

WHAT DOES "SUCCESS" MEAN FOR YOU? SUCCESS FEES IN *KIGEN V NOR CAPITAL*

The High Court concluded that a success fee in a fundraising engagement letter would only be triggered by external investment, applying established principles of contractual interpretation and commercial common sense.

Background

Kigen (UK) Ltd (Kigen) was seeking new investment capital (of between £30-40m), and its ultimate owner, SoftBank Group Corp (SoftBank) introduced Kigen to NOR Capital Limited (NOR Capital) with a view to obtaining external investment. Kigen and NOR Capital signed an engagement letter (the Agreement), and in clause 3 of this Agreement, Kigen agreed to pay NOR Capital a monthly retainer fee, and a success fee if there was a capital raising transaction.

NOR Capital performed its obligations under the Agreement, so no breach of contract was alleged, but they failed to secure any acceptable external investors. Instead, SoftBank ended up investing a further £20m in Kigen. When NOR Capital invoiced Kigen for £500,000, claiming that the success fee was due, Kigen disagreed that the fee was payable, and applied to court for a declaration to that effect.

Clause 3 of the Agreement provided for a "*minimum Success Fee*" which NOR Capital claimed it was entitled to, as the minimum sum payable in the event of a completed capital raising transaction. However, Kigen argued that there would be "*no charge*" for funding where it was provided by SoftBank (the company's ultimate owner).

What did the judge think?

Andrew Twigger KC concluded that no success fee was payable, considering that clause 3.1.2, when taken in isolation, was ambiguous – "success" was not defined – and neither party had been able to provide the court with "*an entirely satisfactory explanation of the words on the page*" [84].

In such circumstances, the judge carried out an iterative process when approaching the interpretation of the clause (referred to by Lord Hodge in *Wood v Capita*), checking the rival interpretations against the other provisions of the agreement, as well as investigating the commercial consequences of these interpretations [64 – 66].

When examining the contract, the judge ignored statements by both parties as to their subjective intentions regarding the language used in the agreement. This was not a case of rectification of a contract, where negotiations and prior

Key issues

- A success fee is an additional fee which becomes payable only under certain circumstances under the terms of a conditional fee agreement.
- Kigen and NOR Capital had differing perceptions of when a success fee would be payable.
- The judge concluded that the parties would have benefited from defining "success", and he considered the terms of the agreement as a whole and the wider commercial context in finding for the claimant.

drafts might be brought into the reckoning. Instead, the judge focused on the commercial purpose of the contract, and, in particular, that it would make little commercial sense for Kigen to be obliged to pay a success fee when "*the actual outcome was precisely the one which it was the commercial purpose of the Agreement to avoid*". [98].

The judge concluded it was necessary to consider the terms of the agreement as a whole, which indicated that external investment was the trigger for the success fee, and the commercial context also suggested that no fee would be payable because SoftBank had introduced Kigen to NOR Capital in order to identify and secure external sources of funding.

Learnings:

When entering into contractual arrangements, parties should pay particular consideration to any clauses involving payments of contingency or success fees. And they should agree and include a proper definition of "success" in their documentation. As with any contract, it is also important to make sure that both parties fully understand the commercial agreement.

Ultimately, we all have very different perceptions of what "success" looks like – as *Kigen v NOR Capital* shows – so, as ever, it is advisable to define your terms and consider how a reasonable reader might interpret the words on the page to make sure they reflect the commercial position.

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