APPEAL PROCEEDINGS BEFORE THE EXECUTIVE COMMITTEE OF THE SECURITIES REGULATION PANEL

In re:

GOLDFIELDS LIMITED	1st Appellant
GOLDMAN SACHS INTERNATIONAL	2nd Appellant
J P MORGAN plc	3rd Appellant

REASONS FOR THE DECISION ISSUED BY THE EXECUTIVE COMMITTEE OF SECURITIES REGULATION PANEL ON 11 NOVEMBER 2004.

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1. In these reasons the expression set out below shall bear the meanings stated

1.1 Exco – Executive Committee of the SRP

1.2 Goldfields the first Appellant

1.3 Goldman Sachs the second Appellant

1.4 J P Morgan the third Appellant

1.5 SRP – The Securities Regulation Panel

1.6 the Bundle – documents supplied by the Appellants for the purpose of the hearing.

2. On 10 November 2004 Exco consisting of Adv M King S C, Mr J Mthimunye and Mr C A Jaffe as Chairperson heard an appeal by Goldfields, Goldman Sachs and J P Morgan

against the decision of the Executive Director of the SRP given on 2 November 2004. A copy of each of the decisions of the Executive Director and Exco are attached hereto marked respectively R1 and R2.

3. On 3 November 2004 Webber Wentzel Bowens on behalf of Goldman Sachs and J P Morgan noted an appeal against the ruling of the Executive Director.

4. On 5 November 2004, Edward Nathan and Friedland (Pty) Ltd on behalf of Goldfields noted a similar appeal against the ruling of the Executive Director.

5. The appeal was set down for hearing on 10 November 2004 and on that date Advocates P A Solomon SC and I Green appeared before Exco on behalf of all three Appellants. The proceedings were completed on 10 November 2004 and the Exco decision was issued on the following day 11 November 2004. The reasons for that decision are set out below. Unless otherwise stated, references to page numbers relate to the typed record of the proceedings on 10 November 2004.

6. On 6 August 2004 the Appellants entered into an agreement by means of a letter addressed by Goldman Sachs and J P Morgan to and confirmed by Goldfields (the letter agreement) in terms whereof Goldman Sachs and J P Morgan were appointed by Goldfields as its "sole joint financial advisers" in connection with certain transactions relating to the gold mining business of "Open Joint Stock Company Mining Norilsk Nickel" (Annexure."A" in the Bundle).

7. At that stage the appointment of the joint advisors being Goldman Sachs & J P Morgan had no connection with the present proceedings. However Norilsk became a role player in a different capacity in relation to the offer to the shareholders of Goldfields subsequently made by Harmony Gold Mining and Metallurgical Company Ltd (Harmony) to which the present proceedings relate.

8. That position changed after 18 October 2004 when Harmony proposed a transaction to acquire the entire issued share capital of Goldfields. That proposal resulted in the conclusion on 24 October 2004 by letter, (similarly addressed by Goldman Sachs & J P

Morgan to Goldfields) of an amendment (the first amendment) to the letter agreement (Bundle Annexure"D"). The relevant terms of that first amendment are fully set out in paragraph 14 on page 8 of the Appellants' "Statement of Facts" and for the sake of brevity they are not repeated in these reasons save to the extent necessary.

9. The effect of the first amendment was to appoint Goldman Sachs and Morgan as sole joint financial advisors to Goldfields also for the purpose of the Harmony offer. The clear intention was that the joint advisors would jointly provide to Goldfields the "appropriate external advice" on the offer by Harmony as required by Section D Rule 3.1 of the Code of the SRP read together with *inter alia* Rule 3.3 thereof.

10. Of particular importance were the following provisions of the first amendment

10.1 The letter agreement was deemed to be amended with effect from 18 October 2004 but the other terms thereof remained in force.

10.2 The remuneration payable to the joint advisors would be US $ 20 million if

10.2.1 the board of the directors of Goldfields recommended the offer and it was implemented, or

10.2.2 resulted in the acquisition of less than 35% of the entire issue capital of Goldfields and was not recommended by the board of Goldfields or

10.2.3 is withdrawn, lapses or fails to be implemented for any reasons.

10.3 If the offer resulted in the acquisition of 35% or more of the entire issued capital of Goldfields and was not recommended by the Board of Directors of Goldfields the fee was to be US$16 million

11. We were not informed what the agreement was between the two advisors regarding the work to be undertaken by them as joint advisors nor how the remuneration was to be apportioned between them. However as joint advisors it would be expected of them to deliver a joint opinion but they chose not to do so.

12. It was quite clear that there was close co-operation between the two advisors in relation to the investigations undertaken to enable them to comply with the provisions of the letter

agreement and the first amendment. Indeed it was so close a co-operation that they each committed in one case the same textual error, namely:

12.1 Annexure "F" to the Bundle, being a letter dated 29 October 2004 from J P Morgan to SRP. In that letter reference is made to "a meeting held on the SRP on 9 September 2004" the typed date was changed in manuscript to "28 October 2004"

12.2 Annexure "G" to the Bundle, a letter dated 29 October 2004 from Goldman Sachs marked "draft for discussion purposes" which makes the same textual error but which, in that case however, was not corrected at all.

We shall refer again, below, to these two letters.

13. In each of the two cases the purpose of the letter was apparently to try and allay certain *prima facie* concerns which the Executive Director expressed at the meeting with Goldman Sachs & JP Morgan held on the 28 October 2004 regarding certain terms of the Letter Agreement and the first amendment letter (P17-18). It is clear from Annexure E to

the Bundle being an E-Mail from "Ming Allen @ J P Morgan sent to the Executive Director of the SRP at 16h57 on 29 November 2004, that the Executive Director had informed the meeting that "when determining independence" he "would seek to use a JSE guideline to the effect that a success based fee would be a ground for a material conflict of interest".

14. The decision of the Executive Director (Annexure R.1) particularly page 3 thereof shows that the correspondence referred to did not succeed in satisfying him that Goldman Sachs & J P Morgan were in the particular circumstances of this case appropriate external advisors.

15. Flowing from the first amendment (Annexure E to the Bundle) the joint advisers carried out work pursuant to the Letter Agreement as amended by the first amendment. That work was undertaken by the advisers to give effect to their understanding of their functions. Those were stated on pages 55 and 56 of the record of its hearing before Exco

and in view of their importance we set out below the relevant extract from the said pages 55 and 56 as stated by Adv Solomon for the record: -

> "To give independent advice with regard to the offer price.
>
> To give advice for the purpose of maximizing the offer price.
>
> To advise the company, that's Goldfields, of its responsibilities and obligations under the Code.
>
> To draft documents on behalf of the company in relation to the offer, the Harmony offer, such as response to the offer and announcements to be made in relation to the offer.
>
> To assist the company in obtaining all necessary SRP approvals and other regulatory approvals required in relation to the offer.
>
> To examine possible alternative offers to the Harmony offer and to advise with regard to them.
>
> And generally to advice the company on the best interests of the shareholders in relation to the offer or any competing offer. In particular in that regard they have a function of co-coordinating and communicating with shareholders in connection with the offer."

Counsel's statement was confirmed and to an extent expanded upon in a letter dated 11 November 2004 sent to the SRP by the Appellants Attorneys, a copy of which letter is attached hereto marked R3.

16. Rule 3.1 of the Code of the SRP requires the board of Goldfields:-

> "to obtain appropriate external advice on any offer as to how it affects all holders of securities including specifically where applicable minority holders of securities."

The mandate as stated by Adv Solomon on behalf of the Appellants and the contents of R3 go further than the rule requires or permits.

17. Furthermore one cannot ignore the terms of the original Letter Agreement (Annexure A) which *inter alia* specifically includes two Annexures marked "A" and "B" to the Letter Agreement. In this regard it is relevant to refer to the following provisions of Annexure "A" which incorporates its own Annexures "A" and "B". For the sake of clarity we refer to them as "AA" and "AB": -

17.1 The following is an extract from "A"

17.1.1 "8. In addition to the above fees the company will consider at its complete discretion, any further fee it believes reasonable to pay to reward the financial advisers for other efforts in respect of work performed under this engagement, including successful defence of

an offer by Norilsk or any competing offer not recommended by

the board of the company or any other recommended offer:"

17.1.2 The following unnumbered paragraph appears on Page 4 of "A"

> "The company is aware that, that GSI and some of its affiliates and J P Morgan plc and some of its subsidiaries and affiliates are full service securities firms and as such may from time to time effect transactions, for their own account or for the account of customers and hold long or short positions in securities or options on securities of the Company, and that Norilsk and their respective subsidiaries and affiliates which may be the subject of the engagement contemplated by this letter. Goldman Sacks and JP Morgan shall not be under a duty to disclose to the Company or to take into account for the Company's benefit any non-public information acquired in the course of carrying on any business for or in connection with the provisions of services to a party other than the company or which is otherwise subject to any obligation of confidence to another person."

17.3 The following is an extract which appears on page 2 Annexure "AA"

> "The company agrees that following closing or lapsing of a transaction, GSI and JP Morgan may, at their option and expense place an advertisement or announcement in such newspapers and periodicals as they may determine describing their role as financial advisers to the company provided that the company shall have the right to review and pre-approve any such advertisements or announcements or any other public statements made by them regarding their role as financial adviser to the company with regard to the transaction (such approval not to be unreasonably withheld or delayed)."

17.4 The following are extracts from "AB"

> (b) provide advice regarding the Company's strategy and tactics in connection with a Transaction with particular regard to the provisions of the Securities Regulation Code on Takeovers and Mergers (the SRP Code) and the requirements of the JSE Securities Exchange South Africa (JSE);

(c) advise the company of its responsibilities under the SRP Code and coordinate with the company and its other advisers in discussions with the Securities Regulation Panel ("SRP") in connection with a Transaction";

(f) assist the company in preparing any necessary public documents to be issued by the Company including any defence documents, circulars and announcements (based entirely on information supplied by the company) and including assisting in the arrangement of the printing and distribution of such documents;

(h) project manage the implementation of a Transaction and coordinate the activities of the companies other professional advisers; "

17.5 The following unlettered paragraph appears at the foot of page 1 of "AB"

"In addition JP Morgan shall be appointed a transactional sponsor to the company in connection with a transaction in all discussions with the JSE and the submission to the SRP and JSE of all circulars and announcements issued in connection with a Transaction and shall act as the company's agent for sending announcements to be made by the Company in accordance with the SRP Code and the Listings Requirements of the JSE through the Stock Exchange news service (SENS).

18. Annexure D being the first amendment, specifically provides in paragraph 3 for the addition of sub-paragraph (i) and (j) immediately after the paragraph designated as (h) in Annexure AB it also provides that the term "Transaction" includes the one which is the subject of the appeal. At the foot of the letter it also provides -

"save as aforesaid all the terms of the Letter Agreement shall remain of full force and effect."

so that Annexures "AA and AB" are included as they are part of the Letter Agreement.

19. On the 1st November 2004 Goldman Sacks and JP Morgan following the pattern of the Letter Agreement and the first amendment prepared a second amendment letter which was accepted by Goldfields on 2 November 2004. The second amendment supercedes in its entirety the terms of the first amendment Letter and incorporates an additional sub-clause (l) to Annexure "AB" reading as follows -

> "In connection with the transaction described in paragraph 1, do all things necessary, desirable or customary (in the reasonable opinion of the financial advisers) in connection with such an offer including the preparation of a letter containing an opinion regarding the financial adequacy or otherwise of an offer by Harmony and/or any third party to acquire all or part of the share capital of the company to be sent with our consent, in a circular to the company's shareholders."

Another amendment affected by this second amendment letter was to substitute the fixed amount of US$18 million payable to the independent advisers in the place of the previously variable fee. That fee as amended was payable "irrespective of the outcome of any such offer". As in the case of the first amendment letter the second amendment specifically provides that the terms of the original Letter Agreement remain in full force and effect subject to the amendments effected.

20. In Annexure R1 the Executive Director of the SRP stated -

> "I have been advised that all work that had to be done in respect of the obtaining of the appropriate external advice as well as the letters in compliance with Rule 3.1 had been completed prior to the meeting of 28 October 2004."

That statement is supported by the terms of Annexure G to the Bundle to which reference is made in paragraph 12.2 above. Annexure G makes it clear that by 29 November 2004 the date of Annexure G an analysis had already been prepared by Goldman Sachs on the lack of adequacy of the Exchange ratio offered in the Harmony circular. The letter also contained an explanation of the procedures followed by Goldman Sachs and proceeds that "as a matter of procedure such materials, after careful review and scrutiny by the Transaction team, are assessed and approved (together with a preliminary opinion) by an independent committee consisting of senior members of the Goldmans Sachs Investment Banking Division."

21. In Bundle Annexure N which is undated but was clearly prepared for the purposes of the appeal Goldman Sachs continue and explain that the GSI fairness committee, presumably

the members of the Goldman Sachs Investment Banking Division referred to above had "reviewed the GSI opinion prepared by the transaction team and the analysis and assumption used in its preparation at a meeting held in London and by telephone on 26 October 2004. It continues however that the exact form of the GSI opinion was "the subject of continuing discussion involving the transaction team and the members of the GSI fairness committee from 26 October to 1 November 2004."

However, the final opinion of Goldman Sachs in Annexure I to the Bundle was delivered to the SRP under cover of that ancillary transmission dated 1 November 2004 which states "Please find attached latest inadequacy opinion with very minor changes" (our underlining.).

22. The process followed by JP Morgan was parallel to and very similar to that followed by Goldman Sachs. Annexure O to the Bundle is a letter dated 10 November 2004 from JP Morgan addressed to the Executive Committee SRP which *inter alia* records the following -

22.1 It details the procedure followed to which reference is made above.

22.2 In paragraph 4.1 it states

> "the valuation process followed a detailed interactive process between senior management of Goldfields and the GSI and JP Morgan teams over a period of up to three months the clear assumptions are the inputs to the internal valuation were then discussed with the board on Friday 22 October 2004 simply to ensure and test that the correct assumptions and inputs had been followed as a preliminary step in the process in terms of which JP Morgan arrived at our opinion".

22.3 In paragraph 4.2.3 Annexure O refers to a meeting convened in London by its independent valuation review Panel. The valuation team members in Johannesburg

> "participated in this meeting for two hours by way of conference call during which the valuation team took the review Panel through the presentation, explaining, *inter alia*, assumptions and valuations techniques used, the sources of information, valuation summaries and conclusions reached. The internal review Panel subjected the team of valuers to a rigorous interrogation and proposed various amendments. The valuation team incorporated all of the revue Panel's comments and re-circulated the documents for final formal approval internally within JP Morgan".

22.4 In paragraph 4.3.1 of "O" JP Morgan stated

> "It is correct that much of the work we did was done prior to the second amendment letter during the currency of the first amendment letter, but the opinion was rendered when only the second amendment letter was operative. It is important to note however that the advice we rendered was not dependent on the content of any mandate letter i.e. the first or second amendment."

Then 4.3.2 continues

> "Our opinion which is dated 2 November 2004 was rendered under the only contractual arrangement between the company (Goldfields) and ourselves, being the second amendment to the mandate dated 1 November 2004. When the opinion was rendered we took into account all material facts into account." (sic)

23. The opinions and advice given by both Goldman Sachs and JP Morgan were formed on the basis of the mandate dated 6 August 2004 (Annexure A) as amended by the first amendment dated 24 October 2004 (Annexure D) which stated that it took effect on 18 October 2004. Why the earlier date was chosen was not explained but probably from the date that work commenced in August 2004, it was focused on the Harmony offer and not on the original Norilsk transaction.

23.1 From that date until 2 November 2004 when Goldfields accepted the second amendment letter prepared by the two advisers the work proceeded with the advisers being entitled to an increased fee of US$4 million if the Harmony offer was, in effect, unsuccessful or was recommended by the board of directors of Goldfields. That was an increase of 25% on the minimum fee of US$16 million.

23.2 The documentation showed that the work was in fact completed and the decisions made before the second amendment letter (Annexure H) was signed by the advisers on 1 November 2004 and accepted by Goldfields on 2 November 2004. The fact that the opinions were only released on 1 November in the case of Goldman Sachs and 2 November in the case of JP Morgan does not alter the fact that the added incentive of US$4 million was operative throughout the period until 2 November 2004.

23.3 The fact that the second amendment letter contained a provision purporting to deem its effect to be from 18 October 2004 does not alter the situation that for all practical purposes the work was completed before 2 November 2004. The delay in the issue of the two reports until the date stated above appears to be more than a coincidence. The fact that the deeming provision might have been operative between Goldfields and the two advisers does not make it in any way binding on any body else.

23.4 The existence of the split fee with the additional US$4 million payable in the event of the successful resistance by Goldfields of the offer by Harmony was clearly intended to be an incentive to the advisers. Coupled with the provisions of the original mandate being Annexure A and *inter alia* the specific clauses of Annexure A and its own Annexures which are quoted verbatim above that incentive is sufficient to create a material conflict of interest in the two advisers which existed throughout the period of their investigations and was not removed by the second amendment letter which appears to have been devised to remove the conflict.

23.5 It is trite that "justice must not only be done but must also be seen to be done." That principle applies equally to the opinions of appropriate external advisers. We do not imply that the opinions of the advisers were influenced adversely to the bid by reason of the additional fee available. Nor does any finding in any way reflect adversely upon the competence or integrity of the advisers. That is no more so than in the case of e.g. a Judge who recuses himself from dealing with a problem.

Recusal is merely a wise precaution to avoid the suggestion of a conflict of interests.

24. We concluded that both joint advisers had a material conflict of interest in expressing their opinions and were accordingly disqualified from acting as appropriate external advisers in this matter.

25. Yet another ground for holding that Goldman Sachs & JP Morgan cannot be appropriate external advisers is the fact that they became "financial advisers" to Goldfields with effect from 6 August 2004 upon conclusion of the Letter Agreement.

26. We refer to some of the far reaching powers granted to the two advisers by the Letter Agreement some of which were referred to in Adv. Solomon's address and in the letter dated 11 November 2004. The grant of those powers to Goldman Sachs and JP Morgan by means of the Letter Agreement drafted by them `and submitted to Goldfields has so empowered them and allied them to their Principal as to persuade us that they cannot be

classified as external advisers. Those conclusions were perpetuated by the two amendment letters. The two advisers have themselves referred to the letter agreement as a mandate and having regard to the duty of good faith which they owe to their Principal, Goldfields, we concluded that they could not be regarded as "appropriate external advisers" when they have accepted *inter alia* the power actively to take steps to plan strategies and to assist in resisting a hostile take-over of their Principal, Goldfields. Further, that duty could be an additional ground for creating a material conflict of interest.

27. In the 11 November 2004 decision of Exco no order was made by Exco in terms of Rule 3.4 of Section D of the SRP Code in view of the advice given to Exco that Goldfields had appointed a third party as the appropriate external adviser. We presume that the advice has been given, has been accepted by the Executive Director and has been conveyed to Goldfields and its shareholders. During the course of argument Adv. Solomon drew attention to the wording of Rule 3.4 of the SRP Code and pointed out that the provisions of that Rule gives the Panel the right at any time to require the appointment of "further appropriate external advisers approved by the Panel". It is upon that rule that the

Executive Director relied when he required that a second opinion be obtained by Goldfields. Adv. Solomon pointed out that Rule 3.4 refers to a "further appropriate adviser" which implied that there was in existence already an appropriate external adviser. The rule appears to pre-suppose the existence of an appropriate external adviser but both the Executive Director and now Exco have found to the contrary. It would therefore appear that Rule 3.4 might not be of application. In that case had Goldfields not voluntarily dealt with the matter, the consequence would have been a failure to comply with Rule D3.1.

27.1 However, nothing turns on this difference. Whatever the correct interpretation may be, we do not decide it. The position has been cured by the voluntary appointment by Goldfields of the new appropriate independent adviser. That appointment was made by Goldfields without admitting any obligation to do so or the correctness of the decision of the Executive Director.

27.2 It occurred to us in the course of the proceedings before Exco that in view of the appointment of the independent adviser that the Appeal was really an academic

one. It then emerged that the real purpose of the Appeal was to enable the two advisers Goldman Sachs and JP Morgan to establish their *bona fides* in accepting the appointment as joint advisers in the Harmony matter and their integrity and competence to undertake to act as appropriate external advisers in the circumstances. Exco has of course already decided that they were unwise in accepting the appointment because of their material conflict of interest and they have been cited as the second and third Appellants in this matter having formally issued notices of Appeal. We are however, not satisfied that they were entitled to be Appellants or to be heard as such in these proceedings.

28. We are fully aware of the wording of Rule. Section A 2(d) which grants the right to take a matter on appeal to "a party or his adviser" wishing to contest the ruling of the Executive Director. We are inclined to the view that this sub rule was intended only to refer to an adviser contesting the ruling in his capacity as the duly authorized agent of his Principal and on his Principal's behalf. However, to put this matter beyond doubt we suggest that

steps be taken to remove this issue during the course of the rewriting of the Rules of the SRP which is presently in progress.

29. For the above reasons the Appeal was dismissed and the decision of the Executive Director was upheld on the same and additional grounds. The Appeal was in the nature of a rehearing.

Dated at Johannesburg this 31st Day of January 2005

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C A JAFFE
CHAIRPERSON

I agree

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ADV M KING SC

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J MTHIMUNYE