What Do Besotted Teenagers and Investment Bankers Have in Common ?

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"*… in the main, investment bankers, like teenage lovers, pour out their efforts, almost without limit and in response to the slightest encouragement, in the hope of reaching the nirvana of a mandate …*"

Gleeson J, *H&P Advisory Ltd* v *Barrick Gold (Holdings) Ltd* [2025] EWHC 562 (Ch)

Mr. Hannam was an experienced banker who had facilitated a number of transactions between mining companies, before starting his own advisory company – H&P Advisory Limited (**H&P**).

Randgold was a mining company, with its primary operations in Mali, listed on the London Stock Exchange. In December 2018, it merged with Barrick Gold, a U.S. mining company trading on the New York Stock Exchange with the appropriate ticker "*GOLD*".

H&P was not formally mandated to facilitate this deal but contended that Mr. Hannam had performed crucial advisory work for this merger, for which H&P was entitled to payment of advisory fees and expenses amounting to more than $18 million. H&P brought a claim against Randgold's successor entity for this sum. The claim was put first on the basis that there was a binding contract that H&P would be paid such fees and second on the basis of unjust enrichment.

The claim that there was a binding contract was roundly rejected by the Court on the facts. There was no acceptance by Barrick Gold of any offer made by H&P. Randgold had been diligent in refusing to confirm to H&P that it would be paid for the work it had, or would, perform. As such, Gleeson J. was required to consider the more interesting element of H&P's claim, which was founded in unjust enrichment.

What Is Unjust Enrichment?

In *Lipkin Gorman v Karpnale* [1991] 2 A.C. 548, the House of Lords expressly endorsed English law's recognition of claims in unjust enrichment and accepted that such claims were distinct to and did not rely on an implied agreement between parties or the law of tort. Such a claim enables the claimant to recover the enrichment (or the value of the enrichment) received by the defendant. H&P's claim was a particular species of such a claim, called a *quantum meruit* – a claim for the value of services provided.

A claim in unjust enrichment will be available where the following criteria are satisfied:

i) The defendant has been enriched

ii) Such enrichment was at the claimant's expense

iii) Such enrichment was unjust

iv) The defendant has no defence

Had Randgold Been Enriched?

H&P had performed a range of work for Randgold including producing "… *a very significant amount of financial analysis on the sorts of timescales that are familiar to investment bankers but incomprehensible to mere mortals*" (12). While Randgold argued that this work was of no value, so it had not been enriched, this was rejected by Gleeson J. The Judge said he was "*unable to conclude that the acts identified above conferred no benefit at all on Randgold – especially since Randgold had specifically asked for at least some of them*" (196).

Was Such Enrichment at H&P's Expense?

Randgold sought to argue that, because some of the work was done by individuals who were not employed by H&P, its enrichment was not at H&P's expense. This was also rejected by Gleeson J., who considered "*if H&P was obtaining work product from these individuals in order to provide it to Randgold, whatever the terms on which it was obtaining that work from them, that work can be said to have been provided at their expense*" (198).

Was Such Enrichment Unjust?

In order for enrichment to give rise to a claim there must be an "*unjust factor*", with mistake, duress and undue influence commonly relied upon. In this case, H&P sought to rely on two bases: First, a supposed basis of "*free acceptance*", founded on Randgold's acceptance of the advice knowing that H&P expected to be paid and second, on a failure of basis, because both Randgold and H&P had expected that H&P would be retrospectively paid for the work done. To explain these two grounds, the Judge cited an authority which states that:

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

The first ground was rejected by Gleeson J., who held that such a factor based on mere receipt was not recognised by English law. He found: "*Mere receipt of a benefit is therefore, without more, not actionable. Something more than the mere receipt must therefore be needed before any legal obligation can arise*." This conclusion was supported by "*simple logic*", namely that the freedom of contract necessarily entailed the "*freedom not to contract*" and that "*liabilities are not to be forced on people behind their backs*". The judge also noted that an action for a *quantum meruit* is a development of the old action of *assumpsit*, which is based on a non-contractual promise to pay. It would be surprising if this requirement for a non-contractual promise to pay had now been removed.

Gleeson J. did, however, accept the second basis. Drawing on a judicially endorsed definition of this basis as where "*the state of affairs contemplated as the basis or reason for the payment has failed to materialise or, if it did exist, has failed to sustain itself*", his Lordship held that this ground was well founded in the present case. His Lordship considered that, while Mr. Hannam (and so H&P) would have known that they were not formally mandated, a reasonable person in their position would have thought that they had "*a legitimate expectation of involvement, and therefore of*

retrospective remuneration" and that this was "*also the expectation of Randgold*". When this turned out not to be the case, an unjust factor materialised.

There was recognition of the implications of this approach for the recipients of professional services, who often receive free work, provided in the hope that it will lead to further instructions. Recipients of these services could become concerned about prospective litigation stemming from the provision of these free services. However, Gleeson J. considered that this could "*easily be avoided by clear communication between the parties*" – with it being made clear that the providing party would not be paid for the work performed. There was therefore limited sympathy for a defendant who found itself in a perilous position: "… *in circumstances where he knows or ought to know that the service provider expects to be paid, he is at risk if he does not make clear to the service provider that that is his intent*".

Was Any Defence Available?

Randgold argued that, even if it was otherwise liable, it had a defence arising out of the illegality of H&P's conduct. This argument rested both on the alleged breaches of duties owed to employers and also on alleged breaches of the *Financial Services and Markets Act* 2000 (**FSMA**) (in particular, the breach of principles applicable to authorised persons).

Both of these arguments were rejected by the Court. Gleeson J. considered that no specific breaches of duties owed to employers had been particularised by Randgold, so the argument could not be maintained. Considering the leading authority on illegality, *Patel v Mirza* [2016] UKSC 42, it was also held that "*(a) any wrong arising from or ancillary to a breach by Mr. Humphries of his employment duties would be a wrong perpetrated against Barrick (not Randgold); (b) the purpose of such duties (insofar as they exist in this case) would not materially be furthered by denial of the claim; and (c) denial of the claim (with the deprivation of any recognition to H&P for its contribution to the transformational Barrick-Randgold Merger, and the conferral of a substantial windfall on Randgold) would be wholly disproportionate*".

The argument based on FSMA was also rejected, as it would involve a substantial circumvention of the statutory restrictions on the private enforcement of the applicable regulatory rules, which would not have allowed Randgold to bring a claim directly. The "*underlying purpose of the prohibition which has been transgressed*" would therefore not be supported by denying H&P its claim. The illegality defence was thus unavailable.

Conclusion

As a result, the Court held that Randgold was liable to H&P in unjust enrichment for the value of the work provided. This was, however, substantially reduced from the $18 million original claim by Randgold to just $2 million and the expenses incurred by H&P.

This decision is a cautionary tale for any companies accepting free services from advisors. Unless it is made clear that no payment will be forthcoming for such services, there is a risk of a future claim being brought notwithstanding the lack of a formal contract. Being coy and seeking to eke out further services, believing that a lack of contract means you will not be required to make payment, can be a foolish strategy.