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Case No: CL-2022-000391

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

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

Date: 22/05/2023

Before :

STEPHEN HOUSEMAN KC
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between :

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

- -
- -

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

Hearing date: 18 May 2023

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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STEPHEN HOUSEMAN KC SITTING AS A JUDGE OF THE HIGH COURT

This judgment was handed down remotely at 11:30am on 22 May 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Stephen Houseman KC :

Introduction

1. Sub-participation is a well-known concept in corporate finance. It is used to reduce or eliminate the effect of default risk through back-to-back non-recourse funding. Risk and reward are shared in an agreed proportion through a 'pay as paid' model. Rather than taking a direct slice (and hence default risk) a participant sits outside the primary structure in a way that transfers economic impact without involving legal privity with a primary obligor. The prefix "sub" differentiates direct forms of stakeholding - including syndication, novation or assignment - although reference to "participation" is commonplace.

2. The issue in the present case concerns the nature or extent of a participation arrangement concluded between the Claimant ("Yieldpoint") and the Defendant ("Kimura") on 30 March 2021. I refer to this as the "MTV Participation". It provided funding in relation to a pre-existing commodity finance facility described and defined below as the MTV Facility.

3. The sum at stake is relatively modest for the Rolls Building. Yieldpoint seeks repayment of US$5 million which it advanced to Kimura. Kimura says it has no obligation to repay this sum due to the non-recourse basis of the deal.

4. The parties disagree about the nature of their bargain or - more accurately - the extent to which it involved genuine proportionate participation by Yieldpoint. In summary:

   (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.

5. Sometimes there is insufficient documentation to explain the nature of a transaction. Here there is, if anything, too much. There is an awkward interplay between two separate agreements: a Master Participation Agreement for Trade Transactions dated 19 February 2021 ("MPA"); and the MTV Participation contained in or evidenced by formal Offer and Acceptance executed between the parties on 30 March 2021. Each side's analysis suffers heavy linguistic casualties. Making sense of what they

objectively agreed is not easy. They at least agree that they made a binding contract as a matter of English law.

6. Indeed, it is common ground that the MTV Participation is or was a "*Participation Agreement*" in respect of a "*Participated Transaction*" as defined in and contemplated by the terms of the MPA. It involved sub-participation of some kind or to some extent, together with equitable assignments of relevant recourse rights.

7. The trial of this action took place on 18 May 2023. It was conducted under the Shorter Trials Scheme contained in section 2 of PD57AB pursuant to the Order of Mr Justice Foxton made on 9 December 2022.

8. Two factual witnesses were cross-examined: Nathaniel Polachek, Managing Member and Founding Partner of Yieldpoint; and Craig Manielle, Co-Head of Structuring at Kimura Capital LLP, investment adviser to Kimura. In the absence of any extra-contractual doctrines or material disputes about factual matrix, this evidence is of limited assistance. I am grateful to both witnesses for their testimony and insights.

9. For convenience, I will refer to the MPA, MTV Participation and MTV Facility as if still on foot, irrespective of the actual position in each case.

Relevant Background

MTV Facility

10. Kimura is a company incorporated under the laws of the Cayman Islands. Together with an entity in the Anglo American group (known as "AAML") it has for some years provided substantial pre-export commodity finance to Minera Tres Valles SPA ("MTV"), a copper-mining and cathode-producing company incorporated and based in Chile.

11. As at the date of the MPA, Kimura and AAML were joint senior lenders to MTV under a US$45m four-year structured finance facility dated 10 December 2019 as amended and restated on 5 November 2020 ("MTV Facility"). Kimura and AAML provided US$22.5m apiece. This facility was fully funded at all material times.

12. Amongst other things, the MTV Facility provides for quarterly interest at a rate of 3-month LIBOR + 8.0% (plus default rate interest), monthly price participation in favour of the senior lenders and security over MTV's assets and operational output. Repayment of principal is structured in tranches, including a first tranche (8.33%) due from MTV on 31 March 2022. The facility is for a term expiring on 31 December 2024 subject to acceleration for default in the usual way. Citicorp is the facility and security agent.

MPA / Template Offer

13. The MPA was executed on 19 February 2021. This occurred in the context of Kimura and Yieldpoint entering into their first participation arrangement involving a US$3m 90-day inventory financing of sunflower seeds. Kimura proffered the MPA. It is based on or comprises the Bankers Association for Finance and Trade standard form at the relevant time which is available online (see *www.baft.org*).

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 adjustments.

Negotiation of the MTV Participation

28. As noted above, it is common ground that the MTV Participation is a distinct contract which constitutes a PA within the meaning of and made under the rubric of the MPA. The terms of the MTV Participation were negotiated briefly by commercial counterparts in the week or so leading to its execution on Tuesday 30 March 2021.

29. On 23 February 2021, just days after conclusion of the MPA, Mike Fitzgerald of Kimura emailed Mr Polachek of Yieldpoint about a new opportunity involving "*a copper asset ... which is a one year structure with profit kicker upside*". It took a couple of weeks for this raw proposal to develop.

30. The parties met virtually on Thursday 18 March to discuss this potential participation. Mr Polachek recalls discussion of the deal on that occasion as a 12 month fixed-term participation of US$5m within a longer term financing structure, namely the MTV Facility. His first witness statement recalled (paragraph 12) that Mr Fitzgerald or Mr Manielle said that Kimura would "*pay us back on 31 March 2022 (unless we decided to continue participating…*". Mr Manielle did not refute this evidence in any responsive witness statement (for which permission would have been required) and he was - therefore, conspicuously and understandably - not asked about it in cross-examination.

31. Kimura's legal team elected not to cross-examine Mr Polachek. I directed that he be sworn in to ask him about his recollection of the 18 March virtual meeting. In answer to these questions, Mr Polachek clarified his written evidence as follows: during the 18 March virtual meeting he was told that Kimura would "*pay back*" the US$5m at the "*end date*" or "*end of our deal*" or equivalent words; he was then given an assurance about it being paid back "*on 31 March 2022*" in a subsequent virtual meeting held on 26 March 2021: see paragraph 38 below.

32. In light of this clarification, and despite Mr Manielle not covering such matters in his oral testimony, Kimura's legal team was given a further opportunity to recall Mr Polachek to challenge this aspect of his evidence. This was done briefly. Mr Polachek's evidence remained the same if not more adamant.

33. On Monday 22 March 2021, Kimura sent an email to Yieldpoint entitled "*Kimura MTV – Yield Point participation - $5m*". This email had two attachments:

    (a) The first attachment, described in the email as "*an investment summary for the proposed 1-year $5m participation for Yield Point in Kimura's MTV facility*", was a 3-page colour pdf entitled "*Committed Secured Pre-Export Financing Facility*". I refer to this document as the "Transaction Overview" as it has been defined in these proceedings.

    (b) The second attachment was described in the email as "*the draft O&A as documentation for the $5m participation*" proposing "*value date tomorrow*" and inviting discussion. This attachment contained Kimura's proposed deal terms

reflected in an Offer and Acceptance based upon the Template Offer. For convenience, I refer to it as the **"**First Offer".

34. The First Offer described the "*Type of Participation*" as "*Funded - Undisclosed*". It recorded the "*Start Date of Participation*" as the following day (23 March 2021) and the "*Validity Date of Transaction*" as 23 March 2022. (This feature explains the circumstances described in paragraph 31 above.) A new row had been inserted in the next line down entitled "*Number of days of Transaction*" which was filled as "*12 months*". Kimura was guilty of some linguistic confusion between PA and PT at this stage, reflecting the fact that the Template Offer made no provision for different durations. The box entitled "*Your Income Payment(s) for above Participation*" recorded the twin entitlement to "*3M LIBOR + 7.50% p.a., calculated on the basis of a year of 360 days and actual number of days elapsed*" plus "*Pro-rata share of monthly price participation*". (The words "*360 days*" are missing in the printed versions of the Offer document due to a formatting glitch.)

35. The First Offer contained some modifications to the template in Appendix I to the MPA. A couple of rows had been deleted. A new one entitled "*Start Date of Relationship*" had been added (indicating October 2016 for the beginning of Kimura's relationship with MTV). As noted above, the "*12 months*" term of the proposed participation was recorded in a new row albeit entitled "*Number of days of Transaction*". The proposed terms captured the originating description of a "*one year structure with profit kicker upside*" and the discussion on 18 March, as summarised above. The so-called "*profit kicker*" was the "*Pro rata share of monthly price participation*" forming one of the two components of "*Income Payment*" as defined in the MPA.

36. The Transaction Overview contained four sections plus a fulsome disclaimer on the final page. So far as may be material:

(a) The first section, entitled "*Transaction Overview*", mostly concerned the MTV Facility, stating that it was "*co-funded pari-passu with*" AAML. The penultimate paragraph stated: "*The opportunity is for Yield Point to co-participate alongside Kimura in a working capital and pre-export finance facility, to invest on a Pari Passu basis alongside both Kimura and AAML...*" (emphasis added)

(b) The second section, entitled "*Transaction Highlights*", comprised six bullet points. The penultimate point was "*Margin + price participation extends yield protection to double digits*". The final point was "*Investment for fixed amount and fixed tenor with no cash recycling or cash drag*". Although not free from doubt, this section appears to describe features of the MTV Facility rather than the proposed 12-month participation by Yieldpoint.

(c) The third section, entitled "*Transactional Key Terms*", summarised the key terms of the MTV Facility. This indicated that the MTV Facility was fully funded as to US$45m (Tranche 1). The box entitled "*Tenor*" was filled with "*4 years*", whilst "*Security*" was "*First ranking security over all current and future assets*". The interest rate under the MTV Facility was not identified. No mention was made of the capital repayment structure or schedule.

(d) The fourth section, entitled "*Risk Participation Transaction*", summarised the terms of Yieldpoint's proposed participation in respect of the MTV Facility.

"*Tenor*" was stated as "*12 months fixed term investment*". "*Participation*" was "*Committed participation with Participant funding on a pari passu basis*". "*Interest Rate*" was "*3M Libor + 7.5%*". "*Annual Income*" was "*Price participation in monthly cathode production…*" (with a contractual formula summarised). "*Interest payments*" said "*Interest Coupons and price participation paid quarterly*". Illustrated calculations for "*Projected annual yield*" showed 11.505% ("*Base case production*") and 10.024% ("*Conservative production*"). There was no box headed "*Security*" but the one entitled "*Ranking*" said "*Senior Secured* Pari Passu *with Kimura*". Finally, "*Documentation*" referred to the MPA and "*Governing Law*" stated "*English Law*".

(e) The words "*Returns are not guaranteed and capital at risk*" appeared in smaller font in the bottom right-hand corner of each page.

37. As the above summary shows, the Transaction Overview and the First Offer dovetail on material points. They go hand-in-hand and were proffered on that basis. I am satisfied that both documents are admissible for the purposes of determining the proper meaning of the MTV Participation. As to this:

(a) There is no dispute as to the express terms of such contract. Neither side alleges any implied term. The dispute here is about what the express terms mean together and the extent to which they (thereby) prevail over those found in the MPA. To approach that exercise without looking at the Transaction Overview or the First Offer would be artificial.

(b) These contracting parties adapted and augmented the Template Offer forming part of a pre-existing 'master' agreement in order to create a distinct contract on specific terms. The template format itself resembles an insurance slip or fixture recap or deal term sheet. It makes no sense divorced from the MPA, not least because it deploys so many of the definitions. These manual adaptations were done without the assistance or advice, so it seems, of any professional lawyers. The changes themselves may matter when seeking to ascertain the parties' common objective intention as enshrined in the executed specific terms.

(c) Clause 22.3 of the MPA - as incorporated into the MTV Participation: see paragraph 27 above - does not preclude such admissibility. The Transaction Overview does not supply any additional term not found in the agreed terms as described below. Nor do either of the iterations of the Offer leading to the concluded deal, as described below. These documents do, however, evidence or encapsulate the core commercial proposition.

38. There were further exchanges by email during the rest of that week and two virtual meetings on Wednesday 24 and Friday 26 March. Mr Polachek acknowledges that he was told in the second of these meetings that the one-year deal would help Kimura with its "*internal risk limits*" and that it desired the US$5m from Yieldpoint because it represented "*a large portion of the book*", i.e. Kimura's half share in the MTV Facility. As described in paragraph 31 above, Mr Polachek explained at trial that it was in this third and final virtual meeting that Kimura said Yieldpoint would get its money back on 31 March 2022. Yieldpoint confirmed on the same day, Friday 26 March, that it would get the US$5m for the following Thursday, i.e. 1 April 2021.

39. Yieldpoint wished to understand the precise formula for "*price participation*" which had only been paraphrased in the Transaction Overview. A full copy of the MTV Facility (over 650 pages) was provided by Kimura and the price participation terms separately extracted. As regards the need for MTV's consent to Yieldpoint's participation, this was confirmed by Kimura as unnecessary "*where the Existing Lender remains the Lender of record, which will be the case with a risk participation between us*". In this context, Mr Manielle mentioned that he'd spoken to MTV about "*our intention to partially sell down via risk participation a portion of the loan*".

40. Kimura sent a revised version of the Offer and Acceptance documentation the following Tuesday, 30 March 2021. Unlike the First Offer, this version ("Second Offer") contained a new box entitled "*Maturity Date of the Participation*" (showing 31 March 2022) so that "*Validity Date of the Transaction*" became 31 December 2024, i.e. the expiration of the MTV Facility. (Despite that injection of coherence, the "*Number of days of Transaction*" was stated as "*364 days*" by reference to the start date of the "*Participation*" now stated to be 1 April 2021.) New provision was made in the box entitled "*Special conditions or comments (if any)*" giving Yieldpoint an option to extend beyond the "*Maturity Date*" by giving 90 days' notice with provision as to how and by when such extension must be effected. This important addition reflected a discussion between the parties in their virtual meetings the previous week.

41. Yieldpoint made two changes to the proposed terms and sent back its tracked version for signature ("Final Offer") later that day. Both changes were explained in the covering email from Mr Polachek. The first change and its explanation are potentially significant. The notice period for Yieldpoint to extend the term of the participation was reduced from 90 to 45 days "*under the logic that this will increase our likelihood of us extending as our own redemption period is quarterly w/45 days notice, so we will know for sure by then if we have any redemptions we need to satisfy and won't need to automatically end earlier just to be safe*". Mr Polachek finished this explanation: "*We'll of course make best efforts to let you know earlier should we think we won't extend.*"

42. The special conditions in the Final Offer ("Special Conditions") created the following renewal regime with added sub-numbering:

    i. "*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.*"

    ii. *"If the Participant intends to renew the Participation, and* [sic] *new Offer and Acceptance to be agreed within 5 business days.*"

    iii. "*Kimura will notify Yieldpoint within 5 business days if Kimura further reduces Kimura's retention share.*"

43. The parties executed the MTV Participation on the terms of the Final Offer within the next hour or so on Tuesday 30 March 2021. Yieldpoint transferred US$5m to Kimura the same day. This was two days ahead of the start date of the MTV Participation which was agreed as Thursday 1 April 2021.

44. Both the "*Participation Amount*" of US$5m and corresponding "*Retention Share*" of US$17.5m remained constant in all three versions of the Offer. This ratio of 5.0 : 17.5 implied a 22.22% (Yieldpoint) + 77.78% (Kimura) split in respect of Kimura's half share in the MTV Facility; whilst Yieldpoint's capital represented one ninth of the total value of that facility. One oddity is that the "*Retention Share*" was recorded as a dollar amount rather than a percentage as defined in the MPA. It should have said 78.78% consistent with "*Participation Percentage*" being "*22.22% of overall USD 22,500,000 Facility*".

45. The MTV Participation was stated to be for a fixed term of 364 days (i.e. until 31 March 2022) whereas the MTV Facility would continue to run for another 33 months until 31 December 2024. No mention was made of the first capital tranche due under the MTV Facility on 31 March 2022. Indeed, as noted above, Kimura's first proposal was to start the participation on 23 March 2021 and end it on 23 March 2022, i.e. before any capital repayment was due from MTV.

46. Come what may, for the period 1 April 2021 to 31 March 2022 Kimura took a 0.5% spread on the interest rate (assuming a notional set-off with the MTV Facility) whilst sharing 22.22% of the monthly price participation with Yieldpoint on a non-recourse basis. This notional 0.5% spread represented a 6.66% uplift on the interest rate due under the MTV Participation. Kimura's actual use of the US$5m is unknown.

Subsequent Events

47. As regards the position with equitable assignments, no documentation was needed or created to reflect the automatic transfer(s) created by clause 5.4 of the MPA. There is a discrete dispute as to what recourse rights were transferred and their fate depending on what sums have been or may be paid to Yieldpoint.

48. The deal ran smoothly until late 2021. Kimura remitted interest payments and price participation instalments between 27 March and 31 December 2021, but nothing after that date. MTV's financial troubles started to manifest in November 2021, resulting in suspension of operations in January 2022.

49. Kimura granted a forbearance to MTV in November 2021 in respect of the capital instalment due on 31 March 2022. Yieldpoint denies that it was or needed to be involved in that decision. Neither side alleges any form of estoppel. These events are not, therefore, legally relevant.

50. Although not required, Yieldpoint provided formal notice of its intention not to renew the deal on 10 February 2022, i.e. 5 days early. The parties' differing views as to the nature of the MTV Participation emerged around this time. Kimura did not repay any part of the principal to Yieldpoint on or after 31 March 2022 ("Maturity Date").

51. MTV defaulted on its capital repayment as well as interest instalment due on 31 March 2022 under the MTV Facility. It has paid nothing since that date. The Civil Court of Santiago declared MTV bankrupt in February 2023.

Analysis of the MTV Participation

52. The MTV Participation is, on any view, a form of sub-participation in Kimura's share of the MTV Facility. The question is: to what extent or in what way?

53. More specifically, the issue is whether Yieldpoint's capital was exposed to default on the part of MTV rather than just Kimura. Put more simply and in terms of the claim made: was Kimura unconditionally obliged to repay US$5m to Yieldpoint on 31 March 2022?

54. There is no dispute between the parties as to the principles applicable to construing or characterising a contract. I do not need to summarise them.

55. There is no fixed concept of sub-participation as a matter of English law or international financing practice. It is not a term of art or legal genus. Everything depends on the terms agreed irrespective of stereotypes. This is made clear by the Privy Council in *Lloyd's TSB Bank plc v. Clarke & another* [2002] UKPC 27; [2002] 2 All ER (Comm) 992 at [15]-[18] where Lord Hoffmann quoted from *Wood: International Loans, Bonds and Securities Regulation* (1995 edition) at pp.110-111 and referred to a paper published in 1989 by the Banking Supervision Division of the Bank of England entitled "*Loan, Transfer and Securitisation*" (BSD / 1989 / 1).

56. At paragraph [18], Lord Hoffmann regarded as correct the appellant's submission 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... The label was not conclusive. Nor was it conclusive as to whether a transaction fell within a particular market category.*"

57. The issue arising in that case was whether the sub-participation agreement in question had conferred any equitable interest in favour of the participant bank (Chase) in the absence of express language to such effect. It did not. Any linguistic indicators of such position were insufficient to displace the "*clear and uncompromising language*" of the operative provision in the sub-participation agreement (see [25]). Clauses 5.4-5.6 of the MPA achieve such a result in this case, making any contemplated participation more than purely personal as between Kimura and Yieldpoint. It does not matter for present purposes whether the creation of equitable privity in this way represents the modern conventional form of sub-participation in international corporate finance.

58. The standard concept of sub-participation, as reflected in the terms of the MPA itself, involves a proportionate sharing of <u>both</u> risk and reward in the relevant underlying finance. This entails exposure of <u>both</u> 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.

60. The position contended for by Yieldpoint involves a significant alteration to and departure from such conventional model. 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.

61. The parties have not identified any decided case in which such a hybrid form of sub-participation was involved or even mentioned. Nor any case which says it cannot happen. The test must be as summarised by Lord Hoffmann in *Lloyds TSB v. Clarke* (quoted above).

62. Each side's analysis has its own problems. The MTV Participation is a mutant or variant, on any view. This flows directly and inexorably from the fact that it has a term shorter than that of the MTV Facility. This singular feature supplies both novelty and difficulty.

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.

67. These are not small difficulties. They are, however, surmountable.

68. If it is the case that these parties used sufficiently clear language to create a hybrid form of sub-participation, the terms of the MPA can and must be modified or overridden to make sense of that arrangement as mandated by the contract itself:

(a) Kimura's "*Retention Share*" (and hence Yieldpoint's "*Ranking*") can be given meaning referable to sub-participation in respect of "*Income Payments*" without causing undue violence to the contractual language: the *pari passu* apportionment is a product of the respective percentage shares reflecting US$5m (Yieldpoint's 22.22%) and US$17.5m (Kimura's 78.78%). The reference to US$17.5m as "*Retention Share*" in the deal terms was obviously intended, as defined, to denote a percentage share: see paragraph 44 above.

(b) Likewise, Yieldpoint could agree to "*bear the risk*" of any "*General Debt Restructuring*" under the MTV Facility only as regards income default risk during the fixed term; cf. clause 15.1 of the MPA.

(c) Yieldpoint participates in "*risk*" and does so "*alongside*" Kimura (and AAML) in respect of the income stream under the MTV Facility, but not otherwise. This is a form of investment, albeit a limited and unusual perhaps even novel one. It would involve a sale or transfer, by way of equitable assignment, of recourse rights corresponding to the risk assumed and no more: see paragraph 82 below.

(d) In short, the MPA can be modified or changed to capture this form of hybrid sub-participation. The contemplation of capital-risk in conjunction with income-risk in the standard wording does not preclude the applicability of such wording only to the latter category. The standard wording can be modified to achieve differential treatment, albeit with some radical editing. I am not aware of any practical unworkability on this basis.

69. These problems are, therefore, surmountable - but were they or must they be surmounted here? In my judgment, and not without some discomfort, I am satisfied that they were and had to be in order to give effect to what the parties agreed for this particular deal.

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*" (see paragraph 41 above). 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 (see paragraphs 30 to 32 above). 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. The fact that Kimura may have told MTV that it was intending to "*partially sell down ... a portion of the loan*" did not countermand such assurance and expectation; this was conveyed as hearsay to Yieldpoint (see paragraph 39 above). Likewise, the expectation that Kimura might wish to or even need to replace Yieldpoint's US$5m following repayment in a year in order to meet its "*internal risk limits*" (see paragraph 38 above) did not negate such fundamental expectation as to the fate of the capital. Kimura's capital requirements were not disclosed at the time and have not been explained.

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.

74. Kimura is driven to formulate a 'fair market value' mechanism for the ascertainment and realisation of Yieldpoint's assigned recourse rights at the Maturity Date. This mechanism is found nowhere in the contractual terms. To seek to imply it would be far from straightforward and inconsistent with the contractual wording. In particular:

    (a) It is not clear who would 'buy out' Yieldpoint's residual assigned recourse rights or when this might happen. There is no suggestion of a put option in favour of Yieldpoint which would require Kimura to re-purchase such beneficial interest. Kimura could not conceivably obtain a call option as that is inimical to an election on the part of Yieldpoint.

    (b) In so far as it may involve a sale of Yieldpoint's residual beneficial rights to a third party purchaser, it is ostensibly inconsistent with clause 17 of the MPA (prohibition on assignability). An 'on-sale' scenario does not fit comfortably with the fact that Kimura's half of the MTV Facility was fully-funded, as made known to Yieldpoint in the Transaction Overview. In any event, nobody could tell how long it might take to find such purchaser, and the quest for one would involve continuing valuations of MTV's liquidity or solvency.

    (c) In so far as it may involve a re-purchase by Kimura of such rights, there is no mechanism providing for independent determination of 'fair market value' - in contrast to the procedure created in clause 14.3 of the MPA in respect of a "*Relevant Dispute*". In any 'buy-back' scenario, Yieldpoint (as re-seller) and Kimura (as re-buyer) would have polarised commercial interests, by definition.

    (d) Any dispute involving 'fair market value' would have to be litigated in accordance with clause 25 of the MPA. It would invariably require expert valuation evidence as permitted by the court. That would all take some time. It would effectively roll forward the duration of Yieldpoint's participation on unchartered terms, contrary to the express basis and wording of the deal.

(e) The valuation of Yieldpoint's residual beneficial interest in the primary finance receivables could fluctuate during such post-maturity period depending on whether MTV defaulted in the meantime or other contingencies such as global commodity prices, regional or local conditions (e.g. logistical, economic, political, climatic) in Chile. Yieldpoint would thereby remain exposed to primary default risk after the Maturity Date. This is contrary to the notion of a matured loan.

(f) This contingency wasn't just foreseeable. It was inevitable. 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.

(h) An illustration of these uncertainties can be found in the fact that Kimura did not mention a 'fair market value' crystallisation of Yieldpoint's interest as at 31 March 2022 when given 50 days' advance notice of non-renewal by Yieldpoint pursuant to the Special Conditions: see paragraph 50 above.

75. The fact that Kimura is driven to formulate this kind of 'exit' regime at maturity is the most telling point against its interpretation of the MTV Participation. It 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.

76. And yet this would be the unarticulated effect of Kimura's proposed solution to the 'exit' problem. Rather than Yieldpoint having a free choice whether to seek renewal of the arrangement by giving 45 days' written notice, it would - in effect - be trapped in a rolling *ad hoc* arrangement beyond one year given the uncertainties involved in Kimura's proposed 'exit' regime, as described above. This subverts the negotiated renewal regime in the Special Conditions. The Maturity Date becomes a Morton's Fork.

77. In contrast, there is no need to imply a term requiring Kimura to repay the US$5m upon the Maturity Date. This is the essence of a maturity date. When a loan matures, it becomes repayable even without demand: see *Chitty on Contracts* (34th ed. 2019) at 41-272. So far as relevant, this reflects the discussion of what would occur ("*pay us back*") upon maturity and termination in the days leading to this trade on 30 March 2021.

78. The fact that MTV defaulted on its first capital repayment on 31 March 2022 is, therefore, immaterial to Kimura's liability to repay US$5m to Yieldpoint on the same day. Whilst it is unlikely to be a coincidence that MTV's first capital instalment was payable on 31 March 2022, this feature of the primary finance profile was never identified as intrinsic to the repayment of Yieldpoint's capital that day: the First Offer

envisaged Yieldpoint's participation ending on 23 March 2022 (see paragraphs 34 and 45 above).

79. It no doubt suited Kimura to coordinate the Maturity Date to coincide with its expected receipt of US$1,874,250 from MTV. Kimura would also have 45 days' advance notice, i.e. absence of a notified renewal, if it needed to source the remaining US$3,125,750 to replace Yieldpoint's capital - bearing in mind that its 50% share of the MTV Facility was fully funded. The provenance of this particular deal suggests that synchronisation on 31 March 2022 was serendipitous.

80. Kimura takes two further points against Yieldpoint's analysis.

81. First, it is said that clauses 5.4 to 5.6 of the MPA automatically transferred to Yieldpoint a full package of recourse rights covering both its capital of US$5m (i.e. the "*Participation Payment*" / "*Participation Amount*") and all "*Income Payments*" due to it during the fixed term of the MTV Participation. Thus, it is impossible to split capital from income; and the effect of these provisions (especially clause 5.6) means that Yieldpoint is secured vis-à-vis any other creditors of Kimura in the event of its subsequent insolvency. This is anathema to the unsecured fixed-term loan contended for by Yieldpoint.

82. However, the effect of these provisions depends on the extent of Yieldpoint's participation in the MTV Facility. The clauses fall to be read, and if necessary modified, to fit the transaction which the parties concluded. Thus:

(a) In so far as Yieldpoint's participation concerned only "*Income Payments*" then it only took an equitable assignment of recourse rights to that extent for the fixed term of this deal. The "*Transferred Rights*" pursuant to clause 5.4 were those "*associated with*" the US$5m. In the context of this bespoke income-only participation, that meant rights relating to income under the MTV Facility (i.e. a 22.22% share in quarterly interest + monthly price participation) and no other rights.

(b) Yieldpoint has, in any event, formally disavowed any additional or gratuitous assigned rights beyond those pertaining to or associated with the income stream during the fixed term. Any attempt to enforce more than this, if ever made, would be abusive and unconscionable.

(c) Clause 5.6 is not, therefore, repugnant to or contra-indicative of the unsecured loan analysis contended for by Yieldpoint. Yieldpoint remains exposed to default and insolvency risk on the part of Kimura in respect of the capital itself, even if it may enjoy superior status in respect of unpaid income (if any) which accrued during the fixed term.

(d) This illustrates how "*necessary changes*" can be made, if required, in order to "*modify*" the express terms of the MPA to accommodate and make sense of the specific terms agreed in this instance. It does not involve either 'tail wagging dog' disproportionality or 'chicken and egg' circularity. The equitable assignment of proportionate recourse rights is ancillary to and parasitic upon the basis/scope of whatever participation arrangement is in play. Such transfer is shaped by and must yield to that elemental position.

83. Secondly, Kimura says that the legal characterisation advanced by Yieldpoint makes no or substantially less commercial sense than its own characterisation. Why invite surplus funding by way of sub-participation if the provider is not staking its capital on a proportionate basis? Why agree to share almost a quarter of the interest and price participation due under the MTV Facility without offloading commensurate capital default risk?

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: see paragraph 71 above.

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 (see paragraph 46 above). 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. As it happens, both side's positions were adopted with knowledge that MTV was in financial distress by early 2022.

87. I conclude, therefore, that Kimura had an unconditional obligation to repay the sum of US$5m to Yieldpoint on 31 March 2022. Kimura breached that obligation. It is liable in debt, alternatively damages in like amount, together with whatever rate of interest should apply from 31 March 2022.

88. I add, by way of post-script, that there have been moments when an analysis based on common mistake and unjust enrichment has felt more appropriate. I suspect that each side's key negotiators may have believed and intended something different when concluding this deal. If a professional lawyer had been involved in the process leading to agreeing specific terms based on the Template Offer, this potential mismatch in subjective expectations may have been flushed out at the time. That did not happen and nobody is to be criticised for how they chose to record this particular deal.

89. Neither side has suggested there was a common mistake. Both sides say that a binding agreement was reached. The task at this trial has been to ascertain objectively what that agreement was and its effects, choosing between two imperfect interpretations. That involves making optimum sense of what has been dubbed, albeit humanely, as '*Frankenstein's Slip*'.

90. Accepting Yieldpoint's characterisation involves a significant degree of linguistic surgery (see paragraphs 63 to 68 above). I am satisfied that this makes more sense than imposing the kind of fraught and open-ended 'exit' regime required on Kimura's case

to accommodate a change of status arising at the Maturity Date (see paragraphs 73 to 77 above). The subversive impact of the latter causes far more problems than the invasive impact of the former. The Special Conditions must take precedence over optional general terms, as the parties themselves agreed.

91. The meaning of the MTV Participation became acute in light of MTV's intervening default and insolvency. As it turns out on an objective analysis, Yieldpoint did not assume a capital default risk other than that of its own counterparty, Kimura. Yieldpoint took a slice of MTV's default risk in respect of the rent on its money for a year and could have ended up earning nothing from the arrangement in different circumstances. So far as may be relevant, and in the spirit of a post-script, this position is consistent with the warning language in small font on the Transaction Overview: see paragraph 36(e) above.

Disposition

92. The claim for payment of the principal sum succeeds, together with interest at an applicable or appropriate rate accrued since 31 March 2022.

93. I will deal with any consequential matters which the parties are unable to agree, including summary assessment of costs in accordance with paragraphs 2.56 to 2.59 of PD57AB.