Neutral Citation Number: [2019] EWHC 1421 (Comm)

Case No: LM-2018-000175

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
LONDON CIRCUIT COMMERCIAL COURT (QBD)

Rolls Building, 7 Rolls Buildings,
Fetter Lane, London, EC2A 1NL

Date: 11 June 2019

Before :

HIS HONOUR JUDGE KEYSER Q.C.
sitting as a Judge of the High Court

- -

Between :

MOORGATE CAPITAL (CORPORATE FINANCE) LIMITED	**Claimant**
- and -	
H.I.G. EUROPEAN CAPITAL PARTNERS LLP	**Defendant**

- -
- -

Mark Smith (instructed under direct access) for the **Claimant**
Christopher Bond (instructed by **Hogan Lovells International LLP**) for the **Defendant**

Hearing dates: 25, 26, 27, 28 March and 30 April 2019
Written submissions: 5 April 2019

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Approved Judgment

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

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HIS HONOUR JUDGE KEYSER Q.C.

JUDGE KEYSER QC:

Introduction

1. The claimant, Moorgate Capital (Corporate Finance) Ltd ("Moorgate"), carries on the business of providing corporate finance and mergers and acquisitions advice. The defendant, H.I.G. European Capital Partners LLP ("HIG"), is a London-based private equity firm and the European affiliate of H.I.G. Capital LLC, a leading global private equity firm based in the United States.

2. In July and August 2011, two entities affiliated with HIG acquired the entire shareholding in the subsidiaries of Bezier Acquisitions Ltd (I shall simply refer to those subsidiaries as "Bezier") in a debt and equity transaction.

3. In these proceedings, Moorgate claims that it is entitled to payment from HIG for valuable services that it provided to HIG in connection with the acquisition of Bezier ("the Bezier Acquisition"), including introducing Bezier as a potential acquisition. The claim is put on alternative grounds. First, Moorgate claims to be entitled to payment pursuant to an oral agreement ("the Fees Agreement") made on 30 March 2011 between Mr Nicholas Mockett for Moorgate and Mr Paul Canning for HIG, by which, in consideration of the services being provided by Moorgate, HIG promised to pay to Moorgate £1,000,000 in the event that HIG or a subsidiary or affiliate of HIG acquired Bezier. Second, in the alternative, Moorgate claims to be entitled to payment by way of *quantum meruit*, on the grounds of unjust enrichment, for the valuable services it says it provided to HIG in connection with the Bezier Acquisition.

4. HIG disputes the claim in its entirety. It denies that there was an oral agreement as alleged by Moorgate and says that, even if anything regarding payment were discussed, it could not amount to an enforceable contract. HIG denies also that Moorgate provided any valuable services in connection with the acquisition of Bezier or anything for which payment was reasonably to be expected.

5. The various issues to which the claim gives rise are most conveniently considered in the light of an analysis of the facts. I shall therefore set out a detailed narrative, drawn mainly from the documents but also from the witness evidence. Then I shall set out the particular issues that fall for determination. Then I shall say something about the expert evidence in the case. Finally, I shall discuss the specific issues in turn and state my conclusions on them.

6. I am grateful to Mr Mark Smith, counsel for Moorgate, and Mr Christopher Bond, counsel for HIG, for their helpful written and oral submissions.

Narrative

7. Moorgate provides advice to both vendors and acquirers in respect of corporate mergers and acquisitions. Unlike investment banks, its services are purely advisory; it does not also provide finance for acquisitions. Moorgate itself was incorporated in May 2010 with a view to handling part of the business of a larger group ("the Moorgate Group").

Mr Mockett has at all material times been the sole director of Moorgate and, at least initially, was the sole shareholder.

8. Mr Mockett joined the Moorgate Group in 2009 as head of packaging mergers and acquisitions. He had long experience in that field and had for several years specialised exclusively in the packaging and related industries, advising on a large number of major transactions in the sector and establishing an international reputation within it. Before joining the Moorgate Group, he had for nine years been Sector Leader for packaging, paper and printing at PricewaterhouseCoopers Corporate Finance and then for five years a partner at Europa Partners, a boutique investment bank.

9. In the early 2000s, when Mr Mockett was working at PwC Corporate Finance, he got to know Mr Canning, who was then Investment Director at Gresham Private Equity and had experience of investments across a wide range of business sectors. In 2007 Mr Canning joined HIG as a managing director, partner and, with Mr Matthias Allgaier, co-head of private equity in the UK, positions he held until he left HIG in 2016. The head of HIG's London office was Mr Sami Mnaymneh and Mr Canning reported directly to him. Among the other people working for HIG in London, three may be mentioned: Mr Andrew Steel, a Principal who reported directly to Mr Canning; Mr Andrew Busby, a specialist in distressed debt; and Mr Alex Bayliss, a junior employee who assisted Mr Busby.

10. Mr Mockett and Mr Canning continued to have business dealings after Mr Canning joined HIG and after Mr Mockett joined the Moorgate Group. Their relationship was at first purely a business one, but in time they began to socialise with each other and became friends, albeit not close friends.

11. One of Mr Mockett's business acquaintances within the print and packaging sector was Mr David Mitchell, who had held senior positions in various leading companies. In mid-2009 Mr Mitchell was approached with a view to becoming chairman of the Bezier group of companies ("Bezier Group"), which was a leading retail marketing agency. In 2005 Bezier Group had been acquired by MidOcean Partners, a private equity firm, and since then it had made a number of acquisitions of businesses in the same sector. Mr Mockett gave Mr Mitchell his views on Bezier Group, and in due course on 2 November 2009 Mr Mitchell forwarded to him by email a News Release of that date headed "bezier group announces management buy-in led by David Mitchell":

> "Effective from November 5th 2009 the bezier group is pleased to announce a management buy-in and the completion of a £6.5 million equity injection and financial restructuring. David Mitchell will become chairman of bezier group, Europe's leading retail marketing agency.
>
> …
>
> On the financial side, MidOcean Partners will be backing the new management with further investment in order to support the growth plans of the business. With additional support from RBS and Lloyds TSB the company benefits from a strong balance sheet that will support the ambitions and growth plans of the business. …"

12. The positive spin in the News Release does not entirely disguise the fact that the "financial restructuring" was a consequence of what a later document produced by HIG calls "a period of operational underperformance in 2009", which, as the same document observes, was to "culminat[e] in the loss of the Asda contract (c.25% of revenues) in Jan-10". The banks were naturally concerned about their exposure and appointed Deloitte & Touche ("D&T"; later "Deloitte") to lead an Independent Business Review ("IBR"). In spring 2010 Bezier Group's management team was preparing a presentation for the purpose of that IBR. By email on 25 April 2010, headed "IBR Presentation", Mr Mitchell wrote to Mr Mockett:

> "Good to see you the other day. Please find attached a PowerPoint I have started drafting for D&T. It will be good to get your help on this and I look forward to hanging out with you in a fortnight."

13. On 27 April 2010 Mr Mockett met with Mr Mitchell and Mr Richard Barfield, Bezier Group's Chief Financial Officer, and at their request sent them by email "the standard NDA [non-disclosure agreement] for client-advisor exchanges". Mr Barfield used that standard form to create a non-disclosure agreement, which he sent to Mr Mockett for his signature and return on 28 April 2010. Presumably Mr Mockett did sign the non-disclosure agreement, because on 6 May 2010 he received from Bezier's management the master version of the IBR Presentation, and he subsequently arranged a meeting on 6 September 2010 to introduce an interested party (for convenience, "X Co") to the Bezier management. The use of the NDA is one of a number of matters that might tend to suggest that Mr Mockett was acting for the Bezier management. However, Mr Mockett explained that he had made use of a template for a client-advisor relationship for want of anything more appropriate, and he denied that he was retained by or acting for the Bezier management. Although it is clear to me that Mr Mockett was brought in by the management team to facilitate a sale, on balance I accept that there was never an expectation that he would be remunerated on a sell-side basis by Bezier or the management.

14. Just a few days after that meeting with Mr Mitchell, on 10 September 2010 Mr Mockett received an email from Mr Steel of HIG: "Keen to engage your brain on a potential UK print acquisition for Diam (our French POP portfolio co.)." "Diam" was Diam International SAS, a leading manufacturer of cosmetics display fixtures, which HIG had acquired in 2006. Now, in 2010, HIG was interested in acquiring point-of-sale/point-of-purchase ("POS/POP") marketing companies in order to complement Diam. (POS/POP marketing is where customers who are on the point of buying products are encouraged to buy other products; a familiar example is the placing of display material near a checkout at a shop. At least in the in-store context, POS and POP appear to refer to much the same thing, the distinction being that POS is used principally of printed material and POP of branded display stands.) The potential target, not named in Mr Steel's email, was Showcard Print Ltd ("Showcard"). In his initial response dated 14 September 2010, Mr Mockett identified three companies as what he called Showcard's "chief competitors"; one of these was Bezier: "I know the management team very well and advised an under bidder to MidOcean—who (sic) I also know well." Mr Steel invited Mr Mockett to attend a conference call with Michel Vaissaire, Diam's chief executive officer, on 15 September 2010. Mr Steel wrote to Mr Mockett, "Michel will be very interested in your thoughts on Bezier too." Also on

15 September, HIG sent to Mr Mockett a non-disclosure agreement in respect of Showcard.

15. After the conference call between Mr Steel, Mr Mockett and M Vaissaire, Mr Steel sent an email to Mr Mockett: "Thank you. Sensible first call. Appreciate your help." The following day Mr Steel sent an email to Mr Canning in respect of three target businesses, namely Bezier, Showcard and another company:

> "Bezier is now handled from RBS London by Steve Morris. (Paul, do you know him?) I am arranging to meet in early course and will co-ordinate with Andy Busby.
>
> Showcard—useful call yesterday with Nick Mockett, Loic Oury [of HIG's Paris office] and Michel Vaissaire (Diam CEO). Nick helped explain why he thinks Showcard's high profitability is likely sustainable. Michel is keen to press on. … Aim to submit formal written offer by end of this month, likely somewhere between 4–4.5x EBIT (£15.4m – 17.3m)."

16. A follow-up conference call was arranged for 21 September 2010, again to be attended by Mr Steel, Mr Mockett, M Oury and M Vaissaire. I consider it probable that the call related solely to Showcard, not to Bezier. This is a reasonable inference from the terms of the email that Mr Steel sent to Mr Mockett on the following day, which sought his thoughts on anything that might assist in deciding on "an appropriate EBIT multiple to offer for *this asset*" (my emphasis) and which attached a pdf copy of a confidentiality agreement that HIG had entered into with Showcard's parent company. The terms of the confidentiality agreement show that HIG could only disclose confidential information (including the very existence of the confidentiality agreement) to Mr Mockett if he were a professional adviser "engaged to advise [HIG] in connection with" the acquisition of Showcard.

17. On 5 October 2010 HIG made a formal offer of £17,300,000 for Showcard. On 12 October Mr Mockett sent to Mr Steel a formal letter, addressed to Diam, which outlined in twelve items the advisory services that Moorgate could provide in respect of the proposed acquisition. The letter proposed that Moorgate's fees for advising on the transaction, in addition to expenses, would be a commitment fee of £50,000 and a success fee of £250,000 payable upon the completion of the transaction. On the following day Mr Steel replied by email. He said that he had been working with other advisers, who would do "all the corporate advisory work" comprising eight of the twelve items identified by Mr Mockett. He said that he was looking to Moorgate for advice only on a number of specific matters ("I appreciate that this is more like a consulting assignment than a corporate finance advisory project") and that he was hoping to keep the fee to no more than £100,000, "given the small size of the deal." Mr Mockett replied politely and positively, though with evident disappointment: "I think the confusion here has arisen as when you first sought advice on this situation a year or so ago I had understood that if a deal were to go ahead I would be asked to advise in return for this input." Mr Steel in turn sent a conciliatory response: "Apologies for mis-communication, I have tended to think of this as a 'Nick Mockett' advisory role rather than a 'Moorgate Capital' role." It appears that no agreement was ever reached on fees.

18. In the event, HIG's bid for Showcard was unsuccessful and the matter went no further. However, Mr Mockett was unhappy at the way in which Mr Steel had proposed to deal with his fees in the matter. On 27 January 2011 Mr Mockett met Mr Canning by prior arrangement. His evidence was that he told Mr Canning that, where an adviser is remunerated primarily by contingent fees payable in the event of success, the fees must be sufficient to compensate for deals that do not come to fruition. "Paul agreed and concurred that the fee suggested by Andy Steel in respect of [Showcard] had not been appropriate. He promised that proper fees would be paid" (witness statement, paragraph 24). However, Mr Canning's evidence was that he had said that, in view of the relatively small size of the proposed transaction and the limited amount of work that Mr Steel was asking to be done, he considered the level of fee suggested by Mr Steel to be appropriate. It is unnecessary for me to resolve this dispute of fact, though I think that the truth is a matter of emphasis and lies somewhere between the two accounts: that Mr Canning defended Mr Steel's position but did so in a manner that acknowledged Mr Mockett's concerns and attempted to assure him that the importance of proper fees was understood. (In this context, Mr Mockett refers to what he says was Mr Canning's comment to him when he told him he was joining Moorgate: "We need to find you an excuse to pay you an enormous fee." However, if anything like that was said, I have no doubt that it was merely a light-hearted quip; it is not evidence that Mr Canning was looking for an opportunity to pay Mr Mockett fees that would not normally be paid.)

19. Meanwhile, on 9 December 2010 Mr Mockett had attended as a guest at Bezier's launch of a virtual-reality marketing laboratory. The following week, on 16 December, Mr Steel sent to Mr Mockett an email, informing him that M Vaissaire was calling to see him on the following day. "You are welcome to join if you are around. If not convenient, is there anything happening with the B company [that is, Bezier] in which we remain interested and on which I might update Michel?" As the meeting was clearly arranged without prior reference to Mr Mockett, it is clear that it was not arranged specifically for the purpose of involving him in discussions. Nevertheless, he attended the meeting. There is no documentation regarding what was discussed. Mr Mockett's oral evidence was that he thought it quite likely that he "would have been able to give them an indication of what the expected EBITDA would be for that year." I consider it unlikely that he either gave or was able to give any such indication. The absence of any indication in his witness statement that EBITDA was discussed and of any indication in the evidence generally that HIG had any knowledge of the likely EBITDA until much later suggests that the only figure being discussed in and around December 2010 was Bezier's annual turnover of roughly £100 million. I do, however, accept Mr Mockett's oral evidence that he would have discussed Bezier's changed business model, from the sale of a commodity (print) to the creation of agency-type relationships with clients, and its significant investment in software and hardware to that end. In particular, it is unlikely that he would have failed to play upon his attendance at the launch the previous week.

20. As a result of further discussions, and at the request of Mr Steel, Mr Mockett arranged a meeting between Mr Steel, Mr Mockett and Mr Mitchell on 10 February 2011. In anticipation of the meeting, Mr Mockett sent an email to Mr Steel on 7 February:

> "David Mitchell, Chairman of B [Bezier] will be accompanying me to your office at 11:00.

> I attach some background info (PLEASE DO NOT BRING THIS TO THE MEETING).
>
> However, the best flavour of what they do can be gleaned from their highly impressive web site. I would suggest focussing on these pages: …"

The information provided by Mr Mockett was at a high level of generality. It contained summaries of Bezier's core and affiliated businesses, potted biographies of its management team, a list of its prominent clients and some copies of its promotional images. A page headed "History" provided in bullet-point form a brief narrative of Bezier's history since it was established in 1998. The single piece of financial information was "Sales £100m". The information assembled by Mr Mockett does not seem to me to have been, or to have been intended to be, much more than a convenient summary of what could be learned from Bezier's website, save perhaps for some of the points in the "History" section. I am satisfied that it did not contain any proprietary information or trade secrets. In his oral evidence, Mr Mockett suggested that the examples he had given of Bezier's clients constituted proprietary information. I reject that suggestion and note that Bezier's website devoted a page to giving examples of its clients. The fact that Mr Mockett mentioned some clients who were not named on the website does not indicate that the additional information was proprietary or that it was in any way hard to come by. The website also contained more precise financial information than was contained in Mr Mockett's summary: "£92m: our turnover in 2010. £105m: our turnover forecast for 2011." The very fact that Mr Mockett referred to the website for the "best flavour" of Bezier's activities illustrates the limited nature of the information he was able to provide.

21. Immediately after the meeting with Mr Mitchell, Mr Steel reported to M Oury by email:

> "I just met David Mitchell, the Chairman of Bezier, at our offices following an introduction by Nick Mockett. Bezier will next week complete a restructuring, the result of which will be RBS converting a portion of their existing debt into the majority of the equity. David would not reveal the details at this stage, though he did say revenues were around £100m and all in the UK. Management will have a substantially increased equity stake and MidOcean will be diluted down to a stub equity stake.
>
> …
>
> Once the restructuring has been completed, David is interested in meeting Michel [Vaissaire] for an informal discussion on the potential synergies that might be created through merging Diam and Bezier. If such a meeting were to go well, then we could sign an NDA, access financial information and explore a possible offer for the business that would see the Bezier management holding equity and retaining their jobs in the merged entity."

M Oury responded agreeing that a meeting be arranged. Mr Steel forwarded the email chain to Mr Canning. Efforts began with a view to arranging a further meeting,

although in the event progress was slow and several weeks passed before the meeting could take place.

22. Meanwhile, Mr Mockett was having discussions with HIG in respect of a number of other potential transactions. One target was a business called Polestar (designated "Project Compass" by HIG); another was St Ives plc (referred to as "S. Co"). On 3 March 2011 Mr Mockett sent an email to Mr Busby, Mr Bayliss and Mr Canning in respect of Project Compass:

> "Thinking about the bigger picture here, it might make sense to look at buying the whole of 'S Co' and merging the web offset with Project Compass and their other main business which is in POP/POS with Diam. It is very similar to two targets we have been looking at with Diam and Andy Steel."

In the following week, Mr Busby was making efforts to arrange a meeting on Project Compass. On 6 March Mr Canning wrote to Mr Busby by email: "Would be useful to get Nick with us[;] is he otherwise engaged? Let's offer to pay him a day rate if need be e.g. 1000 per day."

23. On 23 March 2011 Mr Steel sent an email to Mr Mockett, explaining that he was trying to get dates for a meeting from M Vaissaire. He wrote:

> "Looks as if the meeting with David Mitchell will have to be in May. Do you think he would be prepared to give us a look at his latest balance sheet and P&Ls [profit and loss] for last year and forecast for this? That would help us crack on with assessing whether or not there is logic to putting the two companies together."

Mr Mockett replied on 25 March: "Will ask him when I next seem him—probably within next couple of weeks." Mr Steel responded with an invitation for Mr Mockett and Mr Mitchell to meet him and M Vaissaire for dinner on 21 April; "Ideally, we would have a balance sheet to assess in advance."

24. Meanwhile, Mr Mockett had arranged a meeting on 22 March between another interested party ("Y Co") and Mr Mitchell. Mr Mockett was also discussing St Ives plc as a potential target with Y Co. On 27 March 2011 he sent Y Co an email setting out the work that Moorgate would do in respect of the acquisitions of Bezier and St Ives plc. He proposed success fees of £1m in respect of Bezier and £2m in respect of St Ives plc, as well as monthly retainers. On 28 March Y Co replied, saying that it would get back to Mr Mockett as soon as possible. That is how matters stood with Y Co on 30 March, which is the date of the alleged Fees Agreement between Mr Mockett for Moorgate and Mr Canning for HIG. However, on 31 March 2011 Y Co provided a further response to Mr Mockett:

> "We are very interested in the proposed deal but would suggest we meet the St Ives CEO and check this is something that we and he would want to progress before we agree a formal mandate. Having said that, I need to make it clear that we don't pay buy-side retainers."

In his oral evidence, Mr Mockett maintained that this reply implicitly accepted his proposed success fee of £2m. It plainly did nothing of the sort. Further, the email, which of course post-dated the alleged Fees Agreement, refers only to St Ives, not to Bezier; there is no documentation concerning Y Co's thoughts on Bezier.

25. On Wednesday 30 March 2011, HIG held an evening reception between 6.30 p.m. and 9.30 p.m. at the Wallace Collection, Hertford House, Manchester Square, London. Mr Canning had arranged the event and was in the position of host for the evening. In oral evidence he explained that he saw the event as a key point for HIG, because after a period of building up the London office the firm was able to make a public declaration that it was now a real presence in the UK and had a large and established team. HIG took pains to identify the right people to be invited to attend, and three hundred invitations were sent out. Mr Canning could not say how many people attended, but it is clear that the event was very busy. Mr Mockett was invited to attend and did so. It is Moorgate's case that the Fees Agreement was made in the course of a conversation between Mr Mockett and Mr Canning at the event. Both men gave oral evidence in examination-in-chief and in cross-examination concerning what happened.

26. Mr Mockett's written evidence was to the following effect. Shortly after he arrived at the event, Mr Steel took him to talk to Mr Canning. He and Mr Canning discussed the significance of his email of 3 March and the potential targets that HIG could pursue, including Bezier and St Ives plc. Mr Canning said that he wanted to pursue both targets. Mr Mockett said that, if Moorgate worked for HIG on those potential transactions, it would have to forego offers from other clients who were willing to pay a fee of £1m in respect of Bezier and a fee of £2m in respect of St Ives plc; Moorgate would therefore need Mr Canning's assurance that HIG would pay those fees. "[Mr Canning] stated that they would, reassuringly adding 'Don't worry about that, Nick'." Mr Canning then asked Mr Mockett to email to him details of the target companies. This was a "serious and considered" discussion and lasted for at least ten minutes.

27. Mr Mockett's oral evidence on the matter was in most respects consistent with his witness statement. When examined in chief, he said that he had been one of the first to arrive at the event, when very few people had yet arrived, and was ushered over by Mr Steel to talk to Mr Canning, who was standing apart in a corner of the large room where the event was held. There he and Mr Canning had a one-to-one conversation "for something like twenty minutes".

> "I talked Mr. Canning through the various options that were in contemplation to build up a platform within the printing and point of sale / point of purchase sector, and I outlined to him the attractions of Bezier, and I outlined to him the attractions of St Ives, and I also mentioned to him the way parts of St Ives could fit with another deal that we had been looking at, called Polestar … I would have explained to Paul at that meeting exactly what had happened since there had been a management team at Bezier, which had taken place roughly 12 months before."

(Mr Mockett said that he would have given that explanation fairly succinctly, "because Paul Canning had some of the background to it at this point.")

> "I explained to Paul how David Mitchell's team had transformed Bezier, or were in the process of transforming Bezier, from being a sort of predominantly print commodity arguably print business into being a managed services provider, and that they built an incredibly impressive virtual reality room to demonstrate their skills to their customers, and how I felt it had a good future in that segment, because it was market leader in what it was doing. So, having explained that and the fit with St Ives, Paul said he was very interested and wanted to do the deals. And the intention would be to buy Bezier first, because it is easier to acquire a private company than a public company, and then to bolt on St Ives to that and, as I say, potentially carve off other bits of St Ives to other things we were looking at. So, Paul said he was very keen to do it, wanted to progress with it, wanted me to run at it as hard as possible with Andy Steel. And I said to Paul, 'If we are going to run with you—we have another client who is interested in the same opportunity; if we are going to run with you, I am going have to turn my back on them. They are prepared to pay us £1 million success fee for Bezier, and the £2 million success fee for St Ives. So, if we are going to drop them as a client and work with you, you have to agree to pay the same fees.' And Paul said to me that he was happy to do that, and he said, 'Do not worry about that, that will not be a problem.' So, as far as I was concerned, at that point, we had agreed what the fee was going to be for the services that were being provided."

28. When he was cross-examined, Mr Mockett said that the likely profitability of Bezier "may have come up" in the conversation, though he did not recall discussing its indebtedness. He said that he had known in March 2011 that there had been a restructuring at Bezier, because he had been told by Mr Mitchell in February that a restructuring was to take place. However, he was unable to say whether by 30 March he knew the final outcome of the restructuring. He did not claim that he had discussed the restructuring with Mr Canning in the course of the conversation, but he commented that Mr Canning was certainly aware that there had been a restructuring, because it was mentioned in Mr Steel's email on 10 February. He said that Mr Canning agreed the fees relating to both Bezier and St Ives without making any attempt to negotiate in respect of them.

29. Mr Canning's written and oral evidence was to very different effect. He said that his concern on the evening was to get around as many of the guests as he could, shaking hands, thanking them for coming, and saying a few words about HIG. He had no recollection of speaking to Mr Mockett at the event, although he believed that, as Mr Mockett was present, he would have done so. He did, however, remember that at around that time, and before 4 April, he had a brief conversation with Mr Mockett, in which Mr Mockett expressed concern that Mr Steel lacked the necessary experience to lead for HIG in the sector generally or in respect of Diam in particular. He said that he had told Mr Mockett that he was satisfied that Mr Steel did have sufficient experience; but he had added that, if time permitted, he would become more involved so as to provide some oversight of Mr Steel. Mr Canning accepted that this conversation could have taken place at the event at the Wallace Collection. "However, I am absolutely

certain that this conversation did not involve a discussion about any proposed fee. If we had had a conversation on that evening involving a proposed fee of £1m, I would have remembered it (as it would have been so unusual)": witness statement, paragraph 29. Similarly, Mr Canning said that he had no recollection of ever speaking with Mr Mockett about a fee of £1m and that it was simply impossible that he had ever agreed to pay Moorgate such a fee.

30. On Monday 4 April 2011 Mr Mockett sent Mr Canning an email headed "project Singapore", which was the name given to the project concerning St Ives plc. It began: "The plan is to merge three leading POS/POP business to create a market leading force." The three businesses were then identified as Diam, Bezier and St Ives plc; project briefs in respect of Bezier and St Ives plc were attached to the email. Mr Mockett said: "We have management angles on both situations and believe this is highly deliverable." The email was sent with an earlier email chain containing Mr Mockett's email to Mr Steel on 7 February 2011. In my view the email of 4 April 2011 is a clear indication that Mr Mockett and Mr Canning had had a recent conversation where the potential acquisitions of Bezier and St Ives plc were either discussed or at least raised as a matter for further consideration. However, the very fact that such a briefing was given to Mr Canning on 4 April is hard to square with the contention that Mr Canning had already on 30 March agreed to pay Moorgate fees of £1m for the Bezier Acquisition and £2m for the St Ives acquisition. Mr Mockett's email made no mention of the Fees Agreement.

31. On 6 April 2011 Mr Mockett sent to Mark Kelly of HIG a draft engagement letter in respect of another potential acquisition, this time of Benson Box Company Ltd. The draft letter set out in nine points the work that Moorgate would do on the project. It provided for fees comprising a Retainer and a Success Fee. The Retainer would be £15,000 per month for six months or such longer period as the parties should agree. The Success Fee was to be calculated on a sliding percentage scale: £500,000 for gross consideration up to £50m; a further 1% of the gross consideration over £50m and up to £100m; and reducing percentages for each £50m thereafter. Accordingly, the Success Fee would be £1m if the gross consideration were £100m. Mr Kelly forwarded the draft engagement letter to Mr Canning for his information. He wrote: "I asked Nick if he had an angle and would be interested in looking at this with us. I think he was drunk when he sent this through." The email chain shows that Mr Kelly orally described the draft engagement letter to Mr Canning as "whacky". Mr Canning replied to Mr Kelly by email on 12 April: "Let's chat[.] I know the thinking behind this." In cross-examination, Mr Canning said that he simply could not remember the circumstances of the email and did not know what it meant. No other evidence casts light on the matter.

32. On 12 April Mr Mockett attended a meeting with Mr Mitchell and a representative of yet another company ("Z Co") that was potentially interested in acquiring Bezier. Mr Mockett's evidence was to this effect: he was not representing Z Co; he was not representing Bezier; his reason for attending was "to gather intelligence" that might be useful to HIG, namely in identifying a potential party to whom in due course HIG could sell Bezier at a profit; he was not asked to attend by HIG and did not recall having told HIG of his attendance, though he "would not be remotely surprised" if he had discussed potential "exit strategies" with HIG and in doing so had mentioned Z Co; he did not tell Z Co that he was advising HIG. Mr Mitchell's evidence concerning this meeting was

that Mr Mockett had introduced Z Co to Bezier and was present at the meeting as acting for Z Co.

33. On 13 April Mr Mitchell and Mr Barfield were introduced by Mr Mockett to Mr Canning and Mr Steel at a pre-arranged meeting at HIG's offices. The meeting was undocumented. Some indication that little of great moment occurred is provided by Mr Barfield's enquiry of Mr Mockett on 27 May 2011: "Can you remind me who were the two HIG guys David [Mitchell] and I met with you when we went to their office the first time around?"

34. Efforts to find a date for a meeting convenient to M Vaissaire were unsuccessful, and it was eventually decided that Mr Steel and M Oury would meet with Mr Mockett and Mr Mitchell on 24 May 2011. On 23 May Mr Steel sent an email to Mr Canning, which explained the purpose of the meeting from his point of view:

> "Tomorrow morning, Loic and I are meeting David Mitchell at his offices to discuss the idea of combining Bezier and Diam. We will aim to find out the current financial state of Bezier and the exposure of RBS."

The best record of the meeting itself is in the email that Mr Steel sent on the evening of 24 May to Mr Mitchell, Mr Barfield and Trevor O'Reilly, Bezier's Chief Executive Officer, all of whom had attended:

> "Please find attached a proposed NDA, as discussed. I will be happy to make any reasonable modifications you suggest.
>
> Once we have agreed the NDA, it would be useful to see the P&L, balance sheet and cash flow statements for year to end April 2010 and your budget for the current year. This would give us a starting point for a follow up discussion on potential opportunities for collaboration between Bezier and H.I.G., potentially involving Diam."

Mr Barfield promised to review the non-disclosure agreement and to get back to Mr Steel on "the financials" once it was in place. The emails show, first, that Bezier had not by this point disclosed financial information to HIG and, second, that by late May 2011 HIG was not considering Bezier solely in terms of a merger with Diam, as had been the original intention.

35. After the non-disclosure agreement was executed, it was arranged that Mr Steel would call at Bezier's offices on Wednesday 1 June 2011. By email on 27 May, Mr O'Reilly notified Mr Mockett of the meeting and wrote: "Let me know if you feel Paul Canning should be there. We will share financial info so they can decide whether or not they're in or out." The following day, Mr Mockett sent an email to Mr Canning: "Can you come to Bezier next Wed at 4pm? Andy Steel is coming in and I think it would be good for HIG if you were able to join."

36. In advance of the meeting on 1 June, Mr Barfield sent to Mr Steel a document entitled "Bezier Opportunity Discussion". Several matters contained in the document are of relevance.

- In the section headed "Transaction opportunity" it was explained that the banks had facilitated a short-term "fix", which had resulted in a split of equity ownership as to 65% to the banks and 25% to management and 10% to MidOcean. However, the banks wished to limit further funding and were looking for an exit "via trade or financial sale". "Banks have encouraged management to seek alternative funding arrangements." The opportunity for HIG was said to involve, among other benefits, "Pre-emptive offer with minimal competition."

- For the first time, detailed financial information was produced.

- Two "financial scenarios" were put forward. Scenario 1, "Base Case", assumed "revenue / gross margin set to predictable run rate, with commensurate run rate cost base". For the financial year 2012 it showed revenues of £80m and an EBITDA of £5.2m. Scenario 2, "Current Case (Growth)", assumed "investment to grow new business and share of wallet"; the planned investment was set out in summary form. The summary forecast for Scenario 2 was: "Move to run rates over next 18 months: Revenues £100m; EBITDA £9.5m".

37. The meeting on 1 June appeared to be productive. In cross-examination, Mr Canning described it as the moment when, for HIG, the transaction "became real". For him, the critical point was that the banks were no longer willing to fund Bezier; this meant that there was a genuine opportunity for HIG. That evening, in an email to Mr Canning, Mr Steel set out the structure and basic terms of a possible offer for a 67.5% holding in Bezier, based on an Enterprise Value (EV) for the company of £19.9m. The email concluded:

> "Management will love it. Banks are unlikely to accept at face, but might be tempted to enter negotiations on the size of senior debt write-down (we lead that haggle) and on equity write-down (mgmt may be prepared to do a deal with banks…as they did in the last refi…keeping us at 67.5% and keeping mgmt highly motivated to help us close the deal)."

38. However, a manuscript note of the meeting recorded that the banks had appointed Anup Shah of Deloitte to advise in their interests. In an email of the previous week, Mr Shah had already mentioned to Mr Busby that he was in the early stages of dealing with an unnamed business that might be of interest to Diam. It soon became apparent that he was referring to Bezier. This was to alter the course that HIG's discussions took. On 2 June Mr Barfield sent some further financial information to Mr Steel and spoke to him by telephone. Mr Steel sent an email to Mr Canning: "Sounds to me as if a firm offer to [Mr Shah] tonight or tomorrow morning would be to our advantage." Mr Canning replied: "No that won't get us anywhere. Spoke to both Anup and Trevor [O'Reilly] today[;] think we are in for long haul but will circle back with Anup tmrw (he was seeing the banks this pm)."

39. On 3 June, Mr Mockett sent an email to Mr Canning:

> "Just spoke with Trevor [O'Reilly]. He is keen to talk with you and a conference call might be a good idea.

> May still be possible to usurp the process but we need to understand how your thoughts are developing."

The remark that it might "still be possible to usurp the process" rather points to the fact that it was now appearing likely that the original plan for an exclusive bilateral deal had itself been usurped by Deloitte's takeover of the process. Mr Mockett said in cross-examination that Deloitte did not take over the process but simply ran the process that was always envisaged. In my view, that is incorrect and was not how he saw things when he wrote this email. Mr Canning's evidence, which I accept, was that it was clear to him by this stage that it would not be possible to do a bilateral deal outside a competitive process, although he still thought that it would be advantageous to have the management team on-side.

40. On 6 June a three-way telephone call took place between Mr Canning, Mr Mockett and Mr O'Reilly; after it had finished, Mr Mockett sent an email to Mr O'Reilly:

> "Reflecting on the call just now I had the following thoughts that I would try to convey to Mark Wood [of RBS Debt Recovery].
>
> * You will remember when we met on x/y/2011 that you asked us to look for alternative funding solutions.
>
> * We had previously been approached by DIAM and their shareholders HIG.
>
> * They have indicated that they would provide immediate short term funding with a view to acquiring B[ezier] as soon as possible.
>
> * We realise that this is a trade player backed by a PE house and we (the management) might ultimately be a synergy, but feel this party has the right attributes to pay a fair market price quickly.
>
> * We continue to demonstrate our ongoing commitment to B e.g. by putting our own money in (even when you did not).
>
> * We are keen to hear your thoughts on where we stand and how we move the business forward.
>
> Hope this makes sense / helps."

Mr Mockett spoke to Mr O'Reilly after sending that email and then sent an email to Mr Mitchell: "it's inevitable in the process that leaks will occur (particularly from trade players) and this could stall or put in jeopardy two major contracts, and hence be value destructive."

41. On the same day, as part of an internal procedure of reporting potential deals, Mr Canning summarised the position for HIG's Investment Committee:

> "We have formed a good relationship with the new management of Bezier (whom [sic] we think are very credible) through the DIAM discussions. They are looking to carry out their own

> MBO from the banks. The catalyst to a potential transaction is an immediate £5m working cap requirement to normalise creditors. We are awaiting feedback from Deloitte (appointed by banks to review the business) on appetite from the banks to meet the short term funding requirement."

42. On 7 June Mr Steel suggested to Mr Canning that they meet on the following day with Mr O'Reilly and Mr Barfield "to agree tactics". Mr Canning replied: "Spoke to Trevor[:] no need for meet tmrw. He is away ahead of us on short term tactics this week—reduce list of potential parties (especially trade) and down grade numbers expectations." This reply is as unclear as was Mr Canning's attempt to explain it in cross-examination. However, the probable meaning is that Mr O'Reilly's tactic to persuade Deloitte, and therefore the banks, to accept the proposal that HIG and Bezier's management team were putting forward was to minimise the potential competition and to present less favourable trading forecasts, thereby reducing both the level of interest and the price that the banks could hope to achieve on a competitive sale.

43. On 8 June, Mr Canning's P.A. told Mr Mockett that Mr Canning had asked her to get in touch to try to arrange dinner the following week with him and "the 'team' including David Mitchell". "Sorry, Paul hasn't given me names so I'm assuming you will know who (sic) he means by 'team' and have their contact details. Paul will be joined by Andy Steel and Andrew Busby." Mr Mockett replied that he could not attend on the suggested date, and commented: "But I am not critical I guess!!!"

44. Dinner with the Bezier management team was arranged for 14 June. In an email that morning to Mr Steel and Mr Busby, Mr Canning recorded that Mr Mitchell had informed him that Deloitte had a shortlist of interested parties comprising five private equity houses and one trade buyer. Mr Mitchell wanted to know what further information HIG needed to be able to give him a "headline offer": "he doesn't want to side up with us if we don't offer the right deal." Mr Busby replied that he had just received a call from Mr Shah, who said that the formal process of finding a buyer would commence shortly with the issue of an Information Memorandum (IM), that he expected "a few financial buyers [to] switch off quickly", and that, as HIG was already involved, he wanted to arrange a meeting between HIG and management "ahead of the game". (It is clear that Deloitte was unaware of the contact between HIG and the Bezier management.) Later that day, Mr Steel informed Mr Canning and Mr Busby that Mr Mockett had been "chasing", "keen that HIG outline to management what the terms of any deal might be for them." "His line is that this team has worked on multiple previous PE deals and so will want to be given guidance on this early, before they fully commit to working with us." Mr Mockett's intervention is consistent with him simply wishing to ensure that HIG stood the best chance of closing the deal. It is also consistent with him acting primarily in the interests of the management team that was looking to be included in any deal that Deloitte and the banks approved.

45. Discussions within HIG continued over the next few days. On 16 June it received from Deloitte a non-disclosure agreement, which it returned duly executed a few days later. On 17 June Mr Steel recorded that Mr Mnaymneh was strongly supportive of making an offer worth £15m and "immediately locking in [management] team and getting the deal done."

46. On 18 June Mr Steel had a further conversation with Mr Barfield and Mr O'Reilly. Before he did so, Mr Canning sent him an email: "Andy[,] forgot to say don't mention me talking to Nick[:] agreed we would play it that he doesn't know what we are going back with." I accept the explanation of this in Mr Canning's witness statement: "Although it was unlikely that Mr Mockett was representing the management team (he had limited involvement and was not present at most of our meetings) we asked for Mr Mockett's views on our proposal. I believe that Mr Mockett asked us not to mention that we had asked for his view, as he wanted to be seen to be neutral as between us and the management team." According to Mr Canning, on or around 18 June Mr Steel made an offer of a package to Bezier's management team, which however was not acceptable to Bezier's management. Mr Canning said that from this point on HIG broke off discussions with the management and focused on reaching an agreement with the banks, via Deloitte, regardless of having the management "on side". Mr Mitchell's evidence was that Bezier's management team had been aware that HIG considered it to have "gone hostile", though he thought HIG's perception of the management was unfair.

47. On 20 June, upon receipt of the signed NDA, Deloitte sent to HIG the Information Memorandum relating to the sale of Bezier (which was called "Project Matador"). Mr Bayliss acknowledged receipt of the IM and asked for suggested dates when HIG could "meet with management". The meeting was arranged by Deloitte and took place on 23 June. Neither Mr Canning nor Mr Mitchell was able to attend the meeting, but the following day Mr Canning told Mr Mitchell that he had had "good feedback" from his end. Mr Mitchell replied: "Good – I'm really keen." Also on 24 June, Mr Bayliss asked Deloitte for a number of documents "that would be helpful to us in our evaluation process"; these related to legal, operational, financial and property matters.

48. HIG's thinking at the time appears from an "Initial Overview" document that it prepared for internal purposes only as a working document. The Executive Summary included the following:

> "▪ We have been in discussion with management for a number of months and are close to having them 'locked-up' to work with us on acquiring the business. We have been impressed with their performance to date and view their strategy for continued growth and value creation in the business to be highly credible.
>
> ▪ We [intend to make / have made] an offer for the company on the following terms:
>
>   ▪ £20m EV if one or both of current banks rolls £15m of outstanding £45m senior debt = FY12B 5.0x EBITDA-maint capex. Otherwise, £15m for 100% of the company all cash = 3.8x FY12B
>
>   ▪ Management invests alongside HIG for 10% of the equity
>
>   ▪ Issue management options for additional 10% if they achieve £9.5m EBITDA in FY13 and then another 10% if they achieve £14m EBITDA in FY14.

> - Business requires banking support for a £5m RCF to fund intra-month working capital needs."

Page 5 of the document stated: "HIG regard management as key to winning this deal and driving continued turnaround of the company. We have built a strong relationship with them and believe that we are close to having management 'locked-up' to back us to acquire Bezier."

49. By letter dated 28 June 2011 Deloitte, as "sole financial adviser in relation to Project Matador", formally invited indicative offers for Bezier by 8 July. The letter said that Deloitte intended, on the basis of the offers received, to select a shortlist of parties to participate in the next stage of the process, which it aimed to complete by the end of July.

50. The email chain shows that on 29 June Mr O'Reilly was making attempts to contact Mr Canning and Mr Steel to arrange a meeting. Mr Mockett sent an email to Mr Steel, asking what time the meeting was so that he could try to attend. Mr Steel sent an email to Mr Canning: "We can claim to be unavailable, but that will be a tough stance to hold through to 8 July, or we can do the meeting. Which do you prefer? Looks as if Nick [Mockett] expects to join the meeting too." Mr Canning replied: "Let's do meet but beginning next week?" Mr Steel informed Mr Mockett that the meeting might have to be early in the following week.

51. In his evidence, Mr Canning explained Mr Steel's lack of enthusiasm for holding the meeting with Mr O'Reilly at all. He said that by the end of June HIG's view of the Bezier management, initially positive, had begun to sour, in particular because it appeared that the management team had unrealistic expectations of the rewards they personally could expect and seemed to be more concerned with their own positions than the wellbeing of the company; therefore HIG decided to press on with the deal, with or without the management team, and saw no point in speaking to Mr Mockett about the process being run by Deloitte.

52. That evidence gains some support from the terms of an email sent by Mr Canning to Mr Mnaymneh, Mr Steel and Mr Busby on 7 July 2011, in which he said that the plan was "to submit 2 letters tmrw – one to acquire the shares (per Deloitte process) and one to acquire the bank debt". The email referred to financial projections provided to HIG by Bezier's management team "before we stopped talking". As regards the offer for the shares, Mr Canning proposed to tell Deloitte that HIG could achieve prompt completion "with or without mngmt". The email concluded:

> "We intend to meet the lead partner at Deloitte tmrw handling this to reinforce our messaging i.e. that we think mngmt are playing games / we will acquire without them / we provide certainty will get this done this month / we are not pushing forward without exclusivity."

53. The change in HIG's thinking is also apparent in the redaction of the Initial Overview document prepared in the first week of July; the passage in the Executive Summary set out above was now significantly altered:

> "▪ We have been in discussion with management for a number of months but remain uncertain as to whether they are the right team to drive the business forward.
>
> ▪ We intend to make an offer for the company on the following terms:
>
> ▪ £18m EV cash free / debt free = FY12B 4.4x EBITDA
>
> ▪ Business requires banking support for a £5m RCF to fund intra-month working capital needs.
>
> ▪ IM suggests 2012 negative cashflow of -£2.5m, resulting from £4.1m EBITDA / (£2.0m) change in working capital / (£3.3m) capex / (£1.4m) exceptionals
>
> ▪ We believe these numbers are deliberately cautious as management has attempted to paint a gloomy picture to the banks, hoping to buy the company cheaply. Alternative set of mgmt. projections shown to HIG suggest EBITDA of £9.5m / (£0.8m) change in working capital / capex of (£1.9m)".

At page 10, the document identified "Loss of senior management" as a risk: "We may not be able to agree terms with incumbent CEO [Mr O'Reilly] and Chairman [Mr Mitchell]."

54. On 8 July 2011 HIG submitted its formal offer for Bezier. That morning, before it did so, Mr Canning spoke to Mr Mockett by telephone to see whether he had any thoughts on the figures HIG were proposing to offer. Mr Canning's evidence was that Mr Mockett was not in a position to offer meaningful advice, as he had not been sufficiently closely involved. I accept that evidence. Mr Mockett said in cross-examination that there was a substantive and detailed conversation about the offer and that it might even have resulted in an alteration to the figures offered. However, he had not mentioned the conversation in his written evidence; this suggests that the conversation was not perceived by him to be significant. Further, it is clear from the documents that the offer made was the same as what had already been intended.

55. HIG's offer was submitted by way of two letters to Deloitte. The first letter said that HIG would form a NewCo to acquire 100% of the Bezier shares for £18m in cash "on the basis of a cash and debt-free Transaction." The second letter said that HIG, through a debt-acquisition vehicle, would acquire "all debt and equity securities currently owned or held by the senior secured lenders for a total sum of £15m." HIG informed Deloitte that it would complete the transaction by 29 July and would work with Alvarez & Marsal Europe LLP for financial matters and Kirkland & Ellis International LLP for legal matters.

56. The third version of the Initial Overview document was prepared on or about 10 July 2011; the section corresponding to the passage set out above reads:

> "▪ We have been in discussion with management for a number of months. They may be the right team to drive the business forward, however we have not yet been able to agree terms with them.
>
> ▪ We have made two offers for the company of £18m EV and the debt £15m EV. …
>
> ▪ Business requires banking support for a £5m RCF to fund intra-month working capital needs.
>
> ▪ IM suggests 2012 negative cashflow of -£2.5m, resulting from £4.1m EBITDA / (£2.0m) change in working capital / (£3.3m) capex / (£1.4m) exceptionals. Additionally, intra-month cash swings mean that there may also be need for an RCF facility of up to £5m to fund intra-month working capital needs.
>
> ▪ However, we believe these numbers are deliberately cautious as management has attempted to paint a gloomy picture to the banks, hoping to buy the company cheaply. Alternative set of mgmt. projections shown to HIG suggest EBITDA of £9.5m / (£0.8m) change in working capital / capex of (£1.9m)".

The document recorded that HIG understood itself to be competing against one other trade buyer and two or three financial institutions, and that Deloitte had indicated that it would recommend HIG's offer to the stakeholders and would afford HIG a five-day period of exclusivity to complete on the debt purchase by 15 July.

57. Discussions continued over the course of the following days between HIG and Deloitte; these also involved Mr Barfield, as HIG explored Bezier's financial position in more detail. Mr Mockett was not involved in those discussions. (On 19 July he sent an email to Mr Canning; it indicated that he had been unable to speak to Mr O'Reilly and ended, "Any news from your side?") Members of the HIG team had meetings with Bezier's management on 19 July. In an email to his colleagues on 20 July Mr Canning referred to the "need to be careful not to spook mngmt over the next few days as they seem to have reached the interim conclusion that they are surplus to requirements". Mr Canning's evidence, which I accept, was that HIG was concerned to have the full co-operation of Bezier's management in the due diligence process.

58. The debt element of the Bezier Acquisition was completed on 28 July 2011, when Bezier's debts to the banks were acquired by Grace Bay II Holdings S.a.r.l., an affiliate of HIG.

59. HIG then appointed Deloitte to act in respect of the acquisition of the equity; advice was also received from Alvarez & Marsal. The method adopted was that Bezier Acquisitions Ltd was placed into administration and on 19 August 2011 the joint administrators sold the shares in the trading subsidiaries to HIG Europe – Magenta II Ltd, a newly incorporated special purpose vehicle and affiliate of HIG. The consideration for the shares was £240,000 in cash and the assumption of debts of

£15,760,000 owed by Bezier Acquisitions Ltd to Grace Bay. The debt then became an intra-group loan between Magenta and Grace Bay. The overall effect was that the cost of the Bezier Acquisition was £16m. In accordance with HIG's insistence, Mr Mitchell was removed as chairman of Bezier, though the rest of the management team remained in place.

60. On the morning of 22 August 2011 Mr Mockett sent an email to Mr Canning: "Great news re the pending announcements. Will continue to keep mum until all live. … Thank you for including us in the press releases." However, that afternoon he saw a press release that did not refer to him and sent another email to Mr Canning: "I see the story has gone out. Would have appreciated a mention." Mr Canning responded that the press release had come from Bezier and that HIG had not yet released a statement. On the following day, an article on the deal appeared in Packaging News, which said that HIG "was advised by Moorgate Capital on the deal". That information had been provided by Mr Mockett. When he read that article, Mr Canning sent an email to Mr Mockett: "Just to re-iterate we still haven't put anything out on this … but it seems you don't need our help!" Mr Mockett explained in response that he had been responding to enquiries from trade press but offered to ask for the removal of the comment if it was unhelpful. Mr Canning replied: "Nick no worries its (sic) all good." HIG's own press release was issued the following day; it listed the "Equity" advisers as "Moorgate Capital, Nicholas Mockett (Corporate finance); Kirkland & Ellis, Partha Kar (Legal)". Mr Canning's evidence was that Mr Mockett was named on his instructions.

61. The issue concerning Moorgate's fee arose shortly afterwards. An internal HIG document headed "Bezier fee schedule" includes £80,000 plus VAT for Moorgate for "Introducer success fee". Mr Canning's evidence was that this entry resulted from his discussions with Mr Steel and reflected the fact that, although HIG did not consider either that it was legally obliged to pay Moorgate anything and thought that Mr Mockett had contributed very limited value before the Deloitte process began and none at all thereafter, an ex gratia payment would serve the purpose of maintaining a good commercial relationship with Moorgate. At all events, when Mr Canning and Mr Mockett met for coffee on 8 September 2011, Mr Canning offered a fee of £80,000 for Moorgate and Mr Mockett rejected the offer out of hand and said that he wanted a fee of £1m. Mr Mockett's evidence was that Mr Canning said he would go away and think about it. By contrast, Mr Canning's evidence is that he reacted by withdrawing the offer of £80,000 and terminating the meeting. On 21 September Mr Canning sent a text message, asking for dates when they could meet. Mr Mockett sent some dates, but Mr Canning did not respond further and Mr Mockett took no steps to chase the matter up or even submit an invoice. When in October 2011 Bezier raised some queries concerning the transaction fees, Mr Canning replied: "re Moorgate plse take out of the short term cashflows[:] this fee is on hold indefinitely".

62. Mr Mockett sent an email to Mr Canning in September 2012 but received no response. Mr Canning's evidence was that he did not reply to the email because by this time it had become apparent that the Bezier Acquisition had been, to say the least, unsuccessful and he felt that Mr Mockett had missed his chance to discuss a fee. The two men came across each other occasionally in the following few years but did no more than exchange formal greetings; Bezier was not discussed. In 2017 Mr Mockett contacted Mr Mnaymneh, suggesting that they meet to "finalise the outstanding sums", though even then he did not submit an invoice. There is no evidence that Mr Mnaymneh responded.

The issues

63. The issues arising from the facts, in the light of the statements of case, may be stated at the broadest level as follows:

    (1a) Was there a contract between HIG and Moorgate for payment of a fee of £1m to Moorgate?

    (1b) If there was such a contract, have the conditions for payment been satisfied?

    (2a) If there was not such a contract, is Moorgate entitled to payment from HIG of a *quantum meruit* on the ground of unjust enrichment?

    (2b) If Moorgate is so entitled, what is the amount of the payment due from HIG?

Expert evidence

64. Pursuant to permission given by the court, the parties adduced expert evidence in respect of two issues: (1) custom and practice in seeking and providing corporate finance advice and services in private equity buyout transactions (including the custom and practice in relation to the fees of the providers of such advice); (2) the value of such advice and services. Evidence for Moorgate was given by Mr Charles Martin, formerly an in-house specialist adviser at 3i plc, a private equity firm. Evidence for HIG was given by Mr Jeremy Miller, formerly Chief Operating Officer of the London office of Centreview Partners, a corporate finance advisory firm. Both men had relevant expertise, gave their evidence clearly and in a focused manner, and did their best to assist the court regardless of party considerations. I was assisted by their evidence.

65. The experts agreed a number of matters concerning what they regarded as the "custom and practice" relating to the provision of corporate finance advice and services in private equity buy-out transactions. Among those matters, useful to be mentioned here, are the following (I take them, with some paraphrasing, from the joint memorandum dated 17 January 2019).

    - It is not entirely uncommon for a corporate finance adviser to be involved at an early stage via an oral agreement, which may make provision for a contingent fee, particularly if the corporate finance adviser and the private equity provider have an ongoing relationship. However, in those circumstances, and in the absence of a formal letter of engagement, it would be expected that there would be at least an email confirmation between the corporate finance adviser and the private equity provider.

    - No later than completion of the transaction, any engagement would be formally documented by means of an engagement letter.

    - Custom and practice would be that an invoice for corporate finance advice/services would be submitted to the private equity provider no later than completion of the transaction.

- Corporate finance advisers carry out a significant amount of work for private equity clients on potential deals, many of which do not result in completion and for which the corporate finance advisers do not expect or receive a fee.

- Once a transaction is in progress and the corporate finance adviser has been retained by a private equity provider, the adviser will work exclusively for that private equity provider. It is possible, however, though very unusual, for the adviser to work for more than one potential purchaser on a given transaction with the consent of all involved.

- Where a fee is payable, all or most of it will be paid on successful completion of the transaction. A regular retainer is sometimes agreed in addition, but this will be modest by comparison with the success fee. A fee would rarely be paid to a corporate finance adviser on the basis of hours worked.

- The fee will usually be determined by two factors: the anticipated Enterprise Value ("EV"), which is the aggregate value of the consideration paid for the debt and equity of a business; and the range of services to be provided. The anticipated EV would be used to determine the maximum amount of the fee. The actual fee would then depend on the range of services that the corporate finance adviser was obliged to provide.

- The range of services that a corporate finance adviser might offer and the order of importance that the services would commonly have in determining the fee were set out helpfully in a table in para 3.1 of the joint memorandum dated 17 January 2019. In brief, the services were: (a) Find; (b) Origination; (c) Proprietary; (d) Initial Valuation; (e) Management Presentations; (f) Facilitation; (g) Due Diligence; (h) Review Valuation, in light of due diligence; (i) Debt; (j) Reviewing due diligence support; (k) Monitoring press comments. I need only explain the first two of these, which the experts agreed were the most important. "Find" is where the adviser introduces the private equity house to a target not previously known to it. "Origination" is where the adviser identifies an opportunity concerning a particular target and introduces the private equity house to the opportunity, albeit that the target itself may have been known to the private equity house.

66. The experts expressed some disagreement on the extent to which it was open to the parties to re-visit an agreed fee in the light of changing circumstances. Mr Miller considered that, if the basis of a transaction (for example, the anticipated EV) changed materially or the range of services were altered materially, either party could re-visit the fee. In his written evidence Mr Martin expressed the view that, once a fee had been agreed, it was payable unless the transaction failed to complete. This stark conflict is, as it seems to me, more apparent than real. In cross-examination Mr Martin acknowledged that renegotiation might be appropriate if there were a material change in the basis of the transaction. I think that the matter comes down to questions of law and fact. If the terms of an agreement remain binding, one party cannot change them unilaterally. If the terms of an agreement cease to apply in altered circumstances, they cannot be enforced. As a matter of commercial reality among parties with ongoing relationships, it will presumably sometimes not be sensible to take one's stand on strict contractual rights; renegotiation might be sensible even if it is not obligatory. I am not

sure that expert evidence assists on these matters. More importantly, however, this aspect of the evidence simply did not bear on either of the cases advanced by Moorgate. No issue at all arose as to how a contractually agreed fee, otherwise due and payable to Moorgate, might be reduced. Mr Smith seemed to think that the evidence was relevant to the valuation exercise under the alternative claim to a *quantum meruit*, but in my judgment it is entirely irrelevant to that issue for the simple reason that the alternative claim operates in the absence of a contract.

The claim in contract

67. Moorgate's primary case rests on the contention that there was a contract (the Fees Agreement) between it and HIG, made orally between Mr Mockett for Moorgate and Mr Canning for HIG on 30 March 2011 at the Wallace Collection. I reject that contention and find that there was no such contract. Therefore, the primary case fails.

68. Mr Smith submitted that I could reject Moorgate's primary case only if I were to find that Mr Mockett's evidence about events at the Wallace Collection was dishonestly given. I do not agree. I think it less likely that Mr Mockett was being deliberately untruthful than that he has come to persuade himself, and thus to believe, that he had a legal right to remuneration that he desired and felt he deserved. It is not uncommon in the experience of the courts for witnesses to deceive themselves in what are essentially honest but nonetheless false recollections. In determining where the truth lies it is more helpful to focus on objective indicia, both in the documents and in the inherent probabilities, than to rely on evidence as to a witness's memory, especially when the events in question took place a considerable time ago. (Like many other judges, I find helpful the remarks of Leggatt J in *Gestmin SPGS SA v Credit Suisse Securities (Europe) Ltd* [2013] EWHC 3560 (Comm) at [15]-[22] and in *Blue v Ashley* [2017] EWHC 1928 (Comm) at [65]-[69].)

69. My reasons for finding that there was no Fees Agreement are as follows.

70. First, Mr Canning denies that he made the alleged agreement. That is the clear effect of his evidence: he would not have made such an agreement; he certainly would not have made any such agreement in the circumstances alleged; and the alleged agreement was, in the circumstances, so remarkable that, if *per impossibile* he had made it, he would have remembered it. Mr Canning's evidence is not, of course, conclusive: he could be lying, or he could have persuaded himself of the truth of various falsehoods (for example, that he would not have made such an agreement). However, the evidence is an important starting point.

71. In conjunction with this first reason, I mention Mr Canning's evidence that it was relatively rare for HIG to pay a success fee and that it did so in cases where the adviser had introduced an opportunity in respect of a target of which HIG was previously unaware; in such cases HIG would assess the fee on the basis of a variant of the "Lehman Formula" (the formula is explained in Mr Martin's first report and need not be explained here). Usually, however, HIG would pay advisers on a "time and materials" basis; this would be by way of formal engagement, around the time of the Letter of Intent, if it appeared that the adviser would be giving substantial advice that would add significant value to the transaction. HIG would not pay an adviser merely

for giving them an "angle" on a transaction. This evidence, like the rest of Mr Canning's evidence, militates against acceptance of Moorgate's primary case. However, like the rest of the evidence it is not in itself determinative. It may be noted that the payment methods described by Mr Canning are contrary to what the experts agreed was normal in the corporate finance world: they said that the Lehman Formula was rarely used nowadays and that, unlike other professionals, corporate finance advisers were rarely paid on a time and materials basis. On the other hand, the email of 6 March 2011 (paragraph 22 above) is an example of Mr Canning proposing to pay on the basis of a daily rate, and Mr Mockett complained in evidence that HIG did not observe market practice in respect of fees.

72. Second, there is no contemporary or near-contemporary documentary evidence of the Fees Agreement, although one would reasonably have expected such evidence to exist. The agreement was never reduced to writing. It is not even mentioned in any of the emails or other communications at the time. Mr Mockett's email to Mr Canning on 4 April 2011 contains no mention of or allusion to an agreement as to fees, although there was an obvious opportunity to record the agreement. In my view, it is a simple matter of common business sense to suppose that, if an agreement had been made on 30 March, both sides to the agreement would have wanted a documentary record of it, the more so if the agreement related to not one but two companies, one of which was a public company. That supposition is confirmed by the expert evidence, which at the very least shows that as a matter of fact corporate finance advisers and private equity houses do not defy common sense but record their fee agreements in writing. The disclosed documentation shows several instances of Moorgate making written fee proposals, but there was no such written proposal in the present case. Further, it would have been all the more important for Mr Mockett to have some written record of the Fees Agreement, because he had recently been disappointed by HIG's attitude in respect of Showcard.

73. Third, although it is by no means unlikely that Mr Mockett spoke to Mr Canning about Bezier at the Wallace Collection, it is inherently unlikely that their conversation was of the kind described by Mr Mockett. For one thing, the occasion was not the kind where one would expect deals to be struck or contracts made. Although Mr Mockett was doubtless right to say that the event was not merely social and that it comprised a business element, it was after all a drinks reception for marketing purposes. Any business talk would be likely to be confined to more conversational matters, such as some quick "ear-bending" or letting it be known that one would like to have a meeting with Mr Canning to discuss certain matters. Thus I can well believe that, on being greeted by Mr Canning, Mr Mockett took the opportunity to tell him that he had misgivings about Mr Steel's ability to lead for HIG in respect of Diam; indeed, I think it probable that he did so and that Mr Canning made some remarks to put his mind at rest. But to proceed to attempt to negotiate a retainer (or, as Mr Mockett would have it, two retainers) would be socially dysfunctional and commercially inappropriate; it is unlikely that Mr Mockett would have attempted it or that Mr Canning would have indulged him if he had done so. For another thing, it is in my view unlikely that Mr Canning, who was acting in the role of host at the event, would have been drawn into a conversation lasting between ten and twenty minutes at a time when his social responsibility to his guests and his professional responsibility to HIG required that he be engaged in welcoming those who were in attendance. In their supplemental memorandum dated 17 March 2019 the experts agreed "that agreeing a fee at a marketing event was unusual [and that] reaching agreement on two independent fees

on two separate transactions was even more unusual particularly at a marketing event." Whether or not that agreement properly amounts to expert evidence, it shows that the experience of two men experienced in the world of corporate finance is no different from what one would anyway expect.

74. Fourth, regardless of the social occasion, the very agreement is implausible, because by 30 March HIG still did not have substantial financial information on Bezier and was not in a position to make a sensible estimation of the business's likely EV. A fee of £1m might very well have been appropriate if the anticipated EV were approaching £100m, but it would be very much less appropriate if the anticipated EV were of the order of £16m (as the actual EV turned out to be). HIG did not have the figures to enable it to make a reasoned judgement on this until 1 June. Mr Mockett's own evidence was that the detailed financial information was a "moving feast" and that the proposed fee of £1m was based on a turnover of £100m, which "could well" indicate that the business was worth £100m. It is inherently unlikely that a fee agreement such as is alleged by Moorgate was made at a time when its basis, the financial information, was a "moving feast". Further, the critical matters for assessing EV are profitability and EBITDA, not turnover *per se*. Mr Martin's evidence was that, although it was interesting to know the turnover of a business, turnover was not closely related to valuation. Mr Martin also accepted, in the course of his oral evidence, that an agreement as to the amount of any success fee would be made at a stage when the private equity house had sufficient information to know with reasonable accuracy what the EV of the target company would be. The estimate might, of course, prove to be subject to a relatively small margin of error. But it is not to be expected that a private equity house would agree a success fee at a time when its state of knowledge was so lamentably bad that it estimated the EV to be £100m but the eventual EV was only £16m. (I should say that an exception to this might be if a variant of the Lehman formula were used, because in such circumstances the fee would turn on the actual EV. However, that is not Moorgate's case.)

75. Fifth, as at 30 March the Bezier matter was being handled at HIG by Mr Steel, not by Mr Canning; the latter had oversight but not day-to-day control of the matter. Although Mr Canning no doubt had authority to reach agreements and was not required to seek the approval of his subordinates, it is unlikely that he would have agreed Moorgate's retainer without so much as a word with Mr Steel. It is also unlikely that he would have been comfortable with agreeing the retainer in such circumstances, given his limited involvement to that date, and I can see no reason why he should have felt the need to do so. These points are illustrated graphically by Mr Mockett's email to Mr Canning on 4 April 2011 (paragraph 30 above): some five days after Mr Canning is supposed to have made a contract to pay Moorgate £1m if the Bezier Acquisition went ahead, Mr Mockett was giving Mr Canning fairly basic information about the proposed transaction.

76. Sixth, I consider as implausible Mr Mockett's evidence that Mr Canning simply agreed to the proposed terms without any attempt at negotiation and without any enquiry as to the particular services that Mr Mockett would provide. Mr Canning's evidence was to the general effect that HIG adopted a strictly disciplined approach to the payment of third-party fees. Although that evidence by itself could be dismissed as self-serving, Mr Mockett's own evidence in cross-examination was that HIG neither paid nor sought to pay market rates for advisers. An additional reason why Mr Canning might have

been expected to examine the proposed fee rather than simply agreeing to it immediately is that, according to Mr Mockett's evidence, the fee was put forward on the basis that there was another interested party that was willing to pay it. This, however, meant that HIG was not considering an exclusive opportunity: it knew (according to Mr Mockett's evidence) that Mr Mockett had been discussing the matter with another interested party, with which it was liable to be in competition. (Cf. paragraph 5.29 of Mr Miller's report, which makes this point.)

77. Seventh, the Fees Agreement is said to have related not only to Bezier but also to St Ives plc. In their supplemental memorandum the experts expressed the agreed opinion that, if a private equity house retained a corporate financial adviser to act on its behalf in respect of a possible offer for a listed company, both firms "should have initiated immediate internal and regulatory processes". The experts commented that they had seen no evidence that either HIG or Moorgate had undertaken any such processes; I was not referred to any such evidence. This tends to indicate that no agreement regarding a retainer in respect of St Ives plc was made at the Wallace Collection. That in turn tends to undermine Mr Mockett's evidence on the point.

78. Eighth, the supposed context of the Fees Agreement—that another interested party had intimated agreement to pay Moorgate the fees now being sought from HIG—is false: a request for those fees had been made but no agreement had been obtained.

79. Ninth, I do not accept Mr Mockett's explanation of his attendance at the meeting with Z Co on 12 April 2011. It is unlikely that he attended the meeting in his role as HIG's adviser: (a) there is no documentary or other evidence that he told HIG about the meeting; (b) the fact that he was attending on behalf of HIG would have had to be concealed from Z Co—this would certainly have been unethical and could not realistically have been achieved without deception if, as Mr Mockett claims, he did not disclose the fact to Z Co; (c) Mr Mitchell—whose evidence both Mr Bond and Mr Smith invited me to accept as generally reliable, albeit that he naturally had difficulty with some matters of detail—said that he believed that Mr Mockett was attending on behalf of Z Co. If Mr Mockett did not attend the meeting on behalf of HIG, his attendance was inconsistent with him having entered into the Fees Agreement with HIG less than a fortnight previously. (The point is obvious and was accepted unhesitatingly by Mr Martin in cross-examination.) This counts against the existence of the Fees Agreement.

80. Tenth, there is Moorgate's conduct after the Bezier Acquisition was completed. No invoice was raised, either initially or at any stage thereafter. When HIG offered to pay Moorgate £80,000, Mr Mockett did not respond by sending any email or letter referring to the Fees Agreement. (Mr Canning says that Mr Mockett did not seek to rely orally on any such agreement either, and I accept that evidence.) The matter was not pursued at all for almost six years. I did not find Mr Mockett's attempts to explain this to be very persuasive. In my view, if Mr Mockett had believed that there was a contract between Moorgate and HIG, he would have pursued the matter at the outset.

81. As I find that there was no contract for the payment of a fee to Moorgate, the primary case fails.

82. In the circumstances, there is no need for me to discuss the detailed and interesting submissions advanced by Mr Bond to the effect that any agreement that might have

been made would not have been effective as a contract. Briefly, however, I make the following observations. I should not readily have found that an oral agreement regarding fees made at a drinks reception at the Wallace Collection was intended to create legal relations; it is idle to speculate as to the circumstances in which I might have made that finding, as the facts are hypothetical. However, if I had found that HIG and Moorgate had made an agreement intended by them to create legal relations, I should have taken some persuading that the agreement was insufficiently certain to constitute a valid contract; though again, of course, that would turn on the precise findings of fact—findings that I have not made. Further, I should not have been impressed by the argument that the Fees Agreement described by Mr Mockett created no binding obligation on HIG because the fees would be paid by the SPVs used for the eventual acquisition. Whatever the likely practicalities of payment, there was no agreement with the SPVs and, absent novation, any enforceable liability would have rested with HIG. The discrete argument that any payment obligation would have been subject to a condition precedent that was not fulfilled will be considered, indirectly, in connection with Moorgate's alternative claim to a *quantum meruit*, to which I now turn.

The claim in unjust enrichment: *quantum meruit*

83. The directly relevant part of the particulars of claim is as follows:

> "8. Alternatively, if contrary to Moorgate's case it is not entitled to payment in accordance with the [Fees] Agreement, Moorgate is entitled to be paid for its work on the Bezier transaction on a *quantum meruit* basis. Moorgate will say that the value of its work was £1 million or alternatively such sum as the Court shall think fit.
>
> 9. In the event that the Court finds Moorgate's alternative basis of claim set out in paragraph 8 above to be made out, Moorgate is entitled to be paid for its work on the customary basis adopted in the market between the parties in such transactions, namely an *unum quid* fee negotiated *ex ante* between the parties payable only on successful conclusion of the envisaged transaction, and not based on hours spent, extent of ancillary services provided or not provided, or any other *ex post* factors."

84. Paragraph 9 of Moorgate's reply put flesh on those bones:

> "[T]he claimant's entitlement to a payment on a *quantum meruit* basis arises as follows:
>
> a. The claimant offered the defendant a service for which payment is customarily expected and made, namely origination of and advice on the defendant's acquisition of Bezier;
>
> b. The defendant sought and accepted the said service;

c. The customary basis for payment for such service, and consequently the most accurate gauge of objective market value, is an *unum quid* success fee negotiated *ex ante* between the parties, calculated by proportionate reference to the value of the envisaged transaction and payable only on successful conclusion of the envisaged transaction, and not based on hours spent, extent of ancillary services provided or not provided, or any other *ex post* factors;

d. This customary basis of payment incorporates the practice of advisers such as the claimant carrying out considerable volumes of work for which no fee is ever payable;

e. In the instant case, the claimant was bound to act only for the defendant in the proposed transaction, and as such was kept out of the market for other buy-side instructions;

f. Additionally, the relationships which Mr Mockett held with Bezier's management team were instrumental in the defendant:

    i) having advantageous early access to Bezier's management before and during the sale process,

    ii) being presented as a credible purchaser of Bezier;"

g. The claimant will say that the value of its service on this basis was £1 million or alternatively such objectively measured market value sum as the Court shall think fit."

85. The claim was advanced and argued as a restitutionary claim in unjust enrichment. With reference to the four questions identified by Lord Clarke in *Benedetti v Sawiris* [2013] UKSC 50, [2014] AC 938, at [10], Mr Smith submitted in brief as follows:

    1) HIG was enriched by the work done by Moorgate in respect of the Bezier Acquisition;

    2) That enrichment was at Moorgate's expense, because it resulted from Moorgate's work and because Moorgate regarded itself as bound exclusively to advise HIG and thus excluded itself from access to other potential clients in the market;

    3) The enrichment was unjust, in the sense that it was the product of services requested by HIG and its retention is unjust unless payment is made for it;

    4) There are no relevant defences to the claim for payment.

    Moorgate contends that it is entitled to be paid the objective market value of the services at the date when they began to be provided; this, it says, is £1m.

86. It is, rightly, common ground that, if HIG was enriched by Moorgate's work, that enrichment was "at the expense of" Moorgate. This follows simply from the fact that

we are solely concerned with benefits, or "enrichment", caused or constituted by services provided by Moorgate. It is also common ground that there are no relevant defences (such as change of position) to the claim for *quantum meruit.* The three areas of dispute in respect of the *quantum meruit* claim are, accordingly, (1) the existence of enrichment, (2) the existence of an "unjust factor" and (3) the valuation of any enrichment. At the price of departing from the logical order of the analysis, it is convenient to begin by considering the second of these matters (the "unjust factor") before turning to the existence and valuation of any enrichment.

Was any enrichment of HIG "unjust"?

87. The particulars of claim did not state clearly what "unjust factor" was relied on by Moorgate in support of its alternative claim for a *quantum meruit*. Paragraph 8 of the particulars of claim does not identify any particular factor, unless it be "the [Fees] Agreement" as grounding a non-contractual right to payment. Paragraph 14(1) of the defence complained that the particulars of claim had "failed to identify the ground (or grounds) on which such an entitlement [viz. to payment on a *quantum meruit* basis] is said to arise." Paragraph 9 (b) of the reply shows that what is relied on is that HIG "sought and accepted" Moorgate's services, namely origination and advice, though it does not specify when or how the services were "sought".

88. In my view, a convenient starting point, all too easily overlooked, is to remember that there was no contract for payment. Moorgate puts its case on the basis that HIG requested and received services in circumstances where, objectively, it would be expected to pay for such services (cf. paragraph 9 (a) – (c) of the reply). Yet, as Mr Smith made clear (written submissions, paragraph 45): "Neither party contends for a position of there being a contract that is silent on the fee payable …" It is common for a valid contract for services to be silent as to payment; in such cases, the courts imply a term for payment of reasonable remuneration; cf. *Energy Venture Partners Ltd v Malabu Oil and Gas Ltd* [2013] EWHC 2118 (Comm) at [281] *per* Gloster LJ. That, however, is not this case. Although there is an analytical distinction between payment obligations in contract (reasonable price) and unjust enrichment (disgorgement of benefit), proper justification is required for conferring an entitlement to payment on a party who has not contracted to receive payment. It is not the role of the law of unjust enrichment to create for the parties contracts that they never made.

89. There are, of course, circumstances in which, absent a contract, payment for services can be recovered on the basis of unjust enrichment. One such case is where the parties acted pursuant to a contract that, unbeknown to them, was void or invalid: for example, *Craven-Ellis v Canons Ltd* [1936] 2 KB 403. Another such case, possibly resting on the same ultimate justification (cf. the *dictum* of Barry J in *William Lacey (Hounslow) Ltd v Davis* [1957] 1 WLR 932, 939), is where services have been provided in the parties' confident anticipation of concluding a contract under which the provider will be remunerated: for example, *British Steel Corp v Cleveland Bridge and Engineering Co Ltd* [1984] 1 All ER 504. In the *British Steel Corp* case, negotiations over the terms of a contract were progressing but had not been completed when, in order to keep the project to schedule, the plaintiff carried out some of the works at the defendant's request. Goff J found that there was no contract but held that the plaintiff was entitled to payment, for reasons stated at 511:

> "In my judgment, the true analysis of the situation is simply this. Both parties confidently expected a formal contract to eventuate. In these circumstances, to expedite performance under that anticipated contract, one requested the other to commence the contract work, and the other complied with that request. If thereafter, as anticipated, a contract was entered into, the work done as requested will be treated as having been performed under that contract; if, contrary to their expectation, no contract was entered into, then the performance of the work is not referable to any contract the terms of which can be ascertained, and the law simply imposes an obligation on the party who made the request to pay a reasonable sum for such work as has been done pursuant to that request, such an obligation sounding in quasi contract or, as we now say, in restitution."

90. However, neither the *British Steel Corp* case nor other authority establishes a general right to payment for requested services in the absence of a contract. In *MSM Consulting Ltd v United Republic of Tanzania* [2009] EWHC 121 (QB), 123 ConLR 154, Christopher Clarke J, having found that services had not been provided under a contract, went on to consider the law relating to recovery of a *quantum meruit* when services had been provided in anticipation of a contract that did not materialise. The following passage is relevant:

> "170. In *Countrywide Communications Limited v ICL Pathway Ltd* [1996] C No 2446 Mr Nicholas Strauss QC considered the authorities bearing on the question of whether or not a claim can successfully be made for work done in anticipation of a contract which does not materialise. Having considered *William Lacey (Hounslow) Ltd v Davis* [1957] 1 WLR 932; a number of academic writings; *Jenning and Chapman Ltd v Woodman Matthews & Co* [1952] 2 TLR 406; *Brewer Street Investments Ltd v Barclay Wool & Co Ltd* [1954] 1 QB 428; *British Steel Corporation v Cleveland Bridge and Engineering* [1984] 1 AER 504; *Regalian Plc v London Docklands Development Corporation* [1995] Ch 212; *Marston Construction C Ltd v Kigass Ltd* [1989] 15 Con L..116, he concluded:
>
> > '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. Perhaps, in the absence of any recognition in English law of a general duty of good faith in contractual negotiations, this is not surprising. Much of the difficulty is caused by attempting to categorise as an unjust enrichment of the defendant, for which an action in restitution is available, what is really a loss unfairly sustained by the plaintiff. 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. Undoubtedly

> the court may impose an obligation to pay for benefits resulting from services performed in the course of a contract which is expected to, but does not, come into existence. This is so, even though, in all cases, the defendant is ex hypothesi free to withdraw from the proposed contract, whether the negotiations were expressly made "subject to contract" or not. Undoubtedly, such an obligation will be imposed only if justice requires it or, which comes to much the same thing, if it would be unconscionable for the plaintiff not to be recompensed.
>
> 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. The first is whether the services were of a kind which would normally be given free of charge. Secondly, the terms in which the request to perform the services was made may be important in establishing the extent of the risk (if any) which the plaintiffs may fairly be said to have taken that such services would in the end be unrecompensed. What may be important here is whether the parties are simply negotiating, expressly or impliedly "subject to contract", or whether one party has given some kind of assurance or indication that he will not withdraw, or that he will not withdraw except in certain circumstances. Thirdly, the nature of the benefit which has resulted to the defendants is important, and in particular whether such benefit is real (either "realised" or "realisable") or a fiction, in the sense of Traynor CJ's dictum. Plainly, a court will at least be more inclined to impose an obligation to pay for a real benefit, since otherwise the abortive negotiations will leave the defendant with a windfall and the plaintiff out of pocket. However, the judgment of Denning LJ in the *Brewer Street* case suggests that the performance of services requested may of itself suffice amount to a benefit or enrichment. Fourthly what may often be decisive are the circumstances in which the anticipated contract does not materialise and in particular whether they can be said to involve "fault" on the part of the defendant, or (perhaps of more relevance) to be outside the scope of the risk undertaken by the plaintiff at the outset. I agree with the view of Rattee J that the law should be flexible in this area, and the weight to be given to each of the factors may vary from case to case.'

171 I regard this as a helpful analysis of the authorities from which I also derive the following propositions:

> (a) Although the older authorities use the language of implied contract the modern approach is to determine whether or not the circumstances are such that the law should, as a matter of justice, impose upon the defendant an obligation to make payment of an amount which the claimant deserved to be paid (*quantum meruit*): see *William Lacey* (*Hounslow*) *Ltd v Davis* …
>
> (b) Generally speaking a person who seeks to enter into a contract with another cannot claim to be paid the cost of estimating what it will cost him, or of deciding on a price, or bidding for the contract. Nor can he claim the cost of showing the other party his capability or skills even though, if there was a contract or retainer, he would be paid for them. The solicitor who enters a 'beauty contest' in the course of which he expresses some preliminary views about the client's prospects cannot, ordinarily expect to charge for them. If another firm is retained, he runs the risk of being unrewarded if unsuccessful in his pitch.
>
> (c) The court is likely to impose such an obligation 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.
>
> (d) But the 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: see the *Jennings and Chapman* case.
>
> (e) 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."

91. For Moorgate, Mr Smith submitted that the present case fell within principle (c) in Christopher Clarke J's judgment at [171]: "the defendant … 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." He relied on the remarks of Thomas J in *Becerra v Close Brothers Corporate Finance Ltd* (25 June 1999, unreported) as showing the correct approach:

> "It was common ground that, if the plaintiffs provided services to Close Brothers in circumstances where Close Brothers had requested those services or were to be taken to have requested them, and if there were no circumstances from which it could be inferred that the services would be rendered gratuitously, then the plaintiffs were entitled to a *quantum meruit* for those services."

Mr Smith's submissions were not entirely clear as to which particular requests on the part of HIG he relied on; paragraph 20 of his skeleton argument, taken with paragraph 31, was perhaps the fullest statement of the case, though it does not make the position very clear. Presumably, the first communication relied on regarding Bezier is Mr Steel's request for thoughts on Bezier in mid-September 2010: see paragraph 14 above.

92. For HIG, Mr Bond submitted that Moorgate was a disappointed risk-taker. This was not a case where there was a contract found to be ineffective, nor did the parties act in anticipation of a contract that failed to materialise; there was a simple absence of contract. As a sophisticated commercial party, Moorgate had the ability and opportunity to seek an agreement for its services and yet, in a market where gratuitous services were not uncommonly provided, it did not do so. Why, asked Mr Bond, should Moorgate later be able to claim the payment for which it had omitted to contract? He relied on two further *dicta* of Thomas J in the *Becerra* case, the first in the context of requested services and the second in the context of free acceptance of unrequested services:

> "If such a request [scil. for services] had been made out, I would then have had to consider whether there were special circumstances showing that it was intended that the services should be gratuitous … This would have been a difficult question and I will not express a concluded view. I would have been concerned to hold that in the financial markets where the parties normally make agreements and certainly agree fees for the making of an introduction, it is to be assumed that the plaintiffs intended to be paid. There are all kinds of reasons why a person in the City might make an introduction in the absence of an agreement that he is to act for payment; on most occasions such introductions are made quite gratuitously, possibly on some occasions for long term or short term self-interest of the person effecting the introduction."

> "… I see great force, in the context of dealings in the financial markets and the City, in the argument that a person who acts without being requested takes the risk he will not be paid. In a market place where relationships are complex and actions may be motivated by more than one consideration, it is difficult to see why it is unjust that a person who has not made an agreement (though he is quite capable of making one) and not been requested to act should not be left with the risk of not being paid."

In this context, I note that, just before the second of those passages, Thomas J had cited with apparent approval the following text from Birks, *An Introduction to the Law of Restitution* (revised edition, 1989), p. 282:

> "It is not enough that the plaintiff had a non-gratuitous intent. The defendant must also have known of that intent. Otherwise nothing calls the defendant to ask himself whether he should take steps to reject the benefit; for, as everyone knows, people do

> accept as gifts some benefits which they would certainly reject
> if they thought they were expected to pay."

(That passage, though directed to the concept of "free acceptance" and mentioned in that context by Thomas J, is also relevant to the case of requested services, because such a claim for restitution of unjust enrichment depends on the mutual understanding that the benefits were not intended to be gratuitous.)

93. In my judgment, assuming for the present that Moorgate conferred enrichment on HIG by the provision of services in respect of Bezier, the circumstances are not such as to render the receipt of those services, without payment, unjust. The reasons for this conclusion are set out in the following paragraphs.

94. First, there is no reason to suppose, and it was not suggested, that the parties acted in the mistaken belief that there was a contract for fees.

95. Second, I find that neither Moorgate nor HIG understood that Mr Mockett's work in respect of Bezier would attract a fee, at least unless an agreement were made. Mr Mockett may well have hoped that, if things progressed favourably, HIG would engage him under a contract; in that case, a fee would have been payable. In those circumstances, an agreement would be made and some record of it would in all likelihood be made; see the agreed matters in the expert evidence. But matters never progressed like that. Mr Miller said in cross-examination that cases might arise where, for example, in order to steal a march on rivals in a managed bidding process where the requisite information to agree a fee was not at hand, the parties might agree that work would start and the fee would be agreed later. That is essentially the *British Steel Corp* case, but it is not this case. I am satisfied that the parties did not assume that a contract would eventuate and that Moorgate would be paid under it.

96. Accordingly, the situation relating to Bezier was not essentially different from that relating to Showcard. In the case of Showcard, Mr Mockett provided services in the hope that, if HIG acquired Showcard, he would be given a retainer. In the case of Bezier, he may have had a similar hope, but he had no more.

97. Moorgate contends, in effect, that an analysis of this sort makes no sense, because the result is that the corporate finance adviser provides a valuable opening (in the circumstances of the present case, what is conveniently called an "angle") to the private equity house and has no assurance that the private equity house will not simply take advantage of the angle and cut him out of the picture. (That is how the matter was put to Mr Canning in cross-examination.) I disagree. There is a market in which the advisers are entitled to seek agreements or arrangements to their best advantage. That does not mean that the receipt of an angle by a private equity house gives rise to a contingent liability to make a payment. That would in effect be to posit a unilateral contract at the outset. The true position is that, as Mr Canning observed, it is likely to be in the interests of the adviser to start the conversation by providing the angle in the hope that the private equity house's interest will mature into a contract with the adviser. In the normal course, the entitlement (absolute or conditional) to payment will accrue only when an agreement is made, though as already mentioned it may sometimes arise earlier. Contrary to Moorgate's contention, this is not an unsatisfactory position, because any private equity house that developed a reputation for not entering into contracts with corporate finance advisers in circumstances where other houses would

do so would thereby render itself unattractive as a recipient of further angles in the future. In other words, the nature of the case is inherently speculative from the point of view of the adviser and is regulated by freedom of contract and enlightened self-interest on the part of both parties.

98. Third, and related to what I have said, the courts ought not to be quick to suppose that commercial parties who are well able to make contracts with each other expect payment to be made in the absence of a contract. There may be such cases: see the example given by Mr Miller and mentioned above; but they are not the default position. The remarks of Thomas J in the *Becerra* case, relied on by HIG, are particularly in point in the present case. Mr Mockett was well able to put a fee proposal to HIG but, for whatever reason, he did not do so. Nor did he provide services on the basis of an understanding that they would be paid under a fee agreement to be made when more detailed information was available.

99. Fourth, I regard it as significant that during much of the period for which payment is claimed Moorgate was keeping its options open with other potential clients. Both in the statements of case and in submissions, Moorgate has relied on the contention that it regarded itself as bound exclusively to advise HIG and thus excluded itself from access to other potential clients in the market. That contention is clearly false. For one thing, in the absence of a contract there was no obligation of exclusivity. For another thing, and more importantly, Moorgate did not regard itself as bound exclusively to HIG: quite the contrary. The initial mention of Bezier was in September 2010. However, in late March 2011 Mr Mockett was seeking to agree a retainer in respect of Bezier with a third party (paragraph 24 above)—something he never did with HIG. And on 12 April 2011 he was attending a meeting with the Bezier management on behalf of yet another potential purchaser (paragraph 32 above). It is difficult to see why, when it was keeping its options open and not committing itself to any of the potential clients, Moorgate should subsequently turn around and complain that it is unjust that it has not been paid by one of them.

100. Fifth, the services provided by Moorgate in respect of Bezier were modest. There is no reason to assume that the parties must have expected that they would be paid for regardless of whether a contract eventuated.

1) HIG had in-house specialist knowledge and an existing presence in the sector through Diam, and it already knew about Bezier.

2) Mr Mockett did not initially mention Bezier as a potential target; he mentioned it as one of the three chief competitors of the actual target, Showcard. It was HIG that, in the context of the project concerning Showcard, expressed an interest in knowing Mr Mockett's views on Bezier. In cross-examination, Mr Mockett said that too much should not be read into the word "competitors" and that he had probably already had a telephone conversation with Mr Steel in which he had mentioned Bezier as a potential target. I consider that evidence, which is not supported by other evidence, to be unreliable and an attempt to interpret events in a manner favourable to Moorgate's claim. What probably happened was that, after Mr Mockett had mentioned Bezier as a competitor, M Vaissaire or Mr Steel raised the possibility that it might be an alternative or additional target and Mr Mockett said that he thought it might be "unlockable", to use a word he used in cross-examination.

3) Mr Mockett did indeed make an introduction between HIG and the Bezier management team. His involvement with the management team constituted an "angle". However, given Bezier's actual circumstances, this seems to me to have been of more advantage to the management team than to HIG. At the outset, Mr Steel was aware that the important party as regards Bezier was less the management team than RBS as main creditor, and it appears that he made direct contact with the person at RBS who was responsible for Bezier's account.

4) The information provided by Mr Mockett was slight. I have already commented (paragraph 20 above) on the limited nature of the information provided in advance of the meeting on 10 February 2011. Further, although Mr Mockett claimed in cross-examination that he had provided that information pursuant to a request from Mr Steel, no such request is documented or mentioned elsewhere in the evidence; I think it more likely that Mr Mockett took it upon himself to provide the information. Again, as appears clearly from the narrative, Mr Mockett neither provided nor was in a position to provide any detailed financial information before the management team provided it on 1 June 2011; and by then the involvement of the banks rendered the management team of little importance and Mr Mockett largely irrelevant.

101. Sixth, regarding the nature of the services provided by Moorgate, one particular matter, on which I do not principally rely but which has some relevance, concerns the causative efficacy of Mr Mockett's evidence vis-à-vis the transaction that eventuated. HIG relied on *MSM Consulting Ltd v United Republic of Tanzania* for the proposition that in a buy-side transaction there was to be implied into the adviser's contract a term that it would be entitled to payment only if it were the "effective cause" of the transaction. In this regard, I make the following observations.

1) It is both unnecessary and unhelpful to attempt to reach a definitive conclusion on the question whether any contract between Moorgate and HIG would have contained the implied term. Whether it would be proper to imply a term into a contract must depend ultimately on the findings as to the express terms of the contract. I have found that there was no contract at all.

2) Nevertheless, it seems to me likely that any contract between Moorgate and HIG would have contained the implied term that Moorgate would be entitled to a fee only if it were the effective cause of the transaction. See in particular *MSM Consulting Ltd v United Republic of Tanzania, per* Christopher Clarke J at [142], and *Bowstead and Reynolds on Agency* (21st edition, 2018), Article 57 and commentary. There is nothing in the facts of the present case that leads me to consider that the implication of the term would be inappropriate. Indeed, the very notion that payment would be of a "success fee" invites the conclusion that a direct causal link is required between the services and the transaction.

3) Christopher Clarke J considered, *obiter*, that the fact that a contract would have contained the implied term did not itself mean that a *quantum meruit* was precluded where the services were not the effective cause of the transaction, though it was a factor tending against the award of a *quantum meruit*: see *MSM Consulting Ltd v United Republic of Tanzania* at [176]. It seems to me that it must at least tend strongly against the making of such an award. I would go further and would think that, even where a contract would not have contained

the implied term, the court was entitled to regard the fact that services were not the effective cause of the transaction as a relevant matter when deciding whether it was just to impose a non-contractual payment obligation.

4) In my judgment, Mr Bond was clearly correct to submit that Moorgate was not the effective cause of the Bezier Acquisition. I shall say more about Moorgate's role later in this judgment. For the moment, it suffices to note that Mr Mockett's involvement concerned a potential bilateral transaction involving the merger of Diam and Bezier. However, from the beginning of June 2011 the direct intervention of Deloitte, independent of any prior communication with Bezier's management, meant that HIG was involved in an accelerated debt/equity auction in which Moorgate had no role. Mr Bond submitted that the eventual transaction was "radically different" from what had originally been envisaged and was properly to be regarded as a "substitute transaction that broke the chain of causation" between Moorgate's work and the Bezier Acquisition. I agree and regard this as an additional factor militating against an award in unjust enrichment.

102. In conclusion, Moorgate's primary case was that it had a contract that entitled it to payment for its services. That case has failed. Why should it nevertheless be entitled to payment in the absence of a contract? With HIG's consent, it could have contracted for payment. Without HIG's consent to a contract, it could have declined to provide services. Having, without a contract, nevertheless provided services in the hope of payment or some other advantage, it was, in the circumstances of this case, merely a risk-taker. The risk paid some initial dividends, in terms of some goodwill vis-à-vis HIG and an *ex gratia* offer of £80,000, but it did not result in the offer of a contract. That was a disappointment to Moorgate, which was therefore a disappointed risk-taker. In my judgment, Mr Bond was right to submit that Moorgate had shown no "unjust factor" that would entitle it to payment absent a contract.

103. The claim for a *quantum meruit* fails on this ground. I shall nevertheless say something about the question of enrichment.

Enrichment: existence and valuation

104. If I had considered that Moorgate was entitled to payment of a *quantum meruit* for services provided to HIG, I would have valued those services at £25,600. The reasons for this conclusion are set out in the following paragraphs.

105. I begin with Moorgate's approach to the question of enrichment. This is set out in paragraph 9 of its particulars of claim and paragraph 9 of its reply (see paragraphs 81 and 82 above). Mr Smith relied on principles drawn from the judgment of Lord Clarke in *Benedetti v Sawiris*: that "the enrichment is to be valued at the time when it was received" (at [14]); that "the court should apply an objective test to the issue of market value" (at [16]); and that "the test is 'the price which a reasonable person in the defendant's position would have had to pay for the services'" (at [17], citing the judgment of Etherton LJ in the Court of Appeal). Mr Smith submitted that it followed from these principles that the amount payable as a *quantum meruit* ought to be ascertained by reference to the time when the services were first rendered, entirely

regardless of any consideration of either the extent of the services that were subsequently rendered or the price that was actually paid for Bezier. This appears clearly from his written submissions:

> "56. [T]he sum that the 'reasonable person in the defendant's position would have had to pay for the services' falls to be judged at the time of the defendant first availing itself of the claimant's service, which on the evidence is 15th September 2010. … A more precise formulation of the test that the claimant contends for would be to determine when the services that would have been paid for in the event of success began, and the claimant submits this date was September 2010.
>
> 57. The services that comprise corporate finance advice are not priced individually and are not available on such basis in a situation such as the instant case. It is still less the practice of the market to assess fees retrospectively, particularly seeking to examine the actual work done by the adviser, as this would go against the market practice of the *ex ante* success fee procedure. In addition, the claimant submits that the fact that a 'full service' … could not be provided for reasons outside the claimant's control should not count against the claimant on this issue.
>
> …
>
> 61. In the event that the Court does not find the contract claim made out, the claimant invites the Court to find that the appropriate restitutionary award of *quantum meruit* is £1m on the basis that this is the objective market value of the service provided by the claimant at the time this amount falls to be assessed."

106. It is clear that something has gone very wrong with Moorgate's analysis of the unjust enrichment. This may be the result of abstracting Lord Clarke's remarks from their proper context, which is the valuation of enrichment, not the pretence of a non-existent contract. The entire exercise is premised on the absence of any contract, yet Moorgate's analysis proceeds on the basis of the terms that would have been agreed in a hypothetical contract for services (that is, the full range of services) that were not provided in respect of a transaction (that is, an acquisition for an EV of £100m) that did not take place. There was no contract for a fee to be paid on the basis of an EV of £100m and there is no proper reason to value Moorgate's services on the basis that would have been applicable to such a contract. Similarly, there was never a contract for the provision of a full range of services; therefore, to begin from the success fee that would have been provided for under such a contract and to suppose that the services actually provided are to be given that value, on the basis that it is not the claimant's fault that it was not asked to provide all those services, is to get things back to front. (This is even more obviously the case, as a retained corporate finance adviser acts solely for his client, whereas Mr Mockett's services, such as they were, were not provided exclusively.) The relevant exercise is to ascertain the objective market value of the

services actually provided, which were limited services in respect of a transaction with an EV of £16m.

107. Mr Bond submitted, in reliance on *MSM Consulting Ltd v United Republic of Tanzania*, that any services provided by Moorgate must be regarded as having no value, because Moorgate was not the effective cause of the Bezier Acquisition. For reasons already explained, Christopher Clarke J's approach in that case does not support the conclusion sought to be drawn by Mr Bond, although it does suggest that any enrichment might not be thought "unjust". For the present, I am assuming (contrary to my conclusion) that there is a measure of unjust enrichment. On that assumption, the valuation exercise must be informed by the expert evidence.

108. The experts were in agreement that the usual position in the market would be that the private equity house would pay a success fee arrived at on the basis of two main factors: first, the estimated EV; second, the anticipated range and nature of services provided or to be provided by the corporate finance adviser.

109. In the present case, the actual EV is agreed to have been £16m. It was not £100m (a figure now put forward by Moorgate as having been a reasonable forecast at an early stage) and it was not £32m (a figure that represents a miscalculation arising in the course of the proceedings but not featuring in 2010 or 2011). Moorgate's argument that the relevant figure is £100m is based on Mr Martin's opinion that the market practice is to fix the success fee by reference to an anticipated EV, not to work retrospectively from the actual EV. Even accepting that fees are agreed prospectively and not retrospectively, the argument is wrong. First, of course, there was no contract. Second, there is no reason to act on the supposition that the parties would have agreed a fee on the basis of an EV of £100m: only if the parties had tried to fix a fee at a time when they lacked sufficient information to form a sensible estimate of the EV could they have come up with such a wildly inaccurate figure; and the figure rests on Mr Mockett's evidence that Bezier's turnover of £100m meant that it "may well" have had a value of £100m. On its face, that evidence shows no proper basis for supposing that anyone would in fact have agreed a success fee on the basis of such an EV, and Mr Martin's evidence was that turnover was of little relevance for valuation, the important matters being profitability and EBITDA. Third, even if, for whatever unimaginable reason, one were to assume that if the parties had made a contract that they did not make they would have done so on a grossly mistaken basis, that provides no reason for valuing HIG's enrichment on the basis of this hypothetical and mistaken valuation. In short, the actual EV was £16m and there is no reason to suppose that an agreement for a success fee would ever have been premised on any other figure or that the value of any resultant benefit ought to be assessed on any other basis.

110. The next stage would be to assess the appropriate percentage of the EV. Having regard to the expert evidence, I find that this assessment may conveniently be approached in two stages: first, to assess the maximum percentage that might be appropriate on the basis of the provision of the full range of corporate advisory services; second, to adjust the figure, if necessary, to take account of any limitation on the services provided or to be provided. (That is a different matter from saying that the market price of services would be fixed on a time and materials basis, which the experts are agreed would be inappropriate.)

111. As to the first stage of the assessment, the experts focused mainly on the percentages appropriate where the EV was £100m or £32m. There was some disagreement between them. Where the anticipated EV was £100m, Mr Martin considered that the range was up to 2%, and Mr Miller considered that it was up to 1.25%. Where the anticipated EV was £32m, Mr Martin put the maximum fee at 2.5% and Mr Miller put it at 1.5%. Mr Miller considered that, if the anticipated EV were £16m, the percentage could increase to 1.6%. Mr Martin said in cross-examination that, if the anticipated EV were £16m, the logic of his argument would indicate a percentage higher than 2.5%, though he did not identify a specific figure.

112. In my judgment, the market value of corporate advisory services on a buy-side acquisition, where the expected EV was £16m and the full range of corporate advisory services was to be provided, would have been a maximum of £256,000, representing 1.6% of the EV. In general, I prefer Mr Miller's evidence to Mr Martin's on the question of the appropriate percentage. Mr Martin had, I think, a tendency to try to pitch his figures at a level that would approximate as closely as possible to the supposed Fees Agreement. (This is seen, among other places, in his inclusion in the second joint memorandum of the suggestion that, on an EV of £32m, a fee of £1m on the basis of a percentage of 3.125% "could be justifiable on the basis of substantial unpaid previous work and marketing undertaken by Moorgate as claimed by Mr Mockett.") This tendency may have resulted in part from Mr Martin's prior knowledge of Mr Mockett, though I did consider that the evidence was given in good faith. As for Mr Miller's evidence, I prefer the higher end of his proposed range, because a lower EV will tend to attract a slightly higher percentage.

113. The figure of £256,000 represents the maximum market value of corporate advisory services. However, I accept Mr Miller's opinion that the services actually provided by Moorgate were by no means at the level that would attract that maximum figure.

1) It is plainly wrong to assess the value of the services actually provided on the basis of a notional contract for a range of services that were not provided and not even requested. One must look at what services were actually provided.

2) I accept Mr Miller's evidence that the greatest value lies in the "origination" services of a corporate finance adviser; of particular value is "a find", which is the identification of a company not previously known to the private equity house and the making of an introduction (first joint memorandum, paragraph 3.1). There was no "find" in the present case. Through its own specialist knowledge in the sector HIG was already aware of Bezier, and the possibility that Bezier might be a target was raised by HIG, not by Moorgate, in the course of a consideration of Showcard. HIG also had a degree of personal connection with Royal Bank of Scotland (Bezier's major creditor) and with MidOcean (the private equity house that was its major shareholder).

3) Mr Mockett was able to forge an introduction to the Bezier management team. However, that was not an exclusive opportunity, as is shown by his similar introduction of at least two other parties. Moorgate accepts, and has made much of, the fact that a corporate finance adviser acting under contract to a private equity house has an exclusive relationship. Until there is an agreement, the corporate adviser is free to seek to do business with the private equity house that

provides it with the greatest potential for advantage (cf. Mr Miller's evidence, day 4, p. 532).

4) Further, the introduction to management was of very limited practical use, for at least two reasons: first, HIG was unable to reach an agreement with management (see the narrative in respect of 18 June 2011); second, Deloitte approached HIG directly, and HIG's involvement in the bidding that resulted in the eventual deal did not come about through Bezier's management.

5) The extent of the information provided by Mr Mockett was very limited. The Bezier management team did provide significant financial information. However, full disclosure of information was provided in the bidding exercise run by Deloitte. The highest that the case can be put for Moorgate is that the earlier provision of information by the management team gave HIG the luxury of being able to consider the potential acquisition in a more leisurely fashion; cf. Mr Miller's evidence, transcript, day 4, page 527.

6) Mr Mockett was not involved in any meaningful way in the period leading up to HIG's offer in July 2011. It is for that reason that (as was Mr Canning's evidence, which I accept) Mr Mockett did not give any useful input to the terms or substance of the offer. Mr Mockett did not have any role in the post-offer stages leading up to completion of the transaction.

114. Mr Miller's stated opinion was that the services provided by Mr Mockett were worth only about 10% of the maximum fee of £256,000 for a transaction with an EV of £16m. His opinion on that point was not challenged in cross-examination. Mr Smith did ask questions concerning whether the corporate adviser's services could be contracted for on an à la carte basis and obtained Mr Miller's agreement that in a buy-side transaction of the kind in the present case the adviser would not be able to perform services unless he were involved at all stages: see transcript, day 4, pages 517 – 519. However, Mr Smith did not attempt to explore with Mr Miller how, if at all, this accorded or conflicted with the experts' agreed position that the fee would depend in part on the range or scope of services to be provided (see the first joint memorandum, section 2.3). Further, of course, there was no contract and only limited services were provided. Unless it were to be argued that the provision of any services outside a contract entitled the provider to receive remuneration to the full extent of the fee in a non-existent contract for much more extensive services—which is plainly absurd—this point goes nowhere. I have considered whether some higher percentage than 10% might be more appropriate. However, I have concluded that I have no proper basis for rejecting Mr Miller's unchallenged figure. Therefore, if (contrary to the conclusions already expressed) I had been minded to award a *quantum meruit*, I would have awarded £25,600.

Conclusion

115. For the reasons set out above, the claim will be dismissed.