



One word can make all the difference as Cantor misses out on \$7.5m fee.

## BACKGROUND

The recent decision in the Court of Appeal in Cantor Fitzgerald & Co. v YES Bank Limited turned on the use of a single adjective in an engagement letter and meant Cantor could not demand a \$7.5 million fee. At issue was the definition of the word Financing and whether the word “private” in the phrase “private placement, offering or other sale of equity instruments” only qualifies “placement” or alternatively qualifies “offering or other sale of equity instruments” as well.

YES Bank was experiencing severe financial problems and urgently needed additional capital.

Cantor was engaged to act for YES Bank in connection with a financing, in return for a \$500,000 retainer and 2% of funds raised from the investors listed in a schedule to the engagement letter.

On 5 March 2020, the Reserve Bank of India (RBI) imposed a moratorium on YES Bank. The following day RBI published a reconstruction scheme which provided for the State Bank of India (SBI) to acquire a 49% shareholding in YES Bank. YES Bank’s board was replaced and the new board resolved to raise further funds by a public offer. This was achieved by a further public offer (FPO) which completed in July 2020.

Certain investors with whom Cantor had been in discussion participated in the FPO. YES Bank paid the retainer but did not pay 2% of the amounts subscribed in the FPO by the three investors listed in the schedule to the engagement letter.

## JUDGMENT

In the High Court, the judge had decided that YES Bank did not have to pay to Cantor 2% of the amounts subscribed in the FPO. The judge’s provisional view as to the ordinary meaning of the definition of “Financing” referred to a “conventional understanding” that where an adjective or determiner is followed by a list of nouns, it modifies all of them unless a discordant adjective or determiner breaks the pattern. This provisional view was not affected by the contractual context but was supported by the surrounding circumstances.

## APPEAL

On appeal, Cantor stated that the judge had erred in holding that the engagement letter was limited to private forms of financing. Cantor asserted that the ordinary meaning



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of the words used in the definition of Financing covered all forms of equity financing, which would include the FPO.

The Court of Appeal applied the principles which govern how the true interpretation of a clause in a contract is ascertained. It considered the ordinary meaning of the words used in the context of the contract as a whole and the relevant factual and commercial background (excluding prior negotiations). The aim being to ascertain what a reasonable person having the background knowledge which would have been available to the parties when they were at the time of the contract would have understood the parties to have meant.

After considering the ordinary meaning of the words, the contractual context, factual matrix, and genesis and aim of the engagement letter, the Court of Appeal preferred YES Bank's interpretation that the word "private" in the phrase "private placement" also qualifies "offering or other sale".

## SYNTACTIC AMBIGUITY AND HOW TO ADDRESS IT

The case highlights the issue of syntactic ambiguity. The positioning of adjectives can sometimes create doubt about which of the nouns they are intended to affect. Although the Court of Appeal agreed with Cantor that 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. Unless something in the content of the list or another adjective or determiner within the list suggests otherwise, the reader will naturally tend to assume that an adjective or determiner at the start of a list qualifies the entirety of the list.

Depending on your intention, this ambiguity can be avoided by:

- Changing the word order of the sentence.
  - o *"any offering, other sale of equity instruments or private placement"*
  - o *"any sale of equity instruments including but not limited to any offering or private placement"*
- Repeating the modifier.
  - o *"private placement, private offering or other private sale of equity instruments"*
- Using a different modifier or determiner.
  - o *"private placement, or private or public offering or other sale of equity instruments"*
  - o *"private placement, or any offering or other sale of equity instruments"*

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