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UK Court of Appeal Rules Against Financial Adviser in Dispute Over Fees

SUMMARY

On June 24, 2024, the UK Court of Appeal handed down a judgment with implications for the drafting of English-law governed engagement letters and fee arrangements between financial advisers and their clients which provides a salutary reminder that attention should be paid to drafting, with care given to using clear, unambiguous language.

In *Cantor Fitzgerald & Co v YES Bank Limited* [2024] EWCA Civ 695, Cantor Fitzgerald sought to overturn a decision of the High Court which had found that the drafting of Cantor's engagement letter with YES Bank did not entitle Cantor to commission for facilitating a public offering of YES Bank's shares. Both the original case and the appeal centred on whether or not a "private placement, offering or other sale of equity instruments" extended to a secondary, public offering of shares. The Court of Appeal upheld the High Court's decision that the word "private" qualified not only the term "placement" but also "offering" and "other sale of equity instruments" and that no commission was due to Cantor even though the secondary public offering of shares had included some investors from Cantor's client list.

FACTUAL BACKGROUND

- In December 2019, Cantor and YES Bank signed an engagement letter for Cantor to provide services in connection with one or more potential capital raises by YES Bank.
- Cantor's remuneration was to comprise a non-refundable retainer of $500,000 (due upon execution of the engagement letter) and commission representing 2% of the proceeds of any "Financing", as defined in the engagement letter. Although the letter did not state this clearly, it was common ground that the 2% commission would apply only to proceeds received by YES Bank from certain investors allocated to Cantor – whose names were included in the engagement letter by way of a subsequent amendment.
- The engagement letter defined a "Financing" as: "one or more financing(s) through the private placement, offering or other sale of equity instruments in any form, including, without limitation, preferred or common equity, or instruments convertible into preferred or common equity or other related forms of interests or capital of the Company in one or a series of transactions".
- YES Bank, an Indian commercial bank based in Mumbai, had been in financial difficulty for some time before Cantor's engagement letter was signed and, in March 2020, the Reserve

Bank of India ("RBI") imposed a moratorium on YES Bank. The following day RBI published a reconstruction scheme providing for the State Bank of India ("SBI") to acquire a 49% shareholding in YES Bank. A substantial capital injection from a consortium led by SBI followed later in March.

- YES Bank completed a further regulated, Indian public-law, public offering ("FPO") requiring a prospectus in July 2020 in which certain of the investors allocated to Cantor and named in the engagement letter participated.
- YES Bank paid neither the $500,000 retainer nor the 2% commission and Cantor initiated proceedings in England in the High Court to recover payment. The High Court found in YES Bank's favour in relation to the commission (the retainer was paid before judgment). Cantor appealed this decision to the Court of Appeal.

THE COURT OF APPEAL'S DECISION

Cantor appealed the High Court's decision on two grounds:

- The judge erred in holding that the engagement letter was limited to private forms of financing. Rather, the judge should have held that the ordinary meaning of the words used in the definition of "Financing" covered all forms of equity financing and erred in construing the factual and commercial context of the engagement letter to conclude that it was unlikely the parties intended Cantor to be involved in an FPO.
- The judge erred in holding that the FPO did not fall within the scope of the engagement letter.

The Court of Appeal considered the second ground to follow from the first and assessed them together and applied the usual method for interpreting an English law contract. Where there is ambiguity, the method of interpretation, established in a long line of cases and uncontested in this instance, requires the court to consider the ordinary meaning of the words used in the context of the contract as a whole and the relevant factual and commercial background (excluding the parties' prior negotiations). The court's objective is to identify the parties' intention in an objective sense, i.e. what a reasonable person having all the background knowledge available to the parties would understand their intentions to be using the language in the contract. As the Court of Appeal pointed out, a reasonable person would – except perhaps in a very unusual case – most obviously interpret what the parties had meant from the language of the provision in question.

Regarding the ordinary meaning of the words in the definition of "Financing", the Court of Appeal found that:

- Had the parties intended for a "Financing" to cover all types of equity finance, whether private or public, this could have been achieved by simply referring to "any sale of equity instruments", either without more or followed by an inclusive list of the types of offers intended to be captured.
- On the use of the word "private" before "placement, offering or other sale of equity instruments", whilst there is no firm grammatical rule to the effect that an adjective or determiner at the start of a list of nouns qualifies them all, the nature of the list may well indicate that it does. Given that natural assumption, the court found it notable that the parties did nothing to counter it, whether by omitting the word "private", including the word "public", changing the order of the list or otherwise.
- Although the concept of a "private placement" is understood as having a particular meaning in the financial markets, coupling "private" with "placement" did not prevent it also being applied to "offering" and "other sale" if that is what its natural meaning indicated, which the court found it did.

The wider contractual context was also unhelpful to Cantor's case. The engagement letter contained other provisions indicating that the term "Financing" should be construed narrowly, enabling an inference to be drawn that the letter was not intended to extend to public offers, and also contained an unhelpful clause that ran contrary to Cantor's interpretation that all forms of equity financing fell within the defined term "Financing".

The Court of Appeal found the factual and commercial context to be consistent with YES Bank's narrower interpretation in that an FPO was not a realistic possibility when the engagement letter was signed given YES Bank's financial difficulties. The focus of the engagement letter was on non-public fundraising from new sources, specifically Cantor's client list. The court found nothing in the factual and commercial context to support Cantor's wider interpretation.

In light of all this, the Court of Appeal held that the concept of "Financing" in the engagement letter referred to private forms of equity financing, and that the FPO carried out in July 2020 did not fall within that definition. Cantor was therefore not entitled to the 2% commission.

TAKEAWAYS

The case is a salutary reminder that engagement letters should be carefully drafted, and that care should be taken to use clear and unambiguous language as ambiguity can give rise to disputes. In the view of the High Court judge, "much of the language used" in the engagement letter looked like "generic, boilerplate drafting […] whose text is at least partly inherited from previous contracts between different parties". Had the contract been more finely tailored to the specific circumstances, perhaps the dispute could have been avoided.

Even though the court reached its decision with regard to the specific facts of the case, it is a timely reminder for financial advisers to review their standard form engagement letters and to ensure that the terms are tailored to the particular circumstances of a proposed transaction in the jurisdiction in question and, where the precise scope of the engagement is not clear at the outset, to ensure the drafting is sufficiently clear and broad to cover various eventualities.

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