Neutral Citation Number: [2023] EWHC 745 (Comm)

Case No: CL-2021-000447

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, WC4A 1NL

Date: 31st March 2023

Before :

MR JUSTICE BRIGHT

- -

Between :

Cantor Fitzgerald & Co.

Claimant

- and -

YES Bank Limited

Defendant

- -
- -

Mr Adrian Beltrami KC and Mr Ravi Jackson (instructed by Allen & Overy LLP) for the Claimant
Mr John Taylor KC and Mr Christopher Langley (instructed by Hogan Lovells International LLP) for the Defendant

Hearing dates: 14, 15, 16, 21 March 2023

- -

Approved Judgment

This judgment was handed down remotely at 10am on 31 March 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

....

MR JUSTICE BRIGHT

Mr Justice Bright:

Introduction and the parties

1. This judgment follows the trial of the claim of the Claimant ("Cantor") against the Defendant ("YES Bank") arising from Cantor's efforts to raise finance for YES Bank in late 2019 to early 2020.

2. Cantor was represented by Mr Adrian Beltrami KC and Mr Ravi Jackson. YES Bank was represented by Mr John Taylor KC and Mr Christopher Jackson. I am grateful to all four counsel for the skill and thoroughness of their submissions and assistance.

3. Cantor is a US broker-dealer, investment bank and financial advisor, based in New York. YES Bank is an Indian bank, based in Mumbai.

4. In 2019, YES Bank was undergoing severe financial problems, which were widely reported. It urgently needed to attract additional capital investment. Cantor was engaged to assist (as were various other advisors/institutions).

5. This dispute arises under an Engagement Letter dated 17 December 2019 and signed on 18 December 2019 (as amended on 24 February 2020), which constituted the contract between Cantor and YES Bank.

6. Cantor claims to be entitled to a fee under the Engagement Letter, being 2% (the agreed fee rate) of investments made by three parties defined in the Engagement Letter (as amended) as "Investors". The main issue between the parties on this claim concerns the construction of a few words in one sentence of one clause of the Engagement Letter.

Securities issues and the raising of capital by Indian public companies

7. The issue of new securities and the raising of capital finance in relation to public Indian companies are naturally subject to regulations. The relevant Indian regulator is the Securities and Exchange Board of India ("SEBI").

8. The regulations are most stringent in relation to any public offering – whether an Initial Public Offering ("IPO") or a Further Public Offering ("FPO"). The essence of a public offering is that the opportunity to invest is generally available, including to retail investors. In 2019, YES Bank was already established as a public company, so the potentially relevant form of public offering would have been an FPO.

9. One form of private placement common in India (but not in many other countries) is a Qualified Institutional Placement ("QIP"), in which shares are offered to Qualified Institutional Buyers ("QIBs") – institutional investors who fall into any of a series of defined categories under the relevant SEBI regulations.

10. Another form of private placement is a preferential issue, in which the opportunity to invest can be offered to anyone of the company's choosing (i.e., it is not restricted to QIBs), only to a numerical limit – in this case, 200).

11. The final possibility that it is relevant to mention is a rights issue, in which the opportunity to invest is offered only to existing shareholders. The only way that new investors can become involved via a rights issue is if the existing shareholders (or some

of them) renounce their rights to subscribe to the new equity shares, in which case the right to invest can be offered to others.

12. Each of these routes has different features and (therefore) different advantages and disadvantages. Public offerings attract the heaviest regulation and the most prescriptive requirements. The regulatory requirements for an IPO/FPO cover (among other things) the preparation and publication of a prospectus and disclosures, which must be put into the public domain before the IPO/FPO issue. If the company in question is a bank with severe financial difficulties, the public broadcast of the details of those financial difficulties, before it has secured access to any new investment capital, could be particularly troublesome. In an extreme case, it might cause a run on the bank. This reduced its attractiveness to YES Bank. Furthermore, a public offering must be managed by an Indian-registered merchant bank (which Cantor is not), which reduced its attractiveness to Cantor.

13. A QIP and a rights issue would also require a degree of mandatory disclosure, but the process would not be as demanding as the preparation of a prospectus. In the case of a QIP, it would not require the same advance publication as would apply to a public offering. Both a QIP and a rights issue would also require the involvement of an Indian-registered merchant bank.

14. A preferential issue would not require any specific mandatory disclosure. Nor would it require the involvement of an Indian-registered merchant bank.

15. It is also possible in principle to raise capital via several of these methods, in combination. In particular, it is possible to have a preferential issue (or QIP), which brings in new shareholders, followed by a rights issue which includes both the previous shareholders and the new shareholders; alternatively, a rights issue followed by a preferential issue (or QIP).

16. Cantor is not registered in India as a merchant bank. It therefore could not act as the lead manager of an IPO/FPO, QIP or rights issue, although it would be able to assist with any of those transactions as a mere offshore advisor. Be that as it may, as an experienced and well-regarded New York finance house, Cantor was able to offer both expertise and the benefit of its relationships with potential investors, in particular in the US.

    i) From YES Bank's perspective, one principal reason for engaging Cantor was the perception that Cantor might be able to introduce and/or successfully woo investors who would not otherwise be involved – in particular, investors from the US and elsewhere outside India and Europe (because YES Bank already had other advisors in place for Indian and European investors).

    ii) From Cantor's perspective, the transaction offered the opportunity to earn a fee by securing investment from such new investors.

    iii) From both perspectives, this would work by Cantor attracting capital from such new investors and being paid a fee proportionate to their investment.

17. In such cases (especially where more than one advisor is engaged), the parties typically agree on potential investors that the relevant advisor (here, Cantor) will target. The

specified investors are then 'ring-fenced' for that advisor, who will be entitled to a fee if these investors contribute investment capital within the terms of the agreement.

YES Bank's financial problems

18. YES Bank's financial problems became prominent in early 2019, when it became apparent that there had been significant under-reporting of stressed assets (bad loans). The long-term Chief Executive Officer, Mr Rana Kapoor, who had been one of YES Bank's original founders, was forced out by the Reserve Bank of India ("RBI"). In March 2019, a new Managing Director and Chief Executive Officer was appointed, Mr Ravneet Gill.

19. In August 2019, YES Bank raised INR19.3 billion (around US$273 million) via a QIP. This was nothing like sufficient. The view of YES Bank's board in August 2019 was that further investment of about US$1.5 billion was required. Financial advisors were appointed to assist in raising this additional capital.

20. YES Bank's situation continued to deteriorate. The share price tumbled and the bank was downgraded by ratings agencies. By early December 2019 there was widely reported public speculation questioning YES Bank's viability. Its tenor is summed-up by the headline of an op/ed piece in *The Economic Times* on 12 December 2019 (which was circulated internally within Cantor):

> "View: Yes Bank needs an arranged match, otherwise it's No Bank".

21. In submissions, Mr Taylor KC said that YES Bank needed "survival capital". Cantor objected to this terminology, which was not used at the time. Nevertheless, it was obvious to all onlookers that YES Bank's lack of capital funding was an existential crisis. It was certainly obvious to Cantor: on 11 December 2019, Mr Ashwani Mathur (Managing Director of Global Equities) wrote to Mr Anshu Jain (President of Cantor):

> "The mood on Dalal Street is sombre. The stock is down 16% on the day as I write. There are real issues that the market is questioning on leadership, size of the hole and survival of the bank."

The engagement of Cantor

22. Before appointing Cantor, YES Bank first appointed two other financial advisors – Avendus Capital Private Limited ("Avendus") on 30 September 2019 and Prime Securities Limited ("Prime") on 1 November 2019.

23. The engagement of Cantor came about because Mr Gill had previously worked for some time at Deutsche Bank, where one of his colleagues had been Mr Jain, now the President of Cantor. Mr Gill contacted Mr Jain at some point in late November or early December, with a view to engaging Cantor's assistance.

24. There is no direct written record of these initial communications between Mr Gill and Mr Jain. They seem to have spoken by telephone, without directly involving anyone

else in their calls or taking notes or reporting on the calls via email or SMS text (or any other written medium) to anyone else within YES Bank or Cantor (respectively).

25. The first written record that in any way reflects the discussions between Mr Gill and Mr Jain is an internal Cantor email exchange of 7 December 2019, involving Mr Jain and various others within Cantor – notably, Mr Sage Kelly (Senior Managing Director and Global Head of Investment Banking) and Mr Mark Kaplan (Senior Managing Director and Global Chief Operating Officer). It was concerned solely with the fee that Cantor should seek to charge YES Bank (Mr Jain deciding on 2%). There was no broader discussion, but this does indicate that the initial contact between Mr Gill and Mr Jain must have been no later than 7 December 2019.

26. A draft Engagement Letter was first prepared by Cantor in the form of a draft dated 7 December 2023, along with a draft Non-Disclosure Agreement ("NDA"). It is not clear to me when or how it was sent to YES Bank, but on 11 December 2019 Mr Niranjan Banodkar, YES Bank's Head of Financial & Investor Strategy, sent an email to Mr Kelly of Cantor saying that he would connect to take the process forward on the Engagement Letter once Cantor's NDA had been dealt with (which he hoped would be on 12 December 2019).

27. The next draft of the Engagement Letter that I have seen was dated 12 December 2019. It has various amendments marked in track changes (all of which appear to have been made by Cantor) and showing marginal comments – initial comments by YES Bank, and successive (responsive) comments by Cantor. It was circulated internally within Cantor, in this form, by an email of 13 December 2019. It seems that this draft must have originated with Cantor, been sent to YES Bank and then sent back to Cantor, on 12/13 December 2019.

28. The final version of the Engagement Letter was dated 17 December 2019. Mr Gill signed it on behalf of YES Bank and Mr Kaplan signed it on behalf of Cantor, both on 18 December 2019.

29. By the Engagement Letter, Cantor was engaged by YES Bank in relation to a "Financing" – a defined term whose meaning is central to the outcome of this action, and which I consider in more detail later in this Judgment. For now, it is enough to note that the relevant definition is set out in the first sentence of clause 1 of the Engagement Letter, as follows:

> "We have been advised by the Company that it contemplates 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 (a "Financing")."

30. The Engagement Letter was intended to have, at Schedule I, a list of the potential investors (referred to in the text of the Engagement Letter as "the Investors") who were

ring-fenced for Cantor. As at 17/18 December 2019 it had not been possible to finalise this list, so it was left blank (to be completed later).

31. Cantor's fee was to comprise a non-refundable Retainer of US$500,000 (due upon execution) and 2% of the proceeds received or receivable in connection with any Financing under the Engagement Letter, whether during the currency of the Engagement Letter or prior to 9 months from its termination.

The Amendment Letter

32. Even before the Engagement Letter, it was apparent that it might be necessary, or at least desirable, for Cantor to work with an Indian-registered merchant bank. Cantor's approach to this at that time is apparent from an email sent by Mr Kaplan to Mr Kelly on 12 December 2019:

> "In one of my conversations today with Anshu today he suggested that we engage one of the local Indian Merchant Banks in case we will need their Merchant Banking license. Especially if the deal will include a QIP - - which requires a Merchant Banking license. My view is that a QIP does not make sense here given the pricing restrictions and the extended time frame before we can launch one. But it seems that Anshu wants that optionality."

33. Cantor decided to hold off for the time being and see how things developed. Over the next few weeks, the apparent desirability of an Indian-registered merchant bank increased. Ambit Pvt Ltd ("Ambit") was appointed by YES Bank for this role, under a separate engagement letter of 15 January 2020 ("the Ambit Engagement Letter").

34. The Ambit Engagement Letter acknowledged the involvement of Cantor and provided that Ambit would receive 2% of funds raised from Investors allocated to Ambit and 0.30% of funds raised from Investors allocated to Cantor. It identified 4 Investors as allocated to Ambit.

35. On 24 February 2020, YES Bank and Cantor both signed a further letter agreement which amended the Engagement Letter ("the Amendment Letter"). This recorded the fact that Cantor had been advised of the appointment of Ambit as merchant bank, and that Cantor's fees were reduced from 2% to 1.95%, to the extent that the reduction of 0.05% was paid to Ambit. Schedule I was attached to the Amendment Letter, now completed with the names of over 60 Investors, including the following names: "Hinduja Group… Tilden Park… Amansa."

36. The Amendment Letter stated that the original Engagement Letter remained in full force and effect except as specifically amended. It follows that the Amendment Letter did not alter the meaning of "Financing".

Cantor's capital-raising efforts

37. Cantor devoted very substantial time and effort to its efforts to attract Investors. I received evidence that the number of senior personnel involved was exceptional, because of Mr Jain's personal interest and commitment.

38. These efforts were at least partially effective. On 2 March 2020, Tilden Park submitted a non-binding offer to YES Bank. On 3 March 2020, Amansa submitted a non-binding indication. Both submissions were made broadly on the basis of a preferential issue coupled with a rights issue.

39. However, the amounts involved were not by themselves sufficient, and these non-binding submissions were subject to significant conditions (for example, Tilden Park required board representation).

40. In any event, during the period leading up to March 2020, YES Bank's share price had continued to deteriorate and its financial position was increasingly vulnerable.

The intervention of RBI and the reconstruction of YES Bank with SBI

41. RBI was not satisfied and, on 5 March 2020, it exercised its statutory powers under the relevant Indian legislation to impose a moratorium on YES Bank with effect from 5 March 2020, up to and including 3 April 2020.

42. On the following day, RBI published a Reconstruction Scheme, under which the State Bank of India ("SBI") was to acquire a 49% shareholding in YES Bank. On 13 March 2020, there was a capital infusion into YES Bank of INR100 billion (equivalent to approximately US$1.3 billion) by a consortium of investors led by SBI. In addition, SBI Capital Markets Limited ("SBI Capital") was brought in to assist with capital-raising from other investors.

43. As part of this process, the entire board of directors was replaced and Mr Gill was effectively dismissed and replaced as Managing Director and Chief Executive Officer.

44. The effect was to transform YES Bank's ratings and market assessment. The share price rallied; Moody's and other agencies upgraded the bank's credit status.

The FPO

45. The new board resolved to raise further capital investment. 25 merchant banks were approached and 8 were appointed – 4 domestic and 4 international, including SBI Capital. Cantor was neither approached nor appointed, because it is not Indian-registered. Ambit applied, but was not appointed.

46. YES Bank's further capital-raising endeavours came to fruition in the form of an FPO, in July 2020. The total additional investment achieved by the FPO was about INR150 billion (equivalent to approximately US$2 billion). This total included contributions from entities classified as Investors (as set out in Schedule I to the Amendment Letter) totalling INR27.93 billion (equivalent to approximately US$373.4 million):

    i) Tilden Park: INR22.5 billion (around US$300 million).

    ii) Hinduja Group: INR 1.7 billion (around US$22.7 million).

    iii) Amansa: INR 3.73 billion (around US$50 million).

47. YES Bank said, and I accept, that it was only possible to follow the FPO route because SBI had taken a 49% stake, in effect bailing out YES Bank. This gave the market the confidence in the future of YES Bank that made an FPO viable.

48. YES Bank's case on this point was supported by evidence from Mr Banodkar.

i) Paragraphs 20 to 22 of his witness statement considered the position of YES Bank prior to the engagement of Cantor in December 2019:

> "20. I do not recall any discussions about a public offering at this time. Given the Bank's financial position, the negative publicity about this in the Indian financial and mainstream press and the market reaction we had already been seeing (with YBL's stock price dropping and an increased amount of deposit withdrawals), there obviously would not have been sufficient public confidence (and therefore demand for shares) in YBL for a public financing to succeed. Our difficulty generating interest in YBL from potential good quality public institutional investors prior to the August QIP had already demonstrated this lack of demand and YBL's financial situation had only worsened since then. …
>
> 21. Further, the Bank had limited ability to consider a public financing as the process would have entailed the Bank making disclosures on its current financial position without concurrently having any confirmation or commitment from investors that they would invest in the Bank. Such disclosures might have further impacted public confidence and sparked a run on the Bank (i.e., a rush to withdraw money from the Bank).
>
> 22. Therefore I do not recall considering public financing as an option or discussing this with anyone at YBL – as I explained above, the focus was entirely on raising private capital, which was the only viable option for raising capital at the time".

ii) In paragraph 61 he referred to effect of the Reconstruction Scheme in relation to the FPO that closed in July 2020:

> "Despite YBL reporting large losses in December 2019 and March 2020 and the CET1 ratio still being low, the Reconstruction Scheme gave potential investors confidence that their investments would be safe and that they wouldn't lose their money as YBL was more secure in terms of capital protection. If we had reported the December and March results without the SBI investment and the Reconstruction Scheme in place, YBL would have seen a run on its deposits and this would have impacted its ability to operate. The fact of SBI's involvement as a 49% shareholder following the reconstruction was worth more in terms of the confidence it gave investors than simply injecting capital – SBI was the largest bank in India and was putting

> money into YBL, so shareholders were at that point looking at YBL with a very different attitude. … ”

49. This was in part orthodox factual evidence about when, how and why YES Bank decided to pursue an FPO (a decision in which Mr Banodkar said he was closely involved), and in part opinion evidence speculating on what would have happened if YES Bank had reported its results and held an FPO without the RBI Reconstruction Scheme and the investment of SBI. However, I would have come to the same view even without the benefit of any evidence from Mr Banodkar on this point. I have already noted above that it was obvious in December 2019 that YES Bank faced an existential crisis. I regard it as no less obvious that a bank in that position cannot safely launch a public offering. The reasons set out by Mr Banodkar are self-evident.

Cantor's lack of involvement in the FPO

50. Cantor had no real involvement after 5 March 2020, and no direct involvement in the FPO.

51. It happened that, on 5 March 2020, Mr Gino Ramadi of Tilden Park was in India in connection with the non-binding offer that Tilden Park had submitted on 2 March 2020 on the basis of a simultaneous preferential issue and rights issue. Mr Ramadi was with Mr Ashwani Mathur of Cantor, who had been liaising with Tilden Park in relation to that submission.

52. This was the period when the Covid-19 pandemic first took its effect. One consequence was that Mr Ramadi and Mr Mathur were both obliged to remain in India for some weeks. During this period, Mr Mathur introduced Mr Ramadi to various personnel within SBI and/or SBI Capital.

53. Mr Ramadi made it clear that these introductions contributed significantly to the fact that Tilden Park ultimately made a very substantial capital investment, via the FPO, in July 2020.

Exchanges between YES Bank and Cantor after 5 March 2020

54. There was very limited contact between Cantor and YES Bank, following the intervention of RBI on 5 March 2020.

55. YES Bank had not yet paid the Retainer (despite having been invoiced on 3 January 2020). Cantor did not press for payment prior to March 2020, but did so on several dates during March 2020 and subsequently, including a chaser of 17 May 2020.

56. A conversation ensued, in the course of which Mr Banodkar brought up cancelling or terminating the Engagement Letter. Mr Banodkar followed this up with an email on 29 May 2020, in which he stated that, given the change in circumstances, it was appropriate to formally terminate the current engagement with Cantor, which he referred to as "[t]he proposed termination".

57. Mr Banodkar's email suggested that the effect of this termination would mean no further obligations being owed by either party. Cantor responded with an email from

Mr Jain pointing out that, under the terms of the Engagement Letter, various terms survived for a period after termination, including YES Bank's fee obligations.

58. Mr Jain attached a draft termination agreement, which YES Bank neither commented on nor signed, despite a reminder on 1 June 2020.

59. In the meantime, the Retainer remained outstanding. There were several further chasers from Cantor in June and December 2020.

60. YES Bank finally paid the Retainer on 8 September 2021, long after Cantor's solicitors had sent a formal letter before action on 23 December 2020, and even after the Claim Form in this action had been issued and served.

The essential difference between the parties

61. Cantor's claim was brought on the basis that the FPO that eventually completed in July 2020 was within the meaning of the term "Financing" as used in the Engagement Letter. In circumstances where the proceeds of the FPO included capital funds received from Investors identified in Schedule I (per the Amendment Letter) – i.e., Tilden Park, Amansa and Hinduja Group – Cantor said it was entitled to 2%.

62. (Cantor also had alternative ways of putting its case – on the basis of an implied term and on the basis of unjust enrichment. However, its primary approach, which relied on the true meaning of "Financing", was Mr Beltrami KC's clear front-runner, with the other two approaches mere also-rans.)

63. YES Bank's defence essentially rested on the argument that an FPO was not within the meaning of the term "Financing".

64. Ascertaining the true meaning of "Financing" requires giving careful consideration to the specific provision that contains the relevant definition, within the context of the Engagement Letter as a whole and having regard to the factual matrix, in the light of the relevant legal principles.

65. At bottom, however, it is concerned with the words "the private placement, offering or other sale of equity instruments… ("a "Financing")". Specifically, the question is whether the adjective "private" qualifies only the word immediately following, "placement", or whether it also qualifies the terms that come next, i.e., "offering" and "other sale of equity instruments…".

The witnesses

66. As already noted, Cantor's appointment came about because of the personal relationship between Mr Gill and Mr Jain. The initial contact between the parties therefore was between these two individuals. Further, their communications appear to have been conducted privately, without anyone else being present or involved, and neither of them created any written record.

67. Unfortunately, Mr Jain died in 2022, and Mr Gill was dismissed by YES Bank (along with everyone else at board level). For these different reasons, neither Mr Jain nor Mr Gill gave evidence.

68. In the absence of Mr Jain, Cantor's main witness was Mr Kaplan. Mr Kaplan was guarded and careful in his evidence. He struck me as essentially honest and truthful, but he was merely one member of what was a very large team, which he did not lead. Furthermore, his memory was not clear on points of detail, as he candidly stated several times during his evidence.

69. Cantor also called evidence from Mr Ramadi. His evidence was to the effect that Tilden Park would not have been involved in the July 2020 FPO, had it not been for the earlier efforts of Cantor to achieve a preferential issue (ultimately, in combination with a rights issue). This was welcome evidence, but it had no bearing on the construction of the Engagement Letter.

70. In the absence of Mr Gill, YES Bank's only witness was Mr Banodkar. Whereas I have described Mr Kaplan as guarded and careful, Mr Banodkar frequently gave long, discursive answers (especially in the early stages of cross-examination), some of which made it necessary to look quite hard for the material that responded to the question within the mass of non-responsive material. However, my impression was that this was due to nerves rather than evasiveness. Mr Banodkar gave noticeably shorter and more direct answers later in his evidence, when reminded to do so. He too struck me as essentially honest and truthful.

71. Mr Kaplan and Mr Banodkar are both obviously intelligent people and they were both undoubtedly aware where their respective employers' interests lay. I was conscious that, while seeking to be honest, they endeavoured where possible to give honest evidence that favoured Cantor and YES Bank (respectively) rather than honest evidence that did not.

72. There was nothing wrong with that. I would have been surprised had they acted otherwise. However, it coloured their evidence and I must take it into account. For example, a failure of recollection on a document or point that was difficult for the witness's employer might be thought convenient. By contrast, a failure of recollection where an accurate memory might have helped Cantor/YES Bank (as the case may be) might be thought striking.

The structure and terms of the Engagement Letter

73. The Engagement Letter is in the form of a letter agreement, comprising the letter itself ("the Letter") with an Annex and a Schedule. The Letter itself contains 9 clauses and runs over 3½ pages. It incorporates an Annex containing Additional Provisions A to T (7 pages) and Indemnification Provisions (1½ further pages). As already noted, Schedule I was left incomplete, but was completed in February 2020 by the Amendment Letter.

74. In its entirety, clause 1 of the Engagement Letter provided as follows:

> "1. We have been advised by the Company that it contemplates 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 (a "Financing"). The Company hereby engages CF&CO to act as the Company's financial advisor, placement agent and arranger in connection with any Financing with any Investor (as defined in Annex A and Schedule I) other than a Qualified Institutional Placement ("QIP"). In the event a Financing is structured as a Qualified Institutional Placement, the Company acknowledges that CF&CO shall not be engaged to act as a placement agent or arranger in connection with such transaction, but rather an offshore financial advisor to the Company, and that in such capacity, CF&CO may provide Investor referrals to the Company. In the event any such Investors participate in the QIP, CF&CO shall be entitled to a referral fee with respect to amounts contributed by such Investors in the QIP equal to the fees set forth in 3(b) below, payable in accordance therewith."

75. While most of the submissions focused on clause 1, the other provisions that attracted attention included the following:

"2. CF&CO hereby accepts the engagement and, in that connection, to the extent requested by the Company, permissible under applicable law and appropriate under the circumstances, agrees to assist the Company in the following:

(a) Review and analysis of the business, financial condition and prospects of the Company;
(b) Preparation and implementation of a marketing plan;
(c) Solicitation of, and the review of proposals received from, prospective Investors
(d) Review, from a financial point of view, of proposed Financing structures and terms;
(e) Arranging for prospective Investors to conduct business investigations; and
(f) Participation in the negotiation of the Financing under your guidance.

3. In consideration of our services pursuant to this Agreement, the Company agrees to pay CF&CO the following compensation:

(a) Upon execution of this Agreement, the Company shall pay to CF&CO a non-refundable cash fee in the amount of $500,000 ("Retainer"), which fee will be credited against any fees payable pursuant to Section 3(b) below.
(b) Upon the closing of any Financing, the Company shall pay to CF&CO a non-refundable cash fee equal to 2% of the aggregate maximum gross proceeds received or receivable in connection with such Financing, including, without limitation, aggregate amounts committed by Investors to purchase securities, whether or not all securities are issued on the closing date of the Equity Financing.

…

5. During the period of CF&CO's engagement hereunder and for a period of six months thereafter, CF&CO shall have the right, but not the obligation, to act as (i) lead bookrunning manager for any financing involving equity securities of the Company with Investors (other than a Financing) and (ii) lead financial advisor to the Company in the event of any non-domestic potential acquisition, disposition or other extraordinary corporate transaction (other than a Financing) involving the Company or any of its assets, securities or businesses, whether by way of purchase or sale of securities or assets, merger, consolidation, reorganization or otherwise, in each case on terms and conditions and (iii) co-financial advisor to the Company in the event of any domestic potential acquisition, disposition or other extraordinary corporate transaction (other than a Financing) involving the Company or any of its assets, securities or businesses, whether by way of purchase or sale of securities or assets, merger, consolidation, reorganization or otherwise, in each case on terms and conditions (including receipt of internal committee approvals) customary for CF&CO for similar transactions, which terms and conditions will be embodied in one or more separate written agreements.

6. CF&CO's engagement hereunder shall continue unless and until terminated (a) at any time by CF&CO or (b) by the Company on or after the date that is nine months after the date hereof, in each case, only by written notice thereof to the other party without liability or continuing obligation on the part of the Company or CF&CO; provided, however, that CF&CO will continue to be entitled to the full amount of any compensation payable pursuant to section 3 above in the event that (i) any of the events specified therein occurs prior to the expiration of nine months after any termination of this Agreement or CF&CO's engagement hereunder or (ii) prior to the expiration of nine months after any termination of CF&CO's engagement hereunder an agreement is executed by the Company pursuant to which a Financing is subsequently consummated; and provided, further, that sections 4, 5, 6, and 8, and Annex A and the Indemnification Provisions attached hereto, shall survive any termination of CF&CO's engagement hereunder. For the avoidance of doubt, any termination of this Agreement must be made in writing in accordance with the first sentence of this paragraph, and absent any such termination in writing, CF&CO's engagement hereunder shall be deemed to be continuing.

76. The provisions in the Annex included the following:

“C. The Company represents and warrants that all information (i) made available by the Company or its Representatives to CF&CO or any prospective Investor in the Financing, (ii)

contained in any private placement memorandum for the Financing (as amended and supplemented from time to time, the "Memorandum") or (iii) contained in any filing by the Company with any governmental or regulatory agency or commission (an "Agency") with respect to the Financing will, at the time such information is provided, be, with respect to the Company, correct in all material respects and, with respect to information supplied by the Company regarding third parties, to the best of its knowledge, correct in all material respects and, will not contain any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements therein not misleading in the light of the circumstances under which such statements are made. …

…

F. The Company recognizes and confirms that, in providing our services pursuant to this Agreement, CF&CO will rely upon and assume the accuracy of all financial and other information furnished by or discussed with the Company, any Investor and their respective Representatives, or available from public sources, and CF&CO does not assume responsibility for the accuracy or completeness of any such information, the Memorandum or any other information regarding the Company, any prospective Investor, the Financing or the use of proceeds thereof. …

…

I. This Agreement does not constitute an expressed or implied commitment or undertaking on the part of CF&CO to provide any part of the Financing and does not ensure the successful arrangement or completion of the Financing or any portion thereof. Notwithstanding any oral representations or assurances previously or subsequently made by the parties, in addition to the other matters set forth herein CF&CO's willingness to arrange any private placement or other exempt offering of Company securities or otherwise effect the Financing is subject to CF&CO's ability to provide services in respect of and/or effect such Advisory Transaction without requiring to be registered with any regulatory authority in India, including without limitation, the Securities and Exchange Board of India, in accordance with applicable Indian laws. Notwithstanding anything to the contrary, the Company agrees and acknowledges that CF&CO shall not be required to and shall not provide any services or undertake any such activities pursuant to this Agreement, which would constitute "issue management" (as defined and understood under the SEBI (Merchant Bankers) Regulations, 1992), and that such services/ activities will be expressly outside the scope of CF&CO's engagement under this Agreement, including, without limitation, a Qualified

> Institutions Placement pursuant to the regulations of SEBI or any financing with an investor resident in India."

The general principles of contractual construction

77. There was no disagreement between the parties regarding the general principles of contractual construction. Both referred me to the familiar line of authority in the Supreme Court leading to *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619 and *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173. They also reminded me of some of the many judicial summaries of this law, including that of Leggatt LJ in *Minera Las Bambas Second Arbitration v Glencore Queensland Ltd* [2019] EWCA Civ 972 at [20]:

> "In short, the court's task is to ascertain the objective meaning of the relevant contractual language. This requires the court to consider the ordinary meaning of the words used, in the context of the contract as a whole and any relevant factual background. Where there are rival interpretations, the court should also consider their commercial consequences and which interpretation is more consistent with business common sense. The relative weight to be given to these various factors depends on the circumstances. As a general rule, it may be appropriate to place more emphasis on textual analysis when interpreting a detailed and professionally drafted contract such as we are concerned with in this case, and to pay more regard to context where the contract is brief, informal and drafted without skilled professional assistance. But even in the case of a detailed and professionally drafted contract, the parties may not for a variety of reasons achieve a clear and coherent text and considerations of context and commercial common sense may assume more importance".

General observations on the Engagement Letter

78. The Engagement Letter was expressly subject to English law, pursuant to clause 8. However, given that its subject-matter was the raising of capital finance in respect of an Indian public company, it was common ground that the parties must be taken to have had some familiarity with the relevant Indian statutory and regulatory provisions.

79. Each of them, in different respects, sought to suggest that specific provisions or phrases therefore could and should be compared to the same or similar phrases, as defined and used in those Indian provisions – notably, the Indian Companies Act 2013 and various SEBI regulations. This strikes me as somewhat artificial.

    i) The first sentence of clause 1 uses the phrase "private placement", which is a term of art in the Indian regulations in the sense that s. 42 of the Indian Companies Act provides that "For the purposes of this section…", the expression "private placement" has a specific defined meaning. However, "private placement" is also a term widely used in other jurisdictions and in ordinary commercial language. Its use here should not necessarily be assumed to be a nod to the Indian regulatory background, in particular s. 42.

ii) The more so because the next term used in the same sentence – "offering" – is widely used in the US, but is not used at all in the Indian provisions as a gerund, only as a verb participle. One significant instance of its use in this way is s. 42(8) of the Companies Act 2013 –where it is used in the context of a private placement, not a public offer.

iii) In the second sentence, the terms "financial advisor", "placement agent" and "arranger" are not terms of art under Indian law.

iv) In the third sentence, QIP is a term of art in India and is clearly being used here with its meaning under Indian law.

v) There are further examples elsewhere of terms being used that have an established meaning (legal or otherwise) in the US but are not familiar in India, or at least not terms of art. For example, "lead bookrunning manager" in clause 5.

vi) There are also further examples of terms being used that are used in the Indian law and regulations, but may well have been used simply because they are familiar to most financial people worldwide. For example, "private placement memorandum" in Annex clause C.

80. Furthermore, it is notable that clause 2 and (especially) Annex clause I are obviously intended to safeguard Cantor against inadvertently having assumed an obligation to act in a way that would not be acceptable under the Indian law and regulations, given that Cantor is not registered in India. I take it from this that, while Cantor had a degree of knowledge of the Indian legal and regulatory background (evidenced by the reference to QIPs in clause 1 and by the further references in Annex clause I itself), it did not regard itself (and was not regarded by YES Bank) as an expert.

81. Indeed, while the whole text of the Engagement Letter was considered, negotiated and agreed, much of the language used looks like generic, boilerplate drafting. I highlight this because, like many agreements whose text is at least partly inherited from previous contracts between different parties, it may be unrealistic to invest minute textual points with extreme significance. The reality is that, no matter how much care is taken and no matter how many lawyers have oversight, (i) mistakes are sometimes made and (ii) (less dramatically) language is not always used with perfect precision.

i) A good example of the former is clause 3(b), where both parties accepted that the express words used appear on their face to mean that Cantor is entitled to 2% of all the proceeds of any Financing – even sums that were invested by parties that are not Investors listed in Schedule I (i.e., even if they were invested by someone who had been recruited by a different advisor, e.g. Avendus or Prime). This cannot have been what was intended, and it was common ground between Mr Beltrami KC and Mr Taylor KC that clause 3(b) had to be interpreted as if it referred only to proceeds received from Investors, even though this is not what it appears to say (cf. the words "… including, without limitation, aggregate amounts committed by Investors…).

ii) There are many examples of the latter – in particular, several 'belt and braces' provisions where repetitious phrases with identical or overlapping meanings are

used. The intention is presumably to achieve completeness, emphasis and certainty, but the result may sometimes be the opposite.

82. Considering this in more detail, the problem with clause 3(b) is that it uses the phrase "including, without limitation": a stock phrase very frequently often used when drafting contracts. I infer that someone wrote it into clause 3(b) simply because it is a familiar form of words, without pausing to consider if its use was appropriate in this context. Moreover, this phrase occurs in a provision that was probably bespoke and must have been the focus of real attention, rather than the mere result of legacy drafting or a provision to which no real attention was paid.

83. In my judgment, this signals that the Engagement Letter is a contract – like many – where a formulaic, black-letter approach to textual analysis cannot be assumed to be a reliable guide to the parties' intentions.

84. In this regard, Mr Taylor KC reminded me of the dicta in *Arbuthnott v Fagan* [1996] LRLR 125 of Sir Thomas Bingham MR (at p. 138 col 2) and of Hoffmann LJ (at p. 142, col 2) to the effect that the argument against redundancy is seldom decisive and often has no weight at all, because contractual draftsmen often err on the side of repetition in order to avoid leaving any loopholes. Mr Beltrami KC suggested that this applies more in the context of settlement agreements than elsewhere, but the wealth of authority collected in Lewison, 'The Interpretation of Contracts' (7th ed, 2020) Chapter 7, section 3, demonstrates that it is a general point, especially in the commercial sphere. I note that the approach adopted in 'The Interpretation of Contracts' was recently endorsed in the Supreme Court by Lord Leggatt JSC in *Triple Point Technology Inc v PTT Public Co Ltd* [2021] UKSC 29; [2021] AC 1148, at [119].

The ordinary meaning of the words used

85. As already noted, the relevant words are "the private placement, offering or other sale of equity instruments… ("a "Financing")", and the question arising is whether "private" only qualifies "placement" or whether it also qualifies "offering" and "other sale of equity instruments…".

86. Where an adjective or determiner is followed by a series of nouns in a list, the conventional understanding is that it modifies all the nouns in that list (unless a discordant adjective or determiner breaks the pattern).

87. This is not an abstruse rule or pattern known only to specialist grammarians. It is familiar to people in general; or, as it may more appropriately be put in order to illustrate the point: to every Tom, Dick and Harry.

88. It is certainly widely observed and followed by lawyers. Both in practice and as a tribunal, I have frequently come across the formula "… negligent act or omission" and sometimes "negligent act, error or omission". I do not think it has ever occurred to me or to anyone else involved that the word "negligent" might arguably be said only to modify "act".

89. Above all, this way of using and understanding words was undoubtedly familiar to the parties to the Engagement Letter. It was deliberately used by them in the context of clause 5. This provision is concerned to give Cantor the right (but not the obligation)

to act on behalf of YES Bank in other contexts, beyond a "Financing" under the Engagement Letter. At 5(ii) it addresses the possibility of Cantor acting as lead financial advisor on "any non-domestic potential acquisition, disposition or other extraordinary corporate transaction…" Mr Beltrami KC accepted that "non-domestic" might modify "disposition" and "other extraordinary corporate transaction", just as it does "acquisition". This must be so, because it would not be possible, for regulatory reasons, for Cantor to act as lead financial advisor on a domestic disposition. As a matter of common sense, I think that "potential" must also apply to all three nouns.

90. Accordingly, as a matter of the ordinary meaning of the words, "private" in the first sentence of clause 1 modifies "offering" and "other sale of equity instruments". It follows that the defined term "Financing" only relates to private placements, private offerings and private sales. It does not extend to an FPO. This is necessarily a provisional view, because it is also necessary to consider the first sentence of clause 1 in the context of the contract as a whole and against the background of the overall context, including the factual matrix and broader considerations of business common sense. I do this under the series of headings that follow.

91. Cantor contended that the natural reading was that "private" only modified "placement", because it cannot comfortably apply to "other sale of equity instruments" in that, if written out in full, the word "private" would have to be interposed between "other" and "sale", i.e., "other private sale". I do not see why this militates against "private" applying to all three nouns. On the contrary, it illustrates why it is both more succinct and more elegant to use the word "private" only once.

92. The word "other" is necessary because the first two nouns in the group of three – "placement" and "offering" – are specific examples from within the overall category posited by the final noun "sale". This emphasises the connection between all three nouns and illustrates why it is natural for "private" to apply to all three. I recognise that, sometimes, an adjective that applies to only the second or third noun in a group of three may serve to differentiate them and thus disapply the general grammatical rule. Here, the word "other" is being used as a determiner, not as an adjective, and does not differentiate "sale" from "placement" or "offering": it does the opposite.

93. Cantor also drew attention to "… in any form, without limitation", submitting that this indicates the intended width of the provision. However, this phrase does not relate to any part of "private placement, offering or other sale". It relates to "equity instruments", i.e., it emphasises that the form of the equity instruments does not matter. This is confirmed by the text that follows.

94. Finally, Cantor submitted that if "private" modifies "offering" and "other sale" as well as "placement", then, because "private placement" is a term of art which covers both preferential issues and QIPs (but not FPOs or rights issues), "offering" and "other sale" would be redundant unless they could extend to public offerings and/or rights issues. This submission has no real weight:

   i) I consider it unrealistic to proceed on the basis that "private placement" is being treated as an Indian term of art, rather than as a phrase in general worldwide use among professional people with a financial background.

ii) I accept that, under the Indian law and regulations, "private placement" includes both a preferential issue and a QIP. I am not convinced that it is strictly accurate to say that a rights issue is not also a form of private placement under Indian law. I accept that "private placement" has a specific defined meaning for the specific purposes of s. 42 of the Indian Companies Act 2013, which does not include a rights issue. However, I am not persuaded that "private placement" may not have a wider meaning in India, when used outside the scope of that provision. In evidence, Mr Banodkar said that he thought that a rights issue was (or at least could be) a form of private placement. That is the nearest I have to any expert evidence on this point. In the absence of proper expert evidence, all I can do is observe that a rights issue is a way of offering and placing new equity, and that such new equity is not offered to the public but only to a closed (private) category of people. To describe a rights issue as a kind of private placement (or, indeed, a private offering) therefore is not obviously inaccurate, as a matter of the use of language.

iii) Even if Cantor were right on the two points above, I do not accept that YES Bank's case would mean that "offering" and "other sale" are redundant. On the contrary (and accepting for this purpose Cantor's case that a rights issue is not a "private placement"), these terms, qualified by "private", would still be useful to capture a preferential issue coupled with a rights issue. A hybrid sale of this kind would be a private offering or other sale, even if is not a "private placement" within the definition of s. 42 Companies Act 2013 (which, on Cantor's case, it would not be).

iv) In any event, the argument against redundancy is generally weak, as already noted.

95. Accordingly, none of these points affects my conclusion as to the ordinary meaning of the words.

The contractual context

Clause 1 as a whole

96. The immediate context of the phrase in question, and of the definition of "Financing", is that of clause 1 as a whole.

i) The first sentence of clause 1 defines "Financing."

ii) The second sentence stipulates what roles Cantor is to have in the context of a Financing (other than a QIP). It is to act as YES Bank's "financial advisor, placement agent and arranger" with any Investor.

iii) The third sentence deals with QIPs. But for this third sentence, a QIP would fall within the definition of "Financing" and so would be dealt with in the same way as any other Financing. The third sentence stipulates that, with a QIP, Cantor's only role is "offshore financial advisor", for which it will be paid a referral fee.

97. QIPs therefore are treated as anomalous. It is expressly acknowledged that the Financing may take the form of a QIP, but this possibility is treated as an outlier. The

parties agreed before me that the reason why QIPs are treated differently in the Engagement Letter is the regulatory background, which mandates the involvement of an Indian-registered merchant bank as lead arranger.

98. At least at first sight, this suggests that it was envisaged that every possible Financing other than a QIP would be one in which (per the second sentence) Cantor could and should act fully in all the stipulated roles of financial advisor, placement agent and arranger – not as mere offshore financial advisor. On this basis, YES Bank submitted that "Financing" therefore could not include an FPO, which (like a QIP) would require the involvement of an Indian-registered merchant bank and (therefore) a lesser role for Cantor.

99. However, Cantor pointed to clause 2, which limits Cantor's services to the extent "permissible under applicable law and appropriate under the circumstances", and to clause I of the Annex, which limits Cantor to services that it could provide "without requiring to be registered with any regulatory authority in India".

100. Thus, even if "Financing" were to extend to public offerings, this would not require Cantor to act impermissibly, because of the carve-outs in clause 2 and Annex clause I. Accordingly, YES Bank's point on the second sentence of clause 2 ultimately takes things no further.

Clause 2

101. Cantor relied on clause 2 more positively, on the basis that one of the functions given to Cantor is to review proposed financing structures. Mr Beltrami KC submitted that this meant reviewing (among other things) whether capital should be raised by an FPO, so this was something that could not have been ruled out before Cantor had even been appointed under the Engagement Letter.

102. I do not accept this as logical. I see no reason why YES Bank might not have approached Cantor on the basis that some capital-raising structures were not in play, so Cantor's review was to be conducted within a limited range that did not include an FPO.

Clause 5(i)

103. The next provision identified as potentially significant is clause 5(i). This appears to postulate that there can be a "financing" which is not a "Financing" – suggesting that the defined term "Financing" must be subject to some kind of limit.

104. Mr Beltrami KC suggested that it might refer to a financing outside India (although he acknowledged that this might be difficult in the context of a public company whose shares are listed in India) and made the point that, whatever it means, it cannot refer to an FPO in India, because Cantor would not be able to act as lead bookrunning manager. That is not a complete answer, because it butts up against Mr Beltrami KC's argument in a different context (discussed above) that Annex clause I carves out whatever service elements Cantor cannot provide for regulatory reasons. I do not regard clause 5(i) as pointing conclusively in either direction, but it sits more comfortably with YES Bank's case than with Cantor's.

Clause 6

105. Cantor also relied positively on clause 6, saying that the 9-month period that this envisaged was so long that it would allow for all manner of unpredictable developments, including those that in fact eventuated – i.e., the intervention of RBI, the support from SBI and the FPO. However, the fact that clause 6 provides that the Engagement Letter could not be terminated by YES Bank until August 2020 does not mean that Cantor was being given until then to provide services under the Engagement Letter. I do not regard clause 6 as having any bearing on the overall nature of Cantor's appointment or the meaning of "Financing".

No reference to "prospectus", only to a "private placement memorandum"

106. YES Bank relied on the fact that nowhere in the Engagement Letter is there any reference to a "prospectus" – this being the term of art used in India to describe the publication that must be issued in the context of an FPO. Instead (in particular in Annex clause C) there is reference to a "Memorandum", defined as "any private placement memorandum for the Financing." YES Bank said that an investment banking retainer such as the Engagement Letter would normally include representations, warranties and/or indemnities from the Company (here, YES Bank) as to the accuracy of the information that it would provide. YES Bank then said that the fact that, in this case, these provisions were all directed at a "Memorandum" (as defined) rather than a "prospectus" was a significant indication that the parties had in mind a private placement and did not contemplate an FPO.

107. It seems to me that the fact that "Memorandum" was defined in the way that it was, and the further fact that "prospectus" is not used, suggest no more than that the parties regarded a private placement as the most likely route to pursue. These features do not suggest that a private placement was the only kind of transaction in contemplation.

i) With or without any resort to the rule against redundancy, the first sentence of clause 1 certainly makes it possible for there to be a "Financing" that is not a private placement, but is a (private?) offering or other sale. Thus, the definition adopted for "Memorandum" is not decisive.

ii) In any event, Mr Taylor KC's submissions on this point focussed on Annex clause C (ii) but ignored limbs (i) and (iii), which allowed for information being provided otherwise than in a "Memorandum". Limb (iii), in particular, is wide enough to capture a prospectus issued for an FPO. The contractual provisions relating to such information, and the Indemnification Provisions, could (in principle) encompass such a prospectus.

Footnote 2 to Schedule I (prior to the Amendment Letter)

108. YES Bank relied on the fact that Schedule I, as attached to the Engagement Letter, included a footnote that provided for Investors to be referred either via a QIP process or a preferential allotment.

109. However, in circumstances where Schedule I was deliberately left blank to be completed later, and where it was ultimately completed (and attached to the

Amendment Letter) in a form that did not include this footnote, it would be wrong to attach any significance to the footnote.

The surrounding circumstances

110. The circumstances surrounding the Engagement Letter include, above all, the financial straits that YES Bank was in at the relevant time. I have already commented on this, noting that YES Bank's parlous circumstances were widely reported before 18 December 2019 and were in fact known to Cantor. It was clear that YES Bank needed to raise new capital; Cantor was approached because, as a US broker-dealer, it might be able to approach fresh sources of capital that YES Bank would not otherwise be able to access.

111. Cantor does not appear to have been given any specific deadline, but Mr Kaplan accepted that the situation was urgent.

112. I have also noted above my view that these circumstances made it obvious that an FPO was not a possible solution and that an FPO only became possible because Cantor's efforts to raise capital did not bear fruit prior to the intervention of RBI. It must also have been obvious to Cantor that if YES Bank's position continued to deteriorate, the Indian regulators (in particular, RBI) were likely to become involved.

113. The fact that an FPO did not appear to be a possible solution, as matters stood in mid-December 2019, must have been discernible to Cantor. This is apparent from an updated note prepared in an email of 12 December 2019 by Vikram Sithian (a Director of Investment Banking within Cantor) which said that there were 3 types of offering: a registered offering, a QIP and a preferential issue. The note commented on all three, but in relation to a registered offering – which includes an FPO – it only said, "not an option".

114. In evidence, Mr Kaplan said that his recollection was that in December and January Cantor was discussing every possible alternative. I found this too vague a recollection to be of any reliability. It is correct that, especially in January 2020 (i.e., after the conclusion of the Engagement Letter) there were discussions that included the possibility of a rights issue (in particular, in combination with a preferential issue) but the documentary record contains nothing to suggest that a registered/public offering was ever considered by Cantor at any time.

115. Mr Taylor KC also took Mr Kaplan to the evidence given by Mr Banodkar in paragraph 21 of his witness statement, to the effect that the disclosure requirements of an FPO risked a run on YES Bank. Mr Kaplan found it hard not to agree with Mr Banodkar's evidence on this, ultimately saying "I understand that they had a challenge in that way". The challenge he was referring to had something of Catch-22 about it: an FPO could only safely be launched if YES Bank could first strengthen its financial position for the purpose of disclosures, but strengthening the financial position could only be achieved by first attracting additional capital providers.

116. It is important to add that a rights issue also requires the advance disclosure of financial details. However, if the rights issue is pursued in combination with a preferential issue, the company can simultaneously (i) publish financial details and (ii) broadcast the fact that it has already attracted the necessary capital (or commitments of capital) from new

investors. As Mr Banodkar put it in evidence, in that situation you highlight the problem, but also reveal that you have already found the solution.

117. The circumstances known to both YES Bank and Cantor on 18 December 2019 therefore made it obvious that an FPO was not a possible route, but a preferential issue (or QIP) might be. It is not clear that the parties actually had in their minds at the time the possibility of a preferential issue in combination with a rights issue, but I do not consider that they could have ruled it out. By contrast, they could have ruled out an FPO, and both in fact appear to have done so.

118. They cannot have had in mind using Cantor to help with a pure rights issue, not merely because this (like an FPO) would have required an Indian-registered merchant bank, but also because a rights issue must be offered to existing shareholders, i.e., not to the new Investors that Cantor was intended to introduce. The Investors to be identified in Schedule I would only be able to subscribe to a rights issue if the existing shareholders renounced their right to do so. It cannot have been the parties' intention that YES Bank should launch a rights issue, with all the publicity that this requires, positively hoping that the existing shareholders would refuse to participate.

119. When cross-examining Mr Banodkar, and in submissions, Mr Beltrami KC sought to suggest that a preferential issue also stood no real chance of success in December 2019. This was largely because the relevant Indian regulations impose pricing restrictions on a preferential issue, which made this route unrealistic unless (i) a dispensation was obtained from SEBI or (ii) (possibly) it was used in combination with a rights issue. I accept that accomplishing a successful preferential issue was bound to be very difficult for Cantor, but there can be no doubt that the Engagement Letter was intended to encompass a preferential issue: otherwise it is impossible to give any realistic meaning to the words "private placement" in clause 1 (especially with a QIP being dealt with separately).

120. In short, the surrounding circumstances make it unlikely that the parties intended Cantor to be involved in an FPO. They are more consistent with the word "private" modifying not only "placement" but also "offering" and "other sale".

Genesis and aim

121. In the context of contractual construction, the admissibility of evidence relating to the genesis and aim of the contract is generally discussed in the course of the factual matrix as a whole. In this case, it is convenient to deal with genesis and aim separately from the other surrounding circumstances because of the opening words of clause 1: "We have been advised by the Company that it contemplates one or more financing(s)…".

122. It is unusual for a contract to refer in express terms to pre-contractual communications by which one party told the other party what it wanted the contract to achieve. This gives rise to two questions:

    i) What, exactly, was Cantor told about the financing/Financing that YES Bank was contemplating, prior to the Engagement Letter?

    ii) Might any part of this be admissible as relating to genesis and/or aim, or must it be excluded as pre-contractual negotiations?

123. The same difficulty arises in relation to both questions. Whatever advice YES Bank gave Cantor about what financing(s) it contemplated, this can only have been in the course of the unrecorded exchanges between Mr Gill and Mr Jain. We do not know precisely what was said, and we do not even know precisely when it was said – for example, whether the advice referred to in clause 1 was given at the very outset of contractual negotiations or during the course of those negotiations; and whether it was given in a single message or in a series of exchanges over a period of days or even weeks.

124. In the absence of evidence from the two protagonists, the only way of gauging what was said between them, or may have been, is (i) from the evidence of Mr Kaplan and Mr Banodkar of what Mr Jain and Mr Gill (respectively) said to each of them and (ii) from the limited documentary materials available, which may shed indirect light on the advice given and received.

125. Mr Kaplan did not seem to me to have a clear recollection of what Mr Jain had conveyed to him prior to 18 December 2019, as opposed to general discussions within what was clearly a large team over the period of months that followed the signature of the Engagement Letter. He said that Cantor were trying to understand what YES Bank's needs were, and that Cantor looked at all alternatives, but general evidence of that nature does not really shed any light as to what if anything Mr Gill told Mr Jain prior to 18 December 2019. All that can be said is that the alternatives subsequently considered by Cantor do not seem to have included an FPO.

126. Mr Banodkar worked closely with Mr Gill in relation to YES Bank's capital-raising efforts and said that his own understanding in December 2019 of what YES Bank wanted was informed by what Mr Gill told him. However, while the fact that he did not recall any discussion of a public offering suggests that it is unlikely that Mr Gill told Mr Jain in positive terms that YES Bank was hoping for this outcome, it is difficult to go much further than that.

127. As regards written materials, there are really only two documents of any note.

128. One is Mr Mathur's email of 12 December 2019, indicating that a registered (i.e., public) offering was "not an option" – which I have already discussed. It is conceivable that this reflects advice given by Mr Gill to Mr Jain and passed onto Mr Mathur and other team-members; but it could equally have been a conclusion arrived at internally within Cantor, independently of anything said by Mr Gill.

129. The other is draft of the Engagement Letter dated 12 December 2019, showing comments. There are two potentially relevant comments.

    i) The first relates to clause 5 and the use in the draft text of the term "lead bookrunning manager". YES Bank commented: "Please discuss – this is a private placement." Cantor replied, "Book running titles are often given in equity offerings regardless of whether the offering is structured as an underwritten offering or a private placement on a best efforts basis."

    ii) The second relates to what became Annex clause F, which YES Bank did not like. One of Cantor's comments was: "In any private placement of public

equity, it is customary for placements to rely on representations that the Company makes to investors and on opinions that are delivered. [etc]"

130. Thus, both parties can be said to have made comments referring to the transaction as a private placement.

131. Mr Beltrami KC objected that these were statements made in the course of negotiations and so inadmissible as a matter of course; and that they were comments about the meaning of the Engagement Letter. Mr Taylor KC retorted that these comments might have been inadmissible if he had sought to deploy them in relation to the meaning of the specific provisions to which each comment related – i.e., clause 5 and Annex clause F – but that he was merely relying on them to support his case as to the genesis and aim of the Engagement Letter, both in general terms and in terms of the advice given by Mr Gill to Mr Jain as to the financing that YES Bank contemplated. Mr Beltrami KC replied that this approach did not help YES Bank on admissibility, because it meant that the comments went directly to the meaning of clause 1 of the Engagement Letter.

132. With some hesitation I have concluded that I do not get any assistance from these comments. It is not clear whether they reflect something that on each side was known to have been explained by Mr Gill at the outset, or whether they were a spontaneous expression by each party, respectively, of its own subjective view. More pragmatically, while each comment refers to the transaction as a "private placement", one thing that clause 1 undoubtedly makes clear is that the Engagement Letter extended not only to a private placement but also to a (private?) offering and any other (private?) sale. The fact that a private placement was the sole focus of attention in the comments does not, by itself, shed light on whether "offering" and "other sale" were also modified by "private".

133. Ultimately, therefore, the opening words of clause 1 and the evidence that I was taken to in this context has not contributed to my conclusion.

Business common sense

134. As is very often the case in disputes on construction, each party sought to persuade me that its construction was the only one that was consistent with business common sense.

135. As is also very often the case, I did not find that either party's submissions under this heading contributed greatly to my appreciation of the true meaning of the relevant words.

Conclusion on construction

136. In my judgment, the ordinary and natural meaning of the definition of "Financing" in clause 1 is that it comprises any private placement, any private offering and any other private sale. This provisional view is not substantially affected by considering the relevant words in the wider contractual context. It is supported by the surrounding circumstances, from which it was obvious that a public offering (including an FPO) was not viable, as matters stood in December 2019.

137. The FPO that closed in July 2020 therefore was not within the scope of the Engagement Letter. Accordingly, Cantor's claim fails in so far as brought on the basis of the express terms of the Engagement Letter.

138. Cantor has drawn my attention to the great efforts that it made on YES Bank's behalf, and to the fact that one of the main reasons why YES Bank wished to engage Cantor at all was in order to be introduced to potential investors on Cantor's roster. These efforts and those introductions were not without effect. Most pertinently, they can be said to have resulted, ultimately, in the very significant investment made by Tilden Park. Cantor suggests that the Engagement Letter cannot have been intended to mean that Cantor should get no reward for this.

139. However, the nature of a contract such as the Engagement Letter is that Cantor's right to be paid is contingent on a single result. Cantor was not being paid by the hour or by reference to the number of introductions made. The terms of the Engagement Letter specified that Cantor would only be paid for success: which, under the Engagement Letter, meant that YES Bank should have received amounts from Investors (per the list in Schedule I) in the context of a Financing (per the definition in clause 1). If this had happened, Cantor would have been entitled to the fee stipulated in clause 3(b), no matter how great or how small its efforts had been, and no matter if it had introduced many potential investors or hardly any. Indeed, it would not have mattered if an Investor listed in Schedule I had decided to invest in YES Bank independently of any efforts or introduction from Cantor – i.e. if Cantor's efforts had had no causative effect at all.

140. Cantor chose to contract on an all-or-nothing basis, presumably having made a calculated assessment of the chances of success. It is not open to Cantor now to re-open that bargain.

YES Bank's other contractual defences

141. In case it did not succeed on the issue of construction, YES Bank raised a number of other contractual defences. None of them impressed me.

142. First, it said that Cantor had to demonstrate that it provided services in respect of the relevant Financing, in order to earn its fee under clause 3(b). However, the Engagement Letter does not make the provision of services a condition precedent to the fee becoming payable, nor does it stipulate that Cantor's services must have been provided in relation to the same Financing as that which closes for the purposes of clause 3(b). In any event, Mr Ramadi's evidence that Mr Mathur introduced him to the relevant people within SBI and SBI Capital seems to me sufficient to satisfy the test proposed by YES Bank.

143. Next, YES Bank said that Cantor would only be entitled to the fee if it had been the effective cause of the investment made by the relevant Investor. This was not an express requirement of the Engagement Letter and there is no basis on which any such term could be implied. In any event, Cantor was the (or at least an) effective cause, in particular in relation to Tilden Park.

144. Next, YES Bank said that the Engagement Letter had run its effective course following the Reconstruction Scheme. This argument is inconsistent with clause 6.

145. Finally, YES Bank raised a specific objection in relation to any fee being payable in relation to the investment by the Hinduja Group, on the basis that the particular Hinduja company that made the investment was incorporated in India, and Annex clause A provided that "Investor" only meant any investor not resident in India. However, this was superseded by Schedule I, when completed in the context of the Amendment Letter, which included "Hinduja Group" and expressly stated that it included "all affiliated entities and investment funds of the parties included on this Schedule I". Therefore, the relevant Hinduja company was within the definition of "Investor".

146. I should record that YES Bank pleaded an argument that the Engagement Letter was terminated in May 2020 and this had the effect of extinguishing Cantor's rights under it. However, Mr Taylor KC confirmed in closing submissions that this argument was not pursued.

Cantor's alternative case of implied term

147. In case it failed in relation to its primary case under the Engagement Letter, Cantor pleaded an alternative case that the Engagement Letter was subject to an implied term as follows:

> "…that if one or more Investors participated in an equity financing of [YES Bank] which was structured other than as a Financing (as defined) and in which the Investor(s) would not have so invested (or alternatively would have invested a lesser amount) but for the Services rendered by [Cantor], [YES Bank] would upon the closing of such financing pay to [Cantor] a fee equal to 2% of the aggregate maximum gross proceeds received or receivable from such Investor(s) in connection with such financing…"

148. Cantor acknowledged that the law in relation to implied terms was as set out by Carr LJ in *Yoo Design Services Ltd v Iliv Realty PTE Ltd* [2021] EWCA Civ 560, at [51]:

> " 51. In summary, the relevant principles can be drawn together as follows:
>
> i) A term will not be implied unless, on an objective assessment of the terms of the contract, it is necessary to give business efficacy to the contract and/or on the basis of the obviousness test;
>
> ii) The business efficacy and the obviousness tests are alternative tests. However, it will be a rare (or unusual) case where one, but not the other, is satisfied;
>
> iii) The business efficacy test will only be satisfied if, without the term, the contract would lack commercial or practical coherence. Its application involves a value judgment;
>
> iv) The obviousness test will only be met when the implied term is so obvious that it goes without saying. It needs to be obvious

> not only that a term is to be implied, but precisely what that term (which must be capable of clear expression) is. It is vital to formulate the question to be posed by the officious bystander with the utmost care;
>
> v) A term will not be implied if it is inconsistent with an express term of the contract;
>
> vi) The implication of a term is not critically dependent on proof of an actual intention of the parties. If one is approaching the question by reference to what the parties would have agreed, one is not strictly concerned with the hypothetical answer of the actual parties, but with that of notional reasonable people in the position of the parties at the time;
>
> vii) The question is to be assessed at the time that the contract was made: it is wrong to approach the question with the benefit of hindsight in the light of the particular issue that has in fact arisen. Nor is it enough to show that, had the parties foreseen the eventuality which in fact occurred, they would have wished to make provision for it, unless it can also be shown either that there was only one contractual solution or that one of several possible solutions would without doubt have been preferred;
>
> viii) The equity of a suggested implied term is an essential but not sufficient pre-condition for inclusion. A term should not be implied into a detailed commercial contract merely because it appears fair or merely because the court considers the parties would have agreed it if it had been suggested to them. The test is one of necessity, not reasonableness. That is a stringent test."

149. The implied term contended for by Cantor is not necessary as a matter of business efficacy, nor is it obvious. As I have already observed, Cantor elected to enter into a contract which provided for it to be paid not on the basis of efforts made or even causality, but simply on the basis of the occurrence of a specified contingency. Cantor thereby took a calculated risk. The implication of the term that Cantor suggests would upset that risk.

150. The terms of clause 3(b) in my view make it clear that, if the parties had been asked on 18 December 2019 whether they intended Cantor to be paid in the circumstances that in fact eventuated (including the intervention of the RBI, the substantial investment led by the SBI and the FPO), they would have said no. That would not have been consistent with the terms of clause 3(b).

Cantor's alternative case in unjust enrichment

151. Cantor's final alternative was the contention that YES Bank has been enriched by the services provided by Cantor, specifically by the investments made by Tilden Park, Amansa and Hinduja Group. This enrichment was at Cantor's expense (being the result of Cantor's services), and is unjust.

152. Cantor acknowledged that this case faced an obvious difficulty, in that Cantor's services were provided pursuant to the Engagement Letter. This is problematic for Cantor in the light of the decisions in *Dargamo Holdings Ltd v Avonwick Holdings Ltd* [2021] EWCA Civ 1149; [2022] 1 All ER (Comm) 1244 and *Barton v Morris* [2023] UKSC 3; [2023] 2 WLR 269.

153. In *Dargamo*, Carr LJ emphasised that, while a claim in unjust enrichment can in principle be brought where the contract has failed (described by her as "failure of basis" cases), such a claim cannot succeed where this would interfere impermissibly with the contractual allocation of risk and thus override the parties' agreement: see esp. at [67], [121] to [126], [132] to [133], [137].

154. In *Barton v Morris*, Lady Rose JSC approved the analysis of Carr LJ in *Dargamo* in her analysis at [77] to [107]. Like this case, that was one where the claimant also advanced a case of implied term. Lady Rose JSC held that both cases should be rejected in the light of the contract, explaining her reasons for disagreeing with the view of the Court of Appeal below at [96] as follows:

> "96 I disagree with that analysis for reasons which mirror the reasons for rejecting the implication of a contractual term. When parties stipulate in their contract the circumstances that must occur in order to impose a legal obligation on one party to pay, they necessarily exclude any obligation to pay in the absence of those circumstances; both any obligation to pay under the contract and any obligation to pay to avoid an enrichment they have received from the counterparty from being unjust. The silence of the contract as to what obligations arise on the happening of the particular event means that no obligations arise as Lord Hoffmann made clear in Belize cited earlier. This excludes not only an implied contractual term but a claim in unjust enrichment."

155. Precisely the same reasoning applies in this case. The Engagement Letter provides for Cantor to be paid in the event of particular circumstances, as set out in clause 3(b). The parties thereby agreed that Cantor should not be paid if those circumstances did not eventuate.

156. It does not lie in Cantor's mouth to say that this allocation of risk is unjust, having agreed to it. In any event, it is not open to me, on the law as set out in *Dargamo* and *Barton v Morris*, to upset the contractual allocation of risk.

Cantor's claim for interest on the Retainer

157. Cantor also seeks an award of interest on the Retainer of $500,000, which was not paid until 8 September 2021 (after the commencement of this action). The amount claimed is US$19,253.42 until the date of issue, and a further US$1,941.66 until the date of payment – i.e. a total of US$21,195.08.

158. The claim to interest for late payment of the Retainer is formally denied, but no submissions were advanced in response to the claim and there is, in reality, no arguable defence. Cantor therefore is entitled to judgment in the sum of US$21,195.08.

Overall conclusion

159. Cantor is entitled to judgment in the sum of US$21,195.08, but its claim has otherwise failed and this minor success is not enough to make Cantor the overall winner. On the contrary, the reality is that it has lost.

160. This will be reflected in my order on costs, on which I await the parties' submissions.