



Neutral Citation Number: [2024] EWCA Civ 695

Case No: CA-2023-001097

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)
MR JUSTICE BRIGHT
[2023] EWHC 745 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/06/2024

Before:

SIR JULIAN FLAUX, CHANCELLOR OF THE HIGH COURT
LORD JUSTICE POPPLEWELL
and
LADY JUSTICE FALK

Between:

CANTOR FITZGERALD & CO

**Appellant/
Claimant**

- and -

YES BANK LIMITED

**Respondent/
Defendant**

Adrian Beltrami KC and Ravi Jackson (instructed by A&O Shearman) for the Appellant
John Taylor KC and Christopher Langley (instructed by Hogan Lovells International
LLP) for the Respondent

Hearing date: 12 June 2024

Approved Judgment

This judgment was handed down remotely at 2.00pm on Monday 24 June 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Falk:

Introduction

1. This appeal concerns the proper construction of a provision in an agreement between Cantor Fitzgerald & Co (“Cantor”), a US broker-dealer, investment bank and financial adviser based in New York, and YES Bank Limited (“YES Bank”), an Indian commercial bank based in Mumbai. More specifically, it turns on the use of a single adjective in an engagement letter, namely whether the word “private” in the phrase “private placement, offering or other sale of equity instruments” only qualifies “placement” or alternatively qualifies “offering or other sale” as well.
2. In 2019 YES Bank was experiencing severe financial problems and urgently needed additional capital. Cantor was one of several institutions engaged to assist it. Agreement was reached by an engagement letter dated 17 December 2019 (signed a day later), as amended by a further letter dated 24 February 2020 (together, the “Engagement Letter”). The Engagement Letter is considered further below but, in outline, engaged Cantor to act in connection with a “Financing”, as defined, in return for a US\$500,000 retainer and 2% of funds raised from the “Investors” listed in a schedule to the letter.
3. Shortly after the amendment was agreed, on 5 March 2020, the Reserve Bank of India (“RBI”) imposed a moratorium on YES Bank. The following day the RBI published a reconstruction scheme which provided for the State Bank of India (“SBI”) to acquire a 49% shareholding in YES Bank. A substantial capital infusion from a consortium led by SBI followed on 13 March 2020. YES Bank’s board was also replaced and the new board resolved to raise further funds by a public offer. As YES Bank was already listed in India this was achieved by a further public offer (“FPO”) which completed in July 2020. Certain investors with whom Cantor had been in discussion participated in the FPO.
4. Cantor claims that, in addition to the retainer (which was eventually paid), it is entitled to 2% of the amounts subscribed in the FPO by three investors listed in the schedule, Tilden Park, Hinduja Group and Amansa. The subscriptions totalled INR27.93 billion (equivalent to approximately US\$373.4 million), out of around INR150 billion raised by the FPO. YES Bank maintains that the FPO did not fall within the concept of a “Financing” because the use of the word “private” qualified all forms of financing covered by the engagement, so that Cantor’s entitlement was limited to its retainer. The judge, Mr Justice Bright, agreed.

Capital raising in India and Cantor’s role in outline

5. As the judge explained, Indian public companies such as YES Bank may raise equity capital in a variety of ways (or by a combination of means), subject to regulation by the Securities and Exchange Board of India (“SEBI”).
6. A company coming to the public market for the first time would use an initial public offer (“IPO”) rather than the FPO ultimately used by YES Bank. In an IPO or FPO the opportunity to participate is made generally available, including to retail investors.

7. Forms of private placement are also possible in India. The judge referred to two types, the first being a qualified institutions placement (“QIP”), in which shares are offered to qualified institutional buyers (“QIBs”). QIBs are institutional investors who fall into defined categories under the relevant SEBI regulations. The second type is a “preferential issue”, in which the opportunity to invest can be offered to investors who are not QIBs but the maximum number of non-QIB offerees is limited to 200.
8. Indian companies can also undertake rights issues, where the opportunity to invest is offered to existing shareholders. On a rights issue by a listed company new investors will become involved only to the extent that existing shareholders do not take up their rights or if the new investors buy shares in the market before the record date when the option to exercise the rights accrues.
9. Unsurprisingly, public offers are the most heavily regulated, and require among other things the advance publication of a prospectus and various disclosures. As the judge found (judgment at [12]), this could be “particularly troublesome” for a bank in financial difficulties, in an extreme case potentially resulting in a run on the bank before new capital could be secured. While a QIP and a rights issue would also require mandatory disclosure, it would be less demanding than a prospectus and, for a QIP, would not require the same advance publication: judgment at [13].
10. Relevantly for Cantor, each of a public offer, rights issue and QIP required the involvement of a SEBI-registered merchant bank, which Cantor is not. However, it would be able to assist as an offshore adviser. The judge found at [16] that, as an experienced and well-regarded New York finance house, Cantor was able to offer expertise and the benefit of its relationships with potential investors, particularly those based in the United States and elsewhere outside India and Europe (where YES Bank had other advisers in place).
11. The judge also found that it was typical to agree a list of investors for the relevant adviser to target, those investors then being “ring-fenced” for that adviser. That was the purpose of the schedule to the Engagement Letter in this case, although as it happens the schedule was initially left blank and a completed version was only included in the amended version of the letter (judgment at [17], [30] and [35]).

The Engagement Letter

12. The material parts of the original version of the Engagement Letter provide as follows (the “Company” being YES Bank and “CF&CO” being Cantor):

“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.

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.

...
[Note: it is common ground that the 2% fee applied only to funds raised from Investors as defined, rather than to all funds raised.]

...

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&C'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."

13. Clause 7 provides for the incorporation of Annex A, together with further indemnification provisions. Clause 8 provides for the agreement to be governed by English law.

14. The most significant provisions of Annex A are as follows:

"A. ...For purposes of this Agreement, "Investor" means any investor that is not a person resident in India, in terms of applicable Indian foreign investment related laws, as set forth on Schedule I hereto.

...

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. The Company further represents and warrants that any projections or other information provided by the Company or its Representatives to CF&CO, any prospective Investor in the Financing or any Agency with respect to the Financing, or contained in any Memorandum, will have been prepared in good faith and will be based upon assumptions which, in light of the circumstances under which they are made, are reasonable (it being understood that projections by their nature are inherently uncertain and no assurances are being given that the results reflected in the projections will be achieved and that actual results may differ from such projections and such differences may be material).

...

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."

15. The placeholder page for Schedule I in the original letter included the following footnote as footnote 2:

"Schedule I includes potential referrals to be made by CF&CO in connection with a QIP process; in the event a preferential allotment is pursued, CF&CO may revise Schedule I at such time in order to reflect the more limited scope of permitted outreach."

This footnote was not reproduced in the completed version of Schedule I included in the amendment letter.

16. The amendment letter followed the appointment of a SEBI-registered merchant bank, Ambit Pvt Ltd ("Ambit"). It reduced Cantor's fee to 1.95% to the extent that the

reduction was paid to Ambit and, as already mentioned, included the missing list of Investors. It expressly stated that the original Engagement Letter remained “in full force and effect” except as “specifically amended hereby”. Neither party suggested that the enforceability of the original engagement letter was affected by the absence of a list of investors.

The judge’s decision

17. The judge outlined YES Bank’s acute financial problems, which emerged during 2019 when it became apparent that bad loans had been significantly under-reported. The RBI forced out the existing CEO and replaced him with Mr Ravneet Gill in March 2019. A QIP followed but the amount raised was “nothing like sufficient” and the share price tumbled amidst public speculation as to the bank’s viability. The judge found at [21] that it was “obvious to all onlookers that YES Bank’s lack of capital funding was an existential crisis”.

18. The judge explained that, having already appointed two other advisers, Mr Gill contacted Mr Anshu Jain, the President of Cantor, whom he knew from a previous employment. Their initial conversations were not recorded in any form and neither gave evidence, Mr Jain having unfortunately died and Mr Gill having been replaced when the RBI intervened in YES Bank. The judge referred to the limited documentary evidence that was available at [25] to [27]. As to the explanation for the involvement of Ambit, the judge referred at [32] to an internal Cantor email which noted a suggestion by Mr Jain of engaging a local merchant bank:

“...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.”

19. The judge found that Cantor devoted significant time and effort to attract investors. This led to non-binding offers by Tilden Park and Amansa on 2 and 3 March 2020 respectively, although these were subject to significant conditions. The RBI intervened shortly thereafter, followed by the SBI-led investment and the FPO to which I have already referred.

20. The judge found at [47] 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.”

The judge then referred to witness evidence before repeating at [49] that it was obvious that YES Bank had been facing an existential crisis and that it was “no less obvious that a bank in that position cannot safely launch a public offering”.

21. After referring to Cantor’s lack of involvement in the FPO, the emergence of the dispute between the parties and the available witness evidence, and setting out relevant terms of the Engagement Letter, the judge reminded himself of the general principles of contractual construction and then turned to consider the interpretation of the

Engagement Letter, starting with some general observations. He noted that it was common ground that the parties must be taken to have had some familiarity with the relevant Indian regulatory regime, but at [79] (and again at [94]) rejected the argument that “private placement” had the meaning given to it in a provision of Indian companies legislation, s.42 of the Companies Act 2013, whereas “QIP” was used as a term of art under Indian law. He considered that much of the language used in the letter looked like “generic, boilerplate drafting”, at least partly inherited from previous contracts, concluding 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” and reminding himself that an argument against redundancy is “seldom decisive and often has no weight at all” ([83] and [84]).

22. In considering the ordinary meaning of the words used, the judge referred to a “conventional understanding” that where an adjective or determiner is followed by a list of nouns, it modifies all of them unless a discordant adjective or determiner breaks the pattern (at [86]). He noted that this approach was deliberately used in clause 5, with its contrast between “non-domestic potential acquisition, disposition or other extraordinary corporate transaction” and “domestic potential acquisition, disposition or other extraordinary corporate transaction”. On its ordinary meaning, therefore, in the definition of Financing in the first sentence of clause 1, “private” modified “offering” and “other sale of equity instruments” as well as “placement”. This was a provisional view, subject to considering the context and factual matrix ([90]). The judge also considered and rejected various arguments Cantor raised about the language used, including an argument that unless “offering” and “other sale” extended to public offers and/or rights issues those words would be redundant. In the course of his discussion the judge observed at [94] that it was “not obviously inaccurate” to describe a rights issue as a kind of private placement, but if Cantor was right that it was not then “offering” and “other sale” could still cover a preferential issue coupled with a rights issue.
23. Turning to the contractual context, the judge rejected YES Bank’s argument that the specific provision for QIPs in the third sentence of clause 1 assisted its case because an FPO would require the involvement of a SEBI-registered merchant bank, just like a QIP, on the basis that Cantor’s services were in any event limited under clause 2 to those “permissible under applicable law” ([97]-[100]). However, he found that clause 5(i) “sits more comfortably” with YES Bank’s case and rejected Cantor’s argument that the 9-month period before YES Bank could terminate under clause 6 was so long as to allow for unpredictable developments ([104] and [105]).
24. The judge also rejected a further argument for YES Bank that the concept of “Memorandum”, used in paragraph C of Annex A, and the absence of any reference to a prospectus, assisted its case, on the basis that it indicated only that a private placement was the most likely route ([107]). He also held at [109] that no significance should be attached to the footnote set out at [15.] above because it was not included in the completed version of Schedule I.
25. As to the surrounding circumstances, the judge found at [110]-[120] that they made it unlikely that the parties intended Cantor to be involved in an FPO. He reiterated that Cantor was approached for its potential access to fresh sources of capital and that the “situation was urgent”. An FPO was obviously not possible, only becoming possible after the RBI intervened. The fact that an FPO did not appear possible “must have been discernible to Cantor”, Cantor’s contrary evidence being too vague to be reliable.

However, a preferential issue or a QIP might have been possible, potentially in combination with a rights issue.

26. The judge then considered the genesis and aim of the agreement, noting the unusual reference at the start of clause 1 to Cantor having been advised that YES Bank “contemplates” one or more financing(s) and the lack of direct evidence of the initial communications. The judge felt unable to go beyond a finding at [125] that the alternatives considered by Cantor did not seem to have included an FPO, concluding that he was not assisted by an internal Cantor email dated 12 December 2019 stating that a public offer was “not an option”, or by comments made on a draft of the Engagement Letter as it was being negotiated.
27. In conclusion, the judge’s provisional view as to the ordinary meaning of the definition of Financing was not substantially affected by the contractual context but was supported by the surrounding circumstances, from which it was obvious that as at December 2019 a public offer was not viable ([136]). The FPO that closed in July 2020 was therefore not within the scope of the definition. It made no difference that Cantor had made great efforts which in fact contributed to the Tilden Park investment, because the right to be paid was contingent on a single result.
28. Finally, the judge dealt with other issues that (one point aside) are not the subject of this appeal. These included an alternative case put forward by Cantor that there was an implied term which would entitle it to a fee, or alternatively that there was unjust enrichment.
29. The point that is potentially relevant relates to Hinduja, one of the three investors in respect of which Cantor claims a fee. The Hinduja entity which participated in the FPO was Indian based, and YES Bank relied in the alternative on the exclusion of Indian resident investors in paragraph A of Annex A. The judge held at [145] that this argument failed because the words relied on were superseded by the completed Schedule I, which covered the “Hinduja Group” worldwide.

The grounds of appeal and Respondent’s Notice

30. There are two grounds of appeal, which can be summarised as follows:

Ground 1: The judge erred in holding that the Engagement Letter was limited to private forms of financing. Rather, he should have held that the ordinary meaning of the words used in the definition of Financing covered all forms of equity financing. The judge also erred in concluding that the wider contractual context did not substantially affect the construction and in concluding that the surrounding circumstances made it unlikely that the parties intended Cantor to be involved in an FPO, wrongly taking account of subjective views and focusing on an FPO’s lack of viability in December 2019 rather than later.

Ground 2: The judge erred in holding that the FPO that closed in July 2020 did not fall within the scope of the Engagement Letter.

Ground 2 obviously follows from ground 1 so it is unnecessary to address it separately.

31. By its Respondent's Notice, YES Bank puts forward a number of additional reasons for upholding the judge's decision. In particular, YES Bank says that the judge should have made findings about the genesis and aim of the Engagement Letter, being to raise urgent private finance and thereby avoid RBI intervention. It relies on various items of documentary and witness evidence to support the additional findings of fact that it maintains that the judge should have made. It also relies on the reference to what YES Bank "contemplates" in the first line of clause 1.
32. The Respondent's Notice also repeats some other arguments rejected by the judge, namely the relevance of the references to QIPs in clause 1, the absence of any reference to a prospectus in paragraph C of Annex A and the footnote set out at [15.] above, and challenges the judge's conclusion that the completed Schedule I included the entire Hinduja Group.

The principles to apply

33. There was no dispute about the principles to apply in construing the Engagement Letter. It was uncontroversial that the court is required to consider the ordinary meaning of the words used in the context of the contract as a whole and the relevant factual and commercial background, which will exclude prior negotiations. The objective is to identify the intention of the parties, but in an objective sense, namely what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean. Interpretation is an iterative process in which rival interpretations should be tested against the provisions of the contract and its commercial consequences.
34. It is however worth reiterating the first of the points emphasised by Lord Neuberger in *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619:

"17. First, the reliance placed in some cases on commercial common sense and surrounding circumstances...should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision."

The ordinary meaning of the words

35. The use of the word "private" in the definition of Financing in clause 1 is of undoubted significance. Cantor's argument is, in effect, that all forms of equity financing are covered by the definition. But if that was the intention then it could have been achieved much more straightforwardly. The most obvious way to do this would be by a simple reference to "any sale of equity instruments", either without more or followed by an inclusive list. It is not irrelevant that precisely that approach is used in the same sentence to refer to different types of equity instrument.

36. Instead, the parties chose to commence the description of the kinds of equity fundraising covered by the engagement with the word “private”. While I would agree with Mr Beltrami KC, for Cantor, that there is no firm grammatical rule to the effect that an adjective or determiner at the start of a list of nouns qualifies them all, the nature of the list may well indicate that it does. At the least, unless something in the content of the list or another adjective or determiner within the list suggests otherwise, the reader will naturally tend to assume that an adjective or determiner at the start of a list qualifies the entirety of it. This is not a point of law for which any authority is required (although Mr Taylor KC, for YES Bank, sought to rely on a discussion in a decision of the Supreme Court of Maine, *Ryder v USAA General Indemnity Co* 938 AR, 2d 4 (2007 ME 146)). It is an aspect of the ordinary meaning of the words used, which includes their placement within a phrase or sentence.
37. Given that natural assumption, it is notable that the parties did nothing to counter it, whether by omitting the word “private”, including the word “public”, changing the order of the list or otherwise. In contrast, they did go to the trouble of making clear in the same sentence both that all kinds of equity instrument were covered and that the arrangement would cover both a single and a series of financings. They did this with the reference to “equity instruments in any form, including without limitation...”, and with the references to “one or more financing(s)” and (later on in the sentence) “in one or a series of transactions”. The breadth of those references does not assist Cantor as Mr Beltrami suggested, rather the reverse.
38. Cantor relies on the concept of “private placement” being a term of art, either under Indian law or more broadly. As far as Indian law is concerned, as the judge found “private placement” is defined in s.42 of the Companies Act 2013. However, I agree with the judge that there is no indication that the words were being used in that sense rather than (as the judge also found at [94]) their more generally understood use internationally. In contrast, in the same clause of the Engagement Letter the concept of “Qualified Institutional Placement” is clearly used in an Indian legal sense, as emphasised by the capitalisation of those words.
39. Cantor’s argument by reference to Indian law also breaks down when the list in clause 1 is compared to the three types of equity issuance available under Indian law, under s.23 of the 2013 Act. Section 23(1) refers to issues of securities (a) to the public, (b) by a private placement, or (c) by a rights (or bonus) issue. Even if the reference to “offering” in the list could be compared to an offer to the public under s.23(1)(a), the reference to “other sale” does not readily equate to a rights issue.
40. As the judge found, the concept of “private placement” is understood by those with a relevant financial background well beyond the confines of Indian law. But the fact that “private” therefore naturally couples with “placement” does not prevent it also being applied to “offering” and “other sale” if that is what the natural meaning indicates, which I consider that it does. As the judge found, it can perfectly naturally be applied to both of those concepts.
41. The most significant counter to this is that no clear answer was provided to what would be covered by “private offering” or “other private sale” that is not also covered by “private placement”. Mr Taylor relied principally on the weakness of arguments against redundancy (see for example *Triple Point Technology Inc v PTT Public Co Ltd* [2021] UKSC 29, [2021] AC 1148 at [119], per Lord Leggatt). The judge also suggested that

the additional words might be useful to cover a “hybrid” financing that included both a preferential issue and a rights issue. For myself, I very much doubt whether a rights issue by a company the shares in which are publicly traded could in any sense be described as “private”, but I can see that a lack of clarity as to the precise scope of the concept of private placement – which the judge did not attempt to define – means that the addition of further words is not surprising. Taking the judge’s hybrid as an example, the extra words might help clarify that the fact that a private fundraising could be combined with something else, such as a rights issue in which the new investors could then participate, should not mean that Cantor would be deprived of a fee for finding Investors for the private fundraising element, even if the entire transaction might not be described as a “private placement” as might generally be understood. Another example might be equity issued in exchange for the acquisition of non-cash assets, which (public takeovers aside) would also be a private transaction but might not generally be understood as a private placement, even though it might be carried out as a form of fundraising (or at least to strengthen the bank’s capital base). No doubt other examples could be found. Overall, therefore, I do not consider that the lack of clear examples is of significant weight.

42. I also agree with the judge that the use of “non-domestic” (and indeed “potential”) to qualify the entire list in clause 5(ii) is of some significance. Cantor relied on the obvious contrast with clause 5(iii) as making the intention clear in that case, but the point would apply even if clause 5(iii) was not there.

The contractual context

43. A consideration of the contractual context provides material support for YES Bank’s interpretation.
44. Starting with clause 1, the treatment of QIPs has real significance. Unlike the judge I do not consider that the express provision for QIPs is countered by the more general reference in clause 2 that confines what Cantor can do to what is permissible under applicable law. Rather, it provides a clear indication of the parties’ intention.
45. Clause 1 appoints Cantor as YES Bank’s “financial advisor, placement agent and arranger” in connection with a Financing that is not a QIP. For a QIP Cantor “shall not be engaged to act as a placement agent or arranger in connection with such transaction, but rather an offshore financial advisor”. Further, in such a case Cantor provides referrals and what is payable is described as a “referral fee”. The same distinction between the roles is repeated in the first paragraph of the amendment letter.
46. The specific provision for QIPs reflects the fact that a QIP required the involvement of a SEBI-registered merchant bank and Cantor’s role was necessarily limited to an advisory one (see [10.] above). But exactly the same restriction applied to both a public offer and a rights issue. Clause 1 does not cater for this. That is a strong indicator which cannot be explained by a suggestion that the parties may simply have had QIPs at the forefront of their minds. Contractual interpretation is an objective exercise in which the words used are the primary indicators of meaning. Not only is Cantor’s engagement differently described for a QIP but so is the all-important fee arrangement. In contrast, if Cantor’s interpretation was correct then both a public offer and rights issue would have Cantor acting as “placement agent and arranger”, despite its inability to do so, and

the fee arrangement would be governed by clause 3(b) rather than by the specific provision for a referral fee that the parties saw fit to include in clause 1.

47. Clause 5 also assists YES Bank in a way that is separate from the grammatical point to which I have already referred. Clause 5(i) explicitly contemplates that there could be some form of equity financing that is not a “Financing”. It confers on Cantor the right to act as “lead bookrunning manager for any financing involving equity securities of the Company with Investors (other than a Financing)”. The judge found at [79(v)] that “lead bookrunning manager” was not an Indian term of art but did not otherwise explain it. It is therefore unclear precisely how Cantor might have been able to perform such a role on a public offer in circumstances where it did not have a SEBI registration, but the key point is that clause 5(i) does contemplate a form of equity financing that does not fall within the defined term “Financing”. That is directly contrary to Cantor’s interpretation. It is also difficult to seek to explain clause 5 away as not having any commercial significance (even if that were a reason not to take clause 5 into account, which I doubt). It appears to confer a substantive right on Cantor to take on an additional role if it so chooses.
48. Turning to Annex A, again in respectful disagreement with the judge I would put some weight on the absence of any reference to a prospectus in paragraph C, in contrast to the express inclusion of “any private placement memorandum” via the defined term “Memorandum”. While the other provisions of paragraph C are broad enough to capture a prospectus, the absence of any mention of a highly significant document in the context of a public offer, in circumstances where private placement memoranda are singled out (even though they would also be covered by the general language of the paragraph), is notable.
49. It is also worth noting that paragraph I refers to “CF&CO’s willingness to arrange any private placement or other exempt offering of Company securities or otherwise effect the Financing”. “Exempt offering” is not defined (and the language may have been used in a sense better understood in the United States) but it naturally suggests an offer that is not subject to the full panoply of regulation, which must mean something other than a public offer such as an FPO. Although this is followed by “or otherwise effect”, those words most naturally relate back to the reference to “arrange” rather than expanding the types of financing referred to.
50. Finally, and unlike the judge, I find further support for YES Bank’s interpretation in the footnote set out at [15.] above. It was common ground that the meaning of Financing did not alter as a result of the amendments made in February 2020. The fact that the footnote was then deleted does not mean that no regard should be paid to it in determining what the parties should be taken to have intended.
51. The precise meaning of the footnote is rather obscure because it is debatable what the reference to “more limited scope of permitted outreach” is getting at, but the key point is that it clearly contemplates either a preferential allotment (issue) or a QIP, rather than anything else. As with the reference to QIPs in clause 1 this is relevant to the objective exercise of interpretation and cannot simply be dismissed as referring to the two types of financing that the parties may have had in the forefront of their minds at the time.
52. Cantor placed significant reliance on the length of the engagement and the period over which fees could arise under clause 6. While Cantor could terminate earlier, YES Bank

could only terminate after nine months, and thereafter Cantor's entitlement to fees would run on for another nine months insofar as Financings were implemented or agreed within that period. Against that background Cantor criticised the judge's reliance on YES Bank's position in December 2019, the fact that it could not have launched a public offer at that time and the fact that funds were needed urgently. It was wrong, Mr Beltrami submitted, to focus on what was likely or possible in December 2019, because Cantor's engagement was not limited to that period and the financial outlook over the period for which it was engaged was unknown. There was no finding that non-private forms of fundraising were not contemplated over that longer period, and the judge should have taken that into account as a reasonable possibility. The commercial bargain was for access to Cantor's client list, irrespective of the method by which a financing was achieved.

53. There is some force in these points. The judge's findings were focused on the position in December 2019 and the urgency that undoubtedly existed then, in contrast to the length of the engagement. However, the fact that the position could undoubtedly change over a nine or 18 month period is in my view insufficient to outweigh all the indicators in the terms of the contract that the parties intended to confine the concept of Financing to private, rather than public, issues.

The factual matrix

54. I have already touched on the principal aspects of the factual matrix. As the judge found, an FPO was not a realistic possibility when the contract was agreed, and YES Bank's need for funds was obvious. It is clear that Cantor was approached for its potential access to new sources of capital through its contacts.
55. All of this is consistent with YES Bank's interpretation. The focus was on non-public fundraising from new sources, specifically Cantor's client list. There is certainly nothing in the factual matrix that clearly points towards Cantor's interpretation. For example, there is nothing to indicate that it may have been in the reasonable contemplation of the parties that the route by which investors introduced by Cantor might invest was by an FPO which followed another major capitalisation which made that possible.
56. Returning to how this fits with the length of the contract, that to my mind is explicable by the fact that it clearly contemplated a series of financings. Indeed, YES Bank had already undertaken one QIP earlier in the year which had not raised enough money: see [17.] above. The relevant SEBI regulations also permit only one QIP in each six month period. It must have been contemplated that YES Bank's financial problems might well not be solved all in one go. But the language of the contract does not suggest that any form of public offer was contemplated as being in the mix of possibilities for which the parties contracted, and this is not contradicted by anything in the factual matrix.

Genesis and aim

57. It is well established that, while previous negotiations and declarations of subjective intent are inadmissible, evidence may be adduced as to the genesis and aim of a contract as an aspect of the admissible factual matrix: see *Schofield v Smith* [2022] EWCA Civ 824, [2023] 1 All ER 480 at [26] per Newey LJ, citing *Prenn v Simmonds* [1971] 3 All ER 237 at 240-241, [1971] 1 WLR 1381 at 1385, per Lord Wilberforce.

58. As I have mentioned, the judge felt unable to make material factual findings as to the “genesis and aim” of the transaction. Mr Taylor accepted that there was a high hurdle to surmount before an appellate court would interfere with a trial judge’s assessment of the evidence, but nevertheless invited additional findings of fact as to genesis and aim.
59. I would not readily be persuaded that that hurdle might be met in this case. But in any event I consider that YES Bank’s interpretation is to be preferred without any need to rely on additional factual material, much of which is either of questionable relevance or is at least arguably inadmissible, whether because it did not “cross the line” between the parties or because it relates to aspects of the negotiations or subjective intentions.
60. We heard some argument about whether the use of the word “contemplates” in the first line of clause 1 provided a means of introducing evidence of what YES Bank actually had in mind, contrary to the normal rule that evidence of subjective intentions is inadmissible. Mr Taylor submitted that it did. Mr Beltrami submitted that while it might theoretically be possible for the parties to contract out of the normal rule, the wording was insufficiently clear and was in the nature of a preamble. In my view that debate is better resolved in a case where it would make a difference to the result.

Hinduja Group

61. It follows from what I have said that it is not necessary to determine YES Bank’s fallback argument that the reference to the “Hinduja Group” in the completed schedule of Investors did not include Hinduja Leyland, the Indian company that participated in the FPO. However, if it had been necessary to decide it I would have taken the opposite view to the judge. This is because the (unchanged) definition of Investor in paragraph A of Annex A excludes Indian resident entities. The fact that the list in Schedule I is expressed to extend to affiliated entities does not outweigh this point to my mind, because that clearly has a role in covering non-Indian affiliates. The restriction to non-Indian investors is also consistent with Cantor’s explicit “offshore” role on a QIP and with the last part of paragraph I of Annex A, which refers not only to a QIP but states more generally that Cantor will not provide services or activities in respect of “any financing with an investor resident in India”.

Conclusion

62. In conclusion, I would dismiss the appeal. The judge correctly decided that the concept of “Financing” in the Engagement Letter referred to private forms of equity financing, and accordingly that the FPO carried out in July 2020 did not fall within that definition.

Lord Justice Poplewell:

63. I agree.

Sir Julian Flaux, Chancellor of the High Court:

64. I also agree.