – I think correctly – that in order to advance such a case the Defendant would have

to identify the specific duties owed and the precise actions which breached those duties. It has not done so.

287. Finally, there is the question of whether, even if such a breach could be established, it would be sufficient to deprive the Claimant of any entitlement to a *quantum meruit* on the basis of the defence of illegality.

288. The principles which apply here are agreed between the parties. The *Restatement of the English Law of Unjust Enrichment* at Section 28 ("Illegality as a defence") sets out the bare bones of the doctrine of illegality in restitution. The Supreme Court decision in *Patel v Mirza* [2016] UKSC 42; [2017] AC 467 confirmed that a flexible, 'range of factors' approach should be applied taking into consideration (a) the underlying purpose of any prohibition transgressed and whether that purpose will be enhanced by denial of the claim; (b) whether any relevant public policy on which denial of the claim may have an impact; and (c) whether denial of the claim would be a proportionate response: see [113] & [120] (Lord Toulson) and [133] (Lord Kerr).

289. The Illegality/Public Policy Defence is a defence to restitution of unjust enrichment based on the 'unjust factor' of (total) failure of consideration: *Patel v Mirza* [2016] UKSC 42; [2017] AC 467, at [2], [13] & [121] (Lord Toulson). It extends to claims which rely on conduct which is immoral or contrary to public policy *Les Laboratoires Servier v Apotex Inc* [2014] UKSC 55; [2015] AC 430, at [23]-[28] per (Lord Sumption).

290. The illegality doctrine imposes an extremely exacting threshold to justify the deprivation of a claim. In *Patel v Mirza* itself, the Supreme Court dismissed an assertion that the illegality defence justified rejecting a claim for restitution of

sums paid under an enforceable contract to be used for insider trading (such that the illegality was the integral to and the very purpose of the enrichment); [121] per Lord Toulson (giving the majority judgment):

> "A claimant, such as Mr Patel, who satisfies the ordinary requirements of a claim for unjust enrichment, should not be debarred from enforcing his claim by reason only of the fact that the money which he seeks to recover was paid for an unlawful purpose". Only "rare cases where for some particular reason the enforcement of such a claim might be regarded as undermining the integrity of the justice system" would justify a different outcome.

291. The Claimant argues that it is difficult even to apply the open-textured analysis mandated by *Patel v Mirza* in the absence of a properly particularised case by Randgold as to any specific duty relied upon, its source, its content or its applicable law. But, in any event: (a) any wrong arising from or ancillary to a breach by Mr Humphries of his employment duties would be a wrong perpetrated against Barrick (not Randgold); (b) the purpose of such duties (insofar as they exist in this case) would not materially be furthered by denial of the claim; and (c) denial of the claim (with the deprivation of any recognition to H&P for its contribution to the transformational Barrick-Randgold Merger, and the conferral of a substantial windfall on Randgold) would be wholly disproportionate. I agree.

6.5.2 Illegality under FSMA

292. The Defendant argues that at various points in its conduct in respect of this matter HP was in breach of its regulatory obligations as an authorised person under the FSMA 2000, and that this should in itself give rise to a defence of illegality. In particular, they argue that both Mr Hannam and H&P were in

breach of their obligations under the principles applicable to approved persons (APER) and authorised firms (PRIN) respectively.

293. There are a number of reasons why this argument must fail. The first, and most important, is that there is a statutory scheme in existence which governs private rights of action arising from breaches of regulatory rules, which is set out in s.138D of FSMA. The claimants would not be entitled to bring an action under this section for a number of reasons – the section excludes breaches of principles from its scope, and the Defendant is not within the scope of the section since it is not a "private person" (defined for this purpose in *The Financial Services and Markets Act 2000 (Rights of Action) Regulations 2001*).

294. Section 138D does not purport to remove any existing common law right. However, the courts' general approach to the assertion of common law rights based on regulatory rules – most commonly, claims that the duty of care owed by a firm to its client should be established by implying the terms of the applicable regulatory rules – has in general been to oppose the creation of such rights. In *Green v Royal Bank of Scotland plc* [2012] EWHC 3661 (QB), Tomlinson LJ observed that to recognise such a cause of action at common law would drive "a coach and horses through the intention of Parliament to confer a private law cause of action upon a limited class" (at [44]). This observation was reasserted and followed in *CGL Group Ltd and others v The Royal Bank of Scotland plc and National Westminster Bank plc and others* [2017] EWCA Civ 1073, where Beatson LJ added that the recognition of any such duty "would undermine a regulatory scheme which has carefully identified which class of customers are to have remedies for which kind of breach." (at [86]).

295. The Defendant says that it is not seeking to assert a common law cause of action, as was rejected in those cases, but to plead a defence of illegality. However, there is only one concept of illegality, and the question as to whether a particular claim should be defeated by a plea of illegality should be decided the same way regardless of the context in which the argument from illegality arises. The approach should be that set out by Lord Toulson in Patel v Mizra [2016] UKSC 42

> "The essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system ... In assessing whether the public interest would be harmed [by the enforcement of a claim], it is necessary a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, b) to consider any other relevant public policy on which the denial of the claim may have an impact and c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts" (at [120]).

296. It seems to me to be clear that the Court of Appeal has repeatedly found that public policy is strongly in favour of the confinement of private rights of action under FSMA to those created by s.138D, and that no extension of such rights should be permitted. I think the recognition of an illegality defence on the facts of this case would constitute exactly such an extension of such rights. Consequently, I think that this defence must fail.

7. What is the value of the enrichment

297. *Benedetti v Sawiris* [2014] AC 938 is the leading authority on principles of valuation in unjust enrichment cases. It involved a claim for a *quantum meruit* for services rendered by the claimant in promoting and facilitating a takeover deal through which the defendant bought a telecoms company. The claimant's

primary claim (rejected at trial) was for €3.7 billion under a contract between the parties. The claimant's fall-back claim in unjust enrichment culminated in the Supreme Court considering the principles applicable to valuing the enrichment.

298. At [15], the majority (Lord Clarke (with whom Lords Kerr and Wilson agreed)) held that

> "the starting point in valuing the enrichment is the objective market value, or market price, of the services performed". According to Lord Clarke, the market value was "the price which a reasonable person in the defendant's position would have had to pay for the services": [17].

The Court was unanimous in its agreement with this approach.

299. As to market value, Lord Reed explained further that ([105]-[106]):

> "[M]arket value is specific to a given place at a given time. That point can be illustrated by the episode in Vanity Fair in which Becky Sharp sells her horses during the panic which grips the British community in Brussels after the battle of Waterloo, when rumours reach the city that Napoleon has defeated Wellington and that his army is approaching. The circumstances create a market in which horses are exceptionally valuable, and Becky obtains a price which is far in excess of the ordinary value. It is, nevertheless, the value of the horses in the market in which they are sold… . That example illustrates the general point that market value depends critically on the identification of the relevant market, since there are different markets for many types of goods and services. That is reflected, for example, in the variability in the price of a haircut, or the cost of a meal in a restaurant, or the fees charged by solicitors, or the salaries of professional footballers, depending on the market in which they are operating.

300. Where there is no general market, the Court may take the parties' agreed price to the best available evidence of objective value: see [168] per Lord Neuberger:

> "[i]n the absence of any other evidence or any good reason to the contrary, where two parties agree, at arm's length, that one of them will pay a certain sum, or at a certain rate, for a type of

> benefit to be provided, there must be a prima facie presumption that that amount is, or at least is good evidence of, the market value of that type of benefit".

301. Where there is evidence of a general market price, however, the question what a "reasonable person in the defendant's position would have had to pay for the services" necessarily depends upon how the market quantifies the enrichment. Thus, while Randgold notes that where the services provided 'unlock' a valuable result the enrichment to be quantified is the value of the services, rather than the result obtained, the value of the services may fall to be determined by reference to the value of the result if that is what a defendant would have had to pay for those services. Per Goff & Jones at [5-50]:

> "In various cases the courts have quantified the value of services on a commission basis, on the ground that this is industry practice and/or reflects the parties' own understanding of how much the claimant's services are worth."

302. Numerous cases in comparable contexts are illustrative of this principle. In *Benedetti* itself the trial judge (Patten J) heard evidence from opposing experts on the valuation of the services rendered by the claimant, and concluded that market practice would be a remuneration calculated on a percentage of deal size. The same conclusion was reached in respect of a corporate finance intermediary in *Becerra v Close Bros Corporate Finance Ltd* (unreported, 25 June 1999), where the judge observed that "as rates of remuneration in this type of transaction are related to ideas and success and not time spent, an approach on an hourly rate basis would plainly not be correct."

303. In *Barton v Gwyn-Jones* [2018] EWHC 2426 (Ch) (*Barton v Morris* at first instance) the claimant claimed in unjust enrichment where he had agreed to be paid £1.2 million if he introduced a purchaser willing to pay £6.5 million for

land owned by the company, but where the land was in fact sold (following negotiations) at £6 million. The claim failed. But the judge considered (obiter) the value of the enrichment. The judge agreed that little weight could be put on the fee in fact agreed with the claimant (not least, the agreed fee did not reflect the factual circumstances giving rise to the entitlement to the *quantum meruit*) ([211]). However, he concluded that the value of the work performed would have been 7.25% of the price actually paid for the property, referring to other agreements which the company had entered with potential introducers in relation to the land as benchmarks. At [214], the judge explained:

> "The first two figures were agreed to by Foxpace and potential introducers. This is a good indication of the market price for the services being proffered in circumstances where the sale price was similar. In those cases, the agreement was not entered into with the background of the dealings between Mr Barton and Foxpace referred to at paragraph 210 above. Given that Mr Gwyn Jones' figure was made by way of an offer at a time when there was a brewing dispute between him and Mr Barton, it seems to me inappropriate to give it any particular weight, other than to note its similarity to the other two figures. In those circumstances, it seems to me that a proper valuation is the midpoint of the other two figures, that is to say 7.25%, that is £435,000."

304. These cases related to a situation where the claimant had performed in full the brokerage service claimed for. *AMP Advisory & Management Partners AG v Force India* [2019] EWHC 2426 (Comm) addressed the position where the broker did not perform the full function. The claimant claimed that it (or its officers) acted as intermediaries leading to the sponsorship agreement, and succeeded in an unjust enrichment claim. The judge ultimately declined to value the enrichment on a commission basis (concluding, on "the limited evidence going to valuation before the Court" ([220]), that the value should be £15,000) because the expert evidence was that

> "the experts agreed that on a commission basis, the agent will be expected to have influence over a potential sponsor and a developed relationship with that potential sponsor" ([215]), and this was not the case on the facts."

305. In *Mate v Andrew & Ors* [2023] EWHC 238 (Ch), the claimant sought (in the alternative) a *quantum meruit* on the basis (she contended) that she carried out work for the defendants to develop 40 acres of farmland for them. The experts were agreed that, had the claimant provided all the services of a professional land promoter and achieved a successful outcome, her promotion fee would have been between 15% and 30% of the uplift in the value of the land plus costs incurred up to an agreed maximum value. However, the claimant performed only some of the services of a land promoter, others of which were performed by the developer. The Judge therefore decided that her recovery should be 7.5%.

306. In *Fenchurch Advisory Partners LLP v AA Limited* [2023] EWHC 108 (Comm), the claimant, an investment banking and corporate finance advisory firm, sought (inter alia) a *quantum meruit* for advice and assistance in relation to a 'Project Zodiac', which involved the potential sale of the insurance division of the defendant. However, this transaction did not complete, and the court found that it would have been inapposite to have valued the enrichment rendered by the Claimant on a success fee or commission basis.

307. The overall approach is perhaps best summarised by Jacob J in *Vedatech Corporation v Crystal Decisions (UK) Limited* [2002] EWHC 818 (Ch) (in commenting on the envisaged outcome of an assessment of a *quantum meruit* to be undertaken at a later hearing) at [95]:

> "[w]hen full information as to "all the circumstances" (per Lord Wright) is in, a judgment will have to be made. Neither side should expect anything like precision. Indeed, given that the

> position is even more nebulous than that in Way v Latilla [1937] 3 All ER 759 the parties can expect no more than a very rough figure – an overall value judgment".

7.1 Time of quantification

308. A further difficulty is raised in this case as to when the value of the *quantum meruit* should be established. It is clear that any restitutionary claim must be quantified at the time when it was received. In *Benedetti*, Lord Clarke explained this as follows

> "…it is clear that the enrichment is to be valued at the time when it was received by Mr Sawiris: *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1979] 1 WLR 783, 802, per Robert Goff J ; see also Goff & Jones, para 4-34. As appears at para 52 below, in the present case, the services rendered were completed for all practical purposes by 26 May 2005, by which time there was no possibility of, or need for, further services from Mr Benedetti. Similarly, it is clear that, whether an objective or a subjective approach is taken to the evaluation of the benefit, the question is what is the value of the services themselves, not of any end-product or subsequent profit made by the defendant: see e g *Cobbe v Yeoman s Row Management Ltd* [2008] 1 WLR 1752, paras 41—42, per Lord Scott of Foscote."

309. It is clear that H&P's services had in practice been dispensed with by or shortly after 24 April 2018, so it would appear that that must be the date at which the valuation is made. However, at that date the transaction was no more than a hope. It is an accepted fact of investment banking that there are a million things which can derail any transaction, and the mere fact that a deal has been agreed on in principle should not give any observer any high degree of confidence that it will be executed. However, the situation of this transaction was particularly precarious. Mr Thornton explained this in his evidence. Describing the last days before the announcement of the transaction, he said this:

> "…If you want me to go into some detail, to give you a flavour for this, because of that concern, I arranged for two delegations

> of the board to visit the DRC where Randgold had a mine so they could see first-hand the way Randgold operates in Africa.
>
> Michael Klein, my primary adviser, met with each member of the board, all 15 members, multiple times, between two and six times, depending upon the director and how concerned they were.
>
> September 21, the day we notionally approved the deal, three Canadian directors and one of our American directors met for breakfast to figure out how to kill the deal. The American director let me know that is what had happened. Mark Bristow then gave a three-and-a-half-hour presentation to the board. At the end of that presentation, one of the Canadian directors, who was not at the breakfast but who was himself for 40 years in mining consulting, started by saying "I would like to speak first because I have been against this deal the entire time, but now having heard this three-and-a-half-hour presentation from Mark, I'm fully supportive." The second Canadian director, who was sort of the senior of the Canadians, jumped in right behind him and then it went through, although one of the directors after that meeting resigned.
>
> And we agreed, because there was such a difference of opinion between Morgan Stanley, who had given an opinion to the board about what would happen to our share prices once it was announced, their opinion and my opinion, we agreed that I would then speak to, or see, our top, I can't remember exactly, four or five shareholders over the course of a weekend.
>
> So I flew that night to London, Friday night to Saturday, and had lunch with Evy Hambro at his home who was BlackRock, and then in addition to him, three or four others I spoke to to find out how would the big shareholders actually respond and based on that input, the board would then reconvene by telephone on the 23rd. I would then give the input. If the input were favourable we would then go ahead. If it were not favourable, we would not go ahead."

310. This makes it entirely clear that at the time H&P finished delivering their services, the probability of the transaction going ahead cannot have been regarded as high.

311. This complicates the question of valuation. The question which I put to Mr Hardwick KC in his closing submissions was as follows. You and I reach an understanding that I will buy a lottery ticket with my own money and transfer

it to you. I do this, but the basis of our arrangement fails. I am entitled to *quantum meruit*. Subsequently, the ticket turns out to be a winning ticket. Am I entitled to the winnings or merely to recover the price of the ticket? Mr Hardwick KC's answer was that I am entitled to the winnings; I think on the basis that an action in restitution is not compensatory, but is based on the reversal of any enrichment unjustly received by the defendant. The Defendant – unsurprisingly – took issue with this argument. Their argument was that, at the time of the enrichment, the potential gain to the Defendant was highly notional, and that this should be taken into account in assessing the extent to which they were enriched by those services at the time when those services were delivered. In principle I think that this is correct, but it does not help with the practical problem as to how such uncertainty might mathematically be taken into account.

312. I must take all this into account on order to establish the value of the service provided by H&P.

313. I turn now to the reports of the experts – Mr Harman for the Claimant, and Mr Webb for the Defendant.

7.2 Mr Harman

314. Mr Harman's position is that it is possible to establish how much a normal financial advisor would have been paid on a deal of this type by consideration of the fees paid on other similar deals. His report is based on a great deal of work reviewing a wide variety of comparable transactions. The basis of his conclusion is that, since H&P did in fact perform the function of financial

advisor on the transaction, the value which they contribute should be assessed on that basis.

315. This position – unsurprisingly – led to a good deal of debate as to what "acting as a financial advisor" actually involves.

316. Mr Harman divided an M&A transaction up into six stages as set out below, and in each case identified the role which a financial advisor would be expected to play at that stage. His conclusions are as follows:

> "Stage 1 – Initiation
>
> This is when the parties explore the idea of a combination and make the first approach to the other party. Discussions at this stage will typically be high level (focusing on key deal terms such as price, future management of the business and potential anti-trust issues) and held between the respective Chairs or CEOs of the businesses. Advisers (principally Financial Advisors) may be involved, particularly if they have advocated the idea of the combination, i.e. originated it to one of the parties or have introduced the management of the two companies. The financial advisors will at this stage usually focus on the key terms and alternative transaction structures, but may also in the background do detailed financial modelling using publicly available data for the other party. On other occasions, the Chair or CEO will make contact directly with their opposite number and advisors will only be included in discussions at a later date.
>
> Stage 2 – Negotiation of Key Terms
>
> The parties will negotiate the headline terms of a transaction, typically based on the terms proposed by the offeror to the board of the target. These key terms will include the principal financial terms (offer price or merger ratio) and the future governance/management of the combined business. Consideration will also be given to such factors as the name and domicile of the combined entity, the future business plan, potential synergies, tax implications and future capital structure / dividend policy. Typically this stage commences once there is an overall understanding between the boards of the companies that the transaction discussed in Stage 1 may be viable and has the potential to be of interest to the companies and their shareholders.

The advisors active in Stage 1 will continue to be involved and may be supplemented by additional advisors as the process develops. If other financial advisors are to be added, this will often take place at either this stage or the following stage.

Stage 3 – Negotiation of detailed terms and due diligence

Assuming that the boards of both companies are, in principle, satisfied with the key terms, there will then be a process which may last several weeks while more detailed terms are discussed and due diligence is carried out. This typically includes extensive document sharing via a virtual data room and may include management presentations by the key managers of the target company. If the combination raises competition issues, these and other regulatory matters will be explored in detail. The financial advisors will typically also carry out detailed financial analysis of the combination for the benefit of their client's (or clients') board(s). Accounting, tax and other specialist advisors may be brought on board at this stage.

Stage 4 – Transaction Announcement

The offeror will make an announcement setting out the terms which they are willing to offer to the shareholders of the target. This announcement will typically include details of the proposed financial terms, the rationale for the offer, summary information on the business of the offeror and the target, the arrangements for financing the offer, the conditionality of the offer and planned next steps. The announcement will also contain details of the financial and PR advisors. Inclusion of their contact details in the transaction announcement enables investors and other relevant parties to contact the advisors directly if they wish to discuss the planned transaction.

Stage 5 – Implementation

During this period, which lasts from announcement to completion, the focus is usually on interacting with shareholders so as to secure their support for the transaction and applying for necessary competition and regulatory approvals. In many cases, companies will embark on a programme of shareholder meetings immediately following announcement. In the UK, the company's corporate brokers and/or financial advisors will typically accompany the company on such visits. There will be extensive legal work led by the respective legal advisors. The financial advisors / corporate brokers will be particularly involved in the shareholder engagement, as I explain further below.

> At this time the target may also be considering approaches from other parties who express an interest in acquiring their business in competition to the original offeror.
>
> Stage 6 – Completion
>
> The transaction will close once necessary shareholder and regulatory approvals are in place and other customary closing conditions have been satisfied."

317. Mr Harman's approach was to "read through every one of the letters and the H&P's presentations and take … a view in the round on those, rather than trying to analyse each individually and put an individual value on that". He therefore produced a single, global figure of $10m for the value of H&Ps work which stands or falls on the accuracy of his assumptions. In cross-examination, Mr Harman refused to advance any alternative figure, stating (reasonably) that "to be honest, I really don't want to make up fees on the hoof".

318. The Defendant says that there are a number of problems with Mr Harman's approach to valuation. One is that he had assumed that H&P were involved in Stages 1 and 2, on the basis that Randgold's May 2018 board meetings fell within Stage 3 of his transaction process. However, it was put to him that in light of the information that had come to light during the trial this paragraph of his report would "certainly need to be amended". Mr Harman confirmed that he agreed. In particular, Mr Harman agreed that if the topics of analysis listed in the initial phase of CIBC's work split of 25 May 2018 (e.g. listing location, index inclusion, domicile etc.) had not previously been discussed between the parties, then H&P "never get out of stage 1".

319. It was put to Mr Harman that it was common ground that Mr Hannam did not originate the nil premium concept. Mr Harman agreed that the nil premium concept was "not a spark of genius" and that it was something that had already

been discussed between Randgold and Barrick. It was suggested that if the court decided that the "tectonic plates were moving of their own accord" and that the deal would have happened without Mr Hannam, that would change Mr Harman's valuation. In response he confirmed that if the Court concluded that the deal would have happened on the same timetable anyway this would change his valuation. He also recognised that he was "inevitably speculating as to whether or not it would have happened anyway".

320. Mr Harman's report relies on the assumption that the parties came to an in-principle agreement for a nil premium merger in Jackson Hole. However the evidence is clear that there was no in principle agreement in Jackson Hole and that it was only later (sometime around 20 May 2020) that the principals reached agreement. By this time Mr Hannam was not playing any "defining role".

321. This resulted in Mr Harman's trying to come up with some other justification for concluding that H&P had acted as financial advisor. His evidence on this point was as follows :

> "The term "financial adviser" and "financial advisory services", those two terms, are very broad. Hannam & Partners are a financial advisory firm. They are regulated as such. Mr Hannam's reputation is as a financial adviser, not as some of these other things. I considered in my professional life the work I did on M&A transactions to be financial advisory work.
>
> Financial advisory work may include introducing parties. It may include enormous amounts of financial analysis. It may include, my Lord, as you were referring to yesterday, the judgments that go on as to whether or not a transaction is going to be acceptable to shareholders. It includes also some of the work that goes on in relation to the discussions with shareholders afterwards. That, I believe all comes under financial advisory. That is what we are regulated to do. That is the accepted parlance in M&A and that's why that, I believe, is the right description of the role he was playing.

> These other words have been used in this case but are not widely used in M&A, and some of them have other connotations which, indeed in the mining industry, at least one of them has connotations which are probably pretty unattractive
>
> …
>
> Corporate finance - - financial advisory work is, as I said, a broad phrase. It covers what regulated financial advisers do. It goes - - it is much wider than narrow corporate finance, by which I assume you mean more financial analysis, more deal structuring-type work. It is broader than that."

322. This answer is intellectually disreputable – it amounts to an assertion that the definition of "financial advice" is "anything which investment banker might do within the scope of their corporate finance exemption". This is almost exactly back to front. A firm which has been appointed as a financial advisor might be asked to do any of these things as a part of its mandate. But it is simply wrong to say that a firm which has done any one of these things is thereby necessarily appointed as a financial advisor on a particular deal, and is entitled to a fee calculated as a percentage of the deal value as a result.

323. I therefore find that the approach which Mr Harman took to valuing the extent of the enrichment of the Defendant by the Claimant was not based on the true facts as established at trial. Since Mr Harman provided only one valuation, which was based on the incorrect assumptions which he had made, his valuation was of no assistance.

7.3 Mr Webb

324. I turn now to Mr Webb, the Defendant's expert. Mr Webb was instructed by reference to H&P's pleading to opine on whether: (i) H&P's work was "highly skilled and specialised" (ii) H&P's work was "not of a kind which was normally given free of charge"[including whether parties in H&P's and Randgold's

position would reasonably have expected such work to be paid for; and (iii) the work and services conferred a real benefit on Randgold. He concluded that this value was between $0 and $250,000.

325. This resulted in a detailed analysis of each piece of work identified by H&P in its Particulars of Claim, Reply and witness statements as well as Mr Hannam's alleged origination of the deal.

326. Mr Webb explained that he considered adopting Mr Harman's approach, and he may have done so, had it been clear to him that H&P: (i) had worked for a consistent client; (ii) had advised on the transaction that had actually happened; and (iii) had been involved in multiple stages of the transaction. However, as that was not the case, he did not believe that this was the correct approach.

327. The problem that Mr Webb faced was that he tried to work out what the remuneration of H&P would have been had it been specifically remunerated for the actions which it clearly did perform. However, since investment banks are not ordinarily remunerated separately for the sorts of services involved, he has – I think it is fair to say – struggled. The key point here is that Mr Webb was trying to estimate what these services were "worth".

328. Mr Webb suggests that the services of H&P should be valued at either US$0 (if only their services provided after the meeting between Mr Hannam and Mr Shuttleworth are to be taken into account) or somewhere between US$125,000 or US$250,000 on the basis of a notional retainer.

329. I am inclined to feel that the first of these is correct as an assessment of the value of the services provided after the meeting – which I think were notional.

However, as I have explained, I do not think that that is the basis which was established between the parties. As regards the other figures, the Claimant objects – justifiably - that Mr Webb provides no cogent explanation for his suggestion that Randgold's enrichment should be quantified on the basis of a notional retainer. In the circumstances it is difficult to see what other approach he could adopt. Neither party produced any evidence as to the existence of fee-paid corporate introduction services, so there is no objective data from which to work. In his report, Mr Webb opines that he has "also seen situations where companies have paid a bank a fixed sum equivalent to a retainer to compensate it for its time commitment in the pre-transaction stages if its work is of sufficient depth (especially where a transaction is abandoned)". However, he also observes that "[c]lients generally prefer not to make such payments and prefer instead for the advisor to share the transaction risk…".

330. There is no dispute between the experts that (1) advisors are ordinarily compensated on a 'success fee' basis: "investment banks avoid M&A advisory fees based on hourly rates"; (2) as noted above, it is "market practice that financial advisory fees for larger M&A transactions are set as an absolute sum or as a percentage of the transaction value agreed between the parties"; and (3) monthly retainer fees are "infrequent in large public M&A".

331. I am therefore forced to conclude that the estimated values provided by Mr Webb are unreinforced by real world data, and are entirely hypothetical.

7.4 The Defendant's own Estimation

332. I must therefore turn to the third strand of evidence available to me – the internal discussions within Randgold as to the amount which might be paid to H&P. There are two significant pieces of evidence in this regard.

333. The first of these is the e-mail sent on the 13 August 2018 by Mr Shuttleworth to CIBC's Paul Stafford

> "…Having reviewed the deal data of appropriate sized deals, whilst the average fees are higher there are plenty of examples of gross fees at less than 30bps. Remember we have 3 advisors, so assuming we split this, it might be 15, 10 and 5 bps which would still take us to 30bs in aggregate."

334. It is clear that the "3 advisors" are CIBC, Barclays and H&P respectively. However, this e-mail must be read in context. It was sent by Mr Shuttleworth as part of a negotiation aimed at persuading CIBC to accept a lower fee than the 30 bps which they had initially proposed. There seems to have been broad agreement between them that the absolute level of fees for a deal of this kind should be around 30 bps, and the point that Mr Shuttleworth was making was simply that since there were other advisers, CIBC could not have the whole 30 for itself. It is clear that Mr Shuttleworth did not regard these figures as anything more than illustrative, since his proposal to CIBC was that their fee be 18 bps. Consequently, I do not believe that this e-mail constitutes evidence of any fixed intention to pay Barclays or HP any specified amount.

335. It also notable that, if this e-mail were to be treated as a record of the value that Randgold ascribed to H&P's services, it clearly demonstrates that they did not regard H&P's claims as being for a fixed fee of $10m - otherwise they would have said so.

336. We do, however, have and "objective manifestation" of Randgold's view that H&P's services were worth US$ 2 million. Unusually, Randgold discussed in internal e-mails what the value of H&Ps services had been to them. Because these discussions took place after the decision not to mandate H&P had been taken, the issue which was addressed was – necessarily – non-contractual. However, it seems to have been accepted that Mr Hannam's work at the early stages of the interactions between Mr Thornton and Dr Bristow had been a *causa causans* of the transaction (albeit not, as the Claimant argued, a *causa sine qua non*), and that this was deserving of remuneration. The agreement which was reached within Randgold was that the appropriate reward for H&P was a fee of $2m. This appeared to have been broadly accepted, and it seems to have been the intention of Randgold to pay a fee of this amount to HP right up to the time of the announcement of the transaction. Indeed it was only the receipt of the invoice for $18m which dissuaded them from this course of action. H&P seem to have known of this intention – in a letter from H&P to Mr Shuttleworth sent as part of the ensuing discussions, it is said that "MB [Mark Bristow] in a telephone call to ICH [Mr Hannam] on 27 September 2018 proposed to pay either [US]$2m plus expenses or, if contested, nothing other than expenses".

337. I think that this evidence shows clearly the value which the Defendant placed on the services actually provided by H&P, and I therefore regard the appropriate valuation of the enrichment received as being $2m.

338. The Claimant says that this is too low, and in particular it says that it would indignantly have rejected it if proposed at an early stage (as indeed it did when it was ultimately offered). However, the fact that an amount is not agreed does

not mean that it is not a base for valuation. This point was considered in *Bendetti v Sawaris* in the Supreme Court. In the Court of Appeal, Arden LJ had suggested that an unaccepted offer made by one party to another in a dispute by way of settlement should not be used as a basis for valuation since it was the product of only one party and not agreed by the other. Lord Reed (at [147]) had this to say about this approach

> "I should explain why I do not entirely agree with the thoughtful analysis of Arden LJ. She appears in some parts of her judgment to have proceeded on the basis that an award in restitution should respect the parties common intention. On that basis, an unaccepted offer could not even in principle be relevant evidence of value. This appears to me to be incorrect in principle, and inconsistent with the significance attached in Cobbe v Yeoman's Row Management Ltd [2008] 1 WLR 1752, para 44, to an unaccepted offer in settlement, made in the course of the proceedings, as an indication of the amount a quantum meruit might provide."

339. However, in the following paragraph [148] he also said

> "On the other hand, Arden LJ was in my opinion on sounder ground in rejecting the relevance of the offer of Eur 75.1m on the basis that there was nothing in the evidence relating to the offer to shed light on the market value of Mr Benedetti s services as opposed to an offer that for whatever reason Mr Sawiris was prepared to make".

340. In this case, by contrast, the sole purpose of the assessment as made by the Defendant was to assess the value to them of the efforts of H&P. This amount was not intended to be part of any negotiation of any kind – the Defendant sincerely believed that they owed the Claimant nothing, and their decision to make this payment was simply a recognition of their assessment of the value of the services that they had received. I think it therefore forms the best basis available for assessing the value received by them.

341. This finding dispenses with the Defendant's arguments on subjective devaluation, since they did not seek to subjectively devalue below this $2m level.

8. The contractual position as regards H&P's expenses

342. Mr Shuttleworth stated in the documentation from October 2018 (once the Merger had been announced) that "I can confirm that we did agree to cover [Mr Hannam's] direct expenses". He confirmed this in his cross-examination, saying that (although he could not remember "the exact time of it") "[i]t was probably somewhere around the Jackson Hole meetings" or "somewhere around that period". Mr Shuttleworth recalled this (and a prior conversation with Dr Bristow) because Mr Hannam had told Dr Bristow that "he only flies first class". He accepted in evidence that this was a "binding agreement".

343. H&P recorded in their letter of 26 October 2018 that their understanding of the arrangement regarding fees was that, in a telephone call to Mr Hannam of the 27 September 2018, Dr Bristow offered to pay H&P "either $2m plus expenses or, if contested, nothing other than expenses". The H&P Letter confirms that this offer was rejected. The question is therefore whether there was a pre-existing contractual obligation to pay expenses, and whether that obligation was affected by H&P's rejection of Dr Bristow's offer.

344. I think that it is clear that Randgold had formed the intention to pay H&Ps expenses at an early stage, in accordance with Mr Shuttleworth's testimony. Their reason for this was that Randgold knew that H&P was a start-up business, and did not have the deep pockets of a large bank. It had already incurred significant travel costs in respect of the transaction. More importantly, even if

it was retained as an advisor, if the transaction did not proceed – a very real possibility – it would not be paid at all. It should not be forgotten that, regardless of whether H&P was to be mandated on the deal, both parties clearly perceived that Mr Hannam had done them a valuable service by catalysing discussions. What I do not have is any evidence of Mr Hannam's accepting this offer. However, I think that it is very unlikely that he would not have accepted it had it been made, and Mr Shuttleworth's evidence is that it was made. Consequently, I think there was a pre-existing contractual obligation on Randgold to pay H&P's expenses. Further, I do not think that the subsequent discussion affected this obligation. If I am contractually obliged to you to do X, I subsequently make you an offer to do X along with Y, and you reject that offer, my pre-existing obligation to do X is unaffected.

9. Conclusions

345. There was never a contract in existence between the Claimant and the Defendant under which the Defendant was to be appointed as financial adviser to Randgold in respect of the merger transaction with Barrick. Equally, there was no contract under which the Claimant was to be paid the fee which it claims (or any fee) in respect of its work to date on the transaction.

346. The Claimant's early work in promoting the transaction conferred a valuable benefit on both Randgold and Barrick. Both Randgold and Barrick recognised this, and intended to make some payment to the Claimant in respect of the value which they felt that they had received. They estimated this as being an amount of $2m.

347. There was a binding contract under which Randgold would reimburse the Claimant's expenses whether the transaction proceed or not, and that the validity of that contract was not affected by the Claimant's rejection of Dr Bristow's subsequent offer.

348. I reject the argument that the value which H&P provided was not provided at their expense because two of the individuals involved – Messrs Humphries and Hanrahan – were not employees of the Claimant.

349. The mere fact that Randgold and Barrick had accepted the services provided by the Claimant does not, of itself, give the Claimant any claim against them. In order for such a claim to arise, it would be necessary to show that there had been a failure of basis in respect of the agreement between them.

350. Such a basis was established in the conversation between Mr Hannam and Mr Shuttleworth. In that conversation Mr Hannam had indicated that he regarded himself as appointed by Randgold, and sought to discuss remuneration. Mr Shuttleworth avoided the discussion on remuneration. However, I think it was clear to Mr Shuttleworth (and would have been clear to any objective observer) that Mr Hannam believed that he was (or was to be) appointed as financial adviser on the transaction. Mr Shuttleworth had the opportunity to disabuse Mr Hannam of this belief, but did not do so. As a result, there was a common basis of understanding that H&P would be appointed between the Claimant and the Defendant that H&P would be appointed. That basis entirely failed.

351. This basis of understanding did not relate only to the services to be performed by H&P after the conversation, but extended to all of the services that would have been remunerated in the event that the basis had not failed and H&P had

been appointed as financial adviser. It is normal practice in this industry for transactions of this kind for fees to be agreed some time after services have begun to be provided, and the date of agreement is therefore not a cut-off date for this purpose. Thus on the facts before me, the claim in restitution is not limited to the value of the services provided after the basis had been established, but covers all services to which it related.

352. I do not believe that the Defendant has a complete defence to the claim on the basis that the Claimant was a disappointed risk-taker. In Mr Hannam's mind, the risks which he had taken had paid off, and a basis had arisen under which he was to be remunerated. His claim therefore falls to be evaluated under that basis, without reference to the mechanism by which it was attained.

353. As regards the value of the claim, I cannot accept either of the approaches put forward by the experts. The problem is simply that the objective data available relates to a function which the Claimant did not perform. Thus the Claimant's expert assessed, by reference to objective data, the fee which would be charged by a financial advisor who was active throughout the transaction - which the Claimant was not. The Defendant's expert sought to value individual services provided, but accepted that since this is not a usual approach in the investment banking world, the resulting figures were not confirmed by objectively available data.

354. I therefore think that the best proxy that I have for the value to the Defendant of Mr Hannam's services is the one that the Defendant appears to have put on it itself - $2m.

355. I do not think that that either of the illegality defences raised by the Defendant can succeed. The argument that Mr Humphries must have been in breach of his obligations to Barrick fails because there is no evidence as to what those obligations may have been. The argument that H&P were in breach of their obligations under FSMA fails because that regime contains very clear provisions intended to prevent breaches of those obligations giving rise to private rights in litigation of this kind.

356. I therefore find that the Claimant is entitled to recover $2m plus their expenses (to be agreed) from the Defendant as a restitutionary *quantum meruit*.