

Introduction

1. James Toynton is one of the Joint Administrators of Propinvest Group Limited (hereafter referred to as "PGL"). He was appointed by this Court on 4 November 2011. In that capacity, he has caused PGL to sue its shareholder, Glenn Maud, claiming a debt of £3,359,045.72. The Cause tabled on 2 November 2012 sets out how PGL's documents show on their face that Mr Maud borrowed substantial amounts from PGL and that his loan account was consolidated and formalised under a written agreement (hereafter referred to as "the Loan Agreement") pursuant to a board resolution, both dated 26 March 2010. Mr Maud continued to borrow more money from PGL over the following 12 months and he also made some repayments. PGL then transferred the commitments, rights and obligations under the Loan Agreement to Navarro Ventures S.a.r.l. (hereafter referred to as "Navarro") by a further agreement in writing dated 25 March 2011 (hereafter referred to as "the Loan Transfer Agreement"). It is PGL's case that the amount it claims from Mr Maud was not covered by the Loan Transfer Agreement and constitutes borrowing under a different agreement, the terms of which were not formally recorded, but which included that this further borrowing was interest-free and repayable on demand.
2. Mr Maud admits that the monies it is said he borrowed from PGL were, in the main, borrowed by him. However, his defence is that he does not owe PGL the sum claimed because the effect of the Loan Transfer Agreement is that all his indebtedness to PGL was novated to Navarro. In his Defences, which were amended on a number of occasions, he has advanced three alternative bases for this outcome, each of which effectively involves looking beyond what is recorded on the face of the Loan Agreement and the Loan Transfer Agreement.
3. The case has been described as "a simple debt action". On one level it is: the Plaintiff's case is capable of proof by Mr Toynton producing the documents that he now holds as Joint Administrator and Mr Maud admits that case as far as it goes. On another level, the case is far from straightforward because the evidence given by Mr Maud and Timothy Southern, who was at the time a director of PGL, describing events subtly differently from the way the documents reflect them, cannot be expressly rebutted by Mr Toynton on behalf of PGL because he was not present, or even involved with the business of PGL, at the material times. The credibility of what those witnesses explained and how it all fits in with the other evidence adduced on behalf of Mr Maud is a key factor in how the case has been decided.
4. The hearing took place in two parts. The evidence was heard between 2 and 4 July 2013 and closing submissions were made on 18 July 2013. Judgment was reserved. The Deputy Bailiff did not sum up to the Jurats in open Court but retired with them, as he is permitted to do under section 14(2) of the Royal Court (Reform) (Guernsey) Law, 2008.
5. During the course of the Jurats' deliberations, for personal reasons, Jurat Le Poidevin withdrew from further participation in the case. In due course, Jurat Ferguson and Jurat Helyar-Wilkinson indicated that they had reached differing conclusions about the outcome. Where the Jurats are equally divided, pursuant to section 6(5) of the Royal Court of Guernsey (Miscellaneous Provisions) Law, 1950, the presiding judge has a casting vote for the finding of a majority opinion and so is required to find the facts rather than being solely the arbiter of law and procedure. This judgment, therefore, represents a majority decision in favour of dismissing the Plaintiff's action, but also records the minority findings of Jurat Ferguson. It has been prepared in accordance with the provisions of section 16 of the 2008 Law, which provides that:

- “(5) *A reasoned judgment in civil proceedings in which the Jurats (and not the Bailiff alone) are sitting shall contain –*
- (a) *the Jurats' findings and decisions,*
 - (b) *any dissenting findings or decisions made by different Jurats,*

- (c) *the identity of the Jurats making dissenting findings or decisions,*
- (d) *the Bailiff's findings, decisions and directions of law and procedure, and*
- (e) *the application of his findings, decisions and directions of law and procedure to the facts.*

(6) *In this section "the Bailiff" means the person presiding over the proceedings."*

Unfortunately, the preparation of the judgment has also taken much longer than would usually be the case, in part for the reasons given and as a result of the pressure of other work undertaken by the Deputy Bailiff, for which the Court apologises to the parties.

General directions

6. In giving the Jurats directions at the conclusion of the hearing, the Deputy Bailiff reminded them of the roles each member of the Court performs. The Deputy Bailiff is the sole judge of questions of law and procedure and the Jurats' function is as judges of questions of fact. The Jurats were told to accept his directions on the law and to follow them. He directed the Jurats to have regard to the whole of the evidence presented to the Court, and to form their own judgment about the witnesses, and which evidence they regarded as reliable, and which was not. The Deputy Bailiff gave the Jurats the direction that the facts of the case are their responsibility. They may take account of the arguments in the speeches that they heard, but were not bound to accept them. Equally, if at any time during the course of giving directions the Deputy Bailiff appeared to them to express any views concerning the facts, or emphasise a particular aspect of the evidence, the Jurats were not to adopt those views unless they agreed with them. When it came to the facts of the case, each Jurat's judgment was what mattered.
7. The Deputy Bailiff further directed the Jurats that the burden of proof to establish the Plaintiff's case rests on the Plaintiff and the burden of establishing any of the defences raised by the Defendant rests on the Defendant. The standard of proof is the civil standard of the balance of probabilities. To establish something on the balance of probabilities means to prove that something is more likely so than not so. Where it was sought to establish a fact on behalf of Mr Maud's case, the burden of proof rested on the Defendant to prove it to the civil standard.
8. The Deputy Bailiff proceeded to remind the Jurats that PGL's case rested primarily on the documents produced and the explanations of them given in the evidence of Mr Toynton. In response, the Defences raised on behalf of Mr Maud had been pleaded in the alternative, meaning that if any one of them were to be accepted, the Plaintiff's action would fail. It would, therefore, only be if all elements of the Defences were rejected that the Plaintiff's case would succeed. In general terms, the Jurats were directed to consider carefully the evidence given by the witnesses for the Defendant and to decide whether or not they believed the accounts given by, in particular, Mr Maud and Mr Southern. In doing so, they were entitled to consider whether both of those gentlemen might now be saying things because of the consequences of PGL going into administration rather than accurately recalling the events as they occurred. The Jurats were further reminded that they could consider the contemporaneous documents generated at the time to test whether what was now being said was inconsistent with what had been recorded. The Jurats were entitled to form their impressions of each of the witnesses from whom they heard. If any witness's evidence was not credible, it potentially damaged the defences advanced on behalf of Mr Maud. The specific directions given in respect of each of the lines of defence are set out when we deal with that defence in turn.

PGL's case

9. The Plaintiff's case rests squarely on the documentation Mr Toynton and his fellow administrator received, which they have reviewed and placed before the Court as establishing a *prima facie* case. This was confirmed in Mr Toynton's witness statement dated 27 June 2013, in which he gave some background detail about PGL.
10. The company was first registered as Propinvest Investments Limited on 26 July 2006. It changed its name to PGL by Special Resolution recorded on 9 February 2007. Through a complex structure of entities, including companies and limited partnerships, it held interests in a range of property assets in the UK, Europe and Japan, valued at approximately £6 billion and producing a net annual rental exceeding £350 million. It was, on any account, a substantial business and, given the nature of its interests, was liable to suffer significantly as a result of the global financial crisis, especially in the property field, from 2008 onwards. The sole beneficial owner of PGL is Mr Maud. At the times of the transactions relevant to this claim, there were three directors of PGL. Mr Southern was one, having been appointed on 8 December 2008, and there were two corporate directors, namely Mars Limited and Ares Limited, both of which had been appointed on 30 May 2008. Mr Southern was the only director of both of the corporate directors and had been appointed on 23 May 2008 by each of them as its representative. He was, therefore, the only human being involved in reaching board decisions on behalf of PGL. When the board of PGL resolved to do something, Mr Southern met with himself for that purpose. The position changed on 19 May 2011 when the two corporate directors' resignations were accepted and Mr Maud was appointed as a director.
11. DnB NOR Bank ASA made a statutory demand for NOK 1,407,904,712.79, SEK 280,433,605.41 and €18,666,747.78 against PGL on 25 February 2011 pursuant to a Multicurrency Term Loan Facility Agreement dated 19 December 2007. The administration order in respect of PGL was then made on 4 November 2011 pursuant to an application of DnB NOR Bank ASA dated 6 July 2011. The reasons for that decision are contained in the Court's judgment of 14 November 2011 and do not need to be repeated here.
12. Mr Toynton explained how he set about investigating the affairs of PGL, consistent with his duties as administrator under section 380 of the Companies (Guernsey) Law, 2008. From the limited books and records provided by Mr Southern, he identified a number of transactions that he wished to explore further, one of which was a loan swap with Navarro on 25 March 2011. He and his fellow administrator met with Mr Maud and Mr Southern and sought further information from them. As a result of these investigations, Mr Toynton has pieced together the following information which, he says, supports PGL's claim that Mr Maud remains indebted to the company in the sum of £3,359,045.72.
13. Mr Maud borrowed money from PGL from July 2006 to March 2010. The terms were not recorded as between PGL and Mr Maud, but the approach was consistent with what might be considered to be usual practice for shareholder loans, with the loans being interest-free and repayable on demand. They were recorded in PGL's Nominal Ledger. Taking into account the repayments he made over that period, as at 25 March 2010, the Nominal Ledger recorded that the balance owed by Mr Maud to PGL was £13,361,917.36.
14. The Loan Agreement of 26 March 2010 was signed in Guernsey on behalf of PGL, which was referred to as the "Lender", by Mr Southern and also by Mr Maud, who was referred to as the "Borrower", on his own behalf. It is a short document and reads (including the typographic errors) as follows:

“INTRODUCTION

- (A) *The Lender has made a number of advances to the Borrower over a period of time under a loan and the purpose of this Agreement is to record and document the loan and the terms which have applied throughout..*
- (B) *Additionally this Agreement will provide a facility to the Borrower for further advances up to a total loan amount of £15,059,040*
- (A) **IT IS AGREED** as follows:
1. **THE LOANS**
 - 1.1 *The Lender confirms and the Borrower acknowledges that as at the date of this Agreement the Lender has lent to the Borrower the sum of £13,992,926.00, including interest compounding annually which remains due to the Borrower from the Lender (“the Loan”)*
 2. **FURTHER ADVANCES**
 - 2.1 *The Lender shall advance to the Borrower further sums as requested under the terms of this Agreement subject to the maximum outstanding balance due from the Borrower to the Lender not exceeding £15,059,040.00*
 3. **REPAYMENT**

The Loan shall be repayable by the Borrower seven days after written demand with the balance due having been updated to reflect interest accruing to the repayment date
 4. **INTEREST**

The interest rate payable under this Agreement shall be equal to the official rate set by Her Majesty’s Revenue and Customs from time to time.
 5. **PREPAYMENT**

The Borrower may prepay any amount of the Loan from time to time and at any time.
 6. **GOVERNING LAW**

This agreement (and any dispute, controversy, proceedings or claim of whatever nature arising out of or in any way relating to this Agreement) shall be governed by and construed in accordance with the laws of Guernsey, and for these purposes the Lender and the Borrower hereby irrevocably submit to the exclusive jurisdiction of the Courts of Guernsey.”

It is a typewritten document, save that the amounts in recital (b) and clauses 1.1 and 2.1 have been inserted in manuscript.

15. Mr Toynton has also produced a written resolution of PGL, incorrectly dated 25 March 2009, but recording what Mr Southern did in or around March 2010, and signed on behalf of the three directors of PGL. Under the heading “Business”, the document notes that Mr Maud “*is the 100% beneficial owner of the Company*” and that he has existing loans where the total outstanding at 26 March 2010, including accrued interest, was £13,992,926. It notes the intention of PGL to make a further advance of £1,091,114 and summarises the principal terms of the proposed Loan Agreement, expressly adding “*that the Loan Agreement records all and every loan existing between*” PGL and Mr Maud. The Resolution records that the Directors, by which it means just Mr Southern, confirmed that “*they have received and reviewed the terms of the Loan Agreement*”. PGL resolved that “*the terms of the Loan Agreement be and are hereby approved in the form received by the Directors*”, authorised a director or the company secretary to execute it and also that “*any Director be and is authorised to execute on behalf of the Company all such other Loan Agreements to which it is a party as may be required to implement the transactions set out in the Loan Agreement and generally sign all such certificates, documents, letters, notices, and acknowledgements or certify such documents and notices as being true, complete and current as may be required or thought desirable in connection with the Loan Agreement and subject in each case to such amendments as the person executing them on behalf of the Company shall in their absolute discretion think fit*”.

16. The documentation produced at the time shows that PricewaterhouseCoopers (hereafter referred to as “PwC”) had been calculating the figures to be inserted. As can be quickly seen when comparing the amounts mentioned in the Loan Agreement as being the maximum available, or cap, in clause 2.1 and the aggregate of Mr Maud’s stated indebtedness and the proposed further advance described in PGL’s resolution, the latter is £25,000 greater than the former. This is a small, but simple, example of the errors that have crept in throughout in the manner in which PGL’s business has apparently been undertaken.
17. The Loan Agreement was one of a series of agreements formalising Mr Maud’s borrowings from PGL and other companies within the group of which PGL formed part. This suite of agreements arose from tax advice taken by Mr Maud, to which more detailed reference will be made shortly, under which he was agreeing to borrow from one of the companies to meet the interest payments he was obliged to make to another company, all of which was designed to mitigate his personal tax liabilities in the United Kingdom. The further advance of £1,091,114 to be made under the Loan Agreement was for the purpose of paying interest due to Eagle Holdings Limited under a similar arrangement Mr Maud entered into with that company.
18. Between 30 March 2010 and 25 March 2011, PGL’s Nominal Ledger recorded ten further amounts against Mr Maud’s loan account. There is no particular pattern to each of these advances. Some were recorded as being in respect of interest payments he had to make to other entities, some relate to specific transactions and others are simply generically described as a loan without further elaboration. The aggregate of the ten amounts is £4,019,580.72. During the same period, the Nominal Ledger records two payments made by Mr Maud to PGL, one for £6,000 on 4 May 2010 and the other, described as “GM Loan interest”, for £654,535 on 28 March 2011. Mr Maud admits that he received the amounts the Nominal Ledger describes as being advanced to him and that he made those two payments to PGL during that period. The amount claimed by PGL in its Cause is the amounts advanced that year minus the repayments made.
19. Mr Toynton has analysed the calculations used by PwC to ascertain what they advised Mr Maud owed PGL at various times. The calculations do not reflect precisely what is recorded in PGL’s Nominal Ledger. By 28 March 2011, the Nominal Ledger recorded that Mr Maud owed PGL £18,478,834.08. As far as Mr Toynton is concerned, the various calculation errors he has identified do not matter because what is key to PGL’s case is that the ten advances between 30 March 2010 and 25 March 2011, as reduced by the two repayments, all fall outside the ambit of the Loan Agreement and the Loan Transfer Agreement anyway.
20. The Loan Transfer Agreement of 25 March 2011 is a multi-party agreement governed by English law, where not all of its terms are relevant to this case. Navarro, PGL and Mr Maud (who is referred to in it by the abbreviation “GM”) are three of the nine parties to it. Recital (D) explains that PGL and other companies “*should each transfer their rights under the GM Loans ... to Navarro for Market Value*” and in return Navarro would transfer to PGL and the other companies part of its commitment (amounting to the equivalent Market Value) under the benefit of a loan acquired by it on 15 October 2008 from Kaupthing Bank hf. Clause 2.1.1 of the Loan Transfer Agreement provides:

“Pursuant to the GM Transfer Certificates, PHL, PGL and EHL each agree to transfer by novation of all of their commitments, rights and obligations under the GM Loans to Navarro in consideration of the transfer by Navarro pursuant to the Navarro Transfer Certificate to each of PHL, PGL and EHL of commitments in the Navarro Loan in the amounts set out in part 2 of the Schedule.”

Clause 1.1 of the Loan Transfer Agreement defines various of the terms used in clause 2.1.1. “GM Transfer Certificates” is expressly defined *inter alia* as “*The transfer certificate between*

Navarro (as new lender) and PGL (as existing lender) dated on or around the date of this Agreement". "GM Loans" is defined *inter alia* as "the £15,059,040 loan agreement between GM (as borrower) and PGL (as lender) dated 26th March 2010". Part 2 of the Schedule indicates that the portion of the Navarro Loan being transferred to PGL is €3,112,244. Part 1 of the Schedule sets out the apportionment of the overall valuation of £5 million given in what is termed as "the PWC Report" as between the companies. The definition of "Market Value" is given to these values. The PGL element of the GM Loans is recorded as £1,685,723. The portion of the Navarro Loan being transferred to PGL has been calculated by reference to the apportionment of the loans as valued in the PWC Report, which is defined as meaning "the report prepared by Price Waterhouse Coopers dated 25 March 2011 and entitled "M&A Memorandum on Structure, Exchange of loan receivables """.

21. Mr Toynton and his colleagues held a meeting with Mr Maud and Mr Southern on 23 November 2011. The draft file note produced shows that the issue of the loan swap was raised and records that "GM seemed unsure how to answer this question stating that this was done on PWC advice" and that "GM stated that he was completely unaware as to why this transaction took place. GM to obtain PWC explanation." A follow-up meeting was held on 13 December 2011. The Joint Administrators had not at that time seen any report prepared by PwC as the latter had indicated that it had been prepared for someone other than PGL. When Mr Southern was asked if he had seen the report he replied that he was unsure and was "not prepared to disclose if he had or hadn't seen the report".
22. As a result of the investigations undertaken by the Joint Administrators, they sought and obtained a freezing order, initially on 20 August 2012, in respect of various respondents, including Mr Maud and Mr Southern. The order also required both gentlemen to provide complete books, records and documents in respect of PGL.
23. A formal demand for repayment of monies owed to PGL was made by Mr Toynton's letter of 21 August 2012. In that letter he referred to the terms of the Loan Agreement, listed the ten additional advances, noted the two payments assigned to Mr Maud's Loan Account and wrote "In accordance with the Loan Agreement, PGL hereby demands that the Outstanding Balance [of £3,419,794] be repaid forthwith". The letter concluded that if the Outstanding Balance were not repaid within seven days "proceedings to recover the Outstanding Balance, and any interest accrued" would be instituted without further notice to Mr Maud. When no reply was received, Mr Toynton sent a replacement letter of demand dated 6 September 2012. Mr Toynton explained that his previous letter had "contained an incorrect calculation of the amount owed". The revised Outstanding Balance was now £3,683,535.58, comprising outstanding capital of £3,394,794.08 along with accrued interest of £288,741.50 as at 3 September 2012. The letter proceeded to explain how the Joint Administrators had concluded that Mr Maud owed this amount to PGL and attached documentation demonstrating the approach taken. Similarly to the first demand, this letter demanded that "the Outstanding Balance including interest totalling £3,683,535.58" be repaid forthwith otherwise proceedings for recovery of the same were indicated.
24. Although Mr Toynton has further explained that he now recognises that the additional monies advanced to Mr Maud were not pursuant to the Loan Agreement and so did not carry interest at the rate specified therein, he stands by the approach we have just set out, namely that however else matters are looked at, these monies and the repayments made against them all fall outside the Loan Agreement and the Loan Transfer Agreement, meaning that, at the date of the proceedings, Mr Maud still owes the balance to PGL. He explained that PGL's claim had developed as the Joint Administrators' understanding of the documentation developed. In the absence of anything more explicit, the borrowing of these additional monies must have been on the same basis as previously under the arrangements Mr Maud had with PGL, namely that the loans were interest-free and repayable on demand. Although he was tested in cross-examination by Advocate Swan about the inconsistencies in the calculations used by those

involved at the time and by him since, he remained unshaken that the documents demonstrated that only a portion of Mr Maud's indebtedness to PGL had been transferred to Navarro, leaving the remaining amount claimed owing. He had not looked behind that transaction to be able to offer any suggestion as to its commerciality. He repeated consistently throughout his evidence that he had borne in mind the various documents produced, including the PWC Report dated 25 March 2011 and the variances with what is shown in PGL's Nominal Ledger, when forming his view that Mr Maud still owed PGL the amount claimed. The focus in this case has, therefore, been far more on what Mr Maud advances in his defence than the Plaintiff's case which, if all the defences were to fail, is effectively admitted by Mr Maud.

The Defences raised

25. As we have already noted, Mr Maud's case is that the entirety of his indebtedness to PGL was novated to Navarro pursuant to the Loan Transfer Agreement. He advances a number of routes to that conclusion. Although the parties chose different orders in which to tackle these issues, with Advocate Edwards preferring to deal with them chronologically, we propose to deal with them in the order in which Advocate Swan described them at the hearing.
26. The first route focuses on the Loan Agreement, which it is claimed was varied by the parties to it so that the maximum amount capable of being borrowed by Mr Maud under it increased every time he received an additional advance between March 2010 and March 2011. Accordingly, when the parties entered into the Loan Transfer Agreement by reference to the Loan Agreement, it was the indebtedness under that varied Loan Agreement that was transferred to Navarro, which included the additional amounts borrowed during the preceding year.
27. The second route switches the focus to the Loan Transfer Agreement and involves two strands. The first is a construction point, inviting the Court to rule that the proper construction to give to the words of the document is that it effected the transfer of all of Mr Maud's indebtedness to PGL. It was suggested on Mr Maud's behalf by Advocate Swan that this is the preferred construction because it is consistent with business common sense. The commercial purpose of the Loan Transfer Agreement was plainly to transfer all of Mr Maud's loans from PGL to Navarro and it made no sense for the parties consciously to leave any indebtedness with PGL, as now suggested by Mr Toynton. However, if the Court were to conclude that the words in the Loan Transfer Agreement could not be construed in this way, the alternative approach has been to argue that the words written in that document do not reflect the agreement actually reached. This is a form of rectification defence but, because of the added complexities of counterclaiming for something against a company in administration, this has been dealt with only as a defence to the claim, albeit applying the same principles as if the document itself fell to be rectified.
28. The final way in which Mr Maud claims that the Loan Transfer Agreement produced the effect he asserts is to return to the Loan Agreement and point out that it mis-records the level of indebtedness because PGL's Nominal Ledger wrongly allocated to Mr Maud's loan account monies that should have been booked elsewhere, and a large portion of which in any event had been repaid to PGL before the execution of the Loan Agreement. This issue has been referred to as "the Accounting Error". As a result of this Accounting Error, the maximum amount capable of being borrowed by Mr Maud under the Loan Agreement was never even reached, meaning there was no need to vary the terms of that agreement or to construe the Loan Transfer Agreement any differently from the meaning put forward by the Plaintiff.
29. In respect of each line of defence, to a greater or lesser degree, the Court has had to pay particular attention to the evidence given by Mr Maud, by Mr Southern and by Dexter

Whiting and the witness statements adduced on the Defendant's behalf from Joanna Solomon, David Saunders and Alan Heinz.

The witnesses

30. In relation to the three witnesses whose witness statements were admitted without them giving oral testimony, the Deputy Bailiff directed the Jurats that the unchallenged evidence given by Ms Solomon and Mr Saunders was to be accepted by them on that basis. They could, of course, choose to reject any of that evidence in the light of their consideration of other matters in the case, but both of these witness statements had been admitted pursuant to notices served on behalf of the Defendant in accordance with the Evidence in Civil Proceedings (Guernsey and Alderney) Rules, 2011 and the Plaintiff had not sought to cross-examine either of them on their respective witness statements. Further, the Deputy Bailiff directed the Jurats not to speculate as to the reasons why the Plaintiff did not wish to cross-examine these witnesses, but rather to take their evidence at face value and to treat it in the same way as if it consisted of answers to questions posed to them during examination-in-chief where the Defendant had chosen not to cross-examine at all. The position in relation to Mr Heinz, however, was different because the Plaintiff had been given permission by the Deputy Bailiff pursuant to rule 4 of the 2011 Rules to cross-examine him on the contents of his witness statement and Mr Heinz had failed to attend at the trial. Accordingly, the Jurats could choose what weight, if any, to give to that evidence because the Plaintiff had not had the opportunity to test it in cross-examination. In the event, all the members of the Court chose largely to disregard the content of this witness statement.
31. Of the three witnesses who gave their evidence before the Court, all members of the Court were unimpressed with Mr Southern. For whatever reason, he presented as someone who was determined to be as unhelpful and evasive as he could. His inability, or unwillingness, to give straightforward answers to simple questions posed to him was quite revealing. The members of the Court concluded that if Mr Maud had said "jump" to him he would have jumped. He appeared to be ready to agree with anything proposed by Mr Maud without exercising any real independent judgment. In the context of the relationship between them, this is perhaps not surprising, but it does mean that his evidence had to be subjected to the most careful scrutiny.
32. Mr Whiting's evidence did not take key matters much further than what was said by Mr Maud and Mr Southern. This reflects his position within PGL's group of companies. The quality of how he supervised the recording of matters relating to Mr Maud's loan account raises a number of issues about what was going on within the group, but it was clear to the members of the Court that Mr Whiting, like Mr Southern, fell under the influence of Mr Maud as the driving force behind all matters relevant to PGL's claim.
33. Mr Maud presented as a man who has seen the massive property empire he had created and from which he was potentially deriving huge financial benefits collapse around him. In Jurat Ferguson's opinion, Mr Maud is clearly a well-educated and successful entrepreneur. Accordingly, assessing matters as an ordinary man, he found that Mr Maud's assertion that he had not read and understood the terms of the documents presented to him by his advisers was incapable of belief. Jurat Ferguson's view of Mr Maud's evidence is that it is highly unlikely that he would have signed the documents he did without agreeing that they accurately recorded the position and further that he would have known the levels of his indebtedness to PGL (and indeed the other companies) more accurately than he claimed to. In Jurat Ferguson's view, there is such a significant difference between owing a company well in excess of £10 million and owing just a few millions of pounds that this taints the entirety of Mr Maud's evidence. This view of Mr Maud's evidence, coupled with the unfavourable impression left by Mr Southern has led Jurat Ferguson to reject each of the bases on which Mr

Maud has defended this action, for the reasons that will be spelt out in more detail below, with the consequence that he was prepared to award the full amount claimed by PGL.

34. Jurat Helyar-Wilkinson has taken a different approach to Mr Maud and his evidence. She accepts that someone operating a vast property group such as PGL would inevitably hold a dominant position within that business. He would have been, and expected to be, regarded as “Mr Big” and was in all likelihood a difficult person to deal with, especially when it came to challenging anything he proposed. The back-office aspects of PGL’s business had been taken away from professional administrators in 2008 and Mr Southern had assumed overall board-level responsibilities for these matters. Structuring the business in such a way that decisions fell to be taken by a single human being meant that Mr Maud could indirectly exercise all the influence he wished without necessarily being seen to do so. In the context of his loan account, as the sole shareholder in a business with a paper value of billions and income of many millions, Mr Maud was effectively free to act without any significant challenge and it seems that the staff working for the company were doing their best in what became difficult circumstances to record and document matters in a manner that would stand up to scrutiny. Unfortunately, this action has exposed some of the shortcomings in what was happening, which have come to light more generally since the Joint Administrators have been appointed.
35. Against that background, Jurat Helyar-Wilkinson accepts Mr Maud’s assertions that he did not descend into the details of each transaction. She accepts, in particular, because it is consistent with her understanding of the nature of people like Mr Maud, that, having paid substantial amounts of money for tax and legal advice, he would not have troubled himself with the finer details. Once his advisers identified a way in which to mitigate his UK tax liabilities, he would have been content to let them put the scheme into place and would simply have signed on the dotted lines. In short, he had much more pressing matters to deal with and which were the focus of his attention. Accordingly, when his evidence is reviewed in the light of the perception that Mr Southern was little more than Mr Maud’s “puppet”, it is largely credible and, therefore, the consequences of what they both said happened need to be considered further.
36. The Deputy Bailiff’s opinion of the evidence of Mr Maud and Mr Southern is broadly similar to the approach taken by Jurat Helyar-Wilkinson. The account given by Mr Maud and supported by Mr Southern was, in the most part, believable. Where there are any differences, they will be touched on in turn when dealing with each of the bases of Mr Maud’s defence.

Variation of the Loan Agreement

37. As Advocate Swan submitted, if the Loan Agreement had been varied in such a way that the cap mentioned in clause 2.1 had been raised on each occasion that a further advance to Mr Maud was made by PGL, then the Loan Transfer Agreement could be construed in such a way that everything falling under the Loan Agreement was novated to Navarro. For the purpose of this argument, Mr Maud does not seek to query anything recorded on the face of the document, but asserts that PGL clearly agreed to each subsequent advance made to him and, in doing so, through conduct, varied clause 2.1 of the Loan Agreement.
38. The Deputy Bailiff directed the Jurats that when considering the evidence given they should be looking for some meeting of the minds between the parties. In the context of this case, that meant something more than just continuing as the parties were prior to the execution of the Loan Agreement because that event had changed the parties’ previous positions. Because the Loan Agreement was silent on the matter, there was no requirement for any variation to be in writing. The importance of having a written loan agreement had been explained by Mr Maud’s advisers, but they had chosen not to present PGL and Mr Maud with an agreement that directed that any variation to it be recorded in writing. There was, therefore, sufficient flexibility in the tax mitigation arrangements for the parties to have varied the Loan

Agreement orally or even through conduct, as suggested on behalf of Mr Maud. It had been conceded by Mr Maud that he did not discuss with Mr Southern each of the ten advances in the year following the Loan Agreement being executed, meaning that the only basis on which he advanced this line of defence was that the parties had, through their conduct, agreed to each variation. The Jurats were directed to look for something more than mental acceptance or mere acquiescence; rather, they should be looking for the outward manifestation of both parties forming the same view as if Mr Maud had actually said something like “can I borrow more on the same terms?” and Mr Southern had replied positively on behalf of PGL.

39. The Deputy Bailiff further directed the Jurats to pay particular attention to what Mr Southern, as the human embodiment of PGL, had in his mind and whether it matched exactly what Mr Maud had in his mind. It could only be if there was a coincidence of intention in relation to any suggested variation, as shown through their conduct, that the Loan Agreement could be varied in the manner suggested on behalf of Mr Maud. In reaching their conclusion, they could also have regard to the contrary position adopted on behalf of PGL, namely that each of those advances was made on the previous terms agreed between the parties, being that the loans were interest-free and repayable on demand and how that would impact on the tax planning advice given to Mr Maud.
40. Each member of the Court appreciated that, prior to the execution of the Loan Agreement, Mr Maud had a loan account with PGL which was open-ended, in the sense that there were no limits placed on it and when something fell to be booked to Mr Maud’s loan account, that is what PGL did. Although the parties agreed in 2010 that the amounts representing Mr Maud’s indebtedness to PGL had been accruing interest at the official rate, the position beforehand appeared to be that the loan account was a standard form of unsecured, interest-free and repayable on demand facility afforded to the company’s only shareholder. Further, we are all satisfied that Mr Southern, on behalf of PGL, and Mr Maud were aware that the Loan Agreement had recorded a maximum amount to be borrowed under it. The figure had been handwritten into a document that was otherwise type-written. They both were, therefore, sufficiently well aware of the figure to appreciate that it would need to be varied if the extent of Mr Maud’s borrowing were to exceed that amount.
41. Each member of the Court also accepted that the Loan Agreement had been worked on following advice given by PwC to Mr Maud about how to mitigate his UK tax position. The point at which Jurat Ferguson departs from the findings of Jurat Helyar-Wilkinson and the Deputy Bailiff is in relation to the question of whether, having taken that advice, Mr Maud would have borrowed further money from PGL without ensuring that it was properly recorded. Jurat Ferguson has been persuaded to the civil standard that each of the ten advances made in the year up to March 2011 falls outside the terms of the Loan Agreement, which means that it has not been varied. He regards the suggestion on behalf of Mr Maud that the Loan Agreement was varied as being a late invention designed to avoid the consequences now of what actually happened at the time. In his judgment, the parties simply did not address their minds to what was happening and the Loan Agreement document speaks for itself.
42. Jurat Helyar-Wilkinson and the Deputy Bailiff both place greater emphasis on the desire of Mr Maud, and so also Mr Southern, on behalf of PGL, to facilitate the tax planning exercise being put in place to the fullest extent. They recognise that it would be absurd for Mr Maud to have spent good money on the advice obtained from PwC and to go to the additional expense of putting in place the Loan Agreement, and similar agreements with other companies within the group from which he had borrowed, and then to enter into arrangements with PGL that would not benefit from the same tax treatment. At the very least, when Mr Maud sought additional advances, they accept that he would have been doing so expecting them to fall into the same tax planning arrangement as the consolidation of his loan account represented by the Loan Agreement.

43. There is further support for that conclusion from the fact that the books of PGL show that Mr Maud was using the money loaned to him by PGL to pay the interest on his loans with those related companies. Although there was no actual repayment in overall terms, but rather the increasing of how much he owed across the group, this factor, which applied in 2011 as well as 2010, supports the view that both parties regarded these further loans as carrying interest at the same rate rather than being interest-free, as now suggested on behalf of PGL. Moreover, although Mr Toynton has since adjusted his position, the initial stance of the Joint Administrators reviewing PGL's records, etc was that the loans carried interest, hence the manner of the demands made in August and September 2012.
44. As already noted, the position of Mr Southern, on behalf of PGL, was that he was more likely than not prepared to accede to whatever request Mr Maud made of him. He was aware that the scheme as advised by PwC was to be put in place for Mr Maud's benefit and he was willing to agree as much for that reason. His suggestion that what he was doing throughout was in the best interests of PGL is, however, questionable. Whilst he can look back now and seek to justify his actions on behalf of the company, we very much doubt he had those reasons in mind at the time. We consider that he was doing little more than making sure that the documentation looked to be in order whilst accommodating whatever Mr Maud wanted.
45. Thereafter, both Mr Maud and Mr Southern lost sight of what they should be doing to clarify that each advance was being brought within the terms of the Loan Agreement. Whilst Jurat Helyar-Wilkinson and the Deputy Bailiff incline to the view that, if they had been asked at the time, each would have responded "of course, that is what we are doing", their after-the-event accounts of their subjective intentions do not, in our view, provide sufficient evidence that each of them addressed his mind to these questions at the time. It looks very much as if Mr Maud and Mr Southern, on behalf of PGL, merrily continued in the same fashion as previously without any deeper consideration of the consequences. No one really had a sufficiently clear understanding of what advances were being made and in what way. Indeed, the calculations undertaken by PwC prior to the completion of the drafting of the Loan Transfer Agreement and the transfer certificates demonstrate that no one had informed them of the exact position as between Mr Maud and PGL. Too much has had to be re-created after the event in order to place what happened at that time into context. This has necessarily had an effect on the way in which the members of the Court have reacted to Mr Maud's suggestion that the Loan Agreement had been varied.
46. Mr Toynton also produced a copy of an agreement between Eagle Holdings Limited and Mr Maud dated 3 April 2012 under which Mr Maud's borrowing of £1,952,956 including interest compounding annually was set out, as a means of showing that broadly the same terms were being agreed between those parties as under Loan Agreement between PGL and Mr Maud. There was an accompanying unsigned board resolution of Eagle Holdings Limited. The significance of these documents was that Advocate Edwards suggested on behalf of PGL that they showed that Mr Southern, on behalf of Eagle Holdings Limited, and Mr Maud appreciated the importance of executing documents in respect of Mr Maud's borrowing so as to mitigate the tax consequences for Mr Maud. Accordingly, the inference could be drawn that their failure to record the monies borrowed by Mr Maud from PGL in the year up to March 2011 in one or more written agreements pointed towards those arrangements being something quite different from the tax planning exercise represented by the Loan Agreement. The Court agrees that these documents show that Mr Maud and Mr Southern could, if they set their minds to it, take steps to put their respective positions beyond doubt. It was not, however, necessarily determinative of the issue but amounted to an additional factor showing that the Loan Agreement between PGL and Mr Maud had not been varied in the way suggested.
47. In all these circumstances, the Court has not been able to identify the requisite meeting of the parties' minds in order to be satisfied that the Loan Agreement was varied in the manner

suggested prior to the execution of the Loan Transfer Agreement. Consequently, this first limb of Mr Maud's defence is rejected.

Construction of the Loan Transfer Agreement

48. The second argument advanced on behalf of Mr Maud is that the words on the face of the Loan Transfer Agreement should be construed in such a way that the entirety of his borrowings from PGL was being novated to Navarro. Subject to the Jurats explaining their factual findings about the background against which this exercise of construction takes place, this argument raises a question of law for the determination of the Deputy Bailiff.
49. As the Court indicated at para. 66 in *de Putron v de Putron and de Putron* (unreported, 1 February 2013), in matters of contract, guidance in Guernsey is often taken from the work written by M. Pothier, *A Treatise on the Law of Obligations or Contracts*, an English translation of which has helpfully been prepared by William David Evans dated 1806. The Deputy Bailiff gave the Jurats directions that, when considering the Loan Transfer Agreement, the approach to be taken could sensibly follow Pothier's guidance as set out in Article VII of the section on Effect of Contracts, headed "Rules for the Interpretation of Agreements":

"1st Rule. We ought to examine what was the common intention of the contracting parties rather than the grammatical sense of the terms.

3^d Rule. Where the terms of a contract are capable of two significations we ought to understand them in the sense which is most agreeable to the nature of the contract.

7th Rule. In case of doubt, a clause ought to be interpreted against the person who stipulates any thing, and in discharge of the person who contracts the obligation.

8th Rule. However general the terms may be in which an agreement is conceived, it only comprises those things respecting which it appears, that the contracting parties proposed to contract, and not others which they never thought of."

50. The position under English law is in similar terms. Advocate Swan relied on the Supreme Court's judgment, delivered by Lord Clarke of Stone-cum-Ebony JSC, in *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900 as being as good a summary as any of the principles that could be applied to the present case. The facts of that case were quite different, involving a shipbuilder's refund guarantees and the bank's advance payment bonds and so require no further comment. As in the present case, that judgment recognised that the correct approach to the construction of a contract was not in dispute and had been discussed in a number of recent cases, particularly by Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, to which reference was made in the *de Putron* case (*supra*), and in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101. At para. 21 of its judgment, the Supreme Court stated that:

"The language used by the parties will often have more than one potential meaning. I would accept the submission made on behalf of the appellants that the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other."

In reaching that conclusion, the court expressly rejected the argument that it was necessary to show that the most natural meaning of the words produces a result so extreme as to suggest that it was unintended before being able to reach a conclusion other than that of giving effect to that most natural meaning (see para. 20), but did confirm that “*Where the parties have used unambiguous language, the court must apply it*” (see para. 23).

51. Lord Clarke referred to many sources for reaching these conclusions, and the Deputy Bailiff highlighted just some of them to assist the Jurats (and indeed himself) in how to find the facts before deciding, as a question of law, what the construction of the Loan Transfer Agreement should be. In doing so, he reminded the Jurats that they could properly consider that Guernsey is a place of business where many contracts are formed each year. Accordingly, if they considered it appropriate to do so, they could bear in mind the importance of contracts being construed in a manner most consistent with what the business community would take as the obvious meaning. As Lord Diplock said in *The Antaios* [1985] AC 191, 201: “*If detailed and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense it must yield to business common sense*”. Further, as Lord Steyn said in *Society of Lloyd’s v Robinson* [1999] 1 WLR 756 (at page 763):

“Loyalty to the text of a commercial contract, instrument, or document read in its contextual setting is the paramount principle of interpretation. But in the process of interpreting the meaning of the language of a commercial document the court ought generally to favour a commercially sensible construction. The reason for this approach is that a commercial contract is likely to give effect to the intention of the parties. Words ought therefore to be interpreted in the way in which a reasonable commercial person would construe them. And the reasonable commercial person can safely be assumed to be unimpressed with technical interpretations and undue emphasis on niceties of language.”

In *Mitsui Construction Co Ltd v Attorney General of Hong Kong* (1986) 10 Con LR 1, Lord Bridge of Harwich had commented that the poor drafting of a contract provided “*no reason to depart from the fundamental rule of construction of contractual documents that the intention of the parties must be ascertained from the language they have used interpreted in the light of the relevant factual situation in which the contract was made. But the poorer the quality of the drafting, the less willing the court should be to be driven by semantic niceties to attribute to the parties an improbable and unbusinesslike intention, if the language used, whatever it may lack in precision, is reasonably capable of an interpretation which attributes to the parties an intention to make provision for contingencies inherent in the work contracted for on a sensible and businesslike basis*”. Finally, in *In re Sigma Finance Corpn* [2010] 1 All ER 571, Lord Mance had offered the guidance that the resolution of an issue of interpretation is “*an iterative process, involving checking each of the rival meanings against other provisions of the document and investigating its commercial consequences*”.

52. Although the definition given to “GM Loans” in the Loan Transfer Agreement looks quite specific as being a reference only to Mr Maud’s indebtedness under that agreement, the Deputy Bailiff invited the Jurats to consider what facts were relevant as forming the background knowledge that a reasonable person would have had at the time the parties entered the Loan Transfer Agreement. The exercise that the Jurats needed to undertake was to consider the totality of the evidence of the background to the execution of each agreement on which PGL relies and to identify objectively what the terms agreed were. The legal consequences flowing from that factual matrix would then be a matter for the Deputy Bailiff.
53. Some of that background has already been rehearsed. To the extent that it is necessary for him to do so, Jurat Ferguson recognises that Mr Maud and Mr Southern were involved in formulating an arrangement under which loans owed by Mr Maud to PGL were being swapped with loans from which Navarro benefited. He remains suspicious about the

motivations underlying this course of action and the fact that Mr Maud's wife was the beneficial owner of Navarro. On balance, he cannot believe that Mr Maud did not insist on the figures being rigorously analysed so that they were accurately recorded. As much as anything, it is the existence of oversights of this nature that lead him to conclude that the relevant background did not extend to a wish to transfer the entirety of Mr Maud's borrowings from PGL to Navarro.

54. Once again, the findings of Jurat Helyar-Wilkinson and the Deputy Bailiff are slightly different from those of Jurat Ferguson. Many of the problems faced by Mr Toynton arise from the fact that what the records of PGL show is at odds with the documentation being executed following the advice from PwC. The impression they have got is that at both of the tax year-ends relevant to this case, everyone concerned was frantically scrabbling around at the last minute to put in place arrangements that would assist Mr Maud. Rather than perpetuate the situation beyond 5 April 2011, despite the cautious advice received from PwC, Mr Maud wanted to strip out his loans from being under PGL (and other entities within the group) and to substitute his lender as being Navarro, in return for which Navarro would transfer the benefit of some loans it had acquired for the benefit of entities within the group. Had more time and care been taken to ascertain the full picture, the documentation would, we think, have been prepared in such a way as to give effect to that desired outcome.
55. As Mr Maud candidly put it in his evidence, his financial position was such that he was over-estimating the real value of his indebtedness to PGL and the other companies mentioned. Had all of his creditors sought repayment, each would have been likely at best to have received only a small dividend from his assets. The perception, therefore, is that this loan swap was dreamt up as a means of giving him a clean financial slate with PGL and the other companies in the group before it could come home to roost. As noted in Ms Solomon's evidence, her firm was not instructed at any time that only part of Mr Maud's indebtedness was to be transferred. That is consistent with the overall impression gleaned from all the evidence adduced before the Court that all those involved did not intend to leave any monies owing by Mr Maud to PGL as at 25 March 2011.
56. In this regard, we have also carefully considered the background to the executions of both the Loan Agreement and the Loan Transfer Agreement, which involved PwC undertaking some calculations of the interest that was to be regarded as having accrued on each of Mr Maud's loan accounts with the companies concerned, using the official rate that would apply in respect of daily accruals in respect of the shifting outstanding balances. In respect of PGL, this process began from when Mr Maud's loan account commenced on the day PGL was incorporated on 26 July 2006, at which time he was recorded as having borrowed £2 in respect of his purchase of the shares in the company.
57. In March 2010, consistent with the tax advice being tendered, PwC appear to have looked to fix the level of indebtedness as at March 2009 assuming that interest had been accruing historically and then to calculate the interest payable on that principal sum, (which would in turn be borrowed from another entity within the group of companies), but without taking into account the further monies recorded against Mr Maud's loan account between April 2009 and March 2010. They calculated that, by 5 April 2009, the principal borrowed plus interest amounted to £13,992,026.42. Mr Toynton has shown that this is the wrong figure so, whatever else the Loan Agreement did, it did not accurately record what Mr Maud had borrowed as at that date. To that extent, therefore, the parties to the Loan Agreement were labouring under a misunderstanding of the position between them. In part this arose because the Nominal Ledger had not been modified to reflect the fact that interest on the loan account had been accruing at the end of each tax year on 5 April. Thereafter, the further sums borrowed by Mr Maud from late March 2010 to late March 2011 were also not treated in an identical fashion. Whilst there are some items appearing in both, the Nominal Ledger records a number of debits and a credit that do not feature in the PwC calculation and the PwC figures

include certain items as debits against Mr Maud's account that do not appear in the Nominal Ledger. The fact that the figures produced in the Nominal Ledger and the PwC calculations are within approximately £200,000 of each other is, it seems, the result of a coincidence rather than through any rigorous analysis having been undertaken of what Mr Maud had actually borrowed.

58. We have also considered the fact that the draft Report from PwC dated 24 March 2011 had been prepared on instructions from Mr and Mrs Maud "*for the purpose of the exchange of loans due by Glenn Maud to the Propinvest Group, for part of a loan due by Luxembourg partnership under the control of Propinvest Group Ld to Navarro Ventures Sarl which is owned by Tricia Maud*" and that it was not commissioned by, or on behalf of, PGL. That draft Report recorded that the balance on the loan taken by Mr Maud from PGL as at 5 April 2010 was £15,059,040 and that, as at 24 March 2011, including accrued interest at the official rate, the balance had risen to £15,690,806. Amongst the assumptions made is that the transactions on the loans made by the companies, including PGL, to Mr Maud between 5 April 2010 and 24 March 2011 had been provided by Mr Whiting and that, because of Mr Maud's personal financial circumstances, PwC had been "*informed that the market value of the above receivables is £5m*". The draft Report also sets out the strong advice given by PwC to delay the proposed transaction because of the announcement from HMRC of new "disguised remuneration" rules and PwC's wish to have time to analyse the new legislation after it had been published to enable more fully informed advice to be given about the potential consequences. In a further draft Report from PwC dated 25 March 2011, some of that earlier text, including the assumptions, has been removed but, in diagram form, the outstanding loan to Mr Maud from PGL as at 25 March 2011 was recorded as being £18,281,155. Fresh calculations had been undertaken following the provision of further information. This increase in the amount being used for these calculations is a significant factor in Mr Maud's favour.
59. We have also had regard to PGL's Nominal Ledger, which contains various entries under the heading "*Amounts due to/from Glenn Maud*". These entries include a credit of £18,478,834.08 on 31 March 2011 against the words "*Glenn's debt transferred to Navarro Holdings in Mar 11*". Mr Toynton produced a spreadsheet analysis of Mr Maud's loan account with PGL taken from the Nominal Ledger, culminating with that entry, and sought to deconstruct what had been calculated by PwC so as to reach the slightly different figure of £18,281,155.14, which is what had been inserted in the final draft of the Report dated 25 March 2011. In summary, this analysis shows that a good number of the entries in PGL's Nominal Ledger against Mr Maud's loan account were not included when PwC did its calculations for the purposes of the Loan Agreement or when undertaking its revised calculations for the purposes of the Loan Transfer Agreement.
60. As we have noted, a full review of the evidence leads to the conclusion that there was an element of sloppiness in how these matters were dealt with. However, the balance lies in favour of the conclusion that Mr Maud envisaged that his new creditor for all these loans was Navarro and, on behalf of PGL, the calculations undertaken were not designed to limit the level of indebtedness to the amounts that could legitimately have been recovered pursuant to the Loan Agreement, but were at a higher level. That is the difference between £18 million odd, which was used to calculate the proportion of the loan being swapped and the £15 million or so that would otherwise have had to be used.
61. It is against that background that the Deputy Bailiff has considered the legal submissions about how to construe the words on the face of the Loan Transfer Agreement.
62. The first thing to note about the Loan Transfer Agreement is that it is drafted in unambiguous terms. By making provision for "*all of their commitments, rights and obligations under the GM Loans*" to be transferred to Navarro, PGL (along with the other companies) appears to

have focused on the loans represented by each of the particular agreements specified. That is, of course, quite understandable because the arrangements each had with Mr Maud should have been set out clearly in documents rather than there being the mix of arrangements that were actually in existence. Further, the term “GM Loans” is also clearly defined by reference to the Loan Agreement itself, which the Deputy Bailiff construes as being a reference to the loan capable of being enforced by PGL under that agreement.

63. Because the Court has concluded that the Loan Agreement was not varied by conduct, the terms of the Loan Agreement capable of being enforced by PGL remain unchanged. That is a factor to take into account in considering how to construe references to it in the Loan Transfer Agreement. Accordingly, the Loan Transfer Agreement is quite specific in the way it describes what is being transferred and, in the judgment of the Deputy Bailiff, leaves no real scope to argue that it means anything broader.
64. In the context of the dispute between the parties, in the light of the findings made by Jurat Helyar-Wilkinson, with which he concurs, the Deputy Bailiff would have been minded to regard the contentions made on behalf of Mr Maud as being consistent with business common sense. However, the option of giving the language in a contract such a construction depends on their being two possible constructions. In the judgment of the Deputy Bailiff, it would be straining the specific language used in the Loan Transfer Agreement to give it anything other than the construction that the words ordinarily mean. In his opinion, the words used are unambiguous, with the consequence that that is the meaning that they must be given (see para. 23 of the judgment in the *Rainy Sky* case (*supra*)). The Loan Transfer Agreement, as executed by the parties to it, was effective only to transfer Mr Maud’s indebtedness to PGL under the Loan Agreement.
65. For that reason, this first element of Mr Maud’s line of defence focusing on the construction to be given to the Loan Transfer Agreement is also rejected.

Mistake

66. Mr Maud’s alternative argument relating to the Loan Transfer Agreement is that it does not accurately record the agreement actually struck between the parties. This defence has been treated as if it required the Court to decide whether the Loan Transfer Agreement could be rectified on the ground of a “common mistake”, although without actually proceeding to grant that relief to Mr Maud against PGL.
67. The Deputy Bailiff directed the Jurats on the matters that Mr Maud needed to establish by reference to the summary given by Peter Gibson LJ in *Swainland Builders Ltd v Freehold Properties Ltd* [2002] 2 EGLR 71 (at para. 33), which had been expressly endorsed in the speech of Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* (*supra*) (at para. 48):

“The party seeking rectification must show that: (1) the parties had a common continuing intention, whether or not amounting to an agreement, in respect of a particular matter in the instrument to be rectified; (2) there was an outward expression of accord; (3) the intention continued at the time of the execution of the instrument sought to be rectified; (4) by mistake, the instrument did not reflect that common intention.”

In the Deputy Bailiff’s judgment, this passage could sensibly be adopted as accurately reflecting the law of Guernsey on this question.

68. The Deputy Bailiff further reminded the Jurats of the guidance offered by Denning LJ in *Frederick E Rose (London) Ltd v William H Pim Jnr & Co Ltd* [1953] 2 QB 450 (at p. 461):

“Rectification is concerned with contracts and documents, not with intentions. In order to get rectification it is necessary to show that the parties were in complete agreement on the terms of their contract, but by an error wrote them down wrongly; and in this regard, in order to ascertain the terms of their contract, you do not look into the inner minds of the parties – into their intentions – any more than you do in the formation of any other contract. You look at their outward acts, that is, at what they said or wrote to one another in coming to their agreement, and then compare it with the document which they have signed. If you can predicate with certainty what their contract was, and that it is, by a common mistake, wrongly expressed in the document, then you rectify the document; but nothing less will suffice.”

He emphasised that Mr Maud was required to surmount a high threshold in order to satisfy the Court that the Loan Transfer Agreement should be treated by it as capable of rectification with the result that the aspects of his indebtedness that would otherwise not have been transferred to Navarro were in fact to be so regarded.

69. The Deputy Bailiff also directed the Jurats to pay particular attention to the submissions made by Advocate Edwards on behalf of PGL that there was no, or no sufficient evidence, of there being a common intention different from that expressed on the face of the Loan Transfer Agreement, reminding them of the need to look at the position of each relevant party, namely PGL, Navarro and Mr Maud personally. He highlighted that PGL wished to cross-examine Mr Heinz on the evidence in his witness statement and this was an area where the Jurats should consider extremely carefully what weight, if any, to put on that witness statement. He had also submitted that, in the context of a transaction generating a significant amount of documentation, Mr Southern appeared to have played a very minor role, which made it difficult to understand PGL’s position. In those circumstances, he suggested strongly that Mr Maud’s case did not meet the test for rectification or, if it did, the mistake was not one for which the type of rectification sought would assist him.
70. The findings recorded in relation to the background to this transaction for the purposes of construing the Loan Transfer Agreement are also relevant to this issue and are incorporated without repetition. Having reviewed all the documentation submitted to the Court, Jurat Ferguson remains of the view that the parties and their advisers must have checked the accuracy of the documentation sufficiently to be satisfied that it accurately recorded the terms by which they would thereafter be bound. He is not satisfied to the civil standard that the evidence adduced on behalf of Mr Maud demonstrates that the parties shared a common continuing intention to transfer the entirety of Mr Maud’s indebtedness to PGL to Navarro or, even if it did, that there is evidence of some outward expression of that accord. He concludes that Mr Maud would not at the time have overlooked the further advances of several million pounds that he had enjoyed in the preceding year and Jurat Ferguson believes that Mr Maud had a closer eye than he now claims to have had on what was and was not included. In this regard, Mr Southern’s position on behalf of PGL is now to align himself to the position advanced by Mr Maud when the documents show quite clearly the limitations on what was being transferred and Jurat Ferguson does not believe him on these matters.
71. As an example of this last point, reference can be made to the PGL board resolution of 25 March 2011 signed by Mr Southern in three places in his capacity as director or director representative, which notes that *“the Company has made a loan to Glenn Maud (“GM”) in the amount of £15,059,040 dated 26 March 2010 (the “GM Loan”)*”. That is a clear statement of Mr Southern’s understanding of the position because the business to be conducted at that meeting proposed that PGL enter into the transfer agreement and two transfer certificates, with copies of those documents appended to the minute. In his capacity as PGL’s directors, Mr Southern resolved to approve the terms of those documents and their execution. Thereafter, the transfer certificate from PGL to Navarro was signed in two counterparts, the first on behalf of Navarro and countersigned by Mr Maud as the Borrower

under the arrangements being transferred and the other by Mr Southern on behalf of both corporate directors of PGL. Jurat Ferguson finds that these documents must have been properly considered by Mr Southern at the time and that means that they properly record the position on behalf of PGL. He does not, therefore, accept any of Mr Southern's explanations relating to these documents.

72. The approach of Jurat Helyar-Wilkinson and the Deputy Bailiff to these matters, including these documents, is affected by their conclusions about what the parties intended to agree. They note that both documents are simply dated "March 2011", which is a further example of the lack of attention to detail, principally on the part of Mr Southern. They regard it as significant that the calculations performed by PwC did not concentrate solely on the terms of the Loan Agreement but incorporated other amounts appearing to be due by Mr Maud to PGL. Had PGL intended to transfer to Navarro only the amount due strictly under the terms of the Loan Agreement, clause 2.1 of that agreement would have operated to limit the extent of Mr Maud's exposure to PGL at £15,059,040. It is obvious that the parties did not confine themselves to what could be enforced under the terms of that Loan Agreement when calculating the proportionate amount of the benefit of the loan being transferred from Navarro to PGL. This is why a figure in excess of £18 million was used and why the transfer certificate records the amount payable by Navarro as being £1,685,723.
73. Further, although attributing little weight to it, the fact that Mr Heinz states in his witness statement that Navarro understood that its receivables under the Loan Transfer Agreement reflected everything Mr Maud owed to PGL, that amounts to further support for the conclusion that this was the intention of those parties. In addition, we cannot ignore the fact that the PwC Report had been prepared on the instructions of Mr Maud and Mrs Maud, as the beneficial owner of Navarro, from which the inference can be drawn that the transaction was designed to leave none of Mr Maud's indebtedness to PGL (or the other companies) in place, no doubt because of the potential for someone else to be appointed to administer or liquidate those companies. Jurat Helyar-Wilkinson and the Deputy Bailiff take the view, therefore, that the documents, when considered in the light of Ms Solomon's unchallenged evidence, are sufficient to demonstrate that the terms recorded in the Loan Transfer Agreement do not accurately reflect what the parties had agreed.
74. In their views, the context of this transaction is also relevant. As we have already indicated, we take the view that Mr Maud did not concern himself with the details of what was happening. He gratefully accepted the advice of PwC to structure his loans in such a way that it afforded him a tax benefit. It is inconceivable that, having done this, he would then revert to taking loans from PGL in a manner that did not provide him with those same benefits. Although it was inadequately recorded, which is largely why the Loan Agreement cannot be varied in the manner suggested, it makes no business sense at all for the parties to have entered into the ten further advances on terms that they were interest-free. If they had done so, then the repayments made by Mr Maud, which are accepted by Mr Toynton on behalf of PGL as having been made during the year following the execution of the Loan Agreement, should have been set off against Mr Maud's indebtedness under the Loan Agreement, which was interest-bearing, rather than any separate agreement or agreements under which those advances were provided interest-free. To have allocated them to the interest-free lending in preference to interest-bearing indebtedness would, in their opinion, be contrary to the legal position described in paragraphs 74 and 115 of the Court's judgment in the *de Putron* case (*supra*). The way in which the parties have approached this question is a further indicator that, in their minds and in their acts, this further period of lending by PGL to Mr Maud proceeded on the same basis as set out in the Loan Agreement.
75. In March 2011, when the loan swap with Navarro was being considered, PwC was advising delaying matters. Mr Maud wished to press ahead. Because of the relationship between Mr Maud and Mr Southern, PGL was also content to press ahead. We can infer from the

relationship between Mr Maud and Mrs Maud that Navarro, on the latter's behalf, was also content to press ahead. In those circumstances, the advisers working on the transaction were operating under considerable time pressures. We find that that is why the numbers in the draft PWC Report changed between 24 and 25 March 2011. Although with the luxury of time now afforded to everyone it is possible to identify the errors under which those involved with the transaction were labouring, on balance we find that, on the basis of the inferences that can properly be drawn from all the surrounding circumstances, including the instructions given to the advisers involved, there was a common intention to identify and incorporate all of Mr Maud's indebtedness to PGL. As we have noted, it would have been contrary to business common sense to have done otherwise and, had the wording of the Loan Transfer Agreement permitted such a conclusion that is the construction that would have been given to it. To an extent, there is some overlap between the two arguments raised on behalf of Mr Maud in relation to the Loan Transfer Agreement. We have concluded that, despite there being nothing written down by any of the parties explaining any continuing common intention up to 25 March 2011, the weight of the evidence points towards that intention existing. We further take the view that, if time had permitted, a far closer analysis would have been undertaken by the parties to ensure that every last penny of Mr Maud's indebtedness would have been fully and properly documented, so as to extract him personally from the reaches of PGL (and the other companies). That was the agreement reached by the parties because both Mr Southern and, we strongly suspect, Mr Heinz, were operating in such a way as to give effect to the wishes of their companies' respective beneficial owners. This was a transaction being driven by the Mauds principally for the personal benefit of Mr Maud and must be viewed in that light.

76. As a result, by a majority, the Court finds that PGL cannot recover from Mr Maud the amounts claimed by it in this action because the parties collectively agreed that it would form part of the loan swap of 25 March 2011, even though that agreement is not accurately reflected in language used in the Loan Transfer Agreement.

“Accounting Error”

77. As a result of that decision, it is strictly unnecessary for the Court to reach a decision about the so-called “Accounting Error” identified by Mr Maud in December 2012 and introduced into his Defences by way of amendment. However, although Advocate Swan largely downplayed this particular point, in fairness to the parties, and also because it was the first line of Mr Maud's arguments that attracted Jurat Helyar-Wilkinson's attention and support, we will set out our findings on this issue as briefly as we can.
78. Mr Maud has queried five entries in PGL's Nominal Ledger in respect of his loan account, each of which he suggests should not have been recorded as representing monies he owed to PGL. Three of the amounts are less than £20,000 each, so the parties have concentrated on the other two amounts, which are related to each other, being £9,811,625.63 and £750,000 recorded as “AIB Navarro Loan” and “*AIB Arrangement Fee on Navarro Loan*” respectively. These entries bear the dates 15 and 16 October 2008.
79. The background to these sums being recorded against Mr Maud's loan account (and so brought into the calculations undertaken by PwC before the Loan Agreement was executed) is that an opportunity arose, in the wake of the Icelandic banks' failures, to acquire the benefit of loans made by Kaupthing Bank Hf to Hannover Square Properties Sarl and Hanworth Investments Secs, two Luxembourg-registered entities. It was Navarro, rather than PGL or Mr Maud, that acquired the rights and obligations under these loans on 15 October 2008. Mr Whiting was unable to give a wholly satisfactory explanation as to why the amounts in question had been recorded against Mr Maud's loan account with PGL. It seems that Peter Saunders, who was at the time responsible for these matters, was asked by Mr Whiting about this transaction because there had been insufficient narrative to explain the purpose of the

payments made by PGL. Following Peter Saunders' input, because Mr Whiting was not informed at the time that the loan was to be structured through any other entities, such as Bogota Holdings Ltd, almost as a default exercise, he recorded it as being owed to PGL by Mr Maud. He was influenced to do this because Navarro was owned by Mrs Maud.

80. Mr Toynton's position in relation to this matter has been that, in the absence of properly documenting the loan as having been made to anyone else, this is a reasonable position for PGL to have taken. The onus lies on Mr Maud to prove differently and, in Mr Toynton's mind as one of the Joint Administrator's of PGL, he has failed to do so.
81. Jurat Ferguson agrees with Mr Toynton's analysis. The books and records of PGL speak for themselves and, as at the date of executing the Loan Agreement, Mr Maud did not question the level of his indebtedness to PGL recorded in it. Having regard to the burden and standard of proof, Jurat Ferguson has concluded that the lateness of him raising this line of defence is indicative of it not being something on which he can rely now. As previously noted, he takes the view that Mr Maud had a better idea of the indebtedness that PGL could have enforced against him and would not have permitted it to be inaccurately recorded to his detriment in the way it apparently was. Further, undoing the position now would go to the root of the calculations undertaken by PwC and the basis on which the loan swap with Navarro was undertaken, which is a further reason for Jurat Ferguson rejecting it as a convenient late invention to avoid the consequences of the Plaintiff's action.
82. The position adopted by Jurat Helyar-Wilkinson and the Deputy Bailiff has been to consider whether, prior to the Loan Agreement being executed on 26 March 2010, PGL would have succeeded in enforcing this element of Mr Maud's alleged indebtedness to it. Put another way, if any action that might have been commenced for repayment by Mr Maud at that time would have been bound to fail, then the Accounting Error defence would succeed in the present action. This involves looking carefully at what was occurring at each step of the related transactions.
83. PGL had banking arrangements with Allied Irish Banks, p.l.c. (hereafter referred to as "AIB"). By October 2008, it had a facility agreement with AIB at a level of approximately £185 million. AIB agreed to release £10,750,000, which represented the monies used to purchase the benefit of the loans from Kaupthing Bank Hf. The purchaser of the benefit of those loans was Navarro. Also in 2008, Mrs Maud entered into a Legal Charge under which she gave a first legal mortgage over *inter alia* 4 Wilton Crescent in London to AIB. As shown on an extract from the Land Registry, 4 Wilton Crescent was solely owned by Mrs Maud.
84. In 2009, Mrs Maud wished to switch lenders. She arranged to borrow £12.5 million from Lloyds Bank TSB plc, such loan to be secured on 4 Wilton Crescent. The loan was advanced on 25 February 2009. £10.75 million was paid to AIB. Its charge over 4 Wilton Crescent was released. The firm of Mayer Brown was used in this transaction by AIB and Ms Solomon's firm acted for Mrs Maud.
85. On behalf of PGL, Mr Toynton relies on the fact that none of this money from Lloyds Bank TSB plc was received into any PGL account, with the consequence that he has been unable to identify any repayment of the amounts recorded as having been loaned to Mr Maud in October 2008. Further, PGL's books and records do not correspond to the position now being asserted by Mr Maud. However, Mr Maud has pointed to correspondence from AIB in October 2012 explaining the uses to which the monies received were put. He argues that, although the record-keeping of PGL may not have shown this, whoever borrowed the money recorded in his loan account (and for this purpose he says it does not matter who that was), it was repaid, because PGL had the benefit of the money coming back, however it was deployed by AIB in reducing other indebtedness to that bank. As a consequence, PGL at the time could

not have successfully recovered any monies from him in respect of the amounts recorded against his loan account because the amounts loaned had already been repaid through Mrs Maud's re-structuring of her loan.

86. Whilst not condoning the sloppiness of the way in which these transactions have been recorded, through a process of piecing everything together and following the money movements, Jurat Helyar-Wilkinson and the Deputy Bailiff accept Mr Maud's contentions. They have borne in mind the timing of the acquisition of the loans from Kaupthing Bank Hf, which was in the immediate aftermath of the Icelandic banking system's failure. This appears to have been an opportunistic move by the Mauds to bring what was external indebtedness more within the family's control, and to do so at a significant discount. More care should have been taken by those involved, perhaps particularly Mr Southern, to ensure that what PGL was doing was accurately recorded both at that time and in 2009 when Mrs Maud re-organised the way 4 Wilton Crescent was being used as security for her indebtedness, but they are satisfied that the evidence relating to the entirety of these transactions is such that Mr Maud is now able to say that the cap in the Loan Agreement was never exceeded, meaning that even on the narrowest construction of the Loan Transfer Agreement, the amount of £3,359,045.72, which the Plaintiff seeks to recover from is not due by him to PGL.
87. In reaching that conclusion, the Court is conscious that it throws serious doubt on what was being dealt with under the Loan Transfer Agreement. That is no doubt why this has been treated as an alternative basis for concluding the Mr Maud does not owe PGL the sums in question, although it is a consequence that would need to be resolved primarily between Navarro and Mr Maud. It also means that clause 1.1 of the Loan Agreement is incorrect because the parties should not have agreed that PGL had by that time lent Mr Maud £13,992,926. That may in turn have led the parties not to wish to agree that PGL would advance further sums to Mr Maud up to a maximum outstanding balance not exceeding £15,059,040, as shown by clause 2.1 of the Loan Agreement. However, the factual conclusions reached for the purposes of this action do not need to explore those matters further. If the Court were to be wrong to conclude that the parties to the Loan Transfer Agreement shared a common mistake and that their agreement was actually to transfer all of Mr Maud's indebtedness to PGL to Navarro, the Accounting Error offers an alternative basis on which Mr Maud can successfully defend the Plaintiff's action against him because it does not involve looking behind the key terms of the Loan Agreement and Loan Transfer Agreement on which the Plaintiff has relied.
88. We did give careful consideration to Advocate Edwards' submission that the Court should be slow to conclude that PGL had effectively agreed to lend funds to an entity outside its own group without any formal resolution. However, our overall impression of the way that PGL was operated is that Mr Maud was the driving force behind it and Mr Southern was doing his best, inadequate though it seems to us to have been, to keep up. It is clear that someone should have been exercising more scrutiny about the way in which monies going out of PGL were recorded. The explanations from Mr Whiting that there was often a discussion about what narrative should be recorded, but this occurred only when the bank statements themselves did not provide the answer, mean that what was set out in the Nominal Ledger should not be regarded as definitive. It is clear that these monies were not channelled directly to Mr Maud. The question for PGL was how they should have been recorded. The practice appears to have been to record them as owed by Mr Maud when no other explanation was offered. No one seems to have checked with Mr Maud whether that was the correct thing to do. Come what may, when Mrs Maud borrowed money from Lloyds TSB Bank plc and AIB was repaid in 2009, there should have been some reconciliation of the position across the various loan accounts to reflect PGL's position. The fact that there was not should not now prejudice Mr Maud.

89. The Court recognises that reaching this conclusion involves some mental gymnastics. What Jurat Helyar-Wilkinson and the Deputy Bailiff have done is to disregard for the Accounting Error line of defence some of the findings in respect of the other lines of defence. For example, the significance of the calculations of Mr Maud's indebtedness at in excess of £18 million in respect of the mistake defence has no bearing on the fact that, if the Accounting Error defence were relied on, those calculations are demonstrably hugely wrong. As the Deputy Bailiff reminded the Jurats (and himself) each of the lines of defence advanced on behalf of Mr Maud are separate routes in support of his single contention that he does not owe PGL the monies claimed because that indebtedness was transferred to Navarro by the Loan Transfer Agreement. In effect, each of them requires the Court to go down one path and, if the route is not accepted, re-trace its footsteps and start all over again.
90. Were it necessary to do so, the Court, by a majority, would conclude that Mr Maud has satisfied it that, because any loan to him had been repaid or incorrectly recorded in October 2008 as being a personal loan due from him, the advances in 2010 and 2011 that form the basis of PGL's claim against him were all made at a time when clause 2.1 of the Loan Agreement had not been reached and so fell within its terms, with the consequence that his indebtedness in respect of those advances was transferred to Navarro under the Loan Transfer Agreement.

Disposal and costs

91. For the reasons given, by a majority, the Court dismisses the Plaintiff's action. Jurat Helyar-Wilkinson and the Deputy Bailiff are satisfied that Mr Maud does not owe the amount claimed in the Case to PGL because that indebtedness fell within the loans swapped with Navarro pursuant to the Loan Transfer Agreement. They accept that this is the consequence either of the Loan Transfer Agreement inaccurately recording the parties' agreement, meaning that it could be rectified to reflect that the parties' agreed to transfer not only Mr Maud's indebtedness under the Loan Agreement, but also any indebtedness outside the terms of that contract or because the extent of Mr Maud's actual indebtedness under the Loan Agreement was much lower than the parties understood as a result of the so-called Accounting Error, in which case the documents speak for themselves without the need to refer to any common mistake.
92. At the conclusion of a case such as this, costs would normally follow the event and be awarded on the standard recoverable basis. In default of any submissions from the parties for a different order, that is what the Court will award. However, if either party wishes to make submissions for a different order, the matter should either be listed before the Interlocutory Court within 21 days of this judgment being handed down or, if the parties prefer, written submissions can be lodged and served within the same period and the Deputy Bailiff will decide whether he has sufficient material to determine any party's application on the papers or whether it is necessary to fix a short hearing to do so.