Neutral Citation Number: [2024] EWHC 3164 (Ch)

Case No: BL-2023-001697

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)
SHORTER TRIALS SCHEME

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 9 December 2024

Before :

Andrew Twigger K.C. sitting as a Deputy Judge of the High Court

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Between :

KIGEN (UK) LIMITED	**Claimant**
- and -	
NOR CAPITAL LIMITED	**Defendant**

- -
- -

JAMIE MUIR WOOD (instructed by **Reed Smith LLP**) for the **Claimant**
JAMES KANE (instructed by **Signature Litigation LLP**) for the **Defendant**

Hearing dates: 5 November 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 9th December 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Andrew Twigger K.C. :

A. Introduction

1. This is my judgment following the trial of an action proceeding within the Shorter Trials Scheme pursuant to paragraph 2 of CPR Practice Direction 57AB.

2. The dispute concerns whether, in the events which have happened, the Defendant (**NOR Capital**) is entitled to a "*Success Fee*" of £500,000. Resolution of this issue turns on the interpretation of an engagement letter dated 10 October 2022 sent by NOR Capital to the Claimant (**Kigen**). I understand that the letter was countersigned by Kigen on 13 October 2022 and it has been referred to by the parties as the "**Agreement**". The letter enclosed three exhibits, and it is common ground that they form part of the Agreement. In particular, it is necessary to have regard to Exhibit C, which was NOR Capital's Standard Terms of Engagement (**Standard Terms**). Where I refer below to numbered clauses, they are the clauses of the Agreement found within the engagement letter itself, unless otherwise stated.

3. In addition to the dispute about whether the Success Fee is payable, the list of issues appended to the order of Edwin Johnson J dated 3 May 2024 (made following a case management conference) included a dispute about whether interest is payable on any sum awarded and, if so, at what rate and for what period. By the time of the trial, the parties were agreed that, if the minimum Success Fee is payable, simple interest would run from 29 June 2023 (the date of NOR Capital's invoice) at the rate of 4% above Barclays' base rate.

4. The order of 3 May 2024 also provided for a single witness statement to be filed by each party, with a view to cross-examination in due course. In accordance with that order, a statement from Mr Florent Roulet, the co-founder and a director of NOR Capital, was filed on 3 May 2024. Mr Vincent Korstanje, the CEO of Kigen, filed a statement in response on 5 July 2024. By the time of the trial, however, the parties had agreed that no cross-examination was necessary and that there were no issues of fact requiring the court's determination. Each party nevertheless relied on the evidence in the witness statements concerning the factual background to the Agreement.

5. Accordingly, the hearing consisted wholly of oral argument by Mr Jamie Muir Wood on behalf of Kigen and Mr James Kane on behalf of NOR Capital. I am grateful to them both for their concise and able submissions.

6. The structure of this judgment is as follows:

   i) I summarise the factual background in section B;

   ii) I set out the relevant provisions of the Agreement in section C;

   iii) I refer to the relevant law on interpretation in section D;

   iv) Mr Muir Wood's submissions on behalf of Kigen are summarised in section E;

v) Mr Kane's submissions on behalf of NOR Capital are summarised in section F;

vi) My discussion and analysis of the arguments is in section G; and

vii) I set out my conclusions in section H.

B. Factual Background

7. Kigen is a market leader in the eSIM and iSIM sphere, developing software and services that remove the need for physical SIM cards for mobile telephones and other connected devices.

8. Kigen's ultimate owner is SoftBank Group Corp (**SBG**), a Japanese investment holding company. Its immediate parent company is SVF II EU Aggregator (DE) LLC (**SVF**). Kigen was incorporated in July 2020, in order that part of the business of Arm Holdings plc (**Arm Holdings**), also owned by SBG, could be transferred to it. Arm Technology Investments 2 Limited (**Arm Limited**) is another related company, of which SBG is the ultimate owner.

9. In around early 2022 Kigen recognised that it was going to run out of money unless it received a sizeable injection of capital. That realisation led to Mr Jimi Macdonald of SBG introducing Mr Roulet of NOR Capital to Mr Korstanje of Kigen by email on 9 September 2022. NOR Capital is an investment banking firm specialising in the technology, media and telecoms sectors. It offers capital-raising and M&A advisory services to its clients, providing strategic advice to companies looking for investment or a buyout.

10. Following the introduction, Mr Roulet had separate calls with Mr Macdonald and Mr Korstanje, who both told him that Kigen would run out of cash in the coming months unless a sufficiently sizeable capital injection was made during the second quarter of 2023. Mr Roulet was told that Kigen was looking to raise around £30 to £40 million.

11. Mr Roulet says that NOR Capital knew that SBG was in "*defense mode*" at the time, meaning that it was not making many new investments and was "*very unlikely to continue providing additional financing to Kigen in the future.*" Mr Korstanje says he told Mr Roulet that SBG "*was not looking to invest any further money*" in Kigen, and that this was why NOR Capital was being asked to help.

12. Nevertheless, Mr Roulet encouraged SBG "*to consider providing additional funding to* [Kigen]*, even if that amount was relatively small*", because that would be perceived as a strong signal of confidence in Kigen's business. He says, "*we were asked to focus efforts on sourcing new investment from external investors, but not exclusively. We and Kigen therefore knew that investment from Softbank / Arm Limited was always a possibility and that our work would cover this.*" I shall adopt Mr Roulet's expression "*external investors*" to refer to potential investors with no connection to SBG or any of its direct or indirect subsidiaries; and I shall refer to the latter as "*internal investors*".

13. Mr Roulet describes the "*ultimate objective*" of NOR Capital's business as "*securing various offers for* [a client's] *business from potential investors or buyers, or both.*" He goes on to say that, "*ultimately the client decides which offer they intend to accept, or if they prefer to keep the business.*" It is something of a stretch (although I would accept not a complete misuse of language) to describe an injection of capital by an affiliated company as an "*offer*" from a "*potential investor*". It makes little sense to describe a client offered capital by an affiliate as having a choice whether to accept or to "*keep the business.*" I accept, of course, that NOR Capital's role might vary between transactions, but my firm impression from Mr Roulet's evidence is that NOR Capital's skill is in attracting external investors.

14. Later in September, Mr Roulet explained to Mr Korstanje and other members of Kigen's management team that this was "*a challenging mandate*" and that NOR Capital would need to do a significant amount of work to make Kigen attractive to investors. This would include producing transactional and investor presentation documents of sufficient quality. He said the process might take six months. I observe in passing that these comments must realistically have been referring to the process of making Kigen attractive to external investors. The process of encouraging SBG to invest would have been unlikely to involve six months' work, or the production of detailed presentation documents.

15. Both Mr Roulet and Mr Korstanje include relatively brief evidence in their statements about the negotiations between the parties and various drafts of the Agreement which passed between them. Their statements also contain evidence about their subjective intentions. Although I was invited to read the witness statements in full, Mr Muir Wood and Mr Kane both submitted that evidence about negotiations and subjective intentions is inadmissible for the purposes of interpreting the Agreement. I agree with this as a matter of law (see below). Moreover, I do not consider that I could have made any meaningful findings about such matters without hearing the witnesses cross-examined and receiving detailed submissions on the numerous written communications between the parties. I have, accordingly, ignored evidence of negotiations and subjective intentions when reaching my conclusions below, other than bearing in mind that there were negotiations about the Agreement.

16. As mentioned above, Kigen entered into the Agreement with NOR Capital on 13 October 2022.

17. There is no dispute that NOR Capital performed its obligations under the Agreement. No breach of contract is alleged. NOR Capital was able to identify two companies (according to Kigen) or three companies (according to NOR Capital) who were interested in acquiring majority stakes in Kigen, but the terms on which these companies were prepared to proceed involved SBG either investing in Kigen or taking on certain of its liabilities. SBG was unwilling to underwrite a deal in that way. NOR Capital did not succeed in finding any external investors willing to inject capital in return for a minority interest in Kigen.

18. Consequently, on 15 June 2023, Kigen obtained additional funding from SBG, in the form of an investment of USD 20 million provided by SVF and Arm Limited, in exchange for an equal allotment of new preference shares in Kigen (the **Investment**).

19. On 29 June 2023, following the Investment, NOR Capital sent an invoice for £500,000 to Kigen, being a Success Fee claimed pursuant to clause 3.1.2 of the Agreement. Kigen denied that any Success Fee was due and issued these proceedings on 21 December 2023 seeking a declaration to that effect.

C. The terms of the Agreement

20. There are some unnumbered paragraphs at the beginning of the engagement letter, opening with the following words: "*This Agreement sets forth the terms and conditions upon which* [NOR Capital] *agrees to act as a financial advisor to* [Kigen] *in the preparatory phase and then as an intermediary when transaction counterparties are sought and secured, its affiliates, successors, or assigns (together "**the Company**").*"

21. After referring to the notice of treatment as a "*Professional Client*" pursuant to the FCA Rules (Exhibit A to the Agreement), and the list of data required for prevention of money laundering purposes (Exhibit B), the letter continues, "*Save as expressly provided otherwise in this Letter, words and phrases defined in the Standard Terms of Engagement (attached at Exhibit C) shall have the same meaning in this Letter.*"

22. Clause 1 deals with the services to be provided by NOR Capital. Clause 1.1 again refers to transaction counterparties being sought. Clause 1.2 then provides:

> "*1.2 The scope of work which NOR Capital will provide under this Engagement is limited to those matters which are set out below and hereafter described as the "Services":*
>
> *1.2.1 Understand the Company and its management, specifically reviewing its customers, suppliers, intellectual property, partnerships, shareholders and staff;*
>
> *1.2.2 assess jointly with management the Company's addressable market (for the purpose of the transaction) including analysing the core competitive landscape;*
>
> *1.2.3 prepare and assist in preparing materials for relevant meetings directly related to the transaction;*
>
> *1.2.4 advise on the structure of the transaction and prepare the necessary transaction documentation in conjunction with your other professional advisors;*
>
> *1.2.5 identify, approach and arrange meetings with targeted potential investors, acquirers and other relevant parties;*
>
> *1.2.6 evaluate and provide feedback on proposals received from potential transaction counterparties, including valuation assessments;*
>
> *1.2.7 lead negotiations and provide advice and support to the Company throughout the process, in conjunction with your other professional advisors;*

1.2.8 assist the Company in co-ordinating any due diligence process conducted by potential investors, acquirers and other relevant parties (but for the avoidance of doubt, this shall not require NOR Capital to undertake or provide any such due diligence);

1.2.9 report to the relevant individual(s), specified in writing by the Company to NOR Capital in advance, on a regular basis including written updates, presentations and other communications that are agreed by us on an ad hoc basis."

23. Clause 1.3 sets out various qualifications to the scope of the Services being provided, most of which have little bearing on the issue I must decide. I note, however, that clause 1.3.6 includes the clarification that, "*We do not guarantee the suitability of any potential investors, acquirers or other relevant parties who we may introduce to you or facilitate discussions with on your behalf.*"

24. Clause 2 provides that NOR Capital is to be Kigen's sole financial advisor. It also deals with termination.

25. Clause 3 is the critical provision and needs to be read in its entirety. NOR Capital's claim is that it is entitled to a Capital Raising Success Fee pursuant to clause 3.1.2. The full clause provides:

"*3.1.1* ***Monthly Retainer Fee***

The Company will pay NOR Capital a Monthly Retainer Fee of GBP 15,000 in respect of financial advisory services on signing this letter and on the monthly anniversary thereafter.

If no transaction has taken place by 31st March 2023, the Company and NOR Capital will negotiate in good faith as to how to proceed, however, for clarity, if agreement cannot be reached, the Monthly Retainer Fee will stop.

3.1.2 ***Capital Raising Success Fee***

If a Capital Raising Transaction is completed during the period of this Agreement or within six (6) months of its termination, on the closing date of such transaction, in consideration of NOR Capital agreeing to provide the Services, the Company [i.e. Kigen] *shall pay NOR Capital a cash Success Fee calculated as follows:*

- *No charge for funding provided by Management or by the existing majority shareholder Softbank Group Corp ("**SBG**") through Softbank Vision Fund or any other SBG affiliated entity including Arm Limited or any bank financing separately arranged by Management;*
- *a Fee of 4.0% on funding provided by any other new investor up to GBP 20 million;*
- *a Fee of 3.0% on funding provided by any other new investor above GBP 20 million;*

> *Any fee payable pursuant to this clause 3.1.2 will be reduced by the Monthly Retainer Fee (payable pursuant to clause 3.1.1) down to the minimum Success Fee.*
>
> *The Success Fee will be invoiced simultaneously with the closing of the transaction. There will be a minimum Success Fee of GBP 500,000 regardless of the source of the funding.*
>
> *Assuming new investor(s) acquire existing shares of the Company, i.e. as part of a secondary transaction(s) instead of primary funding, the fee will follow the same structure as the Capital Raising Success Fee outlined above but will be payable pro-rata by the selling shareholder(s).*
>
> *3.1.3* ***Sell Side Advisory Success Fee***
>
> *If, instead of Capital Raising Transaction, a Sell Side Advisory Transaction (other than a transfer of the Company to an affiliate of SBG or a smiliar [sic] internal reorganisation) is completed during the period of this Agreement or within six (6) months of its termination, on the closing date of the Sell Side Advisory Transaction, in consideration of NOR Capital agreeing to provide the Services, the Company shall pay NOR Capital a cash Success Fee calculated on the basis of the Aggregate Transaction Value (ATV) as follows:*
>
> ■ *A Fee of 1.5% of ATV up to GBP 75 million;*
>
> ■ *plus 2.0% of the ATV between GBP 75 million and GPB 125 million;*
>
> ■ *plus 2.5% of the ATV between GBP 125 million and GPB 175 million;*
>
> ■ *plus 3.0% of the ATV above GBP 175 million.*
>
> *The Success Fee will be invoiced simultaneously with the closing of the transaction. There will be a minimum Success Fee of GBP 500,000.*"

26. It is not necessary to refer to the remaining clauses of the Agreement contained in the engagement letter. In accordance with the opening paragraphs of the Agreement, the capitalised terms in the above clauses have the meanings ascribed to them by the Standard Terms. Thus:

    i) A Capital Raising Transaction "*means a minority investment made in the Company or the acquisition of equity (new or existing) in the Company by a third party through debt, equity or other financial instruments.*"

    ii) A Sell Side Advisory Transaction "*means the sale of a majority of the shares or interests (or assets or assumption of debt) in the Company to a third party which may be part of a Capital Raising Transaction for the Company.*"

iii) Success Fee means "*the various Success Fees for each transaction, as defined in paragraph 3 of the Letter.*"

27. Mr Kane said that the references to a "*third party*" in the definitions of Capital Raising Transaction and Sell Side Advisory Transaction are references to any person who is not a party to the Agreement (in other words, not Kigen or NOR Capital), so that SBG and its other subsidiaries would be third parties. That must be Mr Muir Wood's position also, because he accepted that the provision of funding by SBG affiliated entities fell within the definition of Capital Raising Transaction, which would not be the case if such entities were regarded as third parties.

28. There is an oddity about this, however, because (as set out above) the opening words of the Agreement contemplate NOR Capital acting for Kigen and "*its affiliates*", as well as its "*successors, or assigns*", who are all collectively defined as the "*Company*." Many of the provisions of the Agreement make little sense, however, if the "*Company*" means anyone other than Kigen alone. The definition of Sell Side Advisory Transaction, for example, was surely not intended to contemplate a sale of a majority of the shares in Kigen and its affiliates. Moreover, the agreement was signed by Mr Korstanje only on behalf of Kigen, and the affiliates of Kigen cannot properly be said to be parties to the Agreement. Accordingly, I agree that "*third party*" in these definitions must mean any party other than Kigen or NOR Capital.

29. Paragraph 2 of the Standard Terms provides that, where any term of the Standard Terms conflicts with the terms of the engagement letter, the latter will prevail. It is not necessary to refer to the remaining paragraphs of the Standard Terms.

30. It is common ground that the Investment was a "*Capital Raising Transaction*" within the meaning of the above definition. It is also common ground that the funding was provided by two "*SBG affiliated entities*" within the meaning of the first bullet point of clause 3.1.2. In barest outline, therefore, the issue is whether the effect of the first bullet point in that clause is that "*no charge*" is payable (as Kigen says), or whether the effect of the penultimate paragraph of the clause is that a "*minimum Success Fee*" of £500,000 is payable (as NOR Capital says).

D. The law

31. There was no dispute between the parties as to the law concerning the interpretation of agreements, although there were some differences of emphasis. Given the extent of the common ground, I do not propose to set out all the passages from the authorities which were cited to me, many of which are well known, although I have re-read them carefully in the course of preparing this judgment. Instead, I will focus on those passages which seem to me to have a particular bearing on the issue I must decide.

32. For the essence of the court's role when interpreting an agreement, both parties relied principally on paragraphs 15 to 21 of Lord Neuberger's judgment in Arnold v Britton [2015] UKSC 36; [2015] A.C. 1619. That case concerned a lease, but his guidance about interpretation is equally applicable to other types of agreement. In paragraph 15 he said:

> "*When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "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", to quote Lord Hoffmann in* Chartbrook Ltd v Persimmon Homes Ltd *[2009] AC 1101, para 14. And it does so by focussing on the meaning of the relevant words … in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions…*"

33. Other observations by Lord Neuberger in the Arnold case which have a bearing on the matter before me include:

    i) In paragraph 18 Lord Neuberger said, "*when it comes to considering the centrally relevant words to be interpreted, I accept that the less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning.*" Mr Kane submitted that it follows from this that there are "*degrees of ambiguity*" such that business common sense and factual background become progressively less relevant as the ambiguity diminishes. In so far as this submission suggests that the level of ambiguity of a particular provision has a precisely proportional relationship to the permitted level of reliance on business common sense, I doubt this was what Lord Neuberger had in mind. As I understand the law, the clarity of the drafting, and the extent to which the application of the natural meaning makes sense commercially, are both factors to which varying weight can be given in the interpretative process. The appropriate weight to be given to each will depend on the circumstances (as explained by Lord Hodge in Wood v Capita, considered below).

    ii) In paragraphs 19, 20 and 21 of Lord Neuberger's judgment, he said that: commercial common sense is not to be invoked retrospectively; the court can only take into account facts or circumstances which existed at the time that the agreement was made, and which were known or reasonably available to both parties; and the court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed.

34. So far as commercial common sense is concerned, the parties relied on Lord Clarke's well-known judgment in Rainy Sky SA v Kookmin Bank [2011] UKSC 50; [2011] 1 W.L.R. 2900. In paragraph 21 he said, "*If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other.*" Nevertheless, as he said in paragraph 23, "*Where the parties have used unambiguous language, the court must apply it.*"

35. In Wood v Capita Insurance Services Ltd [2017] UKSC 24; [2017] A.C. 1173 Lord Hodge confirmed that the Rainy Sky and Arnold cases were saying the same thing about contractual interpretation. In paragraph 11 he pointed out that, in striking a balance between indications given by the language and the implications of the competing interpretations, the court should "*be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest*", and should "*not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms.*"

36. He returned to the latter point in paragraph 13, saying "*negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type*."

37. In paragraph 12 Lord Hodge said that interpretation is a "*unitary exercise*" which *"involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated ... once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.*"

38. He went on to observe at paragraph 13 that "*textualism and contextualism*" should each be used as tools to ascertain the objective meaning of the language of the agreement and that the extent to which each tool will assist varies according to the circumstances of the particular agreement. I understood both Mr Muir Wood and Mr Kane to contend that the Agreement "*sits on the textual end of the spectrum*" as opposed to the "*contextual*" one. I do not consider that it is of much assistance, at least in this case, to try to decide on which end of a spectrum the Agreement sits (if, indeed, a spectrum is the right analogy). In my judgment, Lord Hodge's guidance stresses the need to balance the text and the context appropriately in each individual case.

39. Mr Muir Wood emphasised that there are four categories of evidence which the court cannot take into account when interpreting an agreement. First, pre-contractual negotiations and drafts of the agreement. Second, the subjective intentions of the parties. Third, facts known to only one of the parties. Fourth, subject to certain exceptions which do not apply here, events occurring after the date of the agreement. Mr Kane did not dispute any of these propositions and they are all supported by the cases referred to above, together with Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] 1 AC 1101 in relation to pre-contractual negotiations.

40. Mr Kane particularly emphasised authorities dealing with provisions in an agreement which are (or which appear to be) inconsistent with each other. In particular:

i) The heading to Section 13 of Chapter 9 in Lewison, on the Interpretation of Contracts (8th edn.), reads: "*The court is reluctant to find that provisions of a contract are inconsistent with each other and will give effect to any reasonable construction which harmonises such clauses.*"

ii) The heading to Section 3 of Chapter 7 of the same work makes a related point to the effect that, "*In interpreting a contract, all parts of it are to be given effect where possible, and no part of it should be treated as inoperative or surplus.*"

iii) Mr Kane placed particular emphasis on Pagnan SpA v Tradax Ocean Transportation SA [1987] 3 All ER 565, in which Bingham LJ (as he then was) said, "*It is a commonplace of documentary construction that an apparently wide and absolute provision is subject to limitation, modification or qualification by other provisions. That does not make the later provisions inconsistent or repugnant.*" Later he said, "*It is not enough if one term qualifies or modifies the effect of another: to be inconsistent a term must contradict another term or be in conflict with it, such that effect cannot fairly be given to both clauses*."

41. Again, I did not understand there to be any controversy about these well-established principles. The debate concerns their application to the circumstances of this case.

E. Submissions on behalf of Kigen

42. Focussing first on the words of clause 3.1.2 by itself, Mr Muir Wood submitted that the provision in the first bullet point, that there is to be "*no charge*" for (amongst other things) funding originating from SBG affiliated entities, is unambiguous and determinative. At one point in his oral submissions, Mr Muir Wood said that "*on a logical construction, when there is such an investment* [i.e. an investment through SBG or affiliated entities]*, one simply stops there. One does not need to continue reading through the clause, because we have been told there is simply no charge.*"

43. In Mr Muir Wood's analysis, all the words appearing after the three bullet points, including the reference to the minimum Success Fee of £500,000, are introduced by the expression, "*Any fee payable pursuant to this clause…*" That expression contemplates that there are circumstances in which a Capital Raising Transaction may occur, yet no fee would be payable. That would only be the case if the first bullet point applies to the transaction and there is no minimum Success Fee. It follows, says Mr Muir Wood, that the minimum Success Fee is applicable only when some fee is payable pursuant to one, or both, of the second and third bullet points.

44. So far as the words "*regardless of the source of the funding*" are concerned, Mr Muir Wood suggested two alternatives. The first is that these words relate to the possibility that there may be multiple external investors in respect of whom a fee is to be calculated pursuant to the second and third bullet points. The words make clear that the minimum success fee is payable regardless of how many such investors there are. The second alternative is that these words reflect the definition of Capital Raising Transaction. Thus, the minimum success fee is payable regardless of whether capital

is raised by way of acquisition of, for example, new equity, or existing equity, or through debt or other financial instruments. The closing words of clause 3.1.2 support this interpretation, since they describe a different mechanism of payment where there is an acquisition by new investors of existing shares. As a last resort, Mr Muir Wood said the words "*regardless of the source of the funding*" might simply be unnecessary "*boilerplate*" and that they do not have to be given the meaning ascribed to them by Mr Kane.

45. Looking at clause 3.1.2 in the context of the Agreement as a whole, Mr Muir Wood had two further points. The first was that the expression "*Success Fee*" contemplates that there has been a "*success*". The words "*no charge*" in the first bullet point, following so soon after the words "*…a cash Success Fee calculated as follows:…*", points strongly towards there being no "*success*" in the circumstances contemplated by the first bullet point. In the absence of such "*success*", NOR Capital did not go empty handed: it received the Monthly Retainer Fee for the work it had done. Something more must be achieved to entitle NOR Capital to a substantial "*bonus*" (as Mr Muir Wood described it). A *"success*" in the relevant sense would not just be the completion of a Capital Raising Transaction, but would only occur when NOR Capital finds an external investor, and that investor invests. The introduction of capital by such an investor is, broadly speaking, what is contemplated by introductory words of the Agreement ("*…when transaction counterparties are sought and secured…*") and the "*scope of work*" detailed in clause 1.2, particularly sub-clauses 1.2.5, 1.2.7 and 1.2.8.

46. Mr Muir Wood's second point concerning the Agreement as a whole relates to clause 3.1.3. He says that, properly interpreted, this expressly excludes the minimum Success Fee of £500,000 when there is a Sell Side Advisory Transaction involving a sale of Kigen to an affiliate of SBG. He adds that wording of the exclusion relating to SBG in clause 3.1.3 must be contemplating a sale (for consideration), rather than a mere transfer of shares around the group, because there would otherwise be no need expressly to refer to such a transfer in clause 3.1.3: a Sell Side Advisory Transaction is defined as a "*sale…*". There would be an inconsistency, in Muir Wood's submission, between no fee being payable where there is such an "*internal*" sale (as he described it), but a success fee nevertheless being payable when there was a Capital Raising Transaction in which the only investors were affiliates of SBG. The parties are unlikely to have intended any difference in outcome between these two situations. Thus, clause 3.1.2 should be interpreted in a way which does not give rise to a minimum Success Fee if the only investors are affiliates of SBG.

47. Mr Muir Wood submitted that, if it is necessary to have regard to the factual background and commercial common sense, they support the conclusion that no success fee was contemplated where the only investors were SBG affiliated entities. The Agreement was entered into precisely because SBG did not want to invest further in Kigen; rather it wanted NOR Capital to try to find external investors. There would be little commercial sense in Kigen being obliged to pay the success fee in circumstances where SBG has, as Mr Muir Wood put it, had to do precisely what it said it did not want to do.

48. To illustrate what he contended was the lack of commercial sense in NOR Capital's interpretation, Mr Muir Wood suggested an example in which, perhaps because an external investor could not be found in time, SBG was forced to invest a more modest

sum to enable Kigen to continue trading for a little longer until another investor could be found. Mr Muir Wood initially proposed £10,000 but later suggested a more realistic example might be £1 million. On NOR Capital's interpretation, provided the investment took the form of a Capital Raising Transaction, the minimum success fee of £500,000 would be payable, even though that would amount to 50% of the sum invested by SBG. The example becomes more extreme if one imagines that external investors are subsequently found and there is then a further Capital Raising Transaction. This could result in NOR Capital receiving a second £500,000 minimum success fee. That seems unlikely to have been intended.

F. Submissions on behalf of NOR Capital

49. Like Mr Muir Wood, Mr Kane argued that the language of the Agreement is unambiguous (or has a "*very low degree of ambiguity*") so that the court need have little regard to commercial common sense. Moreover, the Agreement is between experienced professionals, in a commercial context, with the benefit (at least on Kigen's side) of legal advice.

50. Mr Kane submitted that there is no internal inconsistency in clause 3.1.2. It prescribes a three-stage formula for calculating the Success Fee due when a Capital Raising Transaction is completed during the relevant period. In this connection, Mr Kane stressed the opening words of clause 3.1.2, which use the term "*calculated,*" suggesting that a formula is being provided. The three stages are:

    i) **Stage 1**: the fee is calculated in accordance with the multipliers set out in the bullet points at clause 3.1.2. There is no charge for funding provided by Management or by SBG; a fee of 4.0% on funding provided by any other new investor up to £20 million; and a fee of 3.0% on funding provided by any other new investor above £20 million.

    ii) **Stage 2**: the fee calculated at Stage 1 is reduced by the total amount of the Monthly Retainer Fee already paid by Kigen to NOR Capital.

    iii) **Stage 3**: the fee calculated at Stage 2 is then adjusted so that, if less than £500,000, it is raised back up to the Minimum Success Fee of £500,000. The wording relating to the Minimum Success Fee is an example of a subsequent qualification or modification of an initial broad wording, of the kind referred to in Pagnan v Tradax.

51. Understood in this way, says Mr Kane, there is no inconsistency between the stipulation for "*no charge*" and the imposition of the "*minimum Success Fee*". Indeed, this is the only way to interpret clause 3.1.2 so as to give effect to all the words in it. If Mr Muir Wood were right that the first bullet point referring to "*no charge*" is determinative of the fee, why (Mr Kane asks) are the second and third bullet points not also determinative, such that the remainder of the clause (beginning "*Any fee payable…*") becomes entirely redundant?

52. I note, in passing, that in paragraph 11(a)(i) of the Defence Mr Kane summarised the expression "*no charge*" as involving a multiplication of the amount of any funding by "*0%*". Mr Muir Wood objected to that gloss on the words of the Agreement, but since Mr Kane did not rely on that way of putting the argument before me (either in writing or orally), I have ignored it.

53. The words "*Any fee payable…*" cannot, submitted Mr Kane, plausibly be understood as qualifying the later sentence "*There will be a Minimum Success Fee of £500,000 regardless of the source of the funding*", because that would involve re-writing the clause. The function of the words "*Any fee payable…*" is, Mr Kane says, to indicate that the deduction of Monthly Retainer Fees is not intended to result in a negative number.

54. In Mr Kane's submission, the words "*regardless of the source of the funding*" can only reasonably mean "*regardless of whether funding comes from Management, from SBG, or from any other new investor*". The words are included to make clear that a minimum Success Fee is due, even if some, or all, of the funding comes from Management or SBG.

55. In response to Mr Muir Wood, Mr Kane argues that the types of investment referred to in the definition of Capital Raising Transaction (such as "*acquisition of equity (new or existing) … through debt, equity or other financial instruments*") are not naturally referred to as "*sources*" of funding. The "*source*" is the investor. In any event, it is implausible that the parties intended the word "*source*" to be understood by reference to the definition in the Standard Terms, which would involve the reader turning up Exhibit C to the Agreement, rather than simply referring back to the wording in the bullet points appearing just above the reference to the "*source*" in clause 3.1.2. Finally, if the words "*regardless of the source of the funding*" mean what Mr Muir Wood says, they are redundant: clause 3.1.2 would work equally well without them.

56. In Mr Kane's submission, the expression "*success fee*" is merely a label for the relevant payment and does not indicate what the payment is made for. "*Success*" is not defined. The word is merely an indication that the fee is contingent upon the occurrence of a particular outcome, without in any way defining that outcome. The trigger for the liability to pay the Success Fee pursuant to clause 3.1.2 is the occurrence of a Capital Raising Transaction. It is that which is to be regarded as "*success*". Mr Kane pointed out that the structure of clause 3.1 contemplates that the "*Services*" are provided in consideration of the Success Fees as well as the Monthly Retainer Fee. It would be wrong, he said, to suggest that the Monthly Retainer Fee alone covers the cost of the Services and that the Success Fees are merely "*bonuses*".

57. So far as clause 3.1.3 is concerned, Mr Kane says that, properly interpreted, it <u>does</u> provide for a minimum Success Fee to be paid if there is a sale of Kigen to an affiliate of SBG, so there is no potential inconsistency with clause 3.1.2. He argues that the words "*transfer*" and "*internal reorganisation,*" which are expressly excepted, do not cover sales. The parties had in mind, when using those words, the type of internal reorganisation which had happened in 2020 when the business of Kigen had been "*transferred*" within the group, so that instead of being part of the business of Arm Holdings, it became the business of a subsidiary of SVF.

58. Even if he is wrong about that, Mr Kane says that there is nothing remarkable about different fees being payable in respect of different kinds of transaction. Indeed, the amount of the Success Fee in clause 3.1.3 is calculated by reference to percentages of the Aggregate Transaction Value rather than the amount of funding, so no clear comparison can be made between the two clauses. Moreover, a Capital Raising Transaction would be likely to be undertaken on the basis of, and informed by, the results of the work performed by NOR Capital, unlike a process of reorganisation which SBG is undertaking for its administrative convenience.

59. If it is appropriate to have regard to commercial common sense, Mr Kane said that it was obvious to both parties at the time the Agreement was entered into that there was a risk no external investors would be interested (or at least not on terms which were acceptable to SBG), so that funds would ultimately have to be sought from SBG, if Kigen was to avoid insolvency. If that risk transpired, Kigen would have had the benefit of a comprehensive survey of the market by NOR Capital. An understanding of what your options are, even if those options are very limited, is a valuable piece of information which, said Mr Kane, justified a fee in excess of the Monthly Retainer Fee.

60. In this context, Mr Roulet's statement included evidence about the extent to which NOR Capital's business would be sustainable if it received a sum of only £15,000 per month from its clients. Mr Muir Wood submitted that this was irrelevant to the interpretation of the agreement, because such matters were unknown to Kigen at the time. I agree, and I have ignored that evidence, although in my judgment it remained open to Mr Kane to make the broader submission that the work carried out by NOR Capital was of sufficient value to Kigen in persuading SBG to provide further funding to justify a fee in excess of the Monthly Retainer Fee.

61. Mr Kane also submitted that, even if NOR Capital found an interested external investor, it would be open to Kigen or SBG to decide not to proceed with that investor. The risk that SBG might capriciously refuse to proceed and instead make an investment itself, was a commercial justification for the imposition of a Success Fee in those circumstances. Mr Kane added that any experienced commercial party would have realised that an investment bank or firm such as NOR Capital would expect to be paid more than the Monthly Retainer Fee of £15,000 per month for its work.

62. Mr Muir Wood's example of an investment by SBG of a relatively small sum, such as £1 million, triggering a minimum Success Fee of £500,000 was, Mr Kane said, a contrived one. It was not the scenario the parties were contemplating when the Agreement was made, and was not likely to materialise, since the sum invested would not be enough to avoid the insolvency of Kigen. If such an investment by SBG were followed by a larger investment by an external investor, it was not necessarily the case that two Success Fees would be payable. That would depend on the proper application of the language of the Agreement to the structure of the particular transaction.

G. Discussion

63. For the purposes of the discussion which follows, it is convenient to insert some lettering ([A] to [E]) into clause 3.1.2 in order to identify its constituent parts, as follows:

> *3.1.2* ***Capital Raising Success Fee***
>
> **[A]** *If a Capital Raising Transaction is completed during the period of this Agreement or within six (6) months of its termination, on the closing date of such transaction, in consideration of NOR Capital agreeing to provide the Services, the Company* [i.e. Kigen] *shall pay NOR Capital a cash Success Fee calculated as follows:*
>
> - *No charge for funding provided by Management or by the existing majority shareholder Softbank Group Corp ("**SBG**") through Softbank Vision Fund or any other SBG affiliated entity including Arm Limited or any bank financing separately arranged by Management;*
> - *a Fee of 4.0% on funding provided by any other new investor up to GBP 20 million;*
> - *a Fee of 3.0% on funding provided by any other new investor above GBP 20 million;*
>
> **[B]** *Any fee payable pursuant to this clause 3.1.2 will be reduced by the Monthly Retainer Fee (payable pursuant to clause 3.1.1) down to the minimum Success Fee.*
>
> **[C]** *The Success Fee will be invoiced simultaneously with the closing of the transaction.* **[D]** *There will be a minimum Success Fee of GBP 500,000 regardless of the source of the funding.*
>
> **[E]** *Assuming new investor(s) acquire existing shares of the Company, i.e. as part of a secondary transaction(s) instead of primary funding, the fee will follow the same structure as the Capital Raising Success Fee outlined above but will be payable pro-rata by the selling shareholder(s).*

64. It is well established that if the words of an agreement are unambiguous the court must apply them, even if that results in an outcome which one of the parties might regard as uncommercial. But Mr Muir Wood and Mr Kane cannot *both* be right about the language of clause 3.1.2 being unambiguous, since they arrive at opposite outcomes. They both made cogent and eloquent submissions in support of their respective positions, which tends to demonstrate that "*there are two possible constructions*" as Lord Clarke put it in Rainy Sky.

65. In my judgment, clause 3.1.2 is, indeed, capable of being read in two ways. One cannot simply stop after the first bullet point, as Mr Muir Wood suggested at one stage. The clause was plainly intended to be read as a whole. When that is done, there is an obvious tension between the words "*no charge*" in the first bullet point and the subsequent stipulation in [D] that there "*will*" be a minimum Success Fee of £500,000, "*regardless of the source of the funding.*"

66. In order to decide how to reconcile these potentially conflicting parts of the clause, it is necessary to carry out the iterative process referred to by Lord Hodge in Wood v Capita, checking the rival interpretations against the other provisions of the Agreement and investigating the commercial consequences of those interpretations. In conformity with Lord Hodge's approach, and following the order adopted by the parties' submissions, I propose first to examine the language of clause 3.1.2 by itself, then to consider that clause within the wider setting of the Agreement, and finally to consider the factual background and the commercial implications of the rival interpretations.

Clause 3.1.2

67. Mr Kane is right that clause 3.1.2 contemplates a "*calculation*", but there is no express three-stage formula of the kind to which he referred. Although neither of the parties' submissions expressly focussed on the layout and punctuation, it is difficult to ignore the way the three bullet points follow the colon after the words "*calculated as follows*" at the end of [A]. In my judgment, the reasonable reader would be likely to understand the description of the calculation referred to in [A] as complete by the end of the bullet points, with the sentences at [B] to [E] dealing with qualifications and clarifications.

68. The sentence stipulating the minimum Success Fee of £500,000 appears at [D], after the sentence at [C] dealing with invoicing. Mr Kane is, of course, correct that an apparently wide and absolute provision can be modified or qualified by a later provision. Nevertheless, if the parties' intended there to be a minimum fee of £500,000 upon the occurrence of a Capital Raising Transaction of any kind, locating the relevant words after the description of the calculation of the fee, and after an intervening sentence dealing with invoicing, is hardly the most transparent way of expressing that intention.

69. Moreover, the language of "*no charge*" used in the first bullet point seems an unnatural choice of words if the intention was that there would, in fact, always be a charge of at least £500,000 if a Capital Raising Transaction occurred. It is possible that the intention was simply to make clear that, when calculating whether a fee greater than the minimum £500,000 was due, the percentages referred to in the second and third bullet points (4% and 3%) were not to be applied to funding provided by Management, SBG or SBG affiliated entities. But if that was the intention, there are much clearer ways of expressing it than by saying there would be "*no charge*" for such funding. The parties might, for example, have said something along the lines of the fee being whichever was the greater of either £500,000, or the result of applying the relevant percentages to the amount of any funding other than that provided by Management, SBG or SBG affiliated entities. At the very least, one would have expected the first bullet point to have made clear that a charge of £500,000 was payable come what may.

70. On the other hand, I agree with Mr Kane that effect needs to be given to the sentence providing for a minimum Success Fee of £500,000. A reasonable reader would be likely to conclude that the sentence was included for a reason.

71. When I first read the clause, it seemed to me that a possible reason for including the sentence at [D] was simply to provide a definition of the minimum Success Fee

referred to in [B]. The expression "*minimum Success Fee*" appears for the first time in [B] and the calculation envisaged by [B] can only be carried out if the reader knows that the minimum Success Fee is £500,000, which the reader is subsequently told in [D]. If [D] simply provides the definition for the purposes of [B], the figure of £500,000 would only be relevant if the deduction of the Monthly Retainer Fees resulted in a figure lower than that.

72. That was not, however, the interpretation advanced by Mr Muir Wood. Moreover, I accept it does not sit well with the rest of the sentence at [D]. For one thing, it is hard to give the words "*regardless of the source of the funding*" any content on that interpretation (and I deal with that expression further below). Furthermore, the word "*will*", in the stipulation that "*there will be a minimum Success Fee of GBP 500,000*", suggests that the minimum applies more widely than just as an amount below which the Success Fee cannot be reduced by the Monthly Retainer Fee. Mr Muir Wood accepted (as I understood him) that if external investors provided funding of less than £12.5 million, so that, even before any deduction of Monthly Retainer Fees, the application of the percentage in the second bullet point produced a figure of less than £500,000, the Success Fee would nevertheless be increased to £500,000 as a result of the wording at [D].

73. Mr Muir Wood nevertheless contends that the minimum Success Fee does not apply where the funding is provided solely by internal investors in the way contemplated by the first bullet point. His interpretation turns to a significant extent on the meaning of the phrase "*Any fee payable pursuant to this clause 3.1.2…*" at the beginning of the sentence at [B]. I was not persuaded by Mr Kane's suggestion that these words were intended to preclude the possibility of a negative number resulting from the deduction of Monthly Retainer Fees from an otherwise low value Success Fee (or zero). Even without the relevant words, I do not consider the reasonable reader would be likely to think that a negative number is permitted.

74. I agree with Mr Muir Wood that the words "*any fee*" implicitly contemplate that there might be circumstances in which no fee is payable. However, one interpretation of the phrase "*Any fee payable pursuant to this clause 3.1.2…*" is simply that the provision in [B] was intended to apply only when a Capital Raising Transaction had occurred, but not otherwise. On that reading, the circumstances in which the words "*any fee*" contemplate that no fee is payable are those in which clause 3.1.2 does not apply at all. If that is the right reading of [B], it does not assist with determining the intention behind the wording about the minimum Success Fee in [D].

75. A possible alternative reading of the phrase "*Any fee payable pursuant to this clause 3.1.2…*" in [B], in the context of the clause as a whole, is that it means "*Any fee payable pursuant to the three bullet points above…*". In other words, the parties regarded the bullet points as the operative part of the clause which determined the "*fee payable*" (which is consistent with my point about the layout of the clause above). On that analysis, if the only funding provided pursuant to a Capital Raising Transaction is internal funding of the kind contemplated by the first bullet point, there would be no fee payable for the purposes of the sentence at [B].

76. Since the sentences at [C] and [D] follow that at [B], it is possible to read both [C] and [D] as also concerned with any fee payable pursuant to the three bullet points. In other words, [B], [C] and [D] can be summarised as meaning that, if a fee is payable

pursuant to the three bullet points, (i) it will be reduced by the Monthly Retainer Fee down to the minimum Success Fee; (ii) it will be invoiced simultaneously with the closing of the transaction; and (iii) there will be a minimum Success Fee of £500,000, regardless of the source of the funding.

77. On this interpretation, if the application of the bullet points produces a positive number less than £500,000, it is subject to the stipulation that "*there will be a minimum Success Fee*" of £500,000 in [D]. But that stipulation does not apply if the application of the bullet points produces "*no charge*", as would be the case where only internal funding is provided. If there is no fee payable pursuant to the bullet points, none of sentences [B], [C] or [D] apply. That interpretation allows the words "*no charge*" to have their natural meaning, whilst still imposing a minimum fee if there is external funding of less than £12.5 million (4% of which produces a fee of £500,000).

78. Mr Kane says that this would be rewriting the clause. He is, of course, correct that it is not the court's function to "*rewrite the language which the parties have used in order to make the contract conform to business common sense,*" to adopt the words of Hoffmann LJ (as he then was) in Co-operative Wholesale Society Ltd. v National Westminster Bank plc [1995] 1 EGLR 97 (and cited by Lord Clark in Rainy Sky, paragraph 23, and by Lord Carnwath in Arnold v Britton, paragraph 110). Hoffmann LJ continued, however, "*But language is a very flexible instrument and, if it is capable of more than one construction, one chooses that which seems most likely to give effect to the commercial purpose of the agreement.*" I will come on to consider the commercial purpose of the Agreement below, but I would say at this stage that I disagree with Mr Kane that the interpretation advanced above amounts to rewriting the clause. It is no more a "*rewrite*" than Mr Kane's three-stage formula. It is merely an explanation of the way in which the clause may be read.

79. It is, of course, also necessary to address the expression "*regardless of the source of the funding*" in [D]. I disagree with Mr Kane that there is any difficulty in principle about the parties having in mind the wording of the definition of Capital Raising Transaction in the Standard Terms, which the Agreement expressly incorporates. I nevertheless agree with him that, in context, the reference to the "*source*" of the funding in [D] is not most naturally understood as a reference to new or existing equity, debt or other financial instruments. It more naturally refers to the identities of those providing the funding described in the three bullet points appearing earlier in the clause: Management, SBG, SBG affiliated entities, or other new investors.

80. In those circumstances, Mr Kane is right to say that a possible meaning of the phrase "*regardless of the source of the funding*" is that it is intended to indicate that the minimum Success Fee applies even if the funding is provided by Management, SBG or SBG affiliated entities falling within the first bullet point. If the sentence at [D] had, for example, appeared as the first bullet point and was then followed by the existing three bullet points, Mr Kane's argument would have been powerful. It is not appropriate, however, to ignore the location of the sentence at [D] within the clause, nor to ignore the prominent location of the words "*no charge*" in the first bullet point. These suggest that the parties did not intend there to be a minimum Success Fee where only internal funding was provided.

81. If the sentences at [B], [C] and [D] are understood to apply only when there is a fee payable pursuant to the three bullet points, in the way explained above, the words "*regardless of the source of the funding*" can still serve a meaningful purpose. Mr Muir Wood suggested that they apply where there are multiple external investors and a fee is to be calculated pursuant to the second and third bullet points. I agree with Mr Kane that the words appear somewhat superfluous in that scenario. It seems to me, however, that there is another scenario in which they are potentially meaningful, namely where there is a mixture of internal and external investors.

82. An example might be where SBG provides £10 million and an external investor provides £10 million. There would be a fee of £400,000 payable pursuant to the second bullet point (4% of the £10 million from the external investor). In that situation, the words "*regardless of the source of the funding*" make clear that there is to be a minimum fee of £500,000, despite some of the funding having been provided by SBG, for which there is "*no charge.*" The minimum Success Fee is payable because there is some funding from an external investor and the funding from the internal investor is ignored.

83. For completeness, I should record that I do not obtain any assistance from the sentence at [E]. I do not think it sheds any light on the meaning of the phrase "*source of the funding*" in [D] and it seems to me to be neutral as to whether a Success Fee is payable if funding comes solely from SBG affiliated entities.

84. Ultimately, when clause 3.1.2 is considered in isolation, neither Mr Kane's interpretation, nor Mr Muir Wood's, provides an entirely satisfactory explanation of the words on the page. I bear in mind Lord Hodge's observation that a provision may not be entirely coherent because it is a negotiated compromise or because the negotiators may not have been able to agree more precise terms. As Lord Hodge explained, in order to resolve the difficulty, it is necessary to look at the wider terms of the Agreement and the factual background, to which I turn next.

Clause 3.1.2 in the wider context of the Agreement

85. The word "*Success*" is not defined in the Agreement and I do not find it helpful to consider in the abstract whether the provision of funding by SBG affiliated entities is, or is not, to be regarded as a "*success*". It could be argued, for example, that securing funding from SBG affiliated entities was a "*success*" from Kigen's point of view, but that tells the reader little about whether the parties contemplated that a "*Success Fee*" might be due in those circumstances. In my judgment, there is a "*success*" where the condition which triggers the payment of the relevant fee is satisfied; but this simply begs the question as to what that condition is.

86. I do, however, consider it helpful to consider the nature of the Services which NOR Capital was engaged to provide pursuant to the Agreement. If the scope of the Services makes it possible to identify Kigen's objective in engaging NOR Capital, that may shed light on the circumstances which the parties contemplated would merit the payment of substantial fees, over and above the Monthly Retainer Fee.

87. As explained above, the opening words of the Agreement refer to NOR Capital acting as an intermediary "*when transaction counterparties are sought and secured.*" Kigen did not need NOR Capital to seek SBG affiliated entities, the identity of which must

have been known to SBG. I doubt also whether NOR Capital's assistance was required to "*secure*" funding from SBG affiliated entities, even if NOR Capital's work might, in some sense, have been helpful. Accordingly, the reasonable reader is likely to have understood "*transaction counterparties*" to be external investors.

88. Some of the nine items listed within the scope of work in paragraph 1.2 (set out above) could apply whether NOR Capital was seeking investment from internal or external investors. Clause 1.2.1, for example, refers to understanding Kigen and its management, which would be necessary when seeking investment from any source. Other items, however, could only apply to a search for external investors. Clause 1.2.5, for example, contains an obligation to "*identify, approach and arrange meetings with targeted potential investors, acquirers and other relevant parties.*" Clause 1.2.7 refers to leading negotiations and clause 1.2.8 refers to assistance with "*any due diligence process conducted by potential investors, acquirers and other relevant parties…*" Although Mr Kane sought to persuade me that it was at least possible that the parties contemplated NOR Capital arranging meetings with subsidiaries of SBG, he conceded that "*broadly speaking*" clauses 1.2.5, 1.2.7 and 1.2.8 "*envisage approaching external investors and/or acquirers.*" In my judgment, that concession was rightly made. Kigen obviously did not need help identifying subsidiaries of SBG and they would be most unlikely to need to carry out a formal due diligence process.

89. Likewise, the exclusion of liability in clause 1.3.6 relating to the suitability of "*potential investors, acquirers or other relevant parties whom we may introduce to you*" contemplates NOR Capital seeking and introducing external investors.

90. I do not regard any of these provisions as decisive, but they do all point towards NOR Capital's brief being to find one or more external investors. Whilst it is fair to say that there are many provisions in the Agreement which are neutral, in the sense that they could apply whether the objective was to find either internal or external investors, there are no provisions which relate exclusively (or even "*broadly speaking*") to encouraging SBG or its affiliated entities to provide funding. In my judgment, a reasonable reader of the Agreement as a whole would understand that the reason why Kigen engaged NOR Capital was to find, and secure, external investors. Securing funding from such investors is, therefore, the condition, satisfaction of which the reasonable reader is likely to have understood would entitle NOR Capital to a substantial fee.

91. I also consider that clause 3.1.3 strongly points towards the parties not having contemplated that NOR Capital would receive a Success Fee under clause 3.1.2 if funding ultimately came only from internal investors. I have been hesitant before deciding a dispute about the meaning of clause 3.1.3, in order to shed light on the meaning of clause 3.1.2, since there is a potential for circularity in such a process. On analysis, however, I consider that Mr Kane's rival interpretation of clause 3.1.3 is obviously unsustainable.

92. It will be recalled that Mr Kane contends that, in the phrase "*a Sell Side Advisory Transaction (other than a transfer of the Company* [i.e. Kigen] *to an affiliate of SBG or a smiliar [sic] internal reorganisation)*", the words in parenthesis do not apply to a sale of shares in Kigen to an affiliate of SBG. He says that the word "*transfer*" should take its colour from the word "*reorganisation*" and that this refers only to a change in

ownership of the shares for administrative convenience and without payment of consideration. Consequently, Mr Kane says that a Success Fee would be payable on a sale of shares in Kigen to an affiliate of SBG pursuant to clause 3.1.3, so there is no contrast with clause 3.1.2.

93. The fallacy in this submission is that a change in ownership of shares without payment of consideration would not fall within the definition of Sell Side Advisory Transaction in the first place. The clear purpose of clause 3.1.3 is that it applies if, and only if, there is a sale for consideration. The expression "*Sell Side Advisory Transaction*" contemplates that there is a "*sell side*" and the definition of the expression begins by saying that it means a "*sale…*". If there were merely a movement of shares for administrative convenience and without payment of consideration, there would be no sale. Moreover, there would be no "*Aggregate Transaction Value*" to enable calculation of the Success Fee in accordance with the clause. In my judgment, the reasonable reader would conclude that the words in parenthesis at the beginning of clause 3.1.3 were intended to exempt a sale of Kigen to an affiliate of SBG from the payment of a Success Fee, including the minimum Success Fee of £500,000 referred to at the end of the clause.

94. If the parties intended that no minimum Success Fee of £500,000 would be payable where there is a sale of a majority of the shares in Kigen to an affiliate of SBG (which would amount to a Sell Side Advisory Transaction), it seems unlikely that they can have intended that a minimum Success Fee of £500,000 would nevertheless be payable where SBG affiliated entities obtain a minority interest in Kigen in return for an investment (which would amount to a Capital Raising Transaction). Mr Kane is right that there is nothing in principle remarkable about different fees being payable in respect of different kinds of transaction, but it is impossible to discern a cogent reason for treating these two particular kinds of transaction inconsistently.

95. Of course, clause 3.1.2 is separate from clause 3.1.3, and I do not regard the latter as decisive in relation to the meaning of the former. I do, however, consider Mr Muir Wood is right to say that it strongly supports his interpretation of clause 3.1.2.

The factual background and commercial common sense

96. The summary of the background at section B above establishes that the following matters were known to the parties at the time the Agreement was entered into:

    i) Kigen was looking for an investment of £30 to £40 million;

    ii) SBG was not looking to invest further money in Kigen;

    iii) In those circumstances, SBG introduced NOR Capital to Kigen;

    iv) NOR Capital has a particular skill in attracting external investors;

    v) NOR Capital had been asked to focus its efforts on finding external investors, although not exclusively;

    vi) NOR Capital considered that making Kigen attractive to external investors was a challenging mandate, which might take six months to achieve;

vii) Mr Roulet had encouraged SBG to consider providing a small amount of further funding to Kigen and it was not out of the question that they might do so.

97. Mr Kane submitted that the parties must always have appreciated that it was possible that SBG affiliated entities would end up providing all the required funding. Whilst I agree it must have been obvious that this was a possibility, there can be no real doubt, in my judgment, that SBG introduced NOR Capital to Kigen with a view to avoiding that outcome. NOR Capital knew that SBG did not want to invest further in Kigen. The work which it was anticipated would keep NOR Capital busy for up to six months was aimed at attracting funding from external investors. NOR Capital had particular skill in such a task and that was what it was asked to focus on. Mr Roulet encouraged SBG to make a small investment to signal confidence in Kigen's business, but that is consistent with the objective of attracting external investors, and inconsistent with SBG providing all the funding.

98. I stress that I have ignored statements by Mr Roulet and Mr Korstanje as to their subjective intentions regarding the language used in the Agreement. The significance of the matters referred to in the preceding paragraph is that they identify the commercial purpose of the Agreement, as understood by both parties at the time the Agreement was entered into. I agree with Mr Muir Wood that, since the commercial purpose of the Agreement was to avoid an outcome in which SBG affiliated entities made a substantial further investment in Kigen, there would be little commercial sense in Kigen being obliged to pay a Success Fee when the outcome was precisely the one which it was the purpose of the Agreement to avoid.

99. I consider there is also some force in Mr Muir Wood's submission based on the example of SBG making an investment of £1 million to buy further time for an external investor to be found. It is impossible to say, on the evidence, whether such a scenario was likely to materialise or not, but as a matter of common sense I do not consider the example can simply be dismissed as contrived. Over a period of up to six months it seems possible that an interim injection of funding might have been required, and the wording of clause 3.1.2 has to be capable of application to every situation. If the investment took the form of a Capital Raising Transaction because, for example, preference shares were issued to SBG in return for the provision of £1 million, then, on Mr Kane's interpretation, Kigen would become liable for a Success Fee of £500,000. Accordingly, Kigen would have to pay half the amount it had just received from SBG to NOR Capital. That is most unlikely to have been the parties' intention. That outcome is even more unlikely if a further fee might be payable on a subsequent investment by an external investor, but I accept Mr Kane's point that this might depend on the facts.

100. I agree with Mr Kane that, even if it proved impossible to find external investors, NOR Capital's work would still have had some value to Kigen. But that can almost always be said when a party agrees to work on the basis of a contingency fee of some sort. The party doing the work takes the risk that they may not be paid (or not be paid at a normal commercial rate) for the work they have done, unless the relevant triggering event occurs. The issue concerns the identification of the relevant trigger. Here, the background demonstrates, for the reasons explained above, that the parties are most unlikely to have intended the Success Fee to be triggered if all the funding ended up coming solely from SBG affiliated entities.

101. Mr Kane is right to say that, if no Success Fee is payable when funding comes entirely from SBG affiliated entities, it is theoretically open to Kigen and SBG unreasonably, or capriciously, to refuse to proceed with an external investor and thereby deprive NOR Capital of its fee. I agree that is a risk which NOR Capital took, if Mr Muir Wood's interpretation is correct. Such a risk cannot, however, be said to be outside the bounds of commercial good sense. In the circumstances known to NOR Capital at the time of the Agreement, it was highly unlikely that Kigen and SBG would refuse to proceed with an external investor, unless there was a good commercial reason for that refusal.

H. Conclusion

102. For the reasons explained above, clause 3.1.2 can be read either as prescribing "*no charge*" where funding is provided entirely by SBG affiliated entities, or as imposing a minimum Success Fee of £500,000, regardless of whether the funding is provided entirely by SBG affiliated entities or anyone else.

103. There are elements of the clause tending in favour of each of these interpretations and, just considering the clause in isolation, the judgment as to which is correct is finely balanced. If pressed, I would marginally favour Kigen's interpretation, because of the prominence of the words "*no charge*" in the description of the calculation of the fee, compared with the location of the sentence at [D] dealing with the minimum Success Fee, after the bullet points and after a sentence dealing with invoicing.

104. It is, however, not necessary (or appropriate) to reach a view based on the wording of clause 3.1.2 in isolation. When the Agreement is read as a whole and placed in its factual context, the choice between the rival interpretations becomes straightforward, in my judgment. All the contextual factors point in one direction, namely in favour of Kigen's interpretation. The terms of the Agreement contemplate that NOR Capital was engaged to find and "*secure*" external investors. That is consistent with the commercial background. SBG wanted to avoid making any further investment in Kigen and it introduced NOR Capital to Kigen in order to identify external sources of funding.

105. In these circumstances, there would be little commercial sense in Kigen being obliged to pay a Success Fee when the actual outcome was precisely the one which it was the commercial purpose of the Agreement to avoid. That is consistent with the only realistic reading of clause 3.1.3, which excludes any Success Fee where there is a sale of a majority of the shares in Kigen to an affiliate of SBG. It would be illogical for a Success Fee nevertheless to be payable pursuant to clause 3.1.2 when funding is provided by SBG affiliated entities in return for a minority interest.

106. For all these reasons, I have concluded that Kigen's interpretation of clause 3.1.2 is to be preferred. As explained above, the effect of sentences [B], [C] and [D] may be summarised as meaning that, if a fee is payable pursuant to the three bullet points, (i) it will be reduced by the Monthly Retainer Fee down to the minimum Success Fee; (ii) it will be invoiced simultaneously with the closing of the transaction; and (iii) there will be a minimum Success Fee of £500,000, regardless of the source of the funding.

107. On that interpretation, it is only if a fee is payable pursuant to the three bullet points that the minimum Success Fee applies. This allows the words "*no charge*" in the first bullet point to mean what they say, rather than there always being a charge of £500,000. The words "*regardless of the source of funding*" in the sentence at [D] are included to deal with a situation in which the funding comes both from internal and external investors. That makes sense, because a scenario in which SBG (or its affiliates) provided a relatively small amount of funding alongside an external investor providing a more substantial sum was one of the outcomes which, at the time of the Agreement, NOR Capital was encouraging SBG to contemplate. A scenario in which SBG (or its affiliates) provided all the funding was not.

108. In the events which have happened, no fee is payable pursuant to the three bullet points because all the funding was provided by SBG affiliated entities. It follows that, on the true construction of the Agreement, NOR Capital is not entitled to £500,000, or any Success Fee, pursuant to clause 3.1.2.

109. In the circumstances, no interest is payable. As explained above, the parties were in any case agreed as to the calculation of interest, so no findings are required in relation to that issue.

110. I will hear submissions as to the terms of the order to be made consequential on my decision.