

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

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

Date: 01/07/2026

Before :

ROSALIND PHELPS KC (sitting as a judge of the High Court)

Between :

YIELDPOINT STABLE VALUE FUND, LP

Claimant

- and -

**QUINTAR KIMURA SPECIAL CREDIT FUND
LIMITED
(formerly Kimura Commodity Trade Finance Fund
Limited)**

Defendant

Fionn Pilbrow KC and Danielle Carrington (instructed by Katten Muchin Rosenman UK
LLP) for the **Claimant**
Nathan Searle and Robert Shoemith of Hogan Lovells International LLP for the **Defendant**

Hearing dates: 3-5 June 2026

JUDGMENT

This judgment was handed down remotely at 10.30am on 1 July 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives. .

.....

ROSALIND PHELPS KC

Introduction

1. This claim involves one issue: the determination of the value of an expired one-year participation by the Claimant, Yieldpoint Stable Value Fund, LP (“**Yieldpoint**”) in a four year loan made by the Defendant, then known as Kimura Commodity Trade Finance Fund Limited (“**Kimura**”) to a Chilean mining venture called Minera Tres Valles SPA (“**MTV**”). Although the issue can be simply stated, and the sums involved are at the lower end of those considered by Rolls Buildings courts, the dispute is not lacking in complexity.
2. The proper interpretation of the relevant contract has already been considered at both first instance and in the Court of Appeal in an earlier set of proceedings between the same parties. Both courts agreed that this was a highly unusual transaction, described memorably by the previous first instance judge as a “*Frankenstein’s slip*” ([2023] EWHC 1212 (Comm) (“**First Instance Decision**”), at [5] and [89]).
3. As is not uncommon, the proper construction of the relevant contract apparently does not match either party’s understanding of the bargain it struck. As will be seen, there is little available by way of guidance as to how to approach the valuation exercise. Accordingly, the parties, the experts and the Court have had to do the best they can in the circumstances.

Factual Background

4. MTV, whose parent company at the material time was a Canadian company then called Three Valleys Copper (“**TVC**”), purchased the relevant mining project in Chile in 2013.
5. On 10 December 2019, Kimura and Anglo American Marketing Limited (“**AAML**”) (together the “**Senior Lenders**”) and others entered into a secured four-year facility with MTV as Borrower (“**MTV Facility**”). Pursuant to that agreement, the Senior Lenders loaned USD 45 million to MTV (USD 22.5 million each) and were also entitled to participate in sales of copper made by MTV when the price rose above a certain level.
6. 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. Interest was payable quarterly at the rate of 8% above 3-month LIBOR.
7. By 2021 MTV’s mining activities were focused on two ore bodies:
 - i) Don Gabriel, an open pit that was reopened and expanded in 2021, after a period of care and maintenance, as a temporary cash generator; and
 - ii) Papomono, an underground excavation which started construction in November 2020 aimed at obtaining higher grade copper.

8. On 19 February 2021, Kimura and Yieldpoint concluded a “Master Participation Agreement for Trade Transactions” (the “**MPA**”). This was a form of umbrella agreement based on an industry standard form which permitted the entry into one or more “Participation Agreements” on terms to be agreed in the relevant Offer and Acceptance to the MPA), and the terms of the MPA, unless overridden or modified by the express terms of the Offer and Acceptance.
9. The First Instance Decision summarised the MPA at paragraphs [14] to [27], a passage which was also adopted by the Court of Appeal ([2024] EWCA Civ 639 (“**Court of Appeal Decision**”)) at [11]:

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 subparticipation 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.

10. The definition of “*Related Recourse Rights*” (i.e. the rights beneficial ownership of which passes to Yieldpoint pursuant to a PA) was set out in the MPA:

Related Recourse Rights means, for a Participation, in relation to any Participation Payment that is referable to an amount that the Recourse Parties are liable (presently or in the future, actually or contingently) or are expressed to be liable to pay the Seller under or in connection with the Participated Transaction, all rights, title, benefits and interests of the Seller arising under or in connection with the Transaction Documents, whether present or future, actual or contingent, proprietary, contractual or otherwise, including all:

(a) moneys owing to the Seller in respect of principal, Income Payments or otherwise;

(b) rights of the Seller under the Transaction Documents, including rights to demand payment, reimbursement or repayment of any amount from the Recourse Parties and to enforce the Transaction Documents against the Recourse Parties; and

(c) remedies, including all claims for damages, indemnities or compensation for any breach of any Transaction Document

in each case, if and to the extent that such rights, title, benefits or interests relate to all or part of such amount that the Recourse Parties are liable or is expressed to be liable to pay to the Seller

11. The First Instance and Court of Appeal Decisions concerned the proper construction of an agreement dated 30 March 2021 between Yieldpoint and Kimura made pursuant to the MPA (the “**MTV Participation**”).
12. As found in the First Instance Decision, in an email dated 23 February 2021, Kimura had described the opportunity to invest in the MTV Facility as “*a one year structure with profit kicker upside*” and during a virtual meeting on 18 March 2021 Yieldpoint was told by Kimura that Kimura would “*pay back*” the USD 5 million at the “*end date*” or “*end of our deal*”. See also the Court of Appeal Decision at [15].
13. The MTV Participation followed the template at Appendix 1 to the MPA 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].”
14. The Participation Amount was USD 5 million, and the Participation Percentage was 22.22% of the total facility amount of USD 22,500,000. The “*Start Date of Transaction*” was 5 November 2020 and the “*Start Date of Participation*” was 1 April 2021.
15. Additional lines of the table provided that the “*Maturity Date*” of the MTV Participation was 31 March 2022, and the number of days of the Participation was 364 days. This was not in the template and was the key provision for the purposes of the dispute in the previous proceedings since it led to a disconnect between (i) the duration of the MTV Facility (a fully-funded USD 22.5 million loan for a five year duration) and (ii) the sub-participation by Yieldpoint, which was only to last one year.
16. Yieldpoint was also entitled to ‘Income Payments’ consisting of LIBOR plus 7.50% plus a pro-rata share in the monthly price participation payments.
17. Special conditions were inserted to provide for renewal of the investment:

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.

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.

18. Yieldpoint paid Kimura USD 5 million pursuant to the terms of the MTV Participation on 30 March 2021.
19. Between 27 May 2021 and 31 December 2021, MTV performed its obligations under the MTV Facility by paying Kimura price participation for the months of April to November 2021 and interest payments for June, September and December 2021. Kimura then duly paid to Yieldpoint its share of those sums in accordance with the MTV Participation.
20. By October 2021, according to TVC's management's discussion and analysis of its financial condition as at 26 November 2021, TVC engaged a financial advisor to review and evaluate potential alternatives that may further maximize value for the shareholders of the Company, including mergers, strategic partnerships, acquisition or dispositions of assets and/or refinancing. Following this, on 25 November 2021, TVC entered into a 'Bought-Deal' offering in respect of its own shares which was anticipated to raise at least CAD 16 million to invest into MTV.
21. Relatedly, the Senior Lenders entered into an agreement dated 22 November 2021 (the "**Forbearance Agreement**") to amend the terms of the MTV Facility. They agreed not to accelerate or enforce their rights should MTV, between November 2021 to October 2022, commit a "*Specified Event of Default*" which was either (i) failure by MTV to make any of its scheduled loan repayments on 31 March 2022, 30 June 2022 or 30 September 2022, or (ii) failure to keep the reserve account to the minimum level required under the MTV. Clause 2(a) released the Senior Lenders from their forbearance if an Event of Default other than a Specified Event of Default was continuing.
22. On 24 January 2022, TVC announced the temporary suspension of MTV's Don Gabriel operations, citing its underperformance. Its press release called into question the future economic performance of Don Gabriel and noted the immediate impact to MTV of "*materially lower current and forecasted cash inflows and revenues resulting in a deteriorating liquidity position*". It also noted that, as a result, MTV was temporarily halting the start of block caving at Papomono, that MTV would require additional financing in the next several months, and that there was no assurance that any agreement could be reached with the senior secured lenders.
23. By 31 January 2022, MTV had failed to pay the December price participation due under the Facility Agreement. Kimura served a default notice in respect of this failure on 31 March 2022.

24. By letter dated 10 February 2022 and email the next day, Yieldpoint gave notice that it would not renew the MTV Participation. The reason given in the letter was essentially that the returns on the loan, including via price participation, had been lower than anticipated (confirmed by Mr Nathaniel Polachek, Yieldpoint's founding partner, in evidence).
25. Subsequently, by email on 25 February 2022, Kimura informed Yieldpoint of MTV's default in paying price participation payments. MTV also defaulted in respect of the payment due at the end of February 2022.
26. From February 2022 onwards, the Senior Lenders, MTV and TVC considered various proposals for restructuring the transaction and/or obtaining further finance for MTV. Kroll were appointed to this end on 14 February 2022. Some of the detail of those proposals is considered further below.
27. On 7 March 2022, with the support of Senior Lenders, MTV commenced the Papomono block caving operation while discussions continued.
28. On 31 March 2022:
 - i) MTV failed to pay the interest due on this date to Kimura under the MTV Facility.
 - ii) This was also the original due date of the first capital repayment under the MTV Facility. There was a minor dispute between the parties as to whether the Forbearance Agreement was still operative so as to excuse what would otherwise have been a default when the capital repayment was not made on 31 March 2022. Kimura argued that the Forbearance Agreement had been breached because of the other defaults (which were not "*Specified Events of Default*"), and that as a result MTV was no longer automatically excused from its liabilities to repay principal. Yieldpoint argued that even if the Senior Lenders technically had a legal right to insist on a repayment of principal on that date, in practice they treated the Forbearance Agreement as still on foot. Since it was not in dispute that MTV was in any event in default under MTV Facility by the end of January at the latest because of the failure to make price participation payments, and neither expert suggested that this contractual issue made any difference to valuation, I do not need to decide the point and neither side urged me to do so.
 - iii) This was the Maturity Date of the MTV Participation. Yieldpoint had informed Kimura that it did not intend to renew and a payment was therefore due to Yieldpoint on this date. What that payment should have been is the issue in these proceedings.
 - iv) Kimura's valuation committee met virtually to consider, among other things, whether to take an action from a valuation perspective in relation to the MTV Facility. The committee recommended that Kimura continue to accrue interest and begin provisioning for unpaid interest from 31 March 2022 onwards, but no other action was taken (see paragraph 60 below).

29. The parties were, unsurprisingly, not agreed as to the extent of MTV's financial troubles as at the Maturity Date. However, it was agreed between the experts that, broadly a minimum of USD 20-25 million was required by way of further capital if MTV was to continue. Reflecting this, TVC's condensed interim consolidated financial statements as at 31 March 2022 recorded that:

The Lenders, together with the Company, expressed their intention to provide super senior secured funds to MTV, the approvals for and terms of which are being finalized. This funding, if approved, was expected to be drawn down in tranches by MTV beginning at the end of March 2022 and is expected to fund MTV into July 2022 providing the Company and the Lenders additional time to negotiate a longer-term solution for MTV, including sourcing additional capital that will be required. If approvals from the respective parties are not obtained and funding not provided, it is expected that MTV will not have sufficient funds to operate past mid-June 2022. In addition to the super senior secured funds, the Company expects MTV will require additional capital during 2022.

30. Kimura's valuation committee met again on 27 April 2022 and, again, did not recommend any impairment to the MTV Loan.
31. However, on 13 June 2022 MTV ceased operations at Papomono and filed for creditor protection in Chile, ostensibly to enable a search for a long-term financing solution.
32. Presumably such a solution was not found, since in December 2022, MTV filed for voluntary judicial liquidation in Chile and the liquidation process commenced in February 2023.
33. In April 2025, MTV was acquired by NIU Group, a European investment company.

The previous litigation

First Instance Decision

34. As long ago as 26 July 2022, Yieldpoint commenced proceedings in the Commercial Court seeking repayment of the USD 5 million. A one-day trial ensued on the single issue of construction only – namely, whether the nature of the obligation on the Defendant was an absolute and unconditional one to repay the sum of USD 5 million on the Maturity Date. The trial was heard by Stephen Houseman KC sitting as a Deputy Judge of the High Court and judgment was handed down in May 2023.
35. At that stage the parties' opposing contentions were summarised at [4] of the First Instance Decision as follows:

(a) Yieldpoint contends that its capital was provided as a fixed-term loan of 12 months with a maturity date of 31 March 2022.

As such, and in the absence of any notified extension by it, the principal sum became automatically repayable on 31 March 2022. The fact that Yieldpoint participated proportionately in the economic return and associated security enjoyed by Kimura under the MTV Facility did not alter this characterisation or preclude Kimura's independent repayment obligation upon maturity. Put simply, Yieldpoint did not stake its capital.

(b) Kimura contends that the transaction was (and, by definition, remains) a capital risk investment by Yieldpoint by way of *pari passu* participation as economic stakeholder or co-venturer in Kimura's share of the MTV Facility, i.e. a conventional proportionate sub-participation which also involved equitable assignments of primary receivables. Yieldpoint's capital was, by definition, exposed to underlying default risk, as occurred on or by 31 March 2022. The principal sum has not, therefore, become repayable and, so far as material, had not done so at the time of the subsequent insolvency of the underlying borrower in February 2023.

36. Notably, therefore, at this stage Kimura's contention was that Yieldpoint's participation was ongoing, and, despite the passing of the Maturity Date, was not yet repayable.
37. Kimura argued that there should be some form of 'fair market value' mechanism for the ascertainment and realisation of Yieldpoint's rights at the Maturity Date. However, it followed that since there was no mechanism in the contract for determining 'fair market value', that question would if necessary need to be litigated, which would take time and "*would effectively roll forward the duration of Yieldpoint's participation on unchartered terms, contrary to the express basis and wording of the deal*" (First Instance Decision at [74(d)]). This was a key issue for the Deputy Judge, since (i) the Offer and Acceptance stated in terms that the "*Maturity Date*" was 31 March 2022 and (ii) he had found as a fact that Yieldpoint was told by Kimura that Kimura would pay Yieldpoint back on 31 March 2022 (First Instance Decision at [30] – [32], [70]).
38. The Deputy Judge noted that the "*fraught and open ended 'exit' regime*" (see [90]) which Kimura was driven to read into the MTV Participation was the most telling point against its argument since "*[i]t is anathema to the concept of a maturity date that Yieldpoint's capital would, in effect, remain committed and exposed directly or indirectly to primary default risk for longer than the fixed term of one year*" (at [75]).
39. The Deputy Judge held that, on the proper construction of the MTV Participation Kimura was under an unconditional obligation to repay the sum of USD 5 million on 31 March 2022. He also held that the arrangement was a participation only in relation to the interest and price participation elements of the MTV Facility.

Court of Appeal Decision

40. The Court of Appeal heard the point of construction afresh in January 2024, and handed down judgment on 18 June 2024. The sole issue was whether the Deputy Judge was correct to conclude that that Agreement imposed an unconditional obligation on Kimura to repay USD 5 million to Yieldpoint at the Maturity Date.
41. The Court of Appeal overturned the judgment below, essentially on the basis that the MTV Participation was a “*conventional sub-participation agreement with early redemption*”. In other words, Yieldpoint’s capital was intended to be at risk during the relevant year so there was no automatic right to be paid back the USD 5 million on the Maturity Date.
42. While the judgment of the Court of Appeal speaks for itself, Mr Pilbrow KC for Yieldpoint directed me to the transcript of the hearing to demonstrate how Kimura’s case developed and the basis on which it succeeded. In particular:
 - i) Kimura was represented by new Leading Counsel who, in a departure from Kimura’s case below, accepted that Yieldpoint was only on risk for a one-year period until the Maturity Date.
 - ii) There was repeated recognition and acceptance by Kimura that at the Maturity Date it would be Kimura who would be obliged to pay Yieldpoint. In this respect at least, the MTV participation differed from a conventional sub-participation, which would normally have given Yieldpoint a right to be paid only when MTV paid Kimura (transcript 50A-B).
 - iii) In submission, Kimura recognized that absent default, Kimura is obliged to repay Yieldpoint its investment ‘*at par*’.
 - iv) As to what should happen at maturity in the event of a deterioration in MTV’s credit position but no default, at one point the Court suggested to Kimura’s counsel that the appropriate course would be to consider what a market participant would have paid for the value of Yieldpoint’s participation at maturity. That suggestion was rejected by Kimura’s counsel, who recognized that this did not reflect the fact that Yieldpoint was only putting its capital at risk for a year and no longer (transcript 48F-50H).
 - v) As to what should happen in the event that MTV was in default at maturity, initially Kimura still sought to suggest that Yieldpoint was either obliged or entitled to remain as a participant and seek, ultimately (in a liquidation or otherwise), to enforce its recourse rights.
 - vi) However Kimura’s counsel was challenged as to this attempt to “ride two horses”, with Lord Justice Phillips commenting that (in the event of default, and in circumstances where Yieldpoint has to remain a participant beyond the Maturity Date while it waits to be paid) “[i]t is difficult to see what the meaning of the maturity date is, though, because they would effectively continue to be participants waiting to get their share” (transcript 53D-G). This was the very point which had troubled the Deputy Judge.

vii) Kimura's final position, (transcript 55D-55F) was as follows:

At that point, 31 March, the participation matures. What does that mean in the context of a default? What it means is that Yieldpoint has the right to be paid back but not US\$5 million, whatever its investment is then worth at that date in light of the default. If it were otherwise, it could not realistically be said that it was taking any risk in the preceding year and the transaction would make no sense whatsoever.

At that point, the question is how do you work out what they are paid. The answer is they either agree it between themselves or, if they cannot agree it, they have go to some sort of process that involves valuation. But these are sophisticated market participants and this is not an unusual situation; it is one where one would expect a valuation to be arrived at quickly and one gets the money back.

43. That was the final form of Kimura's argument, following which the Court was persuaded to allow the appeal. As reflected in the Court of Appeal Decision:

- i) The Court addressed the timing point, and the impact of the inclusion of a "*Maturity Date*". It concluded, at [40], that: "[t]here 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)".
- ii) The same passage, at [40] also recognised that it was Kimura who would be paying Yieldpoint back: "*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.*"
- iii) Having concluded that the Deputy Judge was wrong to decide that Yieldpoint was automatically entitled to repayment of its USD 5 million on maturity, the Court considered at [44] what should happen instead:

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.

- iv) The Court also rejected Yieldpoint's request for an order that it retain a portion of the USD 5 million that it had been paid by Kimura following the first instance decision on the basis that 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. That was rejected by the Court of Appeal (at [48]) because there was no alternative claim pleaded by Yieldpoint for the market value of its investment and "*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.*"

44. Perhaps unsurprisingly, the parties did not agree on the value to be paid to Yieldpoint and the alternative claim on fresh evidence foreshadowed by this paragraph was duly issued.

The present claim and the trial

45. In its Particulars of Claim, Yieldpoint claimed to be entitled to receive the market value of its investment assessed at the Maturity Date ("**the Market Value Payment**"). It alleged that Kimura was in breach for failing to make that payment on the due date, and also sought interest from that date at the contractual rate in clause 11.5 MPA of 3-month USD LIBOR (from time to time) plus 1%.
46. In its Defence, Kimura averred at paragraph 33(b) that "*in the event of default, Yieldpoint was entitled to have Kimura repurchase the MTV Participation at the price that a market participant would have been prepared to pay for it on the Maturity Date*", and again at paragraph 39 that "*the market value of the MTV Participation as at 31 March 2022 is the value that a third party market participant would have paid for the MTV Participation on that date.*" That allegation was denied by Yieldpoint save insofar as consistent with its position that Kimura was obliged to pay Yieldpoint the market value (or fair value) of its investment as assessed as at the Maturity Date (Reply paragraph 39).
47. At that stage, in an echo of the argument abandoned before the Court of Appeal, Kimura also maintained that no payment was due by it unless and until the amount had been ascertained, and was therefore not yet due. This argument was – sensibly – not pursued at trial, Kimura by then conceding that any sum it was liable to pay fell due on 31 March 2022.

48. The parties were also, by the time of the trial, agreed that interest was due at the contractual rate from that date. USD LIBOR was discontinued from 30 September 2024. The parties' experts agreed that an equivalent rate for LIBOR in the period after 30 September 2024 would be 3-month CME Term SOFR + 0.26161%.
49. The List of Common Ground and Issues recorded as common ground that:
- 2 Pursuant to the [MTV Participation]:
- 2.1 The Claimant was under an obligation to pay USD 5 million and it performed this obligation on 30 March 2021.
- 2.2 With effect from the receipt of this payment by the Claimant, the Defendant transferred, sold and conveyed to the Claimant an undivided 100% beneficial ownership interest in the Related Recourse Rights relating to the Claimant's 22.22% Pari-Passu share in the Underlying Loan to MTV for a fixed term of 12 months with a Maturity Date of 31 March 2022.
- 2.3 The Defendant was under the following obligations (inter alia):
- (a) Absent a default in respect of the Underlying Facility prior to the Maturity Date, the Defendant was obliged on the Maturity Date to pay the Claimant the principal sum invested at par.
- (b) In the event of a default, the Defendant was obliged to pay the fair market value of the participation rights as at the Maturity Date (31 March 2022)...
- 3 By the Maturity Date, there had been a default by MTV in respect of the Underlying Facility in relation to interest and price participation. Therefore, on the present facts, the relevant obligation on the Defendant is that at paragraph 2.3(b) above.
50. The sole remaining issues between the parties were issue 6, namely "*What is the fair market value of the Claimant's participation assessed at the Date of Maturity, 31 March 2022?*", and issue 7, whether Kimura is in breach of its obligation in issue 2.3(b).
51. At trial I heard evidence from one factual witness, Mr Nathaniel Polachek who is the managing member and founding partner of Yieldpoint. Much of his evidence was not seriously challenged in cross-examination but was also largely irrelevant in view of the factual findings in the previous litigation and the narrow nature of the issue for decision in this claim. I had no reason to doubt that his evidence was anything other than accurate and honest.
52. I also heard from the two expert valuers:
- i) Ms Vikki Wall, a partner at Accounting Valuation Experts LLP. Ms Wall has practised as a forensic accountant for over 25 years. She trained

initially as an auditor before joining EY's disputes services practice, where she worked for over 15 years, subsequently co-founding Haberman Ilett before establishing her current firm in 2022. She is a Fellow of the Institute of Chartered Accountants in England and Wales and the past chair of the advisory panel for its Forensic and Expert Witness Community. Ms Wall specialises in quantum evaluation, including company and asset valuations, loss of profit claims and wasted costs claims.

- ii) Mr Colin Johnson, a partner at Alvarez & Marsal Disputes and Investigations LLP. Mr Johnson is a Fellow of the Association of Chartered Certified Accountants with over 35 years of experience including roles as lender, equity investor, investment manager, project director, legal and financial adviser, and expert witness (including in disputes concerning copper, lead, zinc, aggregate, manganese and iron ore mining). He has previously worked in Latin America for several years and has acted as an investment manager overseeing a portfolio of projects in difficulties and insolvency.

53. Both experts were clearly adequately qualified to opine on the relevant issue in this case, and were, in the main, doing their best to assist the court, albeit by taking strikingly different routes. In the event, for the reasons explained in more detail below, where it mattered, I preferred the evidence of Ms Wall.

The Expert Valuation Evidence

Approaches to valuation

54. Each expert approached the valuation exercise by considering the position of MTV as borrower under the MTV Facility in which Yieldpoint was participating, and each also referred to the concept of 'fair market value' as commonly meaning the price paid for an asset in an arm's length transaction between a willing buyer and a willing seller.
55. Beyond that, there was little common ground and it was apparent that the experts had taken very different approaches.

Yieldpoint's expert evidence

56. Ms Wall noted that neither the Court of Appeal Decision nor the common ground and list of issues defined precisely the process to be taken to value the MTV Participation and nor did they define the rights that a hypothetical purchaser would receive under the participation on the Maturity Date. However, she noted that it was common ground that Kimura transferred, sold and conveyed to Yieldpoint an undivided 100% beneficial ownership interest in the Related Recourse Rights relating to Yieldpoint's 22.22% pari passu share in the MTV Facility, and that it was therefore reasonable to assess the value of the Participation as a 22.22% of the MTV Facility.
57. Ms Wall proceeded to observe that while a loan is performing properly and bears an interest rate consistent with prevailing market conditions it will

normally be assessed at face value. However, where a loan becomes distressed such that there is an increased possibility that the lender will not receive the contracted-for cashflows, it is often necessary to consider a range of possible outcomes together with the probability of those outcomes occurring. This in turn can involve an assessment of the arithmetic probability of the borrower defaulting (“PD”) and the loss to the lender if it does (the “loss given default” or “LGD”).

58. Crucially for her analysis, Ms Wall viewed the MTV Participation as atypical because there was a mismatch between its duration and that of the underlying MTV Facility. As a result of this, there was not expected to be an observable secondary market price for it. In cross-examination she explained that, although she had approached the valuation issue by reference to what a market participant would pay for a share of the loan, it was important to note that in some circumstances there might only be one potential purchaser in the market.
59. She valued the MTV Participation by reference to the underlying MTV Facility, and in particular by considering three ‘reference points’, the most important of which were Kimura's own contemporaneous internal assessments at around the Maturity Date.
60. **First**, as set out above in paragraph 28 Kimura's valuation committee decided, as at the Maturity Date, not to impair the MTV Facility, merely making provision for unpaid interest accruing from March 2022 onwards. In particular:
 - i) In taking that decision it appeared that the committee considered a detailed report intended to provide sufficient information to assess credit losses and whether impairment should be made under the reporting standards for IFRS 9. The report set out MTV’s operational and cash flow difficulties and the need to restructure the facility with additional equity and debt investment.
 - ii) This decision implied that the full USD 5 million participation principal retained its face value as at 31 March 2022.
 - iii) Ms Wall noted that Kimura is a fund registered in the Cayman Islands with regulatory reporting and assessment obligations which it can be presumed to have complied with, including by regularly and accurately assessing the fund’s net asset value.
 - iv) Kimura was also a senior lender with detailed borrower and project information and would be expected to conduct regular valuation assessments. Its internal assessments were therefore informative as to what a hypothetical market participant might reasonably have concluded at that date.
 - v) Ms Wall also noted that even in the subsequent meeting of the valuation committee on 27 April 2022, the MTV Facility was not impaired at this point, either.

61. **Second**, Ms Wall took account of spreadsheets produced by Kimura (the “**Solvency Spreadsheets**”), which contained credit-risk metrics including figures for PD, LGD and associated Expected Loss measures. As to these:
- i) The precise date at which the relevant calculations were performed is unclear but at the earliest, they set out Kimura’s assessment as at the Maturity Date since they refer to the position as at 1 April 2022. The latest date could be 20 April 2022, the date on which the spreadsheets were emailed. Ms Wall therefore proceeded on the basis that they reflected the position at or shortly after the Maturity Date, noting that if they post-dated 31 March 2022, they might be more pessimistic than the position as at that date.
 - ii) The PD figure in the spreadsheets was 6.342%.
 - iii) If loss was assumed (thereby giving the lower boundary of the range), using the LGD-based metric of 37.70% implied a value of approximately USD 3,115,000 for the MTV Participation principal.
 - iv) A third metric of “*Expected Loss (Feed)*” was referred to in the spreadsheets. This appeared to result from a comparison of the principal balance against the likely recovery from the associated collateral. This suggested an 18.2% discount to face value (i.e. recovery of 81.8%), implying a value of approximately USD 4,090,000.
 - v) Using an Expected Loss of principal of 0.44%, which is the product of the above three metrics, the implied value was approximately USD 4,978,000.
62. **Third**, as a cross-check, Ms Wall reviewed published academic and industry studies of recovery rates on defaulted corporate and emerging-market loans. These studies produced recovery rate data points typically in the range of 70% to 85%. In particular, these included figures such as approximately 70% for Latin American bank loans, approximately 72% for global emerging market development finance institution loans, and approximately 82% for mining industry bank loans. She also noted evidence of frequent high recoveries in relevant sub-sectors: for instance, 90%–100% recoveries in approximately 50% of defaults in one dataset, and recoveries of 99.6% or above in 75% of defaults in the materials sector across Latin America and the Caribbean in the database.
63. Ms Wall considered these studies to be broadly consistent with the ranges generated by Kimura's own internal solvency metrics. She treated them as supportive cross-checks rather than a free-standing valuation basis. Ms Wall confirmed in cross-examination that in valuing a loan she would not simply look at these general recovery rates but would consider the specific circumstances of the loan in question. She noted, however that these general recovery rates helped rationalize the position taken by Kimura itself as at the Maturity Date.
64. Finally, Ms Wall gave consideration to the contemporaneous assessments carried out as to the prospects of MTV, and the potential outcomes which presented themselves as at the Maturity Date. In particular:

- i) She noted the operational and liquidity difficulties which had manifested themselves prior to the Maturity Date, including in particular the suspension of operations at Don Gabriel; the delay in commencement of the Papomono block caving and the note in the TVC March 2022 financial statements that, without further funding injections, MTV would not have sufficient funds to operate post mid-June 2022 (paragraph 29 above). In cross-examination she accepted that the parties were at the material time talking in terms of needing at least USD 20 million more capital for MTV some time in 2022.
- ii) Ms Wall's report referred to some of the contemporaneous evidence leading up to the Maturity Date, including in particular as to whether it was more likely that MTV would achieve a solvent restructuring with additional funding or that there would be a liquidation outcome.
- iii) Multiple restructuring options were under consideration, albeit as at the Maturity Date none of these were agreed. Significantly, one of the options discussed was Kimura accepting a 'haircut' of USD 10 million on its debt, translating to a 35% loss on the principal value of USD 28.5 million. This was broadly consistent with Kimura's LGD estimate of 37.7% for the MTV Facility. However, the correspondence shows that Kimura was repeatedly unwilling to accept proposals which required it to write down or convert to equity any part of its debt.
- iv) The absence of an agreed proposal made it difficult to assess the impact on the value of the MTV Facility. However it was notable that a solvent solution was still being considered as at the Maturity Date and beyond. In particular, there were ongoing efforts by Mr Fitzgerald of Kimura, and Kroll (who had been appointed in mid-February to consider restructuring solutions) to seek additional investment, the outcome of which would not have been known at the Maturity Date.
- v) Ms Wall also considered Kroll's calculations presented to Senior Lenders in April and May 2022 ("**Kroll Calculations**"). These were based on analogies with two transactions: (i) the sale of a processing plant and associated mining claims by Marimaca in Chile, which Kroll estimated had led to recoveries of between 4% and 19%; and (ii) the acquisition of 100% interest in Heron Resources which owned a mining project, for which Kroll estimated recoveries of between 6% and 13%. She concluded they were not suitable as a basis for her assessment: they were produced after the Maturity Date, were expressly described as draft and illustrative with significant caveats, and contained simplistic and unsupported assumptions. Nothing in her review of the scenarios led her to conclude that Kimura's contemporaneous internal assessments were unreasonable.

65. Ms Wall's overall conclusion was that:

- i) The fair market value of the MTV Participation as at 31 March 2022 fell within a broad range of USD 3,115,000 to USD 5,000,000, as derived from Kimura's contemporaneous credit-risk metrics.

- ii) Having regard to all relevant information and, in particular, the low probability of default applied by Kimura contemporaneously and the Expected Loss (Feed) metric which took account of the collateral value, the fair market value was more likely to fall within a narrower range of USD 4,090,000 to USD 5,000,000.

Kimura's expert evidence

- 66. Mr Johnson stated that he had been instructed to estimate the fair market value of the MTV Participation “*on the basis of what a potential purchaser would pay on 31 March 2022 on the basis that the Participation is to be repaid pari passu upon MTV making payments to Kimura under the loan*”. He commented that, “*in essence, we are looking at what a potential new investor would pay for this asset on a stand-alone basis*”.
- 67. Mr Johnson's starting point was the three standard valuation methodologies:
 - i) The cost approach (based on what the asset originally cost). He concluded that this was not appropriate because, given the distressed state of MTV at the Maturity Date, there was no basis on which a willing buyer would pay the full principal value of the USD 5 million.
 - ii) The market approach (comparing other transactions either involving the asset in question or comparable assets). This was rejected because there were neither sufficiently comparable companies nor comparable transactions to indicate value, and there were not even offers for the business of the borrower or for financing the borrower (including both conventional investment and debtor-in-possession (“**DiP**”) financing) that could assist. Accordingly, applying the market approach led to an estimated value of zero.
 - iii) That left the income approach. This would ordinarily entail a discounted cash flow analysis but in the present case Mr Johnson concluded that this was not feasible, because (i) by March 2022 the history of MTV's management forecasting raised major questions about reliability, such that there would have been significant concerns about relying on any cash flow projections produced by the existing management; and (ii) even if those projections were considered sufficiently reliable in principle, all of them were predicated on an inflow of financing that was simply not available to the company at the Maturity Date, rendering them meaningless as a valuation tool.
- 68. Like Ms Wall, Mr Johnson was not impressed by the Kroll Calculations, but for the opposite reason that he considered them too optimistic. He was critical of the Heron and Marimaca scenarios as proxies, given the dissimilarities in terms of country, size, the difference in ores mined, and uncertainties about the comparability of the plant and assumptions on recoverable cash, ore inventories and cash receipts. He also pointed out that Kroll would have been motivated to ‘talk up’ the potential realisations from MTV with a view to acting or continuing to be retained to assist in a fee-earning role.

69. He noted that the Kroll Calculations did not take into account the impact on present value of deferred consideration or whether all contingent payments would even be made. Mr Johnson then adjusted for those factors and calculated that the true value as at 31 March 2022 of the two realisations was in the region of only 2.4% to 11.4% of the loan value. He went on to note that even this was optimistic, both because it assumed DiP financing would be provided and because it excluded costs and impacts that would in practice be likely to reduce realisations further.
70. Mr Johnson concluded that the realisable value for MTV was likely significantly lower than suggested by even the adjusted Kroll figures, and that a potential purchaser would not give much weight to those scenarios, even acknowledging that he had been unable to identify better proxies.
71. Mr Johnson instead focused on the actual scenario faced by MTV, and highlighted the following:
- i) MTV had been facing operational issues since 2020, culminating in the pause of active mining at Don Gabriel on 27 January 2022 (as a result of both underperformance and safety concerns) and the announced delay in commencement of the Papomono block caving. Although Papomono excavation subsequently began on 7 March 2022, of the proposed mining areas only one was actually operational as at the Maturity Date.
 - ii) MTV's financial situation was clearly very challenging, and was deteriorating. This was demonstrated by, for example: the call for further cash in the first quarter of 2022, only three months after the previous funding of November 2021; MTV's default in relation to relatively small sums of price participation in December 2021 and January 2022; cash flow models from early February 2022 showing negative cash flow into 2023; a cash flow analysis of MTV dated 13 February 2022 showed that they required an additional USD 20-25 million in 2022, even with Kimura secured debt repayments being deferred by two years; a short-term liquidity outlook by Kroll as at 29 March 2022 showed that without further funding MTV would deplete its cash reserves even without paying interest, price participation or settlements in the week of 7 April 2022, or slightly later in alternative scenarios.
 - iii) The attempts to find further investment or financing had been unsuccessful and did not look hopeful. Kroll's update of 28 March 2022 noted that at that stage Kroll had reached out to 71 capital providers. Although some had expressed interest, many had given negative responses and there was limited evidence of parties familiar with both the asset and the management team demonstrating strong appetite to proceed. As at the Maturity Date, no lender, including the existing lenders, had agreed to provide any capital injections. In their May 2022 wind-down analysis, Kroll confirmed that Senior Lenders were unwilling to make available further funding, stating that DiP financiers were not supportive, mainly due to the regional jurisdiction challenges.

72. Mr Johnson was unpersuaded that the approach of Kimura’s own valuation committee should affect his valuation. He noted that book value was not the same as market value, and/or what a third party purchaser would be willing to pay, despite that fact that the relevant standards¹ required the book value of a business or asset to be recorded as no more than the higher of (i) the value in use of the cash generating unit or asset or (ii) the fair value less costs of disposal. He identified several reasons why impairment is often slower and less complete than it should be, including optimism bias on the part of existing teams, the risk that recognising impairment would itself set a ceiling for recoveries, and the reluctance of fund managers to accept write-downs where investor confidence is at stake. He also noted that history was littered with multiple cases of collapsed companies whose financial accounts failed to reflect their parlous state until shortly before the end (such as Enron, Wirecard and Lehman Brothers), although he fairly accepted in cross-examination that the examples were all of large-scale frauds, and he was not suggesting that Kimura was willingly misleading investors.
73. It does not appear that Mr Johnson considered the Solvency Spreadsheets when producing his report (although, since he did not include a list of the material supplied to him when making the report, it was not possible to tell definitively) but in the experts’ joint memorandum and in cross examination he was clear in his view that these were not an indicator of fair market value. He accepted in cross-examination that the spreadsheets apparently represented Kimura’s actual contemporaneous view (as a “*well-informed party*”) as far as impairment was concerned but “*if you're looking at fair market value or you're looking at impairment, they are two completely different exercises.*”
74. Mr Johnson ultimately concluded the following:
- i) There was no meaningful value in the MTV Participation at the Maturity Date, especially taking account of its relatively small value as a stand-alone investment and the reliance for any value to be recovered in a liquidation.
 - ii) It was therefore unlikely that there would be a willing buyer at that date, but - recognising that a speculative buyer might theoretically emerge - he considered what value such a buyer might ascribe and provided a valuation on that basis.
 - iii) Given all of the issues he identified, he would not expect any such potential buyer to assume realisations in excess of 10% of principal value.
 - iv) It was also relevant to consider transaction costs of around USD 100,000 (to cover geological, financial and legal due diligence), not because these

¹ Mr Johnson originally referred to International Accounting Standard (‘IAS’) 36 on impairment of assets, which reflects this principle in terms. By the time of trial, the experts were agreed that the relevant rule for a financial asset such as the MTV Participation was International Financial Reporting Standard (‘IFRS’) 9 which requires impairment to reflect expected credit losses. Mr Johnson accepted in cross-examination that the principles were the same (although he took issue with whether book value was of any relevance to the fair market value assessment).

affected the mathematical calculation of value, but because they were relevant to what a buyer would likely pay overall.

- v) After taking into account transaction costs and the need for a speculative investor to earn a return reflecting the significant risks of non-payment, the likely maximum payment for the MTV Participation would be USD 200,000 to USD 300,000. With transaction costs that would amount to an outlay of USD 300,000 to USD 400,000 to achieve an expected return of USD 100,000 — a return of 25% to 33% over several years and with considerable uncertainty.

Fair Market Value and the Reality Principle

75. Both parties referred to the decision of Lewison L.J. in *JPMorgan International Finance Ltd v Werealize.com Ltd* [2025] EWCA Civ 57; [2025] BCC 570 dealing with the relevance of the “reality principle” to fair market value at [62] ff.:

62. As the definition of Call Option Fair Market Value makes clear, the overall object of the valuation exercise is to determine the fair market value of the shares in question. The essence of an open market valuation was distilled by Hoffmann LJ in *IRC v Gray* [1994] STC 360:

“The property must be assumed to have been capable of sale in the open market, even if in fact it was inherently unassignable or held subject to restrictions on sale. The question is what a purchaser in the open market would have paid to enjoy whatever rights attached to the property at the relevant date: *Inland Revenue Commissioners v Crossman* [1937] AC 26. Furthermore, the hypothesis must be applied to the property as it actually existed and not to some other property, even if in real life a vendor would have been likely to make some changes or improvements before putting it on the market: *Duke of Buccleuch v Inland Revenue Commissioners* [1967] 1 AC 506, 525. To this extent, but only to this extent, the express terms of the statute may introduce an element of artificiality into the hypothesis.

In all other respects, the theme which runs through the authorities is that one assumes that the hypothetical vendor and purchaser did whatever reasonable people buying and selling such property would be likely to have done in real life. The hypothetical vendor is an anonymous but reasonable vendor, who goes about the sale as a prudent man of business, negotiating seriously without giving the impression of being either over-anxious or unduly reluctant. The hypothetical buyer is slightly less anonymous. He too is assumed to have behaved reasonably, making proper inquiries about the property and not appearing too eager to buy. But he also reflects reality in that he embodies whatever was actually the

demand for that property at the relevant time. It cannot be too strongly emphasised that although the sale is hypothetical, there is nothing hypothetical about the open market in which it is supposed to have taken place. The concept of the open market involves assuming that the whole world was free to bid, and then forming a view about what in those circumstances would in real life have been the best price reasonably obtainable. The practical nature of this exercise will usually mean that although in principle no one is excluded from consideration, most of the world will usually play no part in the calculation. The inquiry will often focus upon what a relatively small number of people would be likely to have paid. It may have to arrive at a figure within a range of prices which the evidence shows that various people would have been likely to pay, reflecting, for example, the fact that one person had a particular reason for paying a higher price than others, but taking into account, if appropriate, the possibility that through accident or whim he might not actually have bought. The valuation is thus a retrospective exercise in probabilities, wholly derived from the real world but rarely committed to the proposition that a sale to a particular purchaser would definitely have happened.

It is often said that the hypothetical vendor and purchaser must be assumed to have been “willing”, but I doubt whether this adds anything to the assumption that they must have behaved as one would reasonably expect of prudent parties who had in fact agreed a sale on the relevant date. It certainly does not mean that having calculated the price which the property might reasonably have been expected to fetch in the way I have described, one then asks whether the hypothetical parties would have been pleased or disappointed with the result; for example, by reference to what the property might have been worth at a different time or in different circumstances. Such considerations are irrelevant.”

63. The first of the quoted paragraphs encapsulates what used to be known as the principle that property is to be valued *rebus sic stantibus* (i.e. as things stand) but is now more commonly referred to as the “reality principle”. Lord Neuberger summarised this principle in *Transport for London v Spirerose Ltd* [2009] UKHL 44, [2009] 1 WLR 1797, 1814:

“if a statute directs that property is to be valued on an open market basis as at a certain date, one would not expect any counter-factual assumptions to be made other than those which are inherent in the valuation exercise (such as the assumption that the property has been on the market and is the subject of a sale agreement on the valuation date) or those which are directed by the statute.”

76. At [64] of *JPMorgan*, Lewison LJ cited his judgment in the Court of Appeal in *Secretary of State for Transport v Curzon Park Ltd* ([2021] EWCA Civ 651, [2021] PTSR 1560):

[42] I expanded on the reality principle in *Harbinger Capital Partners v Caldwell* [2013] EWCA Civ 492. Although mine was a dissenting judgment, I do not think that my colleagues (Mummery and Beatson LJ) disagreed with my statement of principle. They disagreed with the application of the principle to the particular provision under consideration. What I said was:

“22. There are many areas of the law in which an amount is to be ascertained by postulating a hypothetical transaction of one kind or another. Rating is perhaps the oldest example, for which purpose rateable value was measured by postulating the hypothetical grant of a tenancy from year to year. But hypothetical transactions abound in other areas of the law: for example compulsory acquisition, taxation and rent review clauses. Sometimes the hypothesis is statutory and sometimes it is contractual. The courts have developed a well-established set of principles that apply to both kinds of case. The most important of these is that things are to be taken as they are in reality on the valuation date, except to the extent that the instrument postulating the hypothetical transaction requires a departure from reality. In the old cases this is summarised in the Latin phrase *rebus sic stantibus*. In the more modern cases it has been described as the principle of reality: *Hoare v National Trust* (1998) 77 P & CR 366.

“23. The following points amplify the reality principle:

“(i) The hypothesis is only a mechanism for enabling one to arrive at a value of particular property for a particular purpose. It does not entitle the valuer to depart from the real world further than the hypothesis compels: *Hoare v National Trust* at p 380 (Schiemann LJ). The various hypotheses must be taken no further than their terms make strictly necessary: *Cornwall Coast County Club v Cardgrange Ltd* [1987] 1 EGLR 146, 152. It is necessary to adhere to reality subject only to giving full effect to the hypothesis: *Hoare v National Trust* at p 387 (Peter Gibson LJ).

“(ii) Giving effect to the hypothesis may require a legal impediment to the implementation of the hypothesis to be ignored or treated as overridden; but only to the extent necessary to enable the hypothesis to be effective: *Inland Revenue Comrs v Crossman* [1937] AC 26; *Law Land Co Ltd v Consumers' Association Ltd* [1980] 2 EGLR 109; *Walton v Inland Revenue Comrs* [1996] STC 98.

“(iii) The world of make-believe should be kept as near as possible to reality: *Trocette Property Co Ltd v Greater London Council* (1972) 28 P & CR 408, 420 (Lawton LJ); *Hoare v National Trust* at p 386 (Peter Gibson LJ). Reality must be adhered to so far as possible: *Cornwall Coast County Club v Cardgrange Ltd* at p 150 (Scott J). The valuer should depart from reality only when the hypothesis so requires: *Hoare v National Trust* at p 388 (Peter Gibson LJ).

“(iv) Where the hypothesis inevitably entails a particular consequence, the valuer must take that consequence into account: *East End Dwellings Co Ltd v Finsbury Borough Council* [1952] AC 109, 132.

“(v) But there is a clear distinction between hypotheses expressly directed to be made and assumptions allegedly consequential on the express hypotheses. Where the alleged consequence is not inevitable, but merely possible (or even probable), then the consequence cannot be assumed to have happened: *Cornwall Coast County Club v Cardgrange Ltd* at p 149 (Scott J).

“(vi) The reality principle applies as at the valuation date. Events which postdate the valuation date cannot generally be taken into account. But the purchaser will have regard to future possibilities, and it is his perception of the future possibilities that matters. There is, in this respect, a clear difference between events before and after the valuation date. What has happened before the valuation date is either known (because it really happened) or is required by the hypothesis to be assumed to have happened. But the future is unknowable. Assumptions about the future should not be made. Nor can a tribunal make findings of fact about the future. So all that a purchaser (and by extension a valuer) can do is assess the effect on current value of future possibilities.””

77. The Supreme Court in *Curzon Park*, having cited this part of Lewison LJ’s judgment without criticism, described the reality principle as “*a fundamental principle of valuation*” ([2023] UKSC 30, [2023] 1 WLR 2762 at [46] and [64]).
78. At [68] and [69] of *JPMorgan*, Lewison LJ added this:

68. There is one other point about the concept of open market value which I should make. It is well settled that if one person in the market is prepared to pay more than other bidders (and on the facts would have bid) then that higher price will be the open market value. That is illustrated by *IRC v Clay* [1914] 3 KB 466. The case concerned the open market value of a house. It was worth £750 as a residence for private occupation, but a nurses’ home next door wanted the property in order to extend the home, and paid £1,000 for it. Sir Herbert Cozens-Hardy MR said at 472:

“I can see no ground for excluding from consideration the fact that the property is so situate that to one or more persons it presents greater attractions than to anybody else. The house or the land may immediately adjoin one or more landowners likely to offer more than the property would be worth to anybody else. This is a fact which cannot be disregarded.”

69. If, therefore, within the pool of potential purchasers there are some who would pay a higher price than others then (depending on the valuers’ view of whether they would bid) the open market value will be the higher price.

Parties’ Submissions

79. Yieldpoint’s case was essentially that:

- i) The situation of MTV, and the value of the MTV Participation had to be valued strictly as at 31 March 2022, without the benefit of hindsight. As at that date, it was clear that, while the company needed a substantial cash injection, the process of trying to achieve this was still ongoing and it was unclear as to how it would turn out.
- ii) The contract was silent on the criteria to be applied or the method of valuation but the starting point was to consider carefully the asset in question. The exercise was to value the participation right which had expired on 31 March 2022 through some kind of process which should have taken place in the 45 days following the service of notice of non-renewal in February 2022. Once that was borne in mind, the importance and relevance of Kimura’s own internal and contemporaneous assessments of value was apparent, since these would have informed what the parties might negotiate or agree by way of redemption sum. As Mr Pilbrow KC put it, the relevant payment would necessarily reflect the parties “actual honest contemporaneous views as to value”.
- iii) Even if the contract required the application of the ordinary accounting concept of ‘fair market value’ in the sense of the price to be achieved from a hypothetical sale between a willing buyer and seller, that still led to the same place. In particular, as to the ‘reality principle’, Yieldpoint emphasised that the relevant exercise only required a departure from reality where it was necessary to make the hypothesis work (pointing to sub paragraphs (i)-(iii) of Lewison LJ’s analysis in *Harbinger Capital* cited above). In the present case, the reality was that Kimura was the only “purchaser” and the thing being valued was an “*expired participation*” with the right to a redemption payment from Kimura. The process of arriving at a fair market value in accordance with the principles in the authorities did not require those matters of reality to be departed from (by contrast with, for example, matters such as restrictions on selling at all which would need to be ignored as per Lord Hoffmann’s judgment in *IRC v Gray*, cited in *JPMorgan*).

- iv) Ms Wall's evidence was therefore to be preferred because she had valued the correct thing (the expired participation rights) in the best available manner, namely by reference to Kimura's own assessments with a cross-check to relevant recoveries.
80. Kimura described the relevant exercise as being to measure the deterioration in the creditworthiness of the borrower between the start of the 12-month participation in March 2021 and its end on 31 March 2022. Its position was:
- i) Yieldpoint had received an extensive package of documentation prior to entering the participation, which showed that, as at March 2021, MTV was solvent on both a cash-flow and a balance-sheet basis. Liquidation was not in contemplation. The company had not engaged financial advisers to restructure its balance sheet and there was no hint of the operational and financial difficulties that would emerge in the following 12 months.
 - ii) By 31 March 2022 the situation was very different since (i) MTV was in default of the MTV facility; (ii) MTV was running out of cash; the cash projector produced by MTV's management on 23 March 2022 showed "a sea of red" from March to June 2022. It could be seen from this that without an injection of approximately USD 5 million by mid-April, and without deferral of lender payments due between March and June, MTV would run out of money before the end of June 2022; and (iii) any restructuring or new investment, even in the most optimistic scenarios, would not have generated cash available to repay the MTV loan until at least March 2024.
 - iii) As to how the reality principle applied to this case, the only place where the neutral willing buyer/willing seller hypothesis would need to give way to reality was in the area of transaction costs since it was unlikely that Kimura would need to expend those in order to familiarise itself with the asset. Furthermore, Yieldpoint had not pleaded that Kimura was a special purchaser who would pay more than another buyer (c.f. *JPMorgan* [68] – [69]).
 - iv) Yieldpoint were therefore wrong to focus on the fact that there was only one buyer for the asset (Kimura). The proper exercise was to consider only what a hypothetical buyer in the market would pay for the asset as at 31 March 2022, bearing in mind that it was admitted that MTV was in default by this point. Mr Johnson had therefore performed the correct analysis by attempting to consider what a hypothetical (new) third party, approaching the matter afresh, would have been prepared to pay, if anything, for the asset.
 - v) The fair market value depended on the creditworthiness of MTV as the borrower and its ability to pay the future price participation, interest and repayment of principal, assessed as at 31 March 2022, since that is what any hypothetical buyer would have concerned itself with.

- vi) The internal views of Kimura did not bear on this exercise, and the case had not proceeded to that point on the basis that the parties' subjective views were relevant. Ms Wall, despite acknowledging all the factors that would weigh heavily on a hypothetical purchaser's assessment, had not actually performed the required valuation exercise. Instead of determining for herself what a reasonable market participant would have paid for the loan, she had deferred almost entirely to Kimura's own internal valuation committee documents and solvency spreadsheets (which in any event post-dated the Maturity Date). This was the wrong approach, and Mr Johnson's conclusions were therefore to be preferred.

Discussion/determination

Approach to valuation

- 81. The contract is silent as to the valuation exercise but it is clear from the Court of Appeal Decision that I must decide the value of the redemption by Kimura of the expired MTV Participation rights as at 31 March 2022. In the course of argument before the Court of Appeal, it was accepted by Kimura's counsel that the price to be paid on redemption should reflect the fact that Yieldpoint had been on risk for a year and no longer. It was also anticipated that, if matters had proceeded properly, the contract value would be arrived at via negotiation between the parties in the 45 days before the Maturity Date. That is not to say that the subjective view of either party should determine value but for the reasons I explain below, it does feed into the analysis in the unusual circumstances of this case.
- 82. Even absent MTV's difficulties, it is perhaps unsurprising that this asset would have been an unattractive proposition for a hypothetical third party market participant; it follows at least in part from the highly unusual nature of this "*Frankenstein's slip*"; the mismatch between the participation and the underlying facility; the fact that it is relatively small stand-alone investment (albeit one which formed part of a wider relationship between the actual parties); and the fact that the parties (and the court) have ended up seeking to perform an exercise that had not actually been envisaged by the parties.
- 83. The reality was that this was not an asset which would have been realistically offered for sale in the open market, or one which was likely to attract much, if any third-party interest. Ms Wall's evidence was clear that "*there was no actual market for the participation*" (Day 2/p69) – in a sense she agreed with Mr Johnson on this. Her view was that it was a "*theoretical market*" only. Where the experts disagreed was where to go next with the analysis:
 - i) For Ms Wall the absence of any available market reference points drove reliance on Kimura's own independent assessment of the value of its own loan to MTV.
 - ii) However, Mr Johnson was considering "*what a potential new investor would pay for this asset on a stand-alone basis*" while ignoring the position of the actual (only) purchaser of the asset. That led him to a minimal value.

Kimura's own contemporaneous assessments

84. There are a number of reasons why the view of Kimura's valuation committee and the Solvency Spreadsheets are important indicators as regards market value:

- i) Kimura's own view as to the likely recoveries under the MTV Loan has particular relevance given that it is the party that is buying the asset. It was a market of one.
- ii) Kimura was in at least as good a position as any market participant to assess the position, if not better. Furthermore, much of the information relied on by Kimura now as tending to show a negative outlook for MTV was known to members of the valuation committee, including Mr Manielle, the co-head of structuring at Kimura, and Mr Fitzgerald, the portfolio manager. These parties were plainly being kept abreast of MTV's difficulties, which were also fairly summarised in the report to the valuation committee.
- iii) Kimura was under various regulatory assessment and reporting obligations to the Cayman Islands authorities, including to maintain a net asset valuation ('NAV') policy that ensures that the fund's NAV is fair, complete, neutral and free from material error.
- iv) Ms Wall's evidence on the implications of the relevant accounting standards applicable to the exercise carried out by the valuation committee was compelling. While she accepted that book value and fair market value were different measures, she observed that, given that the book value of a financial asset must reflect expected credit losses on the asset, companies must not hold a financial asset on its books at a higher value than what they can reasonably expect to recover from it. As she put it in the experts' joint memorandum:

While the book value of a financial asset (based on its amortised cost) is not the same as market value in a strict sense, the book value must be assessed regularly (in the case of Kimura, this appears to have been monthly) and adjusted to reflect future expected losses taking into account the various potential outcomes, meaning that the difference if any would likely be small and certainly not sufficient to explain the disparity between the value of the Participation assessed by Kimura and Mr Johnson's valuation.

This was a powerful point to which Mr Johnson had no convincing answer.

- v) Mr Johnson was driven to suggest that Kimura's valuation committee were "*sugar-coating*" the picture and had entirely failed to reflect the true economic reality of the MTV Facility (while understandably disavowing any suggesting that Kimura was willingly misleading its investors or concealing the truth from them). This was not credible, not least in view of the fact that the committee contained not only a number

of well-informed representatives of Kimura but also a number of external, independent members. At the very least, even if there was a degree of wishful thinking, this was plainly insufficient to explain the huge disparity between the position adopted by the committee and that of Mr Johnson.

- vi) Ms Wall also fairly made the point that the valuation committee would be considering the value of the collateral held in respect of the MTV loan, on which it was in a good position to form a view.
- vii) When challenged in cross-examination that the solvency spreadsheet was not the sort of document that market participants would have shared with each other when marketing a share of the loan, Ms Wall's (entirely credible) response was that, although the schedule itself could not have been shared, Kimura's calculations could be carried out using information which would be available to a market participant. I should add that she also fairly accepted that with hindsight, Kimura's percentages may not have been not correct, but emphasised throughout her evidence that her task was to evaluate the position as at 31 March 2022. I accept that she was properly focussed on seeking to do this.
- viii) I also note that the willing purchaser is deemed to be assessing, as at 31 March 2022, the effect of future possibilities on current values (see sub paragraph (vi) in Lewison LJ's judgment in *Harbinger Capital*, cited in *JPMorgan*, above at paragraph 75). At a high level, this is what the valuation committee was doing.

MTV's prospects as at the Maturity Date

- 85. The experts were agreed that substantial further capital of at least USD 20 million was required in 2022 if MTV stood any prospect of survival. Where they differed was on MTV's prospects as at maturity.
- 86. Mr Johnson accepted that there were still recovery efforts ongoing on 31 March 2022 but asserted that it could already be seen at that date that these were unlikely to succeed. This was a principal reason why he arrived at such a low value.
- 87. However, in my view this is infected by hindsight and is contradicted by a number of pieces of compelling contemporaneous evidence, to which Mr Johnson failed to give sufficient weight:
 - i) As at 22 March 2022, little more than a week before the Maturity Date, Kroll sent an update (entitled "Grapple Process Update") which stated that 43 investors had been contacted, with 26 yet to be approached. It noted that "*early feedback from capital providers has been mixed*", although it seemed that some parties were potentially interested, and the other leads would continue to be pursued via data rooms and on-site due diligence at the mine.

- ii) On 28 March 2022, Mr Fitzgerald of Kimura reported to Kroll that he had been having discussions about MTV with a “\$8bn family office” called Tarsadia Capital with whom it already had a relationship.
- iii) Also on 28 March 2022, Kroll delivered a further ‘Project Grapple Update.’ By this stage 71 potential investors had been approached, but all were still at initial contact stage. Feedback was ‘mixed’, with some providers not attracted to the asset but there was some interest from royalty companies. At that stage, the process of approaching financiers who might have been interested in DiP funding had not even begun.
- iv) Kroll had prepared a draft ‘teaser’ document to describe and promote the opportunity to potential investors and as at 28 March 2022 this was still being commented on by Kimura and MTV.
- v) TVC’s condensed interim consolidated financial statements as at 31 March 2022 spoke of the current lenders’ intention to provide further funding to MTV which, if approved, would fund MTV into July 2022 (paragraph 29), following which further funding would be required. The tone of the narrative is very far away from failure being inevitable.
- vi) In early April, Kimura issued a notice to investors to update them about the situation regarding the MTV loan. This referred to the fact that the company needed a new capital injection of around USD 25 million over the next 12 months, but that the Senior Lenders were actively working to resolve the situation:

We have engaged Kroll, as Financial Advisors to help market the company for new investment as equity, debt, or comprehensive buyout. This will include the parent company, TVC, giving up their unsecured debt to equity, and ultimately losing control of the company to the new Investors. They will also help advise on any restructuring or liquidation events that could present themselves over coming months.

We have already had several investors interested in the project and are in the process of sharing information with investors

- vii) The valuation committee on 27 April, nearly a month after the Maturity Date, recorded the following:

The Chairman enquired whether the Investment Manager was satisfied that 100% of principal would be recovered. CM advised that the complexities of the re -structure, the onboarding of investors to attain a full sale of the company, and a re-structure of the balance sheet, made it difficult to confirm the likely percentage of recovery of principal at that time.

MW advised the Meeting that the Investment Manager was actively seeking outside parties interested in taking it out; the

Kroll process had identified several, some of which had commenced detailed due diligence on the facility. Liquidation was also being considered as an alternative route.

This was highly significant, since it showed that even nearly a month after the Maturity Date, third party investment was still an option, and liquidation was not a foregone conclusion.

- viii) As late as 23 May 2022, Kroll circulated a further “Project Grapple Update” which showed that six parties had signed an NDA and had proceeded to access the data room to carry out preliminary due diligence. By this stage a number of DiP providers had been approached, many of whom had not yet provided feedback.
- ix) Mr Johnson relied in his report on a Kroll document dated 25 May 2025 called ‘Project Grapple Wind Down Analysis’ which stated that over the next [1-2] weeks MTV would run out of cash and senior lenders were unwilling to make any further funding available. It also stated that “*it is not apparent that third party DiP financiers are supportive*”. However this was plainly not known or knowable as the Maturity Date because none had yet been approached.

88. Mr Johnson’s insistence that it was already apparent as at 31 March 2022 that there were no available financiers was therefore not well-founded.

Conclusions in relation to valuation

89. In my view Ms Wall’s approach is to be preferred:

- i) Although the differences between the experts were largely driven by their dissimilar approaches in principle, my impression of Ms Wall was in general more favourable; she made realistic concessions when asked to do so and her evidence was in my view more focused on providing a fair assessment of the value at the relevant time, and less infected with hindsight than that of Mr Johnson.
- ii) Mr Johnson was unwilling to accept any departure from his rigid position that MTV was insolvent and unavoidably headed for liquidation as at the Maturity Date, even in the face of clear contemporaneous indications that many highly-involved participants did not think so. On the facts it was too soon to tell, and there were some reasons to be optimistic.
- iii) Ms Wall’s consideration of the contemporaneous value and solvency assessments by Kimura was justified because these were important and relevant indicators of value for the reasons explained above. The probabilities and amounts in the Solvency Spreadsheets were additionally supported by her cross-check using recovery rates on defaulted corporate and emerging-market loans which meant that Kimura’s own calculations could be regarded with a degree of confidence.

- iv) It was not wrong in principle to take these into consideration in the circumstances of this case given (i) the exercise in question which, as Kimura's counsel put it, was to measure the "*deterioration in creditworthiness*" by (but not beyond) 31 March 2022, to which they were obviously of some relevance; and (ii) the reality principle required the valuation to reflect the reality of the situation as closely as possible and not to depart from it unless this was necessary for the hypothesis to operate (paragraphs 75-78 above). The reality here was that it was Kimura which was the buyer, and Kimura was in a unique position to assess value. If Kimura as the specific redemption party is the one person in the market who places a value on this particular right, then Kimura's view is the open market value; see *JPMorgan* [68] and [69]).
 - v) Put another way, it was wrong to ignore those assessments altogether even taking account the fact that the valuation committee was not performing the same exercise as the expert valuers. If Mr Johnson's analysis was correct as at 31 March 2022 as regards what a willing buyer would pay then I do not see how the valuation committee could have honestly and reasonably taken the decision it did. The reality principle did not compel those assessments to be ignored.
 - vi) Neither side was much attracted to the Kroll Calculations for different reasons, but since these were (i) predicated on a liquidation route which, as I have found, was not a foregone conclusion as at the Maturity Date; and (ii) involved projects which were, for many reasons, very different from the one in hand, limited assistance could in my view be drawn from them.
 - vii) Mr Johnson's approach of basing a potential 'willing buyer' price at 10% of the participation value was not grounded in any underlying numbers or analysis and therefore came across as entirely arbitrary. To my mind it was far less convincing than Ms Wall's approach, which was anchored in contemporaneous, concrete analysis.
 - viii) Taking all of these considerations into account it was Ms Wall's approach that was a better reflection of the fair market value test.
90. The upper end of Ms Wall's range of values would lead to the recovery of the entire principal which would in my view be inappropriate given that MTV was in default of the MTV Facility at that point and there had been a deterioration in creditworthiness which needed to be reflected in the value of the redemption rights.
91. In my view, doing the best I can with the figures available, it is appropriate to take the lowest end of Ms Wall's range (USD 3,115,000) as the fair market value. This is based on the metric of likely recovery from the Solvency Spreadsheets (i.e. the LGD figure 37.70%). This assumed that MTV would default on the loan (i.e. will not meet its repayment obligations) and therefore erred on the side of generosity to Kimura and took appropriate account of the risk factors which were already present at the Maturity Date. A recovery of 62.3% of the MTV loan can be viewed with relative confidence when viewed

against Ms Wall's cross-check figures for particular sectors and groups of defaulted loans referred to in Ms Wall's report, which gave a range of 70-85%.

92. Yieldpoint argued that Ms Wall's middle figure of USD 4,090,000, which used the "*Expected Loss (Feed)*" metric from the Solvency Spreadsheet, should be the minimum assessment of fair market value because it appeared to take account of likely recovery against collateral. However this did not seem to me to be a reasonable course given (i) Ms Wall's own doubts about this metric (in her report she reasonably confessed that "*the purpose of this calculation is not entirely clear to me*" (paragraph 6.4.9)); (ii) there was little evidence before me as to the true contemporaneous value of the collateral; and (iii) standing back, a recovery rate of 81.8% in relation to an underlying loan which was already in default at that point in all the circumstances seemed too high.
93. Accordingly, I assess the fair market value of Yieldpoint's participation as at 31 March 2022 at USD 3,115,000 and find that the Kimura was in breach of contract in failing to pay it on that date.
94. I will hear further from the parties as to the appropriate calculations as to interest (given the agreed position set out in paragraph 48 above) and consequential orders.