MAPLES GROUP

UPDATE

No engagement letter – No fees?

In the recent case of *Fenchurch Advisory Partners LLP v AA Limited [2023] EWHC 108 (Comm)*[1] the English High Court found that no binding contract was created where no engagement letter was ever signed, even though the terms of engagement were extensively negotiated, significant work completed and fee details agreed.

Speed Read

- This case revolves around the claim for fees brought by an investment banking and corporate finance advisory firm, Fenchurch Advisory Partners LLP ("Fenchurch") in respect of legal advisory work provided to its client AA Limited (the "AA"), an insurance business, in respect of selling part of the AA's business.
- The terms of engagement were heavily negotiated between the parties but no engagement letter was ever signed. In addition, the proposed transaction did not ultimately materialise.
- The English High Court found that due to the lack of a signed engagement letter no binding contract existed between the parties and no contract could be implied.
- However, the court applied the principles of recovery in restitution in favour of Fenchurch's cost to avoid the AA being unjustly enriched. Fenchurch was only able to recover a percentage of what it believed to be the true value of the work provided, which it estimated exceeded £4 million.

Key Facts

- In July 2018, the AA approached Fenchurch to assist it in a possible restructuring and refinancing of its business by selling off part of its insurance business. Despite no signed engagement letter being in place, Fenchurch assisted in preparing two potential sale transactions, both of which were ultimately put on hold.
- Concurrently, there were ongoing discussions around the fee terms for the work. The fee proposal included a success fee based on the value of the transaction and a nominal performance-related fee. The true monetary value in such agreements is the success fee as it entitles the advisor to a percentage of the transaction value upon successful completion.
- In addition, Fenchurch wanted to introduce an additional 'abort' fee or modify the success fee. The AA would have to pay the abort fee if the AA stopped the transaction process between initial expressions of interest and firm offers. Alternatively, the modified success fee would be due where the transaction failed due to a public offer or rejection of the sale by the AA's shareholders.
- Both parties appeared to believe that they would ultimately agree a fee arrangement but at no point was a final engagement letter signed. The AA received a public offer for its insurance business in November 2020, several months after the transaction that Fenchurch had advised on had been put on hold.

Binding contract?

[1] https://www.bailii.org/ew/cases/EWHC/Comm/2023/108.html

Fenchurch argued that a binding agreement had been entered into by the email exchange between the parties and the fact that substantial work had already been carried out for the AA. In contrast, the AA maintained that it was clear from the parties' intentions to only enter into a binding contract when contractual documents, namely the engagement letter itself, had been signed. The court held that the exchange of emails merely signified that the parties believed they would now be able to finalise the engagement letter, but had not yet done so.

Implied contract?

The court distinguished between cases where parties are agreed that remuneration is to be paid but had not sought to agree any such fee prior to commencing work, and those where the parties are seeking to agree a contract under which remuneration is to be paid, but do not manage to do so. Only in the former case can a contract be implied. In the present case, no implied contract existed as the parties had never envisaged that AA would pay a 'reasonable' fee, but that they would pay a fee to be agreed in due course. This was further evidenced by an AA internal note dated January 2020, that marked the engagement letter with Fenchurch as ready for execution or *final commercial negotiation*.

What next?

The court found the AA unjustly enriched if they did not have to pay for the work performed, and therefore granted Fenchurch relief by way of restitution. In terms of quantum, the court determined that this was the price that a reasonable person would have to pay for those services and found that Fenchurch was entitled to a progress payment of £350,000. Fenchurch argued that the public offer made to the AA in November 2020 triggered the AA's obligation to pay the additional success fee, as it effectively ended the possible implementation of the transaction. The court did not find that a modified success fee had been agreed. In effect, this meant that Fenchurch was not able to recover a success fee, which Fenchurch alleged could have entitled them to a payment exceeding £4 million.

Lessons to be learned?

While the discussed case is not binding in Ireland, it highlights the importance of having the administrative side of the client relationship formally recorded.

Don't Forget the Law Society Guidance

The Law Society of Ireland has published extensive guidance on the requirements for setting out legal costs in writing.[2] There is a mandatory requirement for solicitors to provide a notice to the client disclosing the legal costs that will be incurred or set out the basis that the costs will be calculated. Importantly, setting out the basis for calculation is only a *temporary* placeholder and requires, as soon as practicable, to provide a notice that discloses the legal costs that will be incurred. Solicitors are reminded that under Irish law professional work and advices cannot commence before the client has confirmed their wish to instruct the solicitor on those terms or a period of suspension has expired. Only in the very rarest of occasions may this be deviated from.

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[2]https://www.lawsociety.ie/News/News/Stories/new-section-150-guidance-and-precedents#.Y_Ooj3bP2Uk

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