

Plaintiff's application demanding the sum payable under a Loan Agreement as amended and that the Defendants are liable to repay the Loan with interest and in accordance with German law are jointly and severally liable under the terms of Loan Agreement as amended.

**[2022]GRC038**

**IN THE ROYAL COURT OF GUERNSEY**

**(ORDINARY DIVISION)**

**Civil No. 2250**

**Between:**

**KINGFISHER AVIATION LIMITED**

**Plaintiff**

**-AND-**

**(1) OTIUM EVENT GMBH AS GENERAL PARTNER OF  
OTIUM EVENT GMBH & CO. OFFSHORE AUSRÜSTUNGEN KG**

**First Defendant**

**-and-**

**(2) OTIUM EVENT GMBH & CO. OFFSHORE AUSRÜSTUNGEN KG**

**Second Defendant**

**-and-**

**(3) OTIUM CONSULT GMBH AS THE FORMER GENERAL PARTNER OF  
OTIUM EVENT GMBH & CO. OFFSHORE AUSRÜSTUNGEN KG**

**Third Defendant**

**Date of hearing: 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 18<sup>th</sup> of November 2021**

**Judgment handed down: 28<sup>th</sup> June 2022**

**Before: Jessica E Roland, Deputy Bailiff and Jurats C H Le Pelley and S J Morris**

**Counsel for the Plaintiff: Advocate T W McGuffin**

**Counsel for Defendants: Advocate B de Verneuil-Smith**

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

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

The Royal Court Civil Rules, 2007

Sheppard v CI Fire & Security (Guernsey) Limited (unreported, 29 July 2009)  
Newmarket Holdings v Musa Holdings Limited 14/2014  
St Margaret's Lodge Hotel Limited v Elvio Pires 44/2015  
Midland Resources Holding Limited v Prodefin Trading Limited 34/2017  
Investors Compensation Scheme Ltd v West Bromwich [1998] 1WLR 896  
Reardon Smith Line Limited v Yngvar Hansoen-Tangen [1976] 1 WLR 989  
Kallang Shipping SA v AXG Assurances Senegal (NO.2.) [2008] EWHC 2761  
Yang Seng Pte Ltd v International Trade Corporation Limited [2013] EWHC 111  
The Intntrepreneur Pub Company (GL) v East Crown (unreported 28 July 2000)  
J. Evans & Son (Portsmouth) Ltd v Andrea Merzario [1976] 1 WLR 1078 at 1081  
Arnold v Britton and others [2015] UKSC 36  
Rainy Sky SA v Kookmin Bank [2011] UKSC 50  
Cooperative Wholesale Society Ltd v National Westminster 1994 WL 1060926  
Attorney General of Belize v Belize Telecom Ltd [2009] UKPC 10  
Credit Suisse Asset Management LLC v Titan Europe 2006-1 Plc [2016] EWCA Civ 1293  
Ali v Petroleum Company of Trinidad and Tobago [2017] UKPC 2  
*Chitty on Contracts* Thirty-Third Edition

## Introduction

1. The Plaintiff, Kingfisher Aviation Limited (“Kingfisher”) is a Guernsey incorporated company (Registration No. 54039) with a registered office at Trafalgar Court, 2<sup>nd</sup> Floor, East Wing, Admiral Park, St Peter Port, Guernsey. The First Defendant is an entity registered in Germany with its place of business at Bächelweg 8, 01814 Bad Schandau, Krippen, Germany. (“Otium Event”). It is the general partner of the Second Defendant, Otium Event GmbH & Co. Offshore Ausrüstungen Kg (“Otium Offshore”). Otium Offshore is a limited partnership and with a place of business at the same address as the First Defendant (and was formerly known as Otium Consult GmbH & Co. Offshore Ausrüstungen Kg). The Third Defendant (“Otium Consult”) is the former general partner of Otium Offshore before it was replaced by Otium Event. Mr Andreas Wolf was, at the material times, a director of the three defendants (collectively “Otium”).
2. On 14 December 2011, the Plaintiff and Otium Offshore entered into a Loan Agreement for €3,000,000. The Loan Agreement was varied on 2 March 2012 and on 19 April 2012. On 12<sup>th</sup> March 2019, the Plaintiff demanded the sum of €4,113,064.42, payable under the Loan Agreement as varied, being the original sum plus interest up until 12 March 2019. As a matter of German law, Otium Event, as the current general partner of Otium Offshore is jointly and severally liable with Otium Offshore for the debts of Otium Offshore. Further, as a matter of German law, Otium Consult remains liable for any existing debts of Otium Offshore for a period of 5 years after it ceased to be the general partner of Otium Offshore, that being on 11 April 2019. During the trial the Defendants were referred to interchangeably as Otium or by their specific name.
3. The Plaintiff’s claim is that the amount demanded on 12 March 2019 is due and owing to the Plaintiff plus further interest accrued to date. The Defendants’ case is that the Plaintiff is not entitled to the relief claimed or any relief, as set out on the basis of various alternatives in the Re-amended Defences and that they are entitled to set off any relief to which the Plaintiff is entitled against sums as a consequence of the Plaintiff’s own breach or breaches of contract.

4. On behalf of the Plaintiff, three witness statements were filed by Keren Bowen (“Ms Bowen”) dated 12 June 2020, 23 November 2020, and 22 January 2021 and one witness statement was filed by Ian Domaille dated 22 January 2021 (“Mr Domaille”) as directors of the corporate director, Artemis Corporate Services Limited (“Artemis”). Both gave oral evidence. Andreas Wolf (“Mr Wolf”) on behalf of the Defendants filed two witness statements dated 23 November 2020 and 22 January 2021 and gave oral evidence. All the witnesses adopted their witness statements as evidence in chief. Both the Plaintiff and the Defendants filed Statements of facts and issues for determination as well as a number of skeleton arguments. During the course of the hearing in addition to the documents already part of the bundles, further documents were handed up to assist the Court. The evidence was heard over a period of 5 days with a final additional day dealing with the closing speeches of the respective Advocates. Due to the arguments put forward by the Defendants it is necessary to set out the evidence in detail.
5. Mr Wolf gave evidence with the benefit of an interpreter Mr Hubertus Lau.
6. The trial commenced on 2 November 2021 with Jurats Le Pelley, Morris and Burnard, however on 3 November 2021 Jurat Burnard tested positive for Covid. With the agreement of the parties the trial continued with Jurat Le Pelley and Jurat Morris.
7. Further to Section 14(2) of the 2008 Law, the Deputy Bailiff did not sum up to the Jurats in open Court, but instead retired with the Jurats. This is the reasoned Judgment of the Court as required under Section 16(1) of the 2008 Law. When they retired, the Deputy Bailiff reminded the Jurats of their respective roles. The Deputy Bailiff is the sole judge of questions of law and procedure and the Jurats are the sole judges of questions of fact. The Jurats were directed to take account of all the evidence presented to the Court; the evidence on behalf of the Plaintiff and on behalf of the Defendants, both written and oral, and the documents produced to the Court. It was for the Jurats, and not the Deputy Bailiff, to decide what evidence they accepted and what evidence they rejected or of which they are unsure. Although the Deputy Bailiff reminded the Jurats of aspects of the evidence, she directed them that if she appeared to have a view of the evidence, or of the facts, with which they did not agree, the Jurats were to reject her view. The Jurats were directed to take account of the arguments and speeches they had heard, although they were not bound to accept them. The Jurats were further directed that they were entitled to draw inferences, that is to come to common-sense conclusions based on the evidence that they accept, but that they may not speculate about what other evidence there might have been or allow themselves to be drawn into speculation.
8. The Deputy Bailiff directed that the standard of proof is the civil standard of the balance of probabilities and that to establish something on the balance of probabilities means to prove that something is more likely so, than not so.
9. In this Judgment findings of fact are the unanimous findings of the Jurats.

### **Procedural Background**

10. The Plaintiff’s Cause dated 24 June 2019 was tabled before the Court on 4 October 2019, leave having been obtained to serve the Cause out of the jurisdiction. The Defences were originally settled on 29 November 2019 containing an exception de fond as to prescription and an exception declinatoire, by a consent order the Defences were amended on 21 February 2020 (including withdrawing the exception declinatoire) and reamended by consent on 10 July 2020 (“Re-amended Defences”) (including withdrawing the exception de fond). A replique was filed to the Re-amended Defences on 23 November 2020. On 9 September 2021 the Defendants wrote to the Plaintiff confirming that paragraph 46.4 of the Re-amended Defences as to the liability of the Third Defendant was admitted in accordance with German Law.

11. At the commencement of the hearing, the Plaintiff raised an issue with the Defendants' Statements of Facts and Issues for Determination. Contained within the Defendants' statement of fact and issues for determination, were references to a defence based on promissory estoppel. The Plaintiff argued that this had not been pleaded in the Re-amended Defences. This issue had been raised in correspondence prior to the hearing between the parties. This was dealt with as a preliminary issue in the absence of the Jurats. At the time the Deputy Bailiff handed down an ex tempore judgment. For the purposes of this judgment, it is sufficient to say after considering the issue, the Deputy Bailiff concluded that this defence had not been pleaded in the Re-Amended Defences and therefore could not be raised without an amendment to the pleading. The Deputy Bailiff gave the Defendants the opportunity to make an application to amend their pleadings to plead promissory estoppel, which the Defendants' Counsel Advocate de Verneuil-Smith, having sought instructions, declined.

## **Background**

12. Kingfisher is part of a group known as Kulczyk Investments SA ("KI Lux" or "Kulczyk"). KI Lux a Luxembourg entity. The Kulczyk Group comprises KI Lux and its subsidiaries. KI Lux manages funds and assets on behalf of the Kulczyk family who are the ultimate beneficial owners. KI Lux has been a client of Artemis since 2006 and Artemis has worked with KI Lux in relation to the purchase of various aircraft as well as other investments. Mr Wolf through his work with Windrose Air Jetcharter GmbH, ("Windrose") of which he was first a consultant and then managing director from 8 March 2008 until 31 March 2019 worked with Artemis for the Kulczyk Group. Windrose's purpose was to operate and charter aircrafts for private and professional clients.
13. The general counsel of KI Lux between 1 January 2013 and 30 October 2020 was Lukasz Redziniak. During the relevant period Sebastian Kulczyk was the Chief Executive Officer of KI Lux, Stefan Krieglstein was the Chief Financial Officer until 2015 and then a non-executive director until 2017, Marlusz Nowak was a member of the KI Lux board as was Dagmara Ciesla.
14. On 1 August 2011 Otium Offshore purchased a helicopter. This was an IML MI6-T helicopter (aircraft serial no. 10534) ("the Helicopter"). According to the documentation, the Helicopter was built in 1974 and was in need of repair. The background leading to this arrangement is a matter of dispute between the parties. On 12 October 2011, Otium Offshore and Kingfisher entered into an option agreement ("the Option Agreement") pursuant to which Otium Offshore granted Kingfisher an option to purchase the Helicopter. The option price was €3,056,183. The option price was to be paid by way of instalments with the final instalment being payable on the submission of the exercise notice and completion of an aircraft purchase agreement.
15. On 13 October 2011, in accordance with the Option Agreement, a deposit was paid by Artemis to Otium Offshore of €1,550,000. This was non-refundable save if Kingfisher found a purchaser to purchase the Helicopter within the Option Period for at least the Option Price or if Otium Offshore failed to deliver the Helicopter on the exercise of the option. However, on or around 31<sup>st</sup> October 2011, due to German VAT being payable on each payment under the Option Agreement, Mr Wolf suggested that rather than an option agreement, the parties enter into a loan agreement, pursuant to which Kingfisher would provide a loan to Otium Offshore for the same amounts that were provided for in the Option Agreement (the "Loan").
16. On 15 November 2011, the parties terminated the Option Agreement and on 21 November 2011, Otium Offshore signed the loan agreement (the "Loan Agreement"), as drafted by Mr Wolf on 21 November 2011 and this was executed by Ms Bowen representing Artemis as director of Kingfisher on 14 December 2011. The Loan Agreement contained the following terms:
  - (1) Kingfisher granted a loan to Otium Offshore in the sum of €3,000,000 (clause 1).
  - (2) Security for the loan was the Helicopter (clause 4).

- (3) The funds were repayable on or before 29<sup>th</sup> February 2012 (clause 5) defined as the contract period.
  - (4) Interest was payable on the loan at the rate of 5% per annum (clause 3) and was payable at the end of the contract period.
  - (5) The loan funds were to be paid in three instalments.
  - (6) The first instalment was acknowledged to be the amount already paid under the option agreement on 5<sup>th</sup> October 2011.
  - (7) The second instalment in the amount of €1,150,000 was to be paid on 15 December 2011 and the third instalment in the amount of €300,000 was to be paid on the 15 January 2012.
  - (8) The agreement was governed in accordance with the laws of Guernsey (clause 7 (iii)).
17. The Loan Agreement was varied on the 2 March 2012, allowing for the repayment of the Loan plus interest up to 30 April 2012; and varied again on 19 April 2012 allowing for repayment of the Loan plus interest up to 31 May 2012. All the instalments were made in accordance with the Loan Agreement.
18. There is no dispute that the Loan Agreement was validly executed. The loan funds were paid on or around the dates set out in the Loan Agreement by Kingfisher to Otium Offshore's bank account in Germany. Whether the Loan Agreement represented the entire agreement between the parties is a matter of dispute between the parties.
19. On the 12 March 2019 a letter of demand was sent by Kingfisher to the Defendants demanding repayment of the Loan in full together with interest up to 12 March 2019. No payment was received. Mr Wolf, on behalf of the Defendants accepts that no repayment had been made but as set out in the Re-amended Defences, the Defendants assert that no or not all the repayment is due to Kingfisher or to the extent it is owed that this should be set off against money owed to the Defendants.

### **Disputed Evidence**

Ms Bowen

20. Ms Bowen commenced her evidence by making some small amendments to her witness statements.
21. Ms Bowen was not aware of discussions between KI Lux and Mr Wolf in July 2011 about acquiring a Helicopter. Contrary to the representations by Mr Wolf in his evidence, it was not represented to her that Otium Offshore was "*helping KI Lux out*" with the Helicopter.
22. She became aware that in or around 1 August 2011 Otium Offshore had purchased the Helicopter. Her understanding was that in September 2011 after a board meeting, KI Lux agreed to invest in the Helicopter by providing a loan to Otium Offshore either directly or through an SPV. This would fund the purchase by Otium Offshore and the repairs and renovations to the Helicopter. The original proposal was that an entity as yet unspecified would advance the money to Otium as a loan. There was some suggestion that a company called Blue Bird Aviation Limited ("*Bluebird*") would loan the money and draft documentation was produced with Blue Bird as one of the parties however, ultimately following discussions between Artemis and KI Lux, a new company, Kingfisher, was proposed for the investment in the Helicopter. Ms Bowen understood that if Kingfisher had not loaned the money, Otium would have gone to a commercial bank although she said she didn't believe it was discussed at the time beyond an email from Mr Wolf on 3 October 2011 referring to him going to a commercial bank for refinancing.
23. Ms Bowen was asked about the letter from Mr Wolf dated 9 September 2011 addressed to Bluebird (the "*Bluebird Letter*") and Mr Krieglstein. She agreed there was a decision to invest

in the Helicopter and she accepted that Bluebird purchasing the Helicopter from Otium Offshore and the purchase price being paid by way of a loan to Otium Offshore was one of the options that was being considered and one of the proposals put forward by Mr Wolf. She said that whilst the purchase of the Helicopter was, according to the Bluebird letter, the preferred variant for Otium, the proposal at the time was only for a loan. The benefit of the investment from creditor's perspective was that it would either earn interest on the loan or if the creditor proceeded to purchase the Helicopter the subsequent commercial operation of the Helicopter. She understood the benefit for Otium in the loan proposed was that Otium would earn some profit (although it wasn't a huge amount), but they would operate the Helicopter for profit.

24. Her evidence was that whilst KI Lux is an indirect shareholder of Kingfisher. Kingfisher is a separate legal entity from KI Lux. Artemis is the corporate director of Kingfisher and therefore has, and duly exercised, decision-making with respect to Kingfisher. At no time was this decision-making responsibility relinquished and at all times regardless of the separate conversations that Mr Wolf may have been having with members of KI Lux, it was Kingfisher who had to, and did, make the decisions. Kingfisher did not act on or receive instructions from KI Lux. Whilst Kingfisher took account of the wishes of KI Lux, it was Artemis as director which makes the decisions. The description by Mr Wolf that it was Mr Krieglstein who was the contact person for all matters related to the Helicopter including all financial and structural matters was not accurate. She accepted that Mr Krieglstein remained involved as he had a good rapport with Mr Wolf and was German-speaking. However, she said the email correspondence demonstrates that in fact it was Kingfisher with whom Mr Wolf liaised on behalf of Otium about the financing and loan that was made for the Helicopter.
25. Ms Bowen's evidence was that the Loan Agreement is the extent of the agreement between Kingfisher to Otium Offshore. There are no other terms other than the ones in the Loan Agreement. She did not agree with Mr Wolf's description of the business proposal being one where Otium Offshore's only purpose in buying the Helicopter was to hold the Helicopter initially and temporarily for and on behalf of the KI Group to manage and oversee the repair and renovation, and then to manage and oversee the sale of the Helicopter to Kingfisher.
26. The agreement of the board of KI Lux on 27 September 2011 was to invest in the Helicopter by providing a loan to Otium Offshore. A business plan originating from Mr Wolf was sent under cover of the following email dated 29 September from Mr Krieglstein:

*"Dear All,  
following up most recent MBM and board of directors' meeting I'm please to inform you that the group decided to acquire another - commercially much more viable than the Augusta acquisition -helicopter, a Ml 8. The cost for 100% acquisition "ready to operate" of the aircraft consists of –*

- a) Purchase Price of Helicopter: EUR 550.000,00*
  - b) Related Acquisition costs: EUR 52.500,00*
  - c) Total Revamp: EUR 2.368.683,00*
  - d) Other costs: EUR 85.000,00*
- Total **EUR 3.056.183,00***

*Following total revamp, the SPV currently holding the aircraft, OTIUM CONSULT GmbH & Co. Offshore AusrOstungen KG, Schiffbauerdamm 40, 0-10117 Berlin ("OTIUM"), will sell 100% of the aircraft to Blue Bird or a nominee of Bluebird (in case we want to put it into a SPV); in the meantime it is proposed for Kl group, either directly and/or indirectly via Bluebird, to finance OTIUM to complete the revamp. The cash required to complete the task is due as follows:  
EUR 1.550.000,00 immediately,  
15 of November 2011 - EUR 1.150.000,00, and*

*1 0 of December 2011 in the amount of EUR 300.000,00  
Thereafter EUR 56.183,00  
Total therefore: **EUR 3.056.183,00***

*May I kindly ask all "passengers involved" to help in setting this structure up - most efficiently and with a view to cross subsidizing our Augusta Grand.*

*Please act swiftly, as Wolfgang needs the cash urgently - if need be I'm happy to authorize direct bridge financing assigning it to blue bird later. Wolfgang, pls make yourself available to answer all questions raised for the directors of Blue Bird to understand the issues."*

27. This email from Mr Krieglstein still refers to Bluebird and Ms Bowen in evidence accepted at this point there was an intention on KI Lux's part for Bluebird to acquire the Helicopter and the proposal was that it would finance Otium to complete the revamp. However, she remained clear Kingfisher never made a decision to purchase the Helicopter. She was very clear to distinguish between the intentions of KI Lux and those of Kingfisher. She said: "*Kingfisher's directors make the decisions for Kingfisher.*" Kingfisher did not have any employees, but Artemis was the corporate director of Kingfisher. Members of Artemis would work under the supervision of the director and any decision had to be the decision of the director. If Kingfisher had decided to purchase the Helicopter as Kingfisher didn't have the expertise in operating or repairing helicopters, it would have used a consultant or consultants to manage this. This could have been Windrose or Mr Wolf.
28. Prior to the signing of the Option Agreement Mr Wolf sent Kingfisher an email dated 7 October 2011 informing Kingfisher that if Otium as the owner of the Helicopter sold the Helicopter in its current state 19% VAT would be payable. In cross-examination, Ms Bowen accepted that Mr Wolf was referring to a sale to Kingfisher, but Ms Bowen remained adamant that Kingfisher did not ever make a decision to acquire the Helicopter. Kingfisher agreed to make a loan, this was replaced by the Option Agreement but then later this was replaced by the Loan Agreement.
29. The terms of the Option Agreement were that Otium Offshore granted Kingfisher an option to acquire the Helicopter at the option price of €3,056,183. Funds were to be paid in four tranches. The first payment was made on 13 October 2011 of €1,550,000. The monies were advanced to Kingfisher by KI Lux. The fourth tranche was the payment of the outstanding balance which was to be paid on completion of an aircraft purchase agreement and submission of an exercise notice to Otium Offshore. Ms Bowen was adamant that this was always only an option to buy the Helicopter by Kingfisher which it didn't have to exercise. This was the case even if Kingfisher paid the money due under the Option Agreement but decided to forfeit the option. Otium Offshore could only sell the Helicopter with Kingfisher's consent because Kingfisher had first option to purchase under the Option Agreement. Ms Bowen accepted that the additional documentation sought by Kingfisher from Mr Wolf including an original letter of undertaking confirming that on completion of the Helicopter purchase that he would hold the aircraft on trust for Kingfisher went beyond the requirements of the Option Agreement.
30. On 31 October 2011 Mr Wolf informed Kingfisher that he had received tax advice that the Option Agreement would lead to German VAT being payable on each payment under the Option Agreement therefore he proposed that the money should be loaned by Kingfisher as had been originally proposed.
31. The directors of Kingfisher considered this proposal and on 3 November 2011 Kingfisher confirmed that it was willing to grant a loan to Otium Offshore in place of the Option Agreement if the Option Agreement was cancelled in writing. Mr Wolf drafted the Loan Agreement.

32. Prior to the Loan Agreement being signed on behalf of Kingfisher, Kingfisher asked Mr Wolf to provide various pieces of due diligence on the Helicopter and continued to chase for this after the Loan had been paid to Otium.
33. Ms Bowen said the Option Agreement was replaced in its totality by the Loan Agreement and after it was terminated the Option Agreement had no further relevance. The first tranche of money that had been paid by Kingfisher to Otium was treated as an advance under the Loan Agreement. Her evidence was that an option letter dated 25 November 2011 (“the Option Letter”) which was sent by Mr Wolf was not requested by Kingfisher. She assumed that it was Mr Wolf providing evidence of the security that Kingfisher had taken over the Helicopter in accordance with clause 4 of the Loan Agreement (which had not yet been executed by Artemis on behalf of Kingfisher). She had understood that as the Helicopter had not been registered, there could not be formal security such as a legal charge taken over the Helicopter. She did not accept the statement by Mr Wolf that as a consequence of the Option Letter, Otium Offshore was not able to sell the Helicopter without the consent of Kingfisher. The Option Letter was provided unilaterally and not agreed to by Kingfisher. On 25 November 2011 Mr Wolf sent a further letter stating that if Otium Offshore receives VAT payments with a right of refund, Otium will refund the amounts to Kingfisher. She said it was never a term of the Loan Agreement that Kingfisher had to register for VAT in Germany although it was something that was discussed at various points if Kingfisher bought the Helicopter.
34. She said that although Mr Wolf drafted the Loan Agreement, Kingfisher did request some changes to the draft document all of which appear to have been accepted by and incorporated into the Loan Agreement by Mr Wolf.
35. Otium’s business plan for the Helicopter which they had received under cover of the email dated 29 September 2011 from Mr Krieglstein involved it being used as a charter aircraft. Kingfisher relied on the business plan and Mr Wolf’s experience in this area. Kingfisher had no reason to believe what he had provided in terms of the business plan wasn’t correct. She accepted Kingfisher did not take independent advice on the business plan or valuation of the Helicopter nor the question of the registration of the Helicopter.
36. She said that the discussions that may have been had with the officers of KI Lux were extraneous to the Loan Agreement. Neither KI Lux nor these individuals were, or are, party to the Loan Agreement and at all times it was Kingfisher with whom Otium Offshore had the contract.
37. Ms Bowen denied the statement from Mr Wolf that it was understood between the parties that the interest payments would be borne by Kingfisher by way of an increase in the purchase price. She said there was no such understanding between the parties. She said it was stated in the Loan Agreement that Otium would be liable for payment of the interest.
38. Ms Bowen denied that Artemis delayed in making payments for the Helicopter. Further, she said that, as can be seen from the emails at the time, it was necessary for Kingfisher to wait for original certified documents from Mr Wolf and the delays were from Mr Wolf in providing the same and confirmation from Mr Wolf in relation to the insurance position, updates in what was happening etc. throughout the relationship.
39. She said there were delays on completion of the repairs and renovation works on the Helicopter which occurred almost immediately which led in turn to the variations of the Loan Agreement known as annexes on two occasions.
40. Ms Bowen accepted in cross-examination that on the timings by the first repayment date of 29 February 2012 contained in the Loan Agreement, it would not have been possible for Otium to generate any charter income and therefore to pay off the Loan from charter revenue. She also

accepted that it would not have been possible by the second extension to the Loan Agreement, as the repairs had not been completed.

41. From February 2012, Kingfisher wrote on a number of occasions to Mr Wolf to request information about the renovations and the expected completion date. She said responses were not always forthcoming from Mr Wolf however Kingfisher did not call in the Loan. In December 2012 Mr Wolf suggested that Kingfisher set up a permanent establishment in Germany to assist with the reimbursement of VAT and “*improve the liquidity of your enterprise*”. In cross-examination, Ms Bowen accepted that the VAT Mr Wolf must have been referring to would have been on the sale of the Helicopter to Kingfisher. On behalf of Kingfisher, Paulina Brock responded to this suggestion on 8 February 2013 with various questions about this proposal, requesting an updated business plan for the Helicopter as well as a request that Mr Wolf advise where the Helicopter was operating as they had not received any information on the current use of the aircraft. Ms Bowen accepted that some of these questions from Ms Brock appeared to be based on two possibilities i.e., either Kingfisher, or a German company, owning the Helicopter (however she said that neither Ms Brock nor Mr Wolf are communicating in their first language). She said in cross-examination that Ms Brock must have been talking about “if” the Guernsey company owned the Helicopter rather than it did own it at the time. According to Ms Bowen’s evidence no response was forthcoming from Mr Wolf.
42. Ms Bowen maintained that purchasing the Helicopter was only ever one of the options for Kingfisher and she maintained this position despite an email on 12 June 2013 from Paulina Brock to Mr Redziniak copied into Ms Bowen and Mr Domaille where Ms Brock appears to be trying to escalate matters due to a perceived lack of information from Mr Wolf refers to “*Kingfisher Aviation is an entity which was established to acquire a helicopter...following registration Kingfisher were going to purchase the aircraft from Otium*”.
43. By September 2013 Ms Bowen said that it had become clear that the business model based on chartering the aircraft was unsustainable due to a fall in the relevant market. On 25 September 2013 Ms Bowen emailed Mr Krieglstein reporting on a conversation that Mr Domaille had had with Mr Wolf. It refers to the failure of the charter business and then goes to say:

*“The investment in the MI 8T helicopter currently owned by Andreas company, Otium Consult GmbH, brackets, (“Otium”) is no longer worthwhile for Kingfisher.*

*In light of this the Directors of Kingfisher have two options to consider. Either proceeding with the purchase of the aircraft from Otium and then the subsequent sale of the helicopter on the open market for whatever profit we can achieve or alternatively, we could request Otium to consider selling the helicopter on the open market and then repay the loan to Kingfisher. The directors are of the opinion that the second option is preferable...”*

It then goes on to say:

*“We therefore may need to consider in future what stance we should take, should the sale of the helicopter not raise sufficient funds to clear either the interest or the capital and the interest on the loan and if a profit is made, how to deal with that? I would welcome your thoughts.”*

44. Ms Bowen’s evidence was that the first option was not as a result of any obligation to purchase the Helicopter but rather a commercial avenue considered by Kingfisher as one to take in order to recover at least part of the Loan. At no point, she said, did Kingfisher have an obligation to purchase the Helicopter. She accepted that in this email the repayment of the Loan was being considered on the basis that the Helicopter would be sold however Kingfisher could have requested the repayment of the Loan without the sale. Mr Krieglstein replied to Ms Brock on

26 September 2013. He indicated he was not aware of the full extent of the situation, but he wanted to talk to Mr Wolf. He then responded to Mr Domaille on 14 October 2013 that a potential purchaser was in discussions with Mr Wolf although there was a delay on this, and that Mr Wolf had “*sold contracts for another €300k*”. On 18 November 2013 Mr Wolf informed Kingfisher that a sale to a third party was being organised.

45. Rather than call in the Loan, Ms Bowen said that Kingfisher continued to rely on the representations of Mr Wolf that a sale of the Helicopter was possible and might be made. Kingfisher wanted to work constructively with Otium to find a solution. This began a period in 2014 and 2015, where, according to the updates he was giving Artemis, Mr Wolf made various attempts to sell the Helicopter which were unsuccessful. Ms Bowen in cross-examination did not accept that a reference in an email 11 March 2015 from Paulina Bowen chasing Mr Wolf for an update on the sale to “*Otium currently operating the M18 ultimately for and on behalf of Kingfisher*” represented the reality that Kingfisher really owned the Helicopter. In November 2015 there was a series of emails about registration for VAT. Kingfisher through Ms Dorey raised a question about this with Mr Wolf, he in turn forwarded an email from a S Meier. A request at this time by Ms Bowen for more information about why registration in Germany was needed if the Helicopter was sold to a third party went unanswered. Ms Bowen accepted that the email 6 November 2015 from her said that “*it was the intention at one point that [Kingfisher] would take over the ownership of the Helicopter*”.
46. Ms Bowen’s evidence was Kingfisher continued to assist Mr Wolf in his efforts to sell the Helicopter. This included, she said, an attempt by Kingfisher to further vary the Loan Agreement in 2014 to extend the repayment date to 31 May 2015 and in 2016 with an extension for the repayment to 31 December 2017. No response was received to the first request. On the second attempt, an email enclosing the variation (“Annex 3”) was sent by Kingfisher on 6 January 2016 and a response was chased for by Kingfisher on 15 January 2016. Mr Wolf replied on 15 January in which he was adamant that a letter of subordination must be agreed before the Loan Agreement could be amended. She said that for the first time under cover of his response dated 15 January 2016 Mr Wolf enclosed a copy of a letter of subordination. He also said in the same email that “*We are working hard worldwide to find the chance to sale (sic) the helicopter*”.
47. Ms Bowen’s evidence was that Kingfisher was unwilling to agree to subordination terms without properly understanding the liabilities of Otium. Kingfisher pressed for statements from Mr Wolf confirming that Otium had no other liabilities, but these were not forthcoming despite chasing Mr Wolf for them on a number of occasions throughout February and March and making clear that without them the letter of subordination could not be considered. Ms Bowen initially said in evidence that she was not aware that Kingfisher had ever received this information however she accepted that under cover of an email dated 14 February 2018 it appeared to show that Mr Wolf sent a copy of Otium Consult’s latest accounts. Without the financial information, the letter of subordination, which she said Kingfisher was not in any event obliged to provide, could not be properly considered by Kingfisher as it did not know what such subordination would involve.
48. Her evidence was also notwithstanding that there was no letter of subordination, Mr Wolf appeared to continue his efforts to sell the Helicopter to third parties as is apparent from the emails.
49. On 23 March 2016 Mr Krieglstein wrote to Marłusz Nowak, Mr Kulczyk and Mr Domaille copying in Mr Wolfe

***Betreff: AW: Helikopter M18***

*Dear Ian,*

*Dear Sebastian and Mariusz,*

*after years of accepting that the original business plan of using a M18 helicopter – indirectly owned by Kingfisher (KI) – to be chartered out to OFFSHORE WINDFARM developments has failed due to a sudden end of WINDFARM developments north of Germany we seem to be successful in recovering at least some cash by selling out of the M18.*

*We purchased the M18 for ca. EUR3,1m (including cost) – hopefully selling it after almost 5 yrs for ca. EUR2,1m- This will create a loss of ca EUR1m. As the company which formally owns the aircraft is owned by Anderas (sic) Wolf (in trust for Kingfisher) such loss would have to be either compensated or forgone; in both cases it would create a substantial gains in Germany, hence to be taxed in Germany.*

*I therefore suggested that Andraes (sic) Wolf will acquiring Kingfisher for the nominal sales price of the M18 of EUR 2,100,000 and will deal with the loss carry forward as well as winding up the structure himself.*

*Your views appreciated; in case of agreement, I suggest to execute as proposed.*

*Best,*

*Stefan Krieglstein”*

50. Ms Bowen did not accept that the phrases used in the email were indicative of an arrangement where it was always accepted that Kingfisher beneficially owned the Helicopter or that there was an obligation upon Kingfisher to purchase the Helicopter. Mr Krieglstein could have been referring to the security over the Helicopter for the Loan. Her evidence was that regardless of what Mr Krieglstein set out in the email, the Helicopter was owned by Otium and the money for the Helicopter was loaned by Kingfisher. The proposal in the email was only ever a proposal and which would need to be agreed by Kingfisher. It was based on a prospective sale of the Helicopter to a third party for Euro 2,100,000. In any event despite correspondence backwards and forwards, no sale happened although Mr Wolf said it was about to happen on a number of occasions.
51. Kingfisher pressed for updates from Mr Wolf on the sale through May June and August 2016.
52. On 8 September 2016 Mr Wolf set out a further proposal in an email to Kingfisher.

*“From: Andreas Wolf [<mailto:otiumconsult@gmx.de>]  
Sent: 08 September 2016 11:27  
To: Natalie Dorey  
Cc: Ian Domaille; Keren Bowen  
Subject: Kingfisher Aviation Ltd Helikopter MI 8 OK-SFB*

*Dear Natalie,*

*Under the current conditions, we are not in a position to renew the loan agreement except subject to some additional agreements.*

*The limited partnership (“**Kommanditgesellschaft**”) can no longer sustain the liabilities resulting from the interest burden.*

*The personal liability/responsibility is becoming excessively high.*

*Our companies have to reach an agreement on how to deal with the original contract structure and the current situation.*

1. *The current situation breaks down into two directions:*
  - a) *We have an LoI (Letter of Intent) for acquisition of the helicopter; however, because of the current compliance regulations of the German banks, the buyer has so far not yet managed to transfer the collateral payment / secure payment of the purchase price. The likelihood of this LoI being taken to the stage of execution tends to be low.*
  - b) *We are involved in direct negotiations with the German Ministry of Defense that has to procure additional helicopter capabilities at the moment to support a mission. For this purpose, either direct leasing or, alternatively, an acquisition by a leasing company are envisaged. The next step / next negotiations are due approximately in the third week of September.*
  
2. *It is necessary to agree a joint solution that can be adopted in the event of both options failing.*
  - a) *Liquidation of the limited partnership, resulting in loss of the loan receivable by Kingfisher to the point of a total loss.*
  - b) *Acquisition of the helicopter by Kingfisher against a waiver/netting of the loan, and establishing a separate management structure outside Germany.*
  
3. *Irrespective of these two options, two steps that had already been communicated in the past are urgently required:*
  - a) *A German tax identification code must be applied for by Kingfisher*
  - b) *A subordination agreement to be signed.*

*I would suggest explaining these positions in the face-to-face meeting announced earlier and come to a partnership-based solution.*

*Best regards*

*Andreas Wolf*

53. Ms Bowen's evidence was because of the historical relationship with Mr Wolf, Kingfisher considered it appropriate to rely on these assurances and still did not call in the Loan. However, the hoped for sale/leasing arrangement mentioned in the email, did not take place. There was a meeting between Mr Domaille and Mr Wolf on the 14 September 2016 following which Mr Wolf said he would provide his proposals in respect Otium's insolvency. Kingfisher chased for this information on 6 February 2017. In response to this Mr Wolf replied that Otium was not insolvent and said:

*"As base for the solution there are two variants:*

- a) *Transfer of the helicopter towards Kingfisher or other with a purchase price in the a,out (sic) of the credit*
- b) *Continuation of the existing ownership with a monthly management fee in the amount of the developing costs and later variant a."*

Kingfisher requested full details of both proposals including financial forecasts. Emphasis was placed on the need for "comprehensive details" before options could be considered. Kingfisher chased for this on four occasions but did not receive a response. At the same time during February and March 2017 there was further correspondence between Mr Wolf and Kingfisher and Kingfisher continued to pursue Annex 3 to the Loan Agreement.

54. During the course of this correspondence where Mr Wolf again declined to sign Annex 3, Mr Wolf on behalf of Otium, stated on 6 March 2017:

*“There is a valid loan agreement in place that provides for an interest payment to be made on the amount of the extended loan between the payments payment and the 29/02/2012 (prolongation until 31 May 2012). For the time after 29/02/2012 (31/05/2012), no further interest payments have been agreed. An interest at a rate of 0.5% p.a. had been shelved for tax and accounting reasons (only company internal calculation).”*

55. In evidence Ms Bowen confirmed her understanding was that in this email Mr Wolf was not disputing the Loan Agreement. On the issue of interest Kingfisher responded by email on 6 March 2017 that it was assumed that the interest rate remained at 5% per annum. In an email of the same date Mr Wolf advised that Kingfisher was *“the only creditor of the company”*.
56. On the 7 March 2017 there was a call between Mr Wolf, Mr Domaille, Ms Bowen and Ms Dorey from Artemis who has been working on the matter. An attendance note created by Ms Dorey in an email to Mr Domaille and Ms Bowen which records:

*“Kingfisher aviation – Loan Interest/Loan with Otium*

*AW confirmed that Otium has no other assets or liabilities, other than to us.*

*AW confirmed that if we charge the loan interest, Otium will be insolvent. He would have to go to the court in Germany.*

*AW said that there is depreciation of the helicopter and there is a small loan interest charged in the accounts. AW has sent details of what interest is booked in their records.*

*There is an open invoice with the maintenance facility in Czech Republic.*

*ICD said that we will have to waive the interest as we have the equity interest in Otium. ICD said that as debt holders we have every charge over the assets as there is no equity.*

*AW said the main problem is that every flight hour, we lose money. AW said this is the reason we have tried to sell the aircraft as there is no commercial benefit in flying it.*

*ICD said that if we keep the aircraft, it will be worth less and less.*

*AW has an investor who is interested in our helicopter and will meet him at the start of next week. He will then tell us what we will get on the market for the helicopter. AW said we will never get EUR 3.7m for it.*

*ICD questioned whether there is any market to rent it in Africa. AW said that he cannot receive funds in Germany to rent the helicopter to Africa. It does not work in the current structure. ICD said unless we move it to Cyprus, there is not really an option for charter.*

*In AW opinion, the best solution is to sell the helicopter. AW said he cannot work in Africa – who will carry out repairs etc there? There is no maintenance company he can use. The helicopter can only be repaired in Germany/Poland/Czech Republic.*

*ICD/AW agreed that the only real solution is to sell the aircraft.*

*Kingfisher Aviation – Permanent Establishment*

*AW said to wait on this until next week. AW believes that we should sell the Company.*

*ICD said we will need to call on the loan and then get the helicopter back.*

*AW said we should decide on this when we have a buyer.*

*AW asked us to send an email to confirm that Kingfisher's request for interest delayed until 15 April 2017."*

57. Kingfisher agreed in email correspondence that a demand for interest which it said was due from 1 June 2012 to date would be deferred until 17 April 2017 in order that Otium would not become insolvent. Kingfisher continued to chase for updates with regard to the sale and for Mr Wolf's agreement to Annex 3 to the Loan Agreement. Through this period Mr Wolf represented directly to Kingfisher and through Mr Krieglstein that potential sales were in the offing.

58. On 12 May 2017 Mr Krieglstein emailed Mr Domaille, Mr Nowak and Mr Kulczyk copying Mr Wolf:

*"further to our correspondence in the subject matter, this is to inform you, that - assuming you still in favour of selling the m18 – AndreasW has now negotiated a transaction with a different prospect leading to net cash for the aviation group of EUR 2,050,000 (the deal below failed).*

*That said, and as part of what I would call clean-up exercise – I strongly recommend selling the M18 as suggested above followed by winding up Kingfisher and the M18 structure most efficiently.*

*I've discussed the above with Sebastian Kulczyk yesterday eve and confirm our support."*

59. Mr Domaille replied the same day saying that the Board of Kingfisher are "*keen to support this transaction especially in light of support from our shareholders to do so*". However, no sale came to fruition. On 29 August 2017, Mr Wolf emailed that "*...we must discuss the current situation personally*". However, Mr Wolf then subsequently cancelled a meeting that was due to happen on 1 September 2017.

60. Ms Bowen said that on the 4 September 2017 Mr Wolf on behalf of Otium sent a letter to Kingfisher setting out what he described as a summary of the current situation. He enclosed with the letter a draft subordination agreement. As well as describing a number of scenarios, the letter stated that the Helicopter was at Rothenburg airfield as it is uneconomic to use commercially and that there was potential sale as it had received a Letter of intent ("LoI") but with a delay on the deadlines. Mr Wolf then set out as follows:

*"In 2011, OCG & CO Offshore Ausrüstungen KG raised a loan with Kingfisher Ltd to acquire the helicopter for a specific purpose and apply appointments to it in view of the proposed structure of operations. The changes in the general political setting in Germany, and the related revision of the investment plans on the side of the energy utility companies, had it that the costed application of this helicopter is no longer available. There will be no operation at cost. This is the current situation.*

*The original contractual basis, namely that Kingfisher Ltd acquires the helicopter following completion of the repair and fittings, has not been put into practice. The helicopter continues to be owned by OCG & CO Offshore Ausrüstungen KG. The company's balance sheet is currently stretched. There are two scenarios.*

#### **Scenario A**

*Kingfisher Ltd is the only relevant creditor to the company. This is why a draft subordination agreement has been transmitted. This agreement has not been signed up until this day. This means an arrangement has to be found to preclude an intervention by third parties.*

*Scenario A provides for conclusion of an agreement on transfer to Otium of title for the business interest in Kingfisher Ltd. The price for acquisition of Kingfisher amounts to the expected sales price of the helicopter (currently EUR 2,100,000.00) for which a deferral of payment by (sic) will be granted up to the time of its sale. After that, a contractual relationship will exist only between Kingfisher and OCG KG.*

**Scenario B**

*Kingfisher Ltd is the only relevant creditor to the company. This is why a draft subordination agreement has been transmitted. This agreement has not been signed up until this day. This means an arrangement has to be found to preclude an intervention by third parties.*

*Scenario B is the agreed continuation of the current situation subject to the arrangement that subordination is agreed along with an agreement that a potential purchase price will be assigned in full to Kingfisher – against residual debt discharge.*

*Irrespective of this, the M18 will be actively offered for sale beginning on 07 September 2017.*

**OTTIUM CONSULT GmbH & Co. KG: Georg-Wulf-Strasse 3 GAT: D-12529 Schönefeld**

*Best regards/ Mit freundlichen Grüßen*

*Andreas Wolf*

61. Ms Bowen did not accept that the reference in the email to “*the original contractual basis namely that Kingfisher acquires the helicopter following completion of the repair and fittings has not been put into practice*” was a summary of the terms of the original contractual basis but rather that it summarised the original discussions.
62. Mr Wolf chased for a response from Mr Domaille on 25 September 2017. In the email he refers to “*the original contractual option i.e., that Kingfisher takes ownership of the helicopter has presumably ceased to be pursued by your side*” and the “*only practicable alternative solution is to sell the helicopter to a third party*”. However, he also stated that “*we*” have already lost one of the prospects who had signed a LoI because no agreement was reached in the subordination agreement.
63. Ms Bowen was again adamant in evidence that there has never been an agreement for Kingfisher to purchase the Helicopter. It was always one of the possibilities, but it was never more than this. Mr Wolf did not keep Kingfisher apprised of what was happening. Ms Bowen said this was indicative of the relationship with Mr Wolf i.e. long periods would go by when, despite Kingfisher chasing Mr Wolf, nothing would be heard back from him. This meant that Kingfisher didn’t know what was happening with the chartering of the Helicopter nor with the prospective sales. Kingfisher did not receive any of the revenue from the chartering undertaken.
64. Mr Domaille responded to Mr Wolf on 25 September 2017 asking for a discussion (referring to the previous meeting on 1 September 2017 having been cancelled by Mr Wolf) and not accepting Mr Wolf’s representation that the lack of agreement on the subordination agreement had led to a sale of the Helicopter being lost and that he was not informed it was urgent.
65. A conference call was held between Mr Domaille, Ms Dorey, and Mr Wolf on 9 October 2017. This was recorded in an attendance note in the form of an email sent to Ms Bowen and Mr Domaille although Ms Bowen was not present on the call. In that call, after some discussion

there appeared to be an acknowledgment by Mr Domaille recorded in the note that “*we have little alternative so agreed to go to document scenario A*” (referring to Mr Wolf’s email of 4 September 2017) which if agreed with Group in a call the following day, they would “*commence the process of documentation*”. The commercial terms were that Otium would acquire the shares of Kingfisher and the price would be the sale proceedings of the Helicopter and therefore it would be a variable consideration contract but with an expected sale price of €2.1million. Ms Bowen accepted in evidence that if Kingfisher had proceeded with this proposal, then no other sums would have been pursued but that was subject to various documents including the subordination agreement being agreed, so it never proceeded.

66. Matters appeared to go quiet until January 2018 when Ms Dorey emailed Mr Wolf on behalf of Mr Domaille to obtain an update and enquiring about a meeting in London. In response Mr Wolf indicated he wasn’t planning to come to London but could if necessary. He said he needed an answer from Kingfisher to three questions: first, should the Helicopter officially be offered at the market; second, should the letter of subordination be signed; and third, will the targeted purchase price be accepted for the refund of the credit.
67. In response to the first question Mr Domaille replied that they wanted to wind the issue up and enquired whether the first question meant that the Helicopter was not being marketed or only quietly marketed by going to brokers. He also enquired whether going to brokers would be more likely to be successful, asked what the anticipated price was and what the market was like. In response to the second question, Mr Domaille responded that given that Kingfisher will only get the net proceeds of the Helicopter as the company which owned it had no other assets then there would be no issue in Kingfisher executing a letter of subordination. In response to the third question Mr Domaille stated that “*as a consequence of the response to the second question “I suspect that if Kingfisher were to try to recover its debt, all it would recover would be the sale proceeds of the helicopter less costs thereof and therefore I see little difference in accepting the sale proceeds in lieu of the credit or pursuing the entirety of the credit. The net result, I suspect will be the same”*”. Mr Wolf responded again referring to the original three questions that “*we will use every successful way to sell the helicopter. Broker will be necessary*”. That on the second question he said, Mr Domaille was correct that Kingfisher is the only “*third party of Otium KG*” and on the third “*the hull sales price/net price will go to Kingfisher as part of the agreed Letter of subordination. It’s fair and clear*”.
68. Between 13 February 2018 and 14 March 2018, there was an email exchange between Kingfisher and Mr Wolf regarding a further draft of Annex 3 to the Loan. This provided repayment by Otium Offshore on or by 31st December 2019. The draft included an additional sentence that stated, “*The lender will not demand repayment of the loan to the extent that it would make the Borrower insolvent*”.
69. Ms Bowen’s evidence was that it was Kingfisher's intention by this document was to have the position recorded with regard to a possible future date for repayment of the loan. It was also her evidence that it was always contemplated that Otium would repay the loan. However, Kingfisher was willing to accommodate Otium by offering more time to repay the loan and with some comfort in that repayment of the Loan would not be demanded if it would cause Otium to become insolvent. However, the document was never agreed or executed. Ms Bowen said that Kingfisher’s position is clear from an email dated 23 February 2018 where Ms Dorey, states “*the liabilities still exist for Otium so regardless of whether the extension document is actually executed, loan interest is being accrued on the loan, increasing Otium’s liability and the loan remains payable*”. There does not appear to have been a response from Mr Wolf although Ms Dorey chased Mr Wolf.
70. In June 2018 Kingfisher requested an update regarding the status of the letter of subordination from Mr Wolf. There was no response to this although it appears that there was a potential sale as Otium had received a LoI.

71. In an email dated 25 September 2018 Mr Wolf informed Kingfisher and Lukas Redziniak:

*“As already informed, there is a LoI for the helicopter M1-8. Currently the tax situation for delivery is being checked in order to facilitate to draw up a purchase agreement for execution.*

*As it is known, this purchase price will not cover all obligations of the owner’s company to the lender Kingfisher. Since the lender is the sole relevant creditor of the company, it is necessary to obtain a confirmation.*

*Currently it is planned to sell the helicopter for EUR 2.100.000,00. After deduction of the costs for delivery and corrective action for closing the findings of the PPI, an amount of EUR 2.050.000,00/2.000.000,00 will be available to Kingfisher.*

*Please confirm bindingly that you support this procedure and to waive the demands in excess of this value after payment.”*

Mr Redziniak replied on 26 September 2018 that the excess would not be pursued so long as the sale went ahead and the amount of €2 to 2.05million was paid to Kingfisher. He asked Mr Wolf to proceed with the transaction. This was copied in Mr Domaille who subsequently forwarded it to Ms Bowen, who in turn forwarded it to Natalie Sarl of Artemis. When Ms Bowen was asked whether this correspondence had the appearance of Mr Redziniak speaking on behalf of Kingfisher, Ms Bowen accepted that Mr Redziniak had commented, and Kingfisher had not disagreed with the statement. She also accepted that it appeared that Kingfisher had agreed with this proposal.

72. On 24 and 25 October there is an email exchange between Mr Wolf and Mr Redziniak where a further sale is discussed and the basis upon which Otium might be released from its debt, however the sale again failed to materialise. In cross-examination Ms Bowen accepted that although Mr Redziniak appeared to making representations on behalf of Kingfisher, they had not disagreed with the statement.

73. Similarly in November 2018 a sale was flagged but failed to happen. Ms Bowen became aware of an additional round of correspondence between Mr Wolf and Mr Redziniak in February 2019 to which Mr Domaille was copied, where the terms of repayment were again discussed on the basis that if the Helicopter was sold that this would satisfy the debt although in evidence Ms Bowen said this was on the basis of a minimum amount of €2-2,050,000. On 7 March 2019, Mr Wolf and Mr Redziniak and Dagmara Ciesla had a further round of emails still with a prospect of a sale in the background but also a refusal by KI Lux to provide any further money to Otium. Ms Bowen’s evidence was that contrary to the evidence of Mr Wolf, Kingfisher was wholly supportive of a sale to a third party in order to facilitate the repayment of the loan.

74. When Ms Bowen was asked in cross examination that an email from Mr Redziniak on 19 February 2019 which contained the statement “*Official acceptance of Kingfisher will not be an issue once all the other terms are agreed*” suggested that Kingfisher will agree regardless— Ms Bowen said she could not confirm what the shareholder’s belief was. She accepted that KI Lux remained interested in the Loan Agreement and that they did not “*disappear from the scene*”. She also accepted that if a decision involved the ability to repay of the Loan, Kingfisher would have consulted with KI Lux.

75. On 12 March 2019 the letter of demand was sent but no payment has been received. It was accepted that there was no board minute or resolution dealing with the letter of demand.

76. Ms Bowen said that Kingfisher was not required to become a VAT registered company in Germany as a pre-condition or term of or ancillary to the Loan. She was not aware that the fact that Kingfisher didn't register for VAT had ever held up a sale and she understood it was in any event only an issue if Kingfisher had bought the Helicopter but not if it was sold to a third party. She did not accept that Kingfisher was ever obliged to provide a letter of subordination nor that they were uncooperative with regard to the subordination letter or agreement. They may have agreed to a subordination agreement if Mr Wolf had been forthcoming with the information Kingfisher requested. Ms Bowen accepted that due to a restructuring of debt amongst the companies in 2012 that she didn't believe interest was payable by Kingfisher to KI Lux. She did not accept that the issue of Kingfisher's consent ever delayed or stopped a purchase. When language in emails gave the impression of ownership or "held on trust" this was because of the security held against the Loan. She couldn't recall where reference was made to ownership this being overtly corrected however she was clear that Kingfisher didn't own the Helicopter and purchase by Kingfisher was only ever an option. The Helicopter storage and operational costs were being funded by Otium/Mr Wolf for which he did not seek reimbursement. Although there were a couple of proposals for management fees, these did not come to anything. Mr Wolf didn't share the financial information in respect of the revenue received in chartering the Helicopter.

### **Mr Domaille**

77. Mr Domaille's evidence supported that of Ms Bowen. He said in cross-examination that although the Board of Kingfisher would consider the wishes of the shareholders, it has to "*have its own mind*" and they would "*consider the wishes of the shareholders and if they were coincident with the corporate objectives then they would receive due consideration and if appropriate approved*". He did not accept in cross-examination that the directors of Bluebird had agreed to implement the purchase of the Helicopter. He did accept that the Option Price in the Option Agreement would have been the purchase price for the Helicopter. He acknowledged that the non-refundable deposit demonstrated that Kingfisher wanted to invest in the Helicopter. However, he was also clear that the Option Agreement did not mean that Kingfisher had to buy the Helicopter even if it paid the Option Price as the Option Agreement also required the aircraft purchase agreement and the submission of the exercise notice before the Helicopter's ownership would be transferred. It was always considered that sale of the Helicopter to a third party was a possibility and the Option Agreement included this within its terms.

78. The Option Letter was unilateral and, if it was binding, Kingfisher could not revoke it only Otium could. He did not consider that there was an obligation on Kingfisher to release Otium if Otium didn't revoke it as it would not be in Kingfisher's commercial interests to do so.

79. Mr Domaille met Mr Wolf in relation to aircraft Mr Wolf was involved in managing through Windrose on behalf of the owners (which were various companies of which Artemis was a director) although not regularly. His recollection of the meeting of 23 September 2013 was that its purpose was to discuss issues in respect to various aircraft owned by other entities. During the course of the day, Mr Wolf and Mr Domaille discussed the Loan Agreement. His recollection was that Mr Wolf and he discussed commercial options available to the parties to facilitate the repayment of the amounts owing under the Loan Agreement. Either Kingfisher could purchase the Helicopter and sell it, or Otium could sell the Helicopter and repay Kingfisher. These were pragmatic commercial options, not options under any legal document. The relationship with Otium is one of creditor not owner of the Helicopter. In cross-examination on the email from Ms Bowen dated 25 September 2013 (set out at paragraph 43 above) he did not accept the reference to "*investment*" in the first paragraph was a reference to acquisition, rather at the time the investment was a loan. He confirmed that the Kingfisher accounts showed an impairment in 2017 which Mr Domaille believed was after Kingfisher was advised that the Helicopter had

an estimated sale price of the €2.1million and this was the only asset (as they understood it at the time) of Otium.

80. In relation to the subordination agreement, Mr Domaille confirmed that he did not believe that any sale had been lost for the lack of subordination agreement or letter of subordination. In any event he said from the perspective of Kingfisher a subordination agreement would be executed as a contemporaneous closing document with the sale of the of the Helicopter and after due diligence. He accepted that Mr Wolf appeared to be asking for it prior to the conclusion of any sale in his letter dated 4 September 2017 (set out above at paragraph 60).

### **Mr Wolf's evidence**

81. Mr Wolf's evidence was that it was Mr Stefan Krieglstein who was the Chief Financial Officer of KI Lux who was his "*contact person for all matters related to the Helicopter and he decided on all financial and structural matters regarding the Helicopter*". Whilst Mr Wolf agreed in his evidence that Artemis is, and was, the corporate director of a number of SPVs, including Bluebird and Kingfisher, he also said that Artemis did not have any decision making power in relation to any of these companies during the relevant period of time. At all material times, he said Kingfisher received its instructions from KI Lux and Mr Krieglstein. All relevant decisions in relation to the present claim were taken by KI Lux's management board, Mr Krieglstein and Mr Redziniak. Kingfisher operated on the basis of the instructions received from and decisions made by KI Lux. He said, "*Kingfisher was just the technical conclusion of what had been agreed.*"
82. Mr Wolf described in his evidence various aircraft that had been purchased and acquired by separate SPVs incorporated in Guernsey which he said was "*managed by Artemis for and on behalf of KI Group*". Seven aircraft were bought in this manner. This included a number after the Helicopter. The Helicopter was unlike the other aircraft in that it was not new and required repair and renovation.
83. It was his evidence that KI Lux decided to acquire the Helicopter. The Helicopter was its investment. The plan was that after purchase it was to be refitted in the Czech Republic by a company called Lom Praha. As Kingfisher did not have the expertise to manage and oversee such repairs, the arrangement was for Otium Offshore, an entity which was already owned by Mr Wolf, to purchase the aircraft. He said that it was Mr Krieglstein in July 2011 who approached him for his assistance and that led to Mr Wolf offering the use of Otium for the purchase and to organise the repair and maintenance works for the benefit of KI Lux. It was effectively what he did through Windrose but where the ownership of the aircraft would be by an SPV. He said the plan was to use Otium on a temporary basis to manage and oversee the renovations and then to sell the Helicopter to an SPV in Guernsey.
84. The SPV was ultimately Kingfisher. In accordance with the agreement with KI Lux, in August 2011 Otium purchased the Helicopter and took over the maintenance contract. The Helicopter was then transported to Prague as this was where the maintenance was to take place. However, Mr Wolf's evidence was that at no point was it agreed that Otium would purchase the Helicopter from its own funds or for its own benefit nor was it to be liable for any funds which it had received from KI Lux if the Helicopter was not sold. The agreement, he said, was always that the Helicopter once renovated and ready for charter would be sold to Bluebird the original proposed SPV (which was replaced by Kingfisher), and the purchase price would be set in order to match the payments to be made on the Helicopter.
85. Mr Wolf accepted that the Bluebird Letter which he wrote was not an agreement but an offer. He said that Mr Krieglstein had said "*Andreas, write it all down and send it to Bluebird*". He said he believed that Mr Krieglstein always spoke about the Helicopter being part of the Kulczyk structure which Otium held on trust. The offer was to look after the project and to complete it

through Otium. He said that Otium had clear agreements with Kulczyk. However, he accepted that he could not disclose any document from July 2011 evidencing the presentation or approval of the project by the KI Lux Board or the agreements. The only document was the reference in the email 29 September 2011 from Mr Krieglstein. However, he said he would not expect these agreements to be in writing. He was directed what to do by Dr Kulczyk (who died in 2015) or Mr Krieglstein and he trusted them. He referred to telephone conversations he had had over the summer of 2011 with KI Lux, but he said he had no record of them or access to minutes he might have taken as his employment had been terminated by Windrose. He would have had these conversations whilst managing director of Windrose which would have been the capacity in which he was speaking to Mr Krieglstein. He accepted that there is no reference to these calls in his witness statement.

86. He also accepted that there were further emails on 2 and 3 October 2011 which showed that discussions were ongoing and not yet “*fixed*”. He was still asking what “*his partner requires*” which included the possibility of an option.
87. He said that the Option Agreement was set up so that the option price payment instalments matched the dates when Otium was due to pay for the acquisition and renovation of the Helicopter i.e., a deposit of €1,550,000 payable upon the execution of the Option Agreement which was the deposit; a second instalment of €1,550,000 was payable on 15 November 2011 and a third instalment €300,000 payable on 10 December 2011. The total amount payable was €3,056,183 which Mr Wolf said was the amount KI Lux considered to be involved in the acquisition and renovation of the Helicopter. He said after the Option Agreement was signed by him there was “*no risk*” for Otium and “*the risk*” was all with Kingfisher. He said in cross-examination that in Germany, Kingfisher would have become the owner once confirmation of payments had been received. He said that there was never discussion about what would happen if the option was not exercised.
88. He said in cross-examination that if the Option Agreement had not been signed then he could have pulled out of the arrangements and any costs that had been accrued until then would have been paid by KI Lux because there was a lot of trust in the structure. He also said that Otium had its own money which it could have used to fulfil its liabilities with regard to the Helicopter at this time. He accepted that at the end of September beginning of October there were discussions still ongoing about the financing and/or security with respect to the Helicopter. He was also told that it needed to be the best structure for Kulczyk. He said there was no difference between an option agreement and a purchase agreement as the Option Agreement contained all the payment obligations.
89. Mr Wolf agreed with the reasons that Kingfisher gave in evidence for the change from the Option Agreement to the Loan Agreement i.e., the impact of German VAT. His evidence was that Kingfisher on a number of occasions started the registration process in Germany for VAT but didn’t complete this. He also said it was KI Lux that instructed Kingfisher to agree to the Loan Agreement to replace the Option Agreement. Mr Wolf accepted that the Loan Agreement was not a purchase agreement nor did it provide for the Loan only to be enforced on the sale of the Helicopter nor was there a term in the Loan Agreement which stated that Otium would not be liable to pay back the Loan, nor a provision that Kingfisher be registered for VAT in Germany and that the Loan Agreement provided for interest. He said this was where “*it went wrong*” for Otium. Mr Wolf said he signed the Loan Agreement under great financial pressure because the contracts for the repair and renovation of the Helicopter had already been signed by him, but Kingfisher was delaying the payments. He said the intention remained that Kingfisher would purchase the Helicopter once it was repaired and renovated. This is evident, he said, from a letter from him to Kingfisher misdated as 25 April 2012 when it was translated into English from the correct date of 25 September 2012 (which was sent in German to Mr Krieglstein) which outlines the options for purchase price for the Helicopter by Kingfisher taking into account a €100,000 reimbursement due to the delays in delivery of the Helicopter by the Czech company

undertaking the repair and renovation. After setting out the accrual of interest on the “*capital employed*”, under the heading “*Determination of the purchase price with the calculation taken into account*” it states:

*The underlying cost calculation provided for EUR 30,708 In terms of interest on the granted loan in 2011. (determined purchase price: EUR 3,100,000). Taking this item and the obtained indemnification of EUR 100,000 into account, the total budget is EUR 130,708 for interest on the principal, or, alternatively, for a one-off reduction of the purchase price.*

*Option A Breakdown of the purchase price  
EUR 3,142,150.00 + VAT purchase price Kingfisher  
EUR 119,937.50  
EUR 10,770.50 (difference between EUR 130,708.00 and  
EUR 119,937.50)  
EUR 3,011,792.00 - new purchase price*

*Option B Payment of Interest with the purchase price being maintained  
EUR 3,142,500.00 + VAT purchase price. Kingfisher  
EUR 130,708,00 Interest payment*

### *3. Summary*

*The project is successful, The helicopter fully qualifies for certification in the required form. For the investment phase, an imputed return of 5% is ensured, Capital costs have successfully been kept constant plus additional appointments, A decision has to be made about timing of the sale of the helicopter. January 2013 would be recommendable as a tax-free transfer will be possible up until that time: The earnings generated from service of the helicopter may take the shape of a purchase price reduction or, alternatively, pro-rata returns on the capital employed.*

90. Mr Wolf agreed that the Helicopter was security for the loan but said that a registered lien was not required as Kingfisher wanted to acquire the Helicopter. He said he agreed to Annex 1 and Annex 2 of the Loan Agreement because he was waiting for the German VAT registration of Kingfisher on both occasions and, also in relation to Annex 2 for the delivery of the Helicopter.
91. He said that the interest rates stipulated in the Loan Agreement were to cover tax. He said the understanding of all the parties was that interest would be covered by Kingfisher by way of an increase in the purchase price see for example his email to Paulina Brock of Kingfisher dated 3 December 2012 where he says: “*We can calculate every interest rate. The result is the rise of the purchase price.*”. His evidence was that Otium would never have entered into the Loan Agreement on any other basis other than Kingfisher purchasing the Helicopter since it would have made no commercial sense for it to do otherwise particularly as there were no interest payments under the Option Agreement.
92. He said the Option Letter dated 25 November 2011 was produced on Kingfisher’s instructions to achieve the same effect as the Option Agreement. It confirmed that Kingfisher had an irrevocable first option to purchase the Helicopter because it had provided the Loan and to record the agreement that Kingfisher would buy the Helicopter from Otium. As this had not been exercised or revoked by Kingfisher, he said Otium is unable to sell the Helicopter without the consent of Kingfisher. In cross-examination he said Mr Krieglstein had said they needed this Option Letter just in case and he had referred, in jest, to Mr Wolf’s driving style and that “*something might happen to him*”.
93. He said that on 25 September 2013 Kingfisher and Otium agreed that Otium should try to sell the Helicopter on the open market “*for and on behalf of Kingfisher based on the instructions of KI Lux/Kingfisher.*” His evidence was that it was agreed that the sale price would fully discharge

Otium Offshore from any debt under Loan Agreement even if below the outstanding sum and Kingfisher would cooperate with Otium Offshore to secure the sale of the Helicopter.

94. He said that the sale required both the consent of Kingfisher and the letter of subordination which would include a term that the Loan would be repaid from the sale proceeds of the Helicopter. He said that the letter of subordination was never signed by Kingfisher although lawyers from KI Lux commented on the draft document. His evidence was that Kingfisher did not provide any support and so the sale could not take place. He did not agree that the repayment was not sought by Kingfisher when the Loan became due for the reasons put forward by Ms Bowen i.e. the long history of the relationship but rather he said it was because the plan had always been to sell the Helicopter to Kingfisher. He said it was never part of the agreement that Otium would charter the Helicopter on its own account although he accepted that Otium had chartered the Helicopter to have income (through Heliteam). By September 2013 he said that, contrary to Ms Bowen's evidence, it was not Otium's business model that had become unsustainable but rather the charter market and charter prices were an issue for the investment Kingfisher had made in the Helicopter as it was no longer profitable.
95. He said, Kingfisher failed to purchase the Helicopter as agreed. Kingfisher failed to register for VAT therefore this prevented the Helicopter being sold or the Helicopter being transferred to Kingfisher. He accepted that Kingfisher did not need a tax identification number if the Helicopter was sold to a third party, unless Kingfisher was the seller to the third party. Each potential sale that Mr Wolf found to a third party he said was thwarted by Kingfisher failing to provide their consent to the sale in time. The value of the Helicopter has greatly diminished but he said it could still be transferred to Kingfisher at any time as settlement for the alleged claims of Kingfisher. He accepted that the email dated 26 September 2018 from Mr Redziniak had no legal effect. He accepted that no agreement was concluded which provided that the Loan between Otium and Kingfisher would be considered settled by the sale of the Helicopter, even if the sale price was less than the value of the outstanding loan with the balance being written off by Kingfisher.
96. Mr Wolf accepted that the draft letter of subordination which he provided acknowledges the Loan Agreement in the following clause:

*“On grounds of the current market situation, the Borrower is not a position to sell helicopter M18T serial no. 10534 without generating losses that would prevent full repayment of the Loan. To avoid potential over indebtedness under insolvency law and insolvency of the Borrower, the following Subordination Agreement including a respite is entered into. The validity of the liability as such shall remain unaffected hereof. A waiver of the claim is not agreed.”*

97. He accepted that there is no reference in the letter of subordination to conditions having not been met by Kingfisher but stated that was because these references would not belong in the document. He also accepted that between 2013 and 2016 that he hadn't needed or required a subordination agreement to market and sell the Helicopter. He said that the reason was Dr Kulczyk was still alive (whom he trusted) and there was a lot of trust in the structure.
98. He said he refused to sign the Annex 3 dated 22 February 2017 sent under cover of an email from Natalie Dorey of 24 February 2017 because there was no contractual basis for the additional interest and under German law he could only put on the balance sheet what has been agreed and his view was that the Loan Agreement had ended on 31 May 2012. He accepted that Otium is indebted to Kingfisher under the Loan Agreement because Otium Offshore had received €3 million. He said that his view was that when the Loan Agreement ended, the agreement regarding interest accruing ended. He didn't accept that the addition of the term *“The Lender will not demand the repayment of the loan to the extent that it would make the Borrower insolvent”* into the draft of Annex 3 had the equivalent effect of the letter of subordination as it

was time limited and would not have helped Otium under German law. He said the letter of subordination was needed exclusively in order to sell the Helicopter (and not an attempt to reduce liability under the Loan Agreement) but did later accept it was of benefit to the balance sheet of Otium Offshore.

99. The Letter of Demand was a shock to Mr Wolf. He said he would never have signed the Loan Agreement without the “*firm intention and contractual agreement by KI Lux*” that it would acquire the Helicopter through an SPV. He never had any interest in acquiring the Helicopter for Otium’s own benefit and he was merely acting as requested by persons of the KI Group that he trusted. He said in cross-examination “*I wasn’t sceptical about the consequences we were both on the same side.*”. He also said that, “*If I had known what it means to conclude something on the law of Guernsey then I would think about it again*”.
100. Mr Wolf said that the Helicopter was currently in a hanger in Rotenberg in Germany and has an approximate value of between €25,000 and 50,000.

### **The Submissions**

101. The Plaintiff’s case is a straightforward one i.e., the Defendants are liable to repay the Loan with interest and in accordance with German law are jointly and severally liable under the terms of Loan Agreement as amended by the two annexes. The Defendants’ case is that the Plaintiff’s case is over-simplistic and requires the Court to look beyond the Loan Agreement and puts forward five alternative arguments.
102. The Defendants submit that the Loan Agreement must be put in the context KI Lux’s intention to purchase a Helicopter through an SPV which ultimately turned out to be Kingfisher. This the Defendants define as the Transaction. Kingfisher and Otium agreed with KI Lux to carry out the Transaction and this agreement to carry out the Transaction is defined by the Defendants as the Purchase Agreement which they say is shown in the parties’ correspondence, course of dealing and business common sense.
103. The Defendants first argument is that the Loan Agreement does not include all the terms of the contract between the parties. Three additional terms are incorporated into the Loan Agreement. The first additional term is that Kingfisher would purchase the Helicopter from Otium, which Advocate de Verneuil-Smith refers to as the key term; the second additional term is that Kingfisher’s right to repayment of the Loan including interest would be deferred until after the sale of the Helicopter; and the third additional term is that the Loan including interest would be paid from the proceeds of sale of the Helicopter and any balance would be written off. Advocate de Verneuil-Smith’s submissions were that the second two terms are consequential to the key term.
104. The Defendants’ submissions are that these three terms should be construed into the Loan Agreement. There is no entire agreement clause, and the evidence supports a conclusion that outwith the four corners of the Loan Agreement, there are the three further terms. Further the Defendants say that in reliance on the principles of construction including the exceptions to the parol evidence rule; and on an objective examination of the relevant factual background interpreted in line with business common sense that the Loan Agreement should be construed by the Court to include these terms.
105. The Defendants say that as an exception to the parol evidence rule where there is no entire agreement clause, the Court is permitted to look at extrinsic evidence to show that the written agreement was not intended to be the entire contract. As set out in *Sheppard v CI Fire & Security (Guernsey) Limited* (unreported, 29 July 2009, at para. 6) quoted in *St Margaret’s Lodge Hotel Limited v Elvio Pires* 44/2015 at paragraph 47:

*“Article 35 of the Loi relative aux Preuves of 1865, as amended, provides:*

*“Lorsqu’il s’agit d’une convention par écrit il n’est reçu aucune preuve par témoins contre ou outre le contenu de la pièce excepté dans les cas spéciaux reconnus par la loi.”*

*The effect of Article 35 and the parol evidence rule was considered by this Court in Sheppard v C.I. Fire & Security (Guernsey) Limited (unreported, 29 July 2009, at para. 6):*

*“The Jurats were directed as follows (substantially based on the principles set out in Chitty on Contracts, 28th edition, vol 1, paras 12.094 – 12.097): (i) The parol evidence rule, as set out in the cases cited on behalf of P was described; (ii) However, it is and has long been subject to a number of exceptions. In the words of Chitty, “In particular, since the nineteenth century, the courts have been prepared to admit extrinsic evidence of terms additional to those contained in the written document if it is shown that the document was not intended to express the entire agreement between the parties. So, for example, if the parties intend their contract to be partly oral and partly in writing, extrinsic evidence is admissible to prove the oral part of the agreement.” Chitty continues (para 12-095): “It cannot therefore be asserted that, in modern times, the mere production of a written agreement, however complete it may look, will as a matter of law render inadmissible evidence of other terms not included expressly or by reference to the document.”; (iii) it is always open to a party to adduce extrinsic evidence to prove that the document is not a complete record of the Contract. The Law Commission in 1986 stated (para 12-097): “... there is no rule of law that evidence is rendered inadmissible or is to be ignored solely because a document exists which looks like a complete contract. Whether it is a complete contract depends on the intention of the parties, objectively judged, and not on any rule of law.”. It was noted in passing, that the Guernsey authority, the Hougue Fouque CASE (Supra) permitted extrinsic evidence; (iv) however, the burden lies on D in this case, on the balance of probabilities, to show that any further contractual terms were agreed outside the written terms of the document.”*

106. Further, subsequent conduct can be relied upon to establish that the written agreement in question represents only part of the totality of the parties’ contractual relationship. To prove the true nature of the agreement even if this may vary or add to the written instrument, extrinsic evidence is permitted to show that there was a contract and what the terms of the contract were and whether a term was incorporated into a contract (see *Chitty* 13-126-127).

107. The Defendants say that the Court must apply an objective test to properly construe the contract. In this case this means that the Court must look beyond the Loan Agreement and in doing this should take into account the principles set out by Lord Hoffman at 912 in *Investors Compensation Scheme Ltd v West Bromwich* [1998] 1 WLR 896:

*The principles may be summarised as follows:*

*(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having 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.*

*(2) The background was famously referred to by Lord Wilberforce as the “matrix of fact.” But this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be*

*mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.*

*(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification ...*

*(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean.*

*The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax.*

*(5) The “rule” that words should be given their “natural and ordinary meaning” reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said ... “if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense.*

108. Further the Defendants say that the Court must take into account that “no contracts are made in a vacuum; there is always a setting in which they have to be placed” (see Reardon Smith Line Limited v Yngvar Hansoen-Tangen [1976] 1 WLR 989 at page 995. The Court must place itself in the same factual matrix in which the parties were at the time of the making of the contract regarding the commercial purpose of the contract, its genesis, background and context as well as the market in which it was operating. The Defendants also rely on business common sense which they say supports their case.
109. Applying these principles to the first or key term which the Defendants say should be construed into the contract, the Defendants point to the acknowledgement by Kingfisher in the Replique that KI Lux originally decided it would acquire the Helicopter. This intention was further stated in the email from Mr Krieglstein of 29 September 2011 in response to the Bluebird Letter. The difference between KI Lux and Kingfisher on the facts is artificial. The denial by Kingfisher that there was no agreement to purchase when considering the contemporaneous documents, evidence of the witnesses and the objective test of what a reasonable person would have understood the parties to have agreed at the time they entered into the Loan Agreement including the very incorporation of Kingfisher, is they say, unsustainable and all points to the term being part of the Loan Agreement. The Loan Agreement on its terms does not make commercial sense for Kingfisher (nor for KI Lux), nor was it credible that Kingfisher would act contrary to the wishes of KI Lux, given Mr Krieglstein’s involvement on behalf of KI Lux.
110. The Option Agreement was a manifestation of the intention to purchase the Helicopter. Mr Wolf’s evidence was that this was in effect a purchase agreement, requiring exclusivity for Kingfisher over the Helicopter. Advocate de Verneuil-Smith points to the request for Otium to hold the Helicopter to Kingfisher’s order and the non-refundable deposit under the Option Agreement. The amounts under the Option Agreement were the same as the amounts paid under the Loan Agreement. The Option Letter which the Defendants say remains unrevoked also supports the Defendants’ case and combined with the Loan Agreement effectively keeps Otium “hostage” as it cannot sell the Helicopter.

111. The decision to change the Option Agreement to the Loan Agreement due to German VAT issue did not change the underlying intention for Kingfisher to purchase the Helicopter. Further if there was a change of intention to purchase the Helicopter, this was not communicated to Otium and the Defendants say a reasonable observer, using the test from *Investors Compensation Scheme Ltd v West Bromwich (ibid)*, would not have known this. The letter dealing with reimbursement of German VAT sent on 25 November 2011, on the same day as the Option Letter, shows it was the intention of the parties to purchase the Helicopter. The Defendants say the acknowledgment by Ms Bowen in cross-examination of what she said in her email of 6 November 2015 that “*it was the intention at one point that [Kingfisher] would take over the ownership of the Helicopter*”, is clear evidence to any reasonable person that at some point Kingfisher intended to purchase the Helicopter. The email from Ms Brock of 8 February 2013 referring to “*the current position where the Guernsey company owns the aircraft*” is also evidence of subsequent conduct that the term was part of the contract. Answers given by the Plaintiff’s witnesses that purchasing the Helicopter was only one option ignored the plain language of email of 6 November 2015 and they were, the Defendants say, evasive about the meaning of the email of 8 February 2013. Likewise, the response by Ms Bowen in cross-examination to the reference in Ms Brock’s email of 11 March 2015 to “*Otium currently operating the M18 ultimately for and on behalf of Kingfisher*” was evasive. Other emails where Ms Brock refers to Kingfisher’s intention to own the Helicopter support the Defendants’ submission that this term formed part of the Loan Agreement. They also rely on Mr Krieglstein’s references in his emails to ownership on trust for Kingfisher and ownership by KI Lux which were unrectified by any director of Kingfisher and they say reflected the truth and the parties’ intentions. Further the fact it was contemplated that Otium would acquire the shares in Kingfisher demonstrates that a lender/borrower characterisation of the parties does not add up. This all goes to the Defendants’ pleading that the term that the Helicopter would be purchased by Kingfisher is a contractual part of the Loan Agreement.
112. The second term that the Defendants say that the Court should construe as part of the Loan agreement is that repayment of the Loan including interest would be deferred until after the sale of the Helicopter. Again, the Defendants say the evidence supports this argument by reference to evidence prior to the Loan Agreement and evidence after the Loan Agreement. The terms of the Blue Bird Letter, the Loan Agreement, its amount and the fact of the extensions including the evidence that Kingfisher did not seek due diligence on Otium’s ability to repay the Loan at the time of the Loan Agreement and the reasons Mr Wolf agreed to them, and the subsequent extensions including the third Annex to which Otium did not agree, the lack of seeking enforcement of the Loan by Kingfisher until March 2019 and the subsequent correspondence between the parties was all on the basis that the Loan Agreement would not be enforced without the sale of the Helicopter.
113. Likewise, the third term that the Loan including interest would be paid from the proceeds of sale of the Helicopter and any balance written off is supported by the evidence. The Defendants say the evidence particularly subsequent to the Loan Agreement means that the Court should construe this term as being part of the Loan Agreement. They refer to the emails between Kingfisher, Otium and KI Lux in support of this construction.
114. The Defendants also argue that it is a condition precedent that before any sale of the Helicopter that Kingfisher would first register for German VAT otherwise German VAT would be payable on the sale of the Helicopter to Kingfisher. It was Mr Wolf’s evidence that because of the expectation that Kingfisher would so register that Mr Wolf agreed to Annex 1 and 2 of the Loan Agreement extending the period of repayment. In the Re-amended Defences (and opening argument) although not in their closing argument, the Defendants also argue that the three terms which on the first argument the Defendants say should be construed into the Loan Agreement, as an alternative amount to a condition or conditions precedent.

115. If the Court finds that these terms and/or conditions precedent are present, the Defendants submit that the Plaintiff has breached the terms and the Defendants are entitled to relief.
116. The second alternative argument on behalf of the Defendants is that if the Court does not regard the terms as incorporated by construction, having considered all the evidence, the Court should imply the same terms into the Loan Agreement, in addition to an implied term that Kingfisher would cooperate with Otium and act in good faith to secure the sale of the Helicopter to itself or a third party. In relation to the latter implied term the Defendants rely on Kallang Shipping SA v AXG Assurances Senegal (NO.2.) [2008] EWHC 2761 that the Court is likely to imply a term that the parties shall cooperate to ensure the performance of their bargain “*where positive coo-operation between the parties is required to bring about a particular end contemplated by the contract*”. The Defendants also rely on Yang Seng Pte Ltd v International Trade Corporation Limited [2013] EWHC 111 that in this contract that there is a duty of good faith. In this case the Defendants say this term is necessary and intended to allow the sale of the Helicopter.
117. The Defendants submit that if the Court finds that these terms have been implied into the Loan Agreement the Plaintiff has breached these terms and therefore the Defendants are entitled to relief.
118. The third alternative argument on behalf of the Defendants was that Kingfisher’s representations prior to, at the time of and following the Loan Agreement amount to collateral contracts. These added to or varied the Loan Agreement and estop Kingfisher from seeking to enforce the strict terms of the Loan Agreement. As well as the relevant passages from Chitty, the Defendants rely on the principles from The Innpreneur Pub Company (GL) v East Crown (unreported 28 July 2000) which were cited with approval in St Margaret’s Lodge v Elvio Peres (ibid):

*“The relevant legal principles regarding the recognition of pre-contractual promises or assurances as collateral warranties may be stated as follows:*

- (1) *a pre-contractual statement will only be treated as having contractual effect if the evidence shows that parties intended this to be the case. Intention is a question of fact to be decided by looking at the totality of the evidence;*
- (2) *the test is the ordinary objective test for the formation of a contract: what is relevant is not the subjective thought of one party but what a reasonable outside observer would infer from all the circumstances;*
- (3) *in deciding the question of intention, one important consideration will be whether the statement is followed by further negotiations and a written contract not containing any term corresponding to the statement. In such a case, it will be harder to infer that the statement was intended to have contractual effect because the prima facie assumption will be that the written contract includes all the terms the parties wanted to be binding between them;*
- (4) *a further important factor will be the lapse of time between the statement and the making of the formal contract. The longer the interval, the greater the presumption must be that the parties did not intend the statement to have contractual effect in relation to a subsequent deal;*
- (5) *a representation is much more likely intended to have contractual effect than a statement of future fact or a future forecast.”*

119. This can mean that “*when a person gives a promise or an assurance to another, intending that he should act on it by entering into a contract, and he does act on it by entering into the contract, we hold that it is binding.*” (see J. Evans & Son (Portsmouth) Ltd v Andrea Merzario [1976] 1 WLR 1078 at 1081). The effect of a collateral contract may be to vary the terms of the main contract or to estop a party from acting inconsistently with it if it would be inequitable for him

to do so, and a breach of a collateral contract will also give rise to an action for damages for its breach.

120. In support of their argument the Defendants rely in particular on the email of 29 September 2011, the terms of the Option Agreement, the reason for terminating the Option Agreement, the letters of 25 November 2011 sent by Otium which the Defendants say were at the request of the Plaintiff and the unrevoked Option Letter as fulfilling the evidential test identified in *Inntrepreneur Pub Company (GL) v East Crown (ibid)*. They further argue the remainder of the *Inntrepreneur Pub Company (GL) v East Crown (ibid)* tests are satisfied, including the lack of the entire agreement clause, and the possibility of collateral contracts is referred to within the Loan Agreement. The lapse of time between the last representation (25 November 2011) and the Loan Agreement (14 December) is not, they say, significant. All of this the Defendants argue is supported by the fact that Kingfisher did not demand repayment until March 2019.
121. If the Court finds that there are the collateral contracts pleaded by the Defendants, the Defendants say that Kingfisher has breached those contracts.
122. The fourth alternative argument the Defendants plead is that there was an agreement to vary the Purchase Agreement (as defined above) (although in submissions the Defendants refer to a variation of the Loan Agreement between 25 September 2013 and 14 October 2013 (pleaded as “on and around 25 September 2013” in the Re-amended Defences)). This variation includes a term that the parties agreed that the Helicopter would be sold on the open market. The variation includes further terms that the Loan would not be enforced without the sale of the Helicopter, the Helicopter would be sold on the open market for the best possible price and Otium would pay the proceeds to Kingfisher in complete settlement of any liability with the remainder of the Loan being written off (as an implied term or condition precedent). There is a further implied term or condition precedent that Kingfisher’s right to demand or sue for the Loan funds would be deferred until after the sale of the Helicopter. The variation also includes an implied term of cooperation between the parties to secure a sale. The Defendants rely on the requests for the extension of the Loan Agreement, the requests by Kingfisher for updates on the progress with Otium’s responses, correspondence dealing with the sales to a third party and repayment of the Loan and in particular the emails of 25 September 2013, 26 September 2013 and 14 October 2013 dealing with the sale of the Helicopter to a third party. The Defendants say the consideration for this variation was Otium seeking to sell the Helicopter and the payment of maintenance on the Helicopter by Otium during this period.
123. The Defendants submit that on the basis of this variation the Plaintiff breached the Loan Agreement as varied including frustrating the sales such that the Defendants are not bound to perform the contract, are discharged from their obligations and are therefore not liable for the sums on the Loan Agreement.
124. The fifth alternative put forward by the Defendants is that “*something went wrong*” with the language of the Loan Agreement. It does not reflect the intention of the parties as it was not the parties’ intention that the Loan Agreement would be enforced in the absence of a sale of the Helicopter. The intention was that the Loan would be repaid from the proceeds of sale with any residual balance being written off contrary to the repayment term of the Loan Agreement (clause 5) (as amended by Annex 1 and 2). The Defendants argue that the rules of construction allow the Court to depart from the natural meaning of the words of the Loan Agreement. They rely in particular on Lord Hoffman’s words in *Investors Compensation Scheme Ltd v West Bromwich (ibid)* at 913:

“5) *The ‘rule’ that words should be given their ‘natural and ordinary meaning’ reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone*

*wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had.”*

125. On the principles of commercial common sense, they say the outcome where the Loan is called in by the Plaintiff without the Helicopter having been sold cannot have been commercially sensible solution for either party and should be deviated from by the Court. They say there was a mistake in the language of the contract which should be cured by properly construing that term in the way submitted by the Defendants as set out by Lord Hoffman above.
126. If the Court considers that the Loan Agreement should be so interpreted the Defendants argue that this would relieve the Defendants from liability in the absence of the Helicopter being sold.
127. The Defendants also argue if the Court does not find that the Defendants are discharged from all liability, the Defendants are entitled to set off the amount due by them as a consequence of the Plaintiff's breaches of contract on the basis of any of the Defendants' first four arguments set out above. The fact there is no counterclaim does not mean that the Defendants cannot rely on set off (following English law).
128. The Plaintiff's case is that the contract between the parties is contained within the four walls of the written Loan Agreement. Advocate McGuffin submitted it was for the Defendants to show that the terms that they argue are part of the contract (whether express, implied, condition precedent, collateral contract or by variation) are present. However, none of the arguments put forward by the Defendants are supported by the evidence.
129. The Plaintiff agrees that the principles of *Investors Compensation Scheme Ltd v West Bromwich (ibid)* are applicable in this jurisdiction. However, the Defendants in their argument on construction are seeking to include previous negotiations of the parties and declarations of their subjective intent for the purposes of drawing inferences about what the contract means. The Plaintiff agrees that of the test of the parties' intentions is objective however contrary to the evidence relied on by the Defendants, the parties' actual or subjective intentions are irrelevant. The parties cannot give direct evidence of what their intention was. (See *Reardon Smith Line Limited v Ynggvar Hansen-Tangen (ibid)*.).
130. Advocate McGuffin on behalf of the Plaintiff relies on the judgment of the Supreme Court in *Arnold v Britton and others [2015] UKSC 36* and the judgment of Lord Neuberger at page 1629 paragraph 21:

*“The fifth point concerns the facts known to the parties. When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to both parties. Given that a contract is a bilateral, or synallagmatic, arrangement involving both parties, it cannot be right, when interpreting a contractual provision, to take into account a fact or circumstance known only to one of the parties.”*

131. In relation to the general rules on the construction of the contract as well as the Defendants' fifth alternative argument that “*something went wrong*” with the wording, the Plaintiff emphasises the approach the Court should take set out in *Rainy Sky SA v Kookmin Bank [2011] UKSC 50* at 23 where Lord Clarke said:

*“Where the parties have used unambiguous language, the court must apply it. This can be seen from the decision of the Court of Appeal in Co-operative Wholesale Society Ltd v National Westminster Bank plc [1995] 1 EGLR 97, [1995] 01 EG 111. The court was considering the true construction of rent review clauses in a number of different cases. The underlying result which the landlords sought in each case was the same. The court regarded it as a most improbable commercial result. Where the result, though*

*improbable, flowed from the unambiguous language of the clause, the landlords succeeded, whereas where it did not, they failed.”*

132. This is not a case where the Defendants are arguing mistake. Fundamentally the Defendants are asking the Court to re-write the contract. Mr Wolf on behalf of the Defendants wrote the contract and the general rule is that the terms of a contract are construed against the author. Further, this is not a contract which is open to more than one interpretation and therefore the application of business common sense is of no assistance to the Court.
133. Further the general rule is that evidence of conduct subsequent to the making of a contract is not admissible for the purpose of interpreting the contract (see 15-060 of Chitty). Commercial common sense is not to be invoked retrospectively: the fact that a contractual arrangement has, with hindsight, worked out badly, is not a reason for departing from the natural language. The Court cannot rewrite the language which the parties have used to make the contract conform to business common sense even if ill-advised (see *Arnold v Britton* page 1628 at para 20 and *Cooperative Wholesale Society Ltd v National Westminster* 1994 WL 1060926). Further while commercial common sense is a very important factor to take into account when interpreting a contract, a Court should be slow to reject the natural meaning of the words used simply because it was a very imprudent term for one of the parties to have agreed: the purpose of interpretation is to identify what the parties have agreed, not what the Court thinks that they should have agreed.
134. *BMA Special Opportunities Hub Fund Ltd & Others v African Minerals and Finance Ltd* at paragraph 24:

*“The court's job is to discern the intention of the parties, objectively speaking, from the words used in the commercial document, in the relevant context and against the factual background in which the document was created. The starting point is the wording of the document itself and the principle that the commercial parties who agreed the wording intended the words used to mean what they say in setting out the parties' respective rights and obligations. If there are two possible constructions of the document a court is entitled to prefer the construction which is more consistent with “business common sense,” if that can be ascertained. However, I would agree with the statements of Briggs J, in Jackson v Dear ([2012] EWHC 2060 at 40 (Ch)) first, that “commercial common sense” is not to be elevated to an overriding criterion of construction and, secondly, that the parties should not be subjected to “. . . the individual judge's own notions of what might have been the sensible solution to the parties' conundrum”. I would add, still less should the issue of construction be determined by what seems like “commercial common sense” from the point of view of one of the parties to the contract.”*

135. The Plaintiff says that there is no ambiguity in the language. The Loan Agreement makes clear the terms the parties contracted upon and there is no ambiguity. Significant weight should be placed on the words used. The three terms which the Defendants say are part of the contract are not there and the aids to interpretation and construction will not assist the Defendants. The evidence supports the Plaintiff's case and in the absence of ambiguity, again the Defendants cannot ask the Court to rewrite the contract. Mr Wolf's own evidence did not support the defences that the Defendants were relying on. An objective analysis of the parties' words and conduct does not support the Defendants' case.
136. The Plaintiff submitted in relation to the argument that the three terms and the obligation to register for VAT are condition or conditions precedent, the Defendants need to establish that there was an agreement to purchase and that the terms of that agreement must be between Kingfisher and Otium (and not with a third party) as the conditional element is reliant on their

respective contractual performances. They failed to establish this, so this argument is not sustainable.

137. The second alternative case of the Defendants is that the three terms should be implied into the Loan Agreement along with an implied term that Kingfisher would cooperate with Otium and act in good faith to secure the sale of the Helicopter to itself or a third party. These are all terms that would be implied in fact rather than law.
138. The Plaintiff relies on the Newmarket Holdings v Musa Holdings Limited 14/2014 where Beloff J.A at paragraph 24 sets out the following principles:

*“The classic exposition of the relevant principles is found in Attorney General of Belize and Others v Belize Telecom Ltd and Another [2009] UKPC 10 at paragraphs 16 to 27 in the judgment of Lord Hoffman, applied in the Bailiwick the case of Woodbourne Trustees Limited v Generali Worldwide Insurance Company Limited 2011-12 GLR, Note 5 (Southwell LB and Jurats). From the Note I extract the following observations (citations omitted):*

*“(c) the issue as to whether any further term were to be implied could arise only if there were something missing or not dealt with in express terms, or if the express terms required an implied term to make sense .....;*  
*(d) the necessity for implying a term had to arise from the construction of the express terms; it was not to be considered in isolation from or in contradiction of, the express terms, and it had to be required in order to make real sense (commercially or otherwise) of the express terms – not merely to add what the parties might reasonably have added if they had so decided .....;*  
*and (e) a term was only to be implied if it would be necessary to give business efficacy to the contract; it had to be so obvious that it went without saying; it had to be capable of clear expression, and it was not to contradict any express term of the contract.”*

*See further Chitty op cit Vol 1. Para 13-006 – 13-007.”*

139. The Plaintiff says that the Court must be mindful of words of Lord Hoffman in Attorney General of Belize v Belize Telecom [2009] UKPC 10 at paragraph 17:

*“The question of implication arises when the instrument does not expressly provide for what is to happen when some event occurs. The most usual inference in such a case is that nothing is to happen. If the parties had intended something to happen, the instrument would have said so. Otherwise, the express provisions of the instrument are to continue to operate undisturbed. If the event has caused loss to one or other of the parties, the loss lies where it falls.”*

140. The Plaintiff says the additional terms which the Defendants seek to imply are not needed. The Loan Agreement operates on its written terms and the evidence does not suggest their implication is necessary. The terms that the Defendants seek to imply contradict the express terms of the contract. Money was loaned, interest charged and both are due to be repaid. In evidence, the Loan Agreement was acknowledged to work by Mr Wolf and the terms which the Defendants are seeking to be implied were not required because it was a Loan Agreement. There were multiple examples in evidence of the directors of Kingfisher making clear that there was never a decision to purchase the Helicopter. A purchase agreement in the Loan Agreement would be inconsistent with the terms of the Loan Agreement. A purchase agreement would have been inconsistent with the Option Agreement (which was in any event terminated by agreement between the parties) nor is there any basis for implying the other two terms. The Plaintiff submits that the implication of an implied term of good faith or of cooperation, is not settled law in England and Wales nor in Guernsey. However, in any event, as there are no terms

in relation to the purchase or sale of the Helicopter in the contract whether express or implied or otherwise, the further implied term does not need to be considered as it is dependent on the obligation to purchase the Helicopter being found. In any event on the facts if the Court did imply such a term, the Plaintiff did not breach it as it is evident that Kingfisher did cooperate.

141. On the Defendants' pleading that there is a collateral contract or contracts, the Plaintiff says the Defendants fail on the evidence to show that there were the representations made by Kingfisher which gave rise to a collateral contract or contracts which include terms that Kingfisher would purchase the Helicopter from Otium, that Kingfisher's right to repayment of the Loan including interest would be deferred until after the sale of the Helicopter; the Loan including interest would be paid from the proceeds of sale of the Helicopter and any balance would be written off as well as an obligation on Kingfisher to co-operate with and assist Otium Offshore to secure a sale of the Helicopter. At best there is the unilateral Option Letter (which the Plaintiff says is not binding) but that does not require the Plaintiff to exercise the option and does not amount to a collateral contract. If the Option Letter is binding as an option, then relying on this document would be entirely inconsistent with the Defendants' argument that the Plaintiff is contractually obliged to purchase the Helicopter.
142. The fourth argument that there was a variation of the Loan Agreement also fails on the evidence. The main communication which the Defendants rely on was not addressed to Mr Wolf or to Otium and it is only the parties who could agree to vary the Loan Agreement. At the time of the alleged variation which the Defendants plead in their Re-amended Defences, Mr Wolf acknowledged in evidence that the parties were only investigating commercial options (i.e. for Kingfisher purchasing the Helicopter or for the Helicopter to be sold to a third party). Mr Wolf accepted in evidence that Kingfisher did not agree that it would not enforce the Loan. Mr Wolf also accepted that the debt, by virtue of the Loan, was acknowledged by the Defendants on numerous occasions after the alleged variation and an agreement to settle was never concluded. Mr Wolf also agreed that the sentence which Kingfisher offered to insert into Annex 3 (which the Defendants rely on in support of their arrangement on variation) was never agreed. He also accepted that even if had been agreed it would have been limited such that the Plaintiff only agreed not to call on the debt to the extent that it would make Otium insolvent but not to write off the Loan or a promise that the remainder of the Loan was not repayable.
143. The arguments on set off require the Court to find that Kingfisher have breached the Loan Agreement or the other alleged agreements or terms which the Defendants have pleaded in addition to the written terms of the Loan Agreement. The Plaintiff says that the Defendants have failed to show that the Loan Agreement is more than the four walls of the Loan Agreement. The fact there is no counterclaim is indicative of a lack of conviction in the Defendants own case.

## **Discussion**

144. Counsel helpfully identified issues for determination at trial which were of assistance in coming to the conclusions in this judgment although these were modified to take into account the way in which the case was presented by Counsel. Taking into account the evidence and the submissions on the law, these can be reformulated into three questions: the first question is what are the terms of the Loan Agreement entered into by the Plaintiff and the Second Defendant; the second question is have the terms of the Loan Agreement established under the answer to the first question been varied (over and above the Annex 1 and 2 which are accepted variations); and the third question is, what is the liability of the Defendants, if any, under the Loan Agreement as varied or otherwise.
145. The first question is what are the terms of the Loan Agreement entered into by the Plaintiff and Second Defendant.

146. Lady Arden in *Credit Suisse Asset Management LLC v Titan Europe 2006-1 Plc* [2016] EWCA Civ 1293 at paragraph 28 says:

*“Indeed, it is a fundamental principle of English contract law, known as the principle of party autonomy, that in general parties are free to make the contract which they choose to make. It follows from this that the court will not rewrite the parties' bargain. The task of the court is true construction of what they have expressed in their contract, though (and this is a point I make, not Lord Neuberger), because of the imperfections of language, there may on occasions be “obvious interstices in what is expressed which have to be filled up” (per Lord Wright, Luxor (Eastbourne) v Cooper [1941] AC 108, 138).”*

147. The maxim “*la convention fait les lois des parties*” forms part of the law of Guernsey. The Court must establish applying the normal principles of contract law what was the “whole” contract in this matter. Interpretation is concerned with “*what is there*” and involves “*deciding what the parties meant by what they said*” (See Chitty 16-003).

148. The Deputy Bailiff directed the Jurats that she agreed with the Plaintiff that it was for the Defendants to show on a balance of probabilities that the terms that they argue are part of the contract are present.

149. The Deputy Bailiff directed the Jurats that the starting point in this case must be the terms agreed between the parties in the Loan Agreement. Although not specially pleaded or submitted by the Defendants, Advocate de Verneuil-Smith said, in answer to a question from the Deputy Bailiff, that it was the Defendants’ case that the terms were part written, part in emails and part oral. The Deputy Bailiff directed the Jurats that in order for the Court to construe that the additional terms formed part of the contract it was necessary for them to be satisfied that the parties i.e., the Plaintiff and the Defendants had agreed the additional terms. Extrinsic evidence is permissible in this exercise as an exception to the parol evidence rule (see *St Margaret’s Lodge v Elvio Peres* (*ibid*)). The Deputy Bailiff directed the Jurats that, as a matter of law, when interpreting the terms of a contract, the starting point was to give the words used their ordinary and natural meaning. The modern view of admitting extrinsic evidence is permissible to assist with this, however, this does not mean that the Court can rewrite the language used by the parties where it is clear and unambiguous. The negotiations of the parties are not admissible as evidence of the terms for which each party was contending in the course of negotiations.

150. The Deputy Bailiff directed the Jurats that the Guernsey Courts have adopted the English principles of construction and directed them to the summary of *Arnold v Britton* [2015] UKSC 36 in *Midland Resources Holding Limited v Prodefin Trading Limited* 34/2017 and the judgment of Anderson JA at paragraph 14:

*“Lord Neuberger summarised those principles at para 15: “When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to “what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean”, to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd [2009] AC 1101 , para 14. And it does so by focussing on the meaning of the relevant words ... in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions.”*

151. In considering commercial common sense the Deputy Bailiff directed the Jurats that the ultimate aim of interpreting a provision in a contract, especially a commercial contract which this was, was to determine what the parties meant by the language used, which involved ascertaining what a reasonable person would have understood the parties to have meant. The relevant reasonable person was one who had all the background knowledge which would reasonably have been available to the parties in the situation in which they had been at the time of the contract. Where the parties had used unambiguous language, the Court had to apply it. It was settled law that where a term of a contract was open to more than one interpretation, it was generally appropriate to adopt the interpretation which was most consistent with business common sense. It was not required to conclude that a particular construction would produce an absurd or irrational result before proceedings to have regard to the commercial purpose of the agreement.
152. The Court must be able to conclude with confidence that the parties intended to create contractual relations. It is necessary for the Defendants to prove that the alleged terms beyond the written terms of the Loan Agreement are in the contract or have contractual effect. The Deputy Bailiff directed the Jurats that post-contractual conduct is admissible in deciding what terms the parties agreed, as opposed to its meaning, where the contract is not contained wholly in writing. The Jurats were satisfied that there is no entire agreement clause although the agreement did contain a term “*that all changes and additions to the loan agreement and other collateral agreements must be in writing*”. The Jurats found that the terms of the Loan Agreement were clear on the face of it. The Deputy Bailiff directed the Jurats that the parties could waive the contractual obligation which was contained in the Loan Agreement for additional terms to be in writing however the burden was on the Defendants to show any further contractual terms. Therefore, the next step was for the Jurats to consider whether the Loan Agreement was the whole contract or whether there were in fact additional terms.
153. The Jurats found on the evidence that some of the conversations and emails that the Defendants rely on were created before Kingfisher existed and therefore cannot have involved Kingfisher. Whilst the Jurats had little doubt that Mr Wolf and thus Otium’s behaviour was heavily influenced by his relationship with members of the Kulczyk organisation, the contractual relationship the Defendants had was with the Plaintiff. It was also evident to the Jurats from the responses given by Mr Wolf that he would have been assisted by obtaining Guernsey legal advice before entering the written agreements which were subject to Guernsey Law and where the effect is significantly different from his understanding of what would have been the result in Germany. Mr Wolf’s own oral evidence contained an acceptance that KI Lux and Kingfisher are different corporate entities. There was no argument put forward that KI Lux or its officers were acting or held out as agents for Kingfisher or had the power to bind Kingfisher contractually and the Jurats were satisfied on the evidence before them this was not the case.
154. The Jurats found that the correspondence on or around the time of the Option Agreement, the Option Agreement itself, the correspondence on or around the time of the Loan Agreement and the conduct of the parties after the Loan Agreement showed that the parties had an expectation that they would reduce any agreement or terms into writing. Further this expectation derived not only from the parties themselves but also from KI Lux who referred for the need for these arrangements to be “*at arms-length*”.
155. The Jurats also concluded that at the commencement of the project, the purchase by Kingfisher was a likely outcome as demonstrated by the Option Agreement but the recognition by Kingfisher in evidence of an original “*intention to purchase*” was not the same as a contractually binding term to buy the Helicopter within the Loan Agreement. Further the Jurats did not find that there was substance to the submission that the distinction between KI Lux and Kingfisher was artificial. Kingfisher has a separate identity and directors. The Jurats found that the Option Agreement did not include a term that Kingfisher had to purchase the Helicopter and in any event this agreement was terminated by both parties and replaced by the Loan Agreement. The

Jurats were satisfied that despite the unilateral Option Letter (regardless of whether it was requested by Kingfisher or not) there was no contractual term between the parties for Kingfisher to purchase the Helicopter. Further the Jurats did not find that the conduct after the Loan Agreement was executed showed that the alleged term that Kingfisher would buy the Helicopter is incorporated into the Loan Agreement or the other terms alleged by the Defendants. The Jurats found that the terms of the draft subordination agreement supported the Plaintiff's case of the terms and effect of the Loan Agreement. The Jurats found that the parties were working cooperatively with each other and with KI Lux, but Kingfisher was not contractually bound to purchase the Helicopter. The parties had during the majority of the relationship a good working relationship and that although there were discussions between KI Lux, Mr Wolf and officers of Artemis and that this included about the purchase of the Helicopter, they did not find that there was a contractual term or a binding agreement between Kingfisher and Otium Offshore that Kingfisher would buy the Helicopter, nor did they find the second additional term that Kingfisher's right to repayment of the Loan including interest would be deferred until after the sale of the Helicopter nor the third additional term that the Loan including interest would be paid from the proceeds of sale of the Helicopter and any balance would be written off. The Jurats did not find evidence of the contractual terms that the Defendants alleged are present. Therefore, the Jurats did not find the Defendants first argument made out.

156. The Jurats were further satisfied that this was not a case about ambiguous language. An objective examination of the relevant factual background interpreted in line with business common sense did not lead to the conclusion that the additional terms were present in the contract. The Jurats were satisfied that applying commercial common sense did not assist the Defendants. To do so in these circumstances was to a pre-text for rewriting the bargain.
157. The Deputy Bailiff directed the Jurats that in order to satisfy the presence of a condition precedent in a contract, the Defendants would need to show that it was a condition or term of the contract that the Defendants only became liable on the occurrence or non-occurrence of an event. On the Defendants' submission this meant that it is a condition precedent that before any sale of the Helicopter that Kingfisher would first register for German VAT otherwise German VAT would be payable on the sale to Kingfisher. The Deputy Bailiff directed the Jurats that extrinsic evidence is admissible to show that a contract was executed with the intention that it should only take effect as a contract on the performance of a condition precedent. The Jurats were not satisfied that there was any such condition precedent nor was it a term of the Loan Agreement. The parties discussed registration for VAT intermittently on the basis of "if" Kingfisher bought the Helicopter, without conclusion, but there was no requirement under the Loan Agreement for this to be done. Further having found there is no term that the Helicopter has to be sold to Kingfisher, the condition precedent has no foundation within the terms of the contract. In the Re-amended Defences (and opening argument) although not in their closing argument, the Defendants also say it is a condition precedent that the Helicopter is sold to Kingfisher and/or that Kingfisher's right to demand or sue for the Loan Funds would be deferred until the sale of the Helicopter. The Jurats found that the evidence does not support the additional terms as being conditions precedents of the Loan Agreement. The Jurats were not satisfied that the evidence showed that the Loan Agreement was executed with the intention that the terms as to repayment of the Loan would only take effect on the sale of the Helicopter to Kingfisher and that the Loan funds were to be repaid from the purchase price or that Kingfisher's right to demand or sue for the Loan Funds would be deferred until the sale of the Helicopter.
158. The Deputy Bailiff directed the Jurats that when considering as a matter of fact the terms which the Defendants say should be implied, which must be clear, precise and capable of expression, and further for each one the Jurats should use the directions of the Privy Council in *Ali v Petroleum Company of Trinidad and Tobago* [2017] UKPC 2 which Chitty refers to as a helpful summary:

*“It is enough to reiterate that the process of implying a term into the contract must not become the re-writing of the contract in a way which the court believes to be reasonable, or which the court prefers to the agreement which the parties have negotiated. A term is to be implied only if it is necessary to make the contract work, and thus it may be if (i) it is so obvious that it goes without saying (and the parties, although they did not, ex hypothesi, apply their minds to the point, would have rounded on the notional officious bystander to say, and with one voice, “Oh, of course”) and/or (ii) it is necessary to give the contract business efficacy. Usually the outcome of either approach will be the same. The concept of necessity must not be watered down. Necessity is not established by showing that the contract would be improved by the addition. The fairness or equity of a suggested implied term is an essential but not a sufficient pre-condition for inclusion. And if there is an express term in the contract which is inconsistent with the proposed implied term, the latter cannot, by definition, meet these tests, since the parties have demonstrated that it is not their agreement.”*

159. The Jurats were satisfied that there is no need to imply the terms set out by the Defendants. The terms of the Loan Agreement operate coherently and understandably as the terms of the Loan which the parties agreed. The Jurats were not persuaded that the pleaded terms should be implied into the Loan Agreement. They are not obvious or necessary. The terms that the Defendants are seeking to imply were fundamentally inconsistent with express terms. The Deputy Bailiff directed the Jurats that it was not necessary to consider the additional term of good faith or cooperation because that was dependent on the Jurats having found the term (whether implied or express or by way of collateral contract) that Kingfisher is contractually obliged to purchase the Helicopter is a term of the Loan Agreement which they did not.
160. The third alternative argument on behalf of the Defendants was that Kingfisher's representations prior to, at the time of and following the Loan Agreement amount to collateral contract or contracts. These collateral contract submissions are on the basis that the additional terms under the Defendants' first argument are in the alternative a collateral contract or contracts. However, in the Defences, the pleading is limited to the terms of the Option Letter constituting a collateral contract to the Loan Agreement or a separate contract between the parties.
161. The Deputy Bailiff directed the Jurats although it is possible to establish a form of collateral agreement to vary the express terms of a written agreement or to agree not to enforce its terms strictly, that this will be difficult. (See *St Margaret's Lodge v Elvio Peres* (*ibid*)).
162. The Deputy Bailiff directed the Jurats that as the collateral contract based on the three terms had not been pleaded that it was not necessary for them to consider this. However, the Jurats found that, in any event, if they had been required to decide whether there was such a collateral contract or contracts, they would not have concluded that there are such contracts. The email of 29 September 2011 is before Kingfisher was incorporated. As Mr Wolf accepted, it was not possible for Kingfisher to contract before its existence (if this is the argument although it is unclear) nor promises to be made before it existed on the basis of what it might do. Further the Jurats did not find on the evidence that there was such a contract or contracts. Whilst there were discussions and negotiations, no collateral contract or contracts were made out. With regard to the Option Letter, the Jurats found that this did not amount to a collateral contract. It was an option granted by Otium. It does not require the Plaintiff's to exercise the option and would be inconsistent with an obligation on the Plaintiff to purchase the Helicopter. The Jurats were satisfied that there were no collateral contracts. The Deputy Bailiff directed the Jurats that having come to the conclusion that there was no collateral contract or contracts it was not necessary for them to be directed on the issue of estoppel of the enforcement of the contract. The Jurats found it significant that Otium has never demanded enforcement of the alleged terms particularly in relation to the purchase of the Helicopter on the basis of any of the arguments put forward by the Defendants.

163. The fifth alternative argument put forward by the Defendants is that “*something went wrong*” with language of the Loan Agreement such that it does not reflect the intention of the parties that the Loan Agreement would not be enforced in the absence of a sale of the Helicopter. It is not pleaded as a mistake but rather that the principle found in *Investors Compensation Scheme v West Bromwich* (*ibid*) that the normal “rule” is that words should be given their “*natural and ordinary meaning*” can be distinguished where the meaning would involve an absurdity, or would create some inconsistency with the rest of the instrument or where there has been some obvious linguistic mistake or where if the words were construed in their ordinary sense they would lead to a very unreasonable result or impose upon a contractor a responsibility which it could not reasonably be supposed he meant to assume (see 13-083 Chitty).

164. The Deputy Bailiff also directed the Jurats to take into account the guidance offered by the Supreme Court in *Arnold v Britton* [2015] AC 1619 about the interpretation of contractual provisions, especially the first factor identified by Lord Neuberger (at para. 17):

*“... the reliance placed in some cases on commercial common sense and surrounding circumstances (e g in Chartbrook [2009] AC 1101, paras 16-26) should not be invoked to undervalue the importance of the language of a provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision.”*

165. In the Jurats’ view there was no obvious error in the Loan Agreement. It requires a fundamental re-drafting of the Loan Agreement to achieve what the Defendants say went wrong. There is nothing to suggest that Mr Wolf, when he drafted the Loan Agreement, made a mistake nor in the two subsequent extensions drafted by Kingfisher in the form of Annex 1 or 2 in which each party confirmed the obligation of repayment contained an intention which neither party had that the Loan would not be called in without the sale of the Helicopter. The language is plain. The Jurats agreed that it is not reasonable to find that something went wrong with the language.

166. Therefore, in answer to the first question posed, the Jurats concluded that the terms of the Loan Agreement are the natural and ordinary meaning of the written terms contained in the document signed on behalf of Otium Offshore on 21 November 2011 and executed by Artemis as director of Kingfisher on 14<sup>th</sup> December 2011 as amended by Annex 1 and 2.

167. The second question is whether or not the Loan Agreement has been varied (over and above Annex 1 and 2 which were not in dispute). This was the fourth alternative argument put forward by the Defendants. They argued there was an agreement to vary the Purchase Agreement as defined in the pleadings, although in submissions it is the Loan Agreement which the Defendants say was varied. However, the Jurats found that on either version, the evidence did not support the Defendants’ argument. It was not necessary for the Jurats to find that “*on or around 25 September 2013*” as pleaded in the Defences covered a period between 25 September 2013 to 14 October 2013 which on Advocate de Verneuil-Smith’s submissions was a matter of fact to be decided by the Jurats. None of the witnesses considered that there is a variation to the Loan Agreement which is the relevant agreement between the parties to this litigation. Nor does the documentary evidence support the Defendants’ case. There was no obligation upon Kingfisher to consent to the sale of the Helicopter nor to sign the subordination agreement although the Jurats noted that there was no evidence either of Kingfisher not cooperating with the Defendants in any event. It was also notable that a subordination agreement was not referred to in the early discussions about a sale of the Helicopter to a third party. Clearly there were discussions about

the sale on the open market, but these were commercial options only. Therefore, the answer to the second question is that other than Annex 1 and 2 there has been no variation to the Loan Agreement.

168. The third question posed is what is the liability of the Defendants, if any, under the Loan Agreement. The Deputy Bailiff directed the Jurats as they had not found that the Defendants had been successful on any of the arguments in relation to additional obligations of the Plaintiff, it was not necessary for them to consider the Defendants' submissions on set off.
169. The Defendants have pleaded that Kingfisher has failed to mitigate its alleged loss and damage by failing to make a payment demand before 12 March 2019, and / or (ii) enforce the security under the Loan Agreement. The Deputy Bailiff directed the Jurats that what is reasonable for a person to do in mitigation of damage is not a question of law but one of fact in the circumstances of the particular case and thus a question for the Jurats. Kingfisher is not under any obligation to do anything other than in the ordinary course of business, the standard is not a high one since the Defendants are the ones who are liable for breach of contract for the unpaid debt. The Jurats found that Kingfisher was not obliged to purchase the Helicopter, nor did Kingfisher prevent a sale of the Helicopter to a third party (rather it supported the attempts by the Defendants to sell the Helicopter) nor was it obliged to call in the security under the Loan Agreement or call for repayment at an earlier date. The Jurats consider that there was no further mitigation that the Plaintiff could have reasonably undertaken in the circumstances.
170. In the light of the Jurats' conclusions above, the Jurats find that the Plaintiff is entitled to the claim for the sum of €3,000,000 on the basis that the sum is due and owing under the Loan Agreement and in accordance with German Law, the three Defendants are jointly and severally liable for the said sum.
171. The Plaintiff has claimed contractual interest at the rate 5% from the date payment under the Loan Agreement (as varied) to the date of judgment. The Defendants deny that the Plaintiff is entitled to contractual interest beyond 31 May 2012.
172. The Loan Agreement says that "*the loan has interest at the rate of 5 per cent per annum. Interest is payable at the end of the contract period and due to be transferred to an account to be designated by the Lender.*" The Plaintiff's evidence is that interest has continued to accrue and at various times since the Loan Agreement was executed Kingfisher has provided the calculations for the interest. Mr Wolf did not accept that interest continued to accrue after the last agreed extension date i.e. 31 May 2012 (see for example the email 6 March 2017). The Deputy Bailiff directed that the Jurats should apply the same principles of construction set out above. The Jurats found that the Loan Agreement provided that interest was payable up to the end of the contract period. The contract period is defined under clause 5 of the Loan Agreement as "up to the day 29 of February 2012". The contract period was then extended on two occasions by Annex 1 and Annex 2. The first extension was until 30 April 2012 and the final extension was until 31 May 2012. There was no further extension agreed. Therefore, it is the conclusion of the Jurats that contractual interest did not continue to accrue after 31 May 2012.

## **Conclusion**

173. For the reasons given the Court is satisfied that the Plaintiff has proved that the Defendants are jointly and severally liable to the Plaintiff for the amount of the Loan and contractual interest at the rate of 5% up to 31 May 2012.
174. Counsel are invited to agree the terms of the order to be made against the Defendants including the calculation of contractual interest due. Costs would normally follow the event but if there is any dispute between the parties on the costs of these proceedings and/or the Plaintiff's claim for

interest under the Judgments (Interest) (Bailiwick of Guernsey) Law, 1985, either party can bring an application for directions at an early sitting of the Interlocutory Court.