Neutral Citation Number: [2022] EWHC 1153 (Ch)

Claim No BL-2018-002521

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY DIVISION
BUSINESS LIST (ChD)

Royal Courts of Justice
Rolls Building,
Fetter Lane,
London, EC4A 1NL
Date: 16 May 2022

BEFORE:-

MR RECORDER RICHARD SMITH
(Sitting as a Judge of the Chancery Division)

BETWEEN:-

JAMES RUSSELL GRAY

Claimant

- and -

(1) DOUGLAS SIMPSON SMITH
(2) BLACKMOOR INVESTMENT PARTNERS LIMITED

Defendants

Matthew Hardwick QC and Will Bordell (instructed by Candey Limited) for the Claimant
James Bailey QC and Tim Matthewson (instructed by Withers LLP) for the Defendants

APPROVED JUDGMENT

Hearing dates: 14-18 and 21-23 February and 1 March 2022

This judgment was handed down remotely by circulation to the parties' representatives by email and release to the National Archive. The date and time for hand-down is deemed to be 16 May 2022 at 10.30am.

Mr Recorder Richard Smith
(Sitting as a Judge of the Chancery Division)

1 Introduction

1.1 Mr Gray's claim

1. The Claimant, Mr James Gray (**Mr Gray** or the **Claimant**), is an American investment professional who lives in London. The First Defendant, Mr Douglas Smith (**Mr Smith** or the **First Defendant**), is a British investment professional, also living in London. Mr Smith is the majority shareholder in, and director of, the Second Defendant, Blackmoor Investment Partners Limited (**BIPL** or the **Second Defendant** (together **the Defendants**)). BIPL is the regulated investment manager for the investment fund launched in March 2018 and which also operates under the 'Blackmoor' name (**Blackmoor Fund**).

2. This claim concerns an oral agreement allegedly entered into by 15 June 2016 by Mr Gray and Mr Smith (the **Alleged Oral Agreement**) to try and build, and then manage together, on a '50:50' basis an open-ended, committed investment fund with an 'activist investment' strategy, involving the acquisition of publicly traded equities with a view to improving a target company's performance and share value (**Fund**).

3. The Claimant says that the Alleged Oral Agreement was performed from 5 July 2016, including by Mr Gray (i) using and sharing his professional contacts to pursue investor capital (ii) developing the Fund's investment strategy and approach (iii) analysing potential investment targets (iv) preparing investor marketing materials and (v) contributing to BIPL's application to the Financial Conduct Authority (**FCA**).

4. The Claimant also claims that he and Mr Smith were in a fiduciary relationship based on their agreement or understanding that they would participate equally in their Blackmoor 'joint venture' in circumstances giving rise to a relationship of mutual trust and confidence.

5. The Claimant says that Mr Smith breached the Alleged Oral Agreement and/ or his fiduciary duties owed to Mr Gray, including by establishing a 'rival' Blackmoor team (described by Mr Gray as the "*Parallel Blackmoor Team*"), excluding him from the investment management business which they had sought to build together (**Blackmoor**), taking their joint work as his own and bringing the Fund opportunity to a new 'partner', Mr Guido Schmidt-Chiari (**Mr Schmidt-Chiari**).

6. Mr Gray's primary claim is for damages for breach of contract of between €1.72m and €18.53m, said to represent the net fees he would have earned from March 2018 to (at the latest) June 2026 from his joint management with Mr Smith of the Fund, assuming its performance consistent with the average returns of certain suggested comparable market indices.

7. Alternatively, Mr Gray seeks equitable compensation in the same sum or an account of 50% of the profits reasonably connected to Mr Smith's alleged breaches of fiduciary duty.

8. As a further alternative, Mr Gray claims in unjust enrichment the sum of €1,676,250 (and reimbursement of £5,000 expenses), said to represent the value of the services he performed in building and developing Blackmoor in anticipation of a 50% share of its profits.

9. Mr Gray brings the contractual and fiduciary claims against Mr Smith alone. The unjust enrichment claim is asserted against both Defendants.

1.2 Mr Smith's defence

10. The Defendants deny all the claims and relief sought. Mr Smith contends that he set up Blackmoor by incorporating BIPL on 15 April 2016 in which he and his wife originally held all the shares, putting in place Blackmoor's operational infrastructure and generating the necessary funding for the start-up and working capital costs, principally through an investment consultancy services agreement (**StratCap Contract**) with a company called StrategicCapital Advisors Limited (**StratCap**), of which Mr Smith had previously been co-portfolio manager.

11. Following BIPL's establishment, the key objective was to find 'cornerstone' investors to enable the Fund to launch. This, in turn, required an investment team to be built to generate client investment (**Investment Team**). After what Mr Smith called the "*First Blackmoor Team*" fell through in late June 2016, he agreed on 5 July to Mr Gray joining him on the Investment Team on a non-contractual 'trial collaboration' basis. If Mr Gray demonstrated success in raising capital for the Fund, they would then discuss his future participation, including equity, in Blackmoor. The Claimant was therefore at risk of receiving nothing if he failed to raise capital. Mr Smith explained that this approach was consistent with that adopted throughout his investment industry and capital raising experience (described in his written evidence as the "*Pre-Launch Terms*").

12. Despite their efforts from October 2016, the collaboration did not work to attract capital. From April 2017, Mr Smith made clear to Mr Gray that they were not gaining 'traction' and, from May 2017, that he would be taking the business in a "*different direction*" and that Mr Gray needed to look at "*other options*". Mr Smith's attempt to put together a third iteration of the Investment Team and to attract certain cornerstone investors fell through in June 2017 with the untimely death of Mr Michael Treichl (**Mr Treichl**). After 'winding down' their remaining investor leads, Mr Gray and Mr Smith finally parted ways in September 2017. A fourth iteration of the Investment Team, involving Mr Schmidt-Chiari, managed to launch the Blackmoor Fund on 9 March 2018, albeit with committed capital well below target levels.

13. There was no contractual or fiduciary relationship between Mr Gray and Mr Smith and, therefore, no breach of any related obligations. Damages or equitable compensation would not be due to Mr Gray in any event given the conceptual and methodological infirmities of his quantum claim. Nor could there be any duty to account for any profits – none of the ultimate investors in the Blackmoor Fund was the product of their joint efforts. Nor have the Defendants been 'enriched' by Mr Gray as a result of that collaboration, let alone 'unjustly' so.

2 The factual evidence – overview

14. It is common ground that the principal matter for my determination is a factual one, namely what Mr Gray and Mr Smith agreed as to the basis of their collaboration, whether the Alleged Oral Agreement (as Mr Gray contends) or the non-contractual trial period (as Mr Smith contends). The nature of their collaboration in Blackmoor is also highly relevant to Mr Gray's other claims in equity and in unjust enrichment. As to this, Mr Gray and Mr Smith each provided three witness statements containing starkly different accounts which they maintained in oral evidence. Since the claim is concerned with an alleged *oral* agreement, I keep well in mind Leggatt J's observations in *Blue* v *Ashley* [2017] EWHC 1928 (Comm) (at [65]):-

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

15. After citing his own observations in *Gestmin SGPS SA* v *Credit Suisse (UK) Limited* [2013] EWHC 3560 (Comm) (at [16-20]) about the unreliability of human memory, Leggatt J further stated:-

> "*In the light of these considerations, I expressed the opinion in the Gestmin case (at para 22) that the best approach for a judge to adopt in the trial of a commercial case is to place little if any reliance on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts*." (*Blue* at [67])

16. I also keep well in mind that Mr Gray says most of Sections A-E of his first statement (concerning his background through to the end of his relationship with Mr Smith) had been committed to writing in autumn and winter 2017 when his discussions with Mr Smith were freshest in his mind. The Claimant relies on that contemporaneity to support the accuracy of his written evidence, the Defendants for the suggested mismatch of his statement with other aspects of the case.

2.1.1 **Mr Gray's evidence**

17. Mr Gray was a confident and courteous witness. He took great care in answering questions. This was often warranted for precision. He also made some appropriate concessions. However, many of his answers were overly long, some obfuscatory. He relied heavily on his written statements. His oral evidence revealed a tendency in his statements to exaggerate and to rely on parts of the record to put his case in a more favourable light even though the relevant documents did not bear the significance he sought to attach to them.

2.1.2 **Mr Smith's evidence**

18. Mr Smith was an impressive witness. He was self-assured, albeit self-aware and self-critical. He too was careful in answering questions and a number of his responses were long, sometimes going beyond the exact question asked. However, his answers were thoughtful, fair and balanced. Many of his explanations were authentic and insightful. He made appropriate concessions. His oral evidence was generally unprompted by, albeit largely consistent with, his statements.

2.1.3 **Matthew Hansen**

19. Mr Hansen (formerly Head of UK and Europe for Atlas Merchant Capital (**AMC**)) provided a short statement for the Claimant concerning his experience sharing an office with Mr Gray, as well as the pursuit of Mr Gray for a possible role within Panmure Gordon. Although a nervous witness, who struggled to answer straightforward questions, he was honest and genuinely attempted to assist the Court, albeit he added very little to the evidential picture.

2.1.4 **Antonio Todisco**

20. Mr Todisco (formely Investment Director for Temasek International (Europe) Ltd) provided a short statement for the Claimant concerning a meeting he arranged between his boss and Messrs Gray and Smith. I found him to be a fair and honest witness, albeit, again, he added very little.

2.1.5 **Jan Prising**

21. Mr Prising (a retired financial services senior executive) provided a short statement for the Claimant but, in the event, this was not relied on and he did not give oral testimony. In considering the evidence, I have ignored his statement.

2.1.6 **Melissa Carnathan**

22. Ms Carnathan (COO of The SCP Group, a private equity firm) provided a short statement for the Defendants concerning her dealings with Mr Smith, particularly from 2016, and her knowledge of Blackmoor's development. The Claimant elected not to cross-examine her and I was invited by the Defendants to accept her written evidence. I have done so.

2.1.7 **Guy Phillips**

23. Mr Phillips (founder of NuOrion Partners LLC (**NuOrion**)) provided a short statement for the Defendants concerning his involvement with Mr Gray, principally at NuOrion. He gave oral testimony by videolink from Miami, Florida. His testimony was careful and succinct and I found him to be a fair and honest witness.

2.1.8 **Guido Schmidt-Chiari**

24. Mr Schmidt-Chiari (director of BIPL and Investment Team member) provided a short statement for the Defendants about his involvement with Mr Smith, his dealings with Blackmoor in 2017 and the launch of the Blackmoor Fund. His oral testimony revealed some, albeit minor, imprecisions in his written evidence. He acknowledged these and I found him to be honest, albeit at times he seemed concerned to avoid any 'light' between his and Mr Smith's testimony.

2.1.9 **The expert evidence**

25. I also heard expert quantum evidence from Dr Desmond Fitzgerald of Unique Consultants for the Claimant and Mr Timothy Battrick of FTI Consultants for the Defendants. Mr Simon Patterson of Pearl Mayer gave expert evidence for the Defendants on executive compensation. The Claimant did not instruct a separate expert in that field, relying on Dr Fitzgerald for that aspect as well.

26. Although clearly independently minded, I found that Dr Fitzgerald did not fully understand the purpose of his expert evidence and that his analysis lacked rigour in certain important respects. By contrast, Mr Battrick and Mr Patterson were rigorous in their respective analyses and I am satisfied that they did fully understand the object of their evidence. Mr Battrick was understated, fair and balanced. Although more robust in approach, Mr Patterson was no less fair or balanced.

3 Events before 5 July 2016

3.1 Introduction

27. I now identify the main events before 5 July 2016 to frame chronologically the factual 'landscape' within which the parties' rival contentions as to the Alleged Oral Agreement fall to be considered. Where the matters described are important but contentious I have summarised briefly the parties' respective positions, my detailed analysis of which follows later in this judgment (at [164-310]).

3.2 The parties' professional backgrounds/ experience

28. Mr Gray and Mr Smith both have impressive professional backgrounds.

3.2.1 Mr Gray's professional career

29. In 1990, Mr Gray graduated from the University of Virginia with a B.A. in Government and Foreign Affairs. Following university, he worked as a financial analyst for the mergers and acquisitions department of Morgan Stanley. He then worked for 18 months for the private equity firm, Investcorp International, before joining SG Warburg as an associate. SG Warburg sponsored his MBA programme at Harvard Business School (**HBS**) between 1994 and 1996. While there, he also undertook a summer placement at Sovlink in Moscow.

30. After HBS, Mr Gray started to build his career as an investment banker in New York and London, developing a particular private equity expertise. He returned to SG Warburg in 1996 (later UBS), becoming a director in its financial sponsors and leveraged finance group. He then moved to JP Morgan in 2007 as senior managing director. In 2010, he re-joined Morgan Stanley, moving to London to strengthen its pan-European financial sponsor and leveraged finance practice. Morgan Stanley made Mr Gray redundant at the end of 2013.

31. Relative to the rest of his career, Mr Gray did not do anything of substance professionally in 2014.

32. There was some debate about whether it was February or August but Mr Gray joined the 'activist investment' firm, NuOrion, in 2015, working on corporate transactions, each conducted through a separately capitalised special purpose vehicle (**SPV**). Mr Gray left NuOrion in early 2017.

33. In around mid-2016, while still working at NuOrion, Mr Gray began collaborating with Mr Smith in Blackmoor, albeit there is considerable dispute as to precisely when the collaboration began and on what basis. Mr Gray and Mr Smith went their separate ways in September 2017.

34. Mr Gray has since been involved in a few corporate projects and transactions as well as undertaking trading and investing on his own account.

3.2.2 Mr Smith's professional career

35. The path of Mr Smith's career was different, albeit no less impressive. In 1987, he attended Strathclyde University to study for a Masters degree in Engineering. In 1992, he joined McKinsey & Co. Inc. as a consultant in its London office. Between 1994 and 1996, he attended HBS (at the same time as Mr Gray). In 1996, he became CEO, Chairman and a director of Newgate Communications Limited, a telecommunications company.

36. In 1998, Mr Smith co-founded, and became a director and co-CEO of, Jigsaw Capital Partners Limited, a private equity investment firm investing in over 16 private companies with turnaround potential, responsible for investment origination and decision-making, client relationships and investment vehicle structuring. In 2004, Mr Smith joined Hanover Investors (**Hanover**), a constructive activist investment firm focused on investment in small and mid-cap European public market companies with turnaround potential, becoming a partner there in 2005.

37. In 2007, Mr Smith became the portfolio manager of the public equity strategy of Bluecrest Special Situations (**Bluecrest**), focused on investing client capital in European small and mid-cap constructive activist opportunities. In 2010, Mr Smith founded Hill Rise Capital LLP (**Hill Rise**), an investment firm focused on investing client capital in European small and mid-cap constructive active investments with turnaround potential. In 2013, he joined InvestIndustrial Holdings Limited, a private equity firm, to jointly develop its public market strategy. He founded StrategicCapital Advisors Limited (**StratCap**), again focused on constructive activist investment.

38. In April 2016, Mr Smith left StratCap to set up Blackmoor, operating that business through BIPL, of which he remains director and shareholder today. The Blackmoor Fund was launched in March 2018.

3.3 Mr Gray's and Mr Smith's relationship before August 2015

39. It is common ground that Mr Gray and Mr Smith first met in 1994 at HBS, that they were fellow members of a rugby team there and that they have common acquaintances, including in other HBS alumni such as Messrs Terry Mullen, Tim Hurd and Doug Pendergast.

3.4 Mr Smith's and Mr Gray's renewed contact - August 2015 – April 2016

40. The first direct contact between Mr Gray and Mr Smith after they left HBS in 1996 occurred on 19 August 2015 at Bar Boulud in Knightsbridge. It is common ground that they met from time to time thereafter over the period to 28 April 2016, albeit there is a small factual dispute as to whether they also met in March 2016.

3.5 Mr Smith decides to leave StratCap to launch Blackmoor

41. In late 2015, Mr Smith decided to leave StratCap to start Blackmoor. Mr Smith says he appreciated that the execution of his activist investment approach would become increasingly difficult within StratCap but, by now, he had sufficient experience under his belt and credibility to take this next step in his career. Mr Smith's wife and children supported the new venture and chose the Blackmoor name, 'Black' connoting solidity, 'moor' being a reference to where they enjoyed spending their time and a 'nod' to Mr Smith's Scottish heritage.

42. In discussions with its chairman, Mr Bonomi, between November 2015 and April 2016, it was agreed that Mr Smith would leave StratCap to build Blackmoor and Blackmoor would enter into an investment consultancy services agreement with Mr Bonomi's entity, Bi-Invest Services S.A. (**Bi-Invest Contract**). The contract was of 12 months duration, generating fees of €325,000, with Mr Bonomi standing as a potential early investor in the Fund depending upon the development of the Blackmoor client list more broadly. Mr Smith says that the €325,000 under the Bi-Invest Contract was to provide working capital for Blackmoor's initial phase but, to reach a 'break-even' position, Blackmoor would need US$100MM of committed client capital for at least two, ideally four, years.

3.6 The establishment of BIPL/ post-incorporation steps

43. BIPL was incorporated on 15 April 2016 with 100 issued shares. 51 were allotted to Mr Smith, 49 to his wife. They were both appointed BIPL directors. Between mid-April and June 2016, Mr Smith says he took further steps in the establishment of Blackmoor, including preparing a first draft framework or strawman proposition document, purchasing Blackmoor's domain name, appointing BIPL's auditors and branding consultant, setting up e-mail platforms and templates, opening BIPL's bank account, preparing a business plan, concluding the Bi-Invest Contract, trialling financial data systems with various providers and upgrading Mr Smith's Dropbox account to allow for storage of Blackmoor documents.

3.7 The 'First Blackmoor Team' – April to late June 2016

44. Mr Smith explains how, from April to late June 2016, he attempted to build the 'First Blackmoor Team' comprising himself and Messrs Steve Medlicott, Valentin Pierburg and Christian Kappelhoff-Wulff on the Investment Team, with Mr David Lis, Aviva's former Chief Investment Officer (**Mr Lis**), targeted for the role of the Chair of the Advisory and Investment Committees. However, he says the team never came together because, on 27 June 2016, its 'linchpin', Mr Lis, declined the role offered. The Defendants say this is a critical part of the narrative because Mr Smith's efforts to build this team (not including Mr Gray) spanned the period during which the Claimant says they committed to build and operate the Fund on a fully equal basis. The Claimant

criticises the 'Blackmoor Team' 'construct' as representing Mr Smith's re-writing of history, a 'revisionism' borne out, in part, by the so-called 'linchpin' of the 'First Blackmoor Team' only ever being earmarked for a part-time role. The idea that the team excluded Mr Gray was misconceived.

3.8 Mr Gray's and Mr Smith's 28 April 2016 meeting

45. It is common ground that Mr Gray and Mr Smith met over lunch on 28 April 2016 at Burger & Lobster. Mr Smith says that he first told Mr Gray at this meeting of his decision to leave StratCap to build Blackmoor, that Mr Gray asked him to keep him 'in the loop' but that the focus of their discussion was potential NuOrion/ Blackmoor collaboration. According to the Claimant, the meeting was much more significant than that. On Mr Gray's pleaded case (PoC at [7.2]), Mr Gray and Mr Smith also discussed at this meeting a potential joint collaboration involving a private equity approach (Mr Gray's specialism) to investing in public equities (Mr Smith's specialism) applied to a small portfolio of public companies with significant improvement potential by promoting corporate governance and/ or organisational change, with all their business dealings on an "*equal basis*". The Claimant further pleads (PoC at [7.3]) that he and Mr Smith agreed that, if they decided to work together to establish a committed fund, they would:-

a. undertake all business dealings on the basis of being equal partners, working together on a 50:50 consensus basis (PoC at [7.3.1]);

b. have equal decision-making authority in relation to all capital raised and all other matters relating to the running of Blackmoor's business and operations (PoC at [7.3.2]);

c. invest the same amount of capital into Blackmoor as and when required by investors and divide equally all fees and profits generated by Blackmoor (PoC at [7.3.3]);

d. adopt a hedge fund structure which was likely to be (i) open-ended, permitting the acceptance of new capital on an ongoing basis (by contrast with StratCap's closed-end fund structure) and (ii) a standard Cayman Master Feeder structure (PoC at [7.3.4]);

e. refine Blackmoor's investment approach at further meetings by analysing and agreeing specific target investments (PoC at [7.3.5]); and

f. commit (once there was a real prospect of obtaining funding for Blackmoor) to working exclusively on their Blackmoor joint venture (PoC at [7.3.6]).

46. Accordingly, Mr Gray pleads that the parties agreed on 28 April 2016 to build the Fund on an equal basis, albeit conditionally on them both agreeing to 'push the button' and move forward together. Mr Smith denies this.

3.9 Mr Gray's/ Mr Smith's further interactions – May/ June 2016

3.9.1 Mr Smith arranges a New York meeting – 6 May 2016

47. On 6 May 2016, Mr Smith e-mailed Mr Gray and Mr Phillips with a view to setting up a meeting with them in New York between 31 May and 2 June 2016. This meeting was fixed for 1 June 2016.

3.9.2 Mr Gray's discussion with Kabouter - 6 May 2016

48. Mr Gray says that, by this point, he and Mr Smith were already reaching out to third parties with a joint collaboration in mind and, to that end, he spoke to a US fund, Kabouter, on 6 May 2016, albeit he did not mention to Kabouter that he and Mr Smith were looking to build a fund together.

3.9.3 Proposal for London 'pre-meeting' with Mr Phillips – 16 May 2016

49. On 16 May 2016, having already fixed up a meeting in New York for 1 June 2016, Mr Gray e-mailed Mr Smith to inform him that Mr Phillips would be in London the following week (24-26 May 2016), asking whether Mr Smith wanted to meet him as a 'first step' to their New York meeting.

3.9.4 Alleged meeting on 24 or 25 May 2016

50. Mr Gray also says that he and Mr Smith met at Burger & Lobster on 24 or 25 May 2016 when they specifically discussed "*partnering to develop a new shareholder activist investment business under the Blackmoor brand*", including:-

a. comparing their target companies, noting a 50% overlap in terms of their investment then under analysis; and agreeing

b. that everything they did moving forwards in relation to their business dealings would be on the basis of them being joint partners;

c. that they would need at least two fully committed partners to establish and manage the Blackmoor business; and

d. that they would split all fees equally.

51. Although "*not impossible*" that he might have had a meeting with Mr Gray on 24 or 25 May, Mr Smith denies any discussion with Mr Gray in these terms.

3.9.5 New York meeting - 1 June 2016

52. Mr Gray, Mr Phillips and Mr Smith met in New York on 1 June 2016. Mr Gray says that he did not mention then their "*plans for Blackmoor*". Mr Smith says he had asked for the meeting to discuss NuOrion/ Blackmoor collaboration.

3.9.6 Harvard Business School Reunion – 2-5 June 2016

53. Mr Gray and Mr Smith both attended their HBS 20 year reunion between 2 and 5 June 2016. Mr Gray says that, although they saw each other, they did not spend much time together. He also says he did not tell their mutual friends, Mr Mullen and Mr Hurd, outright that he and Mr Smith were partners with a business venture scoped out

rather than saying he was considering partnering with Mr Smith and canvassing their thoughts.

3.9.7 **Mr Gray's dinner with Douglas Pendergast – 10 June 2016**

54. Mr Gray says that, by this stage, he and Mr Smith were starting to discuss the need to recruit Advisory Committee and Operating Bench members to present Blackmoor to the market as an established team and, to that end, Mr Gray started to meet potential candidates, including Mr Doug Pendergast on 10 June 2016.

3.10 **Mr Gray's and Mr Smith's meetings – 13-15 June 2016**

55. There were two further meetings between Mr Gray and Mr Smith, the first at Whole Foods food market on 13 June 2016, the other at Costa Coffee on 15 June 2016. Although not pleaded, Mr Gray says that there was, in fact, a third meeting on 14 June 2016. Based on his own diary entry, it appears Mr Smith does not dispute this (see the Defendants' written closing at [fn 6])). Mr Gray pleads that, at the first and last of these meetings, they "*orally agreed that they would work together for the purposes of establishing Blackmoor*" (PoC at [8]) and, specifically that:-

a. the Blackmoor investment approach would involve 'relationship investing' in West European mid-market publicly listed companies in industrials, business services and consumer goods with the aim of acquiring a significant minority shareholding in six to ten companies at any one time;

b. they would assemble a strong Blackmoor team (**Blackmoor Team**) comprising themselves as the Investment Committee (perhaps with one or two more), a high calibre Advisory Committee and an Operating Bench (comprising eminent company executives) to provide *ad hoc* due diligence on targets;

c. they would pool all their respective contacts to whom an investment in Blackmoor could be of interest;

d. they would jointly market Blackmoor to those contacts for the purpose of establishing a committed fund with a particular focus on one or more 'cornerstone' investors to lend Blackmoor visibility and credibility;

e. they would split equally all material expenses incurred;

f. the minimum duration of investors' capital commitment would be three years; and

g. Blackmoor would seek to launch a fund with a target size of €200-300MM.

56. Mr Gray also says that he discussed with Mr Smith the personal investment by each of them of between €5-10MM of the capital they were looking to raise for the Fund, albeit Mr Smith indicated he would struggle to invest more than a couple of million. In addition, he says they agreed that the making and exiting from investments would be done on the basis of consensus, management and performance fees would be charged to investors, with net fees split on a 50:50 basis, and regulatory approval would be needed for both of them to perform controlled functions.

57. Mr Smith admits the fact of these meetings but denies any oral agreement was reached concerning the joint development of Blackmoor then (or ever). Mr Smith says that they discussed his plans for Blackmoor and that Mr Gray expressed an interest in joining the Investment Team but he was cynical because of Mr Gray's limited investment experience, his lack of professional fit with the Blackmoor strategy and, most importantly, his uncertainty about Mr Gray's personal fit. He highlighted this, suggesting that Mr Gray think about an Operating Bench or Advisory Committee role instead but there was no discussion of building Blackmoor together, pooling contacts, splitting expenses, joint marketing, joint management or exclusivity.

58. Nor, according to Mr Smith, was there any discussion about the matters that would be necessary if they had discussed building a fund together, including references for Mr Gray, working capital requirements and funding, investment decision-making processes and the basis for acquiring equity participation. Discussion about business was one thing but Mr Smith says he was not in the habit of making binding agreements in coffee shops or restaurants, let alone agreements of the utmost importance to him such as ceding significant control of, or economics in, his "*life-long objective*" with an individual he did not yet know.

3.11 **The Alleged Oral Agreement – Express Terms**

59. Mr Gray further pleads (PoC at [9.1]) that, by 15 June 2016, a binding oral contract had been concluded on the following express terms (**Express Terms**), namely that he and Mr Smith would:-

a. pool their respective contacts for the purpose of (i) assembling the Blackmoor Team and (ii) raising a committed fund in Western European mid-market publicly listed companies in the industrials, business services and consumer goods and services sectors (**Joint Contacts Term**);

b. assemble the Blackmoor Team (**Blackmoor Team Term**);

c. jointly market Blackmoor to their joint contacts and any contacts indicated by those contacts or relevant third parties (particularly prime brokers) with a view to securing a committed investment fund of €200-300MM (**Joint Marketing Term**);

d. jointly manage all capital raised with equal decision-making authority also in respect of all Blackmoor's business and operations (**Joint Management Term**);

e. divide all material expenses incurred in relation to, and fees generated by, Blackmoor and invest the same amount of capital as and when requested by investors (**Equal Money Term**);

f. jointly analyse potential investments for the purpose of pitching investment ideas to potential investors (**Financial Analysis Term**); and

g. once there was a real prospect of obtaining funding for Blackmoor, commit to working exclusively on the Blackmoor joint venture (**Exclusivity Term**).

60. According to the Claimant, the Alleged Oral Agreement was 'consummated' at their 15 June 2016 meeting with a handshake, Mr Gray saying "*I'm looking forward to doing this*". Mr Smith denies this. Although Mr Gray did express his interest in joining the Investment Team, Mr Smith was sceptical about his professional and personal 'fit' for such a senior role within Blackmoor. Rather, their discussions concerned Mr Smith's suggestion that Mr Gray might join the Blackmoor Operating Bench or Advisory Committee.

3.12 The Alleged Oral Agreement – Implied Terms

61. In addition to the Express Terms, Mr Gray pleads (at PoC [9.2]) the following implied terms of the Alleged Oral Agreement (**Implied Terms**), namely:-

a. to co-operate to perform the Express Terms (PoC at [9.2.1]);

b. to keep confidential information and documents they received from each other and to use these solely to build the fund together (PoC at [9.2.2]);

c. not to terminate the agreement while there was a real prospect of securing one or more high profile cornerstone investors (PoC at [9.2.3]); and

d. to deal with each other on a good faith basis in all their dealings in relation to the Blackmoor joint venture (PoC at [9.2.4]).

3.13 Events after the 13-15 June 2016 meetings

3.13.1 Mr Smith's e-mail to Mr Hansen – 15 June 2016

62. On the same evening as Mr Gray says he shook hands with Mr Smith on the Alleged Oral Agreement, Mr Gray e-mailed Mr Hansen of AMC asking for recommendations for a "*seasoned, PE-experienced ops guy in London*". Mr Gray says that this represented him reaching out – in accordance with the Alleged Oral Agreement – to source a third Blackmoor Operating Partner. Mr Smith denies this.

3.13.2 Mr Smith's call with Mr Gray – 17 June 2016

63. Mr Smith says that he called Mr Gray on 17 June 2016 and that, as confirmed by an entry in Mr Smith's diary "*James Gray .... Operating partner*," he did so to elicit Mr Gray's thoughts about his suggestion at their recent meetings on 13 and 15 June 2016 that he might join the Blackmoor Operating Bench or Advisory Committee. Mr Gray says the call was to discuss the progress he had made – again, in accordance with the Alleged Oral Agreement – to identify an Operating Partner for the Blackmoor Team.

3.13.3 Mr Lis declines a Blackmoor role – 27 June 2016

64. On 27 June 2016, Mr Lis e-mailed Mr Smith to inform him that he was ruling himself out from the 'First Blackmoor Team' because he felt he would be taking on too many commitments.

3.13.4 Call between Mr Gray and Mr Smith – 28 June 2016

65. Mr Smith says he had a further call with Mr Gray on 28 June 2016 to discuss Mr Gray's potential involvement in Blackmoor, during which Mr Gray reiterated his desire to be on the Investment Team and Mr Smith said he would think about it.

3.13.5 **E-mails between Mr Gray and Mr Smith – 30 June/ 4 July 2016**

66. On 30 June 2016, Mr Smith e-mailed Mr Gray, asking him how certain meetings had gone and when he was back to "*sit down and review*". At the time, Mr Gray was out of the country travelling. Mr Smith says he had sent the 30 June e-mail merely "*to suggest we meet to talk further*." Mr Gray maintains that a contract had already been concluded three weeks earlier and that "*Doug was keen for me to commit more time to Blackmoor*". After Mr Gray landed back in the UK on 4 July 2016, they exchanged further e-mails to arrange to meet the next day for breakfast.

3.14 **Mr Gray and Mr Smith meeting - 5 July 2016**

67. Mr Gray and Mr Smith met again at Baker & Spice on 5 July 2016. Mr Gray pleads (at [PoC 13]) that he and Mr Smith confirmed at this meeting that they were ready to proceed together and market the Fund under the BIPL/ Blackmoor name, reiterating that they would look to build Blackmoor as equal partners and discussing the process for pitching to investors, including pooling contacts. He says they also discussed the desirability of a third partner and they agreed someone with extensive operational experience could give them additional credibility in their pitches. However, they left that decision to later.

68. Mr Smith says that, at the meeting, he asked Mr Gray what he could bring to generate client interest to sit alongside, and unlock, Mr Bonomi's contingent interest as an investor. Mr Gray insisted he had a great potential client contact network and relationships and had been very successful in capital raising, which Mr Smith presumed to be at NuOrion, being his only capital raising role. Mr Smith also says that, despite his reservations, having few alternatives, he offered to try Mr Gray on the Investment Team, with the sole focus to attract client interest to get to target launch capital ($US100MM). If his involvement did not generate such interest or they did not get on, Mr Gray's involvement would end. Mr Gray would continue in his NuOrion role which, given its different area of focus, did not present a conflict but the two activities would need to be presented positively to Blackmoor and NuOrion clients.

69. Mr Smith also says that Mr Gray said he expected to be a senior member of the team, with matching economics, if they were successful. Mr Smith responded that he would be a senior member of the team with 'economics' in the business if they succeeded in launching the fund together but Mr Smith would always retain control, Blackmoor being his 'baby'. Until then, consistent with the Pre-Launch Terms, Mr Gray would not be paid anything, any future role in Blackmoor was contingent on success in capital raising and Mr Gray would carry his direct expenses, with Mr Smith covering all Blackmoor's expenses. Once progress was made, they would have further discussions with a view to firming up mutual expectations about the terms of any potential future participation in the business. Mr Smith says they shook hands at the end of the meeting and said he was looking forward to it and "*it should be fun*." In this way, what Mr Smith describes as the 'Second Blackmoor Team' was born.

3.15 **The parties' cases as to the position reached by 5 July 2016**

70. Accordingly, the parties' respective cases as to the position reached by 5 July 2016 are starkly different: Mr Gray contends that he and Mr Smith had agreed some 20 days earlier a binding oral contract to build the Fund together on the basis of the Express and Implied Terms, with significant steps starting to be taken to that end; Mr Smith says that 5 July 2016 represented the start of a non-contractual 'trial' period, during which Mr Gray was expected to focus on capital raising. If successful, there would be a further discussion about Mr Gray's participation in the business, including a share of the 'economics'.

3.16 **The Blackmoor investor presentation**

71. Mr Smith says that, having pasted in Mr Gray's details to "*look at the proposition in front of my eyes so that I can see how it feels and fits*", he e-mailed Mr Gray with Blackmoor's investor presentation after their meeting on 5 July 2016 and, given their lack of a shared track record, slightly later that day, saying that he (Mr Gray) needed to think through his positioning to address "*how to tie you and I together so the team looks to have history and continuity*." Mr Gray said he saw this as a "*significant development*" because it showed they were ready to "*escalate the hunt for potential investors*", also sending a clear message to potential investors that they "*were going forward on a joint ticket*."

72. The investor presentation was an important marketing document, explaining Blackmoor's strategy of being a "*relationship investor employing a private equity due diligence and engagement approach to invest in fundamentally undervalued European mid-market listed companies*". The then current draft (with the square brackets therein also indicated in this paragraph) identified Blackmoor's (i) focus as a reference shareholder in a limited number of high-quality but undervalued mid-market European listed companies in the industrials, business services and consumer goods and services sectors with improvement potential (ii) approach of understanding those companies' improvement potential, building a reference shareholder stake and supporting good management to implement improvement strategies (iii) patient investment strategy, seeking to create and unlock shareholder value over a 3-5 year horizon (iv) target H2 2016 launch with [€200-300MM] capital and (v) team members, being seasoned private equity and public market investors and operators in the target sectors, indicated in the Executive Summary as comprising the Investment Team "*led by its 4 partners*", Messrs Smith, Gray, [Christian Kappelhoof] and [Valentin Pierburg], with the Advisory Committee chaired by Mr Lis (later indicated in square brackets) and the Operating Bench by [Bill Whiteley].

4 Events after 5 July 2016

4.1 **Introduction**

73. Before considering which (if either) rival version of events of what occurred at the 5 July 2016 meeting (and before) is correct, I also set out the main events post-dating that meeting since some of those matters too may be relevant to the conclusion (or otherwise) of the Alleged Oral Agreement, the Claimant's alternative case (at PoC

[10]) that a contract came into existence in the same terms during performance and the other causes of action asserted by the Claimant.

4.2 Performance of the Alleged Oral Agreement - introduction

74. It is common ground that Mr Gray and Mr Smith collaborated until May 2017, including by marketing the Fund to potential investors. The Claimant says that this is consistent with the Alleged Oral Agreement reached on 15 June 2016. The Defendants say that their mutual efforts are consistent with a 'trial collaboration period' and inconsistent in a number of respects with the Alleged Oral Agreement.

75. Moreover, the amount of work the Claimant says (at PoC [28.2]) he undertook (2,235 hours) is disputed as significantly overstated, with the Defendants estimating, albeit not admitting, that Mr Gray's work would not have taken more than 780 hours. I address this further below in the context of Mr Gray's unjust enrichment claim.

4.3 Performance of the Alleged Oral Agreement – July - December 2016

76. Mr Gray pleads (at PoC [16]) that he dedicated the substantial majority of his working time during the period 5 July to the end of December 2016 to the performance of the Alleged Oral Agreement and, in particular: (i) the pooling of joint contacts (ii) the assembling of the Blackmoor Team (iii) the joint marketing of Blackmoor and (iv) the performance of financial analysis relevant to potential Blackmoor investments. In his first statement, Mr Smith described Mr Gray's expected role in similar terms. However, it is common ground that the most important task was to raise capital from investors. That much is evident from the joint report of Dr Fitzgerald and Mr Patterson on remuneration (Joint Statement at [2.3]) where they state that "[t]*he Experts agree that the activities being undertaken by the Claimant were centred around successfully bringing in investors*." Mr Gray also described in his second statement and oral evidence how capital raising was their "*first priority*" and Mr Smith in his first statement as "*Mr Gray's primary objective*." Indeed, without investors, there would obviously be no Fund and, on either party's case, no 'economics' in which to share, whether pursuant to an existing agreement (as Mr Gray says) or some potential future agreement (as Mr Smith says). To that end, it is common ground that, at least once the summer 2016 holiday period was over, Mr Gray and Mr Smith began contacting potential clients, leveraging their existing contacts (including intermediaries) for that purpose. It is also common ground that:-

a. Mr Gray was set up with a blackmoorip.com e-mail address on 20 September 2016, allowing him actively to represent Blackmoor in his external dealings;

b. Mr Gray and Mr Smith met a number of colleagues with a view to building the Blackmoor Team, including Mr Gray's contact, Mr Jan Prising, who was subsequently appointed to the Blackmoor Advisory Committee;

c. The Blackmoor presentation, originally drafted by Mr Smith, was amended and improved, including with input from Mr Gray; and

d. The Blackmoor Primary Investor List (**PIL**), also originally created by Mr Smith, was expanded to include Mr Gray's contacts and updated on an ongoing basis to reflect their marketing activities.

4.4 Discussion about equity/ decision-making – August - October 2016

77. In his first statement, Mr Smith says he met Mr Gray on 30 August 2016 to review the Blackmoor presentation when Mr Gray wanted to discuss his decision-making authority and his equity participation in Blackmoor. Mr Smith says he found this odd and it made him uncomfortable because they had yet to do any work or make any progress. He also considered Mr Gray pushing for equal decision-making control to be naïve because of Mr Gray's lack of track record. Mr Smith says he told Mr Gray that this was not the time to be having that discussion.

78. Mr Smith also says that, despite this, Mr Gray wanted to return to the subject on 20 September 2016, in response to which, Mr Smith repeated that it was premature to have this discussion, albeit reiterating that, if they were successful in raising capital and launching, he would have no problem with Mr Gray having a significant portion of equity but that equal decision-making would undermine his track record. To resolve this issue, he said he would collect industry examples from Schulte Roth & Zabel LLP (**SRZ**), solicitors, and, in an e-mail to Mr Gray dated 23 September 2016, subsequently confirmed their view that "*consensus unfortunately doesn't work*."

79. Mr Gray denies such discussions about equity participation or equal decision-making but says in his first statement that they did have discussions (and a related e-mail exchange) in late September 2016 about *stalemate resolution* but only because they had *already agreed* equal decision-making power under the Alleged Oral Agreement and, having been told that investors might demand a unilateral decision-maker over exiting investments, Mr Smith was now seeking such unilateral authority. According to Mr Gray, Mr Smith did not let the matter lie and Mr Gray eventually gave way to his "*constant pestering*" on 31 March 2017.

80. On 25 October 2016, Mr Smith e-mailed Mr Gray saying he was coming to the view that he should offer Mr Bonomi "*5-10% of the management co*." Mr Gray agreed this made sense if Mr Bonomi were to "*advocate/ sponsor/ support us*."

4.5 Performance of the Alleged Oral Agreement – January - May 2017

81. In his first statement, Mr Gray says that, by the end of 2016, the Blackmoor business venture was really taking shape, the investment and marketing strategy had been agreed and they had started to market the Fund as equal partners.

82. Mr Gray also says that, by this stage, they needed to consider Blackmoor's regulatory position. On 30 December 2016, Mr Smith sent him FCA Form A to complete. Mr Gray says he understood he needed to hold an official position in BIPL to secure the necessary regulatory approvals and, on 26 January 2017, Mr Smith also sent him a link to complete Form AP01 to become a BIPL director, stating that it was worth him submitting this before a forthcoming Blackmoor US marketing trip. Mr Gray filled out the form and mailed it from Heathrow Airport on 30 January 2017, becoming a director on 1 February.

83. Mr Gray submitted the FCA form on his return from the US on 7 February 2017, ticking the box 'Partner/ Sole Trader' in Section 3.01, the 'Partner' function in Section 3.02, consistent, he says, with the Alleged Oral Agreement and, reflecting his departure

from NuOrion, the ‘Resignation’ box in Section 4.01k. Mr Gray says that, by taking these steps, he had crossed the “*proverbial rubicon*” - no longer working for NuOrion but focusing exclusively on Blackmoor.

84. Although committing exclusively to Blackmoor meant leaving behind potentially lucrative ongoing NuOrion deals, Mr Smith would no longer pressure him to leave NuOrion (as he says Mr Smith had started to do in July 2016 when complaining about his use of NuOrion’s e-mail for Blackmoor matters). Moreover, his relationship with Mr Phillips had become strained since Mr Phillips had said he wanted to reinstate himself as NuOrion CEO, inconsistently with the “*equal partnership*” they had previously agreed. In certain February 2017 e-mails to potential investors, Mr Gray noted that he had now “*formally partnered*” with Mr Smith and says he told potential investors on their US trip that he had left NuOrion.

85. Mr Smith says that Mr Gray’s appointment as BIPL director was a cosmetic exercise for potential investors, to bolster Mr Gray’s seniority and make the team look more ‘joined up’. It was not required for the FCA application and Mr Gray did not carry out any director responsibilities. Nor, even though both Mr Gray and Mr Smith had hatched the CF4 “*Partner*” function on their FCA Form As, were they submitted “*on the basis of us being equal partners*.” Mr Smith also says he did not pressurise Mr Gray to leave NuOrion and it would have made more sense for him to stay as it gave him credibility. Mr Smith’s only issue with a ‘dual’ role was coherence of messaging to potential investors and conflict avoidance but NuOrion’s deal “*sweet spot*” was the US such that there was no conflict.

4.6 Mr Smith’s ‘fee-splitting’ proposal – 8 February 2017

86. On 8 February 2017, Mr Smith e-mailed Mr Gray setting out a proposed financial split for any SPV deals they might conclude - an initial tranche of €250,000 for the deal originator/ leader, followed by a 51:49 split. Mr Gray says that he was “*massively irritated*” by this suggested departure from the ‘50:50’ basis underpinning the Alleged Oral Agreement already concluded in June 2016. However, Mr Gray did not respond.

4.7 Ongoing marketing efforts – January to May 2017

87. Mr Gray’s and Mr Smith’s marketing efforts continued into 2017. It seems to be common ground (or no major point was taken at least) that, between January and May 2017, Mr Gray participated in around 43 formal pitches and 16 conference calls. Their efforts included more in-person meetings such as marketing trips to Zurich (twice), east coast and central USA and Berlin (twice).

4.8 Fund structure – lawyers’ meetings – February 2017

88. It is also common ground that Mr Gray and Mr Smith met with SRZ on 9 February 2017, and Mr Smith alone with Herbert Smith Freehills (**HSF**) on 14 February 2017, when they discussed the proposed Fund structure. SRZ proposed a Cayman Master Feeder structure and HSF a Guernsey structure. Neither proposal indicated BIPL as the ultimate management company that would receive management and performance fees from the Fund. SRZ was selected as the preferred provider, agreeing not to be paid until Fund launch.

4.9 **The 'splitting' of expenses – March 2017**

89. On 24 March 2017, Mr Gray and Mr Smith e-mailed each other about settling up the expenses from some of their marketing trips. The relevant spreadsheet shows that expenses paid on behalf of both of them were split equally, with "*individual expenses kept personal*." The Claimant says this splitting of expenses was consistent with the Alleged Oral Agreement, specifically the Equal Money Term. The Defendants say this arrangement was consistent with Mr Gray settling his own direct expenses as discussed on 5 July 2016, with Blackmoor meeting other business expenses to which Mr Smith says Mr Gray never contributed, inconsistently with the Equal Money Term.

4.10 **The end of the 'Second Blackmoor Team' – introduction**

90. Mr Gray and Mr Smith parted company in September 2017, albeit the parties' accounts of the preceding events are also very different. Reducing their rival positions to their barest terms, Mr Smith says he found that Mr Gray was not a 'good fit' with Blackmoor (personally and professionally). With the "*further negative feedback*" they received, their unsuccessful US trip in February 2017 was a 'reality check' for him. Blackmoor was making no 'market headway'. The current Investment Team was an uncompelling proposition and was not viable. He decided their collaboration should end and he told Mr Gray this from May 2017 onwards. Although he ended Mr Gray's 'trial period' (as he was entitled to do), he treated him courteously, including offering him a 'transition' role on the Advisory Committee.

91. By contrast, Mr Gray says that significant progress had been made to build Blackmoor together but, unbeknown to him, Mr Smith had gone behind his back (and the Alleged Oral Agreement and his fiduciary duties) to develop Blackmoor with what he calls the 'Parallel Blackmoor Team' (including Mr Treichl, a co-founder of Audley Capital) and in conjunction with new (undisclosed) cornerstone investor interest whose demands were in conflict with the Alleged Oral Agreement. While Mr Smith 'ploughed his own furrow' with Mr Treichl, he 'strung Mr Gray along' continuing to exploit his efforts, only then to 'cut him loose.'

92. Given the significance of the events during this period, a number of which are asserted as breaches of the Alleged Oral Agreement and/ or Mr Smith's alleged fiduciary duties, I briefly summarise here the parties' related evidence.

4.11 **The end of the 'Second Blackmoor Team' – April – September 2017**

93. Mr Smith says that, by April 2017, "*substantively all potential client interest*" was exhausted, the Blackmoor team needed a "*significant overhaul*" and he therefore initiated a number of discussions with Mr Gray, starting in April 2017 when he highlighted Blackmoor's lack of "*traction*" in the market. Mr Gray accepted in his oral evidence that, as at April 2017, no capital had yet been committed to Blackmoor but denies such discussions with Mr Smith.

94. According to Mr Smith, this lack of market interest was reinforced when he updated the PIL in early May 2017 and was "*confronted with page after page of red*", representing exhausted or disinterested clients.

95. The Bi-Invest Contract, which Mr Smith says provided BIPL's working capital, was due to expire on 5 May 2017.

96. Mr Smith says he reiterated this lack of traction at a meeting at Baker & Spice on 8 May 2017, noting Mr Gray's need to "*look at other options*", to bottom out the final 'live' potential client interest but not to initiate any new efforts. He said the meeting was uncomfortable but he took some assurance from Mr Gray asking what "*the story*" should be for the market. Mr Smith also says that, a week later, on 15 May 2017, he pushed the message harder in a further meeting. He also raised the need to remove Mr Gray from the FCA application but agreed to keep him on in case the market 'story' included Mr Gray's involvement in some other role.

97. Mr Gray now appears to accept that they met on both these dates in May but denies that Mr Smith told him that they were not getting traction or that his involvement in Blackmoor was coming to an end. Mr Gray says Mr Smith mentioned cashflow issues and said there was a "*high chance*" they would both need to look at something new unrelated to Blackmoor. Mr Gray also said they discussed what they would tell the market if they went their separate ways at some point but Mr Smith did not "*definitively*" say that Mr Gray's involvement was at an end. If he had, they would not have continued to market Blackmoor throughout May 2017 and he would not have provided his further input to the FCA application. Rather, they decided at this meeting to focus on "*high likelihood cornerstone investors*", putting on the 'backburner' their efforts with other investors.

98. A meeting in the diary with Morgan Stanley Alternative Investment Partners later on 15 May 2017 was cancelled. Since he received no e-mails, Mr Smith says he assumed Mr Gray had unilaterally cancelled this. Mr Gray says he postponed the call to focus on cornerstone investors, as had been agreed.

99. On 17 May 2017, Mr Gray sent his CV and 'deal sheet' to Chris Doukaki and Ian Axe, the latter later becoming the CEO of Panmure Gordon & Co.

100. Mr Gray and Mr Smith's marketing activity continued, including pitching to KKR on 16 May 2017, re-visiting Zurich on 23 May to meet Tribus Capital and attending SRZ's 'shareholder activism' conference in London on 24 May.

101. On 26 May 2017, Mr Smith e-mailed Mr Gray asking for his input on further FCA questions for the FCA application. Mr Gray provided this on 30 May.

102. Mr Smith says they met again on 1 June 2017 when he reiterated that he and Blackmoor were "*going in a different* [sic] *direct*[ion]" and they discussed switching off Mr Gray's Blackmoor e-mail and cloud storage and removing him from tthe BIPL board and the FCA application. Mr Smith says Mr Gray was very quiet, almost "*shell shocked*", and asked him not to action these plans "*as he needed time to think*". Mr Gray says that Mr Smith told him at this 1 June 2017 meeting that he was "*planning to take Blackmoor in a different direction*" and "*taking the BIPL vehicle as his own*", causing his blood to boil. Mr Gray says this was "*provocative in the extreme*" but, rather than react, he wanted time to marshal his thoughts - according to Mr Gray, the meeting was very short.

103. On 5 June 2017, Mr Gray followed up on an introduction by UBS by sending marketing materials to a new contact, the Abu Dhabi Investment Council.

104. On 14 June 2017, they also received a request for an introduction to Blackmoor from a high-quality, potential client, the University of Michigan, an approach described by Mr Smith in his related e-mail to Mr Gray as "[g]*ood, but awkward given status*."

105. They met again on 15 June 2017 when Mr Smith says he re-iterated that he was taking Blackmoor in a different direction. Mr Gray says Mr Smith repeated that he "*was looking to take the BIPL vehicle for himself*" and Mr Gray told him that he had acted in an "[sic] *underhanded manner and that* [sic] *had used me, my professional experience and standing, and my efforts to build Blackmoor*" although, when tensions eased, they discussed again looking to find a cornerstone investor.

106. On 16 June 2017, Mr Smith e-mailed Mr Gray stating:-

> "[a]*s mentioned last week, but worth reminding to avoid issues, we have to stop actively marketing the James and Doug Blackmoor proposition; we need to manage incoming, but no new outgoing*."

107. On 7 July 2017, the FCA requested a £100,000 equity subscription into Blackmoor to meet regulatory capital thresholds. This was negotiated down to £50,000 and funded by Mr Smith and his wife.

108. Mr Smith e-mailed Mr Gray on 11 and 14 July 2017, proposing meetings and addressing practicalities, including the deletion of the Dropbox and e-mail. Mr Gray responded on 18 July saying "*Dropbox – go for it*." They met again on 24 July 2017. Mr Smith says he repeated then that the collaboration was over. Mr Gray denies this, saying that he did not say much apart from that he would reflect on next steps during his summer holiday.

109. On 1 September 2017, BIPL received confirmation of FCA authorisation.

110. On 5 September 2017, Mr Smith sent a further e-mail stating that "*it was a great shame that you and I as a team didn't have the magic sauce to get to launch; it was apparent when you and I discussed in April and, as you know I highlighted the need to move on in May*." He also referred to outstanding administrative issues and asked Mr Gray whether he had heard further from the University of Michigan.

111. Mr Gray and Mr Smith met again on 13 September 2017. Mr Smith says Mr Gray suggested he had been a valuable and important part of building Blackmoor such that he should have half of Blackmoor, albeit only citing as evidence the FCA regulatory approval. Mr Smith says he was "*stunned*", explained how their association had been deliberately set up so that he always had control of Blackmoor, how the FCA approval had nominal value and that Mr Gray being on the approval had been more of a favour to him than a benefit to Blackmoor. However, Mr Smith also says he suggested that Mr Gray was better suited to an Advisory Committee role, as he had originally stated in June 2016, for which Mr Gray would earn a fee for any investment by clients introduced by him.

112. Mr Gray says he told Mr Smith on 13 September 2017 that they were "*partners*" to which Mr Smith responded that BIPL was a limited company, not a partnership, from which Mr Gray deduced he must have received legal advice. Mr Gray says he refused to permit his e-mail address to be turned off or to resign as BIPL director and that he told Mr Smith his FCA authorisation should be maintained. Mr Gray also says Mr Smith suggested an alternative role as a member of the Advisory Committee which he found "*massively insulting*". After the meeting, Mr Smith suspended Mr Gray's e-mail but kept his FCA application and directorship in place as a "*further courtesy*" and to preserve the chance of an agreed transition.

113. They met again on 19 September 2017. Mr Smith says he explained that he was continuing with Blackmoor, that he would shortly be heading to the US for meetings and that Mr Bonomi was still interested in Blackmoor, albeit more likely if it was housed within his family investment vehicle, Bi-Invest, which was not attractive to Mr Smith. Mr Smith says he reminded Mr Gray that he could be part of the Blackmoor Advisory Committee.

114. Mr Gray says it was at this meeting that Mr Smith "*opened up about what he had really been doing in the background*." He says that Mr Smith told him he had got Mr Bonomi on board as a cornerstone investor but that he was pushing for more influence. Santo Domingo had also committed as a co-cornerstone investor. These parties (and the new Advisory Committee chair) were all jockeying for a greater percentage of fees and Mr Smith was "*still grappling how to fit all the moving pieces together*." Mr Gray also says Mr Smith told him that he thought he knew Mr Treichl but found out that he did not after all. Given Mr Treichl's passing, there was a "*huge partnership hole*" at Blackmoor. Mr Gray thought that all Mr Smith's statements that they should try "*to make things work*" had been a ploy to buy time while the FCA application was processed and Mr Gray's investor contacts exploited.

115. Mr Smith followed up with an e-mail on 26 September 2017, proposing that they should identify and separate their contacts into "*buckets*", allowing them to discuss different fee levels for the different buckets if Mr Gray did join Blackmoor's Advisory Committee.

116. On 29 September 2017, Mr Gray e-mailed Mr Smith in the following terms:-

> "*As you are fully aware, we entered into a 50/50 partnership in relation to Blackmoor. You are currently attempting to sideline me from this partnership and even suggesting that I now accept a lower role. This is unacceptable and I do not believe you are entitled to do this. Given your approach, I have now instructed solicitors who will be writing to you shortly to set out my legal position and to discuss next steps. In the meantime, my rights are fully reserved.*"

117. On 2 October 2017, Mr Smith responded in the following terms:-

> "*As I have said consistently during our numerous discussions on this topic, you are not and have never been an equity participant in Blackmoor and there was never an agreement to make you an equity participant. If we had been successful in our objective of raising an investment fund, I did say that I was willing to*

consider selling to you an amount of equity that was to be agreed upon depending on your contribution and certain other factors; unfortunately, and despite best efforts, we were not successful in that pursuit, and there was no traction back in May/June when I decided to conclude efforts."

118. Mr Smith says that, since it was clear that Mr Gray would have no role in Blackmoor, he informed the FCA that Mr Gray should no longer be regulated as an approved person. Mr Smith also arranged for Mr Gray's removal as BIPL director.

4.12 **'Third Blackmoor Team' – introduction**

119. As noted (at [5]), Mr Gray alleges that prior to, and in parallel with, the events described immediately above which led to the end of their collaboration, Mr Smith was, unknown to Mr Gray, and in breach of the Alleged Oral Agreement and his fiduciary duties, talking to Mr Treichl with a view to him replacing Mr Gray on the Investment Team and launching the Fund with him instead and the benefit of undisclosed cornerstone investment Mr Treichl had helped to secure.

4.13 **'Third Blackmoor Team' - Mr Smith's evidence**

120. Mr Smith says that he first met Mr Treichl to discuss a potential role with Blackmoor on 25 January 2017. Mr Smith followed this up by sending Mr Treichl various documents in February and March 2017, including (i) the Blackmoor track record, investment terms sheet and investor presentation (ii) Blackmoor's cashflow business plan (iii) UBS and JPM industry data showing the competitive landscape, indicative fee terms and target clients (iv) SRZ's potential fund structure information and (v) excerpts from the PIL. However, the idea of the 'Third Blackmoor Team' – as he calls it – started tentatively in March 2017 when he was discussing the Advisory Committee Chairman role with Mr Treichl and it came together more seriously in May 2017 when it had become clear that the Second Blackmoor Team was not viable and (as noted at [96]) Mr Gray was told he needed to think about other options.

121. Mr Smith says Mr Treichl accepted the Advisory Committee Chairman role over lunch on 23 March 2017 when Mr Smith also tested his interest in joining the Investment Team, having already sent him a 'strawman presentation' on 13 March 2017, naming him as co-Managing Partner, with Mr Treichl's colleague, Mr Hill, also shown on the Advisory Committee. Mr Gray had been removed from that version of the presentation. At that stage, Mr Treichl declined this more central role, wanting to talk to his longstanding friend, Mr Bonomi, before committing further.

122. Mr Smith says that he, Mr Bonomi and Mr Treichl all met on 27 April 2017. Although expressing interest, Mr Bonomi was concerned that all potential client leads had already been exhausted. After having Mr Smith test the Blackmoor proposition further with his colleague, Mr Nauckhoff, on 24 May 2017, Mr Bonomi re-endorsed this, Mr Treichl committed fully to the Investment Team and the 'Third Blackmoor Team' came together, comprising Messrs Smith and Treichl on the Investment Team, Messrs Johnson, Medlicott, Mire and Hill on the Advisory Committee (Mr Prising having been removed) and Mr Kasun de Silva as CFO.

123. Mr Smith says that, during April and May 2017, he had discussed with Mr Treichl how Blackmoor's leadership would work: if they successfully launched the

Fund, they would be co-managing partners, with equal economics and a mutual veto in deals. The engagement would not be exclusive unless there was a successful fund launch. In the meantime, Mr Smith would continue to fund Blackmoor, with each of Mr Smith and Mr Treichl carrying their own direct expenses and Mr Smith remaining sole owner of Blackmoor if things did not work out.

124. In terms of potential investors, on 30 May 2017, Mr Smith sent Mr Treichl a "*summary of launch capital candidates*", indicating three classes of investor candidates: (i) priority founder investors to €100MM (shown as "*JM*", "*ACB*", "*Treichl/ Smith*" and "*Ward/ Phipps*") (ii) other founder and priority day one investors and (iii) other day one and year one investors (including three indicating Mr Gray as a "*Lead*").

125. Mr Smith says that, although Mr Bonomi (ie: "*ACB*") was supportive and said he would like to be involved, he still did not commit but wanted to meet the other cornerstone investors. In that regard, Mr Treichl had introduced Mr Hill of the Meinl family office to Mr Smith, with Mr Hill becoming a member of the Blackmoor Advisory Committee. Mr Smith had later met with the Meinl office principal, Julian Meinl (ie: "*JM*"), at Ockenden Manor, West Sussex, with Mr Treichl, to discuss a potential investment in Blackmoor.

126. Having e-mailed Messrs Treichl and Hill on 4 June 2017, saying that he had "*hard circled JM's partnership this week*", Mr Smith sent a draft term sheet to Mr Hill on 7 June with a partnership proposal, including one third manager equity for each of Messrs Smith, Treichl and Meinl, a €40m investment by Mr Meinl, fund structure and related economic flows, a pre-determined fund launch date and a €3m convertible finance facility from Mr Meinl to provide working capital for the Fund.

127. Mr Smith says that, although the Meinl office indicated its interest, like Mr Bonomi, it did not commit, saying it would like to hear what Mr Treichl's second family office contact (the Phipps family) said first. According to Mr Smith, it appeared that, as of 5 June 2017, they had a 'good prospect' of "*securing two of the three co-dependent jigsaw pieces that we needed to fit together in order to attract the necessary Target Launch Capital*" but bringing in the Phipps office might get Messrs Bonomi and Meinl "*over the line*". On 9 June 2017, Mr Smith e-mailed Mr Treichl indicating that he had had a brief but good call with Mr Bonomi who was "*moving towards the 125bps/ no economics offering. Size is €25, maybe more*".

128. Mr Treichl flew to the USA to meet the Phipps family office and Mr Smith discussed with him how they might fit into the proposal so as to 'unlock' commitments from Messrs Bonomi and Meinl. Although Mr Treichl indicated that things with the Phipps office were "*almost there*", he died unexpectedly on 16 June 2017. Mr Smith says that, as a result, the 'interwoven' cornerstone investor interest fell apart. Mr Gray, however, relies on Mr Smith's and Mr Hill's e-mail exchanges in June 2017, expressing their determination to press on despite Mr Treichl's death and Mr Smith's statements to potential investors in July 2017 that he "*already has 2 founder investors (European family offices) that have committed a minimum of €50 million, which could potentially go to €100 million*" and "*3 anchor investors (75-150M)*" as the "*best evidence as to the state of Blackmoor in July 2017*."

4.14 **'Third Blackmoor Team' – Mr Gray's evidence**

129. Mr Gray says he was deliberately kept in the dark about these events and, as noted (at [114]), that it was not until their meeting on 19 September 2017 that Mr Smith "*opened up about what he had really been doing in the background*." Mr Gray's evidence about the 'Third Blackmoor Team' is therefore understandably brief.

130. Mr Smith says that, in March 2017, he discussed Mr Treichl's potential involvement in Blackmoor with Mr Gray but, in his evidence, Mr Gray was adamant that Mr Smith never mentioned Mr Treichl to him until his name appeared in one of their pitchbooks in May 2017. Had Mr Smith mentioned his name, he says he would have asked to meet and vet him, as he had with every other member of the Advisory Committee.

131. Moreover, Mr Gray says he had "*zero idea*" that Mr Smith was having conversations about pulling together what he (Mr Gray) describes as the 'Parallel Blackmoor Team'. Indeed, as he only now knows, at exactly the same time as Mr Smith was travelling to Ockenden Manor on 29 March 2017 to meet Messrs Meinl and Treichl (noted at [125]), Mr Smith was e-mailing Mr Gray to ask him to draw up a "*first draft of bullet points*" for UBS.

132. When taken to the term sheet dated 7 June 2017 containing the Smith/ Treichl/ Meinl partnership proposal by way of comparison with the Alleged Oral Agreement, Mr Gray accepted that the latter did not provide for *equity* participation in BIPL, a detailed fund structure or pre-determined fund launch date, that he (Mr Gray) had not brought a €40MM investor (such as Mr Meinl) – in fact, no committed capital at all - at that start of his collaboration with Mr Smith, and that, although he had set aside funds for that purpose, he had not injected any working capital into BIPL.

4.15 **Mr Smith's evidence about the 'Fourth Blackmoor Team'/ Fund launch**

133. Mr Smith explains in his statement how, following Mr Treichl's death, the 'Fourth Blackmoor Team' came together. In addition to introducing Mr Hill, Mr Treichl had also introduced Mr Schmidt-Chiari to Mr Smith as a potential member of the Blackmoor Investment Team or Advisory Committee. Mr Schmidt-Chiari was a close friend of Mr Treichl and he and Mr Smith exchanged condolences following his death and discussed options going forward. In the weeks that followed, Mr Schmidt-Chiari and Mr Hill also pitched investment ideas to Mr Smith.

134. Mr Smith's close friends and advisors, Ms Carnathan and Mr Franco, also sought to assist him, in the case of the latter, effecting an introduction in July 2017 to an intermediary called Nolan Capital (**Nolan**). (Mr Franco was shown as an intermediary on Blackmoor's PIL from the period of the collaboration between Mr Gray and Mr Smith.) In September 2017, a "*narrow path to launch a Blackmoor Fund*" opened up with Nolan's introduction to a potential US investor. In addition, two of Mr Smith's former McKinsey colleagues also indicated that they might be willing to invest.

135. Between July and September 2017, Mr Smith worked on a deal-by-deal basis with Mr Schmidt-Chiari and Mr Hill. Mr Schmidt-Chiari joined the Blackmoor Investment Team in mid-September 2017 on the basis of no compensation prior to

success, responsibility for his own direct expenses and a discussion about equity participation if success was achieved. The Advisory Committee included Mr Hill, Mr Medlicott as an informal adviser and others. Mr De Silva joined as CFO in February 2018.

136. Mr Smith says that, although the potential US investor introduced by Nolan was willing to invest, regulatory requirements meant that any capital invested had to be matched dollar for dollar by other investors. Ultimately, seven initial investors committed capital of €28.4MM in aggregate. The Blackmoor Fund was launched on 9 March 2018, albeit well below the target launch capital of US$100MM. Blackmoor's fee obligation to Nolan (as placement agent) also meant that Blackmoor's 'breakeven' capital was increased. Given the challenging economics, Messrs Smith, Schmidt-Chiari and De Silva agreed to lower and/ or deferred compensation packages until Blackmoor could afford to pay more.

137. Blackmoor's client capital grew from €28.4MM at launch to €72.2MM as at 31 December 2020, including three new investors, albeit notice of partial redemption has been received from the US investor. None of the 10 Blackmoor investors (or their investment vehicles) was on Blackmoor's PIL during the period of the 'Second Blackmoor Team'.

138. The agreement for Mr Schmidt-Chiari's participation in Blackmoor equity was committed to a final term sheet dated 19 October 2018.

139. Mr Smith has received a gross salary of £186,836 across the four years since launch.

4.16 Mr Gray's first letter before action – 6 October 2017

140. On 6 October 2017 (around the same time as Mr Gray says he prepared what are now sections A-E of his first statement), his then solicitors, Burges Salmon LLP, sent Mr Smith a letter before action, in which they asserted the primary claim that Mr Gray and Mr Smith had "*both formed a partnership encompassing all of Blackmoor's assets*" … and that all "*partnership capital and profits should be divided on a 50/50 basis between you and our client*." Burges Salmon also asserted breach of fiduciary duty by Mr Smith (as Mr Gray's partner). In the same letter, Mr Gray advanced an alternative case that he and Mr Smith had "*contractually agreed to operate Blackmoor as a joint venture*", the material terms of which were that they would:-

a. introduce their contacts for the purpose of raising investment capital and jointly market Blackmoor's business to those contacts;

b. act as joint investment managers of all capital raised and have equal say over Blackmoor's business operations;

c. split all fees generated equally; and

d. deal with each other on a good faith basis in all their Blackmoor dealings.

141. Mr Smith's solicitors, Withers LLP, responded on 27 October 2017, pointing out that Mr Gray's primary case was "*fundamentally flawed*", including on the basis that the establishment of a corporate entity (BIPL) to 'house' the Blackmoor business made a partnership inherently unlikely (relying on *Dutia* v *Geldof and others* [2016] EWHC 547 (Ch)).

4.17 Mr Gray's second letter before action – 18 June 2018

142. On 18 June 2018, Burges Salmon sent a second letter before action, stating that Mr Gray's case would not be advanced under the Partnership Act 1890 but on three bases: (i) that a contract came into being on 15 June 2016 as to the building and running of Blackmoor, subsequently performed by Mr Gray and repudiated by Mr Smith (ii) that fiduciary duties arose between Mr Gray and Mr Smith as they worked together on Blackmoor, a 'for profit' joint venture, and such duties had been breached and (iii) 'quantum meruit'.

143. The contractual terms asserted in this letter were substantially similar to those pleaded in respect of the Alleged Oral Agreement, save that the implied term as to termination was said to prevent either party terminating the contract "*whilst a potential Cornerstone Investor from the Joint Contacts* ***was interested in*** *investing in the fund and/ or an SPV investment*" rather than, as pleaded (at PoC [9.2.3]), "*whilst there was* ***a real prospect of securing*** *a potential Cornerstone Investor*" (my emphasis in bold).

4.18 Mr Gray's claim - November 2018

144. Not having been able to resolve their differences, Mr Gray issued his claim in November 2018. A number of contractual and fiduciary breaches were asserted but those put forward most forcefully in submission were perhaps (i) Mr Smith's building and development of the 'Parallel Blackmoor Team' without Mr Gray's knowledge or full and proper disclosure and (ii) Mr Smith's announcement on 1 June 2017 that he wanted to take Blackmoor in a "*different direction*" and would be taking BIPL "*as his own*", both at a time when, unknown to Mr Gray, Mr Smith had secured one or more cornerstone investors. Mr Gray's contractual and fiduciary claims are directed against Mr Smith alone but BIPL has since been joined as an additional defendant to Mr Gray's further claim against Mr Smith in unjust enrichment.

5 The Alleged Oral Agreement – legal analysis

145. With that long exposition of the factual framework, I now address in turn each cause of action asserted by Mr Gray, starting with his contractual claim. As noted, it is Mr Gray's case that, by 15 June 2016, there was a binding oral agreement between him and Mr Smith in the terms of the Express and Implied Terms, alternatively that such an agreement can be implied by the conduct of the parties in its performance. Mr Smith's case is that no such contract was concluded, whether in the terms alleged or at all, and that the 'performance' of the parties is consistent with a non-contractual 'trial collaboration period' and inconsistent in a number of key respects with the Alleged Oral Agreement such that no contract can be implied by conduct either.

5.1 Legal principles

146. Although both parties referred me to extensive authority, it is fair to say that there was little difference between them as to the legal principles applicable to the conclusion (or otherwise) of the Alleged Oral Agreement. Perhaps the most useful starting point is the exposition of general principle by Leggatt J in *Blue* v *Ashley* [2017] EWHC 1928 (Comm) (at [49]-[64]). As to **oral agreements**:-

> "*Generally speaking, it is possible under English law to make a contract without any formality, simply by word of mouth. Of course, the absence of a written record may make the existence and terms of a contract harder to prove. Furthermore, because the value of a written record is understood by anyone with business experience, its absence may – depending on the circumstances – tend to suggest that no contract was in fact concluded. But those are matters of proof: they are not legal requirements. The basic requirements of a contract are that: (i) the parties have reached an agreement, which (ii) is intended to be legally binding, (iii) is supported by consideration, and (iv) is sufficiently certain and complete to be enforceable*: …." (*Blue* at [49])

147. As to **whether the parties have reached agreement**:-

> "*In general, the agreement necessary for a contract is reached either by the parties signing a document containing agreed terms or by one party making an offer which the other accepts. Acceptance may be by words or conduct*." (*Blue* at [50])

> "*For the purpose of the law of contract, an offer is an expression, by words or conduct, of a willingness to be bound by specified terms as soon as there is acceptance by the person to whom the offer is made*." (*Blue* at [52])

148. As to the parties' **intention to create legal relations**:-

> "*Even when a person makes a real offer which is accepted, it does not necessarily follow that a legally enforceable contract is created. It is a further requirement of such a contract that the offer, and the agreement resulting from its acceptance, must be intended to create legal rights and obligations which are enforceable in the courts, and not merely moral obligations. Not every agreement that people make with each other, even if there is consideration for it and the terms are certain, is reasonably intended to be enforceable in the courts*." (*Blue* at [55])

> "*Factors which may tend to show that an agreement was not intended to be legally binding include the fact that it was made in a social context, the fact that it was expressed in vague language and the fact that the promissory statement was made in anger or jest. …*" (*Blue* at [56])

149. Moreover, according to Coulson J in *MacInnes* v *Gross* [2017] EWHC 46 (QB) (at [89]):-

> "*The mere fact that the discussion took place over dinner in a smart restaurant does not, of itself, preclude the coming into existence of a binding contract. A contract can be made anywhere, in any circumstances. But I consider that the*

fact that this alleged agreement was made in a highly informal and relaxed setting means that the court should closely scrutinise the contention that, despite the setting, there was an intention to create legal relations. The Claimant himself agreed that, other than his case, he was unaware of any remuneration agreements with investment bankers that had been concluded over dinner in the way in which he now suggested."

150. As to **completeness and certainty of terms**:-

> "*Vagueness in what is said or omission of important terms may be a ground for concluding that no agreement has been reached at all or for concluding that, although an agreement has been reached, it is not intended to be legally binding. But certainty and completeness of terms is also an independent requirement of a contract. Thus, even where it is apparent that the parties have made an agreement which is intended to be legally binding, the court may conclude that the agreement is too uncertain or incomplete to be enforceable – for example, because it lacks an essential term which the court cannot supply for the parties. The courts are, however, reluctant to conclude that what the parties intended to be a legally binding agreement is too uncertain to be of contractual effect and such a conclusion is very much a last resort. As Toulson LJ observed in Durham Tees Valley Airport v bmibaby [2010] EWCA Civ 485, [2011] 1 Lloyd's Rep 68, at para 88*:-
>
> > "*Where parties intend to create a contractual obligation, the court will try to give it legal effect. The court will only hold that the contract, or some part of it, is void for uncertainty if it is legally or practically impossible to give to the agreement (or that part of it) any sensible content." (citing Scammell v Dicker [2005] EWCA Civ 405, para 30, Rix LJ).*" (*Blue* at [61])

151. Given the debate around their application in this case, it is worth specifically noting here the Defendants' reliance on two authorities (in addition to *Blue*) for the proposition that agreements to negotiate or to agree or of uncertain duration are unenforceable as too inherently uncertain - *Walford* v *Miles* [1992] 2 AC 128 and *Dhanani* v *Crasnianski* [2011] 2 All ER (Comm) 799. Mr Smith submits that the contract alleged here to *try* to build a fund, with no agreement as to the Fund structure or any express termination provision, is so uncertain that it should suffer the same fate as the contracts in those cases. The Claimant says such reliance is inapposite: first, there was no agreement to agree or to negotiate here – Mr Gray and Mr Smith reached a complete agreement on 15 June 2016; second, although, superficially, *Dhanani* may seem analogous on the facts, the parties in that case were in a very different position in relation to their proposed fund than Messrs Gray and Smith who had 'bolted down' by 15 June everything that needed to be in place contractually. As Lord Clarke also observed in *RTS Flexible Systems* (at [45]):-

> " ….. *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*."

152. Lord Clarke also endorsed (at [49]) Lloyd LJ's summary of the key principles in *Pagnan SpA* v *Feed Products Ltd* [1987] 2 Lloyd's Rep 601, specifically holding that they apply in the context of contracts concluded "*by oral communications and conduct*". In particular, Lloyd LJ held (at [619]):-

> "*… the parties may intend to be bound forthwith even though there are further terms still to be agreed or some further formality to be filled…. 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….*[T]*here is no legal obstacle which stands in the way of parties agreeing to be bound now while deferring important matters to be agreed later*."

153. Finally, Mr Gray says there is no uncertainty around the duration of the Alleged Oral Agreement given the Implied Term as to termination (noted at [61c]).

154. As to the **<u>nature of the test for determining whether an agreement has been reached</u>**:-

> "*In determining whether an agreement has been made, what its terms are and whether it is intended to be legally binding, English law applies an objective test. As stated by Lord Clarke in RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH and Co KG [2010] UKSC 14; [2010] 1 WLR 753*:-
>
> > "*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*."
> >
> > *As with all questions of meaning in the law of contract, the touchstone is how the words used, in their context, would be understood by a reasonable person. For this purpose the context includes all relevant matters of background fact known to both parties.*
> >
> > *There is, at least arguably, a limitation on the objective nature of the test where one party's subjective intention is actually known to the other: see Novus Aviation Ltd v Alubaf Arab International Bank BSC(c) [2016] EWHC 1575 (Comm); [2017] 1 BCLC 414, para 56. But no reliance has been placed on any such principle in this case. What is accepted by counsel on both sides is that where, as here, the court is concerned with an oral agreement, the test remains objective but evidence of the subjective understanding of the parties is admissible in so far as it tends to show whether, objectively, an agreement was reached and, if so, what its terms were and whether it was intended to be legally binding. Evidence of subsequent conduct is admissible on the same basis. ………..*" (*Blue* at [63]-[64])

155. Both parties led extensive evidence as to the parties' subjective understanding and subsequent conduct. To the extent it assists me in determining, objectively, what the parties agreed in relation to their Blackmoor collaboration, I have taken this into account. As noted (at [14]-[15]), I have also kept well in mind in my analysis the approach to **evidence 'based on memory'** indicated in *Blue* (at [67]).

156. As to **implied terms**, the applicable legal principles, as restated by the Supreme Court in *Marks and Spencer plc* v *BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2016] AC 742 (at [14]), were not contentious. A term will only be implied where it is necessary to give the contract business efficacy or it would be so obvious that it "*goes without saying*".

157. In addition, for a term to be implied, it must (i) be capable of clear expression and (ii) not contradict the express terms of the contract (see, for example, Popplewell J in *Europa Plus SCA SI* v *Anthracite Investments Ireland plc* [2016] EWHC 437 (Comm) (at [33(3)])).

158. As Lord Hughes noted in the Privy Council in *Ali* v *Petroleum Co of Trinidad and Tobago* [2017] ICR 531 (at [7]), the purpose of implying terms is not for the Court to re-write the contract to find the fair or reasonable outcome:-

> "*…. the process of implying a term into the contract must not become the rewriting of the contract in a way which the court believes to be reasonable, or which the court prefers to the agreement which the parties have negotiated. A term is to be implied only if it is necessary to make the contract work. ..... The fairness or equity of a suggested implied term is an essential but not a sufficient precondition for inclusion*."

159. To the extent it is necessary to imply a term to fill a lacuna in the contract, the approach of the Court is a 'minimalist' one – to imply only what is necessary and no more (see Lightman J in *Robin Ray* v *Classic FM* [1998] FSR 622 (at [642]); Lord Wilberforce in *Liverpool City Council* v *Irwin* [1977] AC 239 (at [256]).

160. A term will not be implied unless it is obvious both (i) that a term should be implied and (ii) what term is to be implied. If, on the latter question, there are multiple candidates or the term is capable of expression in multiple different ways, the more likely such implication is neither obvious, necessary or sufficiently certain (see Rix J in *Port of Tilbury (London) Ltd* v *Store Enso Transport & Distribution Ltd* [2009] 1 CLC 35 (at [25]); Rix LJ in *Socimer International Bank Ltd* v *Standard Bank London Ltd* [2008] Bus LR 1304 (at [121]); Morgan J in *Chantry Estates (South East) Ltd* v *Anderson* [2008] EWHC 2457 (Ch) (at [23]); Sales J in *Torre Asset Funding Ltd* v *The Royal Bank of Scotland Plc* [2013] EWHC 2670 (Ch) (at [152(x)-(xi)]).

161. In the specific context of **implied terms about contract duration**, Buckley J explained in *Re Spenborough Urban District Council's Agreement* [1968] Ch 139 (at [147]) that:-

> "*An agreement which is silent about determination will not be determinable unless the facts of the case, such as the subject-matter of the agreement, the*

> *nature of the contract or the circumstances in which the agreement was made, support a finding that the parties intended that it should be determinable, but there is, in my judgment, no presumption one way or the other*."

162. Finally, in relation to **contracts implied by conduct**, contracts may come into existence during, and as a result of, performance. Performance of a contract by both parties often makes it unrealistic to argue that there was no intention to enter into legal relations or that a contract is too vague or uncertain to be enforced (see *G Percy Trentham Ltd* v *Archital Luxfer Ltd* [1993] 1 Lloyd's Rep 25 (at [27])).

163. The test for when a contract will be implied by conduct was set out by the Court of Appeal in *Baird Textile Holdings Ltd* v *Marks & Spencer* [2001] CLC 999 (at [13-21]): a contract will only be implied from conduct if it is *necessary* to do so; it is fatal to the implication of a contract that the parties would act, or might have acted, as they did without any such contract.

6 The Alleged Oral Agreement – factual analysis

6.1 Introduction

164. In approaching the question of whether an oral agreement was concluded by 15 June 2016 and, if so, in what terms, I analyse in greater detail below (i) the professional experience of Mr Gray and Mr Smith (ii) their interactions before August 2015 (iii) their interactions between August 2015 and 28 April 2016 (iv) their meeting on 28 April 2016 (v) their alleged meeting on 24 or 25 May 2016 (vi) further events prior to 13 June 2016 (vii) their 13-15 June 2016 meetings (viii) the position disclosed by the documentary record (ix) the 'industry norm' for remuneration in investment management start-ups (x) the relevance of the Blackmoor corporate structure (xi) commercial probability (xii) certainty of terms (xiii) intention to create legal relations and (xiv) performance of the Alleged Oral Agreement.

6.2 What Mr Gray brought to Blackmoor

165. In the context of the probability of the parties having reached agreement in the terms of the Alleged Oral Agreement, there was considerable discussion about the skills and experience Mr Gray could bring to bear to facilitate the successful launch of the Fund. For 17 years between 1996 and 2013, Mr Gray was a successful investment banker with private equity expertise in the leveraged finance and financial sponsor areas. As he acknowledged in his evidence, a "*decent part*" of his role encompassed acting as the employee of the investment bank advising private equity firms borrowing money from the bank to fund their purchase of target companies. In that capacity, Mr Gray was therefore not *raising* the money to fund the relevant investment – the bank (of which he was an employee) *was* the money. However, Mr Gray went on to explain that his work entailed financial and business analysis of the relevant target opportunities to the same degree of rigour as that undertaken by his financial sponsor clients themselves. Moreover, he testified that he performed broader activities more akin to those undertaken on the 'buyside', including identifying investment opportunities for private equity firms and working closely with those firms to help raise capital as well as with the management teams in refining their pitches and on investor 'roadshows'.

166. I accept that Mr Gray's experience meant that he was 'steeped' in the private equity world and well connected with some of the largest private equity firms, that the distinction connoted by labels of 'sellside' (ascribed to investment banks) and 'buyside' (ascribed to private equity firms) is less meaningful in the area in which Mr Gray was operating, that his expertise ran deeper than 'merely' advising on loans to private equity clients on behalf of his investment bank employers and that the banks financing the private equity deals on which Mr Gray advised took significant credit risk. Nor do I lose sight of Mr Gray's more conventional 'buyside' experience outside of investment banking. However, as extensive and wide-ranging as Mr Gray's experience was, his investment banking roles meant that he was not undertaking the same activities as private equity firms (to the same breadth and extent at least) and he did not assume the same risks (or envisage the same rewards) on behalf of his employer banks. I therefore do not accept that he was "*at the front of the spear*" (as he described it) even if he did often work closely alongside those who were. Finally, the Blackmoor strategy was to be applied to publicly traded equities, a different asset class from private equity. Given these matters, Mr Gray would not, in my view, be an obvious or natural choice to co-lead Blackmoor.

6.3 Mr Gray's NuOrion experience

167. It may be for this reason that Mr Gray attempted in his evidence to bolster his activist investment experience, both at NuOrion and from other prior 'buyside' roles. For example, Mr Gray emphasised his work at InvestCorp and Sovlink, even suggesting that Mr Phillips "*lobbied him*" to join NuOrion because of his investment experience at those firms. However, Mr Gray only worked for InvestCorp for 18 months (shortly after he left college) and his Sovlink role was a summer job during HBS. Moreover, Mr Phillips' evidence was that "*James had no prior investment experience, having been an investment banker all his career.*" Mr Phillips knew Mr Gray well, both as a colleague at UBS and, later, at NuOrion. I accept his evidence.

168. Mr Gray also says that he only agreed to join NuOrion on the basis that all major investment decisions were made on a consensual basis, even suggesting that he managed to persuade Mr Phillips to relinquish his CEO role. However, as Mr Phillips says in his statement, he was (and remains) the sole decision-maker at NuOrion and, although Mr Gray did ask for veto power over investments, Mr Phillips refused, considering Mr Gray "*immature*" even to have asked for it given his lack of investment experience. Again, I accept his evidence. Although he says there were disagreements with Mr Gray about remuneration and other NuOrion deals, and it is clear there were tensions between them when they parted ways, Mr Phillips had no reason to overstate his own position.

169. To further support his experience, Mr Gray relied on a particular transaction undertaken by NuOrion involving Avon Products on which he says he was "*co-leading*", initially seeking capital before working on the execution and marketing side. However, he also exaggerated his work on that deal. Mr Gray omitted to mention in his first statement that his capital raising efforts were unsuccessful. Moreover, the evidence relied on by Mr Gray to support his anti-money laundering work on the transaction was underwhelming, amounting to a few communications with a lawyer. Mr Phillips testified that Mr Gray "*did not contribute much to the deal*". The Claimant sought to challenge this by reference to Mr Gray's related remuneration. However, Mr

Phillips was well aware of Mr Gray's role on the deal and, again, he had no reason to misstate it. I therefore accept his evidence in this regard and that the payment Mr Gray received from NuOrion was to incentivise him. I also accept Mr Phillips' evidence, more broadly, that "[a]*dopting a materiality threshold, James never contributed anything of value to NuOrion or any of its deals*".

170. There was also some discussion at the hearing about Mr Gray's remuneration at NuOrion generally. Mr Gray's evidence was that there was no written contract or partnership agreement with NuOrion - Mr Phillips had pushed back on suggestions of formalising their arrangements. In the absence of any "*contract about how things were to be split*", he worked "*on an ad hoc basis*", with any "*success fee*" payable to the three founding partners "*subject to negotiation based on our precise role in each investment*". Although Mr Gray had suggested that "*the starting point was an expectation that we were to split the fees equally*", this again seemed directed to bolstering his standing within NuOrion. In fact, as he conceded, the split was ultimately "*all decided on a deal by deal basis*" – it was "*an informal arrangement, subject to negotiation, once everybody knows who has contributed what.*" Mr Gray was therefore willing to work within NuOrion at risk of not being paid if he was unsuccessful.

6.4 Mr Smith's 'activist investment' experience

171. Perhaps unsurprisingly given that he conceived of Blackmoor as the next challenge in his career, Mr Smith's professional experience was 'on all fours' with what he aimed to build. Indeed, Mr Gray accepted that Mr Smith had greater activist investing experience and that he better understood the "*process and nuances*" of raising a committed fund. That much was evident from Mr Smith's experience over more than a decade acquired at Hanover, Bluecrest, Hill Rise and, finally, StratCap. It was also evident from his thoughtful articulation in oral evidence of how he intended to build the Fund, including the challenges of capital raising, putting together a team and leveraging influence in (publicly marketed) target companies.

172. I also venture to suggest that Mr Smith's more relevant experience was why Mr Gray considered it necessary to minimise Mr Smith's track record. For example, Mr Gray suggested in his statement that Bluecrest's performance during Mr Smith's involvement was "*abysmal*", that he concealed his track record from Bluecrest and that he only spent six months there investing in public equities. Mr Smith denied these matters, explaining convincingly that the Bluecrest public equities fund had, in fact, outperformed against its peers in the relevant period (during the financial crisis) and that the suggestion of concealment made no sense - Bluecrest already had the relevant information but would be concerned if they thought it was being deployed in Blackmoor's marketing material.

173. Similarly, Mr Gray's attempts to minimise Mr Smith's Hill Rise experience to suggest a lack of synergy with Blackmoor's investing strategy also fell flat, Mr Smith explaining, again convincingly, how he adopted the same approach at Hill Rise as would be replicated at Blackmoor, perhaps working "*just a little bit harder*" with his fellow shareholders.

6.5 Mr Smith's views on what Mr Gray brought to Blackmoor

174. Finally, Mr Smith explained his own views on what Mr Gray might (or might not) bring to Blackmoor. Three exchanges with Mr Smith perhaps capture this best, the first concerning Mr Gray's roles within an investment bank compared to that Mr Smith had been performing:-

> "Q. *And because of the risk that the banks were taking in these sorts of transactions, Mr Gray attended side-by-side the management presentations to its clients, attended the same due diligence call, and you knew -- and you know all this, don't you?*
>
> **A.** ***I do. But one has to be very clear, it's very different. The credit committee of the bank, my Lord, was not making a decision on the merits of Mr Gray as an investment manager, they were taking his analysis and saying, "yeah, your analysis of the KKR deal looks good Mr Gray, I believe you". They were not saying "And I trust you, Mr Gray, because I'm giving you the money." Mr Gray was never the recipient or part of the product that had the money. He was an adviser, my Lord, which is very, very different and, yes, there was a lot of risk but that was taken by the credit committee, and I do not know if Mr Gray was ever part of the credit committee. So I don't know if he made the decisions and -- but I certainly know he was never part of the product that was granted the capital, which is what we are talking about in our world.***"

175. This evidence (which I accept) reinforces my independently formed view (noted at [166]) that Mr Gray was not an obvious 'fit' for Blackmoor. In this context, the Claimant also relied extensively on references in Blackmoor's marketing materials to its "*private equity approach…to investing in public companies*" (see too PoC at [7.2]), to suggest that Mr Gray brought Blackmoor's 'missing' private equity component, complementing Mr Smith's public company offering. However, as Mr Smith again convincingly explained, the two worlds are very different:-

> "Q. *…………. Let's have look at 120(g) then. So that's acquiring, selling stakes in target companies, and the need to engage with investee companies to drive improvement. Again, that is exactly where Mr Gray's expertise lay, wasn't it?*
>
> **A.** ***Again I would say no. Sadly, I wish it was. There's a very firm line between public companies and private companies. The concept of exhibiting or leveraging influence in private companies is a fundamentally different task than public companies. In private companies these owners that Mr Gray was working alongside typically had the majority of the equity, controlled the board, put whatever directors they want on the board. As I alluded to earlier, exerting influence in a public company where you are holding anywhere from 1 to 5, 6, 7 per cent, is a game of pulling together, co-ordinated voices, from the next 10 shareholders. That is a wholly different task than having control. A wholly different task that Mr Gray has had no experience of.***"

176. Mr Smith's evidence reflected a depth of understanding of the strategy and objectives of the Blackmoor Fund and activist investing in the public equities sphere notably lacking from Mr Gray's evidence. In my view, the reference in the marketing literature to a "*private equity approach*" added little, if anything, to the strategy that Mr Smith had already been deploying for more than a decade and I found somewhat

superficial the Claimant's repeated reliance on this 'soundbite' to suggest that Mr Gray added significant value. Rather, the one thing that Mr Smith says he did see in Mr Gray was his apparent ability to raise capital:-

> "Q. *You are very happy, Mr Smith, to sit here now, defending the claim against you, explaining all the problems with Mr Gray's experience. At the time it was exactly Mr Gray's obvious fit with the strategy that you were so keen to work with him on Blackmoor, that's the truth, isn't it?*
>
> **A.** ***I wish that was the case, my Lord. As I say in my witness statement, at numerous points, Mr Gray's ability, and I understood success in raising capital, was the sole thing that interested me in Mr Gray being there. Additionally his different personality to me, whereby the concept of selling and continuing to knock on doors where I would take "no" at the first instance, where clearly Mr Gray has established a much more persistent approach, I felt that that type of, you know, persistence if you want to call it, coupled with the fact that he had been successful, that was what I saw could contribute to Blackmoor.***"

177. I also accept Mr Smith's evidence in this regard. As noted (at [76]), capital raising was the imperative, without which, there would be no Fund.

178. Accordingly, although by no means determinative of the matter, the context in which the existence (or otherwise) of the Alleged Oral Agreement falls to be considered is one in which Mr Gray's background and experience, however stellar in the investment banking private equity sphere, were not obviously on 'all fours' with Blackmoor's strategic approach. The benefit of Mr Gray's offering was therefore uncertain, as reflected by Mr Smith's evidence, albeit it was hoped he might succeed on the capital raising front. In this regard, I found unconvincing Mr Gray's description in his statement of himself as "*the more senior figure*" to Mr Smith. In terms of investment banking and private equity experience, that was no doubt true. However, that was not the world in which he would be operating at Blackmoor such that, in my view, even his more modest clarification in oral evidence that "*I think within the Blackmoor construct we were equal peers*" was overstated.

6.6 Mr Gray's and Mr Smith's dealings before August 2015

179. In his first statement, Mr Gray says that, after he left HBS, he kept in "*semi-regular contact (both professionally and personally)*" with Mr Smith until August 2015. However, the evidence showed that such contact merely comprised their common membership of an e-mail thread, principally about rugby. Mr Gray could not recall any direct e-mail contact with Mr Smith before August 2015 and confirmed that they did not meet for drinks or dinner either. Mr Smith also confirmed that he did not communicate with Mr Gray again until late 2015. Mr Gray's suggestion of "*semi-regular contact*" with Mr Smith was therefore overstated.

6.7 Mr Gray's and Mr Smith's contact between August 2015 and April 2016

180. As noted (at [40]), it is common ground that Mr Gray and Mr Smith met from time to time between 19 August 2015 and 28 April 2016. The Defendants say that (with the exception of one social dinner on 25 January 2016 involving their mutual

friend, Mr Mullen) these meetings all concerned StratCap's possible investment in Avon and other NuOrion generated deals. However, the Claimant says that, after StratCap decided not to invest in Avon, he and Mr Smith nevertheless continued to meet between October 2015 and April 2016 when they "*started discussing the possibility of working together on a joint ticket*". The implication at least was that they discussed a potential joint collaboration in Blackmoor during this period. However, Mr Gray confirmed in oral evidence that he was not seeking to imply this and I find that their interactions throughout this period were concerned with possible NuOrion/ StratCap collaboration.

181. As also noted (at [40]), there was a small factual dispute about whether Mr Gray and Mr Smith also met in March 2016. Mr Gray says this was a meeting at either Costa Coffee or Burger & Lobster when Mr Smith told him he was considering leaving StratCap. Mr Smith says that, although "*not impossible*" that they met in March, his recollection was that he did not tell Mr Gray of his decision to leave StratCap before they met on 28 April 2016, after his departure had been agreed with Mr Bonomi. Mr Gray says he has a Burger & Lobster receipt for that date but, even if this had been disclosed, it would not mean he lunched there with Mr Smith. Indeed, Mr Gray says the meeting could have been at Costa. Ultimately, not much, if anything, turns on the suggested March 2016 meeting but it is not pleaded and, in light of the conflicting and somewhat vague evidence and the absence of any e-mail setting up or referring to the meeting or of an entry in Mr Smith's disclosed electronic diary from the period, I find that they did not meet that month.

6.8 Mr Gray's and Mr Smith's 28 April 2016 meeting

182. As noted (at [45]-[46]), Mr Gray says that, on 28 April 2016, he agreed a joint collaboration with Mr Smith in Blackmoor based on them being 'equal partners', albeit conditionally on them both deciding to 'push the button', in effect 'laying the groundwork' for the conclusion of the Alleged Oral Agreement. However, there are a number of difficulties with Mr Gray's case in this regard.

183. First, having found that there is insufficient basis for concluding that Mr Gray and Mr Smith met in March 2016, I accept Mr Smith's evidence that he told Mr Gray for the first time on 28 April 2016 of his decision to leave StratCap. In those circumstances, it seems improbable that, this information having only just been shared, they would have agreed there and then a framework for a 'joint venture'.

184. Second, it seems even more improbable that they would go to the trouble of working out that framework, only then to 'park' this while they decided if they actually wanted to move forward with it after all.

185. Third, given the matters pleaded by the Claimant as establishing at this meeting the basis for a possible future Blackmoor collaboration (noted at [45]), I would expect Mr Gray to have addressed them in his first statement. He did not. Although he does say they "*specifically discussed raising a committed fund together*", he says little more about the meeting beyond Mr Smith mentioning his corporate vehicle, BIPL (which Mr Gray thought could be helpful if they did do business together), and the proposed fund structure being similar to StratCap (albeit open-ended and possibly adapted on account of Brexit). Indeed, this part of his statement does not mention most of the matters

pleaded (at PoC at [7.3]), let alone indicate any related agreement, even conditional. This 'disconnect' between Mr Gray's written evidence and his pleading is surprising, not just because, on his case, the 28 April 2016 meeting is important in its own right, but also because Mr Gray confirmed in his oral evidence that the Joint Management, Equal Money, Financial Analysis and Exclusivity Terms, all ultimately agreed on 15 June 2016, had their origins in this earlier 28 April meeting.

186. Fourth, when asked about this discrepancy, Mr Gray hesitated and struggled to answer straightforward questions. Although he said he stood by his pleaded case which his statement was not "*intended to parrot*", he confirmed that this part of his statement had been "*drafted meticulously at the end of 2017*". That was well before his original pleading so no 'parroting' would have been involved. In any event, his statement was, of course, supposed to set out his evidence relevant to his pleaded case; the genesis of the Alleged Oral Agreement is a central issue.

187. Fifth, and more substantively, the documentary record shows that, between 14 April 2016 (at the latest) and 27 June 2016, Mr Smith was engaged in discussions about building the Blackmoor Team, to include the Investment Team of himself and Messrs Medlicott, Pierburg and Kappelhoff-Wulff. The Claimant submitted that the suggested 'First Blackmoor Team' was a 'construct'. So, for example, Mr Lis' role would only be part time, as confirmed by Mr Smith's e-mail of 20 May 2016, seeking to reassure Mr Lis of his limited Blackmoor time commitment. It was also suggested that the commitment of Messrs Pierburg and Kappelhoff-Wulff to the 'First Blackmoor Team' was 'lukewarm', Mr Smith having only met them twice. Moreover, Mr Medlicott participated for only a limited time on the 'First Blackmoor Team'. As Mr Smith also accepted, the team was a "*weak proposition*" without Mr Lis. Finally, Mr Smith accepts that Mr Machiels declined a role on the Advisory Committee and that Mr Selkirk in fact only agreed to join the Advisory Committee in July 2016, after Mr Lis had already declined any role.

188. In this regard, I found wide of the mark Mr Gray's suggestion that the 'First Blackmoor Team' was a 'construct': there is no real dispute that the team had its 'limitations', that its members had different levels of interest, that the process of bringing them together was "*messy*" or that, ultimately, it never did come together. However, the suggested 'construct' was nothing more than a label to describe the team then under consideration. The more fundamental point is that, before 28 April 2016 until beyond the conclusion of the Alleged Oral Agreement, there were extensive documented discussions concerning the bringing together of that team in which Mr Gray did not feature at all.

189. Sixth, given those ongoing discussions with the 'First Blackmoor Team' before and after 28 April 2016, it would also be surprising (and improbable) for Mr Smith to have agreed at his meeting with Mr Gray, even conditionally, to work together as 'equal partners', with an even split of fees and expenses. In doing so, Mr Smith would immediately have tied at least one arm behind his back in his discussions with the 'First Blackmoor Team' and significantly constrained what he could offer them.

190. Seventh, despite the Claimant's criticisms of the team 'construct' (noted at [187]), the e-mail communications between April and June 2016 concerning Messrs Lis and Medlicott joining Blackmoor display a palpable sense of anticipation on Mr

Smith's part at that prospect (as well as disappointment when Mr Lis declines the role offered). During that period, Mr Smith also shared with the proposed team information about Blackmoor, including the draft investor presentation. In marked contrast, there were no communications between Mr Smith and Mr Gray about Blackmoor over the same period. In fact, there were no such communications until 5 July 2016 and it was only then that Mr Smith sent Mr Gray the investor presentation. This too is very surprising if the matters suggested by the Claimant had been agreed, even conditionally, on 28 April 2016.

191. Eighth, the next communication between Mr Gray and Mr Smith after 28 April 2016 was on 6 May when Mr Smith e-mailed Mr Gray and Mr Phillips to set up a meeting in New York (noted at [47]). Again, it seems improbable that, having supposedly conditionally agreed a potential joint collaboration with Mr Gray in Blackmoor, Mr Smith would then unilaterally seek a meeting with the principal of the firm (NuOrion) from which he was seeking to attract Mr Gray.

192. Ninth, Mr Gray points to other parts of the documentary record to support his case about the 28 April 2016 meeting. So, for example, as noted (at [48]), Mr Gray says that, following that meeting, he started reaching out to third parties with a joint collaboration in mind, including Kabouter. Although the e-mail evidence confirms that Mr Gray did indeed speak to Kabouter on 6 May 2016 and that Mr Smith followed up with Mr Gray to see how the call went, I find Mr Gray's explanation improbable. Indeed, on Mr Gray's pleaded case, he and Mr Smith had conditionally agreed on 28 April 2016 the basis for a potential future collaboration *if* both parties decided to work together. There would have been further discussion and reflection before they agreed to 'push the button'. However, according to Mr Gray, they did not meet again until 24 or 25 May and, even then, no binding agreement was reached until their further meetings between 13 and 15 June.

193. It is therefore improbable that, within a space of just over a week after the 28 April 2016 meeting, Mr Gray was reaching out to third parties with a joint collaboration in mind. Indeed, it is far from clear, in any event, what Mr Gray could meaningfully share at that stage - as he says, he did not even mention to Kabouter that he and Mr Smith were looking jointly to build a fund and, as he says elsewhere in his evidence about such discussions in the early stages of fund development, "*information like this spreads like wildfire*" and its dissemination "*could have been counterproductive*". Accordingly, although I accept that Mr Gray called Kabouter about their portfolio investments, I find that he did so in his NuOrion capacity. Likewise, I also accept Mr Smith's oral evidence that his eagerness to know about Mr Gray's call with Kabouter was "*in the context of Mr Gray as a NuOrion individual who was talking to Kabouter*." I also accept Mr Smith's evidence that he already knew Kabouter (as appears unprompted from his first statement) and that he was therefore able to speak to Kabouter himself about launching Blackmoor. Mr Gray was again seeking to extract meaning from a document it simply did not bear.

194. Tenth, in his oral evidence, Mr Smith dismissed the idea that he agreed such matters on 28 April 2016, describing it as "*complete commercial suicide*". I address this below (at [245]-[250]).

6.9 **Alleged 24 or 25 May 2016 meeting**

195. As noted (at [50]), Mr Gray says that he had a further meeting on 24 or 25 May 2016 with Mr Smith when they discussed "*partnering to develop a new shareholder activist investment business under the Blackmoor brand*" and that they agreed that their business dealings moving forwards would be on the basis of them being "*equal partners in everything*." Again, I consider there are a number of difficulties with Mr Gray's case on this aspect as well.

196. First, there is no mention in the PoC of any meeting on 24 or 25 May 2016. Given its apparent importance, this further 'disconnect' between the Claimant's pleading and evidence is again surprising.

197. Second, in his oral evidence, Mr Gray withdrew an important part of his written evidence about this meeting, confirming that they did not, in fact, agree on 24 or 25 May 2016 "*to split all fees equally*" (that matter having already been agreed earlier on 28 April 2016).

198. Third, Mr Gray's evidence was that, at this meeting, he compared his target company list with Mr Smith's. However, Mr Smith testified - convincingly in my view - that his universe of target companies was 1,200. I accept his evidence. The suggested comparison exercise therefore seems unlikely.

199. Fourth, although certain e-mails between Mr Gray and Mr Smith on 16 May 2016 do show that a meeting involving Mr Gray and Mr Smith was proposed for the following week, this was as a precursor to the later New York meeting with Mr Phillips and Mr Gray on 1 June 2016 (noted at [49]). Mr Phillips was going to be in London, and would attend that pre-meeting as well. If such a meeting did take place, it would have involved all three of them and therefore likely concerned a NuOrion/ Blackmoor collaboration.

200. In this regard, I found Mr Gray's oral evidence unconvincing, even suggesting that his short e-mail trying to set up the London pre-meeting was signalling to Mr Smith that they "*should open up the kimono and tell* [Mr Phillips] *we're partnering as Blackmoor*". This seemed far-fetched in circumstances in which it was Mr Smith who had unilaterally sought the meeting with Mr Phillips in New York (to which the London meeting was a precursor). If Mr Smith was seeking to prize Mr Gray from NuOrion, it is unlikely he would have reached out to Mr Phillips at all. Moreover, on Mr Gray's evidence, they kept their 'kimonos' firmly shut in New York.

201. Fifth, there are no further e-mails about this meeting on 24 or 25 May 2016 before it is said to have taken place, no related venue bookings or diary entries and no subsequent documents confirming it did take place.

202. Sixth, the next e-mail exchange between Mr Gray and Mr Smith following this alleged meeting was on 30 June 2016. If the matters suggested by Mr Gray had been discussed on 24 or 25 May 2016, one would again expect them to have followed up with each other about Blackmoor much sooner including, again, sharing with Mr Gray the Blackmoor investor presentation, not in fact provided to him until 5 July 2016. The same considerations noted above (at [190]) apply in this context as well.

203. Seventh, inconsistent with Mr Gray's suggestion that he and Mr Smith were "*equal partners in everything*", Mr Smith's communications and discussions with 'the First Blackmoor Team' (not including Mr Gray) were still ongoing at this stage. Indeed, Mr Smith met Messrs Pierburg and Kappelhoff-Wulff on 25 May. The same considerations noted above (at [188]-[189]) apply in this context as well.

204. Eighth, in his oral evidence, Mr Smith again dismissed the idea that he agreed such matters on 24 or 25 May 2016, describing it as "*utterly fanticiful and commercially suicide*". I address this below (at [245]-[250]).

6.10 **Events after 25 May and prior to 13 June 2016**

205. As noted (at [52]), Messrs Gray, Phillips and Smith met in New York on 1 June 2016, Mr Smith having previously reached out for a meeting to include Mr Phillips. As also noted (at [200]), it seems unlikely that Mr Smith would have unilaterally sought this meeting if, as Mr Gray claims, they had reached the agreement they had on 28 April 2016. I accept Mr Smith's evidence that this was to discuss potential NuOrion and Blackmoor collaboration, as to which, I was unable to discern the suggested conflict with Mr Phillips' evidence indicated in the Claimant's written closing (at [fn10]); Mr Phillips' evidence addressed a different point.

206. As noted (at [53]), it is common ground that, between 2 and 5 June 2016, Mr Gray and Mr Smith attended their HBS 20 year reunion in Boston, USA. Mr Gray said in his written and oral evidence that they did not spend much time together. I accept his evidence, albeit I consider it surprising if, as Mr Gray says, they had already agreed they were "*equal partners in everything*", that they did not take the opportunity over these three days to interact about their future plans. I also accept Mr Gray's evidence that he did not tell Messrs Mullen and Hurd that he and Mr Smith were business partners. Mr Gray says he did tell them that he was *considering* partnering with Mr Smith but it does not follow from this that Mr Smith was considering partnering with Mr Gray, let alone that discussions took place on 28 April or 24 or 25 May 2016 in the terms suggested by the Claimant. Indeed, Mr Smith's evidence is that Mr Gray said on 28 April 2016 that he was interested in being kept in the loop about Mr Smith's plans but Mr Smith returned the focus onto possible NuOrion and Blackmoor collaboration.

207. As noted (at [54]), Mr Gray says that, by 10 June 2016, he and Mr Smith were discussing the need to recruit Advisory Committee and Operating Bench members and, to that end, he (Mr Gray) started to meet potential candidates, including his former HBS roommate, Douglas Pendergast. To support this, Mr Gray sought to rely on the 10 June 2016 version of the Blackmoor investor presentation showing Mr Pendergast as an Operating Bench member. Again, I found Mr Gray's related evidence problematical in a number of respects: first, Mr Gray accepted that he had not seen this presentation prior to disclosure in these proceedings; second, again, the presentation did not show Mr Gray as a member of the Investment Team (rather than Messrs Smith, Medlicott, Pierburg and Kappelhoff-Wulff); third, it seems improbable that Mr Gray's meeting with him for dinner on the evening of 10 June 2016 was the reason Mr Pendergast's name appeared in the presentation, in all likelihood prepared by Mr Smith earlier the same day; fourth, on Mr Gray's evidence, by this stage, he and Mr Smith were not yet working as a team – "*we were in the process of that*. [Mr Gray] *didn't think things had*

been nailed down quite yet"; fifth, Mr Smith testified that Mr Pendergast was also his acquaintance from HBS and, in anticipation that he would agree to be on the Blackmoor Operating Bench, Mr Smith had already earmarked him for that role and included his name in the relevant section of the presentation; sixth, consistent with that, Mr Smith was already communicating in writing with Mr Medlicott (not Mr Gray) on 7 June 2016 about the make-up of the Operating Bench. In my view, the far simpler (and correct) position is that Mr Gray had dinner with his former HBS roommate, Mr Pendergast, his wife and family on 10 June 2016 but not as part of any Blackmoor recruitment push. Again, I find that Mr Gray sought to extract significance from a document it did not bear.

6.11 **13-15 June 2016 meetings**

208. It is common ground that Mr Gray and Mr Smith met again on 13 and 15 June 2016. Mr Gray also states that there was a third meeting on 14 June 2016. Although this was not pleaded, Mr Smith's diary indicates a meeting took place that day and, as noted (at [55]), Mr Smith does not appear to dispute that it did. I accept that it did. As also noted (at [59]-[61]), Mr Gray says an oral contract was concluded at these meetings in the terms of the Express and Implied Terms. Mr Smith denies such (or any) agreement was concluded then (or ever). Rather, Mr Smith says that Mr Gray indicated his interest in joining Blackmoor's Investment Team but Mr Smith expressed reservations and did not 'bite' save to indicate that there might be a role for him on the Blackmoor Advisory Committee or Operating Bench. According to Mr Smith, it was not until 5 July 2016 - after the 'First Blackmoor Team' had 'fallen through' – that they entered their *non-contractual* trial collaboration.

209. Based on the evidence, the time spent at these meetings was likely somewhere between 3.5 and 5 hours in total over the course of a few days. Despite Mr Gray's incredulity expressed in closing submissions, I consider that this time spent is equally consistent with discussion of the Alleged Oral Agreement (as asserted by Mr Gray) as it is with discussion of Mr Gray's interest in joining Blackmoor and options for a lesser role within Blackmoor (as asserted by Mr Smith).

210. In closing submission, the Claimant rejected Mr Smith's evidence that he was discussing building a fund with Messrs Lis and Mr Medlicott to the exclusion of Mr Gray, pointing to the fact Mr Smith met Mr Gray three times that week compared to one meeting only with Messrs Lis and Medlicott on 16 June 2016. However, that comparison is inconclusive and begs the very question of what Mr Gray and Mr Smith were discussing. In my view, the more meaningful comparison is with the documented discussions about the 'coming together' of the 'First Blackmoor Team' more than a month before and nearly two weeks after the 13-15 June 2016 meetings.

6.12 **The documentary record**

211. A number of points arise in relation to what was, or was not, agreed between 13 and 15 June 2016 and the related documentary record. Some have already been canvassed (at [187]-[191] and [202]-[203]) in the (earlier) context of the 28 April and (alleged) 24 or 25 May 2016 meetings but, given the critical importance of the meetings between 13 and 15 June, I address them here in further detail.

212. First, there was, of course, no written agreement between the parties. Although this does not preclude the formation of a contract orally or by conduct as a matter of law – it is not suggested, for example, that such a contract would have any particular requirements as to form – it might well be thought that, for two sophisticated businessmen such as Mr Gray and Mr Smith, who had spent their professional life involved in documented corporate transactions, it would be second nature to 'paper' their own mutual business dealings as well.

213. In this regard, as noted (at [170]), Mr Gray says he had unsuccessfully sought to persuade Mr Phillips to formalise the arrangements between the NuOrion 'founder partners', the documentation of any agreement in relation to Blackmoor would therefore likely have been 'on his radar' and, given Mr Smith's suggested eagerness to have Mr Gray on board, 'papering the deal' was unlikely to be difficult to achieve. Indeed, that Mr Smith was accustomed to doing so is evident from his dealings with other potential Blackmoor participants, namely Messrs Treichl, Meinl and Schmidt-Chiari, to whom draft (and in the case of Mr Schmidt-Chiari, final) terms sheets were sent embodying the proposed (or agreed) bases for their participation. Moreover, although there is some dispute between the parties as to its consistency or otherwise with the Alleged Oral Agreement (to which I return later), it is apparent from Mr Smith's e-mail dated 8 February 2017 (noted at [86]) that he also committed to writing, and shared with Mr Gray, his fee-sharing proposals, in that case concerning potential Blackmoor SPV deals.

214. Second, although Mr Gray's e-mail to Mr Smith dated 29 September 2017 did state "[a]*s you are fully aware, we entered into a 50/50 partnership in relation to Blackmoor*", by then, their relationship had broken down and, as Mr Gray stated in that e-mail, he was already preparing for legal battle. There is no contemporaneous e-mail, electronic message or other document recording or even mentioning the Alleged Oral Agreement. In light of (i) what would obviously have been a very significant contract to Mr Gray and Mr Smith (ii) their electronic communications of increasing regularity since August 2015 and (iii) the duration of their collaboration – lasting more than a year - it is surprising that the Alleged Oral Agreement has no "*electronic footprint*" at all.

215. Third, and more specifically still, there is no communication at all between Mr Gray and Mr Smith in the mid-June 2016 period. As noted (at [202]), after the e-mail exchange between Mr Gray and Mr Smith on 16 May about a meeting with Mr Phillips, there was no further e-mail between them until 30 June, more than two weeks after the Alleged Oral Agreement. Again, having concluded such an important agreement, it is surprising that there is not a single electronic communication including, for example, Mr Smith sending Mr Gray a copy of Blackmoor's investor presentation. As noted (at [190] and [202]), this was not provided to Mr Gray until 5 July 2016. In this regard, I found unconvincing Mr Gray's explanation for the dearth of electronic traffic during this period, namely that he was travelling out of the country. This would not have precluded Mr Gray receiving such communications nor considering them while overseas.

216. Fourth, despite the dearth of electronic communications with Mr Gray during this period, there are a number of documents, including e-mail communications from Mr Smith to others through to 27 June 2016 (when Mr Lis turned down the proposed Blackmoor role), concerning the building of the 'First Blackmoor Team'. Accordingly,

far from evidencing the Alleged Oral Agreement, the "*electronic footprint*" that does exist shows Mr Smith attempting to build the Blackmoor Team without him. So, for example, the versions of the investor presentations dated 10, 18 and 23 June 2016 all name (or obviously describe) the Blackmoor Investment Team as Messrs Smith, Medlicott, Pierburg and Kappelhoff-Wulff. Mr Gray is not identified.

217. Mr Smith circulated these versions of the presentation electronically at different times to different persons between 14 and 24 June 2016 (but not to Mr Gray). I do not summarise all the related covering communications here but two warrant specific mention. Having previously sent her on 14 June the then current version of the investor presentation, Mr Smith e-mailed Ms Carnathan again on 20 June with the updated (18 June) version, stating:-

> "*In the meantime could you do me a considerable favour: ditch the text pitch I sent you and review the attached (strictly confidential) intro book. You'll see the team has come together strongly. The favour part is that I'd really appreciate your thoughts during the course of tomorrow?*"

218. The team shown in the 18 June version of the investor presentation comprised the Investment Team of Messrs Smith, Medlicott, Pierburg and Kappelhoff-Wulff and an Advisory Committee of Messrs Lis (Chairman), Selkirk and Mire. Mr Gray was not shown. Accordingly, despite the Alleged Oral Agreement with Mr Gray having supposedly been concluded three days earlier on 15 June, Mr Smith then updated the presentation on 18 June, again without any reference to Mr Gray (supposedly now his 'partner'), and, when sending this to Ms Carnathan on 20 June, Mr Smith explicitly referred to the Blackmoor Team (without Mr Gray) having "*come together strongly*".

219. Likewise, on 23 June, Mr Smith e-mailed Mr Lis with the latest version of the draft presentation dated 23 June, stating that "[t]*he Executive Team are in place*". That version identified the Investment Team of Messrs Smith, Medlicott, Pierburg and Kappelhoff-Wulff and an Advisory Committee of Messrs Lis (Chairman), Selkirk, Mire and Machiels. Again, there was no mention of Mr Gray in this second iteration of the document following the supposed conclusion of the Alleged Oral Agreement.

220. <u>Fifth</u>, as noted (at [68]-[70]), Mr Smith says that a non-contractual 'trial collaboration period' was entered into with Mr Gray on 5 July 2016. Consistent with Mr Smith's evidence, the record shows that Mr Gray and Mr Smith exchanged six e-mails that day, including the investor presentation, marking a significant uptick in their written communications and the first such communications about Mr Gray's involvement in Blackmoor.

221. <u>Sixth</u>, Mr Gray also places store by certain documents created after the Alleged Oral Agreement to support its suggested conclusion and performance. So, for example, as noted (at [62]), Mr Gray relies on his e-mail to Mr Hansen of AMC on 15 June 2016, asking for recommendations for a "*seasoned, PE-experienced ops guy in London*". The title of the e-mail is "*Cerberus Ops Person*", Cerberus being a private equity firm which, according to Mr Gray, acquired Avon's North American business and appointed three members to the Avon board. Mr Gray also said that Avon were in the process of moving their headquarters to London (Chiswick) in 2016. Mr Gray relied on this e-mail to suggest that, following the conclusion of, and pursuant to, the Alleged Oral

Agreement, Mr Gray was working to help assemble the Blackmoor Team, in this case a third Operating Partner. It was put to Mr Gray in oral evidence that the e-mail had nothing to do with Blackmoor but was Avon and/ or NuOrion related. Mr Gray denied this for various reasons but he did not satisfactorily explain the title of the e-mail - "*Cerberus Ops Person*". Indeed, based on what Mr Gray said himself about Cerberus and its role in Avon, the most likely explanation for the e-mail was that Cerberus was looking to source an operating executive in anticipation of Avon's impending move to London. If the e-mail were indeed "*very compelling*" evidence of the Alleged Oral Agreement, Mr Gray would, no doubt, have disclosed this much earlier rather than shortly before trial and he (and Mr Hansen) would have addressed this in their respective statements. Neither did.

222. Mr Gray also relies on Mr Smith's diary entry from 17 June 2016 showing a call described as "*James gray ..... Operating partner*" (noted at [63]) as further evidence that, in the wake of the Alleged Oral Agreement, he and Mr Smith were discussing progress in the recruitment of the Blackmoor Team. However, Mr Gray did not refer to this call in his first statement and he only referred to it briefly in his second, without mentioning the reason now suggested for the call. By contrast, Mr Smith did refer to the call in his first statement, explaining that it concerned a possible role for Mr Gray on Blackmoor's Operating Bench or Advisory Committee (just as he says in his evidence he discussed with Mr Gray at their meetings on 13 and 15 June 2016 as well). In oral evidence, Mr Gray described the idea of a role on the Operating Bench as outside "*the realm of possibility*" but, as Mr Smith, convincingly explained:-

> "Q. *You never suggested to Mr Gray that he should think about being an operating partner, did you?*
> **A. *I did. And let me share with you the reasons. Mr Gray was pushing, he wasn't my cup of tea, I didn't think he had the skill set, but I thought it was interesting to keep him involved, my Lord, from a NuOrion perspective. The advisory committee – the investment team is the core, the advisory committee is quite important. We'll see them four times a year. The operating partner network we will call ad hoc as we get something that's interesting. So the fact of the matter was the operating partner construct was the furthest away that I could suggest that Mr Gray become involved in the business. So that is my rationale of why it fitted. It gave connection, which I was seeking for my business, to build credibility around a number of different areas but it also gave distance. So, my Lord, that is why I suggested it and that is why it is utterly credible.***"

223. Mr Smith's explanation is also consistent with his e-mail to Mr Lis dated 23 June 2016 in which the former said:-

> "*The Operating Bench members that are disclosed in the presentation are up to date, and there are a further ca.10 that I am working through the conversations with at the moment and so far seem well inclined to work with us on the basis laid out in the presentation.*"

224. Moreover, despite the Claimant's scepticism, it seems unlikely, based on Mr Gray's explanation, that the diary entry would refer to "*Operating partner*" (singular) when Blackmoor was building an Operating Bench. A reference to the singular would,

however, be appropriate if, as Mr Smith says, the call concerned Mr Gray's candidature for an Operating Partner role. In this context, I did not find convincing the Claimant's suggestion that Mr Smith had conflated the terms "*Operating Bench*" with "*Operating Partner*". Mr Smith was consistent in his use of the term "*Operating Partner*" or "*OP*" as referring to a member of the Operating Partner Network (as he described it) or Operating Bench.

225. The Claimant also points to the fact that the Defendants only plead that Mr Smith offered Mr Gray a suggested Advisory Committee role, not an Operating Partner role (Defence at [29(a)]). However, Mr Smith's written and oral evidence is clear that he discussed both roles on 13, 15 and 17 June 2016. By contrast, Mr Gray's explanation did not appear in his written evidence or pleading but only emerged at trial. His explanation also appears to contradict his own written evidence. According to Mr Gray's first statement (noted at [67]), he and Mr Smith discussed on 5 July 2016 whether a third partner "*would be beneficial*" and they agreed then that someone with extensive operational experience might be. However, if they were considering the utility of a third Operating Partner on 5 July, it seems unlikely that they would be discussing earlier on 17 June what progress Mr Gray had made finding one. Nor indeed would Mr Gray have reached out to Mr Hansen on 15 June for his suggestions.

226. The Claimant also submitted that Mr Smith's evidence about his reservations concerning a role for Mr Gray on the Investment Team supposedly shared during that call on 17 June 2016 (and at the meetings between 13 and 15 June), namely that Mr Smith did not know Mr Gray who had "*no adviser, fellow shareholder or other networks or any deal pipeline relevant to the strategy*" was "*extreme and obviously improbable*". If matters had been expressed in those "*inflammatory*" terms, Mr Gray would have "*slammed the phone down*". I did not find this submission compelling. Having heard Mr Smith's evidence, I am confident that he could – as he says he did - express himself in a manner avoiding a "*broadside*" against Mr Gray. Moreover, Mr Gray hanging up seems unlikely if he was pushing for a more senior role (as Mr Smith says he was on this call and at their meetings between 13 and 15 June). This is consistent with Mr Smith's evidence about Mr Gray having a persistent approach, ultimately persuading him to 'trial' Mr Gray on the Investment Team.

227. Mr Gray also relies on his e-mail exchange with Mr Smith on 30 June and 4 July 2016 when they arranged a meeting for 5 July 2016. The first e-mail from Mr Smith says "*How did the meetings go? When are you back to sit down and review?*" The Claimant suggested that this showed they had already agreed to build a fund together and would now meet to review the way forward. However, not only does the e-mail not say (or imply) this, this explanation overlooked the fact that, as Mr Smith's diary again records, he and Mr Gray had already spoken on 28 June 2016, the day after Mr Lis had ruled himself out from a Blackmoor role. Again, Mr Gray does not mention the call in his statements. Mr Smith does and says that Mr Gray repeated during that call his desire to be on the Investment Team and Mr Smith said he would think about it. They then arranged a meeting on 5 July 2016 to discuss it further, at which they agreed the trial collaboration. In this regard, the Claimant suggested in written closing submissions that such a "*volte-face*" by Mr Smith from the reservations supposedly expressed on his call with Mr Gray on 17 June (and at the earlier meetings between 13 and 15 June) made no sense. I disagree. By 28 June 2016, Mr Lis had declined the proposed Blackmoor role and, as Mr Smith said (noted at [187]), the proposed team

was a "*weak proposition*" without him. According to Mr Smith, although Mr Gray's fit was not clear, nothing was "*set in stone*" such that a trial collaboration was a manageable risk. The same cannot be said for the Alleged Oral Agreement. If, as Mr Gray says, Mr Smith had effectively ceded half his business upfront, he would have run a much greater risk if Mr Gray did turn out to be a 'bad fit', by which stage, there would be little he could do about it.

228. Mr Gray also relies on the presentation dated 1 July 2016 sent to Mr Gray for the first time on 5 July and the fact that this identifies the Investment Team as comprising Messrs Smith and Gray and (in square brackets) Messrs Pierburg and Kappelhoff-Wulff. This also included Mr Gray's photograph and biography which he says Mr Smith did not have "*much earlier than that*" such that he (Mr Gray) would not have featured in the earlier versions. There are a number of difficulties with this explanation: first, Mr Gray cannot point to any communication in which he (Mr Gray) sent his photograph or biography to Mr Smith; second, the photograph and biography are likely to have been (publicly) available to Mr Smith from the internet – as Mr Gray confirmed in evidence, he appeared on the NuOrion website; third, as noted (at [217]-[219]), Mr Smith explained to Ms Carnathan and Mr Lis on 20 and 23 June respectively (again, after the 13 and 15 June meetings) by reference to the attached investor presentations (which did not refer to, or identify, Mr Gray) that the team had "*come together*" and the executive team "*are in place*". If Mr Gray had, in fact, formed part of the team, Mr Smith would not have said these things or sent incomplete presentations – at a minimum, he would have inserted a 'placeholder' identifying Mr Gray; fourth, this still does not explain why Mr Smith did not send Mr Gray a copy of the investor presentation after the 15 June 2016 meeting - Mr Gray did not need to see his own photograph and CV but, if they had just agreed a joint collaboration, he would have needed to see Blackmoor's most important marketing document and; fifth, Mr Gray appearing for the first time in the 1 July 2016 presentation is consistent with Mr Smith's evidence that he updated that version to include Mr Gray on the Investment Team before sending it to Mr Gray on 5 July after the trial collaboration was agreed.

229. The Claimant expressed scepticism about Mr Smith's evidence concerning the inclusion of Mr Gray in this version of the presentation as a "*scoping exercise*", contrasted with the suggested different approach to Mr Treichl in the 13 March 2017 version. He also contrasted Messrs Pierburg and Kappelhoff-Wulff appearing in the document in square brackets with Mr Gray not in square brackets, reflecting him now having a "*fixed place on the team as Mr Smith's equal partner*". Finally, he alighted on the continuing appearance of Messrs Lis and Medlicott in this version to suggest that Mr Smith also viewed Mr Gray as part of the "*same proposition*". I found none of these points compelling (and the second and third mutually inconsistent). As to the first, the different approaches to Mr Gray and Mr Treichl are consistent with Mr Smith's evidence about his view on their respective offerings for Blackmoor and who was pushing whom for a role. As to the second, 'square-bracketed' or not, no-one appearing as an Investment Team member with Mr Smith, including Mr Gray, was ever described in the investor presentation as an "*equal partner*" (although Mr Treichl was later described as a "*co-managing partner*"). The suggested inference again represents too large a 'leap'. As to the last point, it is clear from the record that Mr Lis had already declined his proposed role within Blackmoor on 27 June 2016. Although he (and Mr Medlicott) remained in the updated version sent to Mr Gray on 5 July 2016, as the Claimant notes, everyone else apart from Mr Smith and Mr Gray was now 'square

bracketed', consistent with Mr Smith's evidence that the 'First Blackmoor Team' did not come together, leading him to consider Mr Gray for the Investment Team.

230. The far more compelling point is that Mr Gray appeared for the very first time in the version of the presentation sent to him on 5 July 2016. Despite Mr Gray's claim that the Alleged Oral Agreement was concluded on 15 June 2016 and foreshadowed in their earlier meetings on 28 April and 24 or 25 May 2016, Mr Gray appeared in none of the earlier versions of the presentation and he was not mentioned in any of the correspondence over that period about the Blackmoor Team 'coming together'. There is therefore nothing in the extensive 'electronic footprint' to indicate "*the reality that Mr Gray and Mr Lis were viewed by Mr Smith as part of the* <u>*same proposition*</u> ..". To the contrary, the 'footprint' confirms that Mr Smith did not view Mr Gray as part of the Blackmoor Team at all until 5 July 2016. Indeed, as noted (at [220]), 5 July marked a significant increase in e-mail traffic with Mr Smith, and the first such traffic mentioning Mr Gray's Blackmoor involvement, consistent with their Blackmoor collaboration only begining then.

6.13 Industry 'norm' for remuneration in investment management start-ups

231. Mr Smith relies on what he describes as the 'industry norm' for start-up investment management businesses such as Blackmoor, namely for individual participants to work 'on risk' on a '*no win, no fee or no equity*' basis, inconsistently with the suggested Equal Money Term (noted at [59e]). As to such 'norm', both parties' experts agreed the following in their joint remuneration report:-

> "*2.4. The Experts agree that prior to launch, a start-up fund has no ability to pay. The ability of a fund to pay its investment team is typically subject to both agreement from the owners of the fund and a successful launch, at which point, performance and management fees become payable.*
>
> *2.5. The Experts agree that were the Blackmoor fund to have successfully launched with the help of the Claimant then, subject to agreement with the owners, payment would have become due via performance and management fees.*"

232. This was developed in the evidence of the respective experts such that Mr Patterson stated further in his own report (at [3.5]) that:-

> "*Instead, owners of the fund tend to operate on a more informal basis, working with individuals who they believe could bring in relevant investors. These individuals tend to operate on a "no win, no fee or no equity" basis*."

233. In submission, Mr Gray focused on that part of Mr Patterson's report (at [3.8]) where he stated "*I could not say what a typical pre-launch payment might look like because there is no norm*". However, that statement was made in the context of those cases where money or equity *is* offered prior to fund launch but, as he went on to say, "[i]*ndividuals who attract these kinds of pre-launch offers are few and far between, they are standouts in their fields, being proven and having significant experience in their chosen investment strategy, have a long and strong track record of making investors' money, and consequently investors have had longstanding dealings and trust*

in their abilities." As noted (at [165]-[166]), despite his strong track record in investment banking, the same could not be said of Mr Gray in the context of activist investing. Accordingly, although Mr Patterson very fairly pointed out the limitations on publicly available data for start-ups such as Blackmoor and that "*there is no one size fits all*", contrary to the Claimant's submissions otherwise, his evidence was clear that "*no win, no fee, no equity"* is the 'market norm'. Nor was I persuaded by the Claimant's suggestion in submission that Mr Patterson had been unduly influenced "[c]*onsciously or not*" in his opinion by his own personal experience of being a partner in a fund which did not launch. As Mr Patterson stated in his report, it was "*useful background*" which, no doubt, did "*inform*" his opinions but, having heard his evidence, I am satisfied that those opinions were firmly founded in his 26 years experience as a remuneration adviser.

234. On this aspect, Dr Fitzgerald testified not dissimilarly to Mr Patterson:-

> "Q. *You have already just confirmed, as you said in your report, that the ability to pay is a basis of launching the fund and having something to pay with?*
> A. ***Absolutely.***
> Q. *So you would agree that the market remuneration norm in the case of a start-up fund is that they are only going to get paid if they perform some functioning role in launching the fund?*
> A. ***Yes.***
> Q. *So in essence you agree with what Mr Patterson describes in his report where he says "no win, no fee, no equity"; would you agree with that?*
> A. ***Yes.***
> Q. *Of course, an individual who becomes involved in a start-up is taking a risk, aren't they, that they will get paid nothing because the fund may not launch?*
> A. ***Yes.***"

235. Mr Gray also "*broadly*" agreed that this was the 'industry norm':-

> "Q. *Okay. Then at paragraph 3.5 he* [Mr Patterson] *says*:-
>> *"Instead owners of the fund tend to operate on the a more informal basis working with individuals who they believe can bring in relevant investors. These individuals tend to operate on a no win no fee or no equity basis."*
>
> *Do you agree with what he says there?*
> **A. *I don't because I don't ... well, I mean there are three different components there. One, my Lord, no win no fee no equity. I mean -- let me just re-read this.***
> **(Pause)**
> ***I think I -- I think I broadly agree with that***."

236. Indeed, Mr Gray worked on a not dissimiliar (non-contractual) basis at NuOrion. As noted (at [170]), although Mr Gray suggested in his first statement that the 'starting point' for his remuneration at NuOrion was a three-way split, the arrangement was, in fact, success-based and subject to discussion and agreement. Likewise, as he says in his first statement, his initial Avon capital raising role was success-based, with any payment reflecting a specific percentage of capital raised.

237. Mr Smith too confirmed in his first statement that success-based remuneration "*is the industry standard for start-up companies and investment funds*."

6.14 **Blackmoor corporate structure**

238. There was considerable discussion in the evidence and submission about the fact that, by the time of the meetings between 13 and 15 June 2016, BIPL had already been incorporated and was the vehicle through which the Blackmoor business was then owned and operated. So, for example, BIPL was identified as the entity that prepared the Blackmoor investor presentation and its contents were confidential to BIPL. It also stated that:-

> "*…. The business model, investment and divestment ideas, strategy and activity are the property of the BIP and not of any single individual, partner, employee, agent or advisor. Individual representatives are such only insofar as authorised and advertised as such by BIP*."

239. Despite some hesitation, Mr Gray confirmed that BIPL was the entity seeking to attract investor capital:-

> "*I repeat my point, Mr Gray. You were going to market Blackmoor Investment Partners, that name, whatever that means, through BIPL. That was the entity that was going to pitch to investors, wasn't it?*
> **A. *Perhaps*.**
> Q. *By "perhaps", do you mean "yes"?*
> **A. *Yes*.**"

240. In his first witness statement, Mr Gray says that he learnt at the meeting on 28 April 2016 that Mr Smith had incorporated BIPL which he thought might be "*useful at some stage in the future if we did proceed to build a business together*." Mr Smith believes that Mr Gray would have learnt about BIPL on 5 July 2016, after he sent him the investor presentation. Either way, Mr Gray confirmed in his oral evidence that he knew (i) Mr Smith controlled BIPL (ii) Mr Smith was a BIPL shareholder (iii) Mr Smith would have determined who its shareholders were and (iv) he (Mr Gray) was not a shareholder.

241. Mr Smith argues that, in these circumstances, the Equal Money Term makes no sense since only BIPL had the power to agree to give away half its fees. An agreement by Mr Smith to give away fees that did not belong to him was a 'legal nonsense' and, therefore, improbable. Mr Gray says that Mr Smith's argument is unduly formalistic or technical. The corporate structure for the ownership and management of the Fund, whether this might involve BIPL or another entity, would be decided upon at a later date, BIPL had only been incorporated very recently and, at the time of their discussions, it was little more than a shell company without any relevant regulatory approval or, as Mr Smith said in oral evidence, any 'business'.

242. In this regard, I do not accept that the point taken by Mr Smith is an unduly 'technical' one. On the basis of the Equal Money Term, the parties had agreed to confer on Mr Gray the right to the principal receivable of the relevant Blackmoor fee-generating entity even though this could not be achieved contractually as between Mr

Gray and (as principal) Mr Smith alone. Equally, however, if parties decide to engage together on a ‘50:50 basis’ in the early stages of a ‘start-up’ business, I can see how they might not express correctly in any agreement the related private law and corporate law rights and/ or their proper balance, giving rise to legal difficulties and asymmetry of the nature identified by Mr Smith.

243. In this case, however, I consider more compelling than the suggested improbability of agreeing a ‘legal nonsense’, Mr Smith’s related point that *these* parties were steeped in, respectively, private equity (Mr Gray) and publicly marketed *equity* activist investment (Mr Smith). *Equity* was therefore the prism through which they would have viewed any deal about jointly building the Fund. I therefore consider it highly improbable that they would have expressed their economic interest in Blackmoor by reference to a division of its main (but not sole) current asset and its current liabilities. Rather, they would simply have agreed to split the *equity* in the relevant fee-generating entity (or entities).

244. Indeed, as noted (at [77]-[79]), Mr Smith’s evidence was that, on 5 July, 30 August and 20 September 2016, Mr Gray raised with Mr Smith the issue of his *equity* participation (not a share of net fees). Similarly, in his e-mail to Mr Gray on 25 October 2016 about ‘reeling in’ Mr Bonomi as an investor (noted at [80]), Mr Smith talked in terms of giving away a share of the management company (not its fees). Likewise, when Mr Smith reduced to writing the proposed or actual terms of his participation with Messrs Treichl, Meinl and Schmidt-Chiari, the relevant term sheets again talked in terms of *equity*. Similarly, Mr Gray says his first witness statement was served in support of his “*claim against Douglas Smith ("Doug") in relation to a 50% ownership interest in the investment business of Blackmoor Investment Partners Limited*” even though his claim is not for an ownership interest at all rather than the fees he said he should have earned pursuant to the Equal Money Term.

6.15 **Commercial probability**

245. There was also much discussion at the hearing about the commercial probability of the Alleged Oral Agreement more generally, with Mr Smith stating more than once in oral evidence that any such agreement would have been “*commercial suicide*”. Given the interplay of commercial probability, certainty of terms, intention to create legal relations and contractual performance, I consider these issues together in the sections which follow.

246. As to commercial probability, Mr Gray was dismissive in closing submission of the suggestion that the Alleged Oral Agreement would have been ‘commercial suicide’, noting two matters in particular: first, Mr Smith’s oral evidence that, as at June 2016, “*we didn’t have a business*” and; second, that it would, in fact, be commercially unrealistic for the Claimant to work ‘on risk’, only then for any remuneration to be in Mr Smith’s gift, even if Mr Gray had achieved success. In my view, the former rather missed the context of Mr Smith’s evidence, namely that, as at June 2016, Blackmoor did not have a “*business*” – meaning an activist investment fund generating fee income - *yet*. Mr Smith was aiming to build the Fund but, on the basis of the Express Terms, before any progress had been made at all, let alone investor capital committed, Mr Gray acquired (i) 50% of the the main receivable from the (current *and future*) investment business with a target AUM of €200-300MM and (ii) joint decision-making authority

over every aspect of that business. Furthermore, on the basis of the Implied Terms, neither party could bring that agreement to an end so long as there was some sufficient investment interest from a cornerstone investor. It did not matter whether Mr Gray had played any part in generating that interest nor, indeed, whether Mr Gray - from Mr Smith's and Blackmoor's perspective, an untested proposition - turned out to be any good at the principal matter which the experts jointly agree would have been his focus - capital raising. In my view, such an arrangement would have been very one-sided indeed in Mr Gray's favour.

247. This also puts into context Mr Gray's own observations about 'risk'. On the basis of the Alleged Oral Agreement, Mr Gray was entitled to half the potential rewards of the business they were seeking to build without first having to demonstrate why he merited them despite, as noted (at [231]-[237]), the accepted 'market norm' for an investment start-up business being '*no win, no fee or no equity*' and Mr Gray's willingness to work at NuOrion on a not dissimilar 'success' basis. Moreover, on Mr Gray's case, he was in any event already 'on risk' that his and Mr Smith's *collective efforts* would be insufficient to raise a meaningful amount of investor capital such that the Fund never got off the ground. It could be said – as Mr Gray did in submission – that this was risk enough already. However, the additional element of risk to Mr Gray on a '*no win, no fee or no equity*' basis was that his *own personal efforts* did not bear fruit. Mr Smith did not know how he would perform but Mr Gray was, of course, much better placed to assess the risk that he might not be able to raise capital.

248. Nor did I find compelling Mr Gray's point that his 'reward' was in Mr Smith's 'gift'. As noted (at [170]), that was also the case at NuOrion in the sense that compensation would be discussed and agreed after conclusion of each individual SPV transaction. If Mr Gray achieved 'success' at Blackmoor, it seems unlikely that Mr Smith would renege on any assurance that they would then sit down and agree 'compensation' commensurate with the success achieved. However, in that unlikely event, it would be open to Mr Gray to bring a claim in unjust enrichment.

249. There is another important aspect to Mr Smith's "*commercial suicide*" remark: in ceding upfront a veto right over the all management decisions and 50% of its 'economics', Mr Smith would constrain from the outset Blackmoor's capital raising options (already constrained by a long, and therefore less attractive, capital lock-up period) in circumstances in which potential significant investors, and/ or those introducing them, might well demand from Blackmoor equity, management influence and/ or remuneration. Moreover, depending upon the level of investor interest, of capital ultimately raised and, therefore, of Blackmoor's fee income – none of which could be known in advance – the business might simply not be able to sustain two 'equal partners'.

250. Finally, Mr Gray and Mr Smith would be obliged to commit their own money to the Fund if investors demanded it. Although Mr Gray said in oral evidence that there was a "*finite cap*" on any contributions by reference to what they could afford, he accepted that this cap did not feature in the Equal Money Term. As such, both of them would have been 'on the hook' to contribute whatever an investor demanded of them whatever the extent of their resources. Again, it seems highly improbable that they would have agreed such a potentially onerous obligation.

6.16 **Certainty of the terms of the Alleged Oral Agreement**

6.16.1 **Introduction**

251. Mr Smith also argues that the Alleged Oral Agreement is uncertain in a number of respects. Since 'certainty' encompasses not only the distinctness of the relevant terms but also their completeness, I first stand back and consider the overall contractual scheme in which the individual terms sought to be impugned are said to operate. This required the parties to *try* to launch a fund with a target AUM of €200-300MM. That much is evident from the framing of the Joint Marketing Term "***with a view to** securing a committed investment fund …* " (my emphasis in bold). Once there was a certain level of investor interest, the parties' obligation to work exclusively for the Blackmoor 'joint venture' would then be engaged. Moreover, on the basis of the relevant Implied Term (at [PoC 9.2.3]), once a certain level of *cornerstone* investor interest had been achieved, the parties could not back out of the Alleged Oral Agreement. Once the Fund had been launched, investor capital would then be managed jointly. Mr Smith suggests that the Alleged Oral Agreement suffers (fatally) from uncertainty with respect to (i) the minimum capital required for Fund launch (ii) the (absence of) Fund terms if it did successfully launch and (iii) the duration and termination of the Alleged Oral Agreement (both before and after Fund launch).

6.16.2 **Certainty of terms - minimum launch capital**

252. As to the former, it follows from the suggested obligation to work together to *try* and build a committed fund that there must come a point (if ever reached) at which the parties could say to each other that the 'button' for Fund launch should now be pressed. The difficulties created by the absence of any related contractual term became evident from Mr Gray's oral evidence:-

> "*Let's take a more financially viable hypothetical. Let's say you had investors of 150 million, but Doug said no, I'm not happy to launch at 150 million, I don't think it's enough, I don't think we're going to generate enough fees to make this a viable business. Is there an obligation on the two of you to launch a fund in that situation, contractually binding obligation?*
> **A.** (Pause) ***Yes.***
> Q. *125 million. Yes or no?*
> **A.** ***Yes.***
> Q. *75 million?*
> **A.** (Pause)
> ***It could depend on how the 75 is comprised but I would probably say yes.***
> Q. *27.4 million?*
> **A. Well, I'd like to offer some editorial, my Lord** --
> Q. *Can you answer the question first* --
> **A.** ***Well, because I don't think it's as simple as you know, hey, yes or no, 27.4*** --
> Q. *Mr Gray, it's a contract you see so it ought to be incredibly simple.*
> **A.** ***It is a contract but however what that number doesn't indicate is whether when you have a so-called first close, as my Lord I'm sure you understand, many times for technical reasons there are first closes meaning, but also meaning that you have a lot of money that is soft circled behind it. So I think -- I think the artificial, you know, definition of a first close when -- when you***

have other money which is very interested or soft circled to commit, you know, I think they are different things. So if you were telling me 27.4 without any prospect of any more capital I'd say no. However if you are saying 27.4 and -- and just in the first close but there's more money coming in or a high prospect of it, I'd say -- I'd say yes*.*

Q. *So you are saying that even to determine if one has a particular number of potential investment, one then has to do an assessment as to the prospects of further money coming in as you just explained in your narrative in order to work out whether there was or was not a contractual obligation to launch; yes?*

A. *Yes.* *"*

253. In my judgment, the minimum launch capital requirement would be an essential term of the Alleged Oral Agreement. However, that agreement is notably silent as to this key 'stepping stone' between performance of the obligations to *try and build the Fund* (as expressed in the Joint Marketing Term) and the further obligation (as expressed in the Joint Management Term) to *manage client capital* once launched. The importance of that 'missing' step – the trigger for Fund launch - is evident from the fact of these proceedings; if the minimum launch requirement was never going to be achieved with Mr Gray and Mr Smith working together as 'equal partners' as contemplated by the Alleged Oral Agreement, it is difficult to see how Mr Gray could claim damages based on fees generated by a fund which would never have come into existence.

254. In written closing submission, Mr Gray pointed to the parties' oral evidence as to their understanding of the Fund's target AUM (€200-300MM) to suggest that they "*understood exactly what was meant by the Joint Marketing Term*". Although this might well answer the point that such target was expressed in too wide a range to be certain, it still does not grapple with the problem left by the absence of any term stipulating the Fund's minimum launch capital. If it is being suggested that this was €200-300MM, this claim would, no doubt, be moot. As Mr Gray accepted in oral evidence, his and Mr Smith's joint marketing efforts had yielded no committed capital by April 2017. Nor has the Blackmoor Fund (as launched in March 2018) ever achieved that target either. However, it seems from Mr Gray's evidence (noted at [252]) that, in his view, the Fund's minimum launch capital is far less than its target AUM but, given the potential complexities, he was unable to identify a specific figure. In my view, this suggested complexity merely reinforced the need for agreement as to minimum launch capital term and the uncertainty of the Alleged Oral Agreement without it.

6.16.3 **Certainty of terms - Fund structure**

255. Mr Smith says that, on Mr Gray's case, even though the Alleged Oral Agreement is concerned both with the building of a fund *and its operation*, there was no discussion as to what the terms of the Fund were to be if successfully launched, including the vehicles to be used, their jurisdiction and ownership, or the terms on which any equity ownership was to be acquired. As noted (at [151]), in addition to *Blue*, he relies on *Walford v Miles* [1992] 2 AC 128, as applied in *Dhanani v Crasnianski* [2011] 2 All ER (Comm) 799 (the latter said to be closely analogous with this case), to argue that the Alleged Oral Agreement is unenforceable as an 'agreement to agree'. One need only look at the complexity and detail of SRZ's preliminary advice of February 2017 about the issues for consideration in the establishment of a fund to

see that the Alleged Oral Agreement – expressed in the barest of terms – fails to address these matters. Mr Gray's simple position is that these matters are already "*accommodated*" by the Joint Management and Equal Money Terms and the parties' ability to decide on those matters at a later point.

256. On its facts, *Dhanani* might, superficially, be said to be analogous but that case was concerned with an agreement between *investor* and manager *to invest into a fund*. By contrast, the Alleged Oral Agreement is concerned with the joint efforts of the proposed *managers to try to raise a fund* and, if launched, to manage it. Although matters of fund structure, jurisdiction(s) and ownership of fund vehicles would obviously be very important if the Fund did launch, they would only need to be 'pinned down' in that event. *Dhanani* is, in my view, meaningfully distinguishable and I do not therefore accept that the parties would have intended these matters to be a precondition to a concluded agreement such that, in the language of *Pagnan SpA* (noted at [152]), there is "*no legal obstacle which stands in the way of parties agreeing to be bound now while deferring important matters to be agreed later*."

257. Where, however, I do depart from Mr Gray's submission is his suggestion that the Joint Management and/ or Equal Money Terms can 'accommodate' Mr Gray's future acquisition of an equity ownership interest in the relevant fund vehicle(s). The parties' equity participation would obviously be a matter of central importance to them both. Even if the relevant fee-generating vehicle(s) had not yet been decided upon, or indeed incorporated, at the time, this would still be capable of expression and agreement upfront. Not to have done so by 15 June 2016 would mean that a fundamental aspect of the suggested 'joint ticket' was 'missing' from their agreement. However, on Mr Gray's case (at PoC [9.1.5]), the parties did, in fact, agree their future interest in the fund, not in the *equity* of the fee-generating Blackmoor entity(ies), but in the "*fees generated by Blackmoor*". This is also reflected in Mr Gray's related claim for damages, expressed as the hypothetical *fees* that would have been generated by the Fund under his and Mr Smith's joint management (at PoC 25), not the value of an *equity* stake in the relevant Fund vehicle(s) (the latter requiring a different approach to damages). As noted (at [243]-[244]), I consider it improbable that these two parties steeped in the *equity* markets would have expressed themselves in terms of a division of *fees* but that is what Mr Gray pleads *was* agreed in June 2016. The Equal Money or Joint Management Terms are not concerned with equity ownership and could not 'accommodate' its future acquisition. This would require either a variation to their agreement or an entirely new one. This difficulty is not an incident of 'formalism' about corporate structure (discussed at [238]-[242]), rather than how Mr Gray himself says the agreement works.

6.16.4 **Certainty of terms – termination**

258. As to termination, Mr Gray accepts that this was not discussed with Mr Smith between 13 and 15 June 2016. However, both parties recognise that neither party would have had to work together indefinitely to try to build the Fund if their efforts were not paying off. I agree. The nature and subject-matter of the Alleged Oral Agreement, requiring them personally to work together, was such that the parties must have intended it to be determinable (as envisaged by *Re Spenborough* (noted at [161])). To that end, Mr Gray says the Court should imply a term into the Alleged Oral Agreement that neither party would seek to terminate it *pre-launch* whilst there was a real prospect

of securing a cornerstone investor. To a similar end, as Mr Gray appears implicitly to recognise through his damages calculation, made more explicit in closing submissions, even if the Fund had, in fact, launched under the joint management of Mr Gray and Mr Smith, there "*had to be an endpoint*". However, no term is asserted (express or implied) as to when the parties could terminate the Alleged Oral Agreement *post-launch.*

6.16.4.1 Certainty of terms – termination *pre-launch*

259. As to *pre-launch* termination, Mr Gray says that the Implied Term asserted is consistent with, and derivative of, the express terms of the Alleged Oral Agreement. In that regard, I was referred to his pleading (at PoC [8.4]) where the fuller discussion as to what they orally agreed on 13 and 15 June 2016 is set out in the following terms:-

> " …….. *they would jointly market Blackmoor to the Joint Contacts for the purposes of establishing a committed fund with a particular (but not exclusive focus) on initially securing one or more high profile cornerstone investor in order to lend visibility and credibility to Blackmoor.*"

260. Having agreed at these meetings that cornerstone investors were the main focus of their marketing effort, it was said to be 'obvious' and/ or necessary as a matter of 'business efficacy' that this concept too should frame the circumstances in which termination of their agreement *pre-launch* would be permitted. Although I accept that, in any discussions over a few hours about the Alleged Oral Agreement, termination would not have been foremost in their minds and that, on Mr Gray's case, the term sought to be implied does share some of the language of those discussions, it does not follow that such implication is either obvious or necessary to give business efficacy to the Alleged Oral Agreement. Nor, in my view, is it 'clearly expressed'. To the contrary, I found it convoluted and liable to give rise to confusion, not clarity.

261. First, although the notion of "*real prospect*" is clear to the Court in the context of the Civil Procedure Rules, it is highly doubtful that the 'officious bystander' would view that phrase in the same way, let alone equate it with a prospect akin to 'more than merely fanciful'. Moreover, the meaning under the CPR only became settled as a result of extensive litigation and, even today, many cases come before the Courts with significant argument as to whether the test has been satisfied. Nor does the colour coding used by the parties in the PIL shed much light either - a (green) 'live' lead on the PIL does not necessarily equate to a real prospect of investment, let alone 'cornerstone' investment. Nor is the phrase "*good prospect*", as used by Mr Smith in the specific context of the steps leading to the potential achievement of target launch capital in 2017, illuminating of a '*real prospect*' in the more general context of securing cornerstone investors.

262. Second, although conceptually well understood by both Mr Gray and Mr Smith, nor is the expression 'cornerstone investor' – in fact, the defined term 'Cornerstone Investor' (at PoC [8.4]) – without its difficulties. That term (as also used in the Implied Term on termination) is said to mean "*one or more high profile cornerstone investor in order to lend visibility or credibility to Blackmoor*". In this regard, Mr Gray's oral evidence was illuminating as to the level of proposed investment for someone to qualify as a cornerstone investor:-

> A. ***Well, this isn't -- this isn't just anyone, my Lord, it's a cornerstone investor. Which is a material investor. It's not someone who wants to put in 5 or 10 million euros. It's a material cornerstone investor and it has to be a real prospect. It can't be just someone who says, hey, I'll throw in 100 grand, or 5 million or 10, it has to be in the quantum of 25 to hundreds of millions.***
> *Q. So that's your threshold figure is it? 25 million euro makes them a cornerstone investor, 24 million euro does not?*
> A. ***I'm not sure I create a bright red line. I don't I'll necessarily say if they said 24.2 I'd say it's not a cornerstone but probably circa in that rough – in probably the -- in that ballpark, 20 - 25 at the bottom end.***
> *Q. 20 - 25. So 20 million would be a cornerstone investor?*
> A. ***I would think.***
> *Q. You see the problem is we do rather need a bright red line because this is a contract. Do you understand why we need some degree of clarity, Mr Gray?*
> A. ***Yes.***

263. Combined with the term 'real prospect', it is not difficult to see that, whether any proposed investment was of sufficient scale on its own, whether any particular investor was sufficiently high profile or lent visibility or credibility, whether any attached conditions made its investment interest too contingent, or whether that interest remained 'real' or had waned or become 'stale', might all be matters of considerable debate. Although Mr Gray submitted that his formulation achieves 'balance', in my view, it lends itself to significant uncertainty. In the context of a term concerning something as important as a termination right – and one to be implied at that - Mr Gray's formulation is, in my view, a precarious one.

264. Third, nor is it possible for me to conclude that the implication of a term in these terms was so obvious that it 'goes without saying' or that it was needed for business efficacy. Indeed, given the onerous obligations in the Alleged Oral Agreement, including as to marketing activity, exclusivity and expense sharing, there would be much to be said for the implication of a term not by reference to the absence of reality of securing a cornerstone investor rather than to some more tangible measure or 'marker' which allows either party to take stock of progress and, if they conclude that insufficient marketing 'headway' has been made, to 'cut their losses' and terminate. In this way, certainty would be achieved and the risk of inadvertent repudiatory breach by wrongful termination avoided. However, there are many potential circumstances in which it could credibly be said that the Alleged Oral Agreement should be terminated including, for example, at will, on reasonable notice, after a certain period of time without Fund launch or if certain minimum levels of committed capital have not been achieved. As such, it is simply not possible to single out any one of them as necessary or obvious. As Rix LJ said in *Port of Tilbury (London) Ltd* v *Store Enso Transport & Distribution Ltd* [2009] 1 CLC (at [25]) (noted at [160]):-

> "*Moreover, the fact that an implied term may take several different formulations is a classic sign that it is neither necessary nor obvious*."

265. Indeed, as noted (at [143]), even the Claimant put forward an alternative formulation (more favourable to him) in his second letter before action dated 18 June 2018, later modified in his pleading (at PoC at [9.2.3]).

6.16.4.2 Certainty - termination *post-launch*

266. As to *post-launch* termination, as noted (at [258]), Mr Gray recognises, albeit only indirectly through his damages claim, that "*there had to be an end point*", after which the parties would not be expected to continue to work together in the Fund. Although, again, I recognise that in any discussions over a few hours about the Alleged Oral Agreement, the parties are unlikely to have dwelt on questions of how to bring to an end their involvement in a fund they had only just agreed to build, that end point would have been a very significant matter such that, in my view, another essential term is missing.

267. Indeed, the importance of this term became apparent from the discussion of contractual damages and the period over which they were to be calculated in the Claimant's counterfactual that the Fund launched with both Messrs Gray and Smith at the helm. The Claimant says that he and Mr Smith are in their early 50s and they both saw the Fund as a long-term project. Since they agreed in the Alleged Oral Agreement the minimum duration of capital at three years (PoC at [8.6]) and the Blackmoor marketing materials stated that the Fund intended to 'unlock' value for shareholders over a 3-5 year horizon (but had not yet done so during the Fund's performance to date), the alternative periods selected (running to June 2024 or June 2026) provided a "*pragmatic cut-off*" for Mr Gray's losses. However, 'pragmatism' does not fill this 'gap' in the contract. Nor is it possible for me to imply a term (even if one had been pleaded); indeed, it does not follow from the Fund's contemplated investment horizon or from any agreement as to 'lock-in' periods that it is either 'obvious' and/ or 'necessary' for business efficacy for such period also to stand as the minimum duration of the Fund.

268. The Claimant appeared to recognise the further problems to which this gives rise in terms of the Fund potentially having to run indefinitely and suggested that any 'perpetuity' difficulty at the contractual level could be addressed at the corporate level by the winding up of the relevant fund vehicles on 'just and equitable' grounds through the exercise of his shareholder rights. However, even if such a power existed in the jurisdiction selected for the relevant vehicle(s), I found this unpersuasive, not least because, as noted (at [149]), Mr Gray's claim is premised on an entitlement to *fees*, not *equity*. On his own case, he would not be a shareholder. Nor would he necessarily be a creditor. As such, he would lack standing to bring a petition.

6.17 **Intention to create legal relations**

269. As to the parties' intention to create legal relations, the social context in which the Alleged Oral Agreement was supposedly concluded is an important consideration. The setting for the meetings on 13 and 15 June 2016 was, respectively, a food market and Costa Coffee, not obvious places to conclude a commercial contract said to yield damages in this case of up to €18.53m. Although discussion over coffee would not preclude the conclusion of an oral agreement and Mr Gray was, of course, correct to say that "*we don't have to be in a room with, you know, dark wood panels, to have a legally binding contract*", as noted (at [149]), the Court should scrutinise contracts said to have been made in such highly informal and relaxed settings.

270. As to how Mr Smith normally went about his dealings, he said in written evidence:-

> "*While I talk about business in coffee shops frequently, I do not make detailed binding agreements in coffee shops or restaurants, and I certainly would not (and did not) agree terms of the utmost significance to me (such as the giving away of a significant control and/or economic portions of my life-long objective, Blackmoor)*".

271. Mr Smith's evidence is also consistent with his dealings with Messrs Treichl, Meinl and Schmidt-Chiari about their participation in Blackmoor. These were committed to writing. No agreement was, of course, ever concluded with Messrs Treichl and Meinl prior to the untimely death of the former but it is notable that the related term sheet dated 7 June 2017 embodying Mr Smith's proposal states: "[t]*he following is a preliminary term sheet for discussion purposes, subject to review by legal advisors*." Accordingly, although it is clear from the contemporaneous communications that he was very keen to 'land' Messrs Treichl and Meinl, Mr Smith reduced his related proposal to writing. Even then, contrary to the Claimant's suggestion of "*the speed with which Mr Smith made significant promises*", including to Mr Treichl, it is plain from the face of the document that further discussion and legal input would still be required before this proposal might become binding. That is, in fact, in marked contrast to the speed at which Mr Gray says significant binding (oral) promises were made on 15 June 2016.

272. Moreover, as noted (at [170]), Mr Gray states in his evidence that there was no written partnership agreement or contract in relation to NuOrion, that over time he discussed making the NuOrion profit split "*more formal*", Mr Phillips refused to entertain any form of partnership agreement but Mr Gray's view was that the NuOrion business "*should have more structure*" to make it strong and sustainable. In oral evidence, Mr Gray said he had these shortcomings in mind in discussion with Mr Smith about Blackmoor:-

> **"… [A]*t the time I agree[d] with NuOrion's construct. I just… thought it was suboptimal. I didn't necessarily like it. And as you pointed out… over time… I pushed for something a bit more formalised. So when the discussions with Doug started I wanted to have something much more clear and simple that we were equal partners and ultimately, yes, I said I trust him*."**

273. It is not unreasonable to suppose that, given his prior unsuccessful efforts to formalise his arrangement at NuOrion, Mr Gray would have requested the Alleged Oral Agreement to be committed to writing. Indeed, given Mr Smith's apparent eagerness to bring him on board, he would be unlikely to encounter the same resistance as he had experienced with Mr Phillips and, with the apparent simplicity of their alleged agreement, this would not have been difficult to achieve without the need for any rooms with dark wood panels. Indeed, as noted (at [212]), with their background in corporate transactions, one might expect this practice to have been engrained in them both. However, although Mr Gray expressed in oral evidence his considerable regret for not having matters reduced to writing, he did not satisfactorily explain why he had failed to do so.

274. Despite the above matters, performance of a contract by both parties often makes it unrealistic to argue that there was no intention to enter into legal relations or that a contract was too vague or uncertain to be enforced (*G Percy Trentham Ltd* v *Archital Luxfer Ltd* [1993] 1 Lloyd's Rep 25 (at [27]) (noted at [162])). As such, I now consider whether, and if so, to what extent, the parties subsequently conducted themselves consistently with the performance of the Alleged Oral Agreement.

6.18 **The performance of the Alleged Oral Agreement**

6.18.1 **Introduction**

275. It is common ground that Mr Gray and Mr Smith worked together from July 2016 with a view to raising a committed fund, including (i) pooling their respective contacts (ii) seeking to recruit team members (iii) jointly marketing Blackmoor and (iv) analysing potential investments for pitching to potential investors. Although there was considerable debate as to the extent, benefit and value of Mr Gray's related work and on whom any such benefit was conferred (addressed further below in the context of his unjust enrichment claim), it could therefore be said that each of the Joint Contacts, Blackmoor Team, Joint Marketing and Financial Analysis Terms were - to some extent at least - performed. However, although the performance of work is a relevant factor pointing in the direction of a binding contract (see, for example, *Dhanani* (at [70])), I accept Mr Smith's submission that such work is equally compatible with the parties undertaking a non-contractual trial collaboration. Since they might therefore both have acted in the same way without a contract, I cannot find that such conduct supports the existence of the Alleged Oral Agreement or that it is 'necessary' to imply an agreement in its terms (see *Baird Textile* noted at [163])). The Joint Management, Equal Money and Exclusivity Terms would, however, be inconsistent with a trial collaboration such that the parties' conduct after July 2016, as it relates to those aspects, is much more insightful.

6.18.2 **Joint decision making authority**

276. As to the Joint Management Term, as noted (at [77-78]), Mr Smith maintains that Mr Gray wanted to discuss equity participation and his decision-making authority at two meetings on 30 August and 20 September 2016. Mr Smith says he responded that it was too soon to discuss equity participation and declined equal decision-making authority in favour of Mr Gray. Shortly after their second meeting, Mr Smith e-mailed Mr Gray on 23 September 2016 about various matters, including:-

> "*Governance, stalemate resolution examples fro* [sic] *PE?*"

277. Mr Gray then e-mailed Mr Smith to say:-

> "*I know for a fact that the large PE firms have a consensus construct; I confirmed yesterday. I think we should look at two "peers", Cevian and Primestone, and then make a decision based on what they have since we are similar in that we are neither hedge fund nor PE. Yes, we have only two principals; we'll figure it out. I will likely get from SRZ in NY or an existing investor unless you think your SRZ guy in London will give you the precise language.*"

278. Mr Smith responded:-

> "*Consensus unfortunately doesn't work; SRZ London have framework and peer relevance... let's discuss.*"

279. Mr Gray replied:-

> "*Then I will need to see the written construct of Cevian and Primestone. Who is the "decision maker" at Primestone?*"

280. Mr Smith says that these exchanges support his case that Mr Gray raised the issue of decision-making authority in August and September 2016 such that the Joint Management Term could not already have been agreed earlier in June 2016 as part of the Alleged Oral Agreement. Mr Gray accepts that he had discussions with Mr Smith about *stalemate resolution* but only because they had *already agreed* equal decision-making power and, having been told that investors might demand a unilateral decision-maker over exiting investments, Mr Smith was now seeking such authority.

281. I found Mr Gray's explanation somewhat convoluted as well as inconsistent with the documents. The discussion in the e-mails was not merely about "*stalemate resolution*". Mr Smith's initial e-mail is concerned more generally with "[g]*overnance*" as well. Mr Gray's response was not about "*stalemate resolution*" but, more broadly, about a "*consensus construct*". The exchanges did not mention the issue of exiting investments. Mr Gray stated that they would "*figure it out*" and "*then make a decision*", indicating that the issue still had to be worked through and a decision yet to be taken. There is no mention of the Joint Management Term having previously been agreed or that the matters discussed represented a departure from it. Moreover, Mr Smith's rejection of a "*consensus construct*" is terse, consistent with him being the decision-maker at Blackmoor. Finally, with his experience, I venture to suggest that Mr Smith was already alive to the fact that some potential investors might require a single Blackmoor decision-maker when it came to exiting investments. I therefore accept Mr Smith's evidence. This also accords with Mr Phillips' evidence about Mr Gray wanting a veto power over investments. Mr Phillips says he considered Mr Gray "*immature even to have asked for it*". Mr Smith's word to describe Mr Gray's request for equal decision-making control was "*naïve*".

282. Mr Gray also gave evidence that he ultimately agreed in March 2017 to give unilateral decision-making authority to exit investments. Mr Smith denies such discussion. He says he already had that authority. Although it must be acknowledged that the Claimant did volunteer this evidence which, on its face, runs counter his case on the Joint Management Term, I consider it unlikely that, if the principle of 'equality in everything' had been agreed, he would have made such a concession on the important issue of exiting from investments.

283. Mr Gray also relies on the 10 January 2017 fund summary presented to UBS as conveying Blackmoor as "*... a joint ticket run by Mr Smith and Mr Gray, two highly experienced equals at the helm of the Fund*." Although this says that "[t]*he Manager is led by seasoned value investors James Gray and Doug Smith …*" and describes them both as "*Partner*", the document does not say they are 'equals' in decision-making nor does it explain Blackmoor's internal governance arrangements, unsurprisingly so for

marketing material. More broadly, the Claimant also emphasied at trial his and Mr Smith's repeated use during their collaboration of the term "*partner*" to describe each other, including in Blackmoor marketing documents. Although he made clear that he was not asserting a *partnership* under the Partnership Act 1890, he did suggest that such use supported them having agreed to be '*equals*' in Blackmoor. However, given the range of potential meanings of *partner*, not necessarily connoting anything more than joint collaboration, I found that this point did not advance matters.

284. Finally, Mr Gray was appointed as a director of BIPL on 1 February 2017. Although the Joint Management Term did not explicitly require his appointment, Mr Gray's membership of the BIPL board could also be said to be consistent with the conclusion and performance of the Joint Management Term. In my view, however, this rather begs the question why it took more than 6 months for the appointment to be made and why Mr Gray did not insist on it earlier. Given the proximity of the appointment to the US marketing trip – as Mr Gray says, he posted the completed form from Heathrow Airport – I accept Mr Smith's evidence that this was intended to "*bolster*" Mr Gray's seniority for marketing purposes and to present a more "*joined-up team*". Indeed, Mr Smith's e-mail to Mr Gray of 27 January 2017 with the relevant appointment forms states "*worth submitting before going to states …*".

6.18.3 **The equal division of fees**

285. As for the Equal Money Term, there could obviously have been no actual splitting of fees between Mr Gray and Mr Smith because the Fund had not been launched before they parted ways. However, as noted (at [86]), on 8 February 2017, Mr Smith e-mailed Mr Gray proposing a financial split for any SPV deals that they might conclude, stating:-

> "*James, thoughts on aligning economics to input and effort, and a sense of fairness:*
>
> - *Initial tranche of €250,000 to originator/ deal leader;*
> - *Thereafter 51% to originator/ deal leader, then 49% to partner.*
>
> *These economics are reciprocal, so if NuOrion does a deal from here you are the originator/ deal leader.*
>
> *This isn't carved up into complicated pieces of value between money raiding, deal origination, deal engagement, etc. but rather an acknowledgement that at this point the Blackmoor deal pipeline is my deal pipeline from the StratCap period and before.*
>
> *Hope this is logical for you.*"

286. Mr Gray says "*Doug's e-mail irritated me*", representing an attempt to "*carve-out*" legacy deals from, and introduce a fee structure to, their "*all things equal agreement*." Despite his apparent irritation, Mr Gray says he did not respond to Mr Smith since the prospect of one-off deals was low. Mr Smith says that, although a different product from the Fund, they also marketed a number of SPVs, again adopting a 'success-based' approach to the economics, as reflected in his 8 February 2017 e-mail. Again, I found Mr Gray's evidence unconvincing. If the Equal Money Term had

been agreed as part of the Alleged Oral Agreement, the proposal in this e-mail would again have represented a departure therefrom and, whatever the prospect of an SPV deal, would most likely have elicited objection from Mr Gray. It did not. Mr Gray made the point in written closing submissions that, if Mr Gray had been working on a trial collaboration basis, he would have "*leapt at the opportunity for any economics, even on these terms*" but he did not respond because he already had a better '50:50' deal. I found this unpersuasive as well. Even on the trial collaboration basis, Mr Gray would still have had the "*opportunity*" for "*economics*", if successful.

6.18.4 **The equal division of expenses**

287. The Equal Money Term also provides for an equal split of Blackmoor expenses. As to that, as noted (at [89]), Mr Gray relies on the reconciliation of expenses incurred during the US and other foreign trips to show that he and Mr Smith split expenses equally, consistent with the Equal Money Term. However, that reconciliation did not reflect an equal split of Blackmoor expenses rather than each of Mr Gray and Mr Smith bearing their *own direct expenses* although, as Mr Smith fairly conceded, Mr Gray's business cards (also featuring in the reconcilation) was a more "*debatable*" item for inclusion.

288. To my mind, the more important issue is not the accounting for their *direct expenses* as between themselves rather than how and by whom *Blackmoor's expenses* were paid during their collaboration. Mr Smith says that these were funded from the monies received by BIPL under the Bi-Invest Contract. There was some suggestion from the Claimant that the original BIPL accounts did not show the flow of those monies into BIPL but the 2018 accounts (restating the 2017 position) show, consistent with the Bi-Invest Contract, turnover of £256,253 for the 18 month period to 30 September 2017, apparently representing (pre-launch) investment advisory fees. Moreover, those accounts also show administrative expenses of £225,534 over the same period. Although the individual expenses within this ledger are not itemised, and it may well include items for which there was no financial outlay as such (eg depreciation), Mr Smith pointed in his evidence to a number of costs incurred, including legal, auditor, design, e-mail formation and FCA fees.

289. Mr Gray says he was not made aware of the Bi-Invest funds, of their use to fund expenses or what those expenses were, but was sceptical as to the level said by Mr Smith to have been incurred, a scepticism also reflected in the Claimant's closing submissions. However, I consider that BIPL's accounts bear out Mr Smith's evidence about significant expenses being incurred and funded through the Bi-Invest Contract. Moreover, Mr Gray's own evidence on this issue reveals a notable lack of interest in, or engagement with, the management and financial functions of the Blackmoor business. When asked about BIPL's expenses, he said "*I think you're going to have to explain to me what the running costs of BIPL were*". In circumstances in which Mr Gray says he had already agreed equal decision-making authority and BIPL would, despite Mr Gray's scepticism, obviously be incurring costs during the pre-launch period, the suggestion that he was 'kept in the dark' about these expenses rings hollow. The more likely explanation, inconsistent with the Joint Management Term, is that he was not involved in BIPL's management.

290. Although Mr Gray says he had earmarked some of his own funds for working capital purposes, he accepted he had contributed none. In terms of his contribution to BIPL's expenses, he could point to little more than his payment for certain binding costs (£100), his office chair, various dinners and drinks, his business cards, his direct marketing expenses (including the additional cost of cancelled flights because of Mr Smith's error) and an offer to split the FCA application cost (£1,500), an offer he says Mr Smith declined. Given that Mr Smith was keen for Mr Gray to settle a £53.44 balance of direct expenses due, I venture to suggest that he would have accepted such an offer had it been made. I prefer Mr Smith's evidence that it was not. The funding of BIPL's expenses through the Bi-Invest Contract, with Mr Gray failing meaningfully to contribute, is inconsistent with the Equal Money Term.

6.18.5 **Exclusivity**

291. Finally, as noted (at [59g]), the Exclusivity Term required Mr Gray and Mr Smith to commit to working exclusively on the Blackmoor 'joint venture' once there was a real prospect of obtaining funding for Blackmoor. As also noted (at [82]-[83]), Mr Gray says that, having completed his BIPL director form on 30 January 2017 and his FCA application on 7 February 2017 (indicating his resignation from NuOrion), he had now crossed the proverbial 'rubicon' of exclusivity with Blackmoor from which there was no turning back.

292. Mr Gray suggests in his evidence that this was, partly at least, in response to pressure from Mr Smith to part ways with NuOrion, pressure which had begun at least as early as 29 July 2016 with Mr Smith asking Mr Gray not to use his NuOrion e-mail address to transmit Blackmoor materials. However, this is another example of Mr Gray reading into documents significance they simply do not bear. Whether they had entered into the Alleged Oral Agreement or a trial collaboration in relation to Blackmoor, it would be rather obvious that use of the NuOrion e-mail address for Blackmoor communications would, at a minimum, risk confusion to e-mail recipients (as Mr Smith testified) or, at worst, jeopardise Blackmoor's confidentiality. Mr Gray appeared to recognise the latter point from his reply e-mail - he did not mean to use the NuOrion address but at least the attachment he sent was password protected.

293. Nor was there any other documentary evidence showing such pressure from Mr Smith for Mr Gray to join Blackmoor, nor more generally indicating that the Exclusivity Term had been, or should now be, engaged. To the contrary, it seems that Mr Smith did not even realise that Mr Gray's completion of his FCA form on 7 February 2017 also marked his resignation from NuOrion. If Mr Smith had realised this, it seems unlikely he would have e-mailed Mr Gray the very next day, 8 February, contemplating SPV deals still being done by Mr Gray through NuOrion. Nor does Mr Gray identify on what basis the Exclusivity Term was now said to be engaged. For this to happen, the Alleged Oral Agreement required a real prospect of obtaining funding for Blackmoor but Mr Gray does not identify the basis for that prospect rather than stating more generally that he "*wanted to exclusively embrace the opportunity to raise a committed fund*".

294. Nor, on his own evidence, did Mr Gray consider himself exclusive to Blackmoor. Although asking Mr Smith whether there would be a problem taking on a non-executive directorship for Pennant Park (as he says he did) would be consistent

with (an agreed exception to) the Exclusivity Term, in my judgment, his frequent communications and meetings with Panmure Gordon between November 2016 to June 2017 about a role as their Head of Investment Banking would not, nor indeed, would its non-disclosure to Mr Smith until, according to Mr Gray, May 2017 sit easily with the Implied Term of good faith also asserted. Although Mr Gray says he resisted their overtures, those discussions went on for months even after exclusivity was said to have 'kicked in'. This suggests that Mr Gray considered himself free to 'jump ship' rather than now tied to Blackmoor.

295. Finally, Mr Gray places store by e-mails he sent in February 2017 to potential investors in which he stated that he had recently "*formally partnered with Doug Smith*" as a mark of his transition away from NuOrion to work exclusively for Blackmoor. However, I also found this point unpersuasive. On his own case, Mr Gray had, in fact, "*formally partnered*" with Mr Smith back in June 2016 at the inception of the Alleged Oral Agreement, albeit he had not left NuOrion yet.

296. For these reasons, I am unable to conclude that Mr Gray had become 'exclusive' to Blackmoor in February 2017. The more straightforward explanation for Mr Gray leaving NuOrion that month was one for which there seems to be a significant measure of common ground between him and Mr Phillips – by then, their relationship had become 'strained'.

7 Conclusions on the Alleged Oral Agreement

297. Having analysed carefully the evidence and the parties' related submissions, I find that the parties did not agree the Alleged Oral Agreement, whether by express agreement between Mr Gray and Mr Smith, or by implication from their subsequent conduct in the performance of its terms. I reach that conclusion based on my findings (cross-referenced to my corresponding analysis and reasoning (above)) that:-

a. Mr Gray was not an obvious choice for a co-leadership role in Blackmoor ([165]-[166]), nor did Mr Smith consider him a 'natural fit' either ([174]-[178]);

b. Far from being "*semi-regular*", there was no meaningful contact between Mr Gray and Mr Smith after leaving HBS in 1996 until August 2015 ([179]);

c. Apart from their social dinner with Mr Mullen in January 2016, the meetings between Mr Gray and Mr Smith in the period August 2015 to April 2016 were concerned with potential collaboration with NuOrion ([180]);

d. There was no meeting between Mr Gray and Mr Smith in March 2016 ([181]);

e. Mr Gray and Mr Smith met on 28 April 2016 but they did not agree then the matters asserted by Mr Gray such that this meeting could not have been the origin of the alleged Joint Management, Equal Money, Financial Analysis and Exclusivity Terms ([182]-[193]). I accept Mr Smith's evidence that he told Mr Gray for the first time at this meeting about his decision to leave StratCap, that Mr Gray expressed an interest about Mr Smith's plans for Blackmoor but that their discussion focused on NuOrion collaboration;

f. The meeting canvassed for the week commencing 23 May 2016 was also about potential NuOrion/ Blackmoor collaboration and would have involved Mr Gray, Mr Phillips and Mr Smith but this never went ahead. Mr Smith and Mr Gray did not meet on 24 or 25 May 2016 and they therefore did not agree then the matters asserted by Mr Gray ([195]-[203]);

g. Messrs Gray, Phillips and Smith did meet on 1 June 2016 in New York to discuss potential NuOrion/ Blackmoor collaboration ([205]);

h. Mr Gray and Mr Smith did not spend much time together at the HBS reunion between 2 and 5 June 2016 and Mr Gray did not tell Messrs Mullen and Hurd that he and Mr Smith were business partners ([206]);

i. Mr Gray had dinner with Mr Pendergast on 10 June 2016 but Mr Gray did not seek to recruit him for the Blackmoor Operating Bench ([207]);

j. Mr Gray and Mr Smith met three times between 13 and 15 June 2016 but they did not discuss then the matters asserted by Mr Gray. Such discussions would have been entirely at odds with the contemporaneous documentary record ([211]-[220]) which shows Mr Smith's considerable efforts before and after mid-June 2016 to establish the 'First Blackmoor Team' in which Mr Gray did not feature. I therefore accept Mr Smith's evidence that Mr Gray expressed his interest then in joining Blackmoor's Investment Team and Mr Smith his reservations about Mr Gray's 'fit', suggesting instead a possible role on the Advisory Committee or Operating Bench;

k. Mr Gray's e-mail to Mr Hansen dated 15 June 2016 seeking recommendations for a "*seasoned, PE-experienced ops guy in London*" was NuOrion/ Avon-related, not Blackmoor-related recruitment activity ([221]);

l. On 17 June 2016, Mr Gray and Mr Smith spoke on the telephone. I accept Mr Smith's evidence that he sought Mr Gray's thoughts on a potential role on the Blackmoor Advisory Committee or Operating Bench, Mr Gray again suggested his suitability for a more senior role and Mr Smith repeated his reservations ([222]-[226]);

m. On 27 June 2016, Mr Lis declined the role of Chairman on the Blackmoor Advisory and Investment Committees. I accept Mr Smith's evidence that the team he had been attempting to build to that point (without Mr Gray) therefore failed. I also accept that this is the reason why Mr Smith gave more serious consideration to Mr Gray joining Blackmoor in a more senior role ([227]);

n. On 28 June 2016, Mr Gray and Mr Smith spoke on the telephone. I accept Mr Smith's evidence that Mr Gray repeated his desire to be on the Blackmoor Investment Team and Mr Smith said he would think about it ([227]);

o. On 30 June 2016, Mr Smith e-mailed Mr Gray asking when he was back to "*sit down and review*". They exchanged further e-mails on 4 July and agreed to meet the next day (5 July 2016). Having found that the Alleged Oral Agreement was not concluded on 15 June 2016, I reject Mr Gray's assertion that these e-mails were

exchanged because Mr Smith wanted Mr Gray to "*commit more time to Blackmoor*" or that they confirmed on 5 July that they *"were ready to proceed with Blackmoor together, and market the Fund under the BIPL/ Blackmoor name*" ([227]). Mr Gray had had no role in Blackmoor before 5 July;

p. The performance of the Joint Contacts, Blackmoor Team, Joint Marketing and Financial Analysis Terms is as consistent with a non-contractual trial collaboration period (as asserted by Mr Smith) as it is with the Alleged Oral Agreement (as asserted by Mr Gray) ([245]);

q. The discussion of Blackmoor governance issues in the e-mail exchanges between Mr Gray and Mr Smith dated 23 September 2016 is inconsistent with the Joint Management Term ([276]-[282]);

r. The terms of the Fund summary from 10 January 2017 ([283]) and Mr Gray's appointment as BIPL director on 1 February 2017 ([284]) are as consistent with a non-contractual trial collaboration period as they are with the Alleged Oral Agreement;

s. Mr Smith's e-mail of 8 February 2017 proposing a split of fees for SPV deals is inconsistent with the Equal Money Term ([285]-[286]);

t. Mr Gray left NuOrion because his relations with Mr Phillips had become strained, not because of the engagement of the Exclusivity Term and/ or pressure from Mr Smith to commit to Blackmoor ([296]);

u. Mr Gray's suggested ignorance of the level of Blackmoor's costs and expenses and the source of their funding is inconsistent with the Joint Management Term ([289]); and

v. Mr Gray's failure to inject any working capital into BIPL, and to contribute meaningfully to its expenses, is inconsistent with the Equal Money Term ([290]).

298. These findings are entirely consistent with, and supported by, the documentary record, both with respect to what the documents positively show (inconsistent with the conclusion and performance of the Alleged Oral Agreement) as well as what they do not show (namely, any trace of a 'footprint' for the Alleged Oral Agreement) ([211]-[230]). I am reinforced in these findings by my further findings that an agreement in the terms of the Alleged Oral Agreement would, in any event, have been:-

a. inconsistent with the 'industry norm' for the remuneration of investment team members in start-up investment management businesses. That 'norm' is based on '*no win, no fee or no equity*', not 'equality in everything' ([231]-[237]). Mr Gray's credentials were not such as to warrant departure from that norm or any pre-launch payment;

b. improbable in circumstances in which:-

    i. these parties would have agreed the sharing of 'economics' by reference to *equity*, not *fees* ([243-244]);

ii. Mr Gray was an unknown quantity and yet, according to him, received upfront the right to receive half the fees from a fund with a target AUM of €200-300MM however well (or badly) he personally performed ([246]);

iii. such upfront ceding of fees and veto rights over all aspects of management would have restricted the ability to accommodate investor demands in respect of equity, management rights or remuneration as a condition to investment (or intermediary referral), thereby unduly constraining capital raising ([249]); and

iv. Mr Gray and Mr Smith would have been required to invest the same amount of capital – without limit - as and when required by investors ([250]).

c. uncertain in its terms in the following fundamental respects so as to render it unworkable and void, namely the failure to express:-

i. the minimum capital requirements for Fund launch ([252]-[254]);

ii. when it could be terminated *pre-launch* (the related Implied Term being neither obvious nor necessary for business efficacy) ([259]-[265]);

iii. when it could be terminated *post-launch* ([266]-[273]); and

iv. any right to share in the *equity* of the fee-generating Fund vehicle(s), such right not being capable of 'accommodation' by the Express Terms ([257]).

299. I am further reinforced in my findings by certain unsatisfactory aspects of the presentation of the Claimant's case already noted in my analysis, including:-

a. Important aspects of the Claimant's evidence not appearing in his pleading (or vice versa);

b. The Claimant's failure to address in his evidence important events and/ or documents, including some on which he now positively relies;

c. The Claimant's tendency to exaggerate to project himself in a more favourable light; and

d. The Claimant's tendency to extract significance from documents which they did not bear.

300. These were far more than pleading points, drafting infelicities or oversights; they concerned key aspects of the factual narrative about the Alleged Oral Agreement.

301. Finally, even if (contrary to my determination), I had found that the parties had entered into the Alleged Oral Agreement, I would also have found that Mr Smith was entitled (based on the Implied Term pleaded by Mr Gray) to terminate that agreement by June 2017 at the latest on the basis there was no 'real prospect' of securing cornerstone investment. As Mr Gray accepted in his oral evidence (i) he did not bring

with him to Blackmoor any committed investment and (ii) having collaborated with Mr Smith for nine months or so, they still had no committed capital by April 2017. Despite the efforts of Mr Smith and Mr Treichl, particularly between May and June 2017, to bring together cornerstone investors, as Mr Smith explained, the interest of each of Messrs Bonomi and Meinl was contingent on the interest of others to invest in the Fund - neither wanted to 'jump first'. I accept his evidence. It is also consistent with the evidence of both Messrs Gray and Smith concerning Mr Bonomi being a potential investor throughout but whose 'elusive' interest was never 'unlocked'. In any event, whatever chance there may have been in early June 2017 to secure a cornerstone investor, I accept Mr Smith's further evidence that, with Mr Treichl's death on 16 June 2017, any such prospect disappeared.

302. In this regard, Mr Gray pointed to various communications which, he suggested, showed real cornerstone investor interest. So, for example, he pointed to an e-mail from 16 November 2016 in which Mr Smith indicated to OMERS that "[w]*e have ca.€100 million to ca.150 million of soft circled commitments*". However, this was a marketing e-mail (and 'soft circled' a very elastic term). Mr Gray was much more forthright in his cyclo-style marketing e-mails from November 2016 that Mr Bonomi had "*committed to be significant day 1 investors in Blackmoor Funds*". However, as Mr Gray confirmed in his first statement, Mr Bonomi had done no such thing. By April 2017, Blackmoor still had no committed, let alone committed cornerstone, investors.

303. Mr Gray also relies on interest in Blackmoor expressed in June 2017 by institutions such as the University of Michigan and the Abu Dhabi Investment Council to suggest there was a 'real prospect' of securing cornerstone investment. Although these were, no doubt, high profile institutions worth pursuing, the interest they expressed was, like so many others, speculative. As noted (at [128]), Mr Gray also relies on further e-mails after Mr Treichl's death suggesting that Blackmoor already had two or three founder investors as the "*best evidence as to the state of Blackmoor in July 2017.*" However, these were, again, marketing e-mails and their external optimism was not matched by Blackmoor's internal documents, including a document from July 2017, indicating in far more tentative terms 'founder investor' status as follows:-

"*JM*	*€25 million - €40 million, if matched.*
ACB	*[]*
Phipps	*Was MT contact. Was €40 million.* *Meeting in second half of July in US.*
Bart Homan [EFP] names	*[]*"

304. Far from showing committed cornerstone investment, this reflects Mr Smith attempting to salvage what he could in light of Mr Treichl's sudden death. However, there is a simpler and more fundamental reason why, on Mr Gray's own case, there was never a 'real prospect' of securing cornerstone investment even to the low threshold connoted by that expression under the CPR such that Mr Smith would always have been entitled to terminate the Alleged Oral Agreement. The term sheet dated 7 June 2017 concerning a potential 'partnership' between Messrs Smith, Treichl and Meinl anticipated Mr Meinl investing €40MM in the Fund, each of them receiving 33% of the Fund manager's equity, all of them being on the Investment Committee and Messrs Smith and Mr Treichl holding a veto. However, Mr Gray's case assumes that he and Mr Smith were already entitled to 50% of the fees from the Fund and already enjoyed

equal decision-making authority in every aspect of the business. The Alleged Oral Agreement was therefore wholly incompatible with the conflicting requirements of Messrs Treichl and Meinl such that, even before Mr Treichl's death, there would never have been a 'real possibility' of securing Mr Meinl (or Mr Bonomi whose interest was contingent) as cornerstone investors, giving force to Mr Smith's repeated refrain that such an agreement would have been 'commercial suicide', severely limiting from the 'get-go' his chances of building a successful fund, and further reinforcing my finding (at [298b]) as to the commercial improbability of the Alleged Oral Agreement.

305. Finally, had it been necessary for me to do so, I would also have found that Mr Smith did, in fact, properly terminate the Alleged Oral Agreement at the latest at their meeting on 1 June 2017 when (as noted at [102]), it is common ground that Mr Smith told Mr Gray he was taking Blackmoor in a "*different direction*."

8 The actual basis of the parties' collaboration

306. Having rejected Mr Gray's case on the Alleged Oral Agreement, I now set out my findings as to what the parties discussed on 5 July 2016 concerning Mr Gray's participation in Blackmoor. As noted (at [297o]), I have rejected Mr Gray's evidence that he and Mr Smith confirmed on 5 July 2016 that they were "*ready to proceed with Blackmoor together, and market the fund under the BIPL/ Blackmoor name*" and that they "*again discussed the fact that we would look to build Blackmoor as partners*." Rather, I accept Mr Smith's evidence (noted at [65]-[66]) that this meeting followed on from Mr Lis' decision on 27 June 2016 not to take a role within Blackmoor, Mr Smith's call with Mr Gray the following day (28 June) when he said he would think about Mr Gray's (renewed) suggestion that he join the Investment Team and the exchange of e-mails before 5 July to arrange to take forward their discussion.

307. Mr Smith's account of the 5 July 2016 meeting is that he offered to try Mr Gray on the Investment Team with the sole focus being capital raising and on the basis he would only be paid if he was successful in that role. The Claimant's main related criticism in closing submission was that Mr Smith had set out in his statement what he described as the "*Pre-Launch Terms*" to describe his team building processes and 'terms' but these did not appear anywhere in writing nor did they appear to match what Mr Smith said in his statement about Mr Gray's involvement in Blackmoor. In this regard, the following exchange in Mr Smith's oral evidence was of note:-

> "Q. *You see, coming back, please, to paragraph 105 of your statement, and it's B193 again, line 5 you say, and you are dealing with your claimed offer to Mr Gray on the investment team. You say:*
>
> *"Mr Gray's involvement was on the Pre-Launch Terms."*
>
> *We've just seen how your term (b), or second of the four terms, was a conversation as to what success was, and potential role and approximate remuneration, yes?*
>
> **A. *Yes, we did.***
>
> Q. *You didn't have any such conversation with Mr Gray on 5 July, did you?*
>
> **A. *I think if you look at 106 you will see that Mr Gray went on to highlight that he expected to be a senior member of the team, that was the very appropriate platform to the discussion which said yes, sure, Mr Gray, if you***

are an important part of the team, you are of equal salary to me. I'm not focused on economics and yes you have a large part of the equity economics, if we are successful. That to me, my Lord, was the discussion that calibrated that if we were successful there's a prize to shoot for. And we had that discussion and I discussed it in 106."

308. Mr Smith fairly accepted in oral evidence that he did not refer at this 5 July 2016 meeting to the collaboration as a 'trial' rather than in terms of 'giving it a go', albeit both are to the same end and envisage possible failure. Mr Smith also accepted that he did not define the level of capital raising 'success' expected of Mr Gray, for example by reference to the target launch capital. However, Mr Smith made clear in his statement that they did discuss 'success' in the context of Mr Gray's indication of his expectations. Moreover, the idea that the "*Pre-Launch Terms*" would have been committed to writing makes no sense. These merely described the *approach* Mr Smith had previously adopted in building teams and its different components.

309. Having carefully considered the evidence, and the parties' related submissions, I accept Mr Smith's account of the 5 July 2016 meeting (noted at [68]-[69]), including that Mr Smith offered to give Mr Gray 'a go' on the Blackmoor Investment Team and that he did so on the basis (expressly communicated by him to Mr Gray) that there would only be a discussion about Mr Gray's future participation in Blackmoor, including in its 'economics', if he and Mr Smith were successful in raising capital together and they both went on to launch the Fund. Mr Gray therefore fully understood from their discussion on 5 July 2016 not only that he would receive nothing if the Fund did not launch (a risk shared by them both), but that he would also receive nothing if he did not succeed in raising capital for the Fund *in his own right* (a risk borne by Mr Gray alone). I come to that conclusion based on the following findings (cross-referenced as appropriate to the relevant parts of my earlier analysis):-

a. I have already found (at [297]) that the parties did not conclude the Alleged Oral Agreement;

b. I have also already specifically rejected (at [297o]) Mr Gray's account of the 5 July 2016 meeting (and of the parties' related prior communications);

c. The focus of Mr Gray's efforts and his priority at Blackmoor were to raise capital ([76]). Mr Smith understood that Mr Gray had been successful in a capital raising role at NuOrion and that is why he 'gave him a go' in Blackmoor ([177]);

d. That trial collaboration is consistent with (i) the 'industry norm' in investment management business start-ups for individuals to work on a '*no win, no fee or equity*' basis ([231]-[237]) and (ii) Mr Gray's success-based arrangement at NuOrion ([170]);

e. Mr Gray's suggestion that he expected to receive half Blackmoor's profits (irrespective of his own capital raising success) makes little sense when (i) he was an untested proposition (ii) investors may well have demanded (incompatibly with such expectations) economic, equity or management participation in Blackmoor and (iii) depending on capital raised, such expectation might turn out to be economically unviable ([246]-[249]). By contrast, the collaboration described by

Mr Smith is consistent with the commercial reality of the need to maintain maximum flexibility;

f. The fact that there was no written agreement between Mr Gray and Mr Smith is consistent with a trial collaboration ([212]). The case for formalising their arrangement would only ever become important if, having built the Fund together, they then agreed the basis of Mr Gray's future participation. Until then, there would be little to commit to writing;

g. Likewise, the fact that Mr Gray only stopped working for NuOrion as late as February 2017 and, only then because of tensions between him and Mr Phillips (not for reasons of exclusivity) is also consistent with a trial collaboration ([291]-[296]); and

h. Their subsequent conduct is also consistent with a trial collaboration, including (i) Blackmoor being funded by the Bi-Invest Contract, with Mr Smith and Mr Gray meeting their own direct expenses and (ii) Mr Gray's failure to contribute financially to, and his detachment from the management of, Blackmoor ([287]-[290]).

310. Finally, having found that there was a 'trial' collaboration on the basis stated by Mr Smith in his evidence, I make clear my further finding that this was a 'non-binding' arrangement. Given the loose basis for their collaboration, that any future agreement between them about Mr Gray's future participation in Blackmoor was contingent on Mr Gray successfully raising capital and the highly informal setting in which their discussion took place on 5 July 2016, Mr Gray and Mr Smith had no intention to create legal relations. Nor was what they discussed sufficiently certain in any event to form the basis for a workable agreement. At its highest, their discussion on 5 July 2016 represented an 'agreement to agree' or, more accurately, an agreement *possibly* to agree. Their trial collaboration was therefore of no contractual effect.

9 Mr Gray's allegations of contractual breach

311. The Claimant's 'core' allegations of contractual breach are that, without his knowledge, Mr Smith built the 'Parallel Blackmoor Team', proposed that team's participation in Blackmoor on terms incompatible with the Alleged Oral Agreement, solicited prospective cornerstone investment behind his back and continued to extract the benefit of his work and contacts before then 'cutting him loose'. However, it follows from my finding that they did not enter into the Alleged Oral Agreement that no question of contractual breach arises. Mr Smith and his wife owned BIPL and Mr Smith ran its investment management business. They did so unconstrained by the Express or Implied Terms. Accordingly, Mr Smith - in fact, BIPL acting through Mr Smith - was not prevented contractually from bringing in new team members such as Mr Treichl, Mr Hill or Mr Schmidt-Chiari or from engaging with potential investors, in either case, without reference to Mr Gray. Likewise, there was no contractual constraint on Mr Smith releasing Mr Gray from their collaboration. Nevertheless, for completeness, I address here briefly by reference to the evidence certain of the pleaded facts and matters relied upon by Mr Gray as the basis for Mr Smith's alleged contractual breaches, tying these in as appropriate with my findings above on the Alleged Oral

Agreement. I emphasise here that the following concerns only Mr Gray's alleged *contractual* breaches. I address separately Mr Gray's claim for breach of *fiduciary* duty.

9.1 The 'Parallel Blackmoor Team'

312. As to the Claimant's allegation that Mr Smith built the 'Parallel Blackmoor Team' without the Claimant's knowledge or proper disclosure (PoC at [23.i]), Mr Gray suggested in evidence that Mr Smith did not mention Mr Treichl's name to him until May 2017 when his photograph appeared in a Blackmoor pitchbook. In fact, Mr Treichl appeared in the Blackmoor investor presentation sent out by Mr Smith (copied to Mr Gray) on 27 March and 10 April 2017 and by Mr Gray himself on 21 March 2017. Although Mr Smith fairly stated that he did not discuss with Mr Gray his later interactions with Mr Treichl concerning a role on Blackmoor's *Investment* Committee, it was no secret that Mr Treichl had been earmarked for the *Advisory* Committee. Mr Gray's evidence was again overstated but there were, in any event, no contractual constraints on Mr Smith building the Blackmoor Team as he saw fit and without reference to Mr Gray.

9.2 Mr Gray's and Mr Smith's meeting – 1 June 2017

313. It is common ground that Mr Smith told Mr Gray on 1 June 2017 that he intended to take Blackmoor "*in a different direction*" (PoC at [23.1]). Contractually, there was again nothing to stop Mr Smith doing so – it was his business. In this regard, I also accept Mr Smith's evidence (denied by Mr Gray) that he started telling Mr Gray from April 2017 onwards that Blackmoor had no 'traction' in the market and at their meetings on 8 and 15 May 2017 that Mr Gray needed to "*look at other options*". The former was self-evident – no capital had been raised. The latter is supported by Mr Gray's cancellation of an investor call later in the day on 15 May 2017. Mr Gray's evidence that he postponed the call to focus on cornerstone investors following their discussion on 15 May makes little sense. Mr Gray had failed to secure any investment, let alone cornerstone investment, and Mr Smith would hardly have put their remaining 'live' leads to the back of a non-existent cornerstone investor queue. That Mr Gray was told he should "*look at other options*" in May 2017 is also supported by Mr Gray doing just that two days later by sending his CV and 'deal sheet' to Chris Doukaki and Ian Axe on 17 May. Mr Smith's e-mail of 5 September 2017 confirms the same: "[i]*t was a great shame that you and I as a team didn't have the magic sauce to get to launch; it was apparent when you and I discussed in April,* ***and as you know I highlighted the need to move on in May***" (emphasis in **bold** supplied). Finally, I do not accept Mr Gray's evidence that Mr Smith told him on 1 June 2017 that he would be "*taking BIP as his own*". Mr Smith did not need to say this – he and his wife already owned BIPL and Mr Smith ran it.

9.3 FCA communications – 9 June 2017

314. Mr Gray also pleaded that Mr Smith failed to inform (i) Mr Gray of his communication with the FCA on 9 June 2017 concerning the adequacy of the additional information he had supplied on 30 May and (ii) the FCA in June 2017 about the status of his relationship with Mr Gray (PoC at [23.1A]). Mr Smith had prepared, submitted and updated the FCA application on behalf of BIPL. Although Mr Gray had provided his input, neither Mr Smith (nor BIPL) was required to consult Mr Gray about the

application or to update the FCA any earlier about his changed status within Blackmoor. As to the latter, although Mr Smith had told Mr Gray in May 2017 that he should "*look at other options*" and in June that he was taking Blackmoor "*in a different direction*", Mr Smith's evidence is that he and Mr Gray agreed on 8 and 15 May 2017 to bottom out their final investor leads. That evidence is consistent with the documents showing the winding down of their marketing efforts. I accept it. It is also common ground that Mr Smith canvassed a potential role for Mr Gray on the Advisory Committee. Their related discussions, and therefore the possible need for Mr Gray's authorisation, continued through to September 2017. However, with Mr Gray's e-mail of 29 September, it was obvious that Mr Gray's association with Blackmoor was over and that his FCA approval would no longer be required. Quite properly, it was then removed.

9.4 Mr Gray's and Mr Smith's meeting – 15 June 2017

315. Mr Gray also relies on his complaint to Mr Smith on 15 June 2017 about his unfair treatment and Mr Smith 'backtracking' by saying they might still be able to make Blackmoor work if they secured a cornerstone investor (PoC at [23.2]). The breach alleged here is unclear but the suggestion that they agreed at their meeting on 15 June 2017 to focus on securing cornerstone investors again makes no sense and I reject it. Not only had they had failed in that very endeavour over the last nine months or so, Mr Smith e-mailed Mr Gray the very next day, saying (inconsistently) that they must "*stop marketing the Doug and James proposition*".

9.5 Securing cornerstone investment

316. Mr Gray also relies on the fact that, by this stage (mid-June 2017), Mr Smith had "*secured one or more Cornerstone Investors*" which he was progressing with the 'Parallel Blackmoor Team' without his knowledge (PoC at [23.2A]). As noted, Mr Smith was not prevented contractually from bringing on board other team members or seeking alternative sources of capital without reference to Mr Gray but no cornerstone investment had, in fact, yet been "*secured*". The draft term sheet between Mr Smith, Mr Treichl and Mr Meinl circulated in early June 2017 was a proposal. It was never agreed before Mr Treichl's untimely death. Finally, the correct reference is not (as pleaded) to Mr Bonomi "***offering** a cornerstone investment worth €25 million and "maybe more"*". The document actually says, more tentatively, that Mr Bonomi was "***moving towards** the 125bps/ no economics offering. Size is €25, maybe more*" (emphasis in **bold** supplied). Messrs Bonomi and Meinl did not ultimately invest.

9.6 "*James and Doug proposition*" - 16 June 2017

317. Mr Gray also relies on Mr Smith's e-mail of 16 June 2017, saying that they "*have to stop actively marketing the James and Doug proposition ... we need to manage incoming but no new outgoing …*" without also informing him of either Mr Smith's FCA communications or the prospect of obtaining cornerstone investment with the help of new Blackmoor team members (PoC at [23.3]). However, Mr Smith was not contractually required to tell Mr Gray about either matter or prevented from winding down their joint marketing activity.

9.7 Dropbox/ e-mail – 14 July 2017

318. Mr Gray also relies on the e-mail from Mr Smith on 14 July 2017 indicating Mr Gray's removal from Blackmoor's Dropbox and e-mail (at PoC [23.4]). There was again nothing contractually preventing Mr Smith – in fact, BIPL acting by Mr Smith - from deciding, and removing, his access rights. Mr Smith seems to have recognised this when (as noted at [108]), he responded on 18 July "*Dropbox – go for it*."

9.8 Mr Gray's and Mr Smith's 24 July 2017 meeting

319. Mr Gray also pleads (PoC at [23.5]) that the parties discussed on 24 July 2017 going their separate ways unless the University of Michigan and/ or British Columbia Investment Management (or Mr Bonomi or some other unexpected investor) invested significant capital. Although pleaded, Mr Gray does not say this in his statement. He merely says he said little at the meeting. Mr Smith's evidence (denied by Mr Gray) is that he reiterated that their collaboration was over. I accept this. As noted (at [313]), he had already said this in May and June 2017. Mr Gray did say in his statement that he inferred from Mr Smith inviting him on 26 July 2017 to follow up with the University of Michigan that Mr Smith was still willing to pursue potential investors with him (also relied on at PoC [23.6]). However, Mr Gray's inference makes no sense and I reject it. As Mr Gray himself noted, the same e-mail records Mr Smith saying "[i]*t was a great shame you and I as a team did not have the magic sauce to get to launch*". Moreover, their continued marketing is entirely consistent with them 'mopping up' the last few leads together. As Mr Smith had said to Mr Gray on 16 June 2017, "*we need to manage incoming but no new outgoing*."

9.9 Cornerstone investors – July/ September 2017

320. Mr Gray also relies on Mr Smith's marketing communications with potential investors in July 2017 to the effect that Blackmoor had been successful in securing two or three cornerstone investors (PoC at [23.5A]). Contractually, there was nothing stopping BIPL from raising capital without reference to Mr Gray. However, as noted (at [303]-[304]) in the context of the Implied Term asserted as to termination rights, it is apparent from Blackmoor's internal documents that it had not succeeded in securing such investment.

321. Mr Gray also relies on his meeting with Mr Smith on 19 September 2017 when he says Mr Smith told him he had secured Mr Bonomi and a wealthy Spanish family as cornerstone investors (PoC at [23.8]). Mr Smith denies this. Moreover, the documents indicate that the Santo Domingo family was, in fact, Mr Treichl's contact (not Mr Smith's), their suggested agreement to invest is not recorded in the documents and neither has ever, in fact, invested. I reject Mr Gray's evidence.

9.10 Mr Gray's and Mr Smith's meeting – 13 September 2017

322. Mr Gray also relies on his meeting with Mr Smith on 13 September 2017 when he says (i) he again expressed his strong dissatisfaction at the manner in which he had been treated (ii) he instructed Mr Smith not to remove him from the BIPL board and (iii) Mr Smith made the offer of a role on the Advisory Committee (PoC [23.7]). The breach alleged here is unclear and the first two matters not apparent from Mr Gray's statements (at least in the terms pleaded) but it is common ground that Mr Smith again canvassed Mr Gray then about a possible Advisory Committee role.

9.11 **Mr Gray's removal as director/ approved person**

323. It is also common ground that, shortly after Mr Gray's e-mail of 29 September 2017 asserting a '50:50' partnership in Blackmoor, Mr Gray was removed as director of BIPL and as an approved person from the FCA Register (PoC at [23.9]). Again, contractually speaking, there was nothing preventing Mr Smith taking those steps on BIPL's behalf.

9.12 **Potential investor contact**

324. On 27 April 2018, Mr Smith's solicitors wrote to Mr Gray's solicitors stating that the former was not prevented from contacting potential investors introduced to him by the latter (PoC at [23.10]). Contractually speaking, they were correct. Mr Smith was free to communicate with potential investor contacts, whether his own, Mr Gray's or those that had been jointly developed.

9.13 **Alleged contractual breaches - conclusion**

325. Although I have not analysed all the twists and turns of the evidence concerning the alleged breaches of the Alleged Oral Agreement, even by more limited reference to the material facts and matters pleaded, I again found that a number did not make sense, were not supported by the evidence, were contradicted by the documentary record or were exaggerated and I reject them. Ultimately, however, given my findings concerning the Alleged Oral Agreement (at [297]), none of the alleged breaches could have founded a breach of contract in any event.

10 Mr Gray's contractual damages claim

10.1 **Introduction**

326. In light of my findings on liability, it is not necessary for me to consider Mr Gray's *contractual* damages claim. However, having heard extensive evidence about it, I analyse this below on the basis (contrary to my actual findings) that the parties did enter into or perform the Alleged Oral Agreement and that this was breached by Mr Smith in the manner contended.

327. At the outset, I should say that I found the Claimant's overall approach to quantum unsatisfactory. By way of prime example, in December 2021, a little over two months before trial, the Claimant sought to amend his claim to abandon the three market 'benchmarks' underpinning his pleaded quantum claim to substitute two new benchmarks (PoC at [25]). In January 2022, permission was given for that amendment. At trial, the Claimant's quantum expert, Dr Fitzgerald, disavowed the original benchmarks as "*completely irrelevant to these proceedings*". According to him, these were only ever used to "*see whether this case was worth bringing*" and had "*nothing at all to do with what you might do if you were developing and launching a fund in 2018* ..". Despite this, the Claimant deployed those original benchmarks in the original PoC from November 2018 and the case proceeded on that basis for another three years before it was abandoned close to trial. As now appears to be common ground, their use would, in fact, have generated, at best, a much smaller loss on Mr Gray's case.

328. Dr Fitzgerald's view expressed at trial as to their unsuitability presumably explains why he did not address in his first report (before the further pleading amendment) the original benchmarks. When presented with this state of affairs at the hearing, Dr Fitzgerald's glib response was "[i]*t's not my problem, is it*?" In closing submissions, the Claimant explained that he originally advanced the claim on the pleaded basis he did because figures for the actual performance of the Blackmoor Fund were not yet available. However, Dr Fitzgerald was clear that the pleaded methodology was only ever intended to test the economics of a potential claim. Knowing that this methodology was unsuitable, the claim should never have been advanced on that basis, let alone for so long. Although in one sense irrelevant to the quantum issues argued at trial – the Claimant's case having since 'moved on' methodologically – this failure in the expert evidence to engage with the pleaded case, only then to change the latter so close to trial, indicated in my view a somewhat casual approach, also apparent from other aspects of quantum.

10.2 **Claimant's methodology**

329. Mr Gray (now) says he suffered loss and damage of between €1.72m and €18.53m, representing the (i) annual management fees of 1.5% of the gross value of the Fund and (ii) annual performance fees of 15% of any profits generated if he had launched the Fund together with Mr Smith (PoC at [25.1]). The losses are based on simulations undertaken by Dr Fitzgerald, now using 'benchmarks' comprising four private equity orientated Exchange Traded Funds (**ETFs**) and Cambridge Associates performance data for ex-US Developed Markets Private Equity and Venture Capital Funds (**CA Index**).

330. In the period March 2018 to December 2021, the actual revenues and accrued incentive fees of the Blackmoor Fund exceeded its pre-tax costs by €1,152,195, giving rise to damages (at 50% of that amount accruing in Mr Gray's favour) of €576,097, alternatively (at 42%) €483,922. However, performing consistently with the "*private equity approach to investment*" (as stated in the investor presentation sent to Mr Gray on 5 July 2016), the Fund would have generated much higher surpluses of €6,899,125 (based on the comparable performance of ETFs) or €8,677,273 (based on the comparable performance of the CA Index), yielding damages in the range (at 50% of those amounts) of **€3.45m-€4.34m**, alternatively (at 42% of those amounts) **€2.90m-€3.64m**.

331. For the period December 2021 to June 2024 or June 2026, after discounting to present value using a discount rate of 5.6%, the Fund would have generated on that same approach €2.95m (to June 2024) or €6.19m (to June 2026) (based on the comparable performance of ETFs) or €12.87m (to June 2024) or €28.37m (to June 2026) (based on comparable performance of the CA Index), yielding damages in the range (at 50% of those amounts) **€1.48m-€14.19m**, alternatively (at 42% of those amounts) **€1.24m-€11.92m**.

10.3 **Conceptual issues**

332. It is trite law that the purpose of contractual damages is to place the innocent party into the position he would have been assuming the proper performance of the relevant contract. This gives rise to five prior conceptual issues on Mr Gray's damages claim.

10.3.1 ***Pre-launch* termination**

333. First, as noted at ([301]-[304]), I have already found that, even if (contrary to my findings) the Alleged Oral Agreement had, in fact, been concluded, it would have been open to Mr Smith to terminate the Alleged Oral Agreement on the basis of the relevant Implied Term. As noted (at [305]), I would also have found that he did so by 1 June 2017 at the latest. In those circumstances, there would have been no obligation on Mr Gray and Mr Smith to launch the Fund together such that no question of any loss would ever have arisen.

10.3.2 **Minimum launch capital**

334. Second, as noted at ([252]-[254]), the Alleged Oral Agreement is silent as to the Fund's minimum launch capital requirements. For this reason too, the Claimant would not have been able to demonstrate any obligation to launch and, therefore, any loss based on anticipated fees from, the Fund.

10.3.3 **What Mr Gray and Mr Smith would have achieved together**

335. Third, the Defendants argued that the Claimant has suffered no loss because, if they had continued to collaborate, they would have raised no capital together. As to this, the Claimant says that the nature of their collaboration under the Alleged Oral Agreement was such that they would both share equally in Blackmoor's profits, whichever of them happened to have sourced the capital. The Claimant also pointed to what he described as the 'continuum' between the efforts of Mr Gray and Mr Smith in jointly developing and marketing the Fund, including refining the marketing materials and narrowing potential investor leads and investment opportunities, dovetailing with, and taken forward by, Mr Smith with the likes of Messrs Treichl, Hill and Schmidt-Chiari through to the launch of the Blackmoor Fund in March 2018. So, for example, although Messrs Treichl and Meinl may not themselves have invested in the Blackmoor Fund, Mr Treichl introduced Mr Smith to Messrs Schmidt-Chiari and Hill who both remain prominent individuals in Blackmoor today and they, in turn, later introduced some of those who did invest in the Blackmoor Fund. Moreover, Mr Franco featured on the PIL (as an intermediary) while Mr Gray was still involved with Blackmoor. In July 2017, Mr Franco introduced Blackmoor to another intermediary, Nolan. Nolan then introduced Blackmoor to a US investor. Without the 'continuum' between Mr Gray's efforts and those of the 'Parallel Blackmoor Team', Mr Smith would not have been able to launch the Blackmoor Fund and, therefore, to make the profits he has.

336. Even ignoring my findings that (i) there was no Alleged Oral Agreement ([297]) and (ii) Mr Gray had to prove capital raising success *in his own right* ([309]) such that (iii) there was no agreed 'equal sharing' of Blackmoor's profits, this exposition was unconvincing: first, although Mr Smith and Mr Gray both invested not insignificant effort, Blackmoor gained no investor momentum during their period of collaboration. After 11 months, they had raised no capital together; second, far from being a 'continuum', Mr Treichl's potential involvement offered a chance to take matters in the "*different direction*" indicated by Mr Smith to Mr Gray on 1 June 2017. That opportunity disappeared when Mr Treichl died; third, Mr Smith nevertheless 'kept going' and, in doing so, he took matters in yet another direction, albeit with two now familiar faces, Messrs Hill and Schmidt-Chiari; fourth, the investments made by contacts of Messrs Schmidt-Chiari, Hill and (more indirectly) Franco arose not because

Mr Gray had already 'laid the groundwork' for them but only because he and Mr Smith had failed to gain any 'traction' together, requiring Mr Smith to 'go back to the drawing board' and adopt a different approach; fifth, the position reached by Mr Smith in March 2018 with the launch of the Blackmoor Fund, with committed capital from investors not featuring on the PIL during his collaboration with Mr Gray, therefore bore no relation to Mr Gray's earlier efforts with Mr Smith. I would therefore have also found that Mr Gray had failed to establish that he would have been able to launch the Fund together with Mr Smith, let alone in the form of the current Blackmoor Fund, as his damages claim assumes.

10.3.4 **The historical performance of the Blackmoor Fund**

337. The fourth conceptual issue, closely related to the third, concerns Mr Smith's criticism of the Claimant's failure to explain why, as his quantum claim also assumes, the Fund would have performed better in the period 2018 to 2021 under their hypothetical joint stewardship than the Blackmoor Fund did in fact, perform under that of Mr Smith and Mr Schmidt-Chiari during that period. Dr Fitzgerald had apparently not turned his mind to that important question:-

> "*So in running your hypothetical analysis of the past, you are in effect contending that had Mr Gray remained involved, the investment returns would have been very much higher than the business as operated by Mr Schmidt-Chiari; that's the effect of what you are doing, isn't it?*
> **A.** ***No, I would hesitate to say what anybody would achieve.***
> Q. *You're not advancing evidence as to how the fund would have performed had Mr Gray remained involved?*
> **A.** ***No.***
> Q. *Are you sure?*
> **A.** ***Yes. We look at the fund as is and we compare it with comparators like the ETFs and so on***."

338. As he also stated later:-

> "Q. *But you don't identify in your expert report, do you, what alternative investments Blackmoor would have made if Mr Gray had remained involved instead of Mr Schmidt-Chiari, do you?*
> A. ***No***.
> Q. *Well, doesn't that rather suggest that Blackmoor's real world investments are the best evidence of what Blackmoor would have invested in and how those investments would have performed if the claimant had remained involved?*
> *A.* ***I have no idea***."

339. I found troubling Dr Fitzgerald's apparent failure to grasp the conceptual basis of the damages claim. Nor was this compensated for by Mr Gray's evidence about what he says he would have done differently, comprising little more than him saying Blackmoor's performance "*would be quite a bit better*" with his skill and experience of communicating with boards and senior management, vital in 'activist investing'. The Claimant also pointed in closing submission to Mr Smith's apparent agreement to the importance of the Fund's "*private equity approach*" as a "*key component of Blackmoor's strategy*" but such 'agreement' was difficult to discern from the evidence.

Mr Smith did, however, explain convincingly that he had been working for the last three years in the Blackmoor Fund (and much longer before) in implementing the very strategy for which Blackmoor had been established:-

> "*Q. It's fairly straightforward isn't it, Mr Smith? Without Mr Gray's private equity experience and eminence Blackmoor has never actually been able to put into practice the investment approach that you agreed with him in the mid-June 2016 meetings?*
> *A.* ***That is not true. We have implemented the strategy as I have prosecuted it since Hanover, Bluecrest, Hill Rise, StratCap, in slightly different areas of focus but consistently. That was the strategy that Blackmoor Investment Partners was set up to advance and that was the strategy that is deployed.***"

340. As noted (at [171]), Mr Gray confirmed that Mr Smith had greater activist investment experience than him. As I have found (at [166]), although Mr Smith's experience was on all fours with the Fund's strategy – not surprisingly since he set up Blackmoor and knew full well what he wanted to create and achieve – Mr Gray's was not. Nor, as noted (at [176]), did I find meaningful the 'soundbite' pressed forcefully by the Claimant concerning the Fund's "*private equity approach*" to publicly marketed equities. Moreover, neither the Claimant nor Dr Fitzgerald has adduced specific, credible evidence of what they say the Claimant would have done differently if, in the counterfactual, Mr Gray had co-led the Fund with Mr Smith. Dr Fitzgerald does say that the Fund has performed "*very badly*" but that is by reference to his recently adopted 'benchmark' indices which, although indicating higher returns than Blackmoor, say nothing about what Mr Smith was supposedly not doing right to match them. As I also explain below, they are inappropriate 'comparators' in any event. Accordingly, in the counterfactual of Mr Gray's and Mr Smith's joint stewardship of the Fund, I would have found the appropriate yardstick for quantifying losses claimed for the period 2018 to 2021 to have been Blackmoor's actual historical performance for the same period.

10.3.5 **Future loss – the duration of the Fund**

341. Fifth, as noted (at [267]), Mr Gray claims damages based on the future performance of the Fund in the counterfactual of their joint stewardship from March 2018 to either June 2024 or June 2026 (originally pleaded as a claim over three or five years). This was suggested to be a 'pragmatic' cut-off date based on Blackmoor's own stated objectives of 'unlocking' investment value over 3-5 years and the agreed three year minimum investment period (pleaded at PoC at [8.6]). Moreover, according to Dr Fitzgerald, starting with the Fund's historic performance to date, then looking ahead three or five years, "*seemed logical*" and was consistent with forecasting in the markets. Mr Smith argues that the periods selected were "*wholly arbitrary*". The Claimant has failed to advance a case as to the minimum duration of the Alleged Oral Agreement but, if losses are to be addressed over some period, this should be 9 months at most, based on Mr Gray's evidence that "[i]*t would take me at least 9 months to rebuild what Doug had essentially stolen from me*", equivalent to €24,000.

342. Any damages awarded to the Claimant would, of course, have had to reflect (in Mr Smith's favour) the earliest date on which the Alleged Oral Agreement could have been brought to an end. That is a matter of the parties' agreement, not pragmatism, such that, in the absence of any such agreement, and for much the same reasons as noted

(at [267]-[268]) with respect to the certainty of terms in the context of termination *post-launch*, I would have found the loss periods asserted to be an unsound and arbitrary basis for founding his damages claim.

10.4 **Methodological issues - introduction**

343. Even ignoring these prior conceptual difficulties of establishing the position in which the Claimant would have found himself assuming the hypothetical performance of the Alleged Oral Agreement, there was also considerable debate about the appropriateness of his methodology.

10.4.1 **Appropriate 'benchmarks'**

344. Perhaps the largest area of debate was whether the (newly pleaded) ETF and CA Index 'benchmarks' for establishing comparable performance of the Fund (both historic and future) were appropriate. As I have already found (at [340]), in light of the Claimant's failure to establish – in fact, to adduce any meaningful evidence - that the Fund would have performed differently under his joint stewardship with Mr Smith, there is no warrant for adopting a 'benchmark' other than the actual performance of the Fund for the historic period of the Claimant's losses. The question therefore only arises in the context of the future losses claimed, in respect of which, there is obviously no Blackmoor Fund data which could serve as the 'benchmark'.

10.4.1.1 The CA Index

345. As to the CA Index 'benchmark' recently adopted by the Claimant, it is fair to say that his own expert was 'lukewarm':-

> "*So, Dr Fitzgerald, what I would suggest is that given these vast differences between what ETFs are tracking and what Cambridge is tracking, and what it is that Blackmoor is in fact doing, doesn't really make the ETFs and Cambridge appropriate comparators of Blackmoor's business does it?*
> **A. *Well, I might agree with you on the Cambridge Associates*.**"

346. Following that concession by Dr Fitzgerald, and his description elsewhere of the CA Index as "*a last resort kind of example*", the Claimant confirmed in closing submission that he was no longer pursuing damages calculated by reference to the CA Index rather than ETFs alone.

10.4.1.2 ETFs

347. The Defendants argued that ETFs are an inappropriate comparator because they track the value of large, primarily North American investment companies, rather than the underlying companies in which investment is made. As Mr Battrick said in oral evidence:-

> "*Q. What the ETFs do is they provide an objective measurable benchmark for the application of a private equity strategy, don't they?*
> ***A. I would disagree. So the main reason I would disagree is that what's being tracked by the ETFs is the value of management companies. It's not the performance of their underlying investments. So you might imagine that the***

value of KKR is affected by the regulatory environment for asset management companies in the US. It may be affected by for example the tax regime applicable to such companies, and -- so it won't track the performance of KKR's underlying investments which will be affected by different drivers. Similarly the performance of Blackmoor's underlying investment will again be affected by different drivers. So you can imagine Dominos Pizza in the UK for example. The Dominos franchise is one of Blackmoor's investments. The factors that affect the performance of Dominos are going to be very different to the drivers that affect the performance of a financial services company in the US that is of such greater size, doing a very different activity."

348. By contrast, Dr Fitzgerald opined that they were suitable:-

"A. *I think the -- can I just -- the whole point about having a strategy, which I perceived as being let's see if we can apply private equity principles in the public equity markets, is if a rational investor comes along with 100 million to invest, let's say and he says, "I like this idea of private equity, what shall I do?", and you're an adviser, I would say to this guy, "Well, you can actually get exposure in private equities with these ETFs because they reflect the big private equity firms". And I suggest that if you want an exposure to private equity you should think about those as a baseline. Unless you can do better.*

He says, "There's these guys at Blackmoor I've read about and they say they're going to try to apply private equity principles to the public equity markets." I would say, "Well, let's put half the 20 million you want to put in, I would put half in the passive side and then you can give Blackmoor another 10 million to let them play around with and we'll see what they do."

Now, if three years later or four years later he comes to me and says, "How are these things doing?" And I find that the passive ETF side has done gangbusters whereas Blackmoor has done relatively badly with their approach, even though they're beating this 8 per cent, I would say the ETF was the better strategy to go for and I am sure my investor would say the same.

Q. *So in effect your thinking here is --*

A. Like an investor.

Q. -- *is as an investor and focused on how you would be advising an investor?*

A. Yes.""

349. I found Dr Fitzgerald's reasoning difficult: first, consonant with his apparent misapprehension of the conceptual framework for Mr Gray's claim (noted at [337]-[340]), he appeared to be looking at matters through the eyes of an *investor* faced with an *investment* choice rather than comparing Blackmoor's performance with that of 'like-minded' funds; second, ETFs were selected by Dr Fitzgerald because they reflected a 'private equity approach'. However, private equity is a different asset class from public equities. As Mr Smith compellingly described (noted at [175]), the way in which value is created from a (private) company in which a private equity firm holds a majority stake (eg through board appointment) is different from the creation of value from a minority stake in a publicly traded company where influence is brought to bear more subtlely by leveraging relationships with other similarly positioned or larger shareholders; third, as noted (at [347]), ETFs track the performance of the relevant investment management companies holding the investments, not the underlying investments themselves and, as such, they are one step further removed as a

'comparable', and therefore less useful still. In fact, they would be prone to distortion by factors peculiar to the relevant investment management company such as the regulatory or taxation environment in which it operates, bearing no relation to the investments they hold. As such, I would have found ETFs to be an inappropriate 'comparator'.

350. Finally, the Claimant also seeks to benchmark the future losses claimed by reference to the performance of ETFs during the actual period of operation of the Fund (March 2018 to December 2021). According to Dr Fitzgerald, ETFs have "*done gangbusters*" over this period. Mr Battrick explains that ETF (and CA Index) returns for this period were "*high relative to their longer-term performance*" and it appears that they may have been strongly affected by the impact of Covid-19 which caused the value of some investments to increase, and others to decline, significantly. Even setting aside for one moment the suitability of ETFs as a comparator at all, and acknowledging that no-one can, of course, say for certain what future returns will look like, I agree that the short period chosen by Dr Fitzgerald is unrepresentative and liable to distortion, including in this case, on account of the exceptional circumstances of the pandemic, and that historic returns over a longer period provide a sounder basis for estimating the most likely future returns.

10.4.1.3 MSCI Indices

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351. Mr Battrick considered different benchmarks, namely a number of indices published by Eurekahedge which provide a measure of the performance of hedge fund managers, as well as share price indices published by MSCI, focusing primarily on those for listed companies in sectors and of size consistent with the Blackmoor Fund's strategy. Based on the MSCI indices (which he considers to be the more relevant), Mr Battrick assumes annual future returns for the Fund of 8%, being towards the middle of their longer-term returns, slightly higher than those indicated by the Eurekahedge returns, much lower than the annual returns of 13% and 24% for the ETF and CA Index benchmarks and slightly higher than for the Blackmoor Fund (7.6% to 31 December 2021). In this regard, I found compelling Mr Battrick's explanation of the suitability of the MSCI indices as a benchmark, both in their own right and by way of comparison with ETFs:-

> "Q. *These general indices from which you source your 8 per cent for future returns, these are not relevant to Blackmoor, Mr Battrick, are they?*
> **A. *I disagree. I think that they are relevant because they reflect the returns that can be earned from investments in companies of the size, geography and sector in which Blackmoor invests*.**
> Q. *What this misses is precisely what Dr Fitzgerald captures with his ETF comparators, isn't it, because that's what's critical to the private equity approach to public listed companies?*
> **A. *No, I would say that the ETFs that Dr Fitzgerald adopts, they reflect the returns of very large, primarily US listed companies, which are very different to Blackmoor's strategy, and they reflect the returns of private equity asset managers as opposed to the investments made by those managers*.**"

352. The Claimant's main criticism of the MSCI indices was their inability to replicate Blackmoor's 'private equity approach' but, as I have already noted (at [349]),

Blackmoor's strategy (for publicly marketed equities) was necessarily different from that adopted by private equity funds (in majority owned private companies). In this regard, it is notable that those funds adopting an 'activist investment' approach in the public equity sphere, and for which returns figures are available, namely, Primestone, Sherborne Investors and RWC, have all been matched or outperformed by Blackmoor. These provide a useful 'sense check' and put firmly into proper context Dr Fitzgerald's observation – which I reject - that the Blackmoor Fund performed "*very badly*".

353. Although the MSCI indices may not replicate all aspects of Blackmoor's 'activist investment' strategy described by Mr Smith, unlike ETFs, they do reflect the key, tangible aspects such as asset class, size, geography and sector and, importantly, the value of the relevant *funds* rather than that of their *fund managers*. Indeed, in this regard, it is also notable that the benchmark index, with which Blackmoor identifies (and identified during the period of Mr Gray's involvement), is the MSCI Europe Index. For all these reasons, I accept Mr Battrick's evidence that the MSCI indices provide a reasonable comparator – and a much more useful one than ETFs - such that any projection of future losses would more appropriately have been undertaken by reference to the former.

10.4.2 **Other methodological issues**

10.4.2.1 The Fund's future AUM

354. Dr Fitzgerald's analyis also assumes that Blackmoor would obtain significant investor contributions in future years. However, this assumption appeared to be premised on his assumption about investment returns:-

> "*Dr Fitzgerald, aren't you now drifting a very long way away from reality because what we know in the real world is rather than having money coming in you've got money going out. Would that not be a rather more realistic way of doing these calculations?*
> ***A. Everything fits together. If I am assuming Blackmoor becomes a gung ho fund that can generate in line with the ETFs I would then consequentially to that expect more money to come in because they're earning 15 per cent.***
> *Q. So it's optimism layered upon optimism?*
> ***A. Well, it's one assumption on another, yes.***"

355. Given my findings as to the unsuitability of ETFs as a 'benchmark' (at [349]), I am unable to accept Dr Fitzgerald's assumption about Blackmoor's future AUM either. Although the Blackmoor Fund's AUM could increase, equally, it could reduce as it has done recently with an investor redemption.

10.4.2.2 Fee structure

356. Dr Fitzgerald also assumes a fee structure of management fees of 1.5% and performance fees at 15% compared to the current structure of management fees of 1.2% and performance fees of 17.5%, with the latter only payable on returns over 5% per annum. As to the former:-

> "**A.** ***Yes. Well, I expect that the management fees have averaged about 1.2 per cent. However, I also point out that if we go back to 2017, when these***

principles were set, the minimum management fee that was referred to for Blackmoor C class shares was 1.5. It wouldn't surprise me if we went back to that. But anyway the purpose of the 1.5 was not actually to be definite but to say 1.5 would certainly cover all costs, bonuses and so on. So that would take out that part of the pot."

357. As to Dr Fitzgerald's forecast removal of the 'hurdle rate' for engagement of the performance fee:-

> ***"Now, what new capital comes in at we don't know. But I will wager, because you're getting new money, because you're giving beautiful performance you won't have such lock-up fees, and I draw attention to the original 2017 A class shares which had no hurdle rate."***

358. I did not understand Dr Fitzgerald's reasoning for why the management fee might return to 1.5% but it appears speculative. In relation to the removal of the hurdle rate, this was based on his assumptions as to performance and the receipt of new capital, neither of which I accept. I therefore consider that any estimate of future losses should be premised on the Fund's current fee structure.

10.4.2.3 Allocation of incentive fees

359. Dr Fitzgerald accepted in oral evidence that Mr Gray's and Mr Smith's share of any fees would have been 42% (not 50%) each because members of the Advisory Committee and mid/ back office staff would also have received a share. I agree.

10.4.2.4 Discount rate

360. Dr Fitzgerald accepted that a discount rate should be applied to any future loss period and that Mr Battrick's proposed rate of 5.6% was appropriate. I agree.

10.4.2.5 Corporation tax

361. I also agree that any loss calculation would need to reflect the incidence of corporation tax on BIPL's profits.

10.4.3 **Conclusions on Mr Gray's quantum claim**

362. In light of my findings, I am satisfied that the loss assessments prepared by Mr Battrick properly reflect the historic and future losses which might properly have been claimed by Mr Gray if (contrary to my actual findings) he and Mr Smith had, in fact, entered into the Alleged Oral Agreement, such agreement had been breached and the 'conceptual' difficulties (noted at [332]-[342]) with the damages claim had not been encountered. Those assessments (showing the different losses depending upon the loss period to be applied) are set out in Appendix 2 to Mr Battrick's supplemental report (updated to reflect the recent redemption) as follows:-

Loss period (from 3/18)	**Loss**
After 1 year	Nil

After 2 years	Nil
After 3 years	€710,000
After 4 years	€737,000
After 5 years	€853,000
After 6.3 years (to 6/24)	€1,307,000
After 8.3 years (to 6/26)	€1,875,000

363. Accordingly, from a damages perspective, Mr Gray's 'best case' scenario would have been a claim for loss after 8.3 years to June 2026 of **€1,875,000**.

10.5 **Mitigation**

10.5.1 **Introduction**

364. The Defendants say that the Claimant has failed to mitigate his losses following the end of his collaboration with Mr Smith, whether by (i) obtaining employment as an investment banker (or similar) or (ii) trying to launch an alternative fund or other vehicle investing third party capital.

10.5.2 **Mitigation – legal principles**

365. A claimant is required to mitigate its loss such that it cannot recover damages for any part of its loss consequent upon a breach of contract that the claimant could have avoided by taking reasonable steps. According to Viscount Haldane in *British Westinghouse Electric and Manufacturing Company Ltd* v *Underground Electric Railways Company of London Ltd* [1912] AC 673 (at [689]):-

> "*but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps. In the words of James, L.J., in Dunkirk Colliery Company v. Lever (9 Ch. Div. 25), "The person who has broken the contract" is not to be "exposed to additional cost by reason of the plaintiffs not having done what they ought to have done as reasonable men, and the plaintiffs" are not to be "under any obligation to do anything otherwise than in the ordinary course of business.*"

366. The question as to what was reasonable for a person to do in mitigation of damage is not a question of law but one of fact in the circumstances of each particular case (*Chitty on Contracts (34th Ed.)* (at [29-099])). As Leggatt J explained in *Thai Airways International plc* v *KI Holdings Co Ltd* [2015] 1 CLC 765 (at [37]), it is possible for a claimant to act in a way that was reasonable from the point of view of its own business interests or personal objectives and yet not to have adopted what the law regards as a reasonable response to a breach of contract. However, as he also noted (at [38]), the standard of reasonableness is applied with some "*tenderness*" towards the claimant; principles of mitigation should not be applied too onerously to the benefit of a wrongdoer (*Banco de Portugal* v *Waterlow* [1932] AC 452 (at [506])). Moreover, claimants will not be expected to engage in activities by way of mitigation that would require them to take risks with their own money or assets (*Jewelowski* v *Propp* [1944] KB 510). The burden of proof rests with the defendant to show that the claimant has

failed to mitigate, although the claimant bears an evidential burden (*Sainsbury's Supermarkets Ltd v Visa Europe Services LLC* [2020] Bus LR 1196 (at [211]-[216])).

10.5.3 **Mitigation – the evidence**

367. The Defendants rely on the Claimant's own evidence to support his failure to mitigate by seeking employment. As Mr Gray says in his first statement about being 'courted' for the role of Head of Investment Banking at Panmure Gordon:-

> "*Ahead of the completion of the takeover, Ian was in the process of organising his senior management team. Matt strongly advocated that I should be part of this team. Ian and I corresponded by email and met on a number of occasions between November 2016 and June 2017 in order to discuss this possibility. ……*
>
> *Prior to the takeover completing, I was asked to consider taking the Head of Investment Banking role and tasked with directing Panmure's strategy in the post-takeover period.*
>
> *In this role I would also be tasked with providing critical support for Panmure's sponsor, placement agency and advisory business. I would be contractually entitled to a cut of Panmure's revenues in these areas. Conservatively, I estimate that this position would have paid £1m in annual compensation ….*
>
> *Ultimately, I decided not to accept this role because of my involvement with, and need to focus on, developing Blackmoor*."

368. And concerning other opportunities after his Blackmoor collaboration ended:-

> " *….. there were a number of employment opportunities that were presented to me. I didn't court any investment banking opportunities, but a number of banks tried to recruit me. I had a very high bar to return to investment banking. I had an open spot at PJT Partners, either in New York or in London, had I so desired. Given my experience with Morgan Stanley, I would only consider positions where: a) I was running a Group such as Financial Sponsors and/or Leveraged Finance; and b) where I trusted the Head of Investment Banking*."

369. In his third statement, Mr Gray says more generally about his personal objectives in the context of an investment banking role:-

> "*In the post-Blackmoor stage of my career I've been willing to return to investment banking and did pursue a couple of leads, but have wanted a role where I know and trust my boss and where I could lead and grow a business – a role I have so far not found or been able to secure. I had already succeeded at the highest levels for some of the top global investment banks on both sides of the Pond and didn't feel like I would have anything left to prove in a lesser role*."

370. And further about a role within smaller investment banks than those in which he previously worked:-

"*Pearl Meyer uses pay data for "smaller to medium sized banks in London", excluding larger global investment banks. Given my experience and background, I have not sought roles in this type of bank, nor have I had a job at one. I would much prefer to try to make more money investing my own capital than accepting a role of this type. Such a role wouldn't provide any additional security for my family; and it would not be my preferred career path*."

371. The Defendants say that, in these circumstances, not least with an "*open spot*" at PJT Partners and an offer of the role of Head of Investment Banking (which Mr Gray continued to discuss with Panmure Gordon after his meeting with Mr Smith on 1 June 2017 (noted at [102])), the Claimant could easily have obtained an investment banking role if he had wanted to and could reasonably be expected to have earned more than £1m per year based on his second statement where he says that his average annual compensation as an investment banker was "*a couple of million pounds per year*" and on his US tax returns for 2010-2013, indicating salary (with his wife) of US$1,883,150 (in 2010), US$8,464,550 (in 2011), US$2,011,903 (in 2012) and US$2,178,101 (in 2013). Alternatively, based on Mr Patterson's report, the Claimant could reasonably be expected to earn £300,000 per year in a smaller to medium sized London bank.

372. The Claimant says that the Panmure Gordon opportunity was not pursued because he had committed to Blackmoor and the opportunity passed by the time Mr Smith 'ousted' him but, post-Blackmoor, he has tried to pursue investment banking opportunities (including at Royal Bank of Canada and HSBC) but these came to nothing. PJT Partners was a 'boutique' firm employing sector specialists and any role would likely be New York based, there are very few jobs at major banks for people of his qualifications, the industry having moved away from generalists to specialists and the "*the half life of a senior banker at* [his] *stage of career* [being] *relatively short*." It is therefore perfectly reasonable for him not to have taken that path again after spending several years after Morgan Stanley in a different working environment. Moreover, he could not reasonably be expected to launch his own fund, not least after the time and energy spent doing this, and pitching to his contacts, at Blackmoor.

10.5.4 **Mitigation – discussion**

373. I accept the Claimant's submission that he could not have reasonably been expected to start his own fund. In my view, this would have been too onerous a requirement and would expose him to risks with his own money or assets, thereby falling foul of the principles noted above (at [366]). The same cannot, however, be said of securing employment in a senior role at an investment bank (or similar). On his own case, with his investment banking background at UBS, JP Morgan and Morgan Stanley, he had a 'stardust' pedigree and track record, involving 122 corporate transactions. Although (as noted at [166]) not on 'all fours' with Blackmoor, his investment banking experience generally and his private equity experience specifically (with his deep knowledge of the major private equity firms), was outstanding. Moreover, his own written evidence confirms that very well paid banking opportunities were presented to him during and after he left Blackmoor such that he was still in demand. I discerned that, in his oral evidence (on mitigation aspects at least), Mr Gray realised that the positive picture of his employment prospects presented in his written evidence and his lack of enthusiasm about returning to an investment banking role were unhelpful and

that he attempted to 'row back' on these by introducing various suggested obstacles. However, I did not find these convincing.

374. To the contrary, based on Mr Gray's evidence, he could readily have secured employment in a senior investment banking role (or similar) and, although he looked into some opportunities after leaving Blackmoor, his interest was passive and half-hearted. To use his own words, he had set a "*very high bar*" for any return to investment banking, he would only consider a position where he was "*running a Group such as Financial Sponsors and/or Leveraged Finance*" and "*trusted the Head of Investment Banking*" and he "*didn't feel like* [he] *would have anything left to prove in a lesser role*". It is also evident from other parts of Mr Gray's evidence that he wanted to be his own boss and to avoid 'office politics' and that he felt let down - and his pride took a large 'knock' - when Morgan Stanley made him redundant. However, he and his family were financially secure and he was content to undertake his own personal trading and investment and to be involved in *ad hoc* business projects with contacts or former colleagues. Although these may all be very good personal reasons for him not wanting to return to investment banking, in my view, this is a case of the nature indicated by Leggatt J in *Thai Airways* (at [37]) (noted at [366]) where, from the point of view of his own personal objectives, his response was reasonable but his conditions for, and/ or sentiments towards, a senior role in an investment bank are not what the law would regard as a reasonable response to a breach of contract.

375. Accordingly, in all the circumstances of this case, not least his impressive investment banking background, experience and credentials, market contacts, deal track record and continued third party interest in recruiting him for high reward, I would have found that, following his departure from Blackmoor, Mr Gray could reasonably have been expected actively to seek a senior investment banking role or similar (not limited by his self-imposed conditions (noted at [368-370])). Had he done so, he would have secured such a role by the time of the Blackmoor Fund launch in March 2018 and, based on his own evidence about his past earnings and, most recently, the Panmure Gordon opportunity, I also find that he could have earned salary and bonuses of at least £1m per annum.

10.6 Mr Gray's contractual damages claim - conclusion

376. Accordingly, even if (as noted at [362]-[363]) Mr Gray's losses could have been established at their maximum of €1,875,000 (based on a June 2026 end date), applying what he would have earned during the same period from a senior role in investment banking (or similar) had he taken steps to mitigate those losses, his earnings would have exceeded by far those losses such that he would not have been entitled to damages in any event.

11 Overall conclusion on Mr Gray's contractual claim

377. For all the above reasons, Mr Gray's claim against Mr Smith in contract fails.

12 Mr Gray's fiduciary claim

12.1 **Fiduciary claim – introduction**

378. Mr Gray also pleads (PoC at [11]) that the parties' relationship was a fiduciary one on account of:-

a. the mutual confidence involved in forming their joint venture;

b. their agreement or understanding that both would participate equally in the Fund;

c. the pooling of confidential client contacts, commercial intelligence and other confidential information that was highly valuable to each of them; and

d. the trust and confidence that Mr Gray reposed in Mr Smith, particularly where the latter led negotiations with certain joint contacts, including BI-Invest.

379. By reason of these matters, the Claimant further pleads (PoC at [12]) that Mr Smith owed fiduciary duties to Mr Gray:-

a. not deliberately to compromise Mr Gray's interests;

b. to act in good faith in Mr Gray's interests;

c. not to prefer the interests of himself or any other third party over Mr Gray's interests and, in particular, not to act in furtherance of his own interests to the prejudice of Mr Gray; and

d. not deliberately to withhold information from Mr Gray.

380. The Defendants deny any fiduciary relationship or related duties: there was no 'joint venture' between the parties, no agreement or understanding that they would participate equally in the Fund and no relationship of trust and confidence.

12.2 **Fiduciary claim - legal principles**

381. The far-reaching consequences of a finding of a fiduciary relationship were explained by Millett LJ in *Bristol and West Building Society* v *Mothew* [1998] Ch 1 (at [18]):-

> "*The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal*."

382. In this case, the Claimant does not allege that Mr Smith was a fiduciary falling within a settled category such as trustee, agent, solicitor, partner or company director. However, this does not preclude fiduciary duties being owed where the circumstances justify their imposition. For such an *ad hoc* fiduciary relationship to arise, there must

be an undertaking or assumption of responsibility by the alleged fiduciary to act in the other's interest, in circumstances giving rise to a relationship of trust and confidence (see *Snell's Equity (34th Ed.)* (at [7-005])), consistent with Millett LJ's further statement in *Mothew* (at [18]) that a fiduciary is:-

> " … *someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence*."

383. As in the settled categories of fiduciary, *ad hoc* fiduciary relationships may arise in commercial settings although, as foreshadowed by *Snell* (at [7-005]), the authorities indicate circumspection:-

> " *….. The reason fiduciary duties do not commonly arise in commercial settings outside the settled categories of fiduciary relationships is that it is normally inappropriate to expect a commercial party to subordinate its own interests to those of another commercial party*."

384. As Lord Walker cautioned in *Cobbe* v *Yeoman's Row Management Ltd* [2008] 1 WLR 1752 (at [81]):-

> "*Nor do they cast doubt on the general principle that the court should be very slow to introduce uncertainty into commercial transactions by over-ready use of equitable concepts such as fiduciary obligations and equitable estoppel. That applies to commercial negotiations whether or not they are expressly stated to be subject to contract*."

385. To a similar end, in *Crossco No.4 Unlimited* v *Jolan Ltd* [2012] 1 P & CR 16 (at [88]), Etherton LJ stated:-

> "*In the absence of agency or partnership, it would require particular and special features for such fiduciary duties to arise between commercial coventurers. It is clear, however, that in special circumstances they can arise* ...."

386. A fiduciary relationship may arise between the parties to a joint venture. As Kitchen LJ stated in *Farrar* v *Miller* [2018] EWCA Civ 172 (at [75]), in a 'joint venture' context, it is often helpful to consider not only whether one joint venturer has undertaken to act for the other in a particular matter or circumstances which have given rise to a relationship of trust and confidence but also whether:-

> "*one joint venturer is in a relationship with the other which has given rise to a legitimate expectation, which equity will recognise, that he will not use his position in such a way which is adverse to the interests of the other. .... Whether a joint venture relationship carries obligations of a fiduciary nature is therefore highly fact-sensitive …*"

387. As to the factual enquiry, as Briggs J explained in *Ross River Ltd* v *Cambridge City Football Club* [2008] 1 All ER 1004 (at [197]), in the context of relationships

"*falling short of partnership, but having in them elements of joint enterprise or joint venture*":-

> " *….. if the relationship is regulated by a contract, then the terms of that contract will be of primary importance, and wider duties will not lightly be implied, in particular in commercial contracts negotiated at arms' length between parties with comparable bargaining power, and all the more so where the contract in question sets out in detail the extent, for example, of a party's disclosure obligations…*"

388. As *Snell* explains (at [7-012]), the scope of any fiduciary duty is "*moulded according to the nature of the relationship and the facts of the case*". According to Newey J in *Vivendi SA* v *Richards* [2013] BCC 771 (at [139]), the relevant undertaking or assumption of responsibility is to be assessed objectively - the subjective intention of the fiduciary is not relevant. Finally, such duties do not generally survive the cessation of the underlying relationship of duty giving rise to the fiduciary obligations (see *A-G* v *Blake* [1998] Ch 439 (at [453-454]); *Bolkiah* v *KPMG* [1999] 2 AC 222 (at [235])).

389. In terms of remedies for breach of fiduciary duty, the claimant is required to elect between equitable compensation or an account of profits, which are alternative, not cumulative, remedies (*Snell* (at [7-052]); *Tang Man Sit* v *Capacious Investments Ltd* [1996] AC 514 (at [521])).

390. As to the former, Lord Reed explained in *AIB Group (UK) plc* v *Mark Redler & Co Solicitors* [2015] AC 1503 (at [135]) in relation to equitable compensation in a misapplication of trust property case that:-

> "*The measure of compensation should therefore normally be assessed at the date of trial, with the benefit of hindsight. The foreseeability of loss is generally irrelevant, but the loss must be caused by the breach of trust, in the sense that it must flow directly from it. Losses resulting from unreasonable behaviour on the part of the claimant will be adjudged to flow from that behaviour, and not from the breach. The requirement that the loss should flow directly from the breach is also the key to determining whether causation has been interrupted by the acts of third parties.*"

391. The measure of equitable compensation will not necessarily be the same as liability for breach of contract (see *AIB* at [136]) but it appears to be common ground in this case that any equitable compensation I might be minded to award should be calculated on the same basis as damages for breach of the Alleged Oral Agreement.

392. As for Mr Gray's alternative claim for an account of profits, Lewison LJ stated in *Parr* v *Keystone Healthcare Ltd* [2019] 4 WLR 99 (at [18]) that:-

> "*There must, of course, be a sufficient degree of connection between the breach of fiduciary duty and the receipt of the secret profit. In Murad Jonathan Parker LJ said at para 112 that the fiduciary is liable to account "only for profits which he has made within the scope and ambit of the duty which conflicts or may conflict with his personal interest". In CMS Dolphin Ltd v Simonet [2001] 2*

BCLC 704, 732 Lawrence Collins J said that there must be "some reasonable connection between the breach of duty and the profits for which the fiduciary is accountable". In Ultraframe (UK) Ltd v Fielding [2005] EWHC 1638 (Ch); 2006] FSR 17 at [1588] I said that there must be a "reasonable relationship" between the breach of duty and the profit for which an account is ordered."

393. Like all equitable remedies, an account of profits is discretionary (*Snell* (at [7-055])).

12.3 **Fiduciary claim – the parties' cases**

394. As for the existence of the alleged fiduciary relationship, Mr Gray relies on much of the same evidence as for the formation and performance of the Alleged Oral Agreement, including as to:-

a. the time spent by Mr Gray and Mr Smith between August 2015 and May 2016 in getting to know each other, discussing their ideas and how their respective firms (NuOrion and StratCap) could be improved including, from October 2015, the possibility of "*working together on a joint ticket*";

b. the meeting on 28 April 2016 when they "*specifically discussed raising a committed fund together*" using BIPL;

c. the meeting on 24 or 25 May 2016 when they "*specifically discussed partnering to develop a new shareholder activist investment business under the Blackmoor brand*";

d. the pooling of contacts from August 2016 to market to investors and their pitches to investors from September 2016, with a particular focus on trying to secure Mr Bonomi, to which effort Mr Gray contributed both in terms of preparation and strategy, with Mr Smith seeking input as a 'joint partner';

e. Mr Gray and Mr Smith working from December 2016 on the FCA application for investment advisor status, Mr Gray becoming a director on 1 February 2017 and sending his FCA Form A on 7 February with the box ticked identifying him as a '*partner*' in BIPL and indicating his resignation from NuOrion; and

f. the intensification of marketing efforts from 2017 as well as the splitting of expenses with Mr Smith.

395. Mr Gray also points in his written evidence to a number of matters showing the trust and confidence they reposed in each other, including their confidential and sensitive discussions about Mr Gray's feelings about his redundancy by, and related 'office politics' at, Morgan Stanley, Mr Smith's concerns about StratCap bonus arrangements, Mr Smith's concerns about Mr Bonomi potentially withholding performance fees and regulatory issues affecting StratCap. In oral evidence, Mr Gray said the sharing this type of information was not standard but required a level of trust. Consistent with such trust, they both exchanged, or permitted access to, sensitive information such as their contacts (shared in the consolidated PIL), deal subscription agreements, Avon investor returns information, the Blackmoor investor presentation

and deals, investors and marketing folders, Mr Gray's deal sheet (including client names) and market intelligence about specific companies and funds. They also jointly acquired contacts from UBS' prime brokerage team. Moreover, Mr Gray provided his credentials for the Form A application and was appointed as BIPL director. They also communicated extensively about investor interest. In oral evidence, Mr Gray did not accept that he was sharing information with BIPL rather than Mr Smith. He also pointed to the reminders in their correspondence about the confidentiality of some of the materials, underlining their mutual reposition of trust. Likewise, they also trusted each other in the joint sharing and exploitation of their commercial networks, representing deep relationships built up over 30 years, described as the 'lifeblood' of their careers.

396. Mr Smith identifies various reasons why he says there could have been no fiduciary relationship, including:-

a. Mr Gray and Mr Smith did not know each other particularly well by 15 June 2016;

b. The fiduciary relationship is said to be underpinned by the Alleged Oral Agreement but no such agreement was concluded;

c. Mr Gray confirmed in oral evidence that the alleged fiduciary relationship was in place by 15 June 2016 but many of the matters relied on by Mr Gray to support that relationship only came later and are therefore irrelevant;

d. The sorts of conversations relied on between Mr Gray and Mr Smith are commonplace conversations between business people not capable of generating fiduciary duties; and

e. As was made clear in the Blackmoor investor presentation, any sharing of confidential information was with BIPL, not Mr Smith personally. Mr Smith was a director of BIPL and he owed fiduciary duties to the company, not to Mr Gray.

397. Accordingly, Mr Smith did not undertake to act on behalf of the Claimant in circumstances giving rise to a relationship of trust and confidence that required him to act in the Claimant's interest (and therefore contrary to the interests of BIPL).

12.4 **Fiduciary claim – discussion**

398. In deciding if a fiduciary relationship existed between Mr Gray and Mr Smith, I must therefore assess objectively whether they undertook to act for or on behalf of each other in their collaboration in Blackmoor in circumstances giving rise to a relationship of trust and confidence. Having considered the evidence and the parties' respective submissions, I have concluded that they did not.

399. <u>First</u>, as noted (at [297]), the parties did not enter into the Alleged Oral Agreement. Far from the foundation of their relationship being a 'joint venture' or agreement (or understanding) to participate equally in the Fund or to share jointly the 'fruits' of their joint contacts, what they actually discussed on 5 July 2016 was an altogether much more one-sided arrangement (in Mr Smith's favour). Mr Smith was the joint owner (with his wife) of a start-up investment management business which he

alone ran and was seeking to develop to a level at which it could launch the Fund. He sought to bring in a team who could help him achieve that objective. The 'First Blackmoor Team' having failed to come together, he agreed for Mr Gray to join him on the Investment Team. Although a senior role, Mr Gray was involved on the express understanding (noted at [309]) that he would only receive any remuneration from, and have any prospect of future participation in, Blackmoor if he was successful in capital raising and subject then to further discussion and agreement. On any view, neither of Mr Gray or Mr Smith undertook to act in the best interests of the other in their Blackmoor collaboration, let alone in circumstances giving rise to a relationship of trust and confidence. Although in my view conclusive of the point, I address briefly the Claimant's other related arguments.

400. Second, I found unconvincing the Claimant's suggestion that he and Mr Smith came to their collaboration already trusting each other as friends. As noted (at [179]-[180]), they had not seen each other for about 20 years and, once they did re-connect in August 2015, their discussions until April 2016 were undertaken in a business capacity concerning potential NuOrion and StratCap collaboration. In their oral evidence, Mr Gray and Mr Smith expressed not dissimilar views. So, Mr Gray said:-

> **"*… And the idea that I would join a complete utter start-up and then deign for some guy I went to business school with to give me "economics" that he thought were okay I just find absurd*"**;

401. The "*guy* [Mr Gray] *went to business school with*", Mr Smith, elaborated:-

> "Q. *By this point in May 2016, so we've now wound forward from your first meeting on 19 August 2015, the previous year, by this point in late May 2016, there was a relationship, a trusting relationship, between you and Mr Gray, wasn't there?*
> **A. *There was not*.**
> Q. *Mr Gray trusted you as a friend, didn't he?*
> **A. *He had no basis to trust me as a friend. I had not seen him for 20X years. I had been on four emails in 2013, contrary to the numerous emails that Mr Gray contends. I had met him in the context of NuOrion. I had spoken to him in the context of NuOrion for August, September, October, November, December, January, February, March, April. At April 28 I suggested to him that I was leaving to build the business, isn't that exciting? So, no, there was no basis for trust whatsoever*.**"

402. As Mr Smith also fairly acknowledged in oral evidence, their professional dealings may have started a friendship but the basis of their discussions was "*around NuOrion*". Nor did the 'easy manner' in which they met up, for example over lunch or coffee, mean that Mr Smith trusted Mr Gray as a friend, rather than that they were good business contacts. The Claimant also relies on the nature of the matters discussed. It appeared to be common ground, for example, that they discussed irritating aspects of their respective roles at NuOrion and StratCap. However, such subjects arising during their ongoing business dialogue would be entirely unremarkable. The same is true of personal matters apparently discussed such as Mr Gray's feelings about his redundancy, Mr Smith's disappointment around StratCap bonuses and Mr Smith's closeness with a particular colleague following the death of another. Finally, Mr Smith denied that he

shared with Mr Gray sensitive matters about the payment of his performance fees by, and regulatory issues affecting, StratCap. However, even if these subjects had been raised, they do not indicate Mr Smith having assumed responsibility to act in Mr Gray's interests rather than business gossip.

403. Third, reliance was also placed on the exchange of confidential information, including their contacts – the "*lifeblood of their careers*". However, the fact that Mr Gray's contacts were 'pooled' with Mr Smith's in the Blackmoor PIL, or that they engaged in joint marketing together, does not mean they jointly shared in the 'fruits' of any progress achieved. They did not. I have already rejected the Alleged Oral Agreement and its Equal Money Term. Mr Gray obviously had to 'pool' his contacts to demonstrate his own success in capital raising before he would have any chance of 'economics'. In this regard, the Claimant pleaded (at PoC [11(4)]) that:-

> " …. *the Claimant reposed trust and confidence in the First Defendant, in particular in circumstances where it was the First Defendant who had sole conduct of the negotiations with certain Joint Contacts including BI-Invest, the primary Cornerstone Investor target*."

404. The suggestion that Mr Gray 'trusted' Mr Smith in his ongoing discussions with Mr Bonomi was, in my view, far-fetched. There was no warrant for Mr Gray's trust or distrust. Mr Smith had worked extensively with Mr Bonomi before setting up Blackmoor. Bi-Invest effectively paid Blackmoor's bills until May 2017. Mr Bonomi was Mr Smith's contact. Mr Gray did not know Mr Bonomi. The fact that Mr Smith may have discussed with Mr Gray the status of Mr Bonomi as a potential investor or that Mr Gray provided his thoughts on the best approach to 'unlocking' his investment is again unremarkable, not an indication of a fiduciary relationship.

405. Mr Gray also relied on his sharing of marketing, investor and deal materials with Mr Smith, some of them commercially sensitive but denied that he was imparting this information *to BIPL*. However, BIPL was the vehicle then 'housing' the Blackmoor business, Blackmoor was the platform from which he and Mr Smith were talking to the market and they were selling the Blackmoor proposition. Likewise, as is evident from some of the materials themselves, when Mr Smith shared marketing materials with Mr Gray, he did so *on behalf of Blackmoor*. This information exchange did not reflect mutual trust and confidence rather than their efforts in building Blackmoor's know-how repository to support their key task of raising capital.

406. Likewise, when Mr Gray submitted his personal information for use by the FCA, he did so to support Blackmoor's application for regulatory approval, Mr Gray then being part of the team, not because the sharing of his credentials reflected "*an unusually close and trusting relationship*" with Mr Smith. Moreover, as noted (at [284]), Mr Gray's appointment as BIPL director was made months after their collaboration started and, only then, to bolster his seniority for Blackmoor marketing purposes. It was not a reflection of confidence reposed in Mr Gray. Indeed, as noted (at [289]), Mr Gray's own evidence reflects his detachment from Blackmoor's management.

407. Finally, although some of the material exchanged between Messrs Gray and Smith was commercially sensitive, including some imparted explicitly on the basis it

was confidential, such sharing is not unusual in commercial settings, with any legitimate expectations of confidentiality still capable of protection other than by way of fiduciary duty. In this regard, on 5 July 2016, Mr Smith sent Mr Gray the Blackmoor investor presentation under cover of an e-mail marked "*strictly private and confidential*". Instead of suggesting the mutual reposition of trust and confidence inherent in a fiduciary relationship, this exchange rather suggested caution on Mr Smith's part in its dissemination. If, as Mr Gray says, there already existed a fiduciary relationship by this point, it seems surprising that Mr Smith felt the need to point out, and Mr Gray in turn to acknowledge, the confidentiality of this core Blackmoor marketing document.

408. Fourth, the Claimant also relied on his and Mr Smith's increased marketing activity in 2017 and their splitting of expenses. However, the former merely indicates two parties investing greater effort to raise capital. As to the latter, as noted (at [287]-[290]), the parties bore their own direct expenses. Neither indicates a relationship of trust and confidence.

409. Fifth, as noted (at [283]) in the contractual context, I found inconclusive the use by Mr Gray and Mr Smith of the term '*partner*' to describe each other. The same holds in this equitable setting.

410. Sixth, if Mr Smith owed fiduciary duties to Mr Gray in his Blackmoor dealings, this would have placed him in a position of conflict with his fiduciary duties to BIPL embodied in sections 171-177 of the Companies Act 2006.

411. Seventh, consistent with the authorities indicating circumspection in the imposition of fiduciary obligations in a commercial setting, their imposition in the circumstances obtaining here would have potentially far-reaching and undesirable consequences for the investment management industry and 'start-ups' more broadly.

412. Accordingly, I find that there was no fiduciary relationship between Mr Gray and Mr Smith.

12.5 **Fiduciary claim – allegations of breach**

413. In light of this finding, nor could there therefore have been any breach of fiduciary duty by Mr Smith, whether by:-

a. deliberately compromising Mr Gray's interests by (i) terminating his involvement in Blackmoor when Mr Smith had secured cornerstone investors (and having told Mr Gray this) and (ii) by developing the Blackmoor Team with the intention of excluding Mr Gray and/ or without his knowledge or consent (PoC 26.1); or

b. failing to act in good faith or to disclose important information by (i) withholding from the Claimant that he had secured cornerstone investors (ii) ending his involvement at the point the success of the business was secure (iii) developing the Blackmoor Team without his knowledge or consent and (iv) continuing to rely on his credentials without updating the FCA as to the change in their relationship, thereby improperly using his personal information (PoC at [26.2]); or

c. preferring and furthering his own interests to the prejudice of the Claimant by (i) taking the benefit of the Claimant's "*total dedication*" to the pursuit of Blackmoor (between July 2016 and May 2017) (ii) encouraging the Claimant to cease working at NuOrion and (iii) taking the benefit of reliance upon the Claimant's credentials to support the FCA application, ultimately ending his Blackmoor involvement at the point when its success was secure or at least reasonably in prospect (PoC at [26.3]).

414. I should also add that, apart from my general finding that there was no breach of fiduciary duty based on the absence of any fiduciary relationship, had it been necessary for me to consider these, I would have rejected a number of the pleaded allegations said to found the individual breaches alleged, namely that:-

a. Mr Smith had secured cornerstone investment when he terminated their collaboration. As noted (at [303]-[304]), he had not;

b. Mr Smith told Mr Gray that he had done so. As noted (at [321]), he did not;

c. Mr Smith failed to update the FCA as to their change of relationship. As noted (at [314]), given their ongoing activities in winding down their collaboration, and a potential alternative role for Mr Gray then under discussion, this was not required;

d. Mr Smith encouraged Mr Gray to cease working at NuOrion. As noted (at [292]-[296]) he did not; and

e. On his own case, Mr Gray was still working at NuOrion until February 2017. He could therefore not have been "*totally dedicated*" to Blackmoor before.

12.6 **Fiduciary claim - relief**

12.6.1 **Equitable compensation**

415. Mr Gray's primary claim for relief for breach of fiduciary duty is for equitable compensation. Despite the structural similarities between common law damages and equitable compensation, it is evident from *AIB* v *Mark Redler & Co*. [2015] AC 1503 (at [136]) that liability of a fiduciary for breach of fiduciary duty is not the same as liability in damages for tort or breach of contract. However, both parties were agreed that, in this case, equitable compensation should be calculated on the same basis as damages for breach of the Alleged Oral Agreement. I agree that a common approach would have been warranted here. The assessment of equitable compensation (as for contractual or tortious damages) reflects an analysis of the characteristics of the particular obligations breached (see, for example, Lord Reed in *AIB* at [92-93]), as to which, there is significant overlap between the alleged breaches the subject of Mr Gray's respective contractual and equitable claims. This common approach extends to the question of 'mitigation' as well. For the same reasons set out (at [373]-[375]) concerning the Claimant's duty to mitigate with respect to the breaches of the Alleged Oral Agreement, I would also have found that Mr Gray's failure to secure a role as a senior investment banker (or similar) would have represented 'unreasonable behaviour' on his part and that his losses should be adjudged to flow from such behaviour, not from any breach of fiduciary duty by Mr Smith (see Lord Reed in *AIB* (at [135])). Accordingly, had it been necessary for me to consider his claim for equitable relief, I

would have found that Mr Gray was not entitled to equitable compensation for the same reasons as I would have denied his contractual damages claim (noted at [327]-[375]).

12.6.2 **Account of profits**

416. As to Mr Gray's claim for an account of profits, he seeks in the alternative (at PoC [27]):-

> "*50% of the profits made by the First Defendant in relation to their Joint Contacts and any other contacts identified by the Joint Contacts and by relevant third parties*."

417. "*Joint Contacts*" are defined (at PoC at [8.3]) as:-

> "*all of their respective contacts … to whom an investment in Blackmoor could be of interest*."

418. The Defendants point to the fact (noted at [392]) that profits cannot be claimed 'in the abstract' but that there must be a "*sufficient degree of connection between the breach of fiduciary duty and the receipt of the secret profit*". Even if a fiduciary relationship did exist, the alleged breaches from Mr Smith's undisclosed engagement with Mr Treichl and potential cornerstone investors and Mr Gray's subsequent 'exclusion' from the business, did not lead to the accrual of any profits to Mr Smith. Any prospect of investment disappeared with Mr Treichl's death. None of those who did ultimately invest in the Blackmoor Fund launched in March 2018 ever featured on the PIL during the period of Mr Gray's and Mr Smith's collaboration. As such, there was nothing for which Mr Smith could have been liable to account. Mr Gray says that focusing on the final investors in the Fund looks at matters too narrowly. The essence of their collaboration was the *joint* sharing of information and contacts for their *mutual* benefit, with both sharing *equally* in the fruits of their efforts regardless of who 'sealed' any particular investment. The Claimant also points to the fact that his and Mr Smith's efforts in jointly developing and marketing the Fund, including refining the marketing materials and narrowing potential investor leads and investment opportunities, were taken forward seamlessly by Mr Smith with others.

419. Even ignoring my finding that the collaboration between Mr Gray and Mr Smith was a far more one-sided affair (in Mr Smith's favour) than the 'joint enterprise' portrayed by Mr Gray, I found this exposition unpersuasive: <u>first</u>, just as I would, if necessary, have found (as noted at [304]-[305]) that Mr Smith was entitled to, and did, bring to an end any contractual collaboration with Mr Gray by 1 June 2016, as noted (at [388]), any fiduciary relationship premised on that collaboration would have ended then as well; <u>second</u>, I have already rejected (at [335]-[336]) in the context of the contractual damages claim, the Claimant's suggestion that the Blackmoor Fund launched in March 2018 represented the 'continuum' of Mr Gray's prior efforts. Those who ultimately invested did so because, having failed to gain 'traction' with Mr Gray, Mr Smith took Blackmoor in a "*different direction*"; <u>third</u>, those investments, including those made on the introduction of Messrs Hill, Schmidt-Chiari and Franco, were not even in the contemplation of Blackmoor before June 2017, let alone opportunities available to Blackmoor then, let alone 'maturing' or 'ripe' ones and; <u>fourth</u>, following the end of any fiduciary relationship, both parties would have been free to pursue their

own personal self-interests, including using know-how, contacts and connections established during their collaboration.

420. The corollary of the Claimant's 'continuum' argument seems to be that, if any person was involved in Blackmoor from the start of Mr Smith's engagement with Mr Treichl in January 2017 to the launch of the Blackmoor Fund in March 2018, whether as potential investor, intermediary or potential or actual member of the Blackmoor Team, any subsequent investment in the Fund connected in some way with that person, firm or entity may be 'fair game' for an account of profits. That proposition is far too broad. Accordingly, had it been necessary for me to do so, I would also have found insufficient connection between the breaches of fiduciary duty alleged by Mr Gray and the profits generated by the Blackmoor Fund such that, for this reason too, the Claimant would not have been entitled to an account of profits.

12.7 **Fiduciary claim – overall conclusions**

421. For all the above reasons, Mr Gray's claim against Mr Smith for breach of fiduciary duty also fails.

13 Unjust enrichment claim

13.1 **Mr Gray's claim in unjust enrichment – introduction**

422. Finally, Mr Gray claims in unjust enrichment against both Mr Smith and BIPL, pleading at (PoC at [28]) that:-

> "*Further or alternatively, in circumstances where the Claimant provided his services to the First Defendant and to BIP over a 14-month period from 5 July 2016 to 9 September 2017 in the anticipation of a 50% share of Blackmoor's profits it would be unconscionable for the Claimant not to be compensated for the services rendered*."

423. Mr Gray says that Mr Smith asked him (on behalf of himself and BIPL) to provide his services, particularly his (i) professional contacts to pursue investor capital (ii) development of strategies for investor capital (iii) analysis of potential investments (iv) preparation of investor presentations and (v) contribution to the FCA application. Mr Gray claims that he spent a total of 2,235 hours on these activities which, applying an hourly rate of €750, equates to services worth some €1,676,250 (plus £5,000 expenses) by which Mr Smith and/ or BIPL have been unjustly enriched.

424. The Defendants raise a number of arguments by way of defence: first, they say that the Claimant provided his services pursuant to the trial collaboration discussed on 5 July 2016 and on risk that he would not be remunerated if he and Mr Smith did not launch the Fund together such that any enrichment would not be 'unjust'; second, on any view, no claim can lie against Mr Smith in unjust enrichment since Mr Gray performed these services for BIPL; third, Mr Gray failed to attract any investment into the Fund such that BIPL received no 'enrichment' or the value of any 'enrichment' it did receive was nil; fourth, even if the time spent by Mr Gray in performing these

services was an appropriate measure of the value of any 'enrichment', he has failed to prove the time spent and the hourly rate is excessive.

13.2 **Unjust enrichment claim - overarching principles**

425. The applicable legal principles were largely common ground. As for the overarching principles, Lord Clarke noted in *Benedetti* v *Sawaris* [2014] AC 938 (at [10]) that:-

> "*It is now well-established that a court must first ask itself four questions when faced with a claim for unjust enrichment as follows. (1) Has the defendant been enriched? (2) Was the enrichment at the claimant's expense? (3) Was the enrichment unjust? (4) Are there any defences available to the defendant?*"

426. The first and third of these questions are in issue on this claim.

13.3 **The 'unjust factor' – failure of basis**

427. Taking the third issue first, the Claimant claims in unjustment enrichment based on the 'unjust factor' sometimes referred to as 'failure of basis', albeit that rubric encompasses many different situations. More specifically, the Claimant says he performed work for Mr Smith and/ or BIPL in anticipation of a 50% share of Blackmoor's profits. In *MSM Consulting Limited* v *United Republic of Tanzania* [2009] EWHC 121 (QB) (at [170]-[171]), Christopher Clarke J endorsed the approach of Mr Nicholas Strauss QC (sitting as a High Court Judge) in *Countrywide Communications Limited v ICL Pathway Ltd* [1996] C No 2446 to the question of when a claim in unjust enrichment might lie for benefits conferred in anticipation of a contract that never materialises, Mr Strauss QC concluding that:-

> *"I have found it impossible to formulate a clear general principle which satisfactorily governs the different factual situations which have arisen, let alone those which could easily arise in other cases. Perhaps, in the absence of any recognition in English law of a general duty of good faith in contractual negotiations, this is not surprising. Much of the difficulty is caused by attempting to categorise as an unjust enrichment of the defendant, for which an action in restitution is available, what is really a loss unfairly sustained by the plaintiff. There is a lot to be said for a broad principle enabling either to be recompensed, but no such principle is clearly established in English Law. Undoubtedly the court may impose an obligation to pay for benefits resulting from services performed in the course of a contract which is expected to, but does not, come into existence. This is so, even though, in all cases, the defendant is ex hypothesi free to withdraw from the proposed contract, whether the negotiations were expressly made "subject to contract" or not. Undoubtedly, such an obligation will be imposed only if justice requires it or, which comes to much the same thing, if it would be unconscionable for the plaintiff not to be recompensed.*
>
> *Beyond that, I do not think that it is possible to go further than to say that, in deciding whether to impose an obligation and if so its extent, the court will take into account and give appropriate weight to a number of considerations which can be identified in the authorities. The first is whether the services were of a*

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

428. Moreover, the basis on which services are provided is to be determined objectively; the parties' uncommunicated thoughts are irrelevant (see *Goff & Jones*: *The Law of Unjust Enrichment (9th Ed.)* (at [13-02]); *Guardian Ocean Cargoes Ltd* v *Banco do Brasil* [1994] CLC 243 (at [251]).

13.4 **Unjust factor - discussion**

429. As the Claimant acknowledges, the evidence as to whether Mr Gray provided services in anticipation of a 50% share of Blackmoor's profits largely mirrors that relevant to conclusion of the Alleged Oral Agreement on 15 June 2016. Mr Gray says that, even if, contrary to his primary case, such agreement was not entered into then, the parties were working thereafter on a clear understanding that Mr Gray was providing his services in return for a future 50% economic interest in Blackmoor. In light of my findings concerning the Alleged Oral Agreement (at [297]) and what was, in fact, discussed on 5 July 2016 as to the actual basis of their collaboration (at [309]), I have no hesitation in concluding that Mr Gray did not provide his services in anticipation of half of Blackmoor's profits. To the contrary, Mr Gray provided his services on the clear understanding, communicated between the parties at their meeting on 5 July 2016, that Mr Gray's future participation in Blackmoor, including in its 'economics', depended on them succeeding in raising capital together and both going on to launch the Fund, with Mr Gray (and Mr Gray alone) being at risk that he would be paid nothing if he did not succeed in raising capital *in his own right*.

430. Moreover, even on the Claimant's case, there was no discussion with Mr Smith in June or July 2016 about the duration or termination of their collaboration. However, in an unjust enrichment context, Mr Gray cannot pray in aid of what he might (and did, as discussed (at [259]-[265])) argue by way of implied term in a contractual context

was 'obvious' or necessary for business efficacy to seek to 'fill this hole'. As noted (at [428]), the parties' uncommunicated thoughts are irrelevant in an unjust enrichment setting. In closing submission, the Claimant pointed to the pleaded discussions in June 2016 about "*the objective of the cornerstone investor*" but, even ignoring my rejection of Mr Gray's case concerning those discussions, they would have been insufficient in any event to found an assurance that Mr Smith would not withdraw from their collaboration.

431. Accordingly, turning back to the second consideration identified in *Countrywide* (noted at [427]), Mr Smith did not give any assurance or indication to Mr Gray on 5 July 2016 that he would not withdraw from their collaboration. Moreover, the risk undertaken by Mr Gray was clear, namely that he would not be compensated unless successful in raising capital. Nor, contrary to Mr Gray's alternative argument in closing argument was that a risk he *shared* with Mr Smith. As I have also found (at [309]), the risk undertaken was not merely that he and Mr Smith would not get paid if the Fund did not launch; the further risk to Mr Gray (and Mr Gray alone) was that he would not be paid if he did not succeed in capital raising *in his own right*.

432. As noted (at [231-237]), his arrangement was also consistent with the 'industry norm' such that the first consideration in *Countrywide* is also engaged, namely that (absent Mr Gray's capital raising success) "*the services were of a kind which would normally be given free of charge*".

433. As to the third consideration in *Countrywide*, whether Mr Smith and/ or BIPL received a "*real benefit*" in the sense described by Traynor C.J. in *Coleman Engineering Co*. v *North American Aviation* 410P, 2d. 713 (at [729]), I am satisfied that there was no such benefit here, the purpose of the services provided being the raising of capital, Mr Gray not having succeeded in that objective.

434. Nor can it be said (in terms of the fourth consideration in *Countrywide*) that there was any fault on the part of the Defendants in the non-materialisation of the 'anticipated' contract. To the contrary, Mr Gray understood full well that no contract would ever materialise unless he succeeded in raising capital. Mr Gray's future participation in Blackmoor was, therefore, dependent on his own performance. Despite Mr Smith affording him ample opportunity to prove himself, Mr Gray did not raise any capital.

435. Finally, for the reasons already noted (at [335-336] and [419]), I reject the Claimant's assertion that "*the Fund continued along a continuum*" allowing Mr Smith to take "*the fruit of his and Mr Gray's labours*." Those 'labours' yielded no capital such that Mr Smith had no choice but to take Blackmoor "*in a different direction*" in 2017. Having done so (without Mr Gray), Mr Smith managed to launch the Blackmoor Fund in March 2018 but only then after revising downwards his ambitions for Blackmoor and his own expected rewards. In my judgment, that is not a "*source of injustice*" warranting restitutionary relief. To the contrary, it is a risk that Mr Gray undertook with his eyes wide open. In those circumstances, the grant of restitutionary relief would, in fact, work an injustice on Mr Smith.

436. As such, I find that there was no failure of basis. The Claimant having failed to establish the presence of any 'unjust factor', no claim in unjust enrichment lies.

13.5 **Enrichment – discussion**

13.5.1 **Unjust enrichment - was Mr Smith enriched?**

437. Although unnecessary in light of the above finding, I consider briefly whether the Defendants were, in fact, 'enriched'. As to this, the first point arising is whether *Mr Smith* received any enrichment. The Defendants say that BIPL has been the management vehicle for Blackmoor's business since its incorporation on 16 April 2016, before Mr Gray's involvement, and is the entity that receives the management and incentive fees from the Blackmoor Fund. Moreover, (as noted at [238]) all Blackmoor's marketing materials made clear that BIPL was the owner of the business. Mr Smith was (and remains) a director and shareholder of BIPL and, as such, he was not enriched by Mr Gray's services. To that end, the Defendants rely on *MacInnes* v *Gross* [2017] EWHC 46 (QB) in which Coulson J held (at [169]):-

> "*It would be a very unusual situation in which a claim for a quantum meruit would lie, not against the legal entities which allegedly benefitted from the claimant's services, but against the majority shareholder of those companies… I consider that clear evidence of a personal obligation or liability, as opposed to one owed by the relevant company or companies, would have to be provided, because it is so contrary to ordinary business practice*."

438. The Claimant says that the Defendants' position is exactly the type of unduly formalistic approach deprecated by Lord Clarke in *Menelaou v Bank of Cyprus UK Ltd* [2016] AC 176 (at [99]) and Lord Steyn before him in *Banque Financière de la Cité* v *Parc (Battersea) Ltd* [1999] 1 AC 221 (at [227]). I reject the suggestion of 'formalism' for a number of reasons: <u>first</u>, the context for the suggested 'formalism' in *Menelaou* was the second issue identified by Lord Clarke in *Benedetti*, namely whether the relevant enrichment was '*at the expense of*' the claimant bank given that the two underlying transactions (a sale of one property by the defendant's parents and the use of the sale proceeds by the defendant to buy another) did not result in the claimant bank making any direct payment to the defendant; <u>second</u>, even if the '*at the expense of*' enquiry were relevant here, in my view, this is not a case in which it is necessary to consider the 'reality' or 'economic reality' of a transaction or whether multiple transactions comprised part of a single 'scheme' such that same issues as to 'formalism' simply do not arise; <u>third</u>, in *The Commissioners for Her Majesty's Revenue and Customs* v *The Investment Trust Companies (in liquidation)* [2017] UKSC 29 (*ITC*), the Supreme Court sought to remove the uncertainty indicated by cases such as *Menelaou* as to the requisite causal connection between the benefit to the defendant ('*enrichment*') and loss to the claimant ('*at the expense of*'). In propounding more precise criteria, the Court appears to have narrowed scope for arguments based on 'formalism' even where such issues do arise; <u>fourth</u>, it is of note that the Court in *ITC* appeared to endorse (at [51]) the holding in *MacDonald Dickens & Macklin* v *Costello* [2011] EWCA Civ 930 that the provision of services to a company did not enrich its directors and shareholders.

439. Turning back to the more straightforward issue in this case of whether Mr Smith or BIPL was enriched, Mr Gray's evidence was that he was aware from 28 April 2016 of the incorporation of BIPL and that BIPL was the entity pitching to investors (noted at [(239-240)]). Moreover, as I have found in the context of the claim for equitable

relief (at [405)), BIPL was the vehicle then 'housing' the Blackmoor business, Blackmoor was the platform from which Mr Gray and Mr Smith were talking to the market and they were selling the Blackmoor proposition. I would therefore have had no hesitation in finding, consistent with *MacDonald* and *MacInnes*, that any benefit from Mr Gray's services was conferred on BIPL, not on its shareholder and director, Mr Smith. As such, BIPL is the only proper defendant to Mr Gray's unjust enrichment claim.

13.5.2 **Unjust enrichment – was BIPL enriched?**

440. According to *Benedetti* (at [15]-[16]), whether the defendant has been enriched is an objective test, ascertained by asking whether the reasonable person would consider the defendant to have received something of value. As *Goff & Jones* notes (at [5-39]), where the provision of services is in issue, considerable debate can arise as to whether the 'enrichment' is properly characterised as the services themselves or their 'end-product'. In this case, the Defendants contend for the latter, saying that the purpose of Mr Gray's involvement in Blackmoor was the raising of capital. *Goff & Jones* suggests (at [5-39]) that, in deciding the proper characterisation of the relevant benefit:-

> "*The best approach is for the court to keep an open mind, and to take all the circumstances into account, including whether the parties themselves thought that the benefit being transferred was the services or their end-product*."

441. The *value* of any enrichment is also to be determined, in the first instance, by an objective test, namely "*the price which a reasonable person in the defendant's position would have had to pay for the services*" (*Benedetti* (at [17])). The authorities show that such "*price*" may take different forms. So, in *Brenner* v *First Artists' Management Pty Ltd* [1993] 2 VR 221, a 'pure services' case concerning the provision of management services to a pop group, the Court considered it would be appropriate in many cases to assess the value of the services by applying an hourly rate to the time spent, making a "*global assessment*" where an itemisation of the hours spent or of the precise services is not possible. However, in other cases, the Court has adopted a different approach to valuation where, for example, a commission, fee, royalty or some other basis reflects industry practice or the parties' own understanding of the value of the claimant's services (see *Goff & Jones* (at [5-45]-[5-46])). Finally, if the defendant can show that he or she valued the enrichment less than its market value, that market value may be reduced to reflect the defendant's 'subjective devaluation' (*Benedetti* (at [18])).

442. Applying these principles here, the Claimant says that it would be wrong simply to look at the *end-product* rather than taking into account "*all the circumstances*", consistent with the approach suggested in *Goff & Jones* (noted at [440]). I was also referred further to *Brenner*, including for the proposition that "*where the services were requested and accepted, the law will not stop to enquire whether they were, on any other basis, of benefit to the party requesting and accepting them*". However, this did not seem to advance matters much beyond it being well established that the provision of 'pure services' can constitute enrichment for the purpose of a claim in restitution.

443. As to the proper characterisation of the benefit *in this case*, the Claimant points to the value of various aspects of the services he provided, including (i) the pooling of

contacts, evidenced by the significant names introduced by Mr Gray and Blackmoor continuing to pitch to contacts from the period of their collaboration (ii) the iterative, collaborative and long-term processes of developing marketing materials, analysing target companies and identifying investors (iii) Mr Smith continuing their association for nearly a year, including their marketing trips and pitches (iv) Mr Gray's inclusion in the FCA application (v) his appointment as BIPL director (vi) Mr Gray's pedigree and credentials and (vii) these efforts cumulatively permitting the seamless continuation of Blackmoor's development to the launch of the Blackmoor Fund.

444. Although I acknowledge that Mr Gray did make significant efforts to attempt to raise capital for Blackmoor, his exposition overlooks the following important matters: first, as noted (at [76]), it is common ground that Mr Gray's most important task was the raising of capital. As both experts agreed (Joint Statement at [2.4]):-

> "*… the activities being undertaken by the Claimant were centred around successfully bringing in investors*."

445. Second, without success in capital raising, there would have been no Fund;

446. Third, as I have already found (at [309]), and noted (at [431]) in the context of the 'unjust factor' relied on, Mr Gray understood that he would not remunerated unless successful in capital raising *in his own right*. As *Chitty* notes in the context of non-monetary benefits (at [32-022]), "[r]*estitution will not be awarded if the dealing between the parties shows that the risk is to be borne by the party rendering the services*."

447. Fourth, in terms of a start-up's ability to pay its investment team pre-launch, the experts also agree (Joint Statement at [2.5]) that:-

> "*…. prior to launch, a start-up fund has no ability to pay. The ability of a fund to pay its investment team is typically subject to both agreement from the owners of the fund and a successful launch, at which point, performance and management fees become payable*."

448. Fifth, Blackmoor was no different. The Bi-Invest Contract funded its expenses but it did not have the means to pay for Mr Gray's services (or direct expenses) as well; and

449. Sixth, despite his pedigree and their collaboration lasting for nearly a year, Mr Gray did not succeed in raising any capital.

450. Finally, I have already rejected Mr Gray's 'continuum argument', including (at [435]) in a restitutionary context as well. It was Mr Smith taking Blackmoor "*in a different direction*", not Mr Gray's prior efforts which eventually allowed the Blackmoor Fund to launch. None of those who invested in it were contacts of Mr Gray or Mr Smith during the period of their collaboration.

451. In circumstances in which the principal objective of their collaboration was the raising of capital, Mr Gray knowingly took the risk that he would not be paid for his work unless he was successful and the parties' mutual understanding in that regard was

consistent with market practice, BIPL's enrichment cannot be said to lie in the individual services provided by Mr Gray. Rather, I would have found that such enrichment lay in their *end-product* in the form of committed investor capital and that the appropriate measure of the value of that enrichment (if any) would have been a fee, commission or percentage share based on the level of capital raised, not the time spent (or expenses incurred) to that end. Since Mr Gray failed to raise any capital, I would therefore have found that BIPL was not enriched.

13.5.3 **Unjust enrichment – Mr Gray's time-based quantification**

13.5.3.1 Introduction

452. Finally, even if (contrary to my finding (at [451])) BIPL's enrichment could have been properly characterised as Mr Gray's 'services' (rather than their product), I now consider whether it would have been appropriate to value these on a 'time-spent' basis and, if so, whether Mr Gray would have established his claim for €1,676,250. As to the first question, since the purpose of the services rendered was the raising of capital, the Defendants say that these should be valued by reference to capital committed, not time spent. As to the second, Mr Gray has not proved the hours spent, the hourly rate is excessive and the total claim "*wildy overstated*".

453. As to his time input, the Claimant says he worked 2,235 hours between 5 July 2016 and 1 June 2017. The Defendants estimate (without admitting this figure) that Mr Gray's work could not have taken more than 780 hours. In terms of the evidence in support of his claim, the experts agree (Joint Statement at [2.3]):-

> " *…… no evidence of time spent has been provided by the Claimant so the Experts cannot comment on how the balance of time was ultimately spent by the Claimant*."

454. As Mr Gray himself acknowledged in oral evidence:-

> "*Q. I understand that. If we look at the pleading and we look at your evidence together, the two together do not even begin to support the contention that you spent 2,235 hours working for Blackmoor, do they?*
> **A. They don't.**"

455. Despite this dearth of support for the extent of his efforts, Mr Gray explained in his evidence how he would usually spend around 11 hours in the office, including focusing on ways to approach potential investors, discussing these with friends and colleagues, considering potential investment ideas and extensively analysing target watchlist companies. The Claimant also points to Mr Hansen's evidence which he says corroborates his work ethic and presence at the office over long hours. He also says he worked at weekends. Moreover, focusing on written output ignores the fact that the work product of the world inhabited by Mr Gray and Mr Smith takes many forms, including face to face discussions, calls, meetings, pitch rehearsals, research and analysis. As for his NuOrion work, Mr Gray said this was limited over the period of his collaboration with Mr Smith, perhaps seven to ten hours per week in July 2016, reducing thereafter to two or four hours per week from the Autumn, before becoming 'exclusive' to Blackmoor in February 2017. Finally, Mr Gray points to Mr Smith's acknowledgement in oral evidence of the significant effort they both made in

Blackmoor, including pooling contacts, recruiting for the Blackmoor Team, refining its marketing strategy and materials and exchanging thoughts on potential investors, not least Mr Bonomi. When Mr Gray joined Blackmoor, Mr Smith had no team or investors and little more than the "*understanding of the to-do list*". Mr Smith's "*repeated refrain*" that he did not know what Mr Gray was doing was unconvincing. It was also inconsistent with their e-mail traffic showing their extensive collaborative efforts over the period to build the Fund.

13.5.3.2 Marketing activity

456. Of the various activities undertaken by Mr Gray, as noted (at [76]), it is common ground that Blackmoor's priority was raising capital. As to this, the Defendants say that Mr Gray only contributed 28 contacts to the PIL (approximately 12% of the total) and that the time spent on updating the document would have been limited. They also say that Mr Gray would not have spent more than 180 hours in potential client meetings, including marketing trips. In oral evidence, Mr Gray acknowledged that his input into the first iteration of the PIL may been limited but he emphasised how this increased and the document evolved significantly over time, reflecting his ongoing marketing activity, as to which, Mr Smith acknowledged Mr Gray's assistance in accessing and 'unlocking' investor contacts, including NuOrion contacts to which Mr Gray introduced Mr Smith on the Blackmoor US marketing trip. Mr Gray denied 'taking' those contacts with him when he left Blackmoor and explained how, having 'unlocked' those relationships, they remain open to Messrs Smith and Schmidt-Chiari.

457. In this context, there was also considerable focus by both parties on the Blackmoor investor presentation. The Claimant pleaded (at PoC [16.4.2]) that he made "*significant changes*" to this document and says in first his statement that he "*thoroughly reviewed and revamped the entire Blackmoor presentation between 18 and 24 August 2016.*" The Defendants say that the presentation was already highly developed before Mr Gray first saw this on 5 July 2016. The parties produced their own bundles containing different iterations of the Blackmoor presentations through which Mr Gray and Mr Smith were taken at some length. In cross-examination, Mr Gray accepted that he had exaggerated his written evidence about his early input into the document:-

> "*The reason for that, Mr Gray, is because in your evidence, your narrative and explanation is that that is the largest part of the work, the largest variation exercise you undertook, entirely revamping the presentation. Would it be right to say, Mr Gray, that that language is something of an exaggeration?*
> ***A. Yes, I think -- I think that's accurate, I think --***
> *Q. How long would that exercise have taken you to do? An hour? I don't know how quickly or productive you are when you work, Mr Gray, so I have to speculate a little bit.*
> ***A. I don't know.***
> *Q. Can you give us some idea.*
> ***A. (Pause) Couple of hours.***
> *Q. That was two hours' work, was it?*
> ***A. Again you're asking me to look back five and a half years ago***."

458. The Defendants say Mr Gray could have spent no more than 5-10 hours in total on Blackmoor's marketing materials. However, Mr Gray testified that most changes to the presentation were made when he and Mr Smith "*sat down side by side*". To support this, he relied on Mr Smith's oral evidence about the different versions of the presentation, Mr Gray's related communications and advice about its improvement and Mr Smith's acknowledgement of the merit of Mr Gray's comments.

13.5.3.3 Watchlist companies/ target investments

459. Mr Gray estimated that he spent "*approximately half his time*" researching 'watchlist' companies. Although he accepted that he had only produced one piece of related work product, he said there was no need to generate documents to analyse a business opportunity. Only if capital was raised would it then be necessary to analyse matters more rigorously and produce investment memoranda. However, he explained the nature and extent of his analysis and how this took a "*tonne of time*." Mr Smith testified that, having produced a watchlist of 84 target companies, suggesting they identify the top five priorities, "*we didn't have one discussion about this*." The Defendants say that Mr Gray spent virtually no time on watchlist research, for their benefit at least. Moreover, the single piece of work product was four slides of poor analysis on NuOrion notepaper concerning Devro. Mr Gray testified that this document was a distillation of his research and naturally did not reflect every nuance of his analysis. He rejected the Defendants' suggestion that he was charging for his own personal research.

13.5.3.4 FCA application

460. The Claimant also says that he contributed to the FCA application, that this was a "*practical necessity*" and that it would not have been possible to attract investor capital without FCA authorisation. However, the Defendants point out that the only document completed by Mr Gray was his own Form A application to perform controlled functions which he accepted in oral evidence was "*not the most challenging of forms*." Even then, Mr Smith provided him with a completed example to draw on. The Defendants say this could not have taken him more than an hour to complete. Mr Gray also answered three follow up questions from the FCA which the Defendants say could not have taken more than half an hour. Mr Smith completed and submitted all the other FCA documentation.

13.5.3.5 The Claimant's hourly rate

461. The Claimant has applied an hourly rate of €750 to the time he says he spent working for Blackmoor. The Defendants say that no hourly rate is appropriate given that Mr Gray was working on risk and in accordance with the '*no win, no fee or no equity*' model of remuneration for start-up investment management businesses. A commission arrangement (reflecting a percentage share of capital raised) would be an appropriate measure of the value of Mr Gray's services. In any event, the Defendants say the suggested rate of €750 is "*fanciful*". Dr Fitzgerald addressed this in his report but the Defendants say I should not place store by his evidence because he is not a remuneration expert. As to this, Dr Fitzgerald testified:-

> "*Q. But there's nothing, is there, in paragraph 1.5, or for that matter in your CV, that provides you with sufficient expertise to provide an expert opinion*

about the value of the services provided by Mr Gray as part of his quantum meruit analysis, is there?
A. Well, I mean I would regard it as common sense to know what the number of hours and how much money you could earn providing services to develop a business in the hedge fund space.
Q. So you would suggest that Mr Patterson's specialism of being a remuneration expert really doesn't exist as a field of expertise at all, it's common sense?
A. I think it's largely common sense but I'm sure he's excellent in his field.
Q. So you acknowledge it is a specialist field?
A. I acknowledge there are employment consultants who specialise in that area, yes.
Q. Doesn't that make him rather better placed to assist the court with this specialist area than you, given the absence of any particular expertise?
***A. I guess that's for the court to judge*.”

462. As to his evidence about the hourly rate, the Defendants say that Dr Fitzgerald misunderstood that he was opining on the ‘value’ of Mr Gray’s services:-

“*You don't really consider in your report, do you, what benefit BIPL's received from the provision of the services, do you? You're not considering the value of what is being provided, you're considering the cost of it, aren't you?*
A. Well, I mean -- I think the 750 is -- you know, if you were doing this on a consulting basis, what could you get away with charging?
Q. What could you get away with charging?
A. Yes*…*”

463. Dr Fitzgerald testified further:-

“*So what you have done in ascribing a price of 750 euro being what you think Mr Gray could get away with, you're analysing the cost of the service, but what your report isn't doing is looking at the value of what he actually provided?*
***A. I suppose not*.**”

464. In arriving at the hourly rate of €750, Dr Fitzgerald used ‘comparable’ charge-out rates of accountancy partners and risk management consultants. The Defendants say these are entirely inappropriate for investment management start-ups with no ability to pay. As to this, Dr Fitzgerald testified:-

“*Q. These proposed comparables are all with professional roles in established businesses, aren't they, rather than start-ups, you would agree with that?*
A. Yes.
Q. And the content of the roles, as we've already touched upon, is very different because Mr Gray was there to raise capital to bring in new investment rather than providing advisory services to a business that was already established?
A. Yes, I agree, but I --
Q. Of course a start-up fund doesn't have an ability to pay anyone anything at all, does it?

> ***A. Not until it --***
> *Q. Launches.*
> ***A. -- starts.***"

465. The Defendants also point to the fact that these so-called 'comparables' are charge-out rates, not the actual rates at which the individuals performing the services are paid. According to Mr Patterson, "*as a rule of thumb, one third to one fifth of a chargeable hourly rate is actually paid in salary, at best*". Dr Fitzgerald agreed that the hourly rates charged by his 'comparable' professional firms did not translate into the salaries paid to the individual actually providing the service. Mr Patterson did not offer his own suggested rate because "*the information that you would need to make a direct comparison doesn't exist*."

466. The Defendants did, however, draw certain 'comparison points' to say that the hourly rate claimed by the Claimant, leading to an unjust enrichment claim of €1,676,250 for 11 months of work, is "*utterly ridiculous*", namely:-

a. Mr Smith received a total of £170,000 in the entire pre-launch period (April 2016 to 9 March 2018), at an average of roughly £85,000 per year;

b. Mr Smith received a total gross salary of £186,836 across nearly four years since launch on 9 March 2018, at an average of roughly £50,000 per year;

c. BIPL's FCA business regulatory plan budgeted for £300,000 personnel expenses (across the entire team) in total in the period up to 31 May 2018;

d. Mr Gray received a total of US$250,000 across the entire period at NuOrion (which he says lasted 2 years);

e. According to Mr Patterson, the base salary for a full-time senior level banking role in a small or medium sized London bank around this time would have been less than £200,000 per annum; and

f. Also according to Mr Patterson, Mr Gray is claiming remuneration at the level earned only by CEOs of the largest FTSE 100 companies.

467. Finally, the Defendants say that Dr Fitzgerald's evidence about the rate Mr Gray could command as an investment banker misses the point:-

> "*Q. Dr Fitzgerald, your suggestion of remuneration based on value delivered of 1.6-odd million is frankly ridiculous in the circumstances, isn't it?*
> ***A. Well, I mean Mr Gray gave us a certain number of hours and 750 per hour for a high-powered investment banker struck me as a reasonable rate --***
> *Q. You understand --*
> ***A. -- for him to charge.***
> *Q. You understand he wasn't doing investment banking yes? You understand that Blackmoor is not an investment bank?*
> ***A. No, I know.***"

13.5.3.6 The 'value' of Mr Gray's services – discussion

468. Even if (contrary to my findings at [(451)]) it had been necessary to value the services themselves (rather than their end-product), I would again have concluded that such value was referable to the amount of capital raised, rather than Mr Gray's time (or expenses), such that a commission, fee or percentage share based on the level of committed capital would again have the appropriate measure. I would have reached that view for much the same reasons as for the proper characterisation of the 'enrichment' (at [444-450]), principally that: (i) the main purpose of those activities was capital raising (ii) the 'industry norm' for remuneration in investment management 'start-ups' is 'no win, no fee or no equity' (iii) such 'start-ups', including BIPL, generally lack pre-launch the funds to pay for such activities and (iv) the expectations of *these* parties was that Mr Gray would not be remunerated unless capital had been raised.

469. To BIPL (and any reasonable company in BIPL's position), Mr Gray's value lay in whether he could translate his contacts and marketing efforts into capital, not the length of time it took him to persuade a potential investor to commit. Nor would it have mattered how much time he spent honing his investor pitch rather than whether he could convert this into raised capital. The Claimant suggested that not all the activities undertaken by Mr Gray were directed to capital raising. However, that was the imperative and the focus of Mr Gray's activities. The 'services' he provided were all concerned, directly or indirectly, with that goal. Accordingly, even treating BIPL's 'enrichment' as the services themselves (rather than their product), I would have valued them at nil, Mr Gray having failed to raise any capital. His claim in unjust enrichment would, therefore, have failed for this reason too.

470. I should add that, even if a time-spent basis had been appropriate, I would also have found that the Claimant had failed to prove the quantum of his claim. Although the Court should not be diffident in its approach to quantum even where the exercise is a challenging or difficult one, a 'broadbrush' approach is often required and, specifically in the context of unjust enrichment by way of non-monetary benefits valued on a time basis, it is open to the Court to undertake a "*global assessment*" where more detailed information is lacking (see, for example, *Brenner* (noted at [441])), the frame of reference indicated by the evidence in this case is simply too vague to embark upon such an exercise, a difficulty compounded by unsatisfactory aspects of that evidence.

471. As to that vagueness, the experts agree there is no evidence of the time spent on these activities. The basis for the claim is therefore a very high global estimate of hours over nearly a year, based principally on Mr Gray's usual office hours and, I assume, the subtraction of his further estimate of time spent on NuOrion work. Mr Gray describes in his evidence, sometimes in some detail, some parts of the work he undertook, but he provides no meaningful breakdown of his activities or time spent over the period. Mr Hansen corroborated Mr Gray's working routine but could not shed light on what he was doing, for how long or for whom.

472. As to the unsatisfactory aspects, I found astonishing the suggestion that Mr Gray spent "*approximately half his time*" researching 'watchlist' companies when his priority was capital raising. As noted (at [177]), I have accepted Mr Smith's evidence that he recruited Mr Gray because of his apparent capital raising experience. For Mr

Gray to have spent – on his case - the equivalent of five months or so undertaking research makes little sense. Moreover, although such analysis would not necessarily yield refined work product in the form of investment memoranda, if Mr Gray had dedicated so much time to this activity, there would have been a much larger document trail than that indicated by the disclosure. Given these shortcomings, I would have been in no position sensibly to ascribe a figure to the time spent on this activity other than to say it would have been much less than the 1,120 hours indicated.

473. Another troubling aspect of the evidence was Mr Gray's admission that he exaggerated the extent of his work in saying he "*revamped the entire Blackmoor presentation*" when, as he subsequently conceded, he had probably only spent a couple of hours on the document in the relevant six day period in August 2016. Although perhaps a small point in the context of the entire period of the claim, and I do accept that he undertook further work on the presentation, including (undocumented) face-to-face discussions with Mr Smith, this exaggeration undermined further my confidence in what is a very significant but ill-defined claim. Moreover, although I also accept that Mr Gray did spend significant time in meetings, pitches, calls and e-mails marketing the Fund to potential investors, including related preparation, travel and updates to Mr Smith and the PIL, any attempt to assess the hours actually spent would also have been too hazardous an exercise.

474. I would therefore have been unable to make a "*global assessment*" of time spent on such a precarious basis nor, for the same reason, would it have been possible for me to alight instead on the Defendants' maximum estimate of 780 hours. Finally, I would also have rejected the hourly rate of €750. Although supported by the evidence of Dr Fitzgerald, he is not a remuneration expert, this aspect of the case is much more than "*common sense*", his professional service firm 'comparables' were not, in my view, 'comparable' to Mr Gray's role in an investment management 'start-up', he did not give sufficient consideration to the 'value' of the services provided by Mr Gray rather than their cost and Mr Gray would not have charged the same rates as such firms. The absurdity of the proposed rate was, in my view, brought home most powerfully by Mr Patterson's evidence that "[l]*ooking purely at base salaries which is perhaps a more reasonable comparator, the annualised GBP figure claimed is equivalent to that earned only by CEOs at the very largest FTSE 100 companies*." However, BIPL was not a company listed on the London Stock Exchange. It was a 'start-up'. I would therefore have rejected this rate and I would not have hazarded a guess at a substitute figure.

475. Accordingly, even if a time-spent basis had been the appropriate measure of the value of BIPL's 'enrichment', I would have found that Mr Gray had failed to prove his claim for €1,676,250 (or any sum) such that his unjust enrichment claim would have failed for that reason too.

13.6 Unjust enrichment – overall conclusions

476. For all the above reasons, Mr Gray's claims in unjust enrichment against Mr Smith and BIPL also fail.

14 Overall conclusions and disposal

477. Given my findings, all Mr Gray's claims fail. The action is dismissed. The parties are invited to submit a draft minute of order embodying my findings, including those consequential matters they can agree. If they cannot agree these and/ or there are matters requiring my input, I will hear further from them.