Neutral Citation Number: [2024] EWCA Civ 639

Case No: CA-2023-001168

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
STEPHEN HOUSEMAN KC (SITTING AS A JUDGE OF THE HIGH COURT)
[2023] EWHC 1212 (COMM)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18 June 2024

Before:
LORD JUSTICE PHILLIPS
LADY JUSTICE ANDREWS
and
LADY JUSTICE FALK

- -

Between:

YIELDPOINT STABLE VALUE FUND, LP	**Respondent/ Claimant**
- and –	
KIMURA COMMODITY TRADE FINANCE FUND LIMITED	**Appellant/ Defendant**

- -

Ben Valentin KC and **Nathan Searle** (instructed by **Hogan Lovells International LLP**) for the **Appellant/Defendant**
Fionn Pilbrow KC and **Danielle Carrington** (instructed by **Katten Muchin Rosenman UK LLP**) for the **Respondent/Claimant**

Hearing date: 25 January 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on Tuesday 18 June 2024
by circulation to the parties or their representatives by e-mail
and by release to the National Archives

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Lord Justice Phillips:

Introduction

1. On 30 March 2021 the respondent ("Yieldpoint") agreed to pay US$5m to the appellant ("Kimura") to participate in Kimura's 50% share of an existing loan facility ("the Facility") extended to Minera Tre Valles SPA ("MTV"), a mining company incorporated in Chile. Yieldpoint was to receive interest quarterly at the rate of 3-month LIBOR plus 7.5% (0.5% less than Kimura's entitlement under the Facility) and a pro-rata share of Kimura's monthly price participation entitlement under the Facility (based on the price of copper).

2. That agreement ("the MTV Participation") was made pursuant to and expressly incorporated (subject to necessary modifications) the terms of a Master Participation Agreement for Trade Transactions ("the MPA") made between Kimura and Yieldpoint on 19 February 2021. The MTV Participation was in the form of a template for an agreement made pursuant to the MPA as set out in Appendix 1 of the MPA, albeit with modifications.

3. It was common ground that the terms of the MPA anticipated and were intended to govern agreements under which Yieldpoint would be a sub-participant in Kimura's trade-finance transactions ("Participated Transactions") by way of *pari passu* participation as an economic stakeholder or co-venturer to the extent of its participation. Yieldpoint would not have recourse to Kimura, and so would expose its capital investment (as well as its rights to interest and income) to the risk of default by Kimura's counterparty in the Participated Transaction. Yieldpoint's sole remedy in the case of a default would be to enforce rights of recourse against the counterparty, rights which Kimura agreed to transfer to Yieldpoint in proportion to its participation.

4. The issue at trial, and on this appeal, was whether that position was altered by the addition in the MTV Participation (absent from the template appended to the MPA) of a "Maturity Date of the Participation" of 31 March 2022, and Special Conditions providing for Yieldpoint to give 45 days prior notice if it intended to renew its participation. Yieldpoint contended that the MTV Participation therefore, properly interpreted, was a fixed term loan from Yieldpoint to Kimura, repayable in full by Kimura on the Maturity Date regardless of any default in the meantime by MTV.

5. In the event, MTV had defaulted on its obligations under the Facility by 31 March 2022. Kimura and Anglo American Marketing Limited, the Senior Lenders, had granted MTV a forbearance in November 2021 in respect of the capital instalment due on 31 March 2022, but as at that date MTV was in default as to interest and price participation payments. It made no further capital repayment to Kimura and was declared bankrupt by the Civil Court of Santiago in February 2023.

6. On 26 July 2022 Yieldpoint commenced these proceedings claiming repayment of the principal sum of US$5m together with what it claimed to be unpaid interest and monthly price participations.

7. On 24 May 2023, following a trial under the Shorter Trials Scheme in the Commercial Court and a reserved judgment handed down on 22 May 2023, Stephen Houseman KC, sitting as a judge of the High Court ("the Judge"), ordered that judgment be entered for Yieldpoint against Kimura in the principal sum of US$5m, with interest to be determined. The Judge held in his judgment that the MTV Participation was indeed a fixed term loan and not a true sub-participation in the Facility, stating that he did so "not without some discomfort".

8. Kimura appealed that finding, contending that the Judge's interpretation was wrong. In particular, Kimura submitted, the Judge had overridden the entire contractual scheme without justification and had wrongly rejected Kimura's case (explained below) that incorporation of a "Maturity Date" was workable in the context of that scheme. Further, the Judge had wrongly relied on pre-contractual assurances, negotiations and drafts and subjective expectations when interpreting the MTV Participation.

The background

The Facility

9. The Facility was a structured loan dated 10 December 2019 (re-stated on 5 November 2020 with a term expiring on 31 December 2024) under which Kimura and a company named Anglo American Marketing Limited were the Senior Lenders, each providing US$22.5m to MTV for pre-export commodity finance. Citicorp was the Facility Agent and the Security Agent.

10. Repayments were due in tranches, the first tranche of 8.33% being payable on 31 March 2022. MTV gave security over its assets and operational output. As stated above, interest was payable quarterly at the rate of 8% above 3-month LIBOR and MTV was also obliged to make monthly payments to the Senior Lenders when the price of copper was above a specified level. The loan was fully funded.

The MPA

11. After noting that the MPA was proffered by Kimura and was based on or comprised the Bankers Association for Finance and Trade standard form at the relevant time, the Judge summarised the terms and effect of the MPA as follows:

> "14. The MPA defines Kimura as "Seller" and Yieldpoint as "Participant". It contemplates future participations being offered by Kimura and potentially accepted by Yieldpoint in accordance with template "Offer" and "Acceptance" documents in Appendix I or "such other form as [the parties] agree in writing" (clauses 3.1 & 4.1). This mechanism would then create a "Participation Agreement" - or 'PA' for short.
>
> 15. The MPA has no set duration; it is terminable on 30 calendar days' written notice by either side (clause 21). It provides for English law and exclusive court jurisdiction (clause 25).
>
> 16. The MPA contemplates two broad categories of PA: unfunded and funded. It makes detailed provision for each kind, together with

appended template forms of demand for payment under certain clauses in relation to each category of participation (Appendix II & Appendix III, respectively). The types of transactions in respect of which participation may occur - defined generically as a "Transaction" and hence becoming a "Participated Transaction" or 'PT' for short - are set out in clause 2. The MTV Facility is or was a loan for trade-related purposes within clause 2.1.12.

17. A fundamental feature of the MPA is the recourse and security regime, depending on whether a participation is funded or unfunded: clauses 5 to 9. A "Funded Participation" corresponds with a conventional sub-participation. An "Unfunded Participation" corresponds with what is conventionally known as a 'risk participation' in finance terminology.

18. Broadly speaking, the recourse and security regime contemplates that the Participant - after it has provided relevant funding - will become beneficially entitled by way of equitable assignment to the Seller's rights against its counterparty (e.g. a borrower such as MTV) under the relevant PT and may receive "pass-through" payments from the Seller in each case reflecting the proportion of its participation - defined as the "Participation Percentage". The corollary of this figure is the "Retention Share" defined as the percentage of the underlying "Credit Amount" which is "retained by the Seller at its own risk".

19. Upon receipt of any "Participation Payment" by the Seller, clauses 5.4 and 5.5 create an automatic transfer by equitable assignment to the Participant of "an undivided 100% beneficial ownership interest in the Related Recourse Rights associated with the Participation Payment". (These are defined as "Transferred Rights".) This is the only property 'sold' pursuant to a PA. The effect of such "ownership transfer" is to place such beneficial interest "beyond the reach of the Seller's creditors" in future (clause 5.6).

20. The Participant enjoys various ancillary protections which reflect its position as economic co-stakeholder or co-venturer in respect of the PT: clauses 12, 13 and 14. Broadly speaking, these clauses confer information and consultation rights with certain matters (involving material variations to the terms of the PT) requiring the consent of the Participant. Clause 18 imposes a responsibility upon the Seller to administer the PT with the same care it would in the absence of any risk participation. There are similarities with quota share reinsurance as regards the vested position of an external risk-bearer.

21. The corollary of this structure is that there is no independent obligation upon the Seller to repay any principal sum (defined as the "Participation Amount") provided by the Participant pursuant to a PA. The terms create a 'pay as may be paid' regime for both capital and income / return on investment. It is a non-recourse structure. The Participant proportionately shares in both downside (default risk) and upside (interest + revenue-sharing / price participation). The MPA

> contemplates that any PA would be a conventional pari passu sub-participation albeit with a direct proprietary cut-through to the primary obligor.
>
> 22. The MPA does not contemplate that any PA will be for a shorter fixed term than its corresponding PT. Consistent with this position, the template Offer in Appendix I ("Template Offer") makes no provision for any separate expiration or maturity date for the "Participation" as distinct from, for example, the "Validity Date" and "Latest possible Due Date" of the "Transaction". The MPA assumes that PA and PT will be coterminous at least as to end point.
>
> 23. "Participation Agreement" is defined as "the agreement between the Seller and the Participant on the terms of the Offer, Acceptance and this Agreement (together with any amendments which the Parties may agree in writing from time to time) in respect of a Participated Transaction".
>
> 24. The Template Offer states as follows: "This is an Offer, as such term is defined in the [MPA]. In this Offer, unless indicated otherwise, definitions from the [MPA] apply. All relevant terms of the [MPA] as at the date of this Offer will apply to the Participation Agreement concluded pursuant to this Offer as if those terms were set out here in full, with the necessary changes. For the avoidance of doubt: • the express terms of this Offer will override or modify any conflicting or inconsistent terms in the [MPA];…"
>
> 25. The above wording chimes with clause 1.2.5 of the MPA: "If there is a conflict between the terms of this Agreement and the terms of a Participation Agreement, then for the purposes of that Participation Agreement only, the terms of that Participation Agreement (as set out in the Offer and Acceptance or otherwise) will prevail."
>
> 26. In so far as clause 1.2.5 is itself inconsistent with the express terms of the Offer quoted above, the latter prevail. Come what may, it is clear that any "inconsistent or conflicting" terms of the MPA are overridden or modified by the express terms of the Offer. Modification is different from overriding. It embraces "necessary changes" to the terms of the MPA.
>
> 27. The MPA contains an entire agreement clause in familiar terms which is said to cover both the MPA and any PA (clause 22.3). There is an element of overkill at play in this context given that any PA would - unless it somehow said otherwise - incorporate clause 22.3 of the MPA with necessary adjustment."

12. It is noteworthy that the Related Recourse Rights transferred to the Participant pursuant to clause 5.4 of the MPA, as identified by the Judge in paragraph 19 of his judgment, are defined as meaning, in relation to any Participation Payment that is referable to an amount that the Recourse Parties are liable to pay the Seller, all rights, title, benefit or interests of the Seller , including "all moneys owing to the Seller in respect of principal,

Income Payment or otherwise" and "rights of the Seller…to demand payment, reimbursement or repayment of any amount from the Recourse Parties".

13. In relation to the "non-recourse" structure referred to by the Judge in paragraph 21 of his judgment, it is worth setting out in full clause 22.6 of the MPA:

> "Save as expressly set out in the Participation Agreement, the Participation is made without recourse to the Seller. The Seller shall not have any liability or obligation to the Participant relating to the Participated Transaction or the Participation Agreement except as specifically set out in the Participation Agreement (including in this Agreement as it applies to the Participation Agreement)."

14. It is also relevant to note:

i) clause 7.1 of the MPA, which provided that the Seller would "pay the Participant the Income Payments set out in the Offer from the start Date until the earlier of (a) the final Due Date; (b) the date the Participation Agreement is Terminated; or (c) the date the Participated Transaction is terminated, in each case adjusted to reflect the duration and quantum of the Participant's exposure".

ii) clause 13 of the MPA, which required the Seller to obtain the Participant's consent before varying the Participated Transaction in certain respects (including extending time for payment by or reducing the liability of relevant counterparties or guarantors). Clause 13.3 provided that if the Participant did not provide its consent where it was required, the Seller would have the option to terminate the Participation Agreement. Clause 13.4 set out the consequences of the exercise of such option, including that "…any amount in respect of principal paid by the Participant to the Seller shall be reimbursed by the Seller to the Participant…".

The negotiation of the MTV Participation

15. The Judge dealt with the negotiation of the MTV Participation in considerable detail, spanning [28] to [46] of his judgment. For present purposes the key points, as found by the Judge, can be summarised as follows:

i) From the outset, in an email dated 23 February 2021, Kimura described the opportunity to invest in the MTV Facility as "a one year structure with profit kicker upside".

ii) During a virtual meeting on 18 March 2021 Yieldpoint was told by Kimura that Kimura would "pay back" the US$5m at the "end date" or "end of our deal";

iii) On 22 March 2021 Kimura sent Yieldpoint two documents. The first was an Offer, containing some modifications from the template in the MPA, including reference to the proposed participation lasting 12 months (wrongly referring to the transaction lasting for that period). The second was an overview of the transaction ("the Transaction Overview"), stating that it was a "12 months fixed term investment", and that it was "Committed participation with Participant

funding on a pari passu basis". In smaller font in the bottom right-hand corner of each page were the words "Returns are not guaranteed and capital at risk".

iv) During a virtual meeting on 26 March 2021 Yieldpoint was told that Kimura would pay Yieldpoint back on 31 March 2022, unless Yieldpoint decided to continue participating.

v) On 30 March 2021 Yieldpoint amended the draft Special Conditions by reducing the notice period for Yieldpoint to extend its participation from 90 days to 45 days (accepted by Kimura and reflected in the executed MTV Participation), explaining that this was to match the redemption period of its own investors, so Yieldpoint would not have to "end earlier just to be safe".

The MTV Participation

16. After referring to the MPA and the Facility, the MTV Participation followed the template in providing that:

> "This is an Offer, as such term is defined in the [MPA].
>
> In this Offer, unless indicated otherwise, definitions from the [MPA] apply. All relevant terms of the [MPA] as at the date of this Offer will apply to any Participation Agreement concluded pursuant to this Offer as if those terms were set out here in full, with the necessary changes.
>
> For the avoidance of doubt:
>
> - the express terms of this Offer will override or modify any conflicting or inconsistent terms in the [MPA]."

17. In tabular form, the MTV Participation confirmed that the Participation Amount was US$5m, and that the Participation Percentage was "22.22% of Overall USD 22,500,000 Facility". The "Start Date of Transaction" was 5 November 2020 and the "Start Date of Participation" was 1 April 2021.

18. Additional lines of the table, not in the template, provided:

> "Maturity Date of the Participation 31st March 2022
>
> …..
>
> Number of days of the [Participation][1] 364 days"

19. Special Conditions were inserted to provide for renewal of the investment as follows:

> "Participant to advise the Seller of its intention to renew the Participation Amount 45 days prior to the Maturity Date of the Participation – i.e. no later than 15th February 2022.

[1] The word used was "Transaction", but it was common ground that this was in error,

> If the Participant intends to renew the Participation, and [sic] new Offer and Acceptance to be agreed within 5 business days."
>
> Kimura will notify Yieldpoint within 5 business days if Kimura further reduces Kimura's retention share."

20. A line from the template stated that the "Retention Share" was "$17,500,000".

21. The Offer contained in the MTV Participation was duly countersigned by Yieldpoint by way of acceptance.

The applicable principles

22. The Privy Council considered a sub-participation agreement in *Lloyds TSB Bank plc v Clarke* [2002] UKPC 27, [2002] 2 All ER (Comm) 992, the issue in that case being whether the agreement gave rise to an equitable assignment of interest and capital payments in favour of the sub-participant. In that context, Lord Hoffmann stated as follows:

> "15. The term "sub-participation agreement" is not a legal term of art like "assignment" or "trust". It is however a term commonly used in the market…
>
> 16. A sub-participation appears to be a transaction generally used by banks in connection with loans rather than bonds, for the purpose of enabling a lending bank to pass on all or part of the debtor risk in a loan it has made. Mr Philip Wood, in his standard work on *International Loans, Bonds and Securities Regulation*, published in 1995, describes (at p. 104) various ways in which a lender ("the lead bank") may grant another bank "participations" in "a loan or other credit facility already entered into". They include novations, assignments and "sub-participations". A "sub-participation" is described (at p. 110−111) as a transaction in which –
>
> > "the participant places a deposit with the lead bank in the amount of its participation and the lead bank agrees to pay to the participant *amounts equal* to the participant's share of the receipts by the lead bank from the borrower if and when received ... The lead bank does not assign or declare a trust of any part of the original loan in favour of the participant. The participant is a creditor only of the lead bank and not the borrower. If the lead bank becomes insolvent, the participant is an unsecured creditor of the lead bank ... Therefore the participant has a double risk − the risk of the borrower and the risk of the lead bank."
>
> 17. There is a similar description of a "sub-participation" in a paper (*Loan, Transfer and Securitisation* BSD/1989/1) published by the Banking Supervision Division of the Bank of England in 1989 for the guidance of banks subject to supervision. It describes "sub-

> participation" as a "back-to-back non-recourse funding arrangement" which creates a debtor-creditor relationship without giving the participator any interest in the underlying loan.
>
> 18. Mr Milligan QC, who appeared for Lloyds, rightly pointed out that the fact that the parties labelled their agreement a "sub-participation agreement" did not necessarily mean that it had to have the legal consequences described by Mr Wood and the Bank of England. The legal rights and duties created by the contract were a matter of construction for the court. Whether those legal rights and duties, as ascertained by construction, should be regarded as having a particular legal character was a question of law: see *Street v Mountford* [1985] AC 809 (lease) and *Agnew v Commissioner of Inland Revenue* [2001] 2 AC 710 (floating charge). The label was not conclusive. Nor was it conclusive as to whether a transaction fell within a particular market category."

23. Lord Hoffmann referred to various turns of phrase which were consistent with an assignment of a beneficial interest in the proceeds of the bonds in question, but concluded at [25] that:

> "…they cannot detract from the clear and uncompromising language of cl 2 of the sub-participating agreement, the operative clause, which firmly identifies the arrangement as being a sub-participation as commonly understood."

24. It is therefore plain that the MTV Participation must be interpreted according to usual principles. There was no dispute between the parties that the process of contractual interpretation is a unitary exercise involving an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences: see Lord Clarke JSC in *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900 at [21] and Lord Hodge in *Wood v Capita* [2017] AC 1173 at [11]. Lord Hodge went on to say in that paragraph that:

> "…once one has read the language in dispute and the relevant part 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."

25. As for the relevance of the factual background, it is useful to note the dictum of Lord Wilberforce in *Prenn v Simmonds* [1971] 1 WLR 1381 at 1385H, referred to in both *Arnold v Britton* [2015] AC 1619 and *Wood v Capita*, holding that while evidence of the parties' intentions or their negotiations was inadmissible, "…evidence of the factual background known to the parties at or before the date of the contract, including evidence of the 'genesis' and objectively the 'aim' of the transaction" was admissible.

The judgment

26. After referring to *Lloyds TSB Bank plc v Clarke*, and pointing out in [57] that in the case of the MPA, clause 5.4-5.6 did effect an equitable assignment in favour of the Participant (the Judge considering it did not matter whether this represented the modern conventional form of sub-participation in international corporate finance), the Judge identified his starting point and approach as follows:

> "58. The standard concept of sub-participation, as reflected in the terms of the MPA itself, involves a proportionate sharing of both risk and reward in the relevant underlying finance. This entails exposure of both capital and income stream (i.e. interest and/or revenue-sharing) to primary default risk. The definition of "Retention Share" presupposes some allocation of capital risk to the Participant. The MPA assumes that a PA would be coterminous with its PT and so makes no 'exit' provision for where the former has a fixed term shorter than the latter.
>
> 59. Given this starting point, both generally and as contemplated by the MPA which gave rise to the MTV Participation, clear language is needed to alter the default structure in a significant way. The more significant the departure, the clearer and stronger the language needed. It is inherently unlikely that these contracting parties intended to make a specific trade pursuant to the terms of the MPA which did not resemble or replicate a conventional sub-participation (funded) or risk participation (unfunded) as chartered in that framework agreement. Whilst unlikely, this was not impossible."

27. The Judge then identified that Yieldpoint's proposed interpretation involved a significant alteration to and departure from the conventional model:

> "60… It involves a hybrid form of sub-participation: one which insulates and protects capital (subject only to default risk from its own contractual counterpart, Kimura) whilst sharing risk and reward on a *pari passu* basis (here, 22.22% / 78.78%) in respect of income earned on such capital during the agreed fixed term. This requires a bright line to be drawn between capital and income."

28. The Judge further noted the following difficulties in Yieldpoint's interpretation:

> "63. Yieldpoint's hybrid analysis renders material parts of the MPA otiose. On such interpretation it was not staking its capital in any meaningful sense. It was sharing primary default risk on and acquiring equitable recourse for the year's rent for its money, but nothing else.
>
> 64. There is no independent obligation to repay the "Participation Amount" in the MPA, as noted above. Nor is there any such positive obligation on the face of the Final Offer (as accepted) which constitutes the MTV Participation together with the MPA so far as applicable. Yieldpoint's construction turns almost entirely upon the insertion of "Maturity Date of the Participation" by way of adaptation to the

> Template Offer and insertion of the Special Conditions relating to renewal upon notice.
>
> 65. A further problem for Yieldpoint is the notion of "Retention Share". This forms a component or term of the MTV Participation: see paragraph 18 above. And yet, on Yieldpoint's analysis, Kimura retained the entire "Credit Amount" of US$22.5m "at its own risk" pursuant to the MTV Participation, not just US$17.5m as recorded on the face of the Final Offer.
>
> 66. Likewise, although not involving contractual wording, it is not obvious how Yieldpoint would "co-participate alongside Kimura" or "invest on a Pari Passu basis alongside both Kimura and AAML" if the capital was simply lent unsecured for a fixed term without being exposed to any underlying default risk. Yieldpoint would only be "alongside" in terms of the income stream on its loan, involving a different rate of interest than applicable under the MTV Facility. Further, there would be no purpose or justification for Yieldpoint to be assigned any rights corresponding to the principal sum under a loan arrangement, and hence Yieldpoint would not in an obvious sense rank "Senior Secured Pari passu with Kimura" as envisaged (see "Ranking") in the Transaction Overview."

29. Whilst recognising that these were not "small difficulties", the Judge considered at [67] that they were surmountable. At [68] he explained that, if the language of the MTV Participation was clear enough to create a hybrid form of sub-participation, the terms of the MPA could and should be modified or overridden to make sense. In the case of each problem identified, the troubling reference (whether, for example, to "Retention Share" or "risk") could be understood as referring only to the income rights or income default risk assumed by Yieldpoint, not any capital risk.

30. Turning to whether the difficulties should be surmounted, and why he concluded that they should (albeit not without the discomfort referred to above) the Judge started by referring to the negotiations between the parties as follows:

> "70. This was always proposed as a "*fixed term*" deal. It was agreed to be renewable by Yieldpoint who reduced the notice period for renewal from 90 to 45 days to synchronise with its "*own redemption period*" so as to meet "*any redemptions we need to satisfy*"…Yieldpoint stipulated for certainty of redemption at maturity, i.e. the return of US$5m. The Special Conditions and their rationale, as articulated an hour before signing, corroborate Mr Polachek's unscathed account of what Kimura's representatives told him in the 18 and 26 March virtual meetings to the effect that Kimura would "*pay us back*" on 31 March 2022…I find as a fact that this is what Yieldpoint was told by Kimura.
>
> 71. Yieldpoint was assured it would get its capital back after one year. Its own need for the return of this capital to meet upstream redemptions drove the concept of renewal at its election beyond the Maturity Date…"

31. The Judge then made his key finding as to the interpretation of the MTV Participation at [72] and [73]:

> 72. In this immediate context, the inclusion of a "*Maturity Date for the Participation*" in the Second Offer and hence the Final Offer, together with the Special Conditions, is sufficiently strong and clear to depart from the pre-ordained sub-participation structure. The concept of a maturity date is itself alien to sub-participation. It is apt for a fixed-term loan where the lender takes the default risk of the borrower, but not that of anybody else. Hence the absence of such a term or component in the Template Offer or any provision in the MPA for a PA which ends prior to the end of the PT.
>
> 73. The consequences of such temporal disconnect are fundamental to the proper interpretation and characterisation of the MTV Participation, in my judgment."

32. The Judge next addressed the main difficulty he saw with Kimura's proposed interpretation, namely, the unspecified mechanism for unwinding Yieldpoint's participation on the Maturity Date. After explaining that Kimura was driven to formulate a 'fair market value' mechanism, and pointing out that it was not to be found in the contractual terms, at [74] the Judge highlighted the difficulties in ascertaining what this would entail in practice and the potential for delays and disputes. The Judge further emphasised that these were not merely possible problems, but would inevitably arise (absent complete default by MTV):

> "(f) ….By the end of the 12 month fixed-term, MTV would (at most) have paid its first (8.33%) tranche of capital under the MTV Facility. Yieldpoint's 22.22% proportionate share of Kimura's 50% share of that capital receivable would be US$416,500. That would leave US$4,583,500 unpaid at the Maturity Date on a best case scenario. Yieldpoint had no further entitlements to income or capital thereafter, because its participation would have matured and terminated.
>
> (g) The notion that the parties did not foresee this obvious outcome and seek to provide for an 'exit' regime upon maturity is a startling one. The Special Conditions were negotiated to deal with the process for and basis of any continuing participation by Yieldpoint after the Maturity Date. Yieldpoint stipulated for certainty. Kimura's explanation involves the opposite."

33. As for clauses 5.4 to 5.6 of the MPA, which on their face automatically transferred to Yieldpoint recourse rights covering capital as well as income, the Judge held at [82] that those provisions could be modified to accommodate and make sense of the specific terms agreed by way of the MTV Participation.

34. The Judge further rejected Kimura's contention that interpreting the MTV Participation as a fixed term loan did not make commercial sense. Kimura asked why it would agree to pay over almost all of its interest entitlement and all of its price participation in respect of US$5m of the Facility if Yieldpoint was taking no risk in that regard. Kimura would simply be borrowing surplus funds at an extremely high rate. The Judge stated:

> "84. There are many potential answers to these rhetorical questions. In the absence of candid evidence and forensic interrogation as to Kimura's financial state of health and strategic aims in late March 2021, let alone communication of such matters across the line at the relevant time, there is no basis for drawing any particular inference…
>
> 85. Kimura's share of the MTV Facility (US$22.5m) was fully funded, so it didn't have an obvious need for an extra US$5m at the time other than for different purposes. It might have concluded - rightly or wrongly, reasonably or unreasonably - that it could earn more from collateral use of US$5m in that year than it would lose by sharing 22.22% of its income stream under the MTV Facility in return for a 0.5% spread on the interest rate over such period... It might have been prepared to be generous to a potential new trading partner with whom it had just days before concluded a master framework agreement of unfixed duration. There are many possibilities.
>
> 86. I am not in a position to conclude that Yieldpoint's characterisation of the MTV Participation lacks commercial sense. What is bad business for one party tends to be good for their counterparty, even if hindsight were to influence the calculus. Hindsight has no place in ascertaining the objective common intentions of contracting parties…"

35. The Judge concluded at [87] that Kimura had an unconditional obligation to repay the sum of US$5m to Yieldpoint on 31 March 22.

The proper interpretation

36. In my judgment the Judge identified the right starting point at [59] of his judgment. The MTV Participation was a single trade made pursuant to and expressly governed by the terms of the MPA, an umbrella agreement designed to save the parties from having to re-negotiate and re-state the detailed terms of their trades on each and every occasion. Indeed the MTV Participation, made on the template annexed to the MPA, only made sense if read together with the MPA. As the Judge stated, it is inherently unlikely that the parties intended that the MTV Participation would not resemble or replicate a conventional sub-participation anticipated and provided for in the MPA. This may be put the other way round: had the parties intended to make an entirely different type of deal, such as a simple unsecured fixed-term loan, they would surely have abandoned the MPA structure and template and executed a separate loan agreement with terms and conditions to be expected in such an agreement.

37. Having expressed the view that clear language was needed to alter the "default structure" provided by the MPA, the Judge recognised at [64] that Yieldpoint's case turned almost entirely upon the insertion of "Maturity Date of the Participation". Despite recognising in that same paragraph that there was no positive obligation to repay the US$5m on the face of the MTV Participation (let alone in the MPA), and further recognising in [65] and [66] that there were significant countervailing provisions in the MTV Participation and in the Transaction Overview (which both parties accepted was admissible as an aid to interpretation), the Judge ultimately concluded at [72] that those additional words were sufficiently strong and clear to depart from the pre-

ordained sub-participation structure: he found that an inherently unlikely outcome had eventuated.

38. I find it difficult to support that conclusion. I recognise the Judge's point that the concept of a Maturity Date of the Participation, creating a "temporal disconnect" between the Facility and Yieldpoint's investment, did not sit comfortably with the sub-participation structure and gives rise to unaddressed issues as to its practical and legal consequences. However, I consider that that single term, which itself contains the key term "Participation", together with the Special Conditions as to the option to extend beyond the Maturity Date, cannot be read as indicating an intention to overturn the entire structure and effect of the umbrella agreement stated to govern the MTV Participation and to require modification of many of its terms and certain of the provisions in the MTV Participation itself (in particular, the Retention Share).

39. I consider that in reaching his conclusion, which he accepted caused him some discomfort, the Judge led himself into error in a number of respects.

40. First, the Judge interpreted the term "Maturity Date of Participation" in the immediate context of the parties' negotiation of the MTV Participation. I have considerable doubts as to the admissibility and relevance of those matters, being a classic case of parole evidence. But even if aspects of the negotiation were admissible to show that the genesis or aim of the transaction was a "fixed term" deal and that Kimura would "pay back" Yieldpoint on 31 March 2022, I do not consider those oral exchanges add anything to the written agreement. There is no doubt that the parties agreed that the MTV Participation would end on 31 March 2022, and that Yieldpoint's investment would be redeemed at that date (by an unidentified mechanism). But what was not discussed (as far as the evidence was recounted) was the key question what would happen if there was a default in the meantime, let alone an agreement reached that Yieldpoint would be paid in full in such circumstances. Parties discussing a trade often focus on what will occur if all goes to plan, without addressing what they no doubt consider to be the unlikely situation of default or non-performance, leaving that to the written terms. Their discussions in this case must also be considered against the backdrop of the MPA and, more specifically, the Transaction Overview, with its express warning that Yieldpoint's capital was at risk.

41. Second, the Judge gave detailed consideration as to whether the problems caused by the many countervailing provisions in the MPA and the MTV Participant itself could be "surmounted", given the weight he attributed to the additional wording "Maturity Date of Participation". In my judgment this was an error of principle. The right approach was first to seek to read all the contractual provisions together, in order to reach a coherent interpretation of the entire contract which conforms with commercial sense. It is only if that is not possible that it is necessary to determine which provisions should be given priority and which given a modified reading or overridden altogether. If that approach had been adopted in this case, it is difficult to see that the MTV Participation, in the context of the MPA, would be read as anything other than a conventional sub-participation agreement with early redemption. Potential difficulties with the mechanism of redemption did not justify, in my view, overturning everything else in the parties' carefully structured deal.

42. Third, and relevant to the second error above, the Judge was wrong in [72] in proceeding on the basis that the MPA did not provide for circumstances in which the

Participation Agreement would end before the Participation Transaction. In fact, clause 13.4 provides that the Seller may acquire an option to terminate the Participation Agreement early, reimbursing the capital participation, and clause 7.1 also anticipates early termination of the Participation Agreement. To be fair to the Judge, it appears that these provisions were not drawn to his attention. Their presence, however, further undermines the conclusion that the addition of a Maturity Date brought about a complete change in the nature of the transaction.

43. Fourth, I consider the Judge was wrong to discount the fact that Yieldpoint's proposed interpretation was highly uncommercial, postulating that Kimura would have agreed to transfer most of its benefit from US$5m of its part of the Facility without Yieldpoint exposing its capital. Whilst the Judge was right that it is generally wrong to consider the adequacy of consideration given by one party to a contract or to speculate on commercial motives for entering it, the position is different when considering competing interpretations, when the iterative process necessarily involves examining the commerciality of each of those interpretations. In this case it is a strong factor, in my view, that Yieldpoint's interpretation undermines the commercial sense of the structure set out in the MPA.

44. Although it is not necessary to reach a concluded view, the question remains as to what the inclusion of a Maturity Date entailed in circumstances where there had been no default by MTV. The Judge was dismissive of Kimura's proposed solution that Yieldpoint would be entitled to a redemption at fair market value, reflecting the payments due over the remaining term of the Facility and the then current creditworthiness of MTV. The Judge pointed out that there was no mechanism for determining such value and no dispute resolution provision for likely issues arising. A more sensible interpretation, in my view, arises from the fact that Yieldpoint's participation on 1 April 2021 was at par: it paid US$5m to acquire an interest in that same amount of the Facility: there was no valuation exercise carried out. Given that clause 13.4 of the MPA also provides for the Participant to be repaid at par if the Seller opts to terminate, it would seem permissible and appropriate to interpret the inclusion of a Maturity Date as entitling Yieldpoint to be repaid on that date at par, absent a default in the preceding 12 months. That would of course be highly beneficial to Yieldpoint if MTV's creditworthiness had declined and it was likely to, but had not yet, defaulted.

45. In the light of the above I am firmly of the view that the MTV Participation was a conventional sub-participation. As MTV had defaulted prior to the Maturity Date, Yieldpoint was not entitled to be repaid its US$5m investment.

Conclusion

46. I would allow the appeal.

47. On receipt of the draft of these judgments, Yieldpoint sought an order that it should retain a portion of the US$5m Kimura had paid pursuant to the judgment below, to be ascertained in some unspecified manner. Yieldpoint contended that, even if not entitled to the return of all its capital, it was entitled to be paid a sum to reflect the market value of its investment on 31 March 2022, taking into account that MTV was in default.

48. I see no basis for making such an order. Yieldpoint's claim was solely based on the assertion that it was entitled to repayment of the full US$5m by way of repayment of a loan. There was no alternative claim at first instance for the market value of its investment by way of sub-participation (if it had any value), and, indeed, reliance on any such alternative claim was expressly disavowed by Yieldpoint. Further, there was (and remains) no application to add that claim by way of amendment, and that fall-back argument was not before this Court on the appeal. Yet further, it is unclear by what mechanism or on what evidence any entitlement of Yieldpoint could now be ascertained (absent agreement), other than by remitting the (unpleaded) alternative claim for trial on (as yet unavailable) fresh evidence.

Lady Justice Andrews

49. I agree.

Lady Justice Falk

50. I also agree.