



**Executive Wealth Management Limited &  
James Joseph Mitchell**  
Royal Court  
25<sup>th</sup> April, 2014

**JUDGMENT 20/2014**

**Claim for the recovery of a loan and personal expenses.**

**Approved Text  
25.04.2014**

**IN THE ROYAL COURT OF GUERNSEY  
(ORDINARY DIVISION)**

**Between: EXECUTIVE WEALTH MANAGEMENT LIMITED**

**Plaintiff**

**-and-**

**JAMES JOSEPH MITCHELL**

**Defendant**

**Hearing dates: 14<sup>th</sup>, 17<sup>th</sup> to 20<sup>th</sup> March 2014**

**Judgment handed down: 25<sup>th</sup> April 2014**

**Before: Richard James McMahon, Esq., Deputy Bailiff**

**Jurats: S M Jones, P S T Girard and C Helyar-Wilkinson**

**Advocate for the Plaintiff: Advocate T W McGuffin  
The Defendant was not represented**

**Cases, texts & legislation referred to:**

The Royal Court (Reform) (Guernsey) Law, 2008

The Royal Court Civil Rules, 2007

The Evidence in Civil Proceedings (Guernsey and Alderney) Law, 2009

**Introduction**

1. The Plaintiff, Executive Wealth Management Limited, is a Guernsey company that was co-founded by the Defendant and Geoff Gottlieb in June 2001. Although other shareholders were introduced in subsequent years, the Defendant and Mr Gottlieb remained as the prominent shareholders and directors of the Plaintiff until 2009, when Mr Gottlieb purchased the Defendant's shares under the terms of their Shareholders Agreement. The termination of their business partnership has been far from harmonious. This action was brought against the Defendant to recover sums of money alleged to be owed to the Plaintiff arising from arrangements put in place when the Defendant was still a director and major shareholder. By the end of the trial, the money claim in respect of the most significant element was, however,

no longer being pursued, with the alternative of a declaration of the amounts due and payable on 7 May 2012 under the oral agreement between the parties being sought instead.

2. This judgment has been prepared in accordance with the provisions of section 16(5) of the Royal Court (Reform) (Guernsey) Law, 2008:

*“(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.”*

The Deputy Bailiff did not sum up to the Jurats in open Court but instead indicated that the Court would reserve its judgment and retired with the Jurats, as he is permitted to do under section 14(2) of the 2008 Law.

3. In this judgment, the findings of fact are the unanimous findings of the Jurats.

### **Procedural background**

4. The Plaintiff’s Cause was tabled on 23 July 2010. The Defences were originally settled on 20 August 2010. The Cause was subsequently amended four times during 2010 and 2011, resulting in the Defences being amended twice. The Plaintiff’s Réplique of 8 October 2010 was also amended three times and the Defendant lodged a Duplique dated 31 October 2011. The parties made numerous Requests for Information of each other. It is from the latest versions of these documents that the Plaintiff’s case and the Defendant’s opposition to it can be ascertained.
5. The Plaintiff pleaded that it was entitled to seek repayment of a loan agreed orally on or about 7 May 2007 between Mr Gottlieb and the Defendant, as directors of the Plaintiff. That agreement provided that the Plaintiff would provide the Defendant with a credit facility of US\$800,000 for a period extending to 31 December 2008. Monies drawn pursuant to this facility would carry interest at 3% per annum. Between 7 May and 31 December 2007, the Plaintiff asserted that the Defendant used \$725,000 of that facility. The agreement was said to have been evidenced in writing by a memo entitled “EWM Revolving Line of Credit Agreement” dated 7 May 2007 and the Defendant delivered to the Plaintiff an executed promissory note with a maturity date of 31 December 2008. During 2008, the Plaintiff pleaded that the oral agreement was varied to increase the line of credit so that the Defendant drew US\$1,275,000 under it. That extension of the line of credit was evidenced by a note to the audited accounts of the Plaintiff in respect of the year ending 31 December 2008. Demands for repayment of the capital amount and interest accrued were not satisfied. Consequently, the Plaintiff sought judgment for the principal amount of \$1,275,000 together with interest accruing each May, most recently at the daily rate of US\$104.79. In the alternative, if the Defendant succeeded in establishing that the maturity date had been varied from 31 December 2008 to 7 May 2012, the Plaintiff sought a declaration that the principal and interest on the Defendant’s loan became payable on that date.
6. The Defendant’s position about what was agreed by early 2007 was different. The arrangements between the Plaintiff and both Mr Gottlieb and him were predicated on both co-founders of the Plaintiff receiving equal compensation/remuneration terms. Against that background, when the Plaintiff was sufficiently successful to award both of them annual

bonuses in accordance with a formula set out in the Shareholders Agreement, in order to assist Mr Gottlieb, they agreed to take an element of their overall compensation package by way of a loan rather than a direct bonus and it was expressly agreed by them that their loans would be forgivable by the Plaintiff at a mutually acceptable and convenient date or on a liquidity event. As such, there is no requirement for the Defendant to repay any monies to the Plaintiff because what he received was part of his compensation package.

7. There were two other amounts of money to which the Plaintiff claimed to be entitled to payment from the Defendant. The first was a sum of CHF 98,868.15 representing invoices for professional services rendered by Baker & McKenzie. This amount was paid by the Plaintiff in two tranches in 2008 pursuant to four invoices rendered by Baker & McKenzie. A review undertaken following the buy-out of the Defendant by Mr Gottlieb in March 2009 led the Plaintiff to conclude that the work had not been undertaken on its behalf but was a personal expense of the Defendant, in respect of which he had wrongfully caused the Plaintiff to settle the invoices. The final head of the Plaintiff's claim was the reimbursement of CHF 45,988.52 in respect of personal credit card expenses incurred by the Defendant from in or about 9 October 2007 to 15 May 2008, which had been paid by the Plaintiff and for which it now sought reimbursement. In respect of the claims for repayment of these two amounts, the Defendant pleaded that they fell within the terms agreed between him and Mr Gottlieb as part of their overall equal compensation/remuneration packages and so he was entitled to cause the Plaintiff to pay them.
8. At the hearing, the Plaintiff was represented by Advocate McGuffin and the Defendant appeared for himself. He had previously been represented by AFR Advocates, who had pleaded the case on his behalf, prepared and lodged a full Skeleton Argument setting out the Defendant's case in the light of those pleadings and the witness statements that were to form the main element of each witness's evidence-in-chief, adding submissions on the law. Because the Defendant was a litigant in person, the Deputy Bailiff endeavoured to assist him in the way he put his case to the Plaintiff's witnesses. The Defendant appeared to the Court to be an articulate businessman who was well able to make the submissions he needed to around the Skeleton Argument that had been prepared on his behalf by Advocate Mark Ferbrache.

### **General directions**

9. The Deputy Bailiff reminded the Jurats of their respective roles: the Deputy Bailiff remains the sole judge of questions of law and procedure and the Jurats are the sole judges of questions of fact. The Jurats were directed that they must accept his directions on the law and follow them.
10. The Deputy Bailiff directed the Jurats that the burden of proof is on the Plaintiff throughout. The standard of proof is the civil standard of the balance of probabilities and the Deputy Bailiff explained that to establish something on the balance of probabilities means to prove that something is more likely so than not so. Insofar as the Defendant sought to establish any fact, the burden of proof rested on him to prove it to the civil standard.
11. The Deputy Bailiff further directed the Jurats to have regard to the whole of the evidence presented to the Court, and to form their own judgments about the witnesses, and which evidence they treated as reliable, and which they considered was not. The Deputy Bailiff directed that the facts of the case are the Jurats' responsibility. They may take account of the arguments in the speeches they heard, but are not bound to accept them. Equally, if at any time the Deputy Bailiff appeared 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. The Deputy Bailiff summarised that position by clarifying that, when it comes to the facts of this case, it is the Jurats' judgment alone that counts.

## The evidence

12. Both parties had permission to adduce opinion evidence from experts in the field of scientific examination of documents and handwriting. On behalf of the Plaintiff, Dr Audrey Giles prepared a report dated 27 October 2011, which she supplemented with a short letter dated 31 October 2011. On behalf of the Defendant, Mr David Browne prepared a report dated 21 February 2012. Both experts then conferred and produced a Joint Statement dated 30 March 2012, in which they agreed that the signature on the promissory note given to the Plaintiff by the Defendant with a maturity date of 31 December 2012 (to which more detailed reference will be made in due course) “*shows a very close similarity to the electronic signature of Mr Gottlieb*”, which was attached to an e-mail dated 29 April 2008, “*which also appears on the 2009 Investor Letter*”. They opined that the “*degree of similarity observed is such that all of these signatures must be images of the same original signature made by Mr Gottlieb*”. They added that, in the absence of access to the original handwritten signature from which the image was taken “*there is no scientific basis we can use to determine when*” that signature was created. Despite the complete agreement between them, both experts attended to give evidence at the trial, but the Jurats concluded that no further material evidence was elicited through that exercise.
13. The Plaintiff’s witnesses of fact were Mr Gottlieb and Dr Wolfgang Schroter, both of whom are directors of the Plaintiff. The Defendant was the only defence witness of fact. After the trial had commenced, the Defendant indicated that Gregory Greene and Robert McCambridge, both of whom had provided signed witness statements, would after all not be called by him to give evidence. The Deputy Bailiff therefore directed the Jurats that they should disregard anything they might have read in those witness statements because they no longer formed any part of the evidence in the case. As a consequence, insofar as the meeting with Dr Schroter in New York in November 2008 was concerned, and any discussions before that meeting, the only evidence to which they were permitted to have regard is, therefore, the evidence given by Dr Schroter.
14. Because the Plaintiff relied on the terms of an oral agreement with the Defendant, made between Mr Gottlieb and the Defendant on or about 7 May 2007, the Deputy Bailiff directed the Jurats to pay particular attention to who said what and whether the contemporaneous documents to which both parties drew attention supported what either stated in their evidence they had said. The Jurats needed to ascertain objectively whether there was a meeting of minds giving rise to an agreement and, if so, whether the terms agreed were those suggested on behalf of the Plaintiff or on behalf of the Defendant. If the Jurats concluded that something was in the mind of one of the gentlemen, but had not been expressed to the other and his agreement to it obtained, that element could not form part of the parties’ agreement. He suggested to them that the most significant term in dispute between the parties appeared to be about whether any loan represented by the amount of money admittedly received by the Defendant from the Plaintiff was forgivable and, if so, at what time, by virtue of which those monies received could be regarded as forming part of his overall compensation for services rendered to the Plaintiff.
15. As part of the process of ascertaining the terms of the oral agreement, the Jurats were reminded that they could take into account what was written about those terms by each witness. Their task, however, was to consider whether the things written accurately reflected what was agreed. If there were differences between what was said at any given time and what was written, they potentially needed to consider whether what was subsequently written amounted to evidence of a variation to the oral agreement that had previously crystallised. Because of the agreement being oral, where different versions of events were advanced, the question of the credibility of the witnesses arose. It was a matter of each Jurat’s judgment as to whether any aspect where they disbelieved a witness meant that they questioned the remainder of that witness’s evidence to the extent of also disbelieving it. They were entitled

to conclude that some other parts of a witness's evidence was not tainted just because one aspect was found to be unreliable.

16. The Deputy Bailiff gave a similar direction to the Jurats in respect of the Plaintiff's money claims relating to the Baker & McKenzie payments and the credit card expenses admittedly paid by the Plaintiff. In relation to issues surrounding the Baker & McKenzie invoices, the Deputy Bailiff directed the Jurats that the correspondence between the Plaintiff and Baker & McKenzie on that topic could be reviewed by them because these documents formed part of the records of the business of the Plaintiff and so were receivable in evidence without further proof pursuant to section 15 of the Evidence in Civil Proceedings (Guernsey and Alderney) Law, 2009. The Plaintiff had to prove that these amounts had been paid by it wrongfully, whereas the Defendant asserted that the payments were made pursuant to the agreement he had with the Plaintiff, through Mr Gottlieb, to have a personal expense account of US\$75,000 annually against which such payments could properly be set. The basis of such an agreement was not in any written contract but was a further oral agreement between them, also evidenced by contemporaneous documents and the course of conduct that operated between both of them and the Plaintiff over a number of years. The Jurats, therefore, needed to determine what the agreement between the parties was and how it applied to these payments. The Deputy Bailiff further directed the Jurats that they were obliged to look carefully at the dates pleaded in the Plaintiff's final version of its Cause in relation to the credit card expenses and to decide whether the Plaintiff had established that the expenses in question were incurred and so paid for before 15 May 2008 in accordance with the pleaded case it advanced. If the Plaintiff's claim related to monies paid by it after that date, the Jurats were entitled to disallow that part of the claim.

### **The facts**

17. In the 1990s, both Mr Gottlieb and the Defendant worked for UBS. Mr Gottlieb was based in London, heading the marketing of its hedge fund business, and the Defendant was based in Zurich, heading its deferred compensation business. They first met in the context of the UBS deferred compensation scheme, of which Mr Gottlieb was a participant. In the summer of 2000, they met over dinner and had a lengthy discussion about the opportunities available to design and administer deferred compensation plans to other organisations, which did not at that time have in place schemes like the UBS plan. The attraction of establishing such a start-up business arose because the part of UBS headed by the Defendant was to disappear in a restructuring and the Defendant feared he would not be offered a suitable alternative position consistent with his envisaged career progression and Mr Gottlieb was looking for something different himself. They met again in October 2000, by which time the Defendant had left UBS, and together they formulated a business plan. They planned to launch their venture following Mr Gottlieb's departure from UBS, which was intended to be in March 2001.
18. The Plaintiff was incorporated on 1 June 2001. At the time, both Mr Gottlieb and the Defendant had equal 50% shareholdings. There were subsequently three private placements of shares, resulting in their respective shareholdings reducing to 39.47% and 38.48% respectively. The difference in size of their respective shareholdings arose from an investment made by the Defendant's brother. As co-founders of the business, they ran matters as equal partners and agreed that each should receive an equal amount of remuneration from the Plaintiff. The Jurats regard that agreement, which was clearly accepted by both Mr Gottlieb and the Defendant, as being of significance to their findings about the matters the two gentlemen subsequently agreed and which are in issue in this case.
19. Initially, Mr Gottlieb operated out of the Plaintiff's London office and the Defendant out of its Zurich office. At the end of 2003, Mr Gottlieb relocated to the United States of America and worked from the Plaintiff's Connecticut office. Thereafter, he travelled to London for approximately one week every month. The business of the Plaintiff had two principal arms: services relating to deferred compensation programs for executives; and services relating to

third party hedge fund marketing. Each arm represented the core specialities and prior experiences of the Defendant and Mr Gottlieb respectively, and was where they concentrated their individual efforts, although each of them retained an interest in the entirety of the Plaintiff's business.

20. Dr Schroter was one of the earlier and more significant recruits to join the Plaintiff. In time, he became the Chief Financial Officer. Following the Defendant's resignation in 2009, Dr Schroter was appointed as a director of the Plaintiff. Throughout the relevant period, he was based in the Plaintiff's Zurich office. His desk was in close proximity to the Defendant's. As a result, they fell into the habit of talking rather than putting everything into writing. Dr Schroter travelled to the United States of America regularly to meet with Mr Gottlieb.
21. The Defendant had an employment contract with the Plaintiff, which was signed on 5 February 2002 and governed by Swiss law. His position was described in it as "*Managing Partner*". The gross base annual salary was fixed at US\$216,000, payable in equal instalments on the last day of each month. In addition to the fixed regular salary, clause 2.2 provided that the Defendant "*shall be entitled to annual discretionary incentive award based on individual performance*". The agreement was terminable by either party giving six months' notice.
22. Following the third private placement of common shares, revisions were made to the Shareholders Agreement to which both Mr Gottlieb and the Defendant were parties. Section 8.3a, headed "*Bonus Pool Caps*" was inserted and provided:

*"EWM's bonus pool (including the bonuses for the founding Directors, Jim Mitchell and Geoff Gottlieb) in any year will be capped at the LESSER of:*

*a) 90% of Earnings Before Interest, Tax, Depreciation and Ammortization (EBITDA) (previously "Contribution before Bonus or CbB)*

*and*

*b) the GREATER of:*

*i. USD 5 million*

*ii. 35% of EBIDTA.*

*The total bonus paid to Jim Mitchell and Geoff Gottlieb will be capped at the LESSER of:*

*a) 35% of contribution after Staff Bonuses (Staff Bonuses are set at the discretion of the Managing Partners, subject to contractual commitments with selected employees)*

*b) Total Bonus Pool Cap less Total Staff Bonuses*

*c) USD 3 Million*

*The annual base salaries for Jim Mitchell and Geoff Gottlieb will also be capped at USD 250,000 each."*

The Jurats found that this provision was a further example of the manner in which Mr Gottlieb, the Defendant and the Plaintiff had agreed that the two gentlemen would, as co-founders and Managing Partners, be treated equally.

23. When Mr Gottlieb and the Defendant established the Plaintiff as their new business, they went from an environment at UBS where they were accustomed to substantial bonuses being paid to the position where they owned and worked for a start-up business where their immediate financial rewards were small by comparison. However, as they both acknowledged, their rewards for the time and effort they invested in the Plaintiff would come through growing the overall value of that business. They had an exit strategy in mind from the outset. They envisaged the Plaintiff becoming profitable within two or three years, at which time bonus

payments could be awarded to themselves, and that the business might be sufficiently well-established within roughly five years or so to enable them to look to realise their investment through some sort of sale or IPO. In the event, those timescales proved to be overly optimistic.

24. The Plaintiff leased a property in London. This property was used by Mr Gottlieb, although other personnel of the Plaintiff might also make use of it. By an e-mail dated 9 November 2001 sent to the Defendant, Mr Gottlieb explained that he would reimburse the Plaintiff via salary reduction for the proportion of the rent on this property attributable to him personally. He assumed that six nights each month would be business use for which the Plaintiff would need to pay. He indicated he would settle the utility bills out of his own pocket. This e-mail also indicated the arrangements that he and the Defendant had agreed for the way in which the Plaintiff would meet certain insurance expenses in respect of both of them.
25. There was e-mail correspondence between Mr Gottlieb, the Defendant and Dr Schroter in September 2003 which indicated that the founding Managing Partners had had to forego their salaries whilst the Plaintiff was getting established and were looking to receive payments in respect of what they had foregone and to go on the payroll for the future. That correspondence again refers to adjusting the amounts received to reflect the rent subsidy in respect of Mr Gottlieb. Their discussions about precisely how the calculations should be finalised continued into the following month, with the Defendant acknowledging that he needed to give the Plaintiff credit for legal fees incurred and highlighting to Mr Gottlieb that he also needed to repay personal expenses incurred through use of the business credit card supplied to him by the Plaintiff.
26. The position in early 2006 resolved itself into an agreement that both Mr Gottlieb and the Defendant would have a capital account with a limit of US\$75,000. Their e-mail exchange of 28 and 29 March 2006 sets out what they had discussed and agreed. Mr Gottlieb initially wrote that the capital account would be set up for each “*to draw an advance against the next bonus*”. His intention was to use the majority of the amount he suggested as his contribution to the rent on the Plaintiff’s London property he was still using. He proposed a small carryover of any unspent balance to the following year. He also wrote that “*It would be best if we could manage this without explicitly identifying it in the financials and in any meeting minutes (if possible). The same of course goes for any additional loans we might want to take out as previously discussed.*” Those proposed arrangements were modified through discussion, as reflected in an e-mail sent on 29 March 2006, which recorded what they had agreed: “*Capital account limits of USD 75,000 for each of us. The unused portion as of year end will be reflected as a bonus that is that much lower than it would have been otherwise (not as an explicit deduction of a bonus number). Given teh [sic] size of the limit, I would suggest that there be no carryover of any unused portion.*”
27. In relation to the Defendant’s 2006 expense budget, a schedule of payments made against the US\$75,000 limit from April to October 2006 has been produced in a schedule prepared by the Plaintiff. It shows that the Defendant overspent the 2006 expense budget by US\$124,435.54. During this time, the Defendant purchased a boat. Some of the purchase price was met by the deferred pay to which he was entitled from the Plaintiff, as shown by a different spreadsheet showing the Retro-pay accumulated as at 31 December 2004 and the amounts paid out at the Defendant’s direction up to and including the boat purchase, with the balance, and subsequent sailing-related expenses, appearing on the expense budget schedule. The significant overspend on the expense budget was regularised by the Plaintiff through a short document headed “*EWM Partner Loan Agreement*” dated November 2006 under which the Defendant agreed to pay to the Plaintiff within one month of the 2006 bonus payment “*which will be paid out some time in q1 2007*” US\$124,435.54. There was no interest or other charges. Repayment was made, as agreed, by the Defendant receiving the bonus in respect of 2006 with a deduction of this amount from the original sum declared.

28. Mr Gottlieb and his former wife, Roxanne, divorced in late 2005. They were subject to a Consent Order dealing with their financial settlement. The relevant aspect of that Consent Order was that, for three years of bonuses paid to Mr Gottlieb, Roxanne would be entitled to half of any excess above US\$350,000 each year, subject to a minimum payment in respect of those three years of US\$350,000. Mr Gottlieb confirmed that the consequences of this term of the Consent Order influenced his approach to fixing the bonus from the Plaintiff to which he would be entitled. The Defendant was aware of this term of the Consent Order and so, perhaps to a lesser degree, was Dr Schroter. In June 2007, Mr Gottlieb arranged for Dr Schroter to send confirmation of Mr Gottlieb's salary and bonus to his solicitor for disclosure to Roxanne's lawyers.
29. The Plaintiff's business became profitable in 2006. The nature of the business was such that, on the basis of payments to be received later in the year, Mr Gottlieb and the Defendant were able to be confident that it would be the first year in which they would be in a position to award themselves a bonus. It was, in the Defendant's words, going to be a "*record year*" and, after a longer than envisaged wait, the co-founders were about to reap the rewards for their endeavours. The figures for the Plaintiff were such that, under the terms of section 8.3a of the Shareholders Agreement to which reference has already been made, Mr Gottlieb and the Defendant could have awarded themselves bonuses at or approaching the cap available to them of US\$3 million. In the event, the bonus declared for each in respect of 2006 was US\$550,000. Discussions between Mr Gottlieb and the Defendant about the bonus payments that could be made took place during 2006 and into early 2007.
30. By an e-mail dated 13 March 2007, Mr Gottlieb wrote "*lets [sic] agree to a maximum borrowing limit for each MP at USD 850,000 through 31 March 2008*". He suggested that the limit could be categorised into three types: expenses the Plaintiff paid on their behalves, whether one-off or ongoing (and he gave as examples the credit card he used in the UK and the payment of the Defendant's tax bill for the previous year); the director capital account, from which his share of the London property was taken; and "*Quarterly cash advances that we set at USD 200,000 to 300,000 at our last meeting*". Mr Gottlieb directed Dr Schroter to ensure that the limit of US\$ 850,000 for cash advances of these types was not exceeded by 31 March 2008.
31. By an instrument dated 20 March 2007 signed by the Defendant and Dr Schroter, the Plaintiff set up a foundation in Liechtenstein known as "*GWFP*". It was established "*as part of EWM's Executive Wealth Accumulation Program*". The Defendant was, and still remains, the beneficiary. Reference was made in the minutes of a board meeting of the Plaintiff on 19 April 2007 to the "*design and implementation of EWM's deferred compensation plan*" having been discussed and approved at a previous board meeting in 2006 at which the Guernsey-based directors had not been present. They were, therefore, requested to forward the minutes of that meeting to the Plaintiff's administrators. This had not been completed by the board meeting of 19 July 2007, but was recorded as having been "*dealt with in full*" in the minutes of the board meeting held on 22 November 2007. The day before that meeting, Dr Schroter had e-mailed the Plaintiff's administrators "*the EWM EWAP Plan rules effective as of November 2005 for the current EWM EWAP Plan administered by EWM*", noting that the Defendant had previously forwarded by mistake an old version of the documents.
32. On 13 April 2007, the Plaintiff made a wire transfer request in respect of the Defendant's 2006 bonus, minus the amount he owed pursuant to the "*EWM Partner Loan Agreement*" dated November 2006. US\$425,564.46 was paid to the bank account of GFWI Foundation. The Plaintiff's bank statement covering this period shows that this payment was made on 17 April 2007. On the same date, US\$500,000 was paid to Carus Foundation, with the narrative used recording "*EWM Bonus 2006 EWM NQDC Plan Bonus 2006*". Dr Schroter accepted that this payment represented the cash element of the bonus he had been awarded in respect of

2006 and that Carus Foundation was established with him as the beneficiary in a similar fashion to the Defendant's position vis-à-vis GFWI Foundation.

33. Prior to the payment of the 2006 bonus minus the loan amount, the Defendant had caused three wire transfer requests to be made by the Plaintiff for his own purposes. The first, dated 30 January 2007, was for US\$50,000 and the reason for it was said to be "*Advanced payment*". It was paid to the Defendant himself. The second was for US\$9,000, directed to the Defendant's father's account, and was dated 19 February 2007 and the same reason given. The third was dated 13 March 2007 relating to US\$85,000 to be received by the Defendant where the reason for payment was given as "*2007 Bonus for Award Year 2006 (I)*". These three amounts aggregating to US\$144,000 were subsequently reclassified by Dr Schroter in June 2007 as being payments under the loan arrangements agreed for the Defendant. This followed a further request by the Defendant for US\$40,000 to be paid to the account of GFWI Foundation on 22 June 2007, where the reason for payment was recorded as "*EWM NQDC Plan – MP Bonus Draw Down (V)*". On 12 July 2007, a further wire transfer request, this time for US\$41,000, payable to GFWI Foundation's account was made for a similar reason. On 17 August 2007, a further wire transfer request was made on behalf of the Defendant in the sum of US\$200,000, payable to him, with the reason for payment given as "*MP Bonus Drawn Down (VII)*". On 30 October 2007, a wire transfer request to pay the account of GFWI Foundation US\$200,000 was made, with the reason given as "*EWM NQDC Plan – MP Bonus Draw Down (VIII)*". On 27 November 2007, for a similar reason, a wire transfer request for US\$100,000 to GFWI Foundation's account was sent by the Plaintiff and, on 7 December 2007, again for a similar reason, a further wire transfer request in the sum of US\$50,000 was made to be sent to the same account. In 2007, the aggregate sums paid at the direction of the Defendant was US\$775,000.
34. By e-mail, Mr Gottlieb requested a draw down of US\$250,000 on his line of credit on 13 June 2007. The reason for payment was given as "*EWM MP GG Line of Credit – Draw Down (I)*". He requested a second draw down of the same amount on 8 November 2007, adding that he no longer envisaged making a third request to reach a total of US\$750,000 before the bonus in respect of 2007 would be declared in the first quarter of 2008. It was processed in a similar way the following day.
35. By the autumn of 2007, Dr Schroter decided that the arrangements agreed for Mr Gottlieb and the Defendant to take loans from the Plaintiff needed to be confirmed in writing. Using materials he located on the internet and adapted for the Plaintiff's purposes, he prepared a document in two pages. The first was headed "*EWM Revolving Line of Credit Agreement*" and the second page was a "*Promissory Note*". He e-mailed this document to Mr Gottlieb on 2 October 2007. The question of how the documents then came to be executed is an area where the witnesses did not give the same accounts.
36. Dr Schroter prepared two copies each of the documents relating to Mr Gottlieb and the Defendant. He and the Defendant signed these four documents in Zurich and Dr Schroter took all four to the United States of America to obtain Mr Gottlieb's signatures on them. Mr Gottlieb said he signed the documents presented by Dr Schroter and then noticed there were some errors in them and that the maturity date given at which time the loan would become repayable was earlier than was realistic "*since no liquidity event could not be expected to take place within less than three years*" and he did not want either of them to be in default. He therefore disposed of the documents relating to him and prepared substitute documents with the correct details, which he signed and returned to Dr Schroter for him to arrange for the Defendant to counter-sign them. Dr Schroter, however, said that Mr Gottlieb never signed the original documents relating to him. Dr Schroter also did not recall being directed by Mr Gottlieb to ensure that the Defendant's documents were amended with the same revised maturity date. When Dr Schroter took the documents relating to Mr Gottlieb back to Zurich for the Defendant to sign, they all had a conference call to discuss the consequences of this

and, according to the Defendant, he counter-signed Mr Gottlieb's documents when it was explained that a revised Promissory Note in respect of him would replaced the document previously executed. It is clear that these documents were signed in the autumn of 2007.

37. The first page of the document materially provided the same in both cases:

*“LINE OF CREDIT. Lender hereby establishes for a period extending to December 31, 2008 (the “MATURITY DATE”) a revolving line of credit (the “CREDIT LINE”) for Borrower in the principal amount of Eight Hundred Thousand Dollars (\$800,000.00) (the “CREDIT LIMIT”). In connection herewith, Borrower shall execute and deliver to Lender a Promissory Note in the amount of the Credit Limit and in form and content satisfactory to Lender. All sums advanced on the Credit Limit or pursuant to the terms of this Agreement (each an “ADVANCE”) shall become part of the principal of said Promissory Note.”*

The Plaintiff is the Lender and Mr Gottlieb or the Defendant, as the case may be, is the Borrower. The documents state that they were “*made and entered into this 7<sup>th</sup> day of May, 2007*” and purported to be executed on that day, even though it was common ground among all three gentlemen that the signatures were subscribed only in the autumn of that year.

38. The second page of the document in respect of the Defendant provides:

*“This Promissory Note (the “NOTE”) is made and executed as of the date referred to above, by and between James Mitchell (the “BORROWER”), AND Executive Wealth Management Limited Guernsey (“LENDER”). By this Note, the Borrower promises and agrees to pay to the order of Lender the principal sum of Eight Hundred Thousand Dollars (\$800,000.00), or the aggregate unpaid principal amount of all advances made by Lender to Borrower pursuant to the terms of a Revolving Line of Credit Agreement (the “LOAN AGREEMENT”) of even date herewith, whichever is less, together with interest thereon from the date each advance is made until paid in full, both before and after judgment, at the rate of 3 percent (3%) per annum, simple interest.*

*Borrower shall pay interest on the outstanding principal balance under the Note on a yearly basis commencing on May 7, 2007, and continuing on the anniversary of this date thereafter until paid in full. The entire unpaid principal balance, together with any accrued interest, shall be due and payable on December 31, 2008 (the “MATURITY DATE”).”*

39. The document executed by Mr Gottlieb in respect of his arrangements differs slightly from that in respect of the Defendant. On the first page, in the description of the parties, “, Guernsey” was removed by Mr Gottlieb and, in the Promissory Note, the “*MATURITY DATE*” was changed to 7 May 2012. Mr Gottlieb's explanation for effecting these changes, and printing out the document on US-sized paper rather than the documents previously prepared by Dr Schroter, which had already been signed by the Defendant and Dr Schroter, was that he wished to see the Plaintiff company's name recorded correctly (although he conceded he had failed to spot that style on the Promissory Note) and he took the view that the original maturity date at the end of 2008 was unrealistic as there could not be a liquidity event for a minimum of three years and he wanted to ensure that neither he nor the Defendant would be in default. His intention was that both he and the Defendant should have arrangements on the same terms.

40. A different version of the Promissory Note in respect of the Defendant was also produced by the Defendant. Unlike the other versions of the document, no original copy was produced. The Defendant explained that he had retained no copies of the original documents anyway,

something confirmed by Dr Schroter, and that the copy of this modified Promissory Note, replacing the earlier version, had been supplied to him by Dr Schroter, something that the latter denied. The wording is similar to the version executed in respect of Mr Gottlieb but shows a number of inconsistencies in style to which attention was drawn. It reads:

*“This Promissory Note (the “NOTE”) is made and executed as of the date referred above, by and between James Mitchell (the “BORROWER”), and Executive Wealth Management Limited Guernsey (“LENDER”). By this note, the Borrower promises and agrees to pay to the order of Lender the principal sum of Eight Hundred Thousand Dollars (\$800,000), or the aggregate unpaid principal amount of all advances made by Lender to Borrower pursuant to the terms of a Revolving Line of Credit Agreement (the “LOAN AGREEMENT”) of even date herewith, whichever is less, together with interest thereon from the date each advance is made until paid in full, both before and after judgement, at the rate of 3 percent (3%) per annum, simple interest.*

*Borrower shall pay interest on the outstanding principal balance under Note on a yearly basis commencing on May 7, 2008, and continuing on the anniversary of this date thereafter until paid in full. The entire unpaid principal balance, together with any accrued interest, shall be due and payable on May 7, 2012 (the “MUTURITY DATE”).”*

The Plaintiff has denied that this document was created by Dr Schroter. Mr Gottlieb denies signing it or authorising its execution by means of applying his signature in an electronic format. The expert evidence confirmed that his signature is so similar to a signature that he used on a document by applying it electronically, as well as being similar to a blank sheet signed by him and attached to an e-mail sent to him by his personal assistant dated 29 April 2008, that this signature and those other two are all from the same original form of his signature available to be applied electronically. The Plaintiff further alleged that the number of silly errors on the face of this document shows that it has been created other than officially by the Plaintiff and so alleged that it was a forgery prepared by, or on behalf of, the Defendant. The Defendant denied that he was responsible for creating the document, explaining that he had, as with the other documents, signed what Dr Schroter placed before him because it corresponded with what he and Mr Gottlieb had discussed at the conference call. This is an issue to which we return shortly.

41. At the beginning of 2008, Mr Gottlieb turned his mind to the key decisions arising out of the Plaintiff’s performance in 2007. In an e-mail to the Defendant on 4 January 2008, Mr Gottlieb proposed keeping their respective bonuses at the same rate of US\$550,000. In relation to the credit line, he commented that *“We have used USD500,000 plus spending account. I say increase to \$1.2mm.”* In a subsequent e-mail dated 14 January 2008, Mr Gottlieb wrote the same, save for substituting US\$1.1 million for the original concept of \$1.2 million, which the Defendant indicated when replying was his preference. Mr Gottlieb explained that he had *“scaled it back because I think we should limit the increase in the credit line to 600,000 each”*.
42. Although the Defendant did not recall sending it, on 15 January 2008 there was an e-mail from him to Dr Schroter explaining that he had discussed *“obtaining a USD 250,000 disbursement from my line of credit”*, to which Mr Gottlieb had agreed, which he subsequently confirmed, and asking for it to be processed. A wire transfer request was generated on 16 January 2008 for US\$250,000 to be sent to the account of GFWI Foundation, with the reason for payment being given as *“EWM NQDC Plan – MP Bonus Drawn Down (XI)”*.

43. In an e-mail dated 5 February 2008 to the Defendant and Dr Schroter, Mr Gottlieb expressed his concern at the amount of cash being drawn from the Plaintiff. On the subject of his and the Defendant's credit lines, he wrote "*We agreed to increase our limit to usd 1.1 million for this calendar year. To date I have drawn usd 500,000 and accrued another usd 120-130,000 in London rent and mastercard expenses. I understand that Jim used usd 850,000 in 2007 (I was not aware of the 350k gap relative to my draw as this amount was drawn without informing me) plus another 250k which was approved as per the proper procedure. That means that Jim's limit has been reached for 2008.*" He sent a further e-mail to them on 8 February 2008 containing his calculations of what was available under the terms of Section 8.3a of the Shareholder Agreement. Taking an approach of rounding down so as to be conservative, he concluded that the bonus pool available for himself and the Defendant was US\$1,500,000, to be split equally. He added that they had agreed to pay themselves US\$550,000 and to "*allocate additional credit line capacity of USD 250,000 (to USD 1,100,000, up from USD 850,000 last year), totalling USD 800,000 each*". He indicated he could "*live with that*" because it still represented a conservative approach to the issue.
44. Mr Gottlieb then arranged for the three of them to discuss these and other matters in a conference call, the outcome of which was recorded in an e-mail from Dr Schroter to Mr Gottlieb and the Defendant dated 22 February 2008. In relation to their credit line status, both were raised to US\$1.1 million in 2008. The Defendant's "*credit line will be raised by 250k to 1.35 million until paid back in 2008 otherwise the additional 250k will be viewed as an advance against his raise in 2009*". As at that date, the draws on the credit lines were US\$624,300.16 in respect of Mr Gottlieb and US\$1,025,000 in respect of the Defendant. Both the Defendant and Mr Gottlieb indicated through their replies that day that they were content with what was recorded. A wire transfer request also dated 22 February 2008 was then made in respect of US\$250,000 payable to the account of GWFI Foundation, with the reason being recorded as "*EWM NQDC Plan – MP Bonus Draw Down (XII)*". The bonus for Dr Schroter in respect of performance in 2007 was agreed by them as US\$900,000, of which US\$500,000 was paid in cash and the remainder in equity in the Plaintiff. The Defendant's bonus of US\$550,000 was paid pursuant to a wire transfer request dated 6 March 2008 with the recipient being the account of GWFI Foundation and the reason for payment given being "*EWM NQDC Plan – Bonus 2007*".
45. On 21 April 2008, Mr Gottlieb sent Dr Schroter an e-mail making it "*absolutely clear that there are to be no further extensions of credit to Jim until 2009 and then only in amounts that reflect his advance (250k?) against 2009's allocation. If he represents otherwise you are instructed to ignore such representations. If he tries to draw further sums you must alert me.*" There was then a further request made by the Defendant, though not in writing, to Mr Gottlieb to approve additional borrowing, to which Mr Gottlieb responded by e-mail on 4 August 2008, denying the request. In doing so, he referred to the "*additional risk*" taken on by the Plaintiff to accommodate the Defendant's personal financial situation and expressed his concern about how the Defendant had failed to make provision for his tax liabilities out of monies already received or due to him. In relation to the 2007 bonus payment he noted that the Defendant "*chose to defer 100pct of [it] for your own personal benefit*".
46. Towards the end of 2008, Dr Schroter sent some calculations to Mr Gottlieb highlighting that he was at, approaching or even exceeding the US\$1.1 million credit limit that had been agreed. When Mr Gottlieb suggesting re-calculating to exclude interest, Dr Schroter responded "*I have to apply interest against the limit otherwise it becomes a farce*". As a result of their discussions, the treatment of the London property rental costs was adjusted and Mr Gottlieb arranged for a wire transfer request for US\$50,000 to be made at the end of that calendar year bringing him up very close to his agreed limit. He had previously made two draw downs for US\$200,000 in May and September 2008.

47. Section 13.4 of the Shareholders Agreement contains a provision relating to a so-called “Russian Roulette” procedure, under which, if one of the co-founders had “*a serious fundamental disagreement about the conduct or direction of the Company’s business*”, he could offer to buy the other co-founder’s shares. The recipient co-founder then had the choice of accepting the terms offered or counter-offering to buy the proposing cofounders’ shares on identical terms. In the latter event, the original proposing co-founder would then be obliged to sell his shares on the terms he had originally offered to purchase the shares.
48. Dr Schroter was informed by the Defendant that the Defendant was minded to exercise this option under the terms of the Shareholders Agreement. In November 2008, at a restaurant in New York, Dr Schroter met Gregory Greene and Robert McCambridge, who were liaising with the Defendant over the terms of any offer to buy out Mr Gottlieb. They discussed the Plaintiff’s business at that meeting and in telephone conversations at around that time. Mr Gottlieb was unaware of these discussions.
49. By a notice dated 26 January 2009 sent on behalf of the Defendant to Mr Gottlieb, together with an undated letter from the Defendant to Mr Gottlieb explaining the rationale for his proposal, all of which was sent to Mr Gottlieb on 27 January 2009, the Defendant made such an offer. He did so recognising that the two arms of the plaintiff needed to be separated to enable both of them to pursue their areas of specialism most productively. Through creating a separate company to which the third party hedge fund marketing business could be transferred and then buying out Mr Gottlieb from the non-qualified deferred compensation plan business left in the Plaintiff for a sum of money, plus agreeing an income stream for four years to allow matters to work themselves through, the Defendant considered he was making a fair offer. In doing so, he referred to the promissory note for US\$1.1 million from Mr Gottlieb held by the Plaintiff as one of the company’s assets. The proposal was to transfer the benefit of that note to the new corporate entity, thereby enabling Mr Gottlieb to control what happened to it. No mention was made in the offer documentation of the similar promissory note given by the Defendant to the Plaintiff.
50. The Defendant’s offer was rejected on the basis that it did not comply with the “Russian Roulette” provision. Mr Gottlieb was subsequently very critical of the Defendant’s approach. Through including the loan he had taken and omitting to refer to the Defendant’s own loan, he took the view that this showed the Defendant intended that the Plaintiff would be in a position to enforce the loan against him. In the event, the Defendant put forward a revised offer to purchase Mr Gottlieb’s shares under cover of a letter dated 9 February 2009, which was expressed to supersede the earlier offer. This offer was a pure cash offer in respect of the shares. The documentation associated with the offer still included the reference to the promissory note from Mr Gottlieb and omitted any reference to any promissory note from the Defendant. The Defendant acknowledged in his evidence that this had been an oversight on the part of him and his attorney and that there should have been no reference to Mr Gottlieb’s loan note. Mr Gottlieb chose to make a counter-offer on identical terms, thereby becoming the purchaser of the Defendant’s shareholding in the Plaintiff.
51. During the course of his employment, the Defendant had an agreement with the Plaintiff that certain personal expenses incurred by him and paid for by the Plaintiff would be reimbursed through deductions made from his monthly salary. His pay slip for May 2008 offers an example of this.
52. On 16 January 2009, by e-mail the Defendant asked Dr Schroter to use CHF 30,000 of his “*partner expense account*” to pay his credit card bill, with Dr Schroter confirming later in the day that it had been taken care of. When it was deducted from the Defendant’s salary, the Defendant sent Dr Schroter an e-mail on 12 March 2009 reminding him of the request that this be set against his partner expense account, referring to extensive discussions all three had had about whether the partner expense account should operate for 2009. Because Mr Gottlieb

indicated he needed these funds, it had been agreed that they would continue to have access to this expense account arrangement for 2009.

53. On 28 January 2009, Mr Gottlieb identified that the Defendant's loan balance exceeded his by almost US\$200,000. In his e-mail to Dr Schroter he wrote "*Last year I agreed for Jim to overdraw his credit line against his bonus for 2008, payable in 1Q09. The result is that his total loan balance exceeds mine by USD 193,522. To redress this imbalance please issue me a draw in the same amount at your earliest convenience.*" Mr Gottlieb explained to the Defendant in an e-mail dated 3 February 2009 that he had given this instruction to Dr Schroter "*in order for us to be equalized*". This message was sent in the context of the situation between them resulting from the Defendant's offer to purchase Mr Gottlieb's shareholding in the Plaintiff, which had been made a few days earlier. There was a follow-up in an e-mail sent by Mr Gottlieb to the Defendant on 6 February 2009, in which he referred to "*Our standing policy has always been that you and I will draw equal compensation and have equal credit lines*".
54. On 16 February 2009, Mr Gottlieb suggested that he and the Defendant draw bonuses of US\$500,000 each in respect of 2008. On 22 February 2009, the Defendant sent an e-mail to Mr Gottlieb and Dr Schroter setting out his bonus recommendations in respect of 2008. In relation to his and Mr Gottlieb's bonuses, he suggested paying US\$750,000, adding "*This amount is significantly lower than previous years. ... I will promise you, I will not tell your ex-wife about all the things we did to assist you in minimizing your alimony payments – EWM having a lease on your London apartment, categorizing a significant portion of your bonus (\$1.1 million) as a loan from EWM (all amounts over \$550,000 – half of all amounts above this number would go to your ex-wife), the partner spending account, etc. We truly went out of our way to help you.*"
55. The buyout of the Defendant's shareholding was concluded on 30 March 2009. The Defendant resigned as a director of the Plaintiff. He was given six months' notice of the termination of his employment contract, effective on 30 September 2009. The Plaintiff first raised with the Defendant the need to repay obligations under the director's line of credit and to reimburse the Plaintiff for personal expenses, including the Baker & McKenzie fees, by letter dated 20 April 2009. A further demand for repayment was made by the Plaintiff on 22 December 2009, to which the Defendant replied directly to Dr Schroter on 5 January 2010 pointing out that the amounts claimed formed part of his deferred compensation plan and partner expense account. The Plaintiff's Advocates sent a letter before action dated 20 May 2010.
56. In November 2010, the Plaintiff corresponded with Baker & McKenzie about the invoices rendered by that firm, which had been paid in 2008. The first invoice dated 20 December 2007 in the sum of CHF 35,299.20 had been sent under cover of a letter addressed to Dr Schroter and was in respect of "*professional services rendered in relation to the US Federal Tax Controversy*". In the detailed timesheets, the firm's client is not identified but there is a reference to "*Conference call with client and his spouse*", implying that the client was not a corporate entity. The three invoices rendered in 2008 were each addressed to the Defendant at the Plaintiff. Mr Micheals of Baker & McKenzie responded by e-mail that "*The work was personal work for Mr Mitchell where we were instructed to invoice EWM*" and he confirmed by letter dated 23 November 2010 that "*our client was not EWM*".

## Findings and discussion

57. Because the Plaintiff's case is largely founded on proving that there existed an oral loan agreement, albeit evidenced in various pieces of writing, against the background described, the Jurats concentrated on whether Mr Gottlieb and the Defendant, as representing the controlling and directing minds of the Plaintiff, had reached a sufficiently certain agreement

in this regard. They found that there was such an agreement by the Spring of 2007, which is sufficiently close to the timing pleaded by the Plaintiff to be capable of forming the basis of its claim. The central question, however, was whether the terms of that agreement reflected the element of forgivability to which the Defendant had referred.

58. As a general comment, the Jurats considered that each of Mr Gottlieb, Dr Schroter and the Defendant was less forthcoming about what happened in 2006 to 2009 than they might have been. In relation to Dr Schroter, they formed the impression that he had, during that time, been far closer to the Defendant than to Mr Gottlieb. They were both located in Zurich and the deferred compensation plan element of the Plaintiff's business interested Dr Schroter more than the third party hedge fund marketing element. Dr Schroter was ambitious and sought greater recognition from the Plaintiff of his contribution to its success. Once the "Russian Roulette" procedure was in train, he wished to back, and then be loyal to, whoever succeeded. The Jurats consider that Dr Schroter's evidence on the events of the years in question was given in a manner supportive of Mr Gottlieb's position for this reason and that, as a result, he underplayed the significance of the financial consequences of Mr Gottlieb's divorce.
59. The Jurats recognised that there was nothing in the contemporaneous documentation referring to forgivability. However, the contemporaneous documentation was, in general, inconsistent with the terms that they found were agreed by Mr Gottlieb and the Defendant, so the omission to record anything about forgivability was not regarded by them as indicative that it was not agreed. The Jurats considered that the way the Plaintiff had been established and operated in its early years was a significant factor in their conclusion that Mr Gottlieb and the Defendant discussed the various options open to them in greater detail than either was prepared to state in their evidence. That is an inference the Jurats consider they are entitled to reach based on the way each of them described their previous employments and the vision they shared for their new venture when they established the Plaintiff.
60. Equality of treatment was an important factor for both gentlemen from the outset. They caused Dr Schroter to keep track of when either or both of them forewent any salary to which they were entitled, enabling a compensating late payment to be made. They ensured that the Defendant received monies equal to the benefit that Mr Gottlieb derived from residing in the Plaintiff's rented London property. Although the Plaintiff's personnel grew over the years and their respective shareholdings were diluted through the private placements undertaken, to all intents and purposes, Mr Gottlieb and the Defendant were in control of the Plaintiff and could decide how best to reward themselves for their services to it. Having come from their respective employments at UBS, they were accustomed to receiving substantial bonuses. At the time the Plaintiff was established, the Jurats find that the two co-founders envisaged being in a position to award themselves substantial bonuses as soon as the company was in a financial position to do so. The first occasion this happened was in respect of 2006, which was slightly later than they had hoped. Moreover, having had to defer receipt of their salaries at times, there was all the more reason to re-balance the position when the Plaintiff could afford to do so, by taking out the monies they were entitled to receive, unless there was a good reason to take a different approach.
61. The good reason arose because of the terms under which Mr Gottlieb divorced his former wife, Roxanne. The Jurats regard that as being a significant factor underlying how Mr Gottlieb and the Defendant approached matters in 2006 and 2007 onwards. It clearly suited Mr Gottlieb for the bonus awarded to him by the Plaintiff to be lower than the cap pursuant to the terms of the Shareholders Agreement. The Jurats, therefore, find that during 2006, Mr Gottlieb and the Defendant were considering ways that would result in the bonus being of a manageable size for Mr Gottlieb's purposes. The concept of a loan arrangement had been ventilated by March 2006. In doing so, they were also considering ways in which the Defendant's equal position could be resolved in a way that suited his own tax arrangements.

The decision to award themselves bonuses of US\$550,000 in respect of 2006 was made against this background. A bonus of that size would fit neatly into the formula under which Mr Gottlieb was obliged to pay a proportion of his bonus over three years to his ex-wife, subject always to a minimum aggregate payment of US\$350,000. Using a figure that would generate roughly US\$100,000, especially if replicated for the two years following, leaving a small top-up payment to be made to satisfy the minimum required was what he wished to achieve. The Defendant's position was that he wished to take out the maximum bonus each of them could but, because he was conscious of the tax position that would arise, he wished to make use of a plan similar to those designed, administered and marketed by the Plaintiff by deferring a good proportion of what he would be entitled to take. In the Jurats' view, it was quite understandable that someone like the Defendant would wish to avail himself of a plan similar to those in which he had specialist knowledge and experience. Further, given that Dr Schroter was awarded a bonus including a cash element of US\$500,000, the Jurats concluded that the differential between what he was awarded and what Mr Gottlieb and the Defendant awarded themselves was not as great as might reasonably have been expected for the co-founders of the Plaintiff. This factor supported their view that the co-founders' bonuses had been artificially suppressed for the reasons stated.

62. The Jurats, therefore, reject the contention on behalf of the Plaintiff that the stated reasons for the payments made to the Defendant were at his direction and contrary to the position of the Plaintiff that these were all advances under the terms of the loans agreed. Although the Plaintiff may not have formally adopted its own non-qualified deferred compensation plan, the actions of the Defendant and of Dr Schroter were consistent with an approach to their bonuses being treated in this manner. Foundations in Liechtenstein were set up with each being the beneficiary shortly after the Plaintiff decided their bonus payments in respect of 2006. Further, because the Jurats accept the Defendant's evidence, which was not challenged on behalf of the Plaintiff, that the monies transferred to the GWFI Foundation account remain in that account and have not been received in the hands of the Defendant, they also reject the contention of the Plaintiff that the loan arrangements put in place were the Defendant's idea because he needed that money at the time for his personal use, whether for sailing or his tax affairs or any other reason. The distribution of the bulk of the payments in respect of the Defendant do not support such a contention.
63. Against that background to the discussions about their bonuses, the Jurats find that the loan arrangement was put in place to assist Mr Gottlieb's position, rather than for the Defendant's direct benefit. It was agreed between them that the loan arrangement should be on the basis of the appropriate interest rate to avoid the advances made pursuant to the loan being treated as taxable in their hands as a benefit in kind. This was why the loans were at simple interest of 3% per annum. The Jurats further find that, because of the underlying purpose of the arrangement, Mr Gottlieb and the Defendant discussed and agreed that their loans would be forgivable at a mutually convenient time or on a liquidity event. To that extent, the Jurats reject the evidence of Mr Gottlieb at paragraph 21 of his witness statement. These were not expectations or discussions but elements where they reached a settled conclusion and so this became a term of their agreement on behalf of the Plaintiff with each other.
64. The documentation prepared by Dr Schroter to reflect the terms agreed failed to do that. The Jurats are satisfied that Mr Gottlieb and the Defendant agreed that the maximum amount that could be taken out of the Plaintiff in the form of a loan was capped at the figure of US\$850,000 and not \$800,000 as was recorded on the face of the Revolving Line of Credit documents and the Promissory Notes. The date of the agreement was not 7 May 2007. There was no agreement between Mr Gottlieb and the Defendant as to how long these arrangements would last; Mr Gottlieb had suggested a single year to start with, rather than the end of 2008, and the Defendant was not unduly troubled by the term because he was satisfied the Plaintiff would not seek to enforce any purported indebtedness. As such, there was no agreement between them as to when the loan would nominally become repayable and Dr Schroter simply

chose a date that he considered fitted in with the documents he prepared in the autumn of 2007. The Jurats conclude that the documents themselves add little, if anything, to the terms actually agreed orally and it was, in effect, an exercise undertaken by Dr Schroter to satisfy the Plaintiff's audit processes. In particular, because there was no evidence that the parties had discussed and agreed the changes to what had been agreed shown in these documents, the Jurats decided that the terms agreed remained unaltered at this stage.

65. Given those findings, the Jurats regard it as unnecessary for them to make detailed findings in relation to the Plaintiff's allegation that the Defendant forged the version of the Promissory Note bearing a maturity date of 7 May 2012. On behalf of the Plaintiff, Mr Gottlieb acknowledged that when he modified the wording of the documents that had been prepared by Dr Schroter he directed Dr Schroter to make the same changes in respect of the Defendant's documents. Dr Schroter said he did not do so. It would have been consistent with Mr Gottlieb's instruction if Dr Schroter had used the template from which he had already worked and made those changes. Had he done so, the silly typographical errors in respect of which the Plaintiff made much would not have been incorporated into the document. However, given the way the Plaintiff accepted, largely through Dr Schroter, that the Defendant was poor at retaining documentation and that they operated a system under which Dr Schroter would present a portfolio of documents to the Defendant for execution and then retain all necessary copies, the Jurats cannot say that the Defendant's evidence about the sequence of events has to be rejected. Accordingly, remembering that the Plaintiff bears the burden to the usual civil standard of proving the alleged forging of this document by the Defendant, insofar as that is relevant to matters, the Jurats concluded that the Plaintiff had not discharged this burden, with the consequence that they do not find that the Defendant forged the Promissory Note bearing the maturity date of 7 May 2012. However, that conclusion does not affect the way they have treated the evidence of the three lay witnesses from whom they heard and which has resulted in their other findings.
66. In early 2008, the loan arrangements were varied by agreement between the parties. This was not, however, something on which the entries in the audited financial statements of the Plaintiff necessarily showed that the Plaintiff was entitled to treat the loan as enforceable in the manner asserted. The entries in the audited financial statements in respect of 2007 and earlier years were approved by the Defendant. To the extent that they replicated what the Plaintiff's paperwork showed, they are accurate, although the 2007 statements mis-record the amount by which the Defendant had then benefited by US\$50,000. The 2008 financial statements were not approved by the Defendant. They were only finalised following his resignation as a director. The extension of the so-called line of credit from US\$850,000 to US\$1.1 million is shown through the e-mail exchanges at the time and what Mr Gottlieb and the Defendant said they discussed when considering what bonuses to award themselves in respect of 2007. Again, the Jurats find that those discussions were predicated on Mr Gottlieb's wish to keep the level of the declared bonus at the same manageable level as the previous year, with the Defendant wishing to draw an amount approaching the maximum under the formula capping their bonuses. This resulted in an increase on their credit limits broadly equating to the aggregate of the two years of maximum bonus less the amounts actually declared and taken openly as such.
67. The Jurats further noted that the increase in the credit limit to US\$1.1 million was not reflected in any change to the terms of the Promissory Notes provided to the Plaintiff by Mr Gottlieb and the Defendant. They noted that Dr Schroter had raised this with Mr Gottlieb in an e-mail dated 22 March 2010, in which he referred to the e-mail exchanges from early 2008 dealing with this matter. However, no further paperwork was generated in respect of the arrangements in place for Mr Gottlieb or the Defendant. Accordingly, the variation of the loan arrangements was oral, evidenced by the e-mail traffic and then recorded in the audited financial statements and it did not result in any change to what had previously been agreed about the loans being forgivable at a mutually convenient time or on a liquidity event.

68. The position in relation to the further US\$250,000 in respect of the Defendant, which was not replicated in respect of Mr Gottlieb is, in the Jurats' view, an example of an arrangement personal to the Defendant and outside the generally agreed terms under which he and Mr Gottlieb received equal treatment from the Plaintiff in relation to remuneration and other benefits. This is shown from the contemporaneous e-mails. This was perceived by them as an exception to the arrangements already in place because it was described as a loan repayable within a given time. It was to be "*paid back in 2008 otherwise the additional 250k will be viewed as an advance against his raise in 2009*". Because of the different treatment of this tranche of monies provided to the Defendant, the Jurats find that it does not represent a further variation of the oral agreement originally concluded by March 2007 for the simple reason that that oral agreement was part of the remuneration parity Mr Gottlieb and the Defendant had agreed, whereas this arrangement was more akin to the time when the Defendant exceeded his agreed personal expense account in 2006 and agreed to repay that excess out of the bonus expected and then paid in 2007. Although Mr Gottlieb then sought to have his credit limit increased at the beginning of 2009, there was no suggestion that he and the Defendant discussed this. In effect, Mr Gottlieb was purporting to take action unilaterally rather than discussing matters so that the Plaintiff would agree to a further variation of the oral agreement he had with it. The Jurats note that no such equalizing draw down was effected.
69. The Jurats further regard it as significant that neither Mr Gottlieb nor the Defendant had any immediate need for the bulk of the money they borrowed from the Plaintiff under the arrangements put in place from March 2007. Mr Gottlieb was quite candid about the fact that he drew down against the loan and invested the money, although the terms of those investments were not explained. The bulk of money drawn by the Defendant was sent to the account of GWFI Foundation and so not immediately available to him. This course of action was consistent with his intention to use a deferred compensation plan of the type administered by the Plaintiff for others. The Jurats find that the way these monies were drawn is more consistent with the version of events given by the Defendant than by Mr Gottlieb and Dr Schroter. The loan arrangement was used by both of them as an element of the co-founders' remuneration from the Plaintiff. They were entitled under the terms of the Shareholders Agreement to take money out of the Plaintiff and, having waited longer than envisaged for that event to arise, the Jurats find it inconceivable that they would have chosen not to do so and enter into loan arrangements on the terms suggested on behalf of the Plaintiff instead. The compromise, principally to suit Mr Gottlieb, was to agree expressly that the loan arrangements would be forgivable, and so capable of being treated as income at a time of their choosing, thereby conferring some benefit on both for the reasons previously described.
70. The other two aspects of the Plaintiff's claim revolve around whether the Plaintiff had satisfactorily proved that the Defendant is now obliged to reimburse the Plaintiff for the expenses it alleges fell outside any arrangements under which the Defendant was entitled to cause the Plaintiff to make those payments on his behalf. The Defendant's response was that he continued to have the benefit of the partner expense account that had been agreed with effect from 2006 and all these payments were properly paid under it. The Jurats concluded that the Plaintiff had failed to discharge the burden of proof in relation to these elements of its claim.
71. The clearest example of an expense paid by the Plaintiff on behalf of the Defendant on which the Plaintiff relied was a payment of CHF 30,000 made to settle the Defendant's personal credit card bill urgently in January 2009. This amount reflects approximately two-thirds of the monies claimed from the Defendant for expenses, ignoring for these purposes the payments of the Baker & McKenzie invoices. The Jurats concluded that this payment was made outside the period pleaded on behalf of the Plaintiff in para. 16 of the Cause. Dr Schroter had acknowledged during his evidence that the dates pleaded appeared to be wrong. Accordingly, the Jurats conclude that this single payment of CHF 30,000 cannot form part of the Plaintiff's pleaded claim and must, therefore, be rejected.

72. In any event, there was little evidence directed to how the amount claimed by the Plaintiff had been calculated. Mr Gottlieb's evidence explained little more than that the Plaintiff had not authorised these expenses to be paid. However, he also acknowledged that the partners' personal expense accounts had continued to operate throughout the time the Defendant remained a director of the Plaintiff. The Jurats found that the expense accounts for Mr Gottlieb and the Defendant continued to operate in the same way as 2006 in each subsequent year up to and including 2009. In his evidence, Dr Schroter focused his attention on the payment of CHF 30,000 in January 2009 and the practice that he and the Defendant had of setting off certain personal expenses of the Defendant against his salary. In response, the Defendant explained that he chose sometimes to avail himself of that practice, thereby leaving more of his partner expense account available to him for later in the calendar year in question.
73. The figure of CHF 45,988.52 used by the Plaintiff appears to have been derived from a single spreadsheet headed "*Overview Expenses Jim Mitchell 2007 - 2009*". Try as they might, the Jurats were unable to reconcile the dates of payments on this sheet with the dates pleaded at para. 16 of the Cause. Having just commented about the wrongful inclusion of the payment of CHF 30,000, the spreadsheet shows that as at the end of May 2008 the Defendant's net position was in credit rather than debit, indicating that other payments in respect of which the Plaintiff now seeks reimbursement were more likely than not related to the period from June 2008 to January 2009. In any event, the lack of clarity in the evidence given on behalf of the Plaintiff in relation to the credit card expenses issue caused the Jurats to conclude that the Plaintiff had not established this element of its claim.
74. In respect of the payment of the Baker & McKenzie invoices, whilst noting that the first invoice, dated 20 December 2007 in the amount of CHF 35,299.20 was the subject of a wire transfer request dated 25 February 2008, the expense was incurred in 2007. The other three invoices, aggregating to CHF 63,568.95 were received and settled by the Plaintiff in 2008. Unlike in respect of 2006, the Plaintiff has not produced a similar document showing how the US\$75,000 partner expense account from which the Defendant benefited was used in 2007 or 2008 (or even in 2009). Given the approach taken by Dr Schroter in 2006 to document the Defendant's drawings against that expense account and then to arrange for the Defendant to enter into a formal written agreement to repay the overspend on it out of the bonus envisaged to be paid in the first quarter of 2007, the Jurats conclude that if the expense account for 2007 had been similarly depleted at an early stage and overdrawn, a similar course of action would have been adopted. Accordingly, the inference they consider they are entitled to draw is that the Defendant's partner expense account was not overspent in 2007. Similar reasoning applies in respect of 2008.
75. In the absence of evidence being led on behalf of the Plaintiff to explain how much of the Defendant's US\$75,000 expense account had been utilised in each relevant calendar year, the Jurats have concluded that the Baker & McKenzie invoices were settled by the Plaintiff on behalf of the Defendant through that expense account.
76. In reaching that conclusion, the Jurats do not need to reach any specific findings about whether the entire amount paid should be attributable to the Defendant's personal expenses or whether, as suggested by the Defendant, a proportion of the work undertaken by Baker & McKenzie was on behalf of the Plaintiff. Further, they have not considered in any detail whether there was a separate agreement between Mr Gottlieb and the Defendant that the Plaintiff would meet certain expenses of this nature on behalf of both of them, along similar lines to the agreement for the Plaintiff to pay certain insurance-related expenses. However, they noted a reference in a previous year to settling a tax bill being treated as a personal expense which might be payable by the Plaintiff out of funds available to the Defendant. In short, the Jurats find that Plaintiff has not discharged the burden upon it to satisfy them that these expenses for professional services are monies that the Plaintiff is now entitled to claim

from the Defendant. The Plaintiff has not proved that the Defendant wrongfully caused these payments to be made or otherwise converted the monies used in making the payment to his own use or in breach of his fiduciary duties as director. Instead, the Jurats consider that the Defendant was able to regard these expenses as having fallen within his overall remuneration, or compensation, package.

## Conclusions

77. Having noted that the Plaintiff abandoned its claim for judgment on the loan arrangements for US\$1,370,022.16 plus simple interest at 3% per annum calculated from 1 June 2010 at the daily rate of US\$104.79, in the light of its factual findings and for the reasons given, the Court has decided that the Plaintiff's remaining money claims are dismissed. That leaves the Plaintiff's alternative claim for declaratory relief that the sum claimed of US\$1,370,022.16, plus annual interest of \$38,250 accruing in May 2011 and May 2012 was payable on 7 May 2012.
78. In relation to this element of the Plaintiff's claim, the Deputy Bailiff had directed the Jurats that declaratory relief is, in any event, discretionary. If they were satisfied that the facts found were as contended for by the Plaintiff, they still retained a discretion not to make the declaration sought. However, such a discretion needed to be exercised judicially. If the Jurats found that the facts did not support the contention on behalf of the Plaintiff in this regard, then, if they considered it appropriate to do so, under the prayer for such "*other order or relief as the Court deems appropriate*", they might consider declaring what the terms of the agreement between the Plaintiff and the Defendant were.
79. As the Jurats' findings demonstrate, they are unable to grant the declaratory relief sought because they did not find that the maturity date of 7 May 2012 had been agreed between Mr Gottlieb and the Defendant. No maturity date was agreed originally because it had been agreed that the loan arrangements were to be forgivable on a future event. The inclusion of a maturity date arose because of the template documents being used by Dr Schroter. His initial suggestion of 31 December 2008 did not at all reflect what the others had discussed. The use of 7 May 2012 was a suggestion of Mr Gottlieb's, to which the Defendant raised no opposition because it was understood that the loan arrangements were in any event not enforceable. Adding a date did not override that element of the agreement. The basic terms agreed remained unchanged. In those circumstances, because the findings of the Jurats are at such variance with the case advanced on behalf of the Plaintiff, they have concluded that the best outcome is to decline to grant any declaratory relief to the Plaintiff.
80. For these reasons, the entirety of the Plaintiff's case is dismissed.

## Costs

81. The Deputy Bailiff has decided that the question of costs should be reserved. He envisages that an application by the Defendant for costs to be awarded in his favour, ie, to follow the event, will be forthcoming and that, given the procedural complexities with which this action has been fraught, there will be some opposition to a straightforward costs award against the Plaintiff on the standard recoverable basis. If that is not the case, the parties can indicate that an order for the Defendant to have his costs is agreed. If there is no such agreement, the Defendant's application for costs will need to be made in writing to the Greffe within 14 days of this judgment being handed down and the Plaintiff's opposition to that application, explaining the grounds for it, should be provided within a further 14 days. The Defendant would then have 14 days in which to reply. Either party may request an oral hearing on the question of costs but, in default of such a request, the Deputy Bailiff will proceed to determine the question on the papers unless he considers it necessary to hear further from the parties.