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Case No: LM-2021-000034

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
LONDON CIRCUIT COMMERCIAL COURT

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

Date: 24/01/2023

Before :

SEAN O'SULLIVAN KC (sitting as a Deputy High Court Judge)

- -

Between :

FENCHURCH ADVISORY PARTNERS LLP	**Claimant**
- and -	
AA LIMITED (formerly **AA PLC**)	**Defendant**

- -
- -

ANDREW AYRES KC and **EDWARD MEULI** (instructed by **NORTON ROSE FULBRIGHT LLP**) for the **CLAIMANT**
MATTHEW PARKER KC (instructed by **REYNOLDS PORTER CHAMBERLAIN LLP**) for the **DEFENDANT**

Hearing dates: 28 November – 2 December 2022; 7 December 2022

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JUDGMENT

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This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 on Tuesday 24th January 2023.

Sean O'Sullivan KC (sitting as a Deputy High Court Judge) :

A Introduction

1. This is a claim for fees brought by an investment banking and corporate finance advisory firm, Fenchurch Advisory Partners LLP ("Fenchurch"), in respect of advice and assistance it provided in relation to "Project Zodiac", which was a potential sale of the insurance division of the well-known breakdown recovery service, AA plc (now AA Limited) ("the AA").

2. One complicating factor is that, while the terms for the engagement of Fenchurch by the AA were extensively negotiated, no engagement letter was ever signed for Project Zodiac. Another is that the sale of the AA's insurance division did not ultimately materialise.

3. Although there are a myriad of sub-issues and points of disagreement between the parties, there seem to me to be three key areas of dispute, namely: (a) whether a binding contract was agreed; (b) if so, whether the AA's obligation to pay what is described as a "success" fee was triggered; and (c) if there was no binding contract on those terms, was there an implied contract or does Fenchurch have a restitutionary claim and, if so, to what sums is it entitled?

4. I will comment briefly on the witnesses whose evidence I heard, then deal in detail with the facts, before turning to the specific issues under those three heads. It may assist with reading this judgment if I provide an index:

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B The witnesses

5. Over the course of 5 days, I heard from 10 witnesses: 8 witnesses of fact and 2 experts.

B.1 Factual witnesses

6. Fenchurch called Duncan Buck, an Executive Vice Chairman of Fenchurch, who was leading the Fenchurch team for the AA's projects, and Brendan Perkins, who was a Director of Fenchurch at the time of the relevant events, and was responsible for much of the work done by Fenchurch on those projects.

7. The AA called:

   7.1. Mark Strickland, who acted as the AA's interim CFO between April and December 2019. He was responsible for negotiating Fenchurch's proposed fees for its engagement until Kevin Dangerfield took over as CFO in January 2020;

   7.2. Joseph Lloyd, Head of Legal – Insurance and Financial Services over the relevant period, who was responsible (with Todd Morrissey) for negotiating the legal provisions of the engagement letter;

   7.3. Janet Connor, the Managing Director of the AA's insurance business during the relevant period. She managed Project Zodiac on behalf of the AA and chaired the Steering Committee and Working Group for the project;

   7.4. Gillian Pritchard (née Purdie), the AA's Director of Finance – Insurance at the relevant time;

   7.5. Nadia Hoosen, who was the Chief Legal Officer at the AA and attended board meetings as company secretary; and

   7.6. Simon Breakwell, who was the AA's CEO throughout the relevant period.

8. With perhaps one exception, I formed the view that all of these factual witnesses were doing their best to assist the Court and were reasonably honest and straightforward about their recollection of events in 2019 and 2020. To a very large degree, that meant admitting that they had little or no actual recollection of individual emails, calls, or meetings.

9. Inevitably, when speaking in more general terms or reconstructing, their memory was affected by the narrative which is imposed by hindsight, especially in the context of a dispute. That tendency was especially evident in their written evidence, and I am dubious about assertions about what the witnesses now believe they thought when reading or writing messages back in 2019. For the most part, the tendency was less pronounced in their oral evidence, where few of the witnesses were really claiming to **remember** what they thought at the time. Most were willing to make sensible concessions about what was likely to have happened or what they might have thought.

10. The one exception to the general rule was Mr Breakwell, who did claim to remember what had been said and intended at meetings which took place almost three years ago. His recollection did not always fit with the contemporaneous documents and it was noteworthy, for example, that he supposedly remembered perfectly what other board members had said and meant at one such meeting, but he could not say why he had then left that board meeting (as the notes suggested he had done), or whether he had returned thereafter. When I asked him questions about this same board meeting, I received slightly different answers from those which he gave to Counsel, despite him insisting he remembered the meeting vividly. It seemed to me that he had convinced himself of a particular narrative and was determined to insist on that narrative. I did not find this very helpful and did not feel able to place any real weight on his assertions about the content of these meetings.

11. In his oral closing, Mr Parker KC mounted something of an attack on the evidence of Mr Buck. For example, he suggested that parts of Mr Buck's written evidence sought to give the impression that the AA had caused delay in the agreement of Fenchurch's terms, but when pressed Mr Buck had accepted that the AA had been waiting for Fenchurch. He was also critical of Mr Buck's answers, when first asked about Fenchurch's compliance manual, to the effect that he should try to adhere to its requirements, rather than being required to comply precisely.

12. I did not consider these criticisms to be entirely fair. It is true that, as with all of the witnesses, Mr Buck's written evidence occasionally showed signs of being coloured by the dispute. But when asked questions and pressed on the details, he was straightforward and quick to make concessions which were contrary to Fenchurch's case. His answers on the compliance manual seemed to me entirely honest: I suspect that he did think of its contents as representing best practice, rather than something which was always achievable in real life. But when invited to focus on what the manual said, rather than how he thought of it, he quickly accepted that it contained requirements, not mere guidance. It may be right to say that a successful result for Fenchurch would be likely to benefit Mr Buck in terms of future bonus or other remuneration, but, in my judgement, that fact did not prevent him taking his oath seriously or from giving answers unhelpful to Fenchurch's case on a number of occasions.

13. Be all that as it may, this is not a case in which very much turns on the factual witness evidence. The documentary record is quite full. While there were some meetings and telephone calls during which the terms of Fenchurch's engagement were discussed, neither party suggested that anything was said orally which was not also reflected in the written record. This was very far from being a case in which everything turned on whether one party's, or the other's, account of a meeting is to be accepted. Where there are factual issues about such matters (and there are not many), I generally relied on the inferences I felt able to draw from the documentary record and placed little, if any, reliance upon assertions from witnesses about what they supposedly remembered being discussed or said.

14. To my mind, the primary value of the witness evidence and cross-examination in a case of this kind was to bring the documents to life. Hearing from the individuals involved in these communications, seeing how they expressed themselves and how they explained messages they sent and received at the time, made it easier for me to put myself into the shoes of parties and to understand what would otherwise be less accessible email exchanges.

15. There is obviously a balance to be struck here. The witnesses' subjective intentions, even if accurately recalled, are (in the contractual context) irrelevant. But the context in which the parties are communicating with one another is very important. That line can be blurred, such as when a witness comments on what he understood a message which he sent or received to be about.

16. In truth, much of the content of the witness statements (on both sides), and the cross-examination, fell on the wrong side of that line, engaging too closely with what witnesses subjectively thought, or intended, or believed. As I work through the chronology, I will provide some examples. But I do not propose to spend time deciding what individuals at Fenchurch, or the AA, subjectively understood, or intended by (for example) notes inserted onto drafts of the engagement letter. On the other hand, I do not want to give the impression, by making that observation, that I found the witness evidence to be of no value, such that it would have been possible to resolve this dispute simply by reading the documents in a vacuum. The danger of doing so would be that the reader then supplies his or her own imagined context, rather than understanding the priorities and personalities which formed the true background against which these documents are to be understood.

17. For completeness, I observe that the AA served a witness statement for Todd Morrissey, who assisted Mr Lloyd with the legal negotiations. He was not called to give evidence. As with many of the other witnesses, he makes one or two assertions about what he meant by specific phrases in messages he sent, which I suspect would have been the subject of cross-examination if he had been called. For the reasons I have already touched on, I query whether any of that really advances matters. Otherwise, most of what he said in his statement is either simple narrative based on the documents, or confirmation that he has no independent recollection. I agree with the submission made on behalf of Fenchurch that, to the extent there is conflict between Mr Morrissey's evidence and that of Fenchurch's witnesses, the court should give little if any weight to Mr Morrissey's evidence. But it does not seem to me that this is of any particular importance in practice.

18. I will also mention at this stage the submission by Fenchurch that I should draw an inference adverse to the AA from its decision not to obtain a witness statement from Mr Dangerfield, who replaced Mr Strickland as CFO. This submission was premised upon an ambiguity which emerged in the notes of the January 2020 board meeting, where Mr Dangerfield was recorded as saying "*it is the bottom of the pile - you are going to have to do it I think*". I consider the submission to be misconceived. Mr Dangerfield's recollection (if any) as to what he had meant by this remark was of peripheral relevance at best. As I will explain, it is clear what view the Board as a whole had reached about Project Zodiac and it is difficult to see why it matters what individual members of the Board said or thought during the meeting.

19. The idea that this situation might be comparable to cases such Wisniewski v. Central Manchester Health Authority [1998] PIQR 324, in which an inference was drawn, was difficult to take seriously. I respectfully endorse the comment made by Cockerill J in Magdeev v. Tsvetkov [2020] EWHC 887 (Comm) that the tendency of parties to rely upon this principle in an increasing number of cases is to be deprecated (see [150]).

B.2 Expert witnesses

20. The expert evidence was directed primarily to the third main topic (implied contract/ restitution). The experts also threw in some comments about how and when

engagement letters are agreed in this industry, most of which were statements of the obvious. However, the experts focussed on the valuation of the services provided by Fenchurch to the AA and/or the quantification of a reasonable fee for those services.

21. I heard from Mr Smith, an M&A banker, for Fenchurch and Mr Esler, an accountant with experience of working on M&A transactions, for the AA.

22. I will deal in detail with their evidence about valuation below, but I should say now that I formed the view that both witnesses were experienced in the field of investment banking and were taking pains to be independent and to assist the Court. The difficulty which they both faced was that they were being asked to do something which neither had ever done before, nor (I suspect) something they had even imagined doing, before being invited into the strange world of litigation: namely retrospectively valuing work which had been carried out by an advisor on an unconsummated sale of a business.

C Disclosure

23. Before plunging into the chronology of events, I note that Fenchurch indicated in opening that it had a concern about the disclosure provided by the AA. This concern appeared to have been prompted by the late provision of previously disclosed documents which had previously been the subject of more extensive redactions and late disclosure of some further documents (i.e. documents which had not previously been disclosed). I was informed that letters were being exchanged between solicitors behind the scenes and that an application would be made if thought to be appropriate. Happily, no application was made.

24. Further, in the course of cross-examination of the AA's witnesses, several of them were asked about their practice in relation to taking notes at meetings and about what had happened to those notes (which had not been disclosed). No application for specific disclosure was made by Fenchurch in this regard either.

25. The only point about disclosure which was made in closing by Mr Ayres KC on behalf of Fenchurch was to the effect that I should not assume that the absence of documents showing reconsideration by the AA's Board of Project Zodiac after January 2020 meant that such reconsideration had not happened. I think it was suggested that I should instead infer (or assume?) that there had been a failure by the AA to make proper disclosure in that regard. I could not see any basis for doing so. This seemed to be pure speculation on the part of Fenchurch, in the face of evidence from the AA's witnesses about the decisions of the AA's Board (which I will discuss in the next section). In any event, I was shown confirmations from the AA's solicitors in relation to their review of later Board minutes and I accept those confirmations. This point went nowhere.

D The facts

26. It is probably convenient to address the history of what the parties called "Project Zodiac" in a single section, rather than dotting around the chronology in the context of the specific issues.

27. Much of this history is not controversial, or the controversy is limited to what I would call "presentational" differences. What follows represents my findings of fact as to the relevant events, even if I do not always canvass absolutely all of the evidence which I have considered for the purpose of making those findings.

28. I repeat that I am not going to make findings about every area of disagreement which was canvassed with the witnesses. Many of these concerned what was going on

internally on one side or the other of the negotiation and I struggle to see why that matters.

D.1 The background

29. The AA has a home and motor insurance business which has a symbiotic relationship with its breakdown recovery service, in that the latter provides brand recognition and access to potential new customers for insurance products and the former provides access to potential new customers for the breakdown recovery service.

30. In 2018 the AA was facing significant financial challenges. Its level of debt was too high (c. £2.8bn) and the difficulties with servicing this debt was affecting everything else, including the share price (the AA was at that time a public listed company). More specifically, a significant part of that debt was in the form of a bond issue (referred to as the "B notes", to distinguish from the higher priority "A" notes) which would mature in 2022 and the bonds for which could be seen to be trading on the market at a significant discount to their face value. This suggested that that part of the debt might be very challenging to refinance. But if it could not be refinanced, and the AA therefore defaulted, the holders of the B notes would take over control of the AA and the value of any equity for the shareholders was likely to be lost.

31. One consequence of this financial weakness was that the AA was a potential target for a takeover. Mr Buck suggested that it was on a number of takeover target lists and Fenchurch pointed out that the AA had retained Greenhill & Co. International LLP to act as an adviser in respect of any public offer some time before any of this. It seems to me clear that both Fenchurch and the AA recognised that it was possible that the AA would be the subject of a public offer for its shares, although (at least in 2018 and 2019) this was only a hypothetical possibility, rather than something which was being actively discussed or envisaged as imminent.

32. The other consequence of its financial weakness was that the AA was looking for ways to raise money and reduce its debt burden. One option was to sell off a part of its business. It was in that context that the AA seems to have first come into contact with Fenchurch, which is a specialist in M&A in the insurance/ financial services sector.

D.2 Project Renault

33. On 24 July 2018, Mr Martin Clarke, then the CFO of the AA, emailed Mr Malik Karim, the founder of Fenchurch, to indicate that the AA was looking at a possible project on which Fenchurch might be able to help. This was a reference to a potential sale of the AA's home insurance business (i.e. part of the insurance division, but not the motor insurance arm), codenamed "Project Renault".

34. Mr Buck was introduced to the AA and he seems thereafter to have been the primary contact on behalf of Fenchurch. On 25 September 2018, he sent an email to Mr Clarke which set out a fee proposal with a success fee of 0.95% of the value of the transaction, plus a performance related element with an increasing percentage of any value in excess of a specified figure (0.45% over £270m, 0.55% over £290m, etc.). In addition, he referred to project fees of £40k per month.

35. It is perhaps worth noting that the success fee was described by Mr Buck as being "*100% contingent on successful completion of the transaction*". That was to be contrasted with the project fee, which was payable in any event, but which was to be offset against the success fee (if the latter became payable). I will say more about the

economics of these fee structures in due course, but it is worth pointing out that the parties agreed that it is very common in this industry to have a (perhaps very significant) "success" fee payable if the transaction on which the advisor is working is completed, sometimes combined with a much smaller "project" fee of some kind which is payable in any event. Everyone agreed that such project fees are not where the advisory firms make their profits.

36. On 2 October 2018, Mr Clarke reverted to suggest an increased success fee, but no project fee. Mr Buck replied the same day, offering to drop the project fees if the AA would agree a single fee of £40k at the end of month 1, plus an "abort" fee payable "*if you abort the transaction having commenced round 2*". I understand "*round 2*" to refer to the second stage of the sale process, as the transaction moves from seeking initial expressions of interest / bids, to firm offers. Mr Clarke expressed his agreement and Mr Buck forwarded that confirmation to Mr Needham (a more junior member of the Fenchurch team) and Mr Perkins saying "For engagement letter".

37. Work then seems to have begun on Project Renault, but by mid-November 2018, a decision had been made to put it on hold. On 14 November 2018, Zeeshan Maqbool of the AA was emailing Ms Connor to say that Mr Clarke had confirmed that they should finalise the "IM", but postpone any marketing "*until the noise around the FCA/ CMA dies down*". The abbreviation "IM" refers to an "Information Memorandum", a document intended to be provided to potential buyers of the business, which sets out financial and other information about what is on offer. That document was a, and perhaps the, key deliverable from Fenchurch, who were experts in setting out such information so as to make the business attractive to likely buyers. I am less certain what "*noise*" there was around the FCA (i.e. the Financial Conduct Authority, the regulator for the UK insurance industry) in late 2018, although, as I will describe, by late 2019 into 2020, there was concern about an FCA consultation about the pricing of retail insurance (especially in relation to renewals for existing customers).

38. On 16 November 2018, Mr Buck sent Mr Maqbool a draft engagement letter under cover of an email which acknowledged that "*we are not pressing the button*" on Project Renault, but suggested that they should get their admin in order so he did not get in trouble with "*our compliance guys*". The draft letter set out the fee proposal as discussed/ agreed with Mr Clarke as the basis of remuneration. It referred to "the Fenchurch terms and conditions for corporate finance business", which were attached. The draft letter concluded: "*We would be grateful if you could confirm your acceptance of the terms of this letter by signing and returning to us the enclosed duplicate of this letter*".

39. The parties never signed the Project Renault engagement letter.

D.3 The birth of Project Zodiac

40. On 24 January 2019, Mr Clarke reported to the AA's board on options for the AA's insurance business. He referred to the need to refinance £1.27bn of borrowing in 2022 and suggested that this might be impossible or prohibitively expensive. He said that, unless there was an improvement in the bond market or in the AA's business, the AA could be facing "*a truly existential crisis in 2022 where a distressed refinancing on terms dictated by the bondholders might render the equity worthless*". That being so, it was incumbent on the Board to consider all options. It was recognised that the only separable asset within the AA's business was the insurance entity. He referred to two options: Project Renault and the new proposal of Project Zodiac, an idea brought to

them by Gareth Davies, previously at the firm Greenhill and now at Zeus Capital Limited ("Zeus").

41. Project Zodiac was at that stage being envisaged as a sale of the whole insurance division, but with a 25% stake being retained by the AA. It was suggested that the business could be valued at 12-14 times EBITDA (i.e. the figure for the insurance division's earnings before interest, taxes, depreciation and amortization) and that the proceeds of a sale at this level would enable a material deleveraging of the remaining business.

42. On 5 February 2019, Mr Buck emailed Mr Perkins and Mr Needham to inform them that Project Renault "*is now Zodiac*", that there was to be a kick off meeting the following day, and that Fenchurch was going to be "*joint with Zeus*", meaning that both firms would be advising the AA on this potential transaction. The project seems to have got underway quickly, with the proposed timetable which was being circulated in late February 2019 envisaging the advisors (Fenchurch and Zeus) drafting the IM for Zodiac by the end of May. Mr Buck said that it was not feasible to have an engagement letter in place before Fenchurch started work, when the kick off meeting was fixed for the day after Fenchurch was told about the project. I am sure that is right.

D.4 First draft of the EL

43. On 20 February 2019, Mr Lloyd of the AA asked Mr Buck for an engagement letter "*for our review*". Mr Buck responded to promise that it would be sent the next day and proposed that they agree a letter and then add the "*fee section as addendum when this has been agreed*".

44. The draft engagement letter ("EL") was sent on 21 February 2019. It set out the scope of Fenchurch's services for the transaction, but the "*Basis of Remuneration*" section contains only a placeholder and some standard terms about expenses. As with the Project Renault EL, the letter concluded: "*We would be grateful if you could confirm your acceptance of the terms of this letter by signing and returning to us the enclosed duplicate of this letter*" and left a space for signature by "*Martin Clarke, CFO, for and on behalf of AA plc*".

45. Mr Buck was asked a number of questions about this and made some important concessions about his thinking at this stage:

> Just to be clear about this, you obviously anticipated at the very outset that there would need to be agreement both as to the terms of the engagement letter itself and as to Fenchurch's fees as part of an overall agreement with the AA. That is correct, isn't it?
>
> A. That is correct.
>
> Q. So agreement to the terms of the engagement letter was a necessary part of reaching a binding agreement with the AA as to the terms on which Fenchurch would be providing its services.
>
> A. To get to a signed engagement letter, we would need to agree the fee and the terms and conditions, correct.
>
> Q. And therefore that was a necessary part of reaching a binding agreement with the AA as to the terms on which Fenchurch would provide its services?
>
> A. It is the process to get to a signed engagement letter. We would need to agree on parts of the engagement letter, correct.
>
> Q. Yes, but just to go back to my question, it is obvious

> that the engagement letter cannot be agreed unless and until the terms and conditions have been agreed, correct?
> A. It is only an agreed engagement letter when one has agreed the front end, the bespoke front end and the terms and conditions, correct.
> Q. Right. Okay. So it is only an agreed engagement letter once the terms and conditions have also been agreed?
> A. Correct.
> Q. Right. We see those, as we have just seen them, beginning at 1217, the terms and conditions.
> It is also obvious that these wouldn't be agreed unless and until they were accepted in full, subject to whatever negotiation there may have been. Correct?
> A. I am not saying it is obvious but one goes through a process to get to an agreed engagement letter, which means negotiating some of the specific terms, correct.
> Q. That process is one whereby all parties understand that unless and until you have reached agreement on all of the terms and conditions, you haven't got an agreement?
> A. You don't have a signed agreement until you have agreed all the terms and the letter has been signed.
> Q. No. Both parties understand in a negotiation of this kind, you don't have any agreement at all unless and until you have agreed all of the terms, written terms and conditions, correct?
> A. Clearly you are not agreed until you are agreed. So you need to agree everything before you can be agreed. Correct.

46. I am conscious that some of this might be said to amount to evidence about Mr Buck's subjective intentions. However, even if it was, it represented an honest reflection of his understanding as an experienced participant in this market, and as the person who was discussing these matters on behalf of Fenchurch with the personnel from the AA. I found this evidence to provide a helpful insight into the background against which the latter exchanges fall to be interpreted, even if it cannot be said, on its own, to answer the ultimate question as to what was or was not agreed.

47. This may also be a convenient point to describe the Fenchurch standard T&Cs which were attached to the draft EL. These standard terms are quite detailed and it is probably fair to say that most of the terms they contain are for the protection of Fenchurch.

D.5 Initial exchanges about fee structure

48. On 25 February 2019, Mr Clarke emailed Mr Karim and Mr Buck to ask if they had given any thoughts to fee arrangements. Mr Clarke referred to Gareth (i.e. Mr Davies of Zeus) having shared some thoughts. Mr Buck indicated to Mr Karim that he had spoken to Mr Davies and asked if he was happy to confirm that they would be targeting £5m from the transaction. Mr Karim responded by referring to £8m fixed and £2m discretionary to be split between Fenchurch and Zeus, but added "*Project fees? Need some*". Mr Buck said he would reference a target of £5m plus a need for project fees and said they would work on him on Thursday night (a reference to a charity event which all three of them would be attending).

49. On 27 February 2019, Mr Buck went back to Mr Clarke referring to a pot (for both Fenchurch and Zeus) of £10m, but adding that "*Whilst the vast majority of our fee would be success based, we will need an element of project fees / abort fees*". Mr Clarke replied: "*Not keen on abort fees. I never agreed to those in PE days (indeed I don't think I was ever asked for any). Nor is it an issue for Gareth... I know we did something on*

the home book for you but I think your role there was somewhat different…". He then stated that, if this was a "*overriding requirement*", the AA might "*proceed with Zeus*" and drop Fenchurch.

50. Mr Buck said in his statement that he had no reason at this stage to believe that an EL would not be agreed and signed. The AA appeared to have budgeted in the right ballpark for the fees which Fenchurch was expecting and he felt he had a good relationship with the Project Zodiac team. I accept that evidence. It explains Fenchurch's willingness to press on with the work.

D.6 Work done by Fenchurch

51. Mr Perkins' evidence was that, from early February 2019, the Fenchurch team worked hard on Project Zodiac, committing a team of 4 individuals to work almost full time, attending working group and steering committee meetings, co-ordinating the work of other advisers, scoping the various workstreams, assisting in the preparation of a financial model and drafting the IM, which is an extremely comprehensive document. Mr Perkins provided a (reconstructed) narrative showing, in outline, what work had been done and when. His evidence about this was not seriously challenged and I accept it. The quantity of work was substantial; hundreds of hours, not just the odd hour here and there.

52. Nor is there any complaint from the AA about the standard of Fenchurch's work, the speed at which it was carried out by Fenchurch, or about anything else of that kind. On the contrary, the AA's management team were consistently complimentary about the work done by Fenchurch.

D.7 Delay to discussions about fees

53. It seems that, between February and June 2019, no substantive progress was made on the fee negotiations. Fenchurch had sent the draft EL with only a placeholder on fees, but nothing else. The AA did not respond to this draft in any way.

54. On 14 May 2019, Mr Davies emailed Mr Buck with the subject "*Fees?*". Mr Davies said: "*We rather parked this pending a green list. Worth comparing notes as Jos keeps asking for an EL...*".

55. Mr Buck was asked whether there had been an agreement with Zeus not to progress the ELs. He made clear that it was just that they (Fenchurch and Zeus) needed to get aligned and this had not yet happened. He could not recall what was meant by "*pending a green list*".

56. The question of "fault" in relation to the delays to the finalisation of the EL was canvassed by both parties in cross-examination. Each side explored a case theory to the effect that the other had a deliberate strategy of delaying the negotiations in the hope of securing some commercial advantage. It was put to Mr Buck, on the basis of this email and another from Mr Davies on 20 May referring to Mr Buck having "*broken ranks*", that he had agreed something with Zeus about waiting or delaying. He explained that he had been told by Mr Clarke that Fenchurch and Zeus needed to be aligned, but that there was no agreement to delay.

57. More generally, Mr Buck accepted that best practice, as reflected by the Fenchurch compliance manual, required that he seek to agree and finalise the EL as soon as possible, and that he had not done so. He was candid about the fact that, while the explanation for this was that he had been very busy on the project, that was not an

excuse, and he could not say that he had literally no opportunity to deal with the EL. He said, for example: "*I would accept that we should have moved quicker*" and "*There would have been the opportunity, correct*". My impression was that, whatever Fenchurch's compliance manual might say, this was not Mr Buck's highest priority at the time. His initial exchanges with Mr Clarke had given him a degree of confidence that there was no unbridgeable gap between the parties' expectations. I reject any suggestion that the delay by Fenchurch was part of a strategy. I cannot see what useful purpose such a strategy would serve.

58. Similarly, it was put to several of the AA's witnesses that there had been a strategy of delaying the signing of engagement letters to put advisors under pressure to agree to terms proposed by the AA. This was based upon some internal messages from Mr Clarke and also a comment by Ms Hoosen in her witness statement about what she had understood Mr Clarke to have done when he was working in private equity (i.e. before joining the AA).

59. The problem for Fenchurch with this theory is that, even if this was Mr **Clarke**'s strategy, he stopped being directly involved after resigning as CFO in April 2019. It was suggested to Mr Strickland that his reference in an email dated 26 June 2019 to the absence of signed ELs from Fenchurch and Zeus giving the AA "*considerable negotiation power*" reflected a desire to delay the process of finalising this agreement. But he was just making the obvious point that, if nothing had yet been agreed, the AA was in a different negotiating position than it would be if his predecessor had already signed up to a deal. The same email records that Mr Strickland had asked Fenchurch and Zeus for the signed letters. That would be a strange thing to do if Mr Strickland's strategy was to delay any discussion about them. More generally, I see no sign of the AA deliberately delaying this process; if anything, it was the AA which was chasing Fenchurch at this stage.

60. To my mind, the explanation for the delay is more prosaic. This was not a top priority for either side. There was no specific deadline. As other deadlines pressed, this was the task which got pushed to the bottom of the list. No doubt Mr Buck's "*compliance guys*" would be unimpressed with his approach here. Perhaps they would consider the facts of the present case a reminder of why it is best practice to get the EL signed at the outset. But it does not follow that any of this was deliberate.

D.8 Further exchange about fees

61. On 13 June 2019, Mr Davies of Zeus sent an email to Mr Buck attaching a draft EL which Zeus had prepared. It envisaged a £4.5m success fee, with a "ratchet" (an increase to the success fee, depending on the price achieved for the insurance business) and a monthly project fee of £40k per month from July 2019 onwards. Importantly, the email referred to the success fee being triggered "*if there is a public offer or the insurance sale is rejected by shareholders*".

62. The attached draft EL contained trigger wording as follows:

"The Success Fee will be payable in full in other instances outlined below:

- *If, upon receipt of a final offer for AA Insurance which the Board considers to be acceptable, it is turned down by the Company's shareholders; and*
- *If the company is acquired via a public takeover"*

63. Although the wording is different, this appears to be the genesis of the public offer trigger which is now relied upon by Fenchurch.

64. On 27 June 2019, Mr Buck sent a draft of Fenchurch's EL to Mr Davies. Mr Buck indicated that he had used Zeus's fee proposal "*but tweaked the language*". The attached draft (dated 27 June 2019) was indeed similar in shape to Zeus's proposal, although the additional triggers for the success fee (in paragraph 2.4) were now phrased as follows:

> *"The Success Fee will be payable in full in other instances outlined below:*
>
> - *if, upon receipt of a final offer for Zodiac which the board considers to be acceptable, it is turned down by The AA's shareholders; or*
> - *if Project Zodiac is aborted as a result of a public offer for The AA"*

65. I will call the second of these "the public offer trigger".

66. The draft EL was sent by Mr Buck to Mr Strickland on 1 July 2019. The date of the draft EL (i.e. 27 June 2019) was not updated. At the same time, Mr Buck referred to a £40k fee for Project Renault and said that "*The draft engagement letter for Renault was with Zeeshan*".

67. Mr Strickland circulated the draft EL within the AA, including to Ms Connor and Ms Pritchard. He made some comments about his preferred payment structure (with "*a simple success fee*"). He also suggested that the AA pay the fee for Project Renault in full and final settlement: "*That way it is closed down*".

68. Mr Strickland and Ms Pritchard both confirmed that they believed that they would have read the public offer trigger at the time. Ms Pritchard did not think she discussed the proposal in person with Mr Strickland, because they were on different floors of the AA's office in Basingstoke.

69. Meanwhile, Mr Strickland asked Mr Buck whether an invoice had been submitted for Project Renault. Mr Perkins provided an invoice on 10 July 2019. Mr Strickland then authorised the payment of that invoice 11 July 2019, describing this as a "*full and final settlement of work that Fenchurch did on Renault*".

70. Fenchurch characterised this as acceptance that the payment was due, notwithstanding the absence of a signed EL for Project Renault. Mr Ayres KC was dismissive of Mr Strickland's evidence about this; namely, that there was no legal obligation to pay. However, it seems to me that this was neither an ex-gratia payment, nor an acknowledgement of a legal obligation to pay. It was a settlement of a potential liability. The fact that the AA was looking to settle its potential liability for these fees, or that Fenchurch was willing to accept the payment on that basis, seems to me to offer limited assistance to either party on any of the issues which I need to decide.

D.9 Approval for continuation of work on Project Zodiac

71. A paper prepared for the AA's Board meeting in July 2019 contained a request for permission to continue with work on Project Zodiac with a view to testing the market in Spring 2020 (or earlier if required). It was said that the aim was to maintain "*strategic optionality*" to respond quickly if required. Three possible timetables were outlined, one envisaging "round 1" (i.e. seeking non-binding offers) in November 2019, one

envisaging round 1 in March 2020 and one in November 2020. The last was referred to as a higher-risk approach.

72. Mr Buck agreed that the second option was a prudent timetable, but he did not accept that spring 2020 was the latest realistic launch date for Project Zodiac. The logic of what the Board was being told here was obvious: if the aim was to complete the sale (including regulatory approvals, etc.) before the AA's external accountants performed the 2021 financial year audit, it would need to start round 1 in about March 2020. But it is equally clear that this timetable was not being identified as the only option for the AA.

73. By 17 July 2019, the AA's Board had given its approval to proceed with the next stage of Project Zodiac (IM completion, vendor due diligence and "*Blueprint*"). It was said in the Project Zodiac Working Group Update of 17 July (a presentation, presumably given by someone at a Working Group meeting) that the Board wanted to have the option to launch round 1 at the end of October or in November 2019.

74. Ms Connor explained that this was a somewhat lukewarm response to the project from the Board:

> Q. Whatever lukewarm feelings there were the board still wanted to be ready to go, didn't they?
> A. They did. Perhaps it would be useful for me to explain lukewarm, your Honour. We went into the July board meeting with the objective of gaining the approval to market the company via the information memorandum. And the documents that preceded the July board meeting had that intent and are in the bundle. However, when we got to the July meeting the board were minded to wait, and this document here reflects an accumulation of that conversation, which is we still want the option, as I have used the word "optionality" before, to be able to go, but we don't want to start marketing presently.
> JUDGE SEAN O'SULLIVAN: So you had gone into the meeting expecting, if that is the right word, or hoping to be given the go-ahead to start marketing and instead you were told "Don't do that but get us ready to start marketing by November".
> A. Yes, I wouldn't use the objective "hoping for". We went into the board to request that we start the marketing process. We were asked not to start the marketing process but to continue the preparation work, which would be better enabled by the separation plan and also the VDD.
>
> The separation plan was incredibly important. The CEO particularly, Mr Breakwell, was extremely concerned about the complexity of exiting one large division from the group and he particularly wanted to see a large amount of work and clarity around that point. So for that reason, we got the go-ahead to do more work, not to market.

75. I accept this evidence. It is quite important for the purposes of understanding what Fenchurch were doing in this period and also forms the background to the decisions made by the Board of the AA later in the year.

D.10 Negotiations over Fenchurch's EL in summer 2019

76. On 26 July 2019, Mr Buck emailed Mr Strickland asking for an update on the draft EL for Project Zodiac.

77. On 9 August 2019, Mr Perkins spoke to Mr Strickland on the telephone about the EL. It appears that Mr Strickland was trying to sort out the engagements of Citibank, Zeus and Fenchurch at the same time. Mr Perkins' note of the call refers to getting the legal team to work on the "*T&Cs*" and then "*Sit down and work through fee in week after he is back*".

78. That last point fits with the email which Mr Strickland sent to Ms Hoosen (with copies to Mr Buck and Mr Perkins), asking the legal teams to discuss and agree the legal terms and conditions while he was away and then he and Fenchurch would "*agree commercials*" upon his return from holiday. Mr Buck agreed that he understood there would be two streams working in parallel.

79. On 27 August 2019, Mr Perkins followed up on the EL with Mr Lloyd by email, copied to Mr Buck. Mr Lloyd replied just a few minutes later that he had done a mark-up, which he said he would share the next day. He indicated that he needed to check with Ms Hoosen and Mr Strickland whether they were happy for him to send it over.

80. On 30 August 2019, after a further chaser from Mr Perkins, Mr Lloyd sent Mr Perkins a marked up copy of the EL. Mr Lloyd observed that he was still waiting for feedback and the draft was "*still subject to internal comments*".

81. In the attachment, Mr Lloyd had used the comment function and also tracked in some proposed changes. He commented on various points, both in the draft letter and the attached T&Cs. In relation to paragraph 2.4, he said:

> *"Whilst the 2nd condition is likely to be acceptable I believe we should push back on the shareholder point. If that instance occurs then we should not be forced to pay a substantile [sic] amount of money for a deal which then does not occur, indeed we would be significantly financially impacted if we had to make such a payment"*

82. The "2nd condition" was the public offer trigger. It was put to Mr Strickland and other of the AA's witnesses that they had seen this comment at the time and agreed with it before the message was sent out. I understood Mr Strickland's position to be that he did not recall specifically, but thought he would have done so. However, I was not sure I could see why it mattered whether, for example, Mr Lloyd had obtained permission from Mr Strickland and Ms Hoosen to show this (internal) comment to Fenchurch, or whether (as Mr Lloyd said when asked about it: "*not only odd but also a mistake*") sending the document out in this form had been a mistake on his part. Viewed objectively, this was an indication that the AA might accept the public offer trigger. But it was also clear from Mr Lloyd's covering message that this was not necessarily the final word from the AA.

83. As far as I can see, no-one at the AA ever expressed any concern about the public offer trigger. That does not mean that it was agreed. But I can certainly see why Fenchurch might have expected that it was going to be agreed.

84. Mr Lloyd also flagged some points in the T&Cs, such as querying why Fenchurch was disclaiming liability for reliance upon modelling and information which it had prepared or provided. He also (among other proposed changes and comments):

    84.1. asked about the two-year time period for the "tail fee" in clause 4.2;

    84.2. commented on the proposed conflict of interest provision in clause 12: "*We would expect you, and any members of your group, not to act for any competitor of the AA Group*";

84.3. made clear, in response to the indemnity for Fenchurch in respect of acting for the AA in clause 15.2, that "*We will need to discuss liability caps*"; and

84.4. indicated that the termination provision in clause 20.1 needed to be discussed.

85. On 2 September 2019, in the context of an email about the Citibank engagement letter, Mr Strickland asked Ms Hoosen if she had comments on the "*legal construct*" of Fenchurch's EL *"... or are they now in good order, leaving just the Commercials to be agreed?*".

86. On 3 and 4 September 2019, Mr Perkins asked Mr Lloyd if they could chat about the EL. Mr Lloyd indicted that he was on leave, but could review a mark-up. After some further messages, Mr Perkins emailed on 10 September 2019 to say that he was seeing Mr Strickland the next day (11 September) and they could touch base after that.

87. On 11 September 2019, Mr Strickland emailed Ms Hoosen (with copies to Mr Lloyd, Ms Connor and Ms Pritchard) to report that he had had a meeting with Mr Buck and Mr Perkins and discussed "*the shape of the Commercials*", which included an abort fee, a base success fee, and a "*Ratchet*". Underneath these three bullets was a further, more indented bullet: "*Criteria to be determined*". It seemed likely to me that this last bullet was directed to the "*Ratchet*", which would obviously need defined criteria. At this stage, Mr Strickland was saying that "*it would be good to try to consummate this by the end of next week*". It was put to Ms Hoosen that this meant sign the EL, which seemed to me both correct and a revealing question for Mr Ayres to ask on behalf of Fenchurch. Ms Hoosen agreed that was how she understood the message.

88. Mr Buck said that, at the meeting with Mr Strickland on 11 September 2019, he explained Fenchurch had been working on Project Zodiac for 8 months and pushed for some project fees on that basis. He said that Mr Strickland was sympathetic to this, which seems consistent with "*the shape of the Commercials*" which I can see were being discussed by this point.

89. On 13 September 2019, Mr Perkins offered to speak to Mr Lloyd. He observed that Fenchurch had not received a final mark-up from the AA, because a number of positions were still "*TBD internally*" in the draft Mr Lloyd had sent. Mr Lloyd replied that this was a good point, but "*it's pretty much the same with the internal comments removed as there is nothing further on these*".

90. The emails suggest that a call between Mr Perkins and Mr Lloyd was arranged for 16 September 2019. Mr Perkins' notes from the call suggest that they discussed clause 4.2 (the tail fee), on which Mr Lloyd was to revert, clause 12 (conflict of interests), the clause 15 indemnity, on which the AA was to respond, and clause 16 on intellectual property.

91. On 26 September 2019, Mr Lloyd told Mr Perkins that "*We're working through the review Mark and Nadia wanted with an aim to have final positions next week*". I understood this to be the AA saying that it was still looking at the legal terms.

D.11 Further discussions in October 2019

92. On 10 October 2019, following a discussion that morning, Mr Buck emailed Mr Strickland a further fee proposal. Mr Buck commented that he hoped this met "*the two criteria that we previously discussed, being 1) simple and providing certainty; and 2) aligning interests to reward success*". This version had no monthly retainer, but instead included a £0.35m "*progress payment*", a milestone fee of £1.15m payable on signing

a transaction, subject to shareholder approval, and a success fee equal to 0.8% of the enterprise value payable upon completion, subject to a minimum of £4.5m. The email concluded: "*Once agreed, we will incorporate into the draft engagement letter and send to Nadia/ Jos so that we can finalise the T&Cs*".

93. It was put to Mr Buck that this message did not envisage the success fee being triggered by anything other than a completed sale. He said the email was dealing with the numbers, not the triggers. He expressed all of this as being part of the EL and confirmed that, when he referred to the EL, he meant the totality of the letter and the attached T&Cs.

94. Meanwhile, the discussions about the T&Cs were ongoing, mostly between Mr Lloyd (assisted by Mr Morrissey) and Mr Perkins. On 17 October 2019, Mr Morrissey sent an email to Mr Perkins, copied to Mr Lloyd, which flagged (among other terms) as matters to be discussed in a call fixed for the following day:

    94.1. the need to align the language for the ratchet success fee as between Zeus and Fenchurch, so that the calculation was the same;

    94.2. the AA's unwillingness to pay fees where the engagement was terminated following material breach by Fenchurch;

    94.3. a query about the success fee if the deal evolved such that the value of the transaction dropped below 11x EBITDA;

    94.4. the success fee payment trigger concerned with shareholder rejection of the deal; and

    94.5. various clauses in the T&Cs which had been raised in Mr Lloyd's mark-up, including:

        94.5.1. clause 4.2: the two year tail fee;

        94.5.2. clause 12: conflicts of interest;

        94.5.3. clause 15.3: the indemnity; and

        94.5.4. clause 20.1: termination.

95. There was then a call on 18 October 2019 between Mr Perkins and Mr Morrissey. Later that day, Mr Morrissey emailed to Mr Perkins an updated mark-up of the EL and the attached T&Cs. The whole of paragraph 2, including the success fee triggers, had now been highlighted with a single comment: "*To be agreed between the commercial teams*". The same comment had been added to clause 4.2(b) of the T&Cs, concerned with the period for the tail fee. There was a proposed change to the width of the indemnity in clause 15.3 and also a proposal to limit it to the amount of the base success fee. The termination rights had also been revised, with a comment about the notice period for this needing to be "*agreed by the commercial parties*".

96. Mr Perkins replied that same day commenting that Fenchurch was comfortable with Mr Morrissey's mark-up, except for 4 points on the T&Cs, namely:

    96.1. clause 2.4 concerning Fenchurch's responsibility for verifying information;

    96.2. proposing a 1 month notice period for termination for convenience in the AA's revised clause 20.1(a). He said the new clause 20.1(b) permitting immediate termination for breach would need to be checked internally;

    96.3. asking for proposed wording for an indemnity at 15.3; and

96.4. making clear that the new text in clause 15.4 – i.e. the capped indemnity – was not acceptable.

97. On 21 and 22 October 2019, Mr Strickland, Ms Connor and Ms Pritchard discussed by email Mr Buck's proposal on the commercials dated 10 October 2019. Ms Pritchard commented that Fenchurch had "*spent a lot of time*" and "*they have really helped us throughout the process*". Ms Connor described Fenchurch as "*v good in our market*" and noted that Fenchurch had "*burnt a lot of time so far so I have sympathy with the abort fee*". It is clear that the "*abort fee*" referred to here is the £0.35m progress payment.

98. On 22 October 2019, Mr Morrissey replied to Mr Perkins on the T&Cs, copied to Mr Lloyd, describing Fenchurch's insistence on an uncapped indemnity as unreasonable and asking for an explanation. He also addressed some of the other outstanding points and indicated that Mr Strickland would need to provide his input on the notice period for termination.

99. On 23 October 2019, Mr Perkins responded, confirming that Fenchurch was fine with changes which had been proposed to clauses 15.3 and 20.1(b), and said that Mr Buck would provide Mr Morrissey with "*some colour around our position*" on the uncapped indemnity in clause 15.4.

100. Later the same day, Mr Morrissey sent Mr Perkins a further revised mark-up of the draft EL and T&Cs. In this version (among other minor changes):

100.1. the basis for remuneration section in paragraph 2 of the EL was still flagged for agreement by the commercial teams;

100.2. clause 4.2 (the two-year tail fee) was also the subject of a note saying the clause was to be agreed by the commercial teams;

100.3. clause 12 (conflicts of interest) was flagged with a comment that the proposed absence of any restriction on working for competitors was subject to approval by AA senior executives;

100.4. the capped indemnity that the AA had previously inserted as clause 15.4 in Version 2B had now been deleted by Mr Morrissey. But there was also a comment that this uncapped indemnity was subject to approval by the AA's senior executives; and

100.5. the notice period for termination in clause 20.1(a) was still blank and flagged for agreement by the commercial teams.

101. In his covering message, Mr Morrissey referred to putting the draft in front of Mr Strickland to progress the commercials. He suggested a call with Mr Buck that afternoon, because "*…we will need senior executive sign-off if we are to accept an uncapped indemnity, so we will need to be able explain Fenchurch's position as part of that process*".

102. Consistently with this, on 23 October 2019, Mr Buck spoke to Mr Morrissey about the uncapped indemnity. When asked about this, Mr Buck remembered explaining why an uncapped indemnity was important to Fenchurch, and giving examples of two "*exceptional*" cases where Fenchurch had accepted a capped indemnity, which examples he had been given by Fenchurch's Compliance Officer. He agreed in cross-examination that Fenchurch was taking the negotiating position that it would not accept a capped indemnity and had said that it would be a decision for Fenchurch's

Compliance Officer as to whether, if it came to it, any cap could be accepted. He emphasised that it had never come to that: "*We were not put in a position where we had to accept a capped indemnity*". He suggested that Mr Morrissey had indicated to him that he was confident that the AA would ultimately be prepared to accept an uncapped indemnity.

103. In his written evidence, Mr Buck said that he was confident at this stage that the parties were agreed on the legal terms. When cross-examined about Fenchurch's position on the indemnity, he referred to there being "*open issues in the engagement letter*". In an important passage of his evidence, he amended the wording of his statement to expressing confidence that there **would be** agreement, although he accepted that the uncapped indemnity etc. was still subject to sign off on AA's side:

Q. Very well. You say at the end of this paragraph:
"After that conversation with Mr Morrissey on 23 October and the emails the next day [that we have looked at] confirming that there were no further legal comments, I was confident that we were agreed on the legal terms and we could focus on finalising our fee."
I take it from your evidence a moment ago that you well understood that you were not agreed on the legal terms, that that is no longer your evidence, this statement at the end of paragraph 49 is no longer your evidence, is that right?
A. I was -- sorry, I was confident that we were agreed, I had had the conversation. It was still subject to sign off, as we have looked at, with Mark and Nadia. But in terms of progressing the legal discussion, what I am saying here in my statement is there was no merit in discussing any further without it effectively going upstairs to be agreed.
Q. That is not what you say, though, is it, Mr Buck. You don't say here that you understood that what issues there were were subject to further review and approval by the AA's legal department, do you?
A. I express my confidence.
Q. No. You express your confidence that you were agreed, not that you could reach agreement, not that the unexpressed need to obtain senior executive sign off would be obtained. You simply say in your witness statement that you were confident that you were agreed on the legal terms. That, you would accept now, is at best a highly misleading comment, isn't it?
A. I was confident we were agreed on the legal terms.
Q. I would suggest –
JUDGE SEAN O'SULLIVAN: Confident that you were agreed or confident that you were going to be agreed?
A. The language is – I was confident that we were going to be agreed I would say would be better language than I have written down here. I agree with that.
MR PARKER: I am grateful for that.
So, although you were confident that you were going to be agreed, it was nevertheless clear to you that at that point you were not agreed. Is that fair?
A. It is fair.

104. On 24 October 2019, Mr Morrissey emailed Mr Perkins asking whether there were further legal comments from Fenchurch on the EL. Mr Morrissey indicated he was keen to put the EL before Mr Strickland on the basis that the "*legal aspects*" had now been agreed. Mr Perkins replied: "*…no not from us on the terms. 15.4 was the last point to discuss. Mark has an email from us outlining the fee proposal*".

105. Mr Perkins' evidence seemed to be that his understanding was that the AA had agreed the legal terms. Despite this, on 28 October 2019, Mr Perkins checked with Mr Morrissey if the AA was comfortable with Fenchurch's position on the indemnity. Mr Morrissey confirmed to Mr Perkins that the uncapped indemnity and a small number of other "*risks*" would be flagged to Mr Strickland and Ms Hoosen as part of the contract approval process. He made clear it was for them to decide if they were comfortable with the risks. Mr Morrissey said that he would now be able to give some context as to why Fenchurch was insisting on the indemnity and confirmed the AA was not waiting for any further input from Fenchurch on the EL at this time.

106. In relation to the "commercials", there was then a counter-proposal from Mr Strickland on 28 October 2019, including a progress payment of £0.35m payable on 31 July 2020, a milestone payment payable upon signing, a flat success fee of £3.5m payable upon completion, and a value creation fee of 0.1% if the enterprise value was £600m to £650m, rising to 0.2% if the enterprise value exceeded £650m.

107. Mr Strickland was asked whether, by 28 October 2019, everyone at the AA was aware of the public offer trigger and whether he accepted that no-one at the AA was expressing any objection to that trigger:

> Q. Now, at this particular stage, do you agree with me, having gone through it, I hope not too laboriously, that by the time we get to 28 October, that everybody on the team, both lawyers and non lawyers, that they were both aware of the draft triggers that Fenchurch was seeking to impose, and secondly that nobody was objecting to them? That is correct, isn't it?
> A. I think it is fair to say that everybody was aware of what was in the documents, yes.
> Q. The second part of my question was that nobody was expressing any objection to them.
> A. To the best of my knowledge, no.

D.12 AA Board November meeting

108. On 6 November 2019, a paper on Project Zodiac was prepared for the AA's November Board Meeting. The paper set out a decision-making tree: if the formal sale criteria were considered to have been triggered, the AA would test the market. If not, the project would be 'lock-boxed', the core project team would be stood down, and then the "*Re-Financing and Macro-Economic triggers*" would be reviewed monthly at each formal Board meeting from February 2020. By this stage, the IM (prepared by Fenchurch) was in a highly developed state and everything was close to ready if the Board wanted to go ahead with Project Zodiac.

109. On 13 November 2019, the AA's Board met and discussed Project Zodiac. Mr Breakwell, Ms Hoosen, Mr Buck, Ms Connor, Ms Purdie and representatives from KPMG and Zeus were present for that discussion. The minutes record that the Board decided that the AA should not test the market at that stage. Project Zodiac was described as "*a last resort option, subject to the outcome of any refinancing*". It was agreed that they would keep this under continuous review.

110. On 13 November 2019, Ms Connor sent a message to the Project Zodiac team to "*put on the record a massive thank you*", suggesting that, because of the hard work of everyone involved, the AA "*now have optionality*". When she was asked about this, she explained that the work had enabled the Board to make a quality decision. Mr Strickland said that nobody had wanted to sell the insurance business, but it was

recognised that it might not be possible to avoid doing so. He agreed that it was and remained a possibility that the AA might have to sell, which was why a sale was never ruled out by the AA. Ms Connor confirmed that, to the best of her knowledge, Project Zodiac was never fully and finally ruled out.

111. Although the parties inevitably described the Board's decision in different words, there did not seem to me to be any real uncertainty about what had happened. The Board had decided not to go ahead with the next stage of Project Zodiac: i.e. with testing the market by seeking non-binding offers. There seems to have been a hope that another route (referred to as "refinancing") would mean that the sale of the insurance division could be avoided. The strategy, or at least the immediate focus, had changed. But at the same time, there was a recognition that the sale of the insurance division could not be ruled out. A clear example of this is the email from Ms Pritchard dated 14 November 2019, in which she referred to the Board as having "paused" Project Zodiac, but with a chance that it "*will be resurrected*" in the next 9 months.

112. The word "resurrected" is suggestive of something which is dead being brought back to life. I did not fully understand what the "*Re-Financing and Macro-Economic triggers*" were which might lead to Project Zodiac being resurrected or taken back out of the locked box. Nothing specific seems to have been defined in the Board papers (and Ms Connor's evidence was that no triggers had been identified to the best of her knowledge). My impression is that reactivation would have required a major shift in the Board's thinking. Ms Connor seemed to me to express the AA's position at this stage in a sensible way:

> A. I think it was unlikely, and I thought at the time it was unlikely that we would resurrect Zodiac. That was because of the financial information that was included in the November pack, my Lord. It looked not a good deal, so I would have been surprised if the project were re-opened. It would have been a last resort and there would have been no other options. I wouldn't have been shocked but I would have been surprised.
> Q. But as a business in distress you wouldn't rule it out, would you?
> A. No, I wouldn't have ruled it out, as I have just said, it would have been a surprise though because the financial information suggested it would be a difficult deal to do.

113. I do not accept that Project Zodiac had been definitively brought to a close, but I doubt that anyone closely involved considered it to be likely that it would be reactivated.

D.13 Agreement on fee construct

114. On 18 November 2019, Mr Strickland emailed Mr Buck and Mr Perkins referring to a fee proposal raised by Mr Buck orally on 6 November 2019, which had comprised:

114.1. a progress payment of £0.35m;

114.2. a flat success fee of £4.25m; and

114.3. a discretionary element of £0.75m.

115. Mr Strickland counter-offered:

115.1. a progress payment of £0.35m;

115.2. a flat success fee of £4m; and

115.3. a value creation fee if the value exceeded £625m.

116. Mr Strickland asked for Mr Buck's thoughts, adding: "*…I am increasingly of the view that if we can't get this resolved, then I am happy to continue with yourselves fully at risk. I am keen that we put this to bed".* When Mr Strickland was asked about this, he indicated that he had meant the risk of not having an agreement about remuneration: i.e. *"let's resolve this or you can keep going in your current uncertain state*". Mr Buck's evidence was that he did not understand Fenchurch to be at risk in respect of the huge volume of work which it had already carried out.

117. Mr Buck and Mr Strickland spoke again on 19 November 2019. Later that day, Mr Strickland emailed Mr Buck as follows:

"Hi Duncan,

It was good to talk this morning.

I think that we have finally agreed on the following construct for the engagement fee;

- *Progress Payment - £0.35m – Payable 31 July 2019 (deductible from the Flat Success Fee)*
- *Success Fee - £4.0m*
- *Value Creation Fee*
  - *At £600m – Nil*
  - *There-after 1% of value created over £600m (with no cap) – Examples are*
    - *At £625m - £0.25m*
    - *At £650m - £0.50m*
    - *At £675m - £0.75m*
    - *At £700m - £1.00m*
    - *At £725m - £1.25m*
    - *At £750m - £1.50m*

If you could confirm by e-mail, I will get the final engagement letters prepared for signature".

118. Mr Buck replied that day "*Many thanks Mark – confirmed*".

119. This email exchange is relied upon by Fenchurch as amounting to a binding agreement and I will discuss how I interpret it in more detail below.

120. Mr Buck was asked whether he had discussed the additional triggers for payment of the success fee with Mr Strickland and he confirmed that he had not. He made clear that he was not engaging here with the other terms of the EL, but envisaged these numbers being dropped into the draft EL and then it being signed. Importantly, he agreed that it would be necessary first for all open issues to be resolved and seemed to be unsure about the status of the legal negotiations:

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22   Q.  Okay.  But that would obviously be subject to the
23       resolution or to those outstanding points that we have
24       already identified, it would be subject to those being
25       resolved, correct?
 1   A.  To be signed, it would need to have all open issues
 2       resolved.
 3   Q.  Okay.  At this point obviously they remained open
 4       issues, correct?
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> A. I would need to check the dates.
> Q. 19 November.
> A. I can't remember the dates of the other.
> Q. Well, they were at 28 October.
> There had been no advancement of the legal negotiations beyond the last communication of 28 October we looked at. So, again, it is clear that those outstanding issues that we have seen remained outstanding at this point, yes?
> A. If they hadn't been resolved they were outstanding, correct.

121. For his part, Mr Strickland accepted that he had not said anything about this agreement being subject to agreement on the legal terms, or final approval of the AA's Board. When I first asked whether he had in mind that there were legal items outstanding, he answered: "*I wasn't aware of and wasn't thinking about them. That was being dealt with by the legal team…*". When he came back to it in re-examination, he seemed to recall it slightly differently:

> JUDGE SEAN O'SULLIVAN: Can I just follow up on that. Do you mean you believe now or you think looking back you were conscious at the time that there were outstanding matters?
> A. I was conscious at the time there were outstanding items.
> JUDGE SEAN O'SULLIVAN: So why did you say "I will get the final engagement letter prepared for signature", then?
> A. Because I believed we were getting quite close on the legal bits.

122. I suspect that Mr Strickland's first answer – that he had not been thinking specifically about any outstanding legal items, which he had left to others – is the more likely to be correct. But perhaps it does not matter, since I am only concerned with what he was objectively communicating, not his subjective thoughts. If Mr Strickland was, when re-examined, suggesting that he and Mr Buck had **discussed** the fact that there were legal items which remained to be agreed, I reject that evidence as inherently unlikely.

123. Fenchurch relied upon some communications internal to the AA at this stage:

123.1. On 19 November 2019, Mr Strickland emailed Ms Hoosen and Mr Breakwell setting out what he had agreed with Mr Buck regarding Fenchurch's engagement "*For good governance / audit trail*". Mr Strickland commented that if they agreed with what was proposed, they could get this into a signed EL, thereby regularising the appointment situation. He queried whether board approval was needed or whether it was implied through the updates which the Board had had during the project. Mr Breakwell replied the next day saying that the deal seemed good to him.

123.2. In the minutes of a Board call on 4 December 2019, Mr Strickland explained that he was trying to regularise the relationship and engagement of all company advisors and suggested that there was "*currently a draft engagement letter in circulation still to be agreed*".

123.3. On 6 December 2019, Mr Strickland was told that the progress payment was to be accrued and was asked if he was happy for "*the agreed Fenchurch Progress Payment £0.35m (exc. VAT) payable July 2020*" to be booked against Project Zodiac for that year. He replied "*absolutely*".

D.14 Further discussions about the EL

124. On 2 December 2019, Mr Perkins followed up on Mr Buck's email of 19 November 2019, asking Mr Strickland whether he should contact Mr Lloyd "*regarding the final engagement*". Mr Strickland replied that he would give his legal colleagues a reminder that this was still outstanding. Mr Perkins chased again on 6 December. Mr Strickland replied that it was with the AA's legal team, which would be in touch very shortly. Mr Perkins replied to confirm that Mr Lloyd had indeed been in touch.

125. Mr Lloyd sought to fix up a call. On 9 December 2019, Mr Perkins spoke to Mr Morrissey, who told him that there were "*more points of discussion in the T&Cs*". Mr Perkins offered to discuss the issues or alternatively that a mark-up or an email setting out the points might be more efficient. Within Fenchurch, Mr Perkins relayed his frustration to Mr Buck, saying that "*Having thought we'd negotiated all the points except for a couple which they needed Mark's sign off on (cap, tail), apparently Nadia is now opening up new points in the T&Cs*". But Mr Buck, in his oral evidence, agreed that these were not actually new points, but rather points which he had thought were going to be agreed. Mr Lloyd said that Fenchurch understood that Ms Hoosen was the ultimate decision maker on these legal terms. That seems to me to be correct.

126. On 11 December 2019, Mr Lloyd provided a table which identified three areas of contention in an email, namely:

126.1. Fenchurch's liability to the AA, including for regulatory fines;

126.2. the AA's uncapped liability under the indemnity; and

126.3. the lack of any express restriction on Fenchurch acting for a competitor.

127. Later that same day, Mr Perkins proposed some adjustments to clause 15.1 to deal with regulatory fines and an adjustment to clause 12 restricting Fenchurch's ability to act for competitors of the AA.

128. Mr Perkins also offered to speak to Mr Lloyd. Mr Morrissey replied that he would circle back with Mr Strickland and Ms Hoosen, but he thought that the next step would be Mr Strickland wanting to close this out.

D.15 Involvement of Evercore

129. On 17 December 2019, Mr Strickland sent an email to Mr Sibbald of Evercore, another advisor, describing the AA's refinancing strategy (i.e. buying back some "A" and then "B" notes before Christmas to see how the market would react, then look to issue further notes in 2020), and asking what Evercore would recommend.

130. In this context, Evercore appears to have approached Fenchurch for information about the valuation of the insurance division. It looks as if this ruffled some feathers, with Mr Strickland on 20 December 2019 (in a text message) promising that Evercore had been told not to request information from Fenchurch directly.

131. Mr Buck responded by saying that "*…it would be personally extremely helpful if you could send over signed Engagement Letter. I am coming under lots of pressure from above!*"

D.16 New CFO at the AA

132. On 8 January 2020, Mr Lloyd responded to a further chaser from Mr Perkins to confirm that "*As far as I'm aware this is with Mark to agree the change to the indemnity point*

and that's it. I sent him the information pre-Christmas". Mr Strickland had no recollection of seeing this message, but agreed that, by early January, the parties were very close together. Mr Lloyd said that he had been on paternity leave at the time and was not sure if he had been involved in all of the internal traffic. Ms Hoosen recalled being aware that Fenchurch was asking for what she called an "*outrageous indemnity*", but did not recall seeing this email.

133. Meanwhile, on 7 January 2020, Mr Buck sent a chaser of his own to Ms Hoosen and Mr Strickland, asking for an update. Mr Hoosen responded to say that Mr Dangerfield, the new CFO arrived on Monday and "*This means I now need to discuss the engagement terms with him*". She continued: "*I know my team have also had challenges agreeing reasonable drafting with your legal team, so the latest version is not agreed by the AA and requires further discussion before any agreement is reached…*". When asked about this, she indicated that she had not spoken to Mr Dangerfield about it yet, because he was still getting on top of a number of issues.

134. Mr Buck's written evidence was that he thought the AA's team was seeking to rewrite history here and that the EL terms had been agreed before this. But when cross-examined, he sensibly conceded that AA's consistent position had been that there was no final agreement.

135. An AA internal document dated 17 January 2020 and entitled "*AA plc – list of advisors*" stated, in relation to Fenchurch: "*Legal negotiation concluded – EL ready for execution or final commercial negotiation if appropriate*". Mr Strickland made clear that he was no longer involved by this stage, because Mr Dangerfield had taken over. Mr Lloyd expressed puzzlement that the point about the indemnity was not mentioned in this document. Ms Hoosen suggested that the wording of this document simply reflected the fact that Mr Lloyd and Mr Morrissey "*had got as far as they could and weren't able to take any of the other points any further*". She pointed out that: "*It doesn't say it is only ready for execution, it is giving the options available*", which I understood to be a reference to the fact that it referred to the option of "*final commercial negotiation if appropriate*". She was adamant that the AA had not signed off on the indemnity.

D.17 AA's January Board meeting

136. On 17 January 2020, Mr Breakwell asked Mr Buck for his thoughts on a valuation of the insurance division "*if the clouds clear*" and also "*if the Company chooses to execute on Zodiac before the clouds clear*". The "*clouds*" in this context referred to the FCA review of pricing practices for consumer insurance. Mr Buck provided an update on the Project Zodiac viability and value. Fenchurch suggested that there might be a concern that material redress would be required (i.e. to customers who had been "overcharged") or that investors might value at the lower end of the range to price in the risk of the potential need to change the business model.

137. On 22 January 2020, the AA's Board met and discussed Project Zodiac and other refinancing options presented by Evercore. The update prepared by Fenchurch regarding Project Zodiac was tabled. The minutes record that the Board agreed that the proposed insurance sale should come off the table "*for the time being*", on the basis that valuations were likely to have gone down and the proceeds would not make enough difference to the balance sheet.

138. Ms Hoosen explained that the meeting was recorded and she had the recording typed up like a transcript to assist in preparing the minutes. These notes refer to the sale of the insurance business as at "*the bottom of the pile*". One non-executive director

(Cathryn Riley) said: "*…in my view I think we do park it. Certainly we don't want to be making any decisions until we have this Phase 2 work again*".

139. There was much discussion of the meaning of the comment from Mr Dangerfield which followed this: "*it is the bottom of the pile – you are going to have to do it I think*". Fenchurch argued that, in the absence of any evidence from Mr Dangerfield, I should infer that his comment meant that, while Project Zodiac was an option of last resort, it was one which Mr Dangerfield thought the AA would ultimately have no choice but to take. But that meaning did not fit with the words said to have been recorded, nor fit with the context in which the remark was made. I doubt that it really matters, but my conclusion is that Mr Dangerfield was either saying that the AA would only sell the insurance division if it had to do it (i.e. if it had no other option), or was referring to the work which was to be done by Evercore (i.e. the "Phase 2 work" just raised by Ms Riley), rather than to the sale of the insurance division, when he said "you are going to have to do it I think".

140. Whatever view one takes of this particular comment from Mr Dangerfield, I am satisfied that what the AA's Board decided was that they would not go ahead with Project Zodiac. They clearly still viewed it as an option of last resort and took the view that various other options were to be preferred. On the other hand, Project Zodiac was not finally ruled out at this stage, or (as far as I can see) at any stage. It remained available to the AA if things looked desperate, but was unlikely to be selected unless the AA's Board took the view that nothing else was going to work.

141. I was not impressed with Mr Breakwell's oral evidence that the project was "*categorically ruled out*" in November 2019, and was not even being reviewed at this stage. As Fenchurch submitted, this was a self-serving reconstruction which did not fit with the Board minutes or the notes. Even Mr Breakwell's own witness statements gave a more balanced impression of what had been agreed in November: e.g. "*…the Board decided to complete the work and put Project Zodiac on the shelf so we could dust it off if it were ever needed in the future, given the uncertainty about what would ultimately happen*".

142. However, if Project Zodiac had become very unlikely to go forward by January 2020, the prospects of it being resurrected dwindled yet further as time went on. There were a number of reasons for this. One was the FCA pricing review. It is clear that this was a cloud which continued to affect confidence about the price which might be generated by a sale. If anything, my impression was that this cloud darkened rather than clearing away. Mr Strickland called it the "*last nail in the coffin*" for Project Zodiac. Mr Breakwell described how the emergence of the FCA's opinion on price regulations later saw the public offer price fall from more than 40p per share to only 35p per share: "*…the FCA's rules that they came out with effectively went to value and it effectively made the insurance business a far riskier proposition than they had previously anticipated, which is why the price came down on the deal*". While there may have been an element of hyperbole in Mr Breakwell's description, this was clearly not invented evidence. In practice, the FCA review meant that it was becoming less and less likely that the insurance business could be sold at a price which would enable the goal of significantly reducing debt (as a percentage of the residual EBTIDA) to be achieved.

143. More generally, as time went on, the window for selling the insurance division, as a way of reducing the AA's indebtedness **before** the "B" notes had to be refinanced, was closing. There was no hard deadline in this regard, but it is obvious that the timings

became more difficult if the process did not get underway in late 2019 or early 2020. Ms Connor described February 2020 as the last real opportunity to go ahead with Project Zodiac. There is plainly a subjective element in that word "real". Ms Connor was not saying it was completely impossible after that. But I accept that the sale was looking unrealistic as a solution for the AA's debt problem after February 2020.

144. Another factor was that the passage of time would render the work which had been done by Fenchurch out of date and requiring updating. Again, this is not a simplistic matter of the IM being ready to go one day and worthless the next. On the contrary, it was always going to be of enormous benefit to have done all of that work on structuring the document etc. The point was that the IM would require more updating if more time had passed. I accept Ms Connor's evidence that market conditions change fast in the world of insurance.

145. For what it adds, Evercore's assessment of Project Zodiac was not enthusiastic: it said the sale of the insurance business was "*not considered a realistic or viable option*". It observed that (because of the timing) the AA was likely to appear a distressed vendor, which would affect the price. Fenchurch suggested that Evercore was not independent and was bound to prefer other options which would earn it more fees, but it was noteworthy that Fenchurch rejected the suggestion that its own advice about the viability of Project Zodiac was coloured by the potential to earn fees. It is not easy to see why Evercore should be any less concerned with its reputation for unbiased advice than Fenchurch.

146. As far as I can see, the AA never looked again at the possibility of restarting Project Zodiac after January 2020. The AA's Board agenda within the pack for the meeting indicated that the Board planned to review Project Zodiac at the Board meeting in April 2020. But, if the Board did so, it plainly remained of the view that it should not be taken forward. Given how things had developed, I do not find this surprising. No formal decision had been made to rule Project Zodiac out as an option, and it would be wrong to say that it had become **impossible** for the AA to take it out of the locked box, or off the shelf (or whatever metaphor is preferred). But I don't believe that anyone thought that was likely to happen.

D.18 Events after January 2020

147. On 30 January 2020, Mr Buck emailed Ms Hoosen to ask whether there had been any progress with Mr Dangerfield since her message of 8 January. Ms Hoosen indicated that Mr Dangerfield had not got to it yet and suggested that Mr Buck contact Mr Dangerfield directly, as it was unlikely to be resolved before she went on maternity leave.

148. On 18 February 2020, the AA's Board met (by conference call). The minutes record: "*Fenchurch: a fee is due in July on work done on Project Zodiac. There is also a success fee but KD [Mr Dangerfield] expects to revisit it*."

149. It seems that Mr Buck finally met with, or at least spoke to, Mr Dangerfield in May 2020. On 19 May 2020, Mr Buck emailed Mr Dangerfield referring to having connected the previous week and stating that Fenchurch had accrued a £350,000 fee for Project Zodiac. He commented that: "*The details of the agreement made with Mark Strickland are in the e-mail chain below. Whilst our engagement letter is c .99% agreed, it was never actually signed*". He asked Mr Dangerfield whether the absence of a signed EL was going to cause a problem with invoicing the fee when due in July.

150. Mr Dangerfield appears to have requested Mr Strickland's comments on this. In an email dated 20 May 2020, Mr Strickland explained that, after the exchange with Mr Buck on 19 November 2019, instructions had been received to await Mr Dangerfield's arrival before committing to any further professional fees and, as a result, "*the deal was never legally consummated*". Mr Dangerfield replied that, if no EL had been signed, he didn't see why he should pay anything.

151. In an email dated 21 May 2020, Ms Pritchard expressed the view that the £350,000 fee was "*payable morally… they did loads of work for us… And they were very close to Mark signing the engagement letter pre-Christmas*". Similarly, on 26 May 2020, Ms Connor acknowledged that Mr Strickland had agreed this fee and observed that Fenchurch "*put in many many hours and quality thinking to the project*". Her view was that "*It would be right to pay in my humble opinion*". It was also confirmed to Mr Dangerfield that the £350,000 fee had been accrued in the AA's accounts.

152. By early August 2020, the Board of the AA had announced that it had been approached about a possible cash offer for its share capital. It was made clear that this would involve a significant amount of new equity capital being invested into the AA, so as to reduce indebtedness. In parallel with this, the Board was continuing to assess refinancing options.

153. On 6 August 2020, Mr Buck sent an invoice to Mr Dangerfield for the £350,000 Project Zodiac progress payment. Together with expenses (of £16,276.06) and VAT, the total was £439,531.27. Mr Dangerfield confirmed that he was OK for this to be paid.

154. On about 19 August 2020, Mr Dangerfield emailed Mr Buck to say that the AA would be processing the invoice, but continued: "*For the avoidance of doubt this payment represents our full and final settlement of any monies due to Fenchurch*". Mr Buck raised this internally, suggesting that the AA was looking to cover the risk of a success fee "*in the event of a broader transaction*". He indicated that: "*Technically the project is currently on hold – we have not been terminated/ aborted*".

155. On 14 September 2020, Mr Buck replied to describe what had been done by Fenchurch on Project Zodiac. He referred to the public offer trigger as "*a core protection that was agreed due to the specific circumstances that The AA were in when you appointed Fenchurch. There was clear acknowledgement at the time that this protection was fair given the high probability that The AA would be subject to a public offer during the term of our engagement*".

156. This was followed up on 24 November 2020, when Mr Buck emailed Mr Dangerfield referring to recent announcements about a possible offer for the AA. He asked Mr Dangerfield to confirm that the potential bidders were aware of the AA's liabilities and obligations to Fenchurch.

157. On 25 November 2020, the AA announced that agreement had been reached on a recommended cash acquisition of the issued share capital of the AA, with each share priced at 35p. As part of that announcement, it was said that the consortium buying the AA: "*…believes that the AA has been held back as a result of underinvestment and levels of debt. The Consortium intends to inject additional funds into the AA to deleverage the business and with the freedom to drive the business forward, to better serve its customers and capitalise on its considerable strengths" and "believes the Insurance business will be a key growth driver, to enable attractive new products and services to be made available to the AA's loyal membership base*".

158. Mr Breakwell agreed that this last part amounted to an announcement that the intention was that the insurance business would be retained. I am sure that is right. But it does not seem to me that very much had changed in that regard, save perhaps that the acquisition meant that it was unlikely (at least in the short term) that the AA would find that its financial position meant that it had no choice but to sell off its insurance business. In terms of mindset, the Board of the AA had felt much the same way about the insurance business as a potential driver of growth, back in November 2019 and January 2020.

E Was a binding agreement reached on the terms of the draft EL?

159. With these findings in mind, I turn to the issues for determination. The first is whether a binding contract was formed.

E.1 The law in relation to contractual formation

(a) Generally

160. There was no real difference between the parties as to the key legal principles which I am to apply as I decide whether a binding contract came into being between Fenchurch and the AA on or after 19 November 2019.

161. Discussions concerning whether a negotiation which has broken down has nevertheless resulted in a binding agreement now usually start with the decision of the Court of Appeal in Pagnan SpA v Feed Products Ltd [1987] 2 Lloyd's Rep 601 and the observation of Lloyd LJ (at p. 619) that: "*the parties may intend to be bound forthwith even though there are further terms still to be agreed…*".

162. In that case, there was an initial exchange of telexes on 1 February 1982 in which the sale of feed pellets was described as "*concluded*". Then the next day, the seller's supplier sent detailed terms, which were forwarded by the buyer to the seller. Some changes were discussed, but when a formal contract was sent out, the changes were not included. The buyers contended that there was no agreement at all. Bingham J and the Court of Appeal decided that there was a binding contract formed on 1 February 1982.

163. Lloyd LJ summarised the principles he derived from the authorities as follows (at p.619):

> *"(1) In order to determine whether a contract has been concluded in the course of correspondence, one must first look to the correspondence as a whole . . .*
>
> *(2) Even if the parties have reached agreement on all the terms of the proposed contract, nevertheless they may intend that the contract shall not become binding until some further condition has been fulfilled. That is the ordinary 'subject to contract' case.*
>
> *(3) Alternatively, they may intend that the contract shall not become binding until some further term or terms have been agreed . . .*
>
> *(4) Conversely, the parties may intend to be bound forthwith even though there are further terms still to be agreed or some further formality to be fulfilled . . .*
>
> *(5) If the parties fail to reach agreement on such further terms, the existing contract is not invalidated unless the failure to reach agreement on such further terms renders the contract as a whole unworkable or void for uncertainty.*

(6) It is sometimes said that the parties must agree on the essential terms and it is only matters of detail which can be left over. This may be misleading, since the word 'essential' in that context is ambiguous. If by 'essential' one means a term without which the contract cannot be enforced then the statement is true: the law cannot enforce an incomplete contract. If by 'essential' one means a term which the parties have agreed to be essential for the formation of a binding contract, then the statement is tautologous. If by 'essential' one means only a term which the court regards as important as opposed to a term which the court regards as less important or a matter of detail, the statement is untrue. It is for the parties to decide whether they wish to be bound and if so, by what terms, whether important or unimportant. It is the parties who are, in the memorable phrase coined by the judge, 'the masters of their contractual fate'. Of course the more important the term is the less likely it is that the parties will have left it for future decision. But there is no legal obstacle which stands in the way of the parties agreeing to be bound now while deferring important matters to be agreed later. It happens every day when parties enter into so-called 'heads of agreement'…"

164. Pagnan was approved by the Supreme Court in RTS v Molkerei [2010] UKSC 14. That was a different scenario from Pagnan: after a preliminary (and time-limited) agreement was put in place, there was an initial exchange about a draft contract which was expressed to be "subject to contract". Nothing was finalised and signed. Despite this, the design and installation work was fully performed. There was then a dispute about whether there was any further contract and, if so, on what terms. The Supreme Court ultimately held that performance in that particular case demonstrated an intention to contract on the terms of the draft, notwithstanding the fact that the document had (originally) been expressed to be "subject to contract".

165. Lord Clarke gave the following summary of the principles at [45] to [54]:

"45. The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement…

47. We agree with Mr Catchpole's submission that, in a case where a contract is being negotiated subject to contract and work begins before the formal contract is executed, it cannot be said that there will always or even usually be a contract on the terms that were agreed subject to contract. That would be too simplistic and dogmatic an approach. The court should not impose binding contracts on the parties which they have not reached. All will depend upon the circumstances…

48. These principles apply to all contracts, including both sales contracts and construction contracts, and are clearly stated in Pagnan SpA v Feed Products Ltd [1987] 2 Lloyd's Rep 601, both by Bingham J at first instance and by the Court of Appeal. In the Pagnan case it was held that, although certain terms of economic significance to the parties were not agreed, neither party intended agreement of those terms to be a

precondition to a concluded agreement. The parties regarded them as relatively minor details which could be sorted out without difficulty once a bargain was struck. The parties agreed to bind themselves to agreed terms, leaving certain subsidiary and legally inessential terms to be decided later…

50. Before the judge much attention was paid to the Percy Trentham case [1993] 1 Lloyd's Rep 25 , where, as Steyn LJ put it at p 26, the case for Trentham (the main contractor) was that the sub-contracts came into existence, not simply from an exchange of contracts, but partly by reason of written exchanges, partly by oral discussions and partly by performance of the transactions. In the passage from the judgment of Steyn LJ, at p 27, quoted by the judge at para 66, he identified these four particular matters which he regarded as of importance. (1) English law generally adopts an objective theory of contract formation, ignoring the subjective expectations and the unexpressed mental reservations of the parties. Instead the governing criterion is the reasonable expectations of honest sensible businessmen. (2) Contracts may come into existence, not as a result of offer and acceptance, but during and as a result of performance. (3) The fact that the transaction is executed rather than executory can be very relevant. The fact that the transaction was performed on both sides will often make it unrealistic to argue that there was no intention to enter into legal relations and difficult to submit that the contract is void for vagueness or uncertainty. Specifically, the fact that the transaction is executed makes it easier to imply a term resolving any uncertainty, or, alternatively, it may make it possible to treat a matter not finalised in negotiations as inessential. This may be so in both fully executed and partly executed transactions. (4) If a contract only comes into existence during and as a result of performance it will frequently be possible to hold that the contract impliedly and retrospectively covers pre-contractual performance…

54. There is said to be a conflict between the approach of Steyn LJ in the Percy Trentham case [1993] 1 Lloyd's Rep 25 and that of Robert Goff J in the British Steel case [1984] 1 All ER 504 . We do not agree. Each case depends upon its own facts. We do not understand Steyn LJ to be saying that it follows from the fact that the work was performed that the parties must have entered into a contract. On the other hand, it is plainly a very relevant factor pointing in that direction. Whether the court will hold that a binding contract was made depends upon all the circumstances of the case, of which that is but one. The decision in the British Steel case was simply one on the other side of the line. Robert Goff J was struck by the likelihood that parties would agree detailed provisions for matters such as liability for defects and concluded on the facts that no binding agreement had been reached. By contrast, in the Pagnan case [1987] 2 Lloyd's Rep 601 Bingham J and the Court of Appeal reached a different conclusion, albeit in a case of sale not construction."

166. Fenchurch emphasised that it is possible for the parties to conclude a binding contract, even though it is understood between them that a formal document recording, or even adding to, the terms agreed will need to be executed subsequently. This is clear from Pagan itself, but was more recently confirmed in Air Studios (Lyndhurst) Limited T/A Air Entertainment Group v Lombard North Central Plc [2012] EWHC 3162 (QB) per Males J at [5].

167. Fenchurch also argued that the fact that a transaction is executed – that work had been done – is highly relevant. It said that, in such cases, it will often be unrealistic to argue that there was no intention to create legal relations. It pointed to G Percy Trentham Ltd v Archital Luxfer Ltd [1993] 1 Lloyd's Rep 25 (esp. Steyn LJ's discussion of the right approach at p.27) as an example of this. That was a case in which Archital had been

performing work while counter-offers were exchanged. It was held that the parties had intended to enter into a binding contract and the combination of the exchanges and the carrying out of the work agreed in those exchanges gave rise to a binding contract.

168. For its part, the AA pointed to cases in which the context suggested that the intention was that a binding contract should only come into being when contractual documents were signed by the parties. In Cheverny Consulting v. Whitehead Mann [2006] EWCA Civ 1303, for example, it was said that, where solicitors were involved on both sides, formal written agreements were to be produced and arrangements made for their execution, the normal inference would be that the parties are not bound unless and until both of them signed the agreement (per Sir Andrew Morritt C at [45]).

169. Similarly, in Investec Bank (UK) Ltd v Zulman [2010] EWCA Civ 536, the first issue on appeal was whether the judge at first instance had been right to treat the negotiations about amendments to a guarantee as effectively "subject to contract" when those words had not been used. Longmore LJ observed (at [16]-[17]):

> *"In our judgment it is important not to over-emphasise the actual phrase subject to contract. It is a question, in every case where a written agreement is contemplated, whether the parties intend not to be bound until the relevant document is actually signed or merely intend that the relevant document is to be the record of an agreement made orally and intended to be binding when made ...*
>
> *The surest guides to the parties' intentions are usually the terms of the draft documents passing between them. The use of the phrase subject to contract is, of course, lawyer's short-hand intending to indicate an absence of intention to be bound until the relevant document is signed but its absence does not necessarily mean an intention to be bound once oral agreement is reached."*

170. The Court of Appeal emphasised that the terms of the letter of variation requested that the other party confirm its acceptance of its terms by signing and returning the letter. It also observed that the draft guarantee contemplated a solicitor signing to confirm that the terms had been explained to the guarantors. It suggested that this would be a "*pointless provision*" if the parties were bound by an earlier oral agreement.

171. In the end, it may be that these cases simply highlight that everything depends on what the parties (objectively) are taken to have intended, having regard to their communications with one another and the wider context. The simplest and probably most common scenario involves binding agreement being reached at the end of a negotiation. But there is no doubt that the parties can intend a binding agreement to be reached at an earlier stage, notwithstanding that the negotiations are incomplete.

172. Context is all. At one end of the spectrum, you might have a commodity sale or a spot fixture, with the price moving hour by hour. The parties will "book" the deal in an informal way (perhaps an exchange of IMs or on the telephone) and then "paper" it when time allows. The absence of a signed sale contract or charterparty does not mean that there is no contract. At the other end of the spectrum, you might have the purchase of a business, with extensive due diligence and solicitors negotiating detailed terms on a "subject to contract" basis. Until the documents are signed by both parties, there is no deal.

(b) The importance of "offer and acceptance"

173. The parties made some submissions about the importance of the "offer and acceptance" analysis in this context. For example, Fenchurch pointed out that, in G Percy Trentham (supra) at p.27, Steyn LJ observed that:

> *"Secondly, it is true that the coincidence of offer and acceptance will in the vast majority of cases represent the mechanism of contract formation. It is so in the case of a contract alleged to have been made by an exchange of correspondence. But i[t] is not necessarily so in the case of a contract alleged to have come into existence during and as a result of performance…"*

174. In a similar way, Andrew Smith J, in Maple Leaf Macro Volatility Master Fund v Rouvroy [2009] EWHC 257 (Comm), commented (at [242]):

> *"Although the formation of contract is conventionally analysed in terms of whether a contractual offer was accepted, the law does not require rigorous compliance with an analysis along these lines. Nor does it require that any particular communication or act must in itself manifest that the party intends to contract: the court will, if appropriate, assess a person's conduct over a period and decide whether its cumulative effect is that he has evinced an intention to make the contract."*

175. The AA countered that, in Tekdata Intercommunications Ltd v Amphenol Ltd [2009] EWCA Civ 1209, Longmore LJ held (at [11]) that:

> *"…the traditional offer and acceptance analysis must be adopted unless the documents passing between the parties and their conduct show that their common intention was that some other terms were intended to prevail".*

176. I have to say that I did not find any of this especially helpful, at least in the context of the specific facts with which I am concerned. It is obvious that a contract can be formed by conduct (although, speaking for myself, I see no problem with fitting conduct into an "offer and acceptance" analysis – hence the "last shot" doctrine applied by the Court of Appeal in Tekdata). But I do not see why this matters here. There is no difficulty finding offer and acceptance in the parties' communications on 19 November 2019: Mr Strickland set out a "*construct*" and Mr Buck responded that it was "*confirmed*". The more fundamental questions are what is understood to have been comprised in the offer from Mr Strickland which was confirmed by Mr Buck, and whether the parties' intention was that this agreement should **immediately** become binding.

177. The AA suggested that the only relevant point was that it could not be assumed that, whenever agreement was reached on a particular aspect of the potential deal, that was immediately taken to be a binding contract to the extent of that agreement. That is obviously correct: if party B responds to an offer by party A to say that the proposed price is acceptable, but the timeframe for delivery must be one week rather than two, that would be a counter-offer. It is not usually open to party A to say that there is now a binding agreement that the product will be supplied at the proposed price, but with no agreement as to time for delivery. Whether or not the message says so expressly, party B will usually be taken to be linking its agreement on price (and everything else) with

its proposal in relation to delivery. Party A can cleanly accept that counter-offer (in which case there will probably be a contract), or can make its own counter-offer (in which case there probably will not).

178. Fenchurch said that, as a matter of commercial reality, terms often become agreed in negotiations by virtue of the fact that a counterparty does not raise any issue or complaint in respect of a particular clause proffered by the other. I agree that negotiations of contractual terms often proceed by a series of communications in "accept/ except" form, whereby a party responding to a proposal identifies the parts of the proposal which are controversial and then is understood to have agreed to the remainder.

179. However, there are two caveats to make in this regard. First, as I have just explained, when I say "agreed to the remainder", I do not mean agreed **in a binding way**, such that it would be open to the other party to say "Fine: you have agreed to that much of my proposal, so now we have a deal on that basis, and everything which remains unagreed will just have to be left over for another day". There is either a clean acceptance or a counter-offer.

180. Second, even this limited proposition must depend on the facts and what the particular response is properly to be understood as "accepting". A complicating factor in the present case is that the negotiations were being conducted, at least at one stage, in two separate workstreams, with the "legal" terms being negotiated separately from the "commercial" terms. It is necessary to be careful about assuming that a message in one workstream involved an acceptance of terms which were under discussion in the other.

E.2 The parties' arguments in outline

(a) Fenchurch's case

181. Fenchurch said that a binding contract was agreed on 19 November 2019.

182. Its primary position (at least in closing) was that everything had been agreed by that stage. By then, the legal negotiations over the detailed terms of the EL had come to an end, with the few controversial points (such as the uncapped indemnity) effectively left to Mr Strickland to agree with Mr Buck, as identified in the comments added to the version of the EL sent by Mr Lloyd to Mr Perkins on 23 October 2019. Fenchurch described this wording as all ready to go, having been confirmed by Mr Perkins. When Mr Strickland made his proposal on the fee construct, without pushing back on any of these outstanding "legal" points, he was implicitly accepting Fenchurch's position on **all** of them. Fenchurch said that, by this stage, the "legal" and the "commercial" channels had run together, with Mr Strickland taking the lead for the AA on all of the outstanding points.

183. Fenchurch's alternative case was that there was a binding agreement on the fee construct and, at the very least, the public offer trigger. Even if some of the other terms of the EL remained to be agreed, the parties objectively evinced an intention to be bound immediately if Mr Buck confirmed the fee construct, leaving over those points of detail for later agreement. Such terms were considered by the parties (viewed objectively) to be minor or non-essential in nature and likely to be capable of subsequent resolution. It is true that the indemnity was of economic significance, but the remaining issue between the parties was only whether it would be capped at £4m or subject to no upper limit.

184. By contrast, there was agreement on the public offer trigger, because the comments from the AA indicated a willingness to accept this (by contrast with the question which had been raised about the shareholder approval trigger) and, indeed, no objection to it was ever suggested.

185. Fenchurch emphasised that had it had done an enormous amount of work for the AA, attending numerous meetings, drafting the IM, advising on valuations, providing strategic advice on the transaction and orchestrating the work of others. The agreement was executed rather than executory, such that there can be no doubt of the parties' intention to enter into a binding contract.

186. It also referred to the AA's post-contractual conduct as being consistent with a binding agreement. However, much of this post-contractual conduct was actually internal to the AA, such as Mr Strickland notifying Mr Breakwell of the exchange for the purpose of an audit trail and the £0.35m progress payment being accrued in the AA's accounts. I have referred to the relevant material in the previous section, and have borne it in mind, but (if it matters) I did not find any of it persuaded me that the AA thought everything had been agreed, or thought that there was a binding agreement without a signed EL. For example, a statement by Ms Pritchard that the progress payment was "*definitely payable morally*", or an offer by the AA to pay the same in full and final settlement, does not seem to me to evidence a belief in the existence of a binding contract. If anything, the contrary.

(b) The AA's case

187. The AA said that no binding contract was concluded, because (objectively speaking) the parties intended that the EL would be signed once everything had been agreed and that the same would then become binding. It argued that it is not open to Fenchurch to advance a case that agreement was in fact reached on all of the terms of the EL, because Fenchurch had pleaded, and opened the case, on the basis that some items remained outstanding after 19 November 2019.

188. More generally, the AA submitted that:

188.1. the public offer trigger was never agreed between the parties. It was never discussed directly and formed no part of the agreed fee construct, which was premised upon the success fee being paid for a successful transaction; and

188.2. the other terms which remained controversial, including in particular the uncapped indemnity, were highly material to the proposed engagement. There could be no contract until these were agreed. For example, it was said that Fenchurch would never agree to carry out the marketing etc. for the AA without that indemnity.

189. The AA emphasised the way that the EL which was being negotiated envisaged signatures and contained an entire agreement clause. That was said to reinforce that the parties wanted a written agreement which set out all of the terms of their bargain.

E.3 Discussion

(a) Points remaining to be agreed?

190. I have my doubts as to whether it was open to Fenchurch to argue in closing submissions (really for the first time) that everything had been agreed on 19 November 2019.

191. In paragraph 11 of the Reply, Fenchurch asserted that "*the three terms in the Engagement Letter that were outstanding were not essential to the Agreement*". I understood that to be an (implicit) admission of the AA's case that items such as the indemnity were outstanding (i.e. had not yet been agreed) as at 19 November 2019.

192. This was confirmed in Fenchurch's Further Information dated 4 July 2021, especially at paragraph 4(4), where it was said that: "*On 11 December 2019, Mr Lloyd for the AA set out in an email the only outstanding terms that remained to be agreed, which now comprised clause 15.1 of the Terms, the Indemnity Clause, and clause 12.1 of the Terms*". I found it impossible to read paragraphs 2 to 4 of this Further Information consistently with Fenchurch's case in closing that there were, after 19 November 2019, no "*outstanding terms that remained to be agreed*".

193. Further, the case had been opened by Fenchurch on the basis that agreement had been reached on the **essential** terms, not **all** of the terms: e.g.:

193.1. (paragraph 63 of its written opening): "*the parties had reached a binding agreement and that the essential terms had been agreed (as they had with Project Renault). Essential terms are what matters, not all terms which might be included in a long form contract or which might even [be] under discussion between the parties*"; and

193.2. (paragraph 64(5)): "*The fact that no agreement was ever reached in respect of the uncapped indemnity is immaterial: that term did not render the contract unworkable or void for uncertainty*".

194. Mr Ayres KC did not explain what had changed since the start of the trial, nor seek permission to amend, but he argued that there was no prejudice to the AA in allowing Fenchurch to argue the case in this different way, on the basis that the legal analysis and the factual investigation would be exactly the same.

195. I am not sure that is right, but fortunately it does not seem to me to matter. I do not accept that agreement was reached on everything on 19 November 2019. The essence of Fenchurch's argument was that, on 23 October 2019, Mr Morrissey sent Mr Perkins a further revised mark-up of the draft EL and T&Cs in which the items which remained controversial were all flagged as needing input/ sign-off from the commercial teams or AA's senior executives. Mr Strickland was on the commercial side and was also one of AA's senior executives. On that basis, it is said, when Mr Strickland provided a "construct" for the engagement fee without commenting on any of those outstanding items, he was to be understood to be confirming that the AA now accepted Fenchurch's position on all of these outstanding items.

196. That does not seem to me a realistic interpretation of Mr Strickland's message. The process of negotiating the "legal" terms had been split from the commercial aspects. Mr Strickland was dealing here with the "construct" for the engagement fee; the commercial aspects. Fenchurch was not suggesting that, when he and Mr Buck spoke, anything was said about the other outstanding items. It is true that others from the AA had indicated to Fenchurch that those other items had been referred to Mr Strickland, but there was no sign Mr Strickland had yet engaged with them at all.

197. Nor does it seem to me that Mr Strickland's final encouragement to agreement at the end of the message: "*If you could confirm by e-mail, I will get the final engagement*

letters prepared for signature" – amounts to saying that the content of those engagement letters had now been agreed. At best, it suggests that he did not expect there to be any particular difficulty about finalising the EL; that (as he put it) the parties were close on the legal terms. But there had been a long series of negotiations, with certain terms remaining controversial despite a number of exchanges. If Mr Strickland had wanted to communicate that the AA was now willing to give way on all of them, it seems to me that he would have said something about this. It is asking too much to read capitulation into the absence of any comment.

198. That is the real answer to the point, but I am confirmed in that conclusion by Mr Buck's evidence about his own perception at the time. His unprompted recollection was that "*in my terminology 99 per cent of the legal side was agreed*". This matched with what he had said to Mr Dangerfield in May 2020; that the EL was "*c.99% agreed*" (see paragraph 149 above). That is very revealing because – at least in the present context – the difference between 99% agreement and 100% agreement is the difference between having now agreed everything and not yet having done so.

199. Later, when discussing his recollection of the position as at early December 2019, Mr Buck was even more straightforward about this:

> In light of the evidence you gave before the short adjournment, I think you would accept that actually there were a number of outstanding issues on the terms of the letter of engagement and the terms and conditions that had still not actually been resolved as between Fenchurch and the AA. Is that right?
> A. That is correct.

200. Fenchurch is therefore forced to submit that Mr Buck was wrong about this; that this represented only his subjective impression, or perhaps his inaccurate recollection of his subjective impression. But Mr Buck is clearly an intelligent man with considerable experience of negotiating engagement letters. This was an admission against Fenchurch's interests, made in the clearest terms. It is to Mr Buck's credit that he did not flinch from making it and I do not lightly dismiss it as mistaken or irrelevant.

201. I simply do not accept that Mr Buck was mistaken about the status of the parties' negotiations on the legal terms as at December 2019. Indeed, it seems clear to me from the parties' exchanges after 19 November 2019 that no-one took the view at the time that final agreement had already been reached on the detailed terms of the EL. Most obviously, neither Mr Lloyd's email of 11 December 2019 setting out "*areas of contention*", nor Mr Perkins' response dated 13 December in which he proposed adjustments to some of the clauses, fit into a narrative in which the parties believed final agreement has already been reached. This is not a discussion in which the AA is seeking to amend something which it has already agreed. Mr Buck accepted that Fenchurch did not suggest at any point that these points had already been agreed and conceded that the AA was making clear that these points had not yet been agreed:

> Q. Okay. You got to a point where you thought they were going to be agreed and what you are receiving here is just confirmation that they hadn't yet been agreed, is that fair?
> A. That is correct.

202. More of the same followed. Ms Hoosen emailed Mr Buck on 8 January 2020, noting that she would need to discuss the engagement terms with Mr Dangerfield and stated that "*the latest version is not agreed by the AA and requires further discussion*". Mr

Buck accepted that "*the AA was consistently maintaining the position that certain detailed points at least on the terms and conditions had not been agreed*". Mr Perkins also seemed to acknowledge that at least the point about the uncapped indemnity remained to be confirmed at this stage.

203. For completeness, I observe that Fenchurch repeatedly relied upon an earlier email from Mr Lloyd dated 12 September 2019 in which he said that Mr Strickland had "*confirmed the commercials*". That reliance was misguided in this context, because it was clear that this was **not** a reference to Mr Strickland confirming anything about the status of outstanding points on the detailed terms of the EL. Those detailed terms were what Mr Lloyd and Mr Perkins were arranging to speak about in the same email exchange.

204. Fenchurch also referred to the internal AA document entitled "*AA plc – List of Advisors*" apparently prepared in January 2020. This said: "*Legal negotiation concluded – EL ready for signature or final commercial negotiation if appropriate*". I do not read that as suggesting that the AA (even subjectively) thought final agreement had already been reached on everything. If it had, how could a "*final commercial negotiation*" ever be appropriate?

205. To pull the threads together, it seems to me that the correct characterisation of Mr Strickland's message of 19 November 2019 was that it was dealing with one aspect of the negotiation over the EL: the fee construct. It was not concerned with the points which remained outstanding on the detailed terms of the EL. Whether Mr Strickland and Mr Buck respectively had in mind anything specific about what remained to be agreed does not matter. The fact was that there were points which did remain outstanding, such as whether the indemnity would be capped and the notice period for termination of the engagement. As at 19 November 2019, and thereafter, there was no agreement on those points.

(b) Binding agreement, with details left over?

206. That is not the end of this part of the case. It was open to the parties to agree that they would be bound before the negotiation was completed on all of the detailed terms of the EL. However, in my judgement, that is not what happened here.

207. The first stage is to consider the context. This was nothing like commodity sale or fixing a vessel on the spot market, when there is an urgent need for a binding agreement. The parties had been conducting an extended negotiation about the commercial and legal terms for Fenchurch's engagement over a period of months. Nothing had suddenly become urgent on 19 November 2019. If anything, the decision of the AA's Board on 13 November 2019 meant that there was no longer any urgency at all in this regard. To the extent that it might be said that Fenchurch needed the protection of a binding contract before carrying out work, that ship had long since sailed. By 19 November 2019, Fenchurch's work on Project Zodiac appeared, at least for the time being, to be drawing to a close.

208. It is perfectly obvious that the parties envisaged that their agreement would be embodied in a signed EL. That was what the draft EL provided for: a formal confirmation of acceptance by the AA, signed by Mr Strickland on its behalf. There was never any suggestion that a binding agreement would come into being at any earlier stage.

209. I am sure it is right to say that the fact that the form of the draft agreement which the parties are seeking to negotiate envisages being signed does not necessarily mean that

there can be no binding agreement until that document is signed. But, as the Court of Appeal observed in Investec (see [17]), the terms of the draft documents they are discussing are often the surest guide to the parties' intention. Putting the point at its lowest, it seems to me one would need to find some external sign that the parties shared a desire to take a different course, despite the shape of their draft EL.

210. But I see no sign of such a desire. On the contrary, Mr Buck agreed that Fenchurch was always trying to get to a final form signed engagement letter, not something less than that:

> Q. I would suggest to you that at the very least what these signing procedures demonstrate is that there was to be or that Fenchurch at least anticipated that there would have to be Fenchurch's signature on an engagement letter in order for it to become binding. You would accept that, wouldn't you, Mr Buck?
> A. As I say, there is the commercial reality of trying to negotiate and get to a final form signed engagement letter. We negotiated for a long period of time and pushed very hard to get to a signed letter. There was no signed letter.

211. All that happened on 19 November was that agreement was reached on one aspect of the overall deal. No doubt, it was a very important aspect, but it was very far from being the whole. This was simply not a situation in which the parties were urgently seeking to fix a price and then assuming that everything else would fall into place once that had been done. They had split the "commercial" negotiation from the "legal" negotiation, but the expectation was that both workstreams would be completed so that a complete version of the EL could be prepared, not that there would immediately be a binding deal once the "commercial" negotiation was completed.

212. As set out in paragraph 45 above, Mr Buck confirmed that, at the outset, he had anticipated that agreement on all of the terms, as well as the fee, would be necessary to get to a signed EL. Mr Buck's oral evidence about this fitted with Mr Strickland's evidence about what he believed he had discussed (in a general way) with Mr Buck: that until both the commercial aspects and the legal terms and conditions had been finalised and the EL signed, there was no concluded agreement. On the face of it, therefore, both of the key protagonists had exactly the same understanding of how this process would work; they would agree all of the terms and then there would be a signed EL.

213. Further, as the AA pointed out, it does not follow from the fact that the points which remained outstanding are not material **to the current dispute** that they were not considered material by the parties at the time. It is obvious from the position it took in the negotiations (e.g. paragraph 102 above), that Fenchurch considered an uncapped indemnity to be a protection of considerable importance. Mr Buck described accepting a cap on the indemnity as something which was "*above my pay grade*". It is impossible to say whether this would have been a deal breaker for either party – indeed, the whole point is that that was never finally tested – but certainly the indemnity was not being treated by the parties as a minor point of detail.

214. Fenchurch argued that, since the difference between the parties was only as to whether there would be a cap on the indemnity or not, that was not of such great importance. But that begs the question as to where the line is to be drawn. For example, had the parties agreed anything about an indemnity as at 19 November? Mr Ayres KC felt forced to concede in oral closing submissions that, on this alternative case, Fenchurch

is to be taken to have agreed to be engaged by the AA, but provided with no indemnity at all ("*On this alternative scenario there is no indemnity*"). As a matter of logic, that concession seems to me unavoidable. But it is not easy to accept that this outcome would have been acceptable to Fenchurch. Its own expert emphasised the importance of having an indemnity in place before the marketing process began, because of the exposures for an advisor like Fenchurch.

215. Uncertainty about where to draw the line between what is agreed, and what is not, feeds into the wider difficulty for Fenchurch with arguing that there was "at least" agreement on the key terms specifically addressed in the exchange on 19 November. Fenchurch needs to go outside that exchange in order to incorporate into this supposed agreement the public offer trigger. However, it then becomes difficult to know how that public offer trigger has been incorporated in circumstances where some other terms set out in the draft EL, and especially the schedule thereto, were still controversial. To say that the parties were immediately bound by everything, save terms which had been specifically flagged as controversial, amounts to treating Mr Strickland's message as an acceptance of some parts of the latest counter-offer by Fenchurch. But, as I discussed at paragraphs 177- 179 above, that is not how negotiations work. There is no suggestion in the message that Mr Strickland was seeking to do that, nor hint from Fenchurch that it was open to Mr Strickland to choose which parts of Fenchurch's counter-offer he would accept.

216. If it adds anything, I am not satisfied that, objectively speaking, Mr Buck and Mr Strickland had in their minds, or were specifically agreeing anything about, additional triggers in the exchange on 19 November 2019. I would accept that it seems likely that, if the remaining kinks in the agreement had been ironed out, the public offer trigger would have been included in the EL. But that is a slightly different point.

217. Fenchurch's refrain – that it is not possible to agree a success fee without knowing what will amount to success – assumes that what was being agreed was a carefully calibrated package, in which the probability of various outcomes has been assessed. On the evidence, I see no sign that Mr Strickland ever gave a moment's thought to the possibility that the public offer trigger might be engaged and the success fee payable. Perhaps he thought a public offer was unlikely to happen. Perhaps he thought that, if it did, it would not matter to him.

218. Either way, it seems to me that, in the context of this negotiation, a reasonable businessman in the position of Fenchurch would not read Mr Strickland's message of 19 November as saying anything about triggers for the success fee. Fenchurch's expectation might continue to be that the public offer trigger would be agreed as part of the EL (since there had been no pushback on that item by the AA to date). However, I don't accept that an objective reader would have thought that this was **actually being agreed** by Mr Strickland on 19 November.

219. I should also deal with Fenchurch's argument that it makes a difference that Fenchurch had already done a great deal of work on Project Zodiac. In some contexts, the fact that a contract is executed rather than executory can be very important. If the question was whether the parties had an intention to create legal relations, the answer might be found in the extent of work performed by Fenchurch. This was certainly not a case in which the parties' relationship was still at an early and exploratory stage. They undoubtedly both intended and expected that there would be a binding legal agreement sooner or later. But the question here is whether the parties intended to be bound immediately, or were still finalising the terms of their intended agreement. I cannot see how the

amount of work which has already been done sheds any light on the answer to that question.

220. For all of these reasons, I conclude that there was no binding agreement between the parties.

E.4 Postscript(1): Lack of authority/ subject to board approval

221. Given my conclusion on the primary question, the AA's arguments about Mr Strickland's authority strictly do not arise. I will deal with them briskly, not least because they do not ultimately seem to me to add very much.

222. The starting point was that, under the AA's Delegation of Authorities Matrix, Board approval would have been required for the EL under either the "PLC/Corporate Advisors" or "Disposals" categories. Moreover, contracts with a potential value in excess of £5m required Board approval under the Schedule of Reserved Matters. The AA's evidence on this was not challenged.

223. It is clear that the AA's Board did not ever specifically approve the EL.

(a) The law

224. There was no real dispute in this regard. It was agreed that, where a party by words or conduct represents to another party that a third party has authority to act on his behalf, he may be bound by the acts of that third party. See *Chitty* paragraph 21-063. A classic example is putting the agent in, or allowing him to adopt, a position carrying with it a usual authority (e.g. Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd [1964] 2 Q.B. 480, where the agent in question had been appointed as Managing Director).

(b) Fenchurch's case

225. Fenchurch accepted that, having regard to the internal AA policies, and especially the Delegation of Authorities Matrix, Mr Strickland was not authorised to agree the EL with Fenchurch without first obtaining Board approval.

226. However, Fenchurch said that Mr Strickland was clothed with ostensible authority. He had stepped into Mr Clarke's shoes as CFO. No-one ever suggested that the fact that he was "acting" CFO affected his decision-making authority. Nobody ever told Fenchurch that the approval of the AA's Board was required before the AA entered into the EL. It was not put to Mr Buck that he had been told this.

227. Much was made of the fact that the draft EL which was exchanged between the parties envisaged a single signature by Mr Clarke, and then Mr Strickland, as CFO, on behalf of the AA. This was said to amount to a representation by the AA, which accepted this formulation, that its CFO had the authority to bind the AA.

228. More generally, it was submitted that the ordinary practice of honest businessmen is that they check internally whether they can agree the contract before reverting to the counterparty, or they make clear to the counterparty that they cannot agree without specific authorisation.

229. It was also pointed out that Mr Strickland himself appears to have been uncertain whether Board approval was still required: see his message of 19 November 2019 to Ms Hoosen referred to at paragraph 123.1 above. This made it unlikely that Mr Strickland had been telling Fenchurch that there was a need for Board approval.

(c) The AA's case

230. The AA says that, in all the circumstances, including the lack of signature on the engagement letter, Mr Strickland did not have apparent authority to bind the AA in the terms of the draft EL. It observed that Mr Strickland was only appointed as an interim CFO and was never appointed as a director of the AA.

231. It contended that the fact that Mr Strickland had been delegated to negotiate the terms of the draft EL did not mean that he was being held out by the AA as having authority to **conclude** that agreement on its behalf.

232. The AA relied, although with limited enthusiasm, on the evidence of Ms Hoosen to the effect that that "*I think there would have been a discussion*" about the need for Board approval, although "*I could not tell you the exact date of that discussion*".

233. However, the AA did accept (in oral closing submissions) that, if the EL had been signed by Mr Strickland, Fenchurch would have been entitled to assume that he had obtained all the necessary internal authorisations before doing so.

(d) Discussion

234. I do not accept Ms Hoosen's evidence that the need for board approval was actually discussed with Fenchurch. If she had been able to recall a particular conversation to which she was party, I would expect her to be able to provide some information about it. If – as was my impression of her evidence about this - she was just asserting that she thought she had been told by someone else that this had been discussed with Fenchurch at some stage, I would consider that to be wishful thinking, not evidence.

235. Putting that point to one side, it seems to me that the AA's case on authority only works as a further reason why it was inherently unlikely that there would be any binding agreement between the parties until the EL had been finalised and signed. Once the AA accepted that, if the EL had been **signed** by Mr Strickland, it would be bound (even if he had not first obtained board approval), it stops really being an argument about authority. That is an admission that Mr Strickland had ostensible authority to bind the AA, at least if he purported to do so in a sufficiently formal way. That seemed to me an entirely sensible concession for the AA to make, given the way in which others at the AA identified him as the commercial decision maker and especially the way in which the draft EL envisaged him signing on behalf of the AA (without any reference to Board approval).

236. On the other hand, it did seem to me that the AA was right to say that it was relevant that Fenchurch had to rely here on the fact that the EL was to be **signed** by Mr Strickland. Indeed, to my mind, there was a disconnect between Fenchurch's case that the parties intended to be bound before anything was signed, and its case that Mr Strickland was held out as authorised to sign on behalf of the AA by the form of the draft EL.

237. It is obvious that each party would, or at least might, have to go through an internal approval process before a contract like this was finalised. As the AA put it, the way in which it had been agreed that the AA would signify to Fenchurch that this process was complete would be by Mr Strickland signing the EL.

238. Indeed, Mr Buck frankly accepted that, until Fenchurch received the signed engagement letter back from the AA, he could not be completely confident that the signatory (at this

stage, Mr Clarke) had the necessary authority to conclude the agreement on behalf of the AA:

> Q. Exactly. So if Mr Clarke had signed this letter and returned it to you, you might reasonably have believed that, whatever internal authorisation he required from the AA's board of directors, he would, as a responsible CFO, have obtained it before signing the letter. Correct?
> A. Correct.
> Q. But unless and until he gave that confirmation by appending his signature to the letter, you could not be confident that he had obtained whatever authorisation he might need?
> A. I could not be 100 per cent confident. Correct.

239. If the evidence had shown that the parties intended to enter into a binding contract on 19 November 2019, it seems likely that there would also have been an evidential basis for a finding that Mr Strickland was, or was held out as being, authorised to enter into such a contract on behalf of the AA, even absent a signature. As it is, it is accepted that he was clothed with ostensible authority to bind the AA **by signing the EL**. Fenchurch's problem is that he did not do so.

E.5 Postscript (2): Estoppel?

240. Fenchurch argued that, even if a requirement for signature existed, the AA is estopped from relying on the fact that the EL was not signed, alternatively that the AA waived any such requirement.

241. This was said to be on the basis that:

241.1. Mr Strickland represented in his email on 19 November 2019 that, if Fenchurch confirmed its agreement to the fee construct, then it would prepare an engagement letter for signature. It was said that Mr Strickland thereby represented that the AA would not unilaterally withdraw from the agreed terms of the EL, alternatively that the AA would not withdraw unilaterally from the finalisation of the EL; and

241.2. Fenchurch continued to work for the AA thereafter on the understanding that the AA would put forward an EL for signature.

242. I found this argument, on which very little time was spent at trial, elusive to say the least. The starting premise seemed to be that there would have been a binding agreement, had it not been for the fact that the EL was not signed. That might work if there was some formalistic fetter on the parties' ability to contract on what were otherwise agreed terms: if a concluded agreement, as a result of its nature, required a signature (e.g. a guarantee, by virtue of the Statute of Frauds). But that is not this case.

243. If my conclusion, following an objective analysis of their communications, were that the parties intended to be bound immediately, then no estoppel is needed. If my conclusion were that they did not intend to be bound immediately, then I cannot see how an estoppel could fill this gap. The idea that there might be a representation about entering into a contract in the future, and reliance on that representation, when the parties could have (but, by definition, have not) agreed to enter into a contract immediately, seems absurdly contrived to me. I note that Bingham J. rejected a rather similar argument, in brisk terms, in Pagnan (at p. 614 rhc).

244. I asked Mr Ayres KC in closing to identify a scenario in which I might be against him on the primary question as to whether the parties objectively are to be taken to have agreed to enter into a binding contract, but his case would be saved by an estoppel. He promised to revert if there appeared, after considering the AA's closing submissions, to be a gap which estoppel could fill. I did not hear any more on this subject.

F Was the "public offer" trigger engaged?

245. Since I have concluded that there was no binding contract between the parties, it might be said that this next topic does not arise. However, the point was fully argued and I ought to make clear what view I take of it. Moreover, as I will explain, it arises (at least tangentially) in the context of the restitutionary claim.

246. There seem to me to be two aspects to this issue: (a) first, construing the trigger and then second, (b) considering whether the facts engage the trigger as I have understood it to operate.

F.1 Construing the public offer trigger

247. Paragraph 2.4 of the draft EL provided: "*The Success Fee will be payable in full … If Project Zodiac is aborted as a result of a public offer for The AA*". That is what I am calling the public offer trigger.

(a) Basic principles

248. This is not a case in which any real assistance is derived from general statements about the correct approach to construing commercial contracts.

249. I will limit myself to recording that Lord Hodge summarised the English law approach in Wood v Capita Insurance Services Ltd [2017] UKSC 24 (at [10]) as follows:

> *"The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning."*

(b) Fenchurch's case

250. Fenchurch submitted that the background or factual matrix known to both parties included the AA's "difficult" financial situation (especially its heavy debt burden) and the AA's desire to find a solution. It described the public offer trigger as an accepted and reasonable protection for Fenchurch, in recognition of the fact that the AA might find a solution to its difficulties other than by a sale of all or part of its insurance division. It is a contractual acknowledgment of the possibility that the transaction might not occur, and that one of the reasons why it might not occur was because the debt and financial difficulties were solved, or at least addressed, by a public offer.

251. Fenchurch argued that, in terms of the commercial purpose of the trigger, a public offer which resulted in a takeover was likely to render any sale of the insurance business redundant, because the solution to the debt would be new capital injected by the offeror. That was, it said, a type of success from the perspective of the AA, and the trigger was designed to award Fenchurch a success fee in those circumstances

252. With this in mind, Fenchurch said that the concept of aborting a possible future transaction includes two elements: (i) the theoretical possibility of the transaction and (ii) its final termination. As such, the possible transaction in contemplation must still be an option, i.e. a choice which the company could make; and then it must be clearly called off. By contrast, it argued that a decision to pause, or not to progress, Project Zodiac was not the same as final termination of the project.

253. It said that the public offer does not need to be sole cause of the abortion of Project Zodiac, because the word "only" does not feature.

(c) The AA's case

254. The AA relied upon the definition of "abort" in the *Cambridge English Dictionary*: "*to cause something to stop or fail before it begins or before it is complete*". It said that Project Zodiac had to be ongoing in order to be aborted, not just a theoretical possibility.

(d) Discussion

255. It seems to me that there are three preliminary observations about the commercial purpose which are worth making.

256. The first is that the trigger is to make the AA liable for a success fee. Fenchurch needs to show that the facts meet the requirements of the trigger. Further, as Fenchurch's submissions recognise, one is looking to construe the trigger consistently with that commercial purpose: rewarding "success", whatever that might mean.

257. The second is that there are agreed to be circumstances in which no success fee would be payable. At one point in his oral closing submissions, Mr Ayres appeared to be suggesting the contrary. But when asked about situations such as the refinancing failing and the bond holders taking control, he accepted that "*there must be multiple scenarios in which things happen in the AA or other transactions are done whereby the success fee isn't payable…*". It seems to me important to remember that the intention was not to cover every scenario, but instead to identify specific circumstances in which a success fee should be paid.

258. It is interesting that the public offer trigger does not appear to operate after Fenchurch's engagement has been cancelled. In one sense, that point might be said to assist Fenchurch. Fenchurch says that the AA has a way out if it does not want to remain on the hook, and hence there is no need to read the words restrictively, because they only operate until Fenchurch's engagement comes to an end. But that limit also means that this trigger cannot have been intended to operate as a line trailing in the water, after Fenchurch's work and role has come to an end. The expectation is that the project will be aborted before any termination of the engagement.

259. The third point is that the first trigger provided in clause 2.4 of the EL (the shareholder rejection trigger) concerns a scenario in which Project Zodiac has reached a stage at which a final offer has been made for the insurance business which the AA's Board consider acceptable, but the offer is turned down by the shareholders. It might be said, since the AA's shareholders have turned the offer down, and there will be no sale, that this is a definition of failure rather than success. But it is easy to see why, when Fenchurch has taken the project to that stage, but been deprived of success by the fact that the AA is a public company, it might be thought to have earned its success fee. That perhaps sheds some oblique light on what the parties might have had in mind by the second trigger. These might be said to be two specific problems which only arise

in the context of public companies, potentially scuppering a project which would otherwise be successful.

260. Turning to the words which are used, it seems to me that the AA is right to say that the key word is "aborted". Although used here in the passive tense, I consider that to be a word which is suggestive of a positive action. It does not simply mean prevented, or rendered impossible, nor is it as general in effect as "terminated". Outside of the medical sphere, it is a word which might most commonly be used in relation to a military mission or the equivalent. Aborting a mission means calling off a mission which is currently active, not ruling out a mission which is theoretically viable, but is no longer being pursued. If a team of soldiers was initially ordered to carry out mission A, and then told to stand down because of bad weather, it could be said that the mission was aborted when that instruction to stand down was given. If a team of soldiers was initially ordered to carry out mission A, ended up waiting at base because of bad weather until a point in time at which mission A had been largely forgotten, and then received orders to carry out mission B, it would be odd to say that mission A was aborted when the team was ordered to carry out mission B, just because mission A had not previously been formally ruled out.

261. I do not agree with Fenchurch's submission that all that is required here is that a transaction which remains theoretically possible is finally terminated. It does not seem to me that delivering the "coup de grâce" to a plan which is already ancient history, is the same as "aborting" the plan.

262. A further aspect of this is that the trigger provides for a causal relationship between the aborting of Project Zodiac and a public offer for the AA. It is not enough if Project Zodiac is aborted. Nor is it enough that a public offer is made. The latter must actively cause the former.

263. To my mind, Fenchurch's approach comes too close to assuming that, if a public offer is made in circumstances where the success fee has not yet been earned, that offer will inevitably mean that the trigger will be engaged. It argued that a public offer would have to resolve the debt problem which was the main driver for Project Zodiac and so it made sense for the parties to treat that as a success. But if that was the parties' thinking, the trigger could simply say that the success fee would be paid "*if there is a public offer for The AA*" (as the equivalent trigger in the Zeus EL seems, at least at one point, to have provided). It would not be necessary to require the public offer to cause Project Zodiac to be aborted, if the fact of a public offer amounted to success.

264. It seems to me that the parties were focussed in paragraph 2.4 of the EL on specific risks applying to a public company which might prevent the transaction being consummated, not on other ways in which the AA's debt problem might be resolved. After all, if the aim was simply to reward Fenchurch if the AA found a way out of its debt problem, one might expect the trigger to refer to that event.

265. I would suggest that the type of scenario which the parties actually had in mind, when providing for this trigger, was one in which Project Zodiac is on track and might be consummated, but the effect of generating market interest in the AA's insurance business is that an offer is made instead for the whole company. That would involve Project Zodiac being aborted. It would also have the necessary causal ingredient. It would also make commercial sense: the public offer would be a type of success resulting from Project Zodiac, like when shareholder approval is not obtained for an otherwise acceptable offer.

266. I do not mean to suggest that the foregoing is the only factual scenario which could engage the public offer trigger. My point is really just that Project Zodiac would need to be ongoing at the time of the public offer so that the same can be said to have been "aborted", and so that the effect of the public offer would have to be to bring Project Zodiac to an end. Another way of expressing the same thing is that the public offer needs to operate as the alternative to Project Zodiac being **consummated**, not the alternative to the passage of time rendering Project Zodiac unworkable.

F.2 Was Project Zodiac "aborted" by the public offer?

267. Inevitably, the parties' submissions about the facts took their shape from their competing legal arguments as to the requirements of the trigger.

(a) Fenchurch's case

268. Fenchurch focussed much of its fire on the AA's case that Project Zodiac was effectively cancelled at the AA Board's November 2019 board meeting. It invited me to find that the AA's board actually decided to keep Project Zodiac under continuous review and did not, at that time, or at any point thereafter, formally rule it out. As I have explained at paragraphs 111 and 140 above, I largely accept that proposition.

269. On that basis, Fenchurch suggested it must follow that, in November 2020, the public offer resulted in Project Zodiac being aborted, when:

269.1. the consortium making the offer committed to injecting funds into the AA and deleveraging the business. In effect, the debt problem was solved when this private equity sale had been agreed;

269.2. the consortium expressed the belief that the insurance business would be a key growth driver, which amounted to saying that the insurance business would be retained; and hence

269.3. Project Zodiac no longer remained under consideration. The umbrella project under which Project Zodiac sat had been achieved by virtue of the injection of funds.

270. Fenchurch said that the fact that work on Project Zodiac had been paused in November 2019 did not affect whether and/or when it was subsequently terminated. By contrast, it said that, given the purpose for which Project Zodiac was created, namely as a potential solution to the AA's debt crisis, there was no prospect of Project Zodiac being implemented after the public offer was accepted.

(b) The AA's case

271. The AA's position was that, by November 2019, it had become clear that the sale of the insurance business was not a viable solution to the AA's debt situation. In particular, it would have had to be sold at a price of at least 11.5x its EBITDA in order to reduce the AA's debt sufficiently. However, achieving that price was looking increasingly unlikely. This was due, in part, to the uncertainty created by the report of the FCA on pricing practices. It said that I could find that Project Zodiac was not viable and that would be that.

272. The AA said that its Board had, in effect, decided in November 2019 not to go ahead with Project Zodiac. All work on the project stopped and all planned meetings were cancelled. On that basis, it said that Project Zodiac was aborted on 13 November 2019 when the project was put "on hold" by the AA's board and put into a "lock box". If an

observer was asked when the project was aborted, it suggested, the only sensible answer would be "on 13 November 2019".

273. Moreover, by the time of the Board's January 2020 meeting, the potential sale of the insurance business was being taken off the table (at least "*for the time being*" – as the Board minutes record). After that, the prospect of the sale going ahead diminished over time. After the FCA review came out in September 2020, the effect this had on the price for the AA as a whole shows that it would have made the sale of the insurance division alone unworkable.

274. By contrast, the AA argued, the possibility of a public offer was only identified as a possible solution to the AA's financial situation in mid-2020. It submitted that it was only in around April/May 2020 that this was being seriously considered as an option.

275. Further, the AA suggested that Project Zodiac was not formally ruled out, or rendered impossible, even **after** the public offer was made. If Fenchurch was right to say that the transaction was only aborted once it became impossible, then that did not happen as a result of the public offer either. It was open to the new owners of the AA to change their minds and sell the insurance division.

(c) Discussion

276. As I have explained, I do not accept that, in this particular context, the word "*aborted*" is synonymous with "finally becomes impossible". In my judgment, it requires something more active. It requires something more akin to the project being stopped while in progress; it envisages a public offer which is operating as an alternative to a successful sale of the insurance business.

277. I have set out above my detailed findings of fact in relation to the November 2019 Board meeting. In summary, I accept that Project Zodiac was not ruled out at that stage, but also that it was unlikely to go ahead and that it was becoming ever more unlikely as time went on.

278. Having regard to those findings, it seems to me that, if a sensible independent observer was asked at the end of 2020 whether, and if so, when, Project Zodiac was aborted, they would either say that it was aborted in November 2019, as a result of the November Board meeting, or that it was never aborted. They would not say that it was aborted at the time of the acceptance of the public offer.

279. By the time of the public offer, Project Zodiac was already ancient history from the perspective of those who had been involved in it. Even assuming it remained viable as an option after the November 2019 Board meeting, it was only a theoretical possibility by mid-2020.

280. It also seems to me that the AA is right to say that, if Project Zodiac remained "viable" at the time of the public offer (so as to leave something in existence which could be aborted), that option also remained "viable" thereafter. Fenchurch finds itself on the horns of a dilemma here: if it relies upon the fact that the consortium buying the AA had made a decision not to sell the insurance division, it must explain how that is to be distinguished from the decisions which had been made by the AA's Board in November 2019 and January 2020. There was still no clear and unequivocal termination of Fenchurch's engagement in late 2020. It was still, in theory, open to the new owners of the AA to revive Project Zodiac and break up the group, as Mr Breakwell made clear ("*The new owners were entitled to do whatever they wanted with the company*").

281. Fenchurch argued that the debt issue had been resolved and so there was no longer any need to sell. It is right that Mr Breakwell agreed that a significant amount of deleveraging was effectively a condition of the Board recommending the public offer to the AA's shareholders. But the extent of deleveraging and the security of the AA's financial position must be relative, rather than binary. What if the financial position of the now privately owned company were to decline? Presumably, a sale of the insurance division might quickly find itself back on the table as an option.

282. The problem for Fenchurch is that, after November 2019, what happened is that the sale of the AA's insurance division grew progressively less likely. Fenchurch can make the points that the AA did not formally rule out Project Zodiac, nor terminate Fenchurch's engagement (although this last is perhaps neutral, given that the EL had not been signed), but it then must accept that these things did not happen following the public offer either. No doubt the injection of capital by the consortium further reduced the prospects of the sale of the insurance division going ahead, but it was only a further lengthening of what were already long odds. This was not a step change in those prospects which might rival the November Board meeting.

283. There is no escaping from it: once Project Zodiac had become an outside possibility even if not yet formally been ruled out (which was undoubtedly the case after the decision of the AA's Board in November 2019), Fenchurch is in difficulties when contending that the public offer trigger was engaged. It is forced to argue that the difference between (say) a 2% chance of the project going ahead before the public offer is made and (say) a 1% chance afterwards, still amounts to the project being aborted as a result of the public offer. For the reasons given above, I reject that argument.

F.3 Conclusion

284. In my judgment, the public offer trigger was not engaged by the facts as I have found them to be.

285. This was not a case where, as a viable project moved forward, a public offer for the AA was made and caused the project to be halted in its tracks. It was a case in which the project had effectively been halted almost a year earlier, in November 2019, for reasons unrelated to any public offer. While the project remained an option for the AA thereafter, it increasingly became only a theoretical one. Even the public offer could not be said to have finally killed off that theoretical option. At best, the public offer further reduced the likelihood of a successful transaction. But the public offer trigger required more than that.

G Implied contract/ claim in restitution

286. Since I have held that no binding contract came into being between the parties on about 19 November 2019, I must go on to consider Fenchurch's alternative cases.

287. Fenchurch says that, if there was no binding agreement reached in respect of its engagement based on the 19 November fee construct, there arose an implied contract between the parties that Fenchurch would be paid a reasonable fee for its services.

288. By way of further alternative, if there was no contract, Fenchurch advances a claim in restitution for unjust enrichment in respect of the services provided by Fenchurch in the period from February 2019 to at least January 2020.

289. In some ways, these are just different ways of resolving the same problem: namely that the parties have conducted themselves by reference to an expectation that they would sign an EL, but had ultimately failed to do so.

G.1 Implied contract

(a) Fenchurch's case

290. Fenchurch says that it would be commercially absurd to suggest that it was acting on the basis that it did not expect to be paid should the AA unilaterally refuse to progress the negotiation of the contract.

291. It points out that Mr Esler, the AA's own expert, agrees that Fenchurch's work went well beyond a demonstration of expertise and initial assessment of deliverability. Fenchurch says that the reasonable commercial expectation was that it would be remunerated for its work.

292. It submits, by their conduct, objectively construed, the parties agreed that, if the AA unilaterally withdrew from the negotiations for the EL, Fenchurch would be reimbursed a reasonable fee and expenses for the work that it had done for D. It also complains that the AA ultimately withdrew from the negotiations over the EL without explaining its basis for doing so.

(b) The AA's case

293. The AA says that the implied contract analysis does not work in a case where the parties intended to agree terms, but ultimately failed to do so, as opposed to intending that Fenchurch be paid a reasonable fee, but being unable to agree what that fee should be.

(c) The law

294. There is no doubt that an implied contract can arise out of the parties' conduct, such as when one party begins to render services requested by another, such that under this contract the service provider would be paid a reasonable sum for the services. See, for example, *Chitty on Contracts* (34th Ed) at paragraph 4-261. But contracts are not lightly to be implied from conduct (see *Chitty* paragraph 4-208) and, where work has been done in anticipation of a contract which does not eventuate, the remedy of restitution may be available. See *Chitty* paragraph 4-275.

295. The implied contract analysis may be applicable where it is obvious that the parties are agreed that remuneration is to be paid, but have not sought to agree any such fee prior to the work being carried out, such as when a professional is engaged on the basis that he will be paid a reasonable fee. In *Benedetti v Sawiris* [2013] UKSC 50, the Supreme Court referred (at [9]) to the possibility of a claim premised upon an implied term that Mr Benedetti would be paid a reasonable remuneration for his services:

> *"Thus, if A consults, say, a private doctor or a lawyer for advice there will ordinarily be a contract between them. Often the amount of his or her remuneration is not spelled out. In those circumstances, assuming there is a contract at all, the law will normally imply a term into the agreement that the remuneration will be reasonable in all the circumstances"*

296. However, what is being described there is something different from a case where the parties are seeking to agree a contract under which remuneration will be paid, but do

not manage to do so. It would be artificial, in the latter case, to say that the parties were agreeing that work would be done at a reasonable price.

297. In MSM Consulting Limited v United Republic of Tanzania [2009] EWHC 121 (QB), Christopher Clarke J observed that, while older authorities used the language of implied contract in cases of this kind, the modern approach was to consider whether the law imposes an obligation to make a payment by way of quantum meruit.

298. That might make it sound as if the difference is just terminology, but in fact the classification can be of some importance when it comes to quantification. In Energy Venture Partners v Malabu Oil and Gas [2013] EWHC 2118 (Comm), a fee was claimed for services in relation to the sale by Malabu of its interest in a licence to exploit an oil field in Nigerian waters. Gloster LJ (sitting at first instance) held that there was an agreement pursuant to which EVP was entitled to a reasonable fee. She explained the distinction (at [281]) as follows:

> *"There was no dispute between the parties that there is an important distinction between: (a) the situation where the court has to determine what is a reasonable sum, in a case where a contract either expressly or impliedly provides that a reasonable sum shall be payable; and (b) the situation where the court is having to assess what is the appropriate figure to award a Claimant by way of quantum meruit, in a restitutionary claim for unjust enrichment. In the former case, the assessment of such a sum will depend upon all of the circumstances, the objective being to ascertain what the parties to the contract would have considered to have been a reasonable amount. In contrast, the objective in a restitutionary quantum meruit assessment is to reverse the unjust enrichment of a Defendant, with the measure of any award reflecting the benefit to that Defendant of the services received."*

(d) Discussion

299. In my judgement, the AA is correct to submit that the present facts are not susceptible to being analysed as an implied contract.

300. This is very clearly a case in which the parties were seeking to negotiate terms for a contract, pursuant to which Fenchurch would provide services in return for an agreed remuneration. It was never contemplated that the AA would pay a "reasonable" fee. The parties envisaged agreeing the fee.

301. Logically, the argument would have to be that an implied agreement came into being at an early stage, when Fenchurch started work despite there being no EL yet in place. However, an implied contract would require, at the very least, that the parties' conduct at the relevant stage was only consistent with an intention to enter into such an agreement. That is simply not true here: Fenchurch can be seen to have been starting work on the basis that it was confident the terms for its engagement would **in due course** be agreed, not that there was already an agreement in place.

302. If the concept of unjust enrichment did not exist in English law, there might be a temptation to characterise the parties' dealings as evincing a mutual intention to agree, perhaps on an interim basis, that Fenchurch be paid a reasonable sum for the work it was being asked by the AA to do. But there is no doubt in my mind that this characterisation would be highly artificial; a legal fiction, rather than a genuine inference from the facts. If the parties had been asked at the time whether there was an

agreement of that type in place, I suspect they would have been mystified by the question and would have pointed to the draft EL as representing what they were seeking to agree. Finding such an implied agreement on the facts of this case would therefore amount to overlaying the parties' actual objective intentions with an imagined alternative (and one which cuts across those actual intentions).

303. Since English law now provides a satisfactory way of doing justice where services are provided in the expectation of a contract, without requiring any pretence that it had already been agreed by the parties that a reasonable fee would be paid, I am not persuaded that there is any proper basis on which to find that there was an implied agreement here.

(e) Conclusion

304. I reject the claim premised upon an implied contract. I am not sure it will ultimately make an enormous difference to the process of quantification in this case, but for the avoidance of doubt I do not consider it appropriate to ascertain what the parties would have considered to have been a reasonable amount to pay Fenchurch for its services.

G.2 Restitution: liability

305. As I have explained, Fenchurch's final alternative case is that it was entitled to recover in restitution because the AA was unjustly enriched.

(a) The law

306. In unjust enrichment claims, the court asks itself: (1) has the defendant been enriched; (2) was the enrichment at the claimant's expense; (3) was the enrichment unjust; and (4) are there any defences available to the defendant. See Benedetti (supra) at [10].

307. It is established that, where one party does work at the request of another in anticipation of a contract, but no contract is created, the first party may be entitled to payment of a reasonable sum for work done at the defendant's request. An example of this is British Steel Corp v Cleveland Bridge and Engineering Co Ltd [1984] 1 All ER 504 at 511, in which Robert Goff J. decided that there had been no contract between the parties, despite British Steel manufacturing cast-steel nodes for Cleveland and delivering them. He held that British Steel had a claim in restitution and explained his approach as follows (at p.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 of which the terms 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".*

308. The court is likely to order restitution where the defendant has received a benefit (e.g. a financial gain or saving of expense) as a result of the claimant's services; or where the defendant has asked the claimant to provide services, or the defendant accepted

them (having the ability to refuse them) when offered, in the knowledge that the services were not intended to be given freely.

309. In MSM Consulting Limited (supra), to which both parties referred, Christopher Clarke J quoted from, and described as helpful, some comments made by Nicholas Strauss QC in Countrywide Communications Limited v ICL Pathway Ltd [1996] C No 2446:

> *"…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 L.J. in the Brewer Street case suggests that the performance of services requested may of itself suffice [to] 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".*

310. Christopher Clarke J then added the following further principles (at [171]):

> *"(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 he deserved to be paid (quantum meruit): ...*
>
> *(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…

(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".

311. The editors of *Goff & Jones: The Law of Unjust Enrichment* (9th Ed) comment, at paras 16-08 and 16-09:

"The dealings between the parties may show that the basis of any transfer is that it shall not be paid for unless a binding contract is entered.

…
An alternative way of approaching the issue of whether benefits have been conferred on the basis that they are to be paid for, is to ask who took the risk of a contract failing to materialise."

(b) Unjust: acceptance of risk?

312. The AA picked up this last point and argued that the risk of no contract being executed was allocated to Fenchurch. Fenchurch countered that it did not assume the risk that the AA would unilaterally withdraw from negotiations over the EL.

313. In my judgement, the AA was confusing two different types of risk here. Fenchurch undoubtedly took a risk that the transaction would not be consummated and it would not earn any success fee. But that is a different point and one which is more satisfactorily addressed at the valuation stage.

314. It might also be true to say that, at least at an early stage, Fenchurch took the risk that the AA might decide not to go ahead with the project at all, or might choose a different adviser. When Mr Clarke, for example, suggested on 27 February 2019 that the AA might "*proceed with Zeus*" (see paragraph 49 above), perhaps it was still open to the AA to select that option and cut Fenchurch loose without agreeing to pay anything.

315. However, by September/ October 2019, the AA cannot have been contemplating doing anything of that kind. Fenchurch had been working hard on the project, at the AA's request, with the IM reaching a highly developed stage.

316. To be fair to the AA's witnesses, they did not really make any bones about this. They all accepted that Fenchurch had done a great deal of work. Several of them also accepted that, at least morally (which is perhaps relevant territory for a claim in restitution), Fenchurch deserved to be paid something for the work it had done. See, e.g., paragraph 151 above. No-one from the AA was suggesting that it had all been done at Fenchurch's own risk.

317. The AA relied upon the comment by Mr Strickland about Fenchurch being "*fully at risk*" (see paragraph 116 above). But it does not seem to me that he was actually suggesting that it was open to the AA to walk away from the negotiation at this stage. If he had thought that option was available, it would have made little sense to press forward with the negotiation (since by 18 November 2019, the AA's Board had already

decided to pause the work on Project Zodiac). In truth, this was a tactic: an attempt to encourage Fenchurch to agree what he had proposed.

318. That said, I am not sure I would want to express any of this in terms of the AA being at **fault** for the negotiation over the EL failing, as Fenchurch was keen to do. That is obviously one way of getting to the conclusion that it would be unjust for Fenchurch not to be compensated for the benefit transferred to the AA. However, it seems to me that the negotiations fizzled out, rather than being scuppered by one party or the other. Of course, part of the reason for that was that the Board of the AA had decided not to go ahead with Project Zodiac, at least in the short term. I suppose this is not a million miles away from a case in which the party receiving the benefit changes its mind about proceeding with the contract (see *Goff and Jones* paragraph 16-10).

319. I still take the view it is more accurate to say that, while the parties understood Fenchurch to be taking a risk when it worked on the transaction, in relation to whether or not it would ultimately earn a success fee, they did not understand Fenchurch to be taking a risk as to whether, even if the transaction was consummated, a fee would be paid. The fact that the shared expectation that an EL would be signed was falsified was what made any enrichment received by the AA unjust.

320. Put simply, at the time at which the AA was asking Fenchurch to provide advice and assistance with the drafting of the IM, neither party anticipated, or expected Fenchurch to be taking the risk, that the terms of Fenchurch's engagement might **never** be agreed. It seems to me that both parties were confident that the EL would be agreed; indeed, they were so confident that neither party saw any particular need for urgency. To use the phrase preferred by Nicholas Strauss QC (as he then was): what happened was outside the scope of the risk taken by Fenchurch.

321. Other factors which seem to me important (using the list set out by Christopher Clarke J in MSM) include the quantity of work performed and its nature. No-one in their right mind would imagine that Fenchurch would devote hundreds of hours to drafting an IM free of charge, or just in the hope of securing the engagement (like a solicitor engaged in a beauty parade). The fact that the work was ongoing for such a prolonged period while the EL was being negotiated seems to me to make clear that this was not akin to Fenchurch incurring some initial cost while a "subject to contract" negotiation was carried out.

322. In those circumstances, it seems to me that it would be unjust if the AA was able to take the benefit of the work done by Fenchurch without paying for it, in the entirely unanticipated scenario in which no EL ended up being signed.

(c) Did the AA receive a benefit?

323. The AA also argued that it did not ultimately receive any benefit, because Project Zodiac did not end up going ahead.

324. This seemed to me to approach the issue of benefit much too narrowly. I am satisfied that the AA did receive a valuable benefit as a result of the work done by Fenchurch. It is plainly relevant to the value of that benefit that the AA's insurance division did not end up being sold, and I will address its impact on valuation in the context of quantum below. But I do not accept that this fact renders Fenchurch's work worthless.

325. There is an important legal point about the date at which one assesses the value of the benefit. But I do not consider this issue to be decisive in this context and it is more convenient to explain how it operates when I am considering quantum in the next

section. To my mind, the better answer to the AA's submission at the liability stage is a factual one: the work done by Fenchurch had a value in enabling the AA to decide whether it would go ahead with Project Zodiac. It did not only have value if a different decision was made. Given the debt problems with which it was faced, this was a journey which the AA needed to take; an option which it had no choice but to explore fully.

326. Fenchurch expressed this as giving the AA "optionality". I agree. It was Fenchurch's work that enabled the AA's Board to take a decision in November 2019 as to whether to proceed with Project Zodiac and whether to test the market at that time or to pause. Nor, given the time pressures, was it realistic to suggest that the work necessary to make the decision could have been performed, but the work necessary to enable the AA to go forward, if a positive decision was made, left until later. Ms Connor's evidence was that there was a lot of work which needed to be done before a decision could be made by the AA's Board (hence the instruction to continue with Project Zodiac in July 2019). She explained: "*it took a lot of money and a lot of time to come to that decision and in the November board pack, which we can refer to later if helpful, I think we brought together the consideration and the choice in a really articulate fashion. So when I talked about optionality, I meant we have provided quality information to enable the board to make a quality decision that it can offset and consider alongside other options should it have them when it comes to deleveraging the debt*". That seems to me a realistic way of seeing it.

327. The experts agreed that, by the time of the November 2019 Board meeting, Fenchurch had completed the work that they would have expected to have been completed by this stage. They also agreed that the AA derived a value from the services performed by Fenchurch by enabling the AA to make a decision about whether to go ahead with Project Zodiac. It was suggested to Mr Smith that it was possible to distinguish between work done on the IM and work required in order for the Board to make that decision. He was dubious about this:

> Q. It is work you wouldn't necessarily have to do if you just wanted to make a decision about whether or not you are going to sell the business at that time.
> A. No.
> Q. Okay.
> A. But, sorry, may I --
> Q. Yes, of course.
> A. I think that's right, but you couldn't, given the timescale, you couldn't -- well, from reading I don't believe that they could have done all the preparatory work and then decided to write an IM, that would have had an impact on the timetable. So if they wanted to be able to go to market as soon as possible, they would have had to, as they did as I understand it, done the work in parallel.
> Q. If they wanted to be able to bring Zodiac, or bring the insurance business to the market within a timeframe within which it would actually be able to solve the financial issue the AA was facing, they would need to have the IM ready at that point; is that what you are saying?
> A. Yes.

328. It seems to me that Mr Smith was right that this was better seen as a single exercise, which had value in enabling the AA to go ahead with the sale if it chose to do so, rather than two separate exercises.

329. With all of that in mind, I am not surprised that Mr Breakwell conceded, without prevarication, that Project Zodiac was an important piece of work and that the work done by Fenchurch was of value to the AA. I find that the AA received a benefit from the services provided by Fenchurch. It is obvious that it received that benefit at Fenchurch's expense.

(d) Conclusion

330. I am satisfied that all the necessary ingredients for a restitutionary claim are present here. The AA received a benefit, at Fenchurch's expense. It would be unjust to allow the AA to retain that benefit without compensating Fenchurch. It is not suggested that the AA's position has changed in any relevant way, so as to make it unjust for the AA to have to make restitution.

G.3 Restitution: quantum

331. That is the easy part of the decision on restitution. The more difficult part is quantifying the value of the benefit received by the AA, in respect of which the AA must provide restitution.

(a) The law

332. The principle is easy to state. In cases where the benefit is services rendered, the value is the price which a reasonable person in the defendant's position would have had to pay for those services: Benedetti (supra) at [17].

333. In Benedetti, there is an extensive discussion of factors which are to be taken into account and those which are to be ignored. Lord Clarke explained that the basic principle is that a claim for unjust enrichment is not a claim for compensation for loss, but for recovery of a benefit unjustly gained (at [13], citing NEC Semi-Conductors v. IRC [2006] STC 606). He said (at [15] - [16]) that the starting point was the objective market value, or market price, of the services provided. This was to be contrasted with a subjective test, concerned with how the defendant values the benefit in question. The defendant's "*generous or parsimonious personality*" was to be ignored, but factors which affected the price that would have to be paid in the market should not. For example, the availability of the services, and the defendant's buying power in the market, would be relevant.

334. Lord Reed (at [99] – [100]) expressed the aim when seeking to arrive at a value in similar terms:

> *"The object of the remedy in a case of the present kind is therefore to correct the injustice arising from the defendant's receipt of the claimant's services on a basis which was not fulfilled. That injustice cannot be corrected by requiring the defendant to provide the claimant with the reward which either party might have been willing to agree. That is because, in the absence of a contract, neither party's intentions or expectations can be determinative of their mutual rights and obligations. Nor can the court make the parties' contract for them: a contract which might have included many other terms and conditions besides a price. In such circumstances, the unjust enrichment arising from the defendant's receipt of the claimant's services can only be corrected by requiring the defendant to pay the claimant the monetary value of those services, thereby restoring both parties, so far as a monetary award can do so, to their previous positions.*

Prima facie, the monetary value of the services can be fairly ascertained by determining what a reasonable person in the position of the defendant would have agreed to pay for them. That will depend on how much it would have cost a reasonable person in the position of the defendant to acquire the services elsewhere in the market (assuming that a relevant market exists, as will normally be the case). The payment by the defendant of the value of the services to a reasonable person in his position will normally achieve a result which is just to both parties in a case of this kind, since the claimant will receive the amount for which he could have sold his services to another recipient in the same position, and the defendant will pay the amount which the services would have cost a reasonable person in his position to acquire from another supplier in the market. The basis of the valuation is thus consistent with the purpose of the valuation exercise…"

335. It was confirmed by the Supreme Court in that case that offers which had been made by the defendant might provide a guide to the market price, but also held that, if some subjective or idiosyncratic factor was pushing up the offer above the market price, then the benefit was to be valued using the market price, and not subjectively revalued. See, for example, paragraphs [56], [123] and [168].

336. One potential complexity concerns the date for the assessment. The starting point is that the amount recoverable is the value of the benefit at the time of receipt. See ***Energy Ventures Partners Ltd*** (supra) at [282].

337. Where services are performed over an extended period, it has been suggested that the relevant date (for both the cause of action and the valuation) is when the services are completed. In Benedetti (supra) at [14], it was said by Lord Clarke that this point was reached, on the facts of that case, when there was "*no possibility of, or need for*" further services. This approach seems to be more to do with practical considerations and doing broad justice than with any point of principle.

338. The authors of ***Goff & Jones*** (at paragraph 4-55) give an example of why the date matters: a defendant who asks for services cannot afterwards deny that he was enriched by the work just because he has changed his mind about wanting them. For example, if a developer asks an engineer to draw up plans for a building, but then decides on a different design, he cannot deny that he was enriched by the engineer's work even though he will never use the plans: at the time when the work was done, it was what he wanted.

339. So far, so sensible. The question I found much more difficult to answer was how to deal with uncertainty as at the date for valuation. It was common ground, as I will explain, that a contingency might be relevant to the valuation process. But the parties differed as to how a contingency interacted with the rule about the date of valuation.

340. Put simply: what if the value of the services depends on what happens next? To take a simple example: imagine an estate agent makes a claim for the value of services. The property is advertised, potential buyers are introduced, but then the relationship breaks down and no contract between the agent and the seller is ever agreed. At the point at which the services come to an end, the seller is deep in negotiations with a buyer for the purchase of the property. But contracts have not been exchanged. Is it legitimate for the Court to look beyond the valuation date in order to see whether or not the sale ends up being completed and thereby resolve the uncertainty? Or must the services be valued as at that valuation date having regard to that uncertainty and, if so, how is this to be done?

341. The authorities to which I was referred did not grapple with this directly. In MSM, the restitutionary claim was premised upon the purchase of a property to be used as an embassy. Christopher Clarke J did not express any concern about having regard to the fact that the purchase had been completed, nor to his conclusion (at [176]) that:

> *"the work that was done was in anticipation of a contract which, if it had materialised, would have entitled MSM to remuneration only if MSM had been the effective cause of the purchase; and MSM was not".*

342. As far as I can see, there was no discussion of the valuation date at all in that case: the above was simply number 4 in a list of reasons why the restitutionary claim failed.

(b) Fenchurch's case

343. It is important to explain that Fenchurch's pleaded case was that "The value of the benefit of the services…falls to be assessed (inter alia) on the basis of the total hours worked at the industry / market rate(s)". But it largely abandoned this case at trial, for entirely sensible reasons. It was simply not supported by its expert, Mr Smith, who agreed with Mr Esler that this is not the way in which advisers like Fenchurch charge for their services in this kind of transaction (see below). They invariably charge a success fee, contingent upon the transaction taking place, and often also fixed or monthly retainers or project fees. Before I heard the expert evidence, Mr Ayres KC formally confirmed that Fenchurch was "*not going to be pursuing a remedy based upon quantification by reason of time cost analysis*".

344. Instead, Fenchurch ended up premising its case upon the agreement between the experts that the fee construct negotiated between Mr Strickland and Mr Buck represented a reasonable fee for the work done by Fenchurch. Fenchurch then took this forward in two different ways. The first sought to arrive at a current value (as at early 2020), of the uncertainty: in effect taking a percentage said to represent the chance of a successful transaction and the extent of the work to be done by Fenchurch which had been completed, and multiplying that by the value of the success fee as agreed on 19 November 2019. This calculation was said to result in the fee being "discounted" to avoid generating a windfall for an adviser when the entitlement to a success fee was not guaranteed and was based on the evidence of Mr Smith, who used this (or an earlier iteration of this idea) to arrive at what he said was a reasonable fee for Fenchurch's services.

345. The second possibility was to assume that the reasonable fee had regard to the public offer trigger and then to allow (whether prospectively or retrospectively) for the fact that the same would have been (on Fenchurch's case), or might be (if judged at the valuation date), triggered.

346. Fenchurch emphasised that I was seeking to arrive at a reasonable fee and said that, unless I took into account the contingency – i.e. the potential success fee – I would not capture the real value of Fenchurch's work, which was really carried out to earn the success fee, not just a progress payment. Fenchurch pointed out that Mr Esler acknowledged that the progress payment of £350,000 would not provide any profit element for Fenchurch. It said that could not represent the value of Fenchurch's services. It described the progress payment as inadequate by way of compensation because it completely ignored the contingent element that would form part of any fee.

347. It also argued that it would be insufficient to use the agreed fee construct without having regard to the public offer trigger which (it contended) would have formed part of that construct. It said that, as at November 2019 or January 2020, it would be absurd to suggest that a reasonable fee arrangement would not include this protection for the adviser.

348. Fenchurch acknowledged that Mr Smith had been arriving at a reasonable fee as at February 20**19** and that this is not the correct valuation date (at least in the present context). But it submitted that the probability of entitlement to the success fee would be the same whether judged in February 2019 or November 2019, because, if in November 2019 the prospects of the transaction completing had decreased, then the amount of protection sought by the adviser by way of alternative triggers would have increased.

349. Fenchurch argued that it was not open to me to take into account hindsight when arriving at a value for the services as at the valuation date. It said that, if that valuation "rule" was not abided by, it becomes impossible to arrive at a value.

(c) The AA's case

350. The AA agreed that it was crucial to the parties that the vast majority of the fee to be earned by Fenchurch and paid by the AA was contingent on success. It said that Fenchurch would never have agreed to work on a basis that did not reward success and the AA would never have agreed to pay any significant sum in the absence of a successful transaction. It pointed out that Ms Connor had explained how the AA had been very concerned about fees being incurred if there was no successful transaction to pay these fees, and that her evidence about that had not been challenged. It observed that Fenchurch was always going to be taking the risk that it would do a lot of work, but there would ultimately be no sale of the insurance business and hence no success fee.

351. The AA focussed its fire on Mr Smith's evidence and argued that, if this evidence was not accepted, Fenchurch was left without any alternative case on quantum. It did not accept that Fenchurch could just encourage me to do my best, if necessary by adapting the expert evidence as I saw fit. It said that Fenchurch had advanced a specific case on valuation and cannot now be heard to say that the Court should determine a reasonable fee on some different basis.

352. It contended that Mr Smith's calculation of a "reasonable fee" is fundamentally flawed, because:

352.1. it does not even purport to be a market valuation of the work done by Fenchurch. The AA pointed out that Mr Smith does not have any experience of valuing the services provided by an adviser, and his methodology is not said to reflect any existing market practice;

352.2. it is not the price which a reasonable person in the defendant's position would have paid for the services. Fenchurch would never have sought a percentage of a success fee, part way through the process, and the AA would never have agreed to pay on this basis;

352.3. it would result in the AA having to pay very substantial fees (up to £2m), even in circumstances where there was never a successful sale of the insurance business. It described this as antithetical to any client's requirement that all or

most of the potential fee is conditional upon success, and contrary to the AA's actual position that it would only pay for success; and

352.4. it was based on a supposed probability of success of 66-75%, but this figure did not reflect Mr Smith's assessment of the likelihood of the project being successful **in this particular case**. The AA said that the actual probability of success would have been much lower, especially by early 2020. It suggested that, after the Board's decision on 13 November 2019, the likelihood of success might have been zero.

353. The AA observed that, in the early stages of the negotiations, it had been envisaged that Fenchurch would be entirely at risk as to its costs, if no sale of the insurance business was ever successfully concluded. On that basis, it said that the reasonable fee for the work would be zero. It acknowledged that, from 1 July 2019 onwards, Fenchurch sought, in addition, monthly retainers (initially of £40,000 per month) or progress payments. It agreed that Mr Strickland agreed in principle that Fenchurch should receive a progress payment of £350,000, which would be payable even if Project Zodiac did not go ahead. On that basis, it described that as the reasonable fee for a case where Project Zodiac did not proceed.

354. The AA submitted that it was not appropriate to the valuation methodology to assume that the clause 2.4 public offer trigger was included. It suggested that this went beyond looking at an objectively reasonable fee and amounted to taking into account subjective matters.

355. The AA's case was that, valued at the end of the engagement (i.e. on or after 19 November 2019), the services which had been provided by Fenchurch were of negligible value. For example, it was said that the IM was unlikely to be of any use.

(d) Expert evidence

356. A very great deal was actually common ground between the experts. They agreed about the process for a sale transaction like Project Zodiac and the role of an advisor such as Fenchurch. They agreed that such an adviser would invariably charge a success fee, contingent on the transaction taking place or other defined circumstances, and would often also charge retainers or project fees. They agreed that the fee structure proposed by Fenchurch for Project Zodiac was in line with market practice and specifically that £4m as a success fee was in line with market practice.

357. There was a difference between them as to whether retainers/ project fees should be viewed as "*token*" (Mr Smith's word) payments, but that seemed to me a slightly arid debate. Mr Smith seemed to mean by that label that advisers would not be focussed on earning project fees, nor usually willing to work for such fees alone. I am sure that is right. Mr Esler suggested that such fees could be of economic significance as a component of the overall fee structure. I am sure that it true too. I note that Mr Smith insisted that, in his experience "*firms do look to achieve some form of progress payment*".

358. It was agreed that the fee structure for an adviser like Fenchurch would **not** be based on an hourly charging structure. Neither expert felt they could opine on the reasonableness of the hourly rates put forward by Fenchurch in its pleaded claim. Mr Smith agreed that one objection to hourly rates was that payment on this basis "*effectively removes that element of conditionality*" and another objection was that it "*wouldn't reflect what would ever actually be agreed in practice*".

359. Mr Smith explained that the aim of the seller is to keep costs to a minimum, especially if no transaction ultimately takes place and there was no "*pot of money*" with which to pay fees. Meanwhile, the adviser is seeking to earn the maximum fee possible. It is clear that this is why the market practice is for advisers to be paid largely by reference to the success of the transaction. He confirmed that clients would not be prepared to pay hourly rates that reflected the success fee element and advisers would not be willing to work for a rate which excluded it.

360. He suggested that one way of conceptualising the value provided by Fenchurch to the AA was by reference to the "saved" cost of assembling a team of individuals at the AA to perform that work. However, he made clear that this was not a very realistic way of arriving at a figure, because it would be very difficult (or very expensive) for the AA to employ individuals with the relevant expertise and experience. Moreover, if such a team had been assembled at the AA as full-time employees, they would have been able to do other work during the year. There was no sensible way of allowing for this as a (notional) discount against the (equally notional) cost. As a result, while Mr Smith suggested that the annual cost he arrived at by this method (£1.6m) "*provides some context*", he did not put it forward as a valuation of the value of Fenchurch's work. As with the hourly rate methodology, Fenchurch made clear that it was not inviting me to quantify value on this basis.

361. Mr Smith also discussed some other hypothetical ways of arriving at a figure (such as estimating the reduction in the fee which would have been paid to a replacement adviser for the work done by Fenchurch), but ultimately expressed the view that the Court should seek to arrive at a "reasonable fee" on the basis of an implied contract. He said this meant starting with the fee construct agreed on 19 November 2019, then considering (a) what percentage of the work Fenchurch still needed to complete in order to earn its success fee and (b) the probability of the transaction being completed and Fenchurch earning that success fee. His calculation resulted in a figure of £1.7m-£2m (£4m x 65% x 66-75%).

362. In relation to the first percentage, Mr Smith estimated that Fenchurch had completed 65% of the total work, even though the first stage of the bidding process had not yet been reached. Mr Esler said that figure was arrived at by comparing the actual, and rather prolonged, preparation stage, with "textbook" short subsequent phases, in a way which was unrealistic. He thought that Mr Smith was underestimating the true complexity of the subsequent phases and that the negotiations with a preferred bidder about carving out the insurance business were likely to be difficult and protracted.

363. In relation the probability of a completed transaction, Mr Smith made clear that there are no published statistics. He suggested that advisers would not take on engagements if they did not anticipate a successful outcome and, on this basis, speculated that "*the majority*" result in a successful completion. On this basis, he indicated that he would use a probability of 66%-75%. He clarified in cross-examination that this was to be taken as the probability as at February 2019, and also that it was not based on any assessment of this particular project. Mr Esler said that this did not reflect the risks associated with a corporate divestment of an insurance business. He thought it might be optimistic "*in a scenario where there are multiple and conflicting strategies alongside the sale of the insurance division*".

364. Mr Smith was invited by Mr Parker KC to accept that his methodology was susceptible of the very same criticisms as had caused him to reject the hourly rate approach, namely that it removed any conditionality and was not a form in which parties would ever

actually agree a fee. He did not appear to accept this, but I have to say that Mr Parker's point seemed to me to have considerable force and I could not really see what answer Mr Smith had to it. Mr Smith certainly agreed that his "reasonable fee" was not actually a fee which Fenchurch or the AA would ever have been willing to agree, because it removed the crucial element of conditionality. He accepted that this process of adjusting the success fee was not one he had ever seen the market perform. It is obvious that those are significant black marks against this methodology.

365. Mr Smith accepted without demur that his "probability" ingredient did not include any consideration of how likely Project Zodiac was to go ahead, whether before or after the decision of the AA's Board in November 2019. He said that he did not think he would be able to assess that. He also accepted that if a probability figure was to be used as at November 2019, it would not be 66-75%, and might be 0%.

366. In his first report, Mr Esler focussed on explaining the problems with Fenchurch's pleaded approach to quantification, namely using hourly rates. As I have said, most of what he said about this ended up being common ground. In terms of an alternative, he asserted that any fee must reflect the fact that, as he saw it, Fenchurch did not undertake the most significant "*value add*" elements of the sell-side process, such as marketing the business, selecting the preferred bidder and project managing the sale process. On that basis, he suggested that the best indication of the value of the services is the £350,000 progress payment that would have been payable to Fenchurch if the EL had been signed. He explained in his oral evidence that "*it's my experience that in sell-side mandates if a transaction doesn't happen, you look to the non-contingent elements of the fee structure, be those progress payments, milestone payments, or abort fees for the reward to an adviser in a context where a transaction has not happened*".

367. I note that Mr Esler accepted that clause 2.4 of the EL, and the public offer trigger found there, is an "*entirely normal provision*" to agree. However, he did seem to distinguish between the different triggers when asked about what might, absent any agreement, represent a reasonable fee. He explained that the shareholder rejection trigger involved a scenario "*that by definition is at the very end of the process*", and suggested that was to be contrasted with the public offer trigger, which might come at any stage, and hence a success fee earned in that way: "*commercially, no, it wouldn't be a reasonable fee*".

368. For his part, Mr Smith made clear that he had not factored this public offer trigger into his probability assessment at all:

> JUDGE SEAN O'SULLIVAN: Can I just check, before Mr Ayres asks any questions he wants to ask, your analysis involving the 66 to 75 per cent probability, does that have built into it this trigger or is that assuming success in the sense of the transaction completing?
>
> A. It was more generic, my Lord, it was me putting my feet in the shoes of Fenchurch at the time taking on the mandate and what in that position I would have assessed as being the likelihood of the transaction happening in general, not with all the specifics, because I think transactions raise issues at any time, so I think it's impossible to work out specifically in that regard, but you would use your general experience, it's a good asset, they anticipated lots of buyers, and that's the basis that I thought that it was more likely to happen than not.
>
> JUDGE SEAN O'SULLIVAN: When you talk about it happening you just don't mean the success fee becoming payable by virtue of some trigger of this kind, you mean the transaction actually taking place --

16 A. Completing. Correct, my Lord, yes.

369. As I have said, Mr Smith had given a figure for an entirely general prospect of success, unrelated to the specifics of this transaction.

(e) Discussion

370. There is no doubt in my mind that the right approach is to value the services by reference to what a reasonable person in the position of the AA would have to pay for those services in about February 2020. I also accept that, given the way the market for advisers like Fenchurch operates, this requires having regard to the fact that the fee was going to involve a contingent element.

371. Indeed, the main difficulty with ascribing a "market value" to these services, at a point when it is unknown whether or not the transaction will be successful, is that everybody agrees that such services are priced (and, if different, valued) by reference to success and failure. It is impossible to divorce the assessment of value from the contingency, at least if one is seeking to arrive at a value by a process which bears any resemblance to the way in which this market operates.

372. I admire the creative way in which Fenchurch sought to resolve this problem, by (in effect) capitalising the uncertainty. But its proposed methodology seems to me to end up being too artificial, and too divorced from the way in which this type of advisory work is actually priced, for the Court to adopt. It is like the hourly rate analysis: it can be said to be a theoretical way to arrive at a figure, but not one that would ever be used by participants in this market, because it removed the essential ingredient of conditionality. In some scenarios, Fenchurch would be over-compensated and in others undercompensated. In no scenarios would the resulting valuation match with the value which the parties would **actually** have attributed to the work. Further, the result here would be that the AA would pay more by way of restitution for unjust enrichment than if the EL had actually been signed. That is by no means an impossible outcome, but it would be a little surprising.

373. For completeness, I should add that Mr Smith's calculation of the "percentage completion" seemed to me rather arbitrary. There is no need for me to descend into the detail here, because I am rejecting this whole approach. But if it mattered, I would have made some much more conservative assumptions about the effort which would have been required in the subsequent stages.

374. I also disagree with where Mr Smith ended up on the percentage chance of success. However, in this context, my disagreement is more with his approach than his implementation of that approach. As explained at paragraphs 363, 368 and 369 above, Mr Smith's figure represents the probability of a transaction succeeding at a very general level. He had not attempted to arrive at a probability of success for Project Zodiac specifically, let alone considered how that probability of success might vary over time. If the aim is to arrive at a value for a date in about February 2020, I take the view that one would need to use the probability of earning a success fee, in relation to this specific transaction, as at that specific date.

375. That said, I think arriving at such a percentage is ultimately unnecessary, because it seems to me that there is an important difference between valuing as at a specific date, and valuing by reference to the parties' state of knowledge as at that date. There is no problem with arriving at a value as at the date of completion of the services, but on the

basis of all the information which the Court has about market value of those services, including information which came to light after that date.

376. My own view is that it does not offend any rule about the date of valuation, in the context of restitution, to have regard to all of the information which the Court has at the time of the trial, so as to arrive at an accurate value for the services. In other contexts, similar rules about the date for valuation are subject to exceptions where justice or logic demands (see, for example, The *Golden Victory* [2007] UKHL 12). Here, the stated aim is to achieve justice between the parties: to provide fair restitution when one party has been enriched at the expense of another. The "rule" about the valuation date which is discussed briefly in Benedetti seems to me a matter of practicality (i.e. avoiding having to value services day by day), and an attempt to strike a fair balance when dealing with services, rather than being a rule which is required for some important conceptual reason.

377. On that basis, I would have regard to the fact that the Project Zodiac transaction did not ultimately go ahead. I would be looking to arrive at a value for the services which assumed that no success fee would be earned, because we know the transaction would not succeed.

378. Further, it does not seem to me appropriate to factor any success fee ingredient into my valuation by reference to the public offer trigger. There are at least four reasons for that:

    378.1. first, including that very specific trigger has the potential to cross the line between (a) having regard to the parties' negotiations as a guide to market value at the relevant time (which is legitimate), and (b) permitting subjective overvaluation (which was said to be wrong in principle in Benedetti). This is especially true in relation to the public offer trigger, because I am far from sure that both parties specifically had that trigger in mind when the fee construct was being negotiated (see paragraphs 216 - 218 above);

    378.2. second, that trigger was never intended to operate as the equivalent to a tail fee, generating a success fee long after work had come to an end. My understanding is that Fenchurch accepted that it would have been open to the AA to terminate the engagement and prevent the public offer trigger from operating. So, on no view, as at February 2020, was the AA **inevitably** going to have to pay a success fee. On the contrary, it was easy for the AA to avoid doing so;

    378.3. third, the public offer trigger formed no part of Mr Smith's analysis (see paragraph 368 above), which analysis is said to be the evidence upon which Fenchurch's case on valuation is based. It seems to me that Mr Parker KC had a valid complaint about the way in which Fenchurch's case in this regard ended up being assembled in a rather higgledy-piggledy fashion, preventing him from properly investigating all of its constituent parts;

    378.4. fourth, and most importantly, I have held (in section F above) that the public offer trigger was not engaged in any event. So, even if that trigger was theoretically relevant to the value of the services, it in fact adds nothing to that value, at least assuming I am right to say that one can have regard to all of the information which the Court has at trial when valuing the entitlement.

379. Once all of the arguments about the relevance of the success fee are disposed of, it seems to me that one is left with the progress payment of £350,000 (plus expenses) as representing the true value of Fenchurch's services, on the basis that we know that

Project Zodiac would not go ahead and hence that the success fee would not be earned. I do not accept Fenchurch's criticisms of that conclusion. On the contrary, it seems to me that the fact that the parties were agreeing a progress payment, payable whether or not Project Zodiac advanced further, on 19 November 2019, just as the AA's Board decided to put that project on hold, suggests that such a payment was considered to strike a fair balance between the AA paying significant sums in the context of a failed transaction, and Fenchurch being remunerated only if the transaction was successful. Mr Esler seemed to me to express this point well, when explaining why it was necessary to see the progress payment as a part of the whole remuneration scheme:

> Q. I understand. Just looking at it from another -- what the judge might have to decide in this case is what is a reasonable fee and that's one of the things you are obviously looking at. But another way of looking at this is let's imagine the professionals workforce of Fenchurch is about 38 people, so just assume that. Of those professionals, let's say we have four of them working and so that's roughly speaking 10 per cent of the workforce, we have them working for ten months for what is around about on one of the years 1.2 per cent of turnover. And looked at it like that, you couldn't say that £350,000 is a reasonable fee, could you?
> A. No, but I could say £4 million plus performance fee is a reasonable reward and fair reward for a very successful outcome. And my experience and understanding of market expectation and market practice from corporate finance advisers and sell-side mandates is that they look at that wider context and do not expect significant reward in the event that a transaction does not happen.

380. Given that Project Zodiac did not go ahead, it seems to me unrealistic for Fenchurch to complain that receiving the progress payment alone would deprive it of any profit. That was the risk which it had always agreed to take. On the basis of my conclusions, even if the EL had been signed, Fenchurch would only have earned £350,000 (plus expenses).

381. For completeness, even if I was wrong about having regard to information which comes to light after the notional valuation date, in circumstances where – by that stage – there remained only a theoretical possibility that the success fee would be earned, I do not think I would add anything to the value to reflect this possibility. Even if one was prevented from having regard to events after the valuation date (in February 2020), it still seems to me it would be wrong to value Fenchurch's services by allowing a percentage of a notional success fee which had not yet been earned and which (by that stage) looked very unlikely ever to be earned.

382. By February 2020, the AA's Board had decided to put Project Zodiac in a locked box. The work on that project had been paused and nobody really expected it to be reactivated. It was at the bottom of the pile of available options. It is true that there remained a tiny (and diminishing) chance that, for example, the AA would find itself forced to pursue Project Zodiac, but, if that had happened, there would have been further work for Fenchurch to do (e.g. to update the IM and grapple with the FCA review) and then further risks which would have had to be run (especially risks that the non-binding offers received when marketing began would be too low to make the transaction workable). To uplift the value of the services provided by Fenchurch by February 2020 to reflect this tiny chance would seem to me an error.

383. Another way of expressing this same point is that it seems to me that, by the February 2020 valuation date, the prospects of Project Zodiac actually going ahead were already vanishingly small. Similarly, if relevant, I take the view that Project Zodiac was even more unlikely to end up being aborted as a result of a public offer (because that would require the project to be resurrected and then aborted: doubly unlikely).

(f) Conclusion

384. For these reasons, I value the benefit which the AA received at £350,000, plus the expenses of £16,276.06.

H Disposition

385. I find that there was no binding contract between the parties. Even if there had been, the public offer trigger would not have been engaged and Fenchurch's contractual entitlement (excluding VAT) would have been limited to the progress payment of £350,000, plus expenses of £16,276.06.

386. Since the parties, to their mutual surprise, failed to arrive at final agreement on the terms of Fenchurch's engagement, Fenchurch provided services to the AA without payment, and the AA was unjustly enriched as a result. I value the benefit which the AA received at £350,000 plus expenses (excluding VAT). It is not clear to me whether it is appropriate to add VAT when this is being awarded in the context of a claim for restitution and I will invite the parties to make submissions in that regard if it is not agreed.

387. For these reasons, there will be judgment for Fenchurch in the sums indicated. As well as on the incidence of VAT, I will hear the parties on interest and costs and any other consequential matters.

388. I must conclude by expressing my gratitude to Counsel for the quality of their written and oral advocacy, to the solicitors for the care with which the case had been prepared, and the legal teams as a whole for the sensible and cooperative way in which this trial was conducted.