Engaging M&A advisers: the importance of agreeing terms for early-stage work

Businesses and their advisers may wish to examine their approach to handling engagement terms for early-stage work on mergers and acquisitions (M&A) deals following the recent decision in *H&P Advisory Ltd v Barrick Gold (Holdings) Ltd*, which is likely to have significant reverberations for M&A deal making (*[2025] EWHC 562 (Ch)*).

The importance of engagement letters

Engagement letters are vital in mergers and acquisitions advisory work in order to clearly define scope, responsibilities and compensation. They are the contract between the adviser and the client, and typically specify:

- The fee structure, including the retainer, the success fee and any discretionary bonus.
- The scope of advisory services.
- Confidentiality.
- Termination rights.
- Expenses reimbursement.

A well-drafted engagement letter prevents misunderstandings about whether an adviser is hired and on what terms. In *H&P Advisory Ltd v Barrick Gold (Holdings) Ltd*, the absence of any signed engagement was central (*[2025] EWHC 562 (Ch)*). The court highlighted that every other adviser on the transaction had a formal engagement letter and the lack of even a draft from H&P Advisory was telling. Legally, an engagement letter would have made the fee entitlement explicit. Without it, H&P's claim hinged on oral statements and implied promises, which are much harder to prove and enforce.

In addition, engagement letters typically delineate when fees are earned, such as on deal completion, and protect advisers through tail provisions, which entitle the adviser to fees if a transaction with an introduced party occurs within a certain period, even after termination. In the absence of a letter, these issues become contentious. *H&P Advisory* reminds practitioners that failing to paper the relationship can lead to complex restitutionary claims instead of straightforward breach of contract claims.

The dispute

H&P Advisory concerned a boutique investment bank, H&P Advisory, founded by Mr Ian Hannam, that claimed fees for its role in initiating a merger between Barrick Gold Holdings Limited and Randgold Resources Limited in 2018. H&P alleged that an oral fee agreement entitled it to a minimum of $10 million and up to around $18 million based on the deal size. In the alternative, H&P claimed a restitutionary quantum meruit of the same amount for work done in the absence of a contract. Barrick denied any formal engagement or fee obligation.

Contractual claim. The High Court found no objective evidence of a concluded agreement to provide investment advisory services between H&P and Randgold and did not believe that Randgold's CFO had accepted Mr Hannam's offer, such that an oral contract would have been formed (*see box "The importance of engagement letters"*). The court also applied *Blue v Ashley* and examined the electronic footprint of the transaction but found that, unlike all other advisers on the deal, no engagement letter was drafted or sent, and post-meeting communications omitted any reference to a fee (*[2017] EWHC 1928 (Comm); www.practicallaw.com/w-010-0843*).

Non-contractual claim. In assessing H&P's claim for a non-contractual quantum meruit, the court approached the issue through the lens of unjust enrichment. The court found that Randgold had been enriched by H&P's early work in facilitating merger talks and that this enrichment was at H&P's expense. The key question was whether retaining that benefit without pay was unjust. The court examined the concept of free acceptance, which requires that the defendant knew that a service was being offered, knew or ought to have known that it was not being offered gratuitously, and had the opportunity to decline it. Following *Barton and others v Morris and another in place of Gwyn Jones (deceased)*, the court rejected free acceptance alone as a basis for unjust enrichment and as an unjust factor in restitution (*[2023] UKSC 3; see News brief "Implied terms and unjust enrichment: silence in court", www.practicallaw.com/w-038-6341*). However, the court found a failure of basis; that is, a shared understanding that H&P was engaged as an adviser. Randgold's silence in not disabusing H&P of this belief encouraged H&P to continue working in expectation of later, retrospective, remuneration.

The court found that it is industry practice that formal appointments often occur late and work done at risk may later be covered by engagement terms. So, once a basis of understanding arose by Randgold's conduct and, notably, silence, it retrospectively encompassed earlier work. The court held that H&P was not a mere "disappointed risk taker" and was instead entitled to a restitutionary award for the benefit conferred as a "gratified" risk-taker subsequent to the establishment of a basis.

As to quantum, the best evidence of value was Randgold's own internal view. Randgold had considered paying H&P approximately $2 million for Mr Hannam's efforts in acting as a go-between in the early stages. The court therefore awarded $2 million plus expenses. Notably, expenses were separately enforceable due to an oral side agreement on cost reimbursement. Following the judgment, both sides claimed victory: H&P for establishing fees on a handshake with no written contract, and Barrick for limiting the award to what Randgold had earmarked.

Practical M&A advisory issues

H&P Advisory sheds light on the early-stage engagement dynamics in M&A deals. Investment banks often perform substantial preliminary work without a formal contract. Advisers cultivate deals at risk and, as the judge put it, "like teenage lovers, pour out their efforts…in the hope of reaching the nirvana of a mandate", human nature being such that "hope springs eternal". This industry norm, where major work occurs before any paperwork is signed, is driven by competition and relationship-building. Businesses may hesitate to formally engage advisers early due to cost concerns and uncertainty: agreeing a multi-million-dollar success fee upfront can seem premature if a deal is speculative. Businesses might leverage free work from multiple banks before choosing one. As the court observed, banks often do free marketing work in order to stay close to clients.

The hesitation to sign engagement letters early is partly because once an engagement is signed, fee obligations crystalise, often regardless of outcome. Firms avoid incurring fees until a deal looks likely, so there is a grey period where advisers contribute informally and certain risks arise. H&P invested time and resources on the expectation of a mandate that never formally materialised. Businesses that are engaged in early talks might assume that no contract equals no liability, but *H&P Advisory* warns that a client receiving prolonged free services without clear disavowal, especially where fee expectations have been communicated, can trigger implied obligations.

Market impact of the decision

H&P Advisory is likely to reverberate in how businesses and advisers handle engagement terms. For advisers, it is a cautionary tale of the limits of working on a handshake. While H&P ultimately recovered something, it was far less than the claimed maximum of $18 million or even the minimum fee of $10 million, had a formal engagement letter for this amount been entered into. Advisers may push for earlier formal engagements or at least written deal-in-principle letters in order to secure their fees. They might also document key meetings and client interactions in order to create the electronic footprint of their role, which will help to protect their position if a client later disputes an agreement.

Businesses, on the other hand, may become more cautious in their communications with informal advisers and indeed internally. The court emphasised that if a business does not intend to pay for pre-contract work, it must clearly communicate that to the adviser. Businesses might explicitly email or write to banks after initial meetings to clarify that the work is exploratory and not a mandate. This could become standard practice to avoid the sort of implied understanding and establishment of a basis found in *H&P Advisory*.

Overall, the ruling could lead to stricter documentation practices. Engagement letters might be signed earlier in the process for clarity, or alternatively, businesses may issue non-engagement letters; that is, letters of understanding that no engagement exists yet despite ongoing discussions. Businesses may also consider "dropping of the hands"; that is, clearly cutting off an informal process if no contract is reached in order to mitigate quantum meruit exposure. The court acknowledged a potential chilling effect on free preliminary work. However, it suggested that the solution is simple: clear communication and documentation. Therefore, *H&P Advisory* likely nudges the market toward greater transparency and written records, although it recognises the practical reality that, in deal making, some work will always precede paperwork.

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