

| | |
|---|---|
| <p>1 Friday, 20 November 2015</p> <p>2 (10.30 am)</p> <p>3 Housekeeping</p> <p>4 MR ALLISON: Good morning, my Lord.</p> <p>5 MR JUSTICE HILDYARD: Good morning.</p> <p>6 THE WITNESS: Good morning.</p> <p>7 MR ALLISON: Before continuing with Professor Mülbert, there</p> <p>8 was one matter where I agreed to provide I think my Lord</p> <p>9 and Mr Dicker with some further information. I have</p> <p>10 already provided it to Mr Dicker, and I will provide it</p> <p>11 to my Lord now. This was in relation to the handful of</p> <p>12 further authorities that was provided to Freshfields at</p> <p>13 1.00 on Tuesday, as my Lord knows.</p> <p>14 MR JUSTICE HILDYARD: Yes.</p> <p>15 MR ALLISON: My Lord, the background is important but I can</p> <p>16 be short. We saw yesterday that in relation to each of</p> <p>17 the arguments, ie when a sum from a terminated contract</p> <p>18 becomes due, whether a proof of debt can be a warning</p> <p>19 notice and whether the exception to a warning notice</p> <p>20 could be triggered by an insolvency application,</p> <p>21 Professor Mülbert was very frank in acknowledging there</p> <p>22 was no textbook or authority in support of that. As</p> <p>23 a result, those instructing me had continued to search</p> <p>24 German materials to see whether there was anything else</p> <p>25 not in the reports that could be brought to my Lord's</p> <p>Page 1</p> | <p>1 so be it.</p> <p>2 That is the background.</p> <p>3 We saw yesterday that in view of the answers that</p> <p>4 Professor Mülbert gave, I actually I think only needed</p> <p>5 to touch on one -- I think one and a half my Lord said</p> <p>6 at the end of yesterday. The half was in relation to</p> <p>7 the burden of proof for lost profits, because</p> <p>8 Professor Mülbert recognised that there are different</p> <p>9 decisions saying different things but then expressed his</p> <p>10 view as an expert as to what he thought the correct</p> <p>11 answer should be. Which was a balance of probabilities,</p> <p>12 so I don't think I need to go to that authority.</p> <p>13 I think there was only one authority that I would</p> <p>14 like to ask Professor Mülbert about today, which was the</p> <p>15 heating bill case which I indicated to Professor Mülbert</p> <p>16 yesterday the relevant paragraph within that decision</p> <p>17 and Professor Mülbert indicated that he had received the</p> <p>18 materials in advance of the hearing and had a chance to</p> <p>19 look at them.</p> <p>20 I am in my Lord's hands. That is the only one</p> <p>21 I actually wanted to put to the witness this morning, if</p> <p>22 my Lord permits me.</p> <p>23 MR JUSTICE HILDYARD: Thank you very much, Mr Allison. When</p> <p>24 you say "last Tuesday", do you mean Tuesday the 10th?</p> <p>25 MR ALLISON: My Lord, I do mean Tuesday the 10th,</p> <p>Page 3</p> |
| <p>1 attention as part of a process that would be of</p> <p>2 assistance.</p> <p>3 That is a process that has been continuing since</p> <p>4 after the joint statement of experts was agreed and</p> <p>5 there was the addendum to that joint statement.</p> <p>6 The handful of the cases in the supplemental bundle</p> <p>7 were part of a batch identified as part of that process.</p> <p>8 Just so my Lord knows the chronology, they were sent to</p> <p>9 the translator by those instructing me last Tuesday</p> <p>10 while we were dealing with costs of funding issues.</p> <p>11 They received translations on Thursday and Friday of</p> <p>12 last week. They reviewed them over the weekend,</p> <p>13 provided comments to the translator on Monday and then</p> <p>14 they were provided to Freshfields on Tuesday as soon as</p> <p>15 the translator had looked at those comments. That is</p> <p>16 the chronology for my Lord.</p> <p>17 Just so my Lord knows as well, I am sure the task</p> <p>18 has been going on on the other side because there was</p> <p>19 one authority, I think it may have been referred to as</p> <p>20 a footnote in the reports but was not in the bundle. We</p> <p>21 received a translation of that for the first time from</p> <p>22 Freshfields at 10.00 pm this Tuesday but it was a short</p> <p>23 report we reviewed it Tuesday and thought it may be</p> <p>24 relevant to the court issues and so it should go into</p> <p>25 the bundle. If they wish to ask Judge Fischer about it,</p> <p>Page 2</p> | <p>1 absolutely.</p> <p>2 MR JUSTICE HILDYARD: That is when it was provided to the</p> <p>3 translators?</p> <p>4 MR ALLISON: My Lord, yes, as part of the larger batch.</p> <p>5 MR JUSTICE HILDYARD: Do you say it would have come to the</p> <p>6 notice of Mr Dicker's clients at that stage?</p> <p>7 MR ALLISON: My Lord, no, it was not. It was provided to</p> <p>8 translators Tuesday the 10th, we received translations</p> <p>9 on the Thursday evening and the Friday. They were</p> <p>10 reviewed along with other translations over the weekend</p> <p>11 by Kirkland & Ellis both in Munich and London discussing</p> <p>12 with one another and also by junior counsel to see what</p> <p>13 of the batch may be relevant to my Lord's issues.</p> <p>14 MR JUSTICE HILDYARD: Right.</p> <p>15 MR ALLISON: Then as soon as the translator had agreed the</p> <p>16 small suggested revisions to those documents on Tuesday</p> <p>17 they were provided immediately to Freshfields that, is</p> <p>18 the chronology my Lord.</p> <p>19 MR JUSTICE HILDYARD: Tuesday the 17th.</p> <p>20 MR ALLISON: My Lord yes, absolutely. Absolutely.</p> <p>21 MR JUSTICE HILDYARD: I had understood that there was</p> <p>22 a process for, as it were, everyone to be happy with the</p> <p>23 translation?</p> <p>24 MR ALLISON: My Lord, absolutely, there is a process for the</p> <p>25 translations that are to go into the bundle, there is</p> <p>Page 4</p> |

| | |
|---|--|
| <p>1 an agreed translation --</p> <p>2 MR JUSTICE HILDYARD: When did that take place?</p> <p>3 MR ALLISON: The agreed translator, my Lord, looked at the</p> <p>4 documents, as I said, provided initial comments because</p> <p>5 they used the same agreed translator in advance as part</p> <p>6 of the wider batch --</p> <p>7 MR JUSTICE HILDYARD: That is the agreed translator, but</p> <p>8 when was the translation agreed?</p> <p>9 MR ALLISON: By the agreed translator on Tuesday an agreed</p> <p>10 translation was approved by the agreed translator and</p> <p>11 sent to both Wentworth and to Freshfields at that time.</p> <p>12 MR JUSTICE HILDYARD: Maybe I am being opaque. My</p> <p>13 understanding is that there is an agreed translator who</p> <p>14 produces translations, which translations then go</p> <p>15 through a process of being agreed so that the</p> <p>16 translation which emerges is one which neither side can</p> <p>17 object to.</p> <p>18 MR ALLISON: My Lord, that is absolutely correct.</p> <p>19 MR JUSTICE HILDYARD: When did that take place, that last</p> <p>20 stage?</p> <p>21 MR ALLISON: The last stage, I am sorry, my Lord, if</p> <p>22 I didn't make that clear. The last stage is the</p> <p>23 translation, as prepared by the agreed translator was</p> <p>24 provided to Freshfields for the first time for any</p> <p>25 comments they had on the translation at 1.00 pm on this</p> <p style="text-align: center;">Page 5</p> | <p>1 not become payable until after the invoice but not in</p> <p>2 the context of a deposit, so that is the purpose.</p> <p>3 MR JUSTICE HILDYARD: I see.</p> <p>4 Mr Dicker?</p> <p>5 MR DICKER: My Lord, we are concerned to ensure that your</p> <p>6 Lordship decides matters on the basis of relevant German</p> <p>7 law. What has happened in our submission is plainly not</p> <p>8 satisfactory, but I am not going to say anymore about</p> <p>9 that.</p> <p>10 My Lord, the only thing I would say is that</p> <p>11 obviously Professor Mülbart needs to be able to say</p> <p>12 whether and to what extent he has had a chance to</p> <p>13 consider the decision and to do the sort of research,</p> <p>14 which I think he indicated yesterday he might wish to.</p> <p>15 We are slightly concerned on this side, as your</p> <p>16 Lordship knows, this is not adversarial litigation of</p> <p>17 the normal sort. We are here, although not in fact as</p> <p>18 representative creditors, running arguments in the</p> <p>19 interests of all unsecured creditors of LBIE and</p> <p>20 obviously their interests need to be taken into account</p> <p>21 in this process as well.</p> <p>22 My Lord, I do not object, all I do ask is obviously</p> <p>23 Professor Mülbart is given an opportunity, if he feels</p> <p>24 it necessary, to be able to respond. I don't know</p> <p>25 whether he has had adequate opportunity so far.</p> <p style="text-align: center;">Page 7</p> |
| <p>1 Tuesday.</p> <p>2 MR JUSTICE HILDYARD: Tuesday the 17th. I see.</p> <p>3 MR ALLISON: Absolutely.</p> <p>4 MR JUSTICE HILDYARD: Okay.</p> <p>5 This final case you wish to refer to, that was</p> <p>6 notified in that way and you only seek to rely on the</p> <p>7 passage you indicated to the Professor, is that right?</p> <p>8 MR ALLISON: My Lord, that is the key passage but I probably</p> <p>9 was going to take the Professor through the three-page</p> <p>10 report just so he can understand the context of the</p> <p>11 passage.</p> <p>12 MR JUSTICE HILDYARD: Right.</p> <p>13 You identified to Mr Dicker did you the purpose for</p> <p>14 which you wish to refer to the case?</p> <p>15 MR ALLISON: We identified the paragraphs yesterday, but</p> <p>16 I think I identified orally actually yesterday the</p> <p>17 purpose for which I wanted to rely on this case. As</p> <p>18 a response, Professor Mülbart said that the landlord</p> <p>19 case relied on by Judge Fischer, what may be different</p> <p>20 because it arose in the deposit context -- I don't know</p> <p>21 if my Lord recalls that?</p> <p>22 MR JUSTICE HILDYARD: Yes.</p> <p>23 MR ALLISON: Therefore what I said is to Professor Mülbart,</p> <p>24 orally yesterday, as Mr Dicker heard, this case is</p> <p>25 important because it is a case in which the bill does</p> <p style="text-align: center;">Page 6</p> | <p>1 MR JUSTICE HILDYARD: That seems fair and reasonable to me,</p> <p>2 Mr Allison.</p> <p>3 There is a certain unreality in the treatment of</p> <p>4 foreign law as facts in that we can all read the English</p> <p>5 translation -- provided there is no flaw in it -- we can</p> <p>6 all reach our conclusions guided by the experts as to</p> <p>7 the proper way of approaching the German law.</p> <p>8 Let us continue. I think if Professor Mülbart</p> <p>9 wanted to cite additional authority or put in some</p> <p>10 explanation, you could not really object to that and we</p> <p>11 would have to have some time to do so. Hopefully it</p> <p>12 would not require him to be recalled, that would be</p> <p>13 a great pity, but let us cross that bridge if we come to</p> <p>14 it.</p> <p>15 MR ALLISON: My Lord, of course.</p> <p>16 MR JUSTICE HILDYARD: Yes.</p> <p>17 Professor, I am sorry about this, I am not going to</p> <p>18 call it learned discussion, I am just going to call it</p> <p>19 chit-chat between us and we can now get on with your</p> <p>20 examination.</p> <p>21 Evidence of PROFESSOR PETER OTTO MÜLBART (continued)</p> <p>22 A. Thank you my Lord.</p> <p>23 Cross-examination by MR ALLISON (continued)</p> <p>24 MR ALLISON: Professor Mülbart, even though we have just</p> <p>25 heard that discussion, I will pick up where we were</p> <p style="text-align: center;">Page 8</p> |

| | |
|--|---|
| <p>1 yesterday and finish the questions in relation to</p> <p>2 assignment before we come to this point.</p> <p>3 We were looking at the ability of an assignee to</p> <p>4 assert a greater claim for further damage than the</p> <p>5 assignor, do you recall that yesterday?</p> <p>6 A. Yes.</p> <p>7 Q. Can we agree -- again, I think we reached there -- what</p> <p>8 an assignee can claim? A claim for further damage is</p> <p>9 a claim for damage actually suffered by reason of the</p> <p>10 delay, isn't it?</p> <p>11 A. Yes.</p> <p>12 Q. You agree that the assignee cannot make a claim for</p> <p>13 further damage in respect of the period before the</p> <p>14 assignment, don't you?</p> <p>15 A. My Lord, this is not a simple yes or no answer. It</p> <p>16 depends on whether the claim that arose prior to the</p> <p>17 transfer was transferred as well or not. If not, he</p> <p>18 cannot claim that net amount. If the transfer took</p> <p>19 place, he can claim that amount.</p> <p>20 Q. Thank you, Professor Mülbert. Just building on that,</p> <p>21 when you say he can claim that amount, in relation to</p> <p>22 the period before the assignment, by "that amount" you</p> <p>23 are referring to the loss of the assignor during that</p> <p>24 period, aren't you?</p> <p>25 A. Yes, I refer to that loss.</p> <p style="text-align: right;">Page 9</p> | <p>1 happened only in the last month after the assignment,</p> <p>2 isn't it?</p> <p>3 A. Yes.</p> <p>4 Q. That is because the delay relevant to the damages claim</p> <p>5 only occurred in that month?</p> <p>6 A. My Lord, I would not put it that way. The delay</p> <p>7 occurred on, as I understand the case, on 1 April and it</p> <p>8 went on until the claim was repaid. It is just that the</p> <p>9 transferee had the claim only for the period from 1 June</p> <p>10 to 30 June and because of that period, he is only</p> <p>11 entitled to damages for that period.</p> <p>12 MR JUSTICE HILDYARD: In his own right?</p> <p>13 A. Pardon?</p> <p>14 MR JUSTICE HILDYARD: In his own right?</p> <p>15 A. Pardon, yes, in his own right.</p> <p>16 MR ALLISON: You said yesterday that that claim, the claim</p> <p>17 of the assignee, was rooted in the claim of the</p> <p>18 assignor. Do you remember that?</p> <p>19 A. Yes, I -- my Lord, may I clarify? I said that --</p> <p>20 I think I expressed it slightly differently. I said</p> <p>21 that the root for -- the damage claim rooted in the</p> <p>22 claim that the debtor's claim existing at the time of</p> <p>23 the delay default and it is the default -- and the claim</p> <p>24 arising out of that would -- did not materialise, the</p> <p>25 claim arising because of the default did not materialise</p> <p style="text-align: right;">Page 11</p> |
| <p>1 Q. After the assignment, it is the loss of the assignee</p> <p>2 that becomes relevant, yes?</p> <p>3 A. Yes.</p> <p>4 Q. Let's just see if we can agree how that works with</p> <p>5 a simple example.</p> <p>6 You have a debt where there is default on the</p> <p>7 1 April, so there is a sum that is owed which is</p> <p>8 defaulted on 1 April.</p> <p>9 It is then assigned two months later and in that</p> <p>10 two-month period before the assignment the assignor has</p> <p>11 not actually suffered any further damage during that</p> <p>12 period.</p> <p>13 The debt is repaid a further month later.</p> <p>14 If the assignee wants to assert a claim for further</p> <p>15 damage, let's say the lost interest on a deposit</p> <p>16 account, the way it would have used the money, do you</p> <p>17 say that the assignee can claim further damage for the</p> <p>18 lost interest for the whole three-month period or only</p> <p>19 for the one month after the assignment?</p> <p>20 A. My Lord, according to my understanding, he can claim the</p> <p>21 amount for the one month following the transfer.</p> <p>22 Q. You would agree that it cannot claim any loss of</p> <p>23 interest for the two-month period before the assignment?</p> <p>24 A. Yes, I agree with that.</p> <p>25 Q. That is because the relevant loss for the assignee</p> <p style="text-align: right;">Page 10</p> | <p>1 or become fully existent because there was no damage on</p> <p>2 the part of the debtor, but still the legal basis for</p> <p>3 that claim for the damages claim came into existence at</p> <p>4 the time of the default.</p> <p>5 Q. You are not saying that the assignor actually had the</p> <p>6 assignee's claim for further damage before the</p> <p>7 assignment, are you?</p> <p>8 A. No, I don't say that.</p> <p>9 Q. Can we just look at one authority on the point. If you</p> <p>10 could pick up volume 1, please, and go to tab 14.</p> <p>11 Professor Mülbert, you may recall that we looked at</p> <p>12 this case together yesterday and you agreed that the</p> <p>13 Bundesgerichtshof expressly left open the question of</p> <p>14 whether the assignee's damages are limited to those of</p> <p>15 the assignor. Do you recall that?</p> <p>16 A. Yes, I recall that.</p> <p>17 Q. The passage I would like to have a look at with you is</p> <p>18 in (ii), and do you see in the English, on the third</p> <p>19 line, the words "Claims for ..."?</p> <p>20 A. Yes.</p> <p>21 Q. Would you mind just reading "Claims for ..." until you</p> <p>22 will see eight lines down the words, "... person of the</p> <p>23 assignee".</p> <p>24 (Pause)</p> <p>25 A. Yes.</p> <p style="text-align: right;">Page 12</p> |

| | |
|---|---|
| <p>1 Q. Do you see that?</p> <p>2 A. Yes.</p> <p>3 Q. What the court says is that the claims for compensation</p> <p>4 are allowed because of the -- they use the words, "The</p> <p>5 change in legal responsibility to a new creditor".</p> <p>6 The court is talking about the assignee becoming</p> <p>7 a new creditor, and a new creditor with its own claim to</p> <p>8 damages, isn't it?</p> <p>9 A. My Lord, I can't find that understanding even in the</p> <p>10 English version and I can't find it even less in the</p> <p>11 German original.</p> <p>12 According to my understanding -- I have pondered</p> <p>13 that question we are discussing now myself before</p> <p>14 writing my report -- the German version does not say</p> <p>15 that there is a new claim, it talks about a new</p> <p>16 creditor, which is obviously the case because of the</p> <p>17 transfer of the claim but, according to my</p> <p>18 understanding, the German version, or the German</p> <p>19 original, does not say that there is a new claim</p> <p>20 arising.</p> <p>21 Q. Would you agree that the court does say that there has</p> <p>22 been a change in legal responsibility?</p> <p>23 A. Again, my Lord, the German word used is that -- the</p> <p>24 German idea, as I understand it, is that it is now the</p> <p>25 new creditor who holds the claim, it is not about</p> <p style="text-align: center;">Page 13</p> | <p>1 what -- whether the amount withheld would have been</p> <p>2 invested in total or only in part.</p> <p>3 Q. It depends on the facts I think you would say?</p> <p>4 A. It depends on the facts.</p> <p>5 Q. Can I give you one, possibly two examples, to just check</p> <p>6 we agree on the way it works. Company A and company B,</p> <p>7 there is a debt of 2 million euros owed by company A to</p> <p>8 company B. That is defaulted. Company B needs to</p> <p>9 borrow during the period of default but only needs to</p> <p>10 borrow 1 million euros, and it borrows 1 million euros</p> <p>11 at 4 per cent.</p> <p>12 Would you say that the court makes an award of</p> <p>13 further damage based on the borrowing of</p> <p>14 1 million euros, that is right, isn't it?</p> <p>15 A. The court with respect to the 4 per cent, yes, he would</p> <p>16 make that award based on the 1 million, but that doesn't</p> <p>17 tell anything about the rest that is to say the other</p> <p>18 million owed.</p> <p>19 Q. Which may, in relation to the other 1 million, if</p> <p>20 a specific loss could be proved, there may be able to be</p> <p>21 an additional lump sum recovery in relation to that?</p> <p>22 A. There may be, my Lord, but also if the company would</p> <p>23 have invested that 1 million profitably and was not able</p> <p>24 to do that, the rules on the loss, the compensation for</p> <p>25 missed investment opportunities would apply. That again</p> <p style="text-align: center;">Page 15</p> |
| <p>1 responsibilities, it is about who owns the claim.</p> <p>2 Q. After the assignment, the assignee owns, as a new</p> <p>3 creditor, the claim for its own further damages?</p> <p>4 A. Yes.</p> <p>5 Q. Thank you Professor Mülbart.</p> <p>6 Just one quick series of questions in relation to</p> <p>7 damages before we look at the additional case together.</p> <p>8 In the joint statement you and Judge Fischer agree</p> <p>9 that the court awards damages as a matter of the</p> <p>10 exercise of its discretion, yes?</p> <p>11 A. Yes, my Lord, subject, according to my understanding, to</p> <p>12 what is set out by substantive law and in particular</p> <p>13 subject to the requirements provided for by section 252.</p> <p>14 The BGB, which is part of substantive law and not of</p> <p>15 procedural law.</p> <p>16 Q. Thank you. You also agree that when making a damages</p> <p>17 award, if the court makes that award at a rate rather</p> <p>18 than an amount, it may refer to a smaller amount than</p> <p>19 the one for which the debtor is in default?</p> <p>20 A. Yes, my Lord. But this was meant to indicate cases</p> <p>21 where, for example, an amount would not be a part of the</p> <p>22 amount withheld, would not be invested and for that</p> <p>23 reason would not be carrying interest. It was not to</p> <p>24 say that the court could arbitrarily award interest only</p> <p>25 to a part of the funds, it relates back to the question</p> <p style="text-align: center;">Page 14</p> | <p>1 could be explained as a rate, so it actually depends on</p> <p>2 the facts of the case.</p> <p>3 Q. It is fact sensitive, you agree?</p> <p>4 A. I agree, yes.</p> <p>5 Q. You could end up with a rate applicable on my example</p> <p>6 only to 1 million euros of the 2 million?</p> <p>7 A. Yes, you could --</p> <p>8 Q. You could on your further example end up with two</p> <p>9 different rates, one rate applicable to the 1 million</p> <p>10 euros that was borrowed and another rate applicable to,</p> <p>11 on your example, the loss of investment opportunity?</p> <p>12 A. My Lord, that is my understanding, yes.</p> <p>13 Q. Thank you, Professor Mülbart.</p> <p>14 I think the only thing I wanted to take you to now,</p> <p>15 back in the context of when a claim falls due, is the</p> <p>16 landlord heating case. I don't know whether you have</p> <p>17 a copy of that?</p> <p>18 A. Yes, I was provided with a copy.</p> <p>19 Q. You very fairly indicated yesterday that you had had the</p> <p>20 opportunity to look at it before yesterday. Have you</p> <p>21 had a further opportunity to look at it overnight?</p> <p>22 A. My Lord, I had an opportunity to take a look at the</p> <p>23 case, even though I obviously -- yes. I am still</p> <p>24 curious about the exact -- about what the question will</p> <p>25 be about, because that was not indicated. That was</p> <p style="text-align: center;">Page 16</p> |

| | |
|--|--|
| <p>1 indicated generally but ...</p> <p>2 Q. Just to make sure we understand the context, this is</p> <p>3 a case in which the time at which the debt fell due was</p> <p>4 important because the court had to decide when the</p> <p>5 limitation period started to run, that is why the timing</p> <p>6 of default was actually important in this case.</p> <p>7 Have you picked that up from the case?</p> <p>8 A. Yes.</p> <p>9 MR JUSTICE HILDYARD: Is this in tab 8?</p> <p>10 MR ALLISON: My Lord, I am so sorry, it is not, it is in the</p> <p>11 further bundle behind tab 3.</p> <p>12 MR JUSTICE HILDYARD: Thank you.</p> <p>13 MR ALLISON: I wonder, Professor Mülbert, out of fairness,</p> <p>14 maybe I will just give you a moment just to refresh your</p> <p>15 memory on the facts of the case on the first page.</p> <p>16 (Pause)</p> <p>17 A. Thank you.</p> <p>18 Q. You see what the court had to consider for limitation</p> <p>19 purposes was: does the debt become due in the period in</p> <p>20 which the heating was actually used or only when the</p> <p>21 tenant received a bill for the heating?</p> <p>22 Do you agree with that?</p> <p>23 A. Yes.</p> <p>24 Q. If we could turn over to the third page, at letter B,</p> <p>25 which was the passage I indicated to you yesterday, so</p> <p style="text-align: center;">Page 17</p> | <p>1 you agree with that?</p> <p>2 A. Yes.</p> <p>3 Q. Then, if we can just go to the final page, there is one</p> <p>4 other observation that the court makes in the</p> <p>5 penultimate sentence of the judgment. Do you see the</p> <p>6 sentence beginning "Otherwise" six lines up from the</p> <p>7 bottom of the judgment?</p> <p>8 Perhaps you could just read that sentence. (Pause)</p> <p>9 A. Yes.</p> <p>10 Q. The court is also saying that the date is important if,</p> <p>11 actually, the calculation works the other way, so the</p> <p>12 tenant is owed some money, isn't it? (Pause)</p> <p>13 A. My Lord, may the question be repeated, please?</p> <p>14 Q. Of course, let me try. What the court is saying here is</p> <p>15 that, if when the calculation is done actually the</p> <p>16 landlord owes the tenant money, limitation for that</p> <p>17 claim does not start to run until the bill has been</p> <p>18 sent.</p> <p>19 A. My Lord, I am somewhat confused. I think I was asked to</p> <p>20 start reading with the words "Otherwise"?</p> <p>21 Q. Yes, let me read:</p> <p>22 "Otherwise the interpretation given here leads to</p> <p>23 the consequence beneficial for the tenant that the</p> <p>24 limitation period for a potential repayment claim the</p> <p>25 tenant has because of overpayment of utilities, also</p> <p style="text-align: center;">Page 19</p> |
| <p>1 page 3 of 4, letter B, do you see that?</p> <p>2 A. Yes.</p> <p>3 Q. Again, would you like to just refresh your memory on the</p> <p>4 paragraph at letter B. (Pause)</p> <p>5 A. I have refreshed, refreshed my memory.</p> <p>6 Q. Thank you. You see this is a case in which the court</p> <p>7 said that the parties had not actually agreed the due</p> <p>8 date for the claim. Do you see that?</p> <p>9 A. Yes.</p> <p>10 Q. Therefore the court had to decide when the claim fell</p> <p>11 due, and what the court found is that the claim only</p> <p>12 falls due upon issue of a verifiable bill. Do you see</p> <p>13 that?</p> <p>14 A. Yes.</p> <p>15 Q. The court said, in the last sentence, that this is to be</p> <p>16 determined from the circumstances as defined by the</p> <p>17 provision that you referred to in your reports. The</p> <p>18 reason the court says that it doesn't fall due</p> <p>19 immediately is:</p> <p>20 "Because the tenant cannot ascertain and therefore</p> <p>21 cannot pay the amount owed without a bill."</p> <p>22 Do you see that?</p> <p>23 A. Yes.</p> <p>24 Q. The court is saying that until the tenant knows what it</p> <p>25 has to pay, the debt should not be seen as being due, do</p> <p style="text-align: center;">Page 18</p> | <p>1 only begins when the bill is sent."</p> <p>2 A. My Lord, it is talking -- it is talking about</p> <p>3 an interpretation of the clause that is beneficial for</p> <p>4 the tenant, not for the landlord.</p> <p>5 Q. Indeed, I am so sorry, that is my point</p> <p>6 Professor Mülbert. If the claim became due immediately</p> <p>7 in the year the heating was used --</p> <p>8 A. Okay.</p> <p>9 Q. That would be detrimental to the tenant because it would</p> <p>10 not know it had the claim to assert, would it?</p> <p>11 A. Yes, indeed.</p> <p>12 Q. Thank you. Professor Mülbert, thank you --</p> <p>13 A. No, first --</p> <p>14 Q. Of course.</p> <p>15 A. -- I would like to draw your attention, my Lord, to</p> <p>16 another part of the decision and if I may take you to,</p> <p>17 it is on page 4, the final sentence in the third</p> <p>18 paragraph which, starting with, "Contrary to the view of</p> <p>19 the submitting court ..."</p> <p>20 Here the court explains in the final sentence --</p> <p>21 MR JUSTICE HILDYARD: Sorry, where is that?</p> <p>22 A. It is page 3, the third paragraph from above. The third</p> <p>23 paragraph starts with, "Contrary to the view ..."</p> <p>24 MR JUSTICE HILDYARD: Thank you, yes.</p> <p>25 A. The court says that, here, at least in the ... (Pause)</p> <p style="text-align: center;">Page 20</p> |

5 (Pages 17 to 20)

| | |
|---|--|
| <p>1 The court, according to my understanding, says in 2 the last paragraph that the situation differs from the 3 normal situation for which the provisions of the BGB 4 apply. 5 No, sorry, my Lord. I think I misread that part of 6 the decision. Therefore it is not necessary to draw 7 your attention to that part. I would just like to 8 add -- 9 MR ALLISON: Can I maybe just help you, I think on this 10 paragraph that you just referred to, all the court is 11 doing is saying, "These other provisions of the civil 12 code do not actually help us at all". 13 A. That is, my Lord, indeed true. What I just wanted to 14 add, to what we discussed just now, is to draw your 15 attention, my Lord, to the fact that, as we said 16 yesterday, the landlord tenant cases are a vast area 17 which in part follows rules that are determined by the 18 idea of protecting the tenant to some extent and 19 therefore cannot be generalised. 20 Moreover, in the reasoning of the court, the court 21 basically says that it follows from the circumstances, 22 one of the two elements mentioned in section 271 and 23 following from these circumstances, he comes to the 24 result that, in these circumstances, for this specific 25 situation, the bill is, or the invoice, is required for</p> <p style="text-align: center;">Page 21</p> | <p>1 Re-examination by MR DICKER 2 MR DICKER: Professor Mülbert, just a few questions by way 3 of re-examination and then your work will be done. 4 I want to start with when the single compensation 5 sum became due. Can I remind you of a passage in the 6 bundles which you wanted added to the joint statement. 7 You will find it in bundle 4, tab 15, page 527. It is 8 the second sentence of the first paragraph that I wanted 9 to ask you about, you say there: 10 "German courts and legal literature very broadly 11 agree that upon an early termination of a contract for 12 cause, a compensation claim in favour of the party 13 exercising its termination right, eg clause 7(1) GMA, 14 becomes due and payable immediately upon termination." 15 As I understand it, you illustrated that by 16 referring to two cases, the first is the vehicle damage 17 case, if you remember that and you will find that in 18 bundle 1 of the authorities at tab 29, if you could take 19 that up. It is at tab 29A. 20 The passage which my learned friend took you to, 21 I think, was paragraph marked 9. I just wanted to ask 22 you about the first, I think it is three sentences where 23 the judgment says: 24 "The concept of a due date refers to the point in 25 time where a creditor may demand performance. If the</p> <p style="text-align: center;">Page 23</p> |
| <p>1 the claim to fall due but this is following from these 2 circumstances. 3 MR JUSTICE HILDYARD: Yes. I mean as I read it, and I may 4 very well have misunderstood it and you must correct me 5 or show me how it works, there seem to be certain 6 circumstances, both generally and in the landlord and 7 tenant context, where the obligation to pay arises in 8 accordance with a set procedure, or some set rule. In 9 those circumstances, the obligation to pay is not 10 subject to any precondition of an invoice but in the 11 particular circumstances of this case, those automatic 12 payment provisions were not applicable and the 13 obligation to pay was preconditioned on the supply of 14 an invoice, or bill, and that being so the limitation 15 period only ran after satisfaction of the precondition 16 by delivery of the invoice. Is that right? 17 A. That is my understanding of the case, yes. 18 MR ALLISON: My Lord I think just anticipated my last 19 question as a result -- 20 MR JUSTICE HILDYARD: Sorry. 21 MR ALLISON: Not at all. 22 Professor Mülbert, I do not have anything further. 23 Thank you very much. Mr Dicker may have some questions 24 for you. 25 </p> <p style="text-align: center;">Page 22</p> | <p>1 time for performance is not defined or is not apparent 2 from the circumstances then the creditor may demand 3 immediate performance. If the injured party may demand 4 restoration of a damaged object or the amount of money 5 required to restore the object, then the due date is the 6 same as the date when the damage to the legally 7 protected interest occurs." 8 Can I ask, are those statements there in your view 9 limited to tort cases of the kind with which the 10 judgment is concerned or are those principles applicable 11 more generally? 12 A. My Lord, I am sorry, I understood paragraph 9, so I am 13 lost. Could I be taken to -- oh, sorry. 14 My Lord, the wording of that paragraph is very broad 15 and it is not limited, the wording of that paragraph of 16 the decision, is very broad and not limited to tort 17 cases. 18 There are other cases, or situations, in which the 19 claimant has a right to choose between different methods 20 of calculating his damages. One would be the cases we 21 discussed yesterday and which is also mentioned, is also 22 the case of the decision of the court of appeals of 23 Frankfurt, namely this isn't a situation that the 24 claimant claims the loss of profit because of an early 25 termination of a loan contract and he has two different</p> <p style="text-align: center;">Page 24</p> |

6 (Pages 21 to 24)

| | |
|---|--|
| <p>1 methods of calculating his damages and the loss of 2 profits and still, as the court of appeal states, the 3 claim falls due immediately. Even though at the time of 4 the termination of the contract the creditor has not yet 5 decided which method he will use to calculate the 6 damages.</p> <p>7 Q. Thank you. My learned friend asked you about a slightly 8 different situation, which is where there is a contract 9 and the seller has to provide an invoice for the goods 10 or services that he has supplied. My learned friend put 11 to you yesterday the following. He said: 12 "The general rule is that where a debtor cannot 13 determine how much they have to pay before they receive 14 the invoice, the amount does not become due until the 15 invoice is provided." 16 Your response was: 17 "As a matter of German law, I think the majority 18 would require the bill to be presented to the debtor." 19 Can I ask you this question: is the essential 20 difference between yourself and Judge Fischer, as you 21 understand it, that you treat the claim under clause 9 22 of the German master agreement as a compensation claim 23 in favour of the party exercising its termination 24 right -- if you remember from the passage in your 25 statement --</p> <p style="text-align: center;">Page 25</p> | <p>1 A. My Lord, if I may take you to the page I just mentioned. 2 I am of the opinion that the closeout netting provisions 3 not only apply in the case of a party becoming insolvent 4 but also in the case of an early termination of the 5 German master agreement pursuant to clause 7(1) of the 6 German master agreement.</p> <p>7 For that reason -- for that reason, I think that the 8 situation at hand is closer, is much closer to the 9 situation and can be, in the case of an early 10 termination of a loan contract for cause, and that the 11 claim for loss of profits are resulting there from 12 than -- than from the bill situation. Obvious from my 13 understanding of the workings of the German master 14 agreement, no bill or invoice has to be supplied to the 15 other party.</p> <p>16 Q. Can I show you two provisions of the German master 17 agreement and then ask you whether or not those are 18 relevant to answering that question. If you go to core 19 bundle -- 20 MR ALLISON: I am in my Lord's hand, but I didn't go to the 21 document. We explored that construction was for your 22 Lordship, Professor Mülbert confirmed that. It is 23 surprising that Mr Dicker is going to new documents but 24 of course it is a matter for your Lordship. 25 MR JUSTICE HILDYARD: I think Mr Allison is right that we</p> <p style="text-align: center;">Page 27</p> |
| <p>1 MR ALLISON: My Lord, I am very sorry. The first question 2 we let go. It would be nice to hear why the witness 3 thinks there is a difference, rather than the potential 4 difference being pointed out first in the question. 5 I just rise once and hope that the questions are put in 6 a way that the witness gives his answers. 7 MR DICKER: Mr Mülbert -- 8 MR JUSTICE HILDYARD: I think Mr Dicker was putting it as 9 a confirmation, but I take your point that it would be 10 best if the question were open-ended, rather than 11 assuming an answer. 12 MR DICKER: Professor Mülbert, in the passage that 13 I referred you to at bundle 4, tab 15, you talk about 14 a compensation claim in favour of the party exercising 15 its termination right, eg clause 7(1) of the GMA. 16 Mr Allison put to you, as I said, a situation where 17 there is a contract and the seller has to provide 18 an invoice for goods or services that he has supplied 19 and he said, and you agreed, that in that case you need 20 the invoice before the sums become due. 21 Can you indicate, perhaps if you are -- I am not 22 allowed to ask you to confirm -- that in your view the 23 German master agreement single compensation claim is to 24 be regarded as a compensation claim in favour of the 25 party exercising its termination right?</p> <p style="text-align: center;">Page 26</p> | <p>1 did only approach this by giving me German spectacles 2 whereby to review the documentation. What is your line 3 here? 4 MR DICKER: Professor Mülbert has said in his report that 5 the compensation claim essentially under the German 6 master agreement is to be viewed as a compensation claim 7 in favour of the party exercising its termination right. 8 I just wanted to check whether, in his view, the 9 provisions of clause 7(1) and 8(1) of the German master 10 agreement are relevant or not to the view that he has 11 expressed. 12 MR JUSTICE HILDYARD: I assume they are, but does it arise 13 out of the cross-examination? 14 MR DICKER: Yes, my learned friend's -- 15 MR JUSTICE HILDYARD: I can see it arises out of your 16 witness's report but does it arise out of any 17 cross-examination of the witness? 18 MR DICKER: Yes -- 19 MR JUSTICE HILDYARD: It does? 20 MR DICKER: -- because Professor Mülbert's view, as your 21 Lordship has seen from the extract I have shown your 22 Lordship, is that the claim is to be regarded as 23 a compensation claim arising on termination. My learned 24 friend's line of cross-examination, as I understand it, 25 was, "No, that is wrong, the claim is properly to be</p> <p style="text-align: center;">Page 28</p> |

| | |
|---|--|
| <p>1 regarded as equivalent to the invoice case".</p> <p>2 I am seeking to re-examine Professor Mühlert just to</p> <p>3 ensure your Lordship understands precisely</p> <p>4 Professor Mühlert's position in relation to that and the</p> <p>5 reasons for it. Obviously ultimately, to the extent it</p> <p>6 is a question of construction, that is a matter for your</p> <p>7 Lordship but in reaching that decision it seemed to us</p> <p>8 important your Lordship at least understood the basis on</p> <p>9 which Professor Mühlert was characterising it one way</p> <p>10 rather than the other.</p> <p>11 MR JUSTICE HILDYARD: Mr Allison, I think it is on the very</p> <p>12 edge but I think I am going to allow this question,</p> <p>13 subject to the saving that ultimately I think you are</p> <p>14 right, that questions of interpretation, albeit subject</p> <p>15 to the rules of interpretation under the German law, are</p> <p>16 matters for me, right or wrong.</p> <p>17 MR ALLISON: My Lord, on which Professor Mühlert agreed</p> <p>18 those rules of interpretation as my Lord will recall,</p> <p>19 and I didn't go to these provisions as my Lord will</p> <p>20 recall. It is surprising that it is said it came out of</p> <p>21 the cross-examination.</p> <p>22 MR JUSTICE HILDYARD: It may be an irrelevant opinion, which</p> <p>23 would put me in difficulties if I disagreed with it in</p> <p>24 the sense of deferring to the German law experts before</p> <p>25 me, but I will allow it in case it --</p> <p style="text-align: center;">Page 29</p> | <p>1 German writers of section 8, is a result of the</p> <p>2 German -- of the drafters of that provision to put it in</p> <p>3 the language of the German law on damages. That is,</p> <p>4 yes.</p> <p>5 MR JUSTICE HILDYARD: Your interpretation -- which I may or</p> <p>6 may not accept -- is that the wording and the purpose</p> <p>7 was to trigger an immediate right to damages on that</p> <p>8 termination, at that termination time?</p> <p>9 A. Right.</p> <p>10 MR JUSTICE HILDYARD: That is what I understood your case to</p> <p>11 be.</p> <p>12 A. Yes. Yes, my Lord.</p> <p>13 MR DICKER: Thank you.</p> <p>14 Professor Mühlert, my learned friend referred you to</p> <p>15 the situation of a landlord who holds a deposit as</p> <p>16 security for any sums that he is owed by the tenant.</p> <p>17 Your comment, Day 6, page 26, was that you said:</p> <p>18 "The court in the landlord tenant case has exactly</p> <p>19 said that that is not what German courts in general have</p> <p>20 said."</p> <p>21 Can you just explain -- it may be your last answer</p> <p>22 was the explanation -- what German courts in general</p> <p>23 have said?</p> <p>24 MR JUSTICE HILDYARD: Do you mean outside the context of</p> <p>25 a landlord and tenant deposit? You may be here some</p> <p style="text-align: center;">Page 31</p> |
| <p>1 MR ALLISON: My Lord, very well.</p> <p>2 MR JUSTICE HILDYARD: -- elicits some clarification.</p> <p>3 MR DICKER: Professor Mühlert, could you take core bundle,</p> <p>4 tab 9, page 208. Just refer to clause 7(1) which</p> <p>5 states:</p> <p>6 "Where transactions have been entered into and not</p> <p>7 yet fully settled, the agreement can only be terminated</p> <p>8 by either party for material reason."</p> <p>9 Then that is explained at 7(2) dealing with</p> <p>10 insolvency, and then 8(1):</p> <p>11 "In the event of termination, the party giving</p> <p>12 notice or the solvent party as the case may be,</p> <p>13 hereinafter called 'party entitled to damages' shall be</p> <p>14 entitled to claim damages."</p> <p>15 Can I just ask whether, in expressing the view that</p> <p>16 you did in the statement that I showed you that you</p> <p>17 regarded those provisions as relevant or irrelevant to</p> <p>18 the question of characterisation?</p> <p>19 A. My Lord, I regret this, that provision, but also</p> <p>20 clause 9(1) which talks about the damages which are</p> <p>21 payable or shall be combined by the party entitled to</p> <p>22 damages to -- as relevant as a basis for my comparison</p> <p>23 between the single compensation claim and the claim for</p> <p>24 damages pursuant to the early termination of a loan</p> <p>25 contract for costs. The whole wording, according to the</p> <p style="text-align: center;">Page 30</p> | <p>1 time I think.</p> <p>2 MR DICKER: I was not hoping that we would be, but your</p> <p>3 Lordship is quite right.</p> <p>4 MR JUSTICE HILDYARD: Right.</p> <p>5 MR DICKER: I am asking Professor Mühlert perhaps to</p> <p>6 elaborate on what he meant when he said that is not what</p> <p>7 the German courts in general have said?</p> <p>8 A. My Lord, what I meant by saying that is that, again, as</p> <p>9 I said yesterday, at least according to my memory, which</p> <p>10 is not supported by a transcript, I said that in that</p> <p>11 situation, under these circumstances, if you would want</p> <p>12 to put it in the context of 271 BGB, under these</p> <p>13 circumstances, they have for that specific situation,</p> <p>14 given the purpose of the deposit, said that it would</p> <p>15 only become due upon the lender being able to specify</p> <p>16 the amount.</p> <p>17 That is again a fact specific interpretation and</p> <p>18 cannot be generalised to the extent that, as we have</p> <p>19 seen from, my Lord, the tort case, and also from the</p> <p>20 decision of the court of appeals of Frankfurt, that</p> <p>21 cannot be generalised to the point that only upon the</p> <p>22 creditor know exactly the amount -- the amount to be</p> <p>23 paid the debt falls due. That is what I wanted to say</p> <p>24 by that.</p> <p>25 Q. Thank you Professor Mühlert.</p> <p style="text-align: center;">Page 32</p> |

| | |
|--|--|
| <p>1 Can we turn to serious and definitive refusal.</p> <p>2 I want to do one thing, which is take you back to</p> <p>3 a document my learned friend showed you, it is in the</p> <p>4 authorities bundle at tab 70.</p> <p>5 A. Volume 2?</p> <p>6 Q. It is by, I think Schwarze. You were shown I think if</p> <p>7 you have volume 1 tab 70 --</p> <p>8 MR JUSTICE HILDYARD: 70 or 17?</p> <p>9 MR DICKER: 7-0, I am sorry.</p> <p>10 MR JUSTICE HILDYARD: Is that volume 2?</p> <p>11 MR DICKER: Sorry, they are arranged differently.</p> <p>12 MR JUSTICE HILDYARD: I think you and I are in sync, but the</p> <p>13 rest of them are out of sync.</p> <p>14 MR DICKER: Volume 2, tab 70. You were asked about the</p> <p>15 paragraph marked B91, if you have that --</p> <p>16 A. Yes.</p> <p>17 Q. -- where it speaks of:</p> <p>18 "One can only speak of refusal of performance of the</p> <p>19 obligor denies performance in a certain manner as</p> <p>20 a final act."</p> <p>21 Can you briefly explain what you understand the</p> <p>22 concept of "final act" to mean and the purpose of this</p> <p>23 requirement?</p> <p>24 A. My Lord, my understanding, based on the German court</p> <p>25 decisions is that the final act means that there is no</p> <p style="text-align: center;">Page 33</p> | <p>1 a refusal to perform present in the following cases ..."</p> <p>2 Then there is a list of cases. Three lines from the</p> <p>3 end there is a reference to the petition to open</p> <p>4 insolvency proceedings and then there is the word</p> <p>5 "alone", which I think my learned friend omitted when he</p> <p>6 referred to this, and then there is a reference,</p> <p>7 OLG Munich. I think you mentioned the case and</p> <p>8 indicated you wanted to refer to it. My learned friend</p> <p>9 said he would come back to it. In the end, I am sure he</p> <p>10 overlooked it, he didn't.</p> <p>11 I would like to give you an opportunity to comment</p> <p>12 on the case if you want to. You will find it in</p> <p>13 bundle 3, tab 98. Perhaps if I could just give you</p> <p>14 a moment to remind yourself of it. (Pause)</p> <p>15 A. Well, may I ... (Pause)</p> <p>16 It is an extract from a decision of the court of</p> <p>17 appeals of Munich and it notes in passing that the</p> <p>18 opening of insolvency procedures cannot be regarded as</p> <p>19 a serious and definite refusal and by implication from</p> <p>20 what follows from the rest of the text provided, or</p> <p>21 published I should say, it follows that the opening of</p> <p>22 the filing for -- the mandatory filing for insolvency</p> <p>23 proceeding, did not constitute a serious and definite</p> <p>24 refusal but the court does not explain that. You can</p> <p>25 deduce that from the decision, but the court gives no</p> <p style="text-align: center;">Page 35</p> |
| <p>1 way to turn around. Yesterday you used the example of</p> <p>2 a sales contract, when the seller burns this old good,</p> <p>3 and so, according to my understanding, it is that there</p> <p>4 is no reasonable way the person could turn around and</p> <p>5 say, "No, I behave differently".</p> <p>6 Q. Thank you, if you go down to B94, you will see the</p> <p>7 extract says:</p> <p>8 "The refusal to perform can be implied and be</p> <p>9 concluded from external circumstances. The debtor sells</p> <p>10 the merchandise to be delivered to a third party."</p> <p>11 Again, just so we are clear, is your understanding</p> <p>12 of the German law that where you take the example of</p> <p>13 a debtor selling the merchandise to be delivered to</p> <p>14 a third party, does that fact need to be known or does</p> <p>15 it not need to be known to the other contracting party</p> <p>16 for there to be a serious and definitive refusal?</p> <p>17 A. My Lord, I seem to recall that I said yesterday that it</p> <p>18 need not be known to the other party, but the other</p> <p>19 party, at some point in time, needs to know the fact in</p> <p>20 order to make use of, to rely on that fact to exert his</p> <p>21 rights resulting from that act.</p> <p>22 Q. Thank you.</p> <p>23 The last thing you were shown I think was in B95</p> <p>24 where the text says:</p> <p>25 "Some examples from the judicature, there is not</p> <p style="text-align: center;">Page 34</p> | <p>1 explanation whatsoever as to that position.</p> <p>2 MR JUSTICE HILDYARD: It appears that the context was, is</p> <p>3 this right, that the debtor, the principal debtor, was</p> <p>4 claiming only what is here described as a temporary</p> <p>5 liquidity bottleneck. Ie, he was not foreclosing the</p> <p>6 possibility that payment would be made in the end. Is</p> <p>7 that right?</p> <p>8 A. That can be inferred from what we are informed by other</p> <p>9 texts published, yes.</p> <p>10 MR JUSTICE HILDYARD: I am reading it from page 2, in the</p> <p>11 second line. That seems to be the context. That gives</p> <p>12 to my mind -- but you must correct me if I am wrong --</p> <p>13 some content to the word "alone" which Mr Dicker was</p> <p>14 explaining.</p> <p>15 Do I have that right or wrong? You can say wrong --</p> <p>16 I shan't be ...</p> <p>17 A. May I be taken back to --</p> <p>18 MR JUSTICE HILDYARD: Yes, tab 98, it was, in the third</p> <p>19 volume.</p> <p>20 A. No, to the word "Alone" because, when reading, I think</p> <p>21 the extract from Staudinger, I didn't see that word.</p> <p>22 MR JUSTICE HILDYARD: It is in the last line or so:</p> <p>23 "Beyond this it follows from section 17 KO that the</p> <p>24 opening of a bankruptcy alone does not justify the</p> <p>25 assumption of a refusal to perform."</p> <p style="text-align: center;">Page 36</p> |

| | |
|--|--|
| <p>1 They are saying that, as I understand it, but please</p> <p>2 correct me, in the context of the previous sentence</p> <p>3 where the plaintiff itself submits that the principal</p> <p>4 debtor claims only a temporary liquidity bottleneck.</p> <p>5 That is my understanding.</p> <p>6 A. My Lord, my understanding is a bit different. They are</p> <p>7 talking about the -- that is my understanding, that they</p> <p>8 are talking about the opening of insolvency proceedings</p> <p>9 as such do not, does not suffice for a serious and</p> <p>10 definite refusal.</p> <p>11 MR JUSTICE HILDYARD: I see.</p> <p>12 MR DICKER: Professor Mülbert, are you aware of any other</p> <p>13 case which deals with whether or not the petition to</p> <p>14 open insolvency proceedings can constitute a serious and</p> <p>15 definitive refusal?</p> <p>16 A. My Lord, I am not aware of any other cases, otherwise</p> <p>17 I would have surely noted these cases in my report.</p> <p>18 MR DICKER: Thank you Professor Mülbert.</p> <p>19 My Lord, I have no further questions.</p> <p>20 Questions from THE BENCH</p> <p>21 MR JUSTICE HILDYARD: Professor, can I just ask one or two,</p> <p>22 I am afraid they will be rather muddled because I have</p> <p>23 been trying to catch up in the meantime. I just want to</p> <p>24 understand better your position on the issue of</p> <p>25 assignment.</p> <p style="text-align: right;">Page 37</p> | <p>1 A. Yes, that follows from section 404, basically.</p> <p>2 MR JUSTICE HILDYARD: Yes. The only issue for you, really,</p> <p>3 is what rights the assignee has against the other party</p> <p>4 in legal terms. That is right, isn't it? It is only</p> <p>5 legal rights?</p> <p>6 A. My Lord, as I said yesterday, it is not only about the</p> <p>7 legal rights of the assignee towards the debtor, but it</p> <p>8 is also about defences the debtor has against his</p> <p>9 creditor and he should --</p> <p>10 MR JUSTICE HILDYARD: That is a defences point, isn't it?</p> <p>11 A. Exactly, yes.</p> <p>12 MR JUSTICE HILDYARD: Yes.</p> <p>13 Supposing the assignor has already an accrued</p> <p>14 entitlement in respect of time wasted before the</p> <p>15 assignment, yes, and he sought to measure that with</p> <p>16 respect to some opportunity that he missed because he</p> <p>17 was out of the money. Right? He could assign that to</p> <p>18 the assignee as being an accrued claim --</p> <p>19 A. Yes.</p> <p>20 MR JUSTICE HILDYARD: -- but the assignee, absent some</p> <p>21 special assignment, would not have any right in respect</p> <p>22 of that claim?</p> <p>23 A. Absent any special --</p> <p>24 Q. Special provision, yes.</p> <p>25 A. Yes.</p> <p style="text-align: right;">Page 39</p> |
| <p>1 I wondered whether one could distinguish between</p> <p>2 various things. My understanding is that you consider</p> <p>3 there to be no protection as regards the debtor in</p> <p>4 respect of some worsening factual position which occurs</p> <p>5 upon assignment. That is to say the debtor must just</p> <p>6 put up with the fact that the assignee may be a less</p> <p>7 reliable person, or the creditor or the debtor. Yes?</p> <p>8 A. Yes.</p> <p>9 MR JUSTICE HILDYARD: Is that right?</p> <p>10 A. Yes.</p> <p>11 MR JUSTICE HILDYARD: The facts is different, it is only</p> <p>12 law.</p> <p>13 A. May I explain?</p> <p>14 MR JUSTICE HILDYARD: Yes.</p> <p>15 A. If the claim were assigned to a creditor who is going</p> <p>16 after the debtor, whereas the former creditor was more</p> <p>17 lenient towards the creditor in enforcing his claims,</p> <p>18 that would be also a factual deterioration of the</p> <p>19 debtor's position, but there is nothing you can do about</p> <p>20 that.</p> <p>21 MR JUSTICE HILDYARD: No.</p> <p>22 Then there is another aspect, which I think you</p> <p>23 indicate in your report but please clarify for me, that</p> <p>24 if there were available defences, by or against the</p> <p>25 assignor, the assignee can be in no better position.</p> <p style="text-align: right;">Page 38</p> | <p>1 MR JUSTICE HILDYARD: That is one part of it, the second</p> <p>2 part I want to clarify is, can you mix and match, if</p> <p>3 I can put it that way?</p> <p>4 That is to say, supposing the assignor said:</p> <p>5 "Oh, I would have invested in a project which would</p> <p>6 have come to fruition in five years time, and I would</p> <p>7 have had a tremendous bonanza from that, predicated on</p> <p>8 it resulting in some future time."</p> <p>9 Can the assignee then say:</p> <p>10 "Actually, I would have put the very same money ..."</p> <p>11 Which by comparative reason has already been locked</p> <p>12 up in some longer venture, can the assignee say:</p> <p>13 "No, I would have put it on, I don't know, Red Rum</p> <p>14 at 2.30 ..."</p> <p>15 I don't know what it might be, can the assignee come</p> <p>16 up with a completely different investment theory?</p> <p>17 A. My Lord, only for the period after the transfer becoming</p> <p>18 effective. Because, again, for the period prior to the</p> <p>19 transfer it is the assignor who serves as the point of</p> <p>20 reference for the determination of damages and from that</p> <p>21 point onwards, from the point when the transfer becomes</p> <p>22 effective, it is the assignee. Therefore his even</p> <p>23 better story is understood here, example, his more</p> <p>24 profitable business only comes into play from that point</p> <p>25 in time onwards.</p> <p style="text-align: right;">Page 40</p> |

| | |
|---|---|
| <p>1 MR JUSTICE HILDYARD: I can understand that in theory, but</p> <p>2 what was worrying me was the assignor has locked the</p> <p>3 money up -- and the whole benefit to the assignor is in</p> <p>4 it having being locked up. Why is the assignee allowed</p> <p>5 to proceed as if the money were not locked up?</p> <p>6 A. My Lord, I am sorry, could you --</p> <p>7 MR JUSTICE HILDYARD: Sorry, supposing the assignor had</p> <p>8 decided that he would invest in a long term project and</p> <p>9 the long term project is assessed, taking account time</p> <p>10 value of money et cetera, as having been very valuable</p> <p>11 and the opportunity cost as having been very great. It</p> <p>12 is of the essence of what the assignor's claim was that</p> <p>13 that money would have been tied up for a long time. Do</p> <p>14 you see what I mean?</p> <p>15 A. Yes.</p> <p>16 MR JUSTICE HILDYARD: He has put it in something which is</p> <p>17 a long term prospect, not instantly realisable, the</p> <p>18 money would have been used for that.</p> <p>19 The rights under the agreement are then assigned.</p> <p>20 You accept, and have sought to clarify for me, that the</p> <p>21 assignee cannot claim in respect of that project unless</p> <p>22 it was separately and specifically assigned.</p> <p>23 A. Yes.</p> <p>24 Q. As regards the counterparty, can the counterparty say:</p> <p>25 "Well, you cannot do this twice, the money has</p> <p style="text-align: center;">Page 41</p> | <p>1 I would have done this."</p> <p>2 The assignee can say:</p> <p>3 "After the assignment, I would have had this money</p> <p>4 and I would have done that."</p> <p>5 And there is no necessity to compare the two?</p> <p>6 A. Yes.</p> <p>7 MR JUSTICE HILDYARD: Yes, okay.</p> <p>8 I think that is all I have.</p> <p>9 Does anything arise out of that?</p> <p>10 MR ALLISON: My Lord, no.</p> <p>11 MR JUSTICE HILDYARD: I am very grateful indeed for all your</p> <p>12 assistance.</p> <p>13 MR DICKER: Thank you, Professor Mülbert. I think you can</p> <p>14 step down.</p> <p>15 My Lord, I see the time. I don't know whether this</p> <p>16 would be a convenient moment before my learned friend</p> <p>17 calls Judge Fischer.</p> <p>18 MR JUSTICE HILDYARD: Yes, that does seem a good time.</p> <p>19 Does that suit you?</p> <p>20 (11.50 am)</p> <p>21 (A short adjournment)</p> <p>22 (11.55 am)</p> <p>23 MR ALLISON: My Lord, I would like to call Judge Fischer,</p> <p>24 please.</p> <p>25</p> <p style="text-align: center;">Page 43</p> |
| <p>1 already been locked up in a long term project which you</p> <p>2 have said is very valuable, you cannot say the money is</p> <p>3 available to you, Mr Assignee because, if it had not</p> <p>4 been a long term project, you would not have been able</p> <p>5 to claim that huge amount."</p> <p>6 Do you see what I mean? The money, how can you mix</p> <p>7 and match in that way?</p> <p>8 A. My Lord, at the moment I am very sorry but I have</p> <p>9 difficulties in understanding how the question -- where</p> <p>10 the money is -- fits in the problem, since it is the</p> <p>11 money, the damage resulting from that on the part of the</p> <p>12 assignor as well as on the part of the assignee, as</p> <p>13 I understand the example, is that they would have</p> <p>14 invested. It is not that the money is invested, but</p> <p>15 they would have invested and because they were not able</p> <p>16 to invest, they have a loss of profit which they can</p> <p>17 claim as an investment. Therefore the money from -- the</p> <p>18 money from that perspective has gone to the debtor --</p> <p>19 this is, I am very sorry if I am --</p> <p>20 MR JUSTICE HILDYARD: I think what you are saying is the</p> <p>21 assignee can only claim in respect of the period after</p> <p>22 the assignment, subject to any special deal. The</p> <p>23 assignor is allowed to say:</p> <p>24 "Well, I would have done, with the money I would</p> <p>25 have accrued, had it properly be paid before assignment,</p> <p style="text-align: center;">Page 42</p> | <p>1 MR JUSTICE HILDYARD: Can I just mention one thing.</p> <p>2 I decided it was only fair that both should be sworn in</p> <p>3 on the same basis. It does occur to me that in some</p> <p>4 ways the oath is not wholly honed to the position of</p> <p>5 an expert, but nevertheless I think it is as well to</p> <p>6 keep parity, but it is something which invite</p> <p>7 reconsideration of.</p> <p>8 MR ALLISON: Of course, my Lord.</p> <p>9 (The interpreter was sworn)</p> <p>10 JUDGE GERO FISCHER (sworn)</p> <p>11 MR JUSTICE HILDYARD: You have some water there. If you</p> <p>12 need a break, you will let me know.</p> <p>13 A. Thank you.</p> <p>14 Examination in-chief by MR ALLISON</p> <p>15 MR ALLISON: Good afternoon, Judge Fischer. If we could</p> <p>16 just look at your evidence in a moment but if first you</p> <p>17 could just confirm to the court your name and address.</p> <p>18 A. My name is Gero Fischer and I am from Freiburg in</p> <p>19 Germany. [German address given]</p> <p>20 (Interpreted) 23.</p> <p>21 23, yes.</p> <p>22 Q. Thank you, if you could please be passed volume 4 of the</p> <p>23 hearing bundle. If you could turn -- I will go slowly</p> <p>24 but of course if you need any help, do say -- to tab 8,</p> <p>25 please.</p> <p style="text-align: center;">Page 44</p> |

| | |
|---|--|
| <p>1 A. Tab 8, yes.</p> <p>2 Q. Is this your first expert report?</p> <p>3 A. Yes, that is true.</p> <p>4 Q. You confirm it is the evidence you wish to give in these</p> <p>5 proceedings?</p> <p>6 A. Yes, that's right.</p> <p>7 Q. Could you turn to page 192, please.</p> <p>8 A. 192, yes.</p> <p>9 Q. Could you confirm to his Lordship that that is your</p> <p>10 signature?</p> <p>11 A. That is my signature, yes, that's right.</p> <p>12 Q. If you could now turn to tab 10, this is your second</p> <p>13 report.</p> <p>14 A. Reply report, yes, that's right.</p> <p>15 Q. Could you confirm that this is your reply evidence that</p> <p>16 you wish to give in these proceedings?</p> <p>17 A. Yes, that is okay, that's right.</p> <p>18 Q. Again, if we look at page 241 --</p> <p>19 A. Yes.</p> <p>20 Q. -- could you confirm to his Lordship that that is your</p> <p>21 signature?</p> <p>22 A. That's correct.</p> <p>23 Q. Three more documents to look at. Tab 12, next. This is</p> <p>24 your third report, is it?</p> <p>25 A. Yes, my Lord, that is okay. That is my third report.</p> <p style="text-align: center;">Page 45</p> | <p>1 MR ALLISON: Thank you very much.</p> <p>2 If you could stay there, I am sure Mr Dicker will</p> <p>3 now have some questions for you.</p> <p>4 Cross-examination by MR DICKER</p> <p>5 MR DICKER: Good afternoon.</p> <p>6 A. Good afternoon.</p> <p>7 Q. The first topic I want to ask you about concerns the</p> <p>8 single compensation sum under clause 9 of the German</p> <p>9 master agreement.</p> <p>10 A. (Interpreted) Yes, I would like to have the single, the</p> <p>11 German master agreement in front of me.</p> <p>12 Q. I will come and ask you questions about the wording of</p> <p>13 it later.</p> <p>14 A. Yes, later. Okay.</p> <p>15 Q. My first topic concerns when the sums become due.</p> <p>16 No one, as I understand it, has been able to find</p> <p>17 a decision of a court which decides this issue?</p> <p>18 A. (Interpreted) Yes, that is correct. I haven't found any</p> <p>19 decision either.</p> <p>20 Q. Indeed, there is no case dealing with a situation where</p> <p>21 there is a netting clause which operates on termination.</p> <p>22 A. (Interpreted) To my knowledge, there is no decision of</p> <p>23 a German court concerning this, in my view there is not</p> <p>24 a decision -- such a decision.</p> <p>25 Q. Thank you, so as I understand it, as a matter of German</p> <p style="text-align: center;">Page 47</p> |
| <p>1 Q. If you can go to page 347, again, could you confirm to</p> <p>2 his Lordship that is your signature?</p> <p>3 A. Yes, that is my signature, my Lord.</p> <p>4 Q. The next document is tab 13, the next tab.</p> <p>5 A. Yes.</p> <p>6 Q. This is the joint statement you prepared with</p> <p>7 Professor Mülbert?</p> <p>8 A. Yes, you are right. Yes, my Lord.</p> <p>9 Q. Again, you confirm that this is the joint statement, as</p> <p>10 agreed by you and Professor Mülbert?</p> <p>11 A. Yes, I confirm my Lord.</p> <p>12 Q. Page 390, should be --</p> <p>13 A. Yes.</p> <p>14 Q. Again, could you confirm to his Lordship, that is your</p> <p>15 signature on the joint statement?</p> <p>16 A. Yes, my Lord, that is my signature.</p> <p>17 Q. One more document to look at together, tab 16 -- it</p> <p>18 should be the last tab -- could you confirm that this is</p> <p>19 your reply to the text provided by Professor Mülbert</p> <p>20 after your meeting?</p> <p>21 A. Yes, this is a reply provided by Professor Mülbert,</p> <p>22 my Lord.</p> <p>23 Q. If we could go to page 543, you will know the question</p> <p>24 by now --</p> <p>25 A. I confirm it is my signature.</p> <p style="text-align: center;">Page 46</p> | <p>1 law, the answer depends on the construction of the</p> <p>2 German master agreement in the light of general rules</p> <p>3 and principles of German law?</p> <p>4 A. I agree, but --</p> <p>5 (Interpreted) That is correct that the construction</p> <p>6 of the German master agreement is first of all that</p> <p>7 arising from the German master agreement as a priority</p> <p>8 of the general business conditions, but I would already</p> <p>9 indicate here that it also involves the construction of</p> <p>10 a section 104 of the insolvency act, the InsO, the</p> <p>11 I-N-S-O.</p> <p>12 Q. Can we leave aside for the moment rules and principles</p> <p>13 of German insolvency law?</p> <p>14 A. Yes.</p> <p>15 Q. Can I start with section 271 of the BGB.</p> <p>16 A. Yes.</p> <p>17 Q. You will find that, I hope in bundle 2, tab 83 at</p> <p>18 letter J. You may not have the benefit of tabs, but if</p> <p>19 so I think it should be at page 27.</p> <p>20 A. Yes. Thank you.</p> <p>21 Q. As I understand it, this is a default rule. It applies</p> <p>22 if no time for performance has been specified or is</p> <p>23 evident from the circumstances.</p> <p>24 A. (Interpreted) 271 does not deal with default as such but</p> <p>25 only with the due date of performance, when the</p> <p style="text-align: center;">Page 48</p> |

| | |
|---|--|
| <p>1 performance falls due.</p> <p>2 Q. It is my fault; I don't think my question was</p> <p>3 sufficiently clear. As I understand it, section 271</p> <p>4 applies if no time for performance has been specified or</p> <p>5 is evident from the circumstances.</p> <p>6 A. (Interpreted) That's correct, but one first has to ask</p> <p>7 whether a time has been determined contractually.</p> <p>8 Second, whether the time can be inferred from the</p> <p>9 circumstances and, so to say, in order to fill the gap,</p> <p>10 the performance can then be demanded immediately.</p> <p>11 Q. Although questions of construction are a matter for his</p> <p>12 Lordship, both you and Professor Mülbert agree that</p> <p>13 nothing has been specified in clause 9 of the German</p> <p>14 master agreement.</p> <p>15 A. (Interpreted) That is correct. Section 729 of the</p> <p>16 German master agreement do not contain any provisions as</p> <p>17 to the time of the performance. This is agreed between</p> <p>18 myself and Professor Mülbert.</p> <p>19 Q. The question is whether anything is evident from the</p> <p>20 circumstances, if not, the rule contained in section 271</p> <p>21 applies?</p> <p>22 A. (Interpreted) I agree that the next step should be the</p> <p>23 circumstances, whether the circumstances can indicate</p> <p>24 when performance should take place and if not then we</p> <p>25 fall back on the gap filling.</p> <p style="text-align: right;">Page 49</p> | <p>1 MR DICKER: There is not, unless you have a copy, because</p> <p>2 Professor Mülbert gave his report in English.</p> <p>3 A. Yes.</p> <p>4 Q. What I want to do is read a sentence and then perhaps it</p> <p>5 can be translated for you. The sentence is the second</p> <p>6 sentence in the first paragraph, which says:</p> <p>7 "German courts and legal literature very broadly</p> <p>8 agree that upon an early termination of a contract for</p> <p>9 cause, a compensation claim in favour of the party</p> <p>10 exercising its termination right, eg clause 7(1) of the</p> <p>11 GMA, becomes due and payable immediately upon</p> <p>12 termination."</p> <p>13 I wonder if that could be translated for you.</p> <p>14 A. No, it is clear for me.</p> <p>15 Q. Do you agree with what Professor Mülbert says there,</p> <p>16 ignoring, for the moment, the reference to the GMA?</p> <p>17 A. (Interpreted) Yes, with no reference to the GMA I would</p> <p>18 say that in principle I agree that prevailing opinion in</p> <p>19 Germany is that once a contract is terminated because of</p> <p>20 unusual circumstances, the conditions provide that the</p> <p>21 party claiming damages can do this immediately and also</p> <p>22 the calculation can take place immediately.</p> <p>23 Q. Thank you.</p> <p>24 MR ALLISON: My Lord, I am so sorry to rise. A German</p> <p>25 speaker has suggested something may have gone wrong with</p> <p style="text-align: right;">Page 51</p> |
| <p>1 Q. Thank you.</p> <p>2 It is probably easiest if you put away that bundle</p> <p>3 and take out bundle 4, if you would.</p> <p>4 A. That is 4, yes.</p> <p>5 THE INTERPRETER: We have it here.</p> <p>6 MR DICKER: I want to show you a statement that</p> <p>7 Professor Mülbert wanted to include in the joint</p> <p>8 statement, which you will find at tab 15, page 527.</p> <p>9 The --</p> <p>10 THE INTERPRETER: Just for the German text.</p> <p>11 A. The German text, yes.</p> <p>12 MR DICKER: Page 527.</p> <p>13 THE INTERPRETER: Would you allow me to take the English</p> <p>14 text out, so that I can --</p> <p>15 MR DICKER: Whatever is easiest.</p> <p>16 THE INTERPRETER: Thank you.</p> <p>17 MR DICKER: In the first paragraph, the second sentence,</p> <p>18 what it says in English is:</p> <p>19 "German courts and legal literature very broadly</p> <p>20 agree ..."</p> <p>21 A. It is only in English.</p> <p>22 THE INTERPRETER: No, it is not.</p> <p>23 A. Yes, that is only in English.</p> <p>24 THE INTERPRETER: There is no German text.</p> <p>25 A. There is not a German text, I think.</p> <p style="text-align: right;">Page 50</p> | <p>1 the translation. It may be easier, and this is just</p> <p>2 a suggestion, if it is possible for Judge Fischer to</p> <p>3 break up the answer for the benefit of the interpreter</p> <p>4 as we go through.</p> <p>5 MR JUSTICE HILDYARD: Yes.</p> <p>6 MR ALLISON: I have no idea, but I have just been told</p> <p>7 something was missed there.</p> <p>8 MR JUSTICE HILDYARD: Yes, let's deal with that in stages.</p> <p>9 It is an imposition but it would assist us all</p> <p>10 I think if you were to pause between sections of your</p> <p>11 answer --</p> <p>12 A. Yes.</p> <p>13 MR JUSTICE HILDYARD: -- so that the interpreter has let</p> <p>14 less to remember to interpret.</p> <p>15 A. Yes.</p> <p>16 MR JUSTICE HILDYARD: Do you feel that the last answer needs</p> <p>17 further consideration for accuracy -- I don't mean that</p> <p>18 impolitely, I just mean it was a quite long answer and</p> <p>19 maybe towards the end it may have been lost.</p> <p>20 A. (Interpreted) Yes, my Lord, I agree.</p> <p>21 (Interpreted) Should I repeat once more what --</p> <p>22 MR JUSTICE HILDYARD: Do they have a telescreen?</p> <p>23 MR DICKER: I am not sure they do.</p> <p>24 I wonder whether it would not be easiest if I ask</p> <p>25 the question again, Judge Fischer answers and ideally,</p> <p style="text-align: right;">Page 52</p> |

| | |
|---|--|
| <p>1 as your Lordship suggested --</p> <p>2 MR JUSTICE HILDYARD: In sections.</p> <p>3 MR DICKER: -- broken down into sections.</p> <p>4 MR JUSTICE HILDYARD: I am sorry to have to do that, but</p> <p>5 let's do that.</p> <p>6 MR DICKER: Can I ask the question again. If you look at</p> <p>7 the sentence that I showed you in Professor Mülbert's</p> <p>8 appendix, if you ignore the reference, leave out the</p> <p>9 reference to the GMA, do you agree that that is</p> <p>10 a correct statement of German law?</p> <p>11 A. (Interpreted) This declaration is correct. Insofar that</p> <p>12 if there is an extraordinary condition existing that</p> <p>13 a claim for damages is in existence.</p> <p>14 It is not always self-evident -- in no way</p> <p>15 self-evident that, after an extraordinary termination,</p> <p>16 a damages claim is in existence. There can be a claim</p> <p>17 for performance, but not a claim for damages.</p> <p>18 Q. Thank you.</p> <p>19 We were shown, or referred to, I think four main</p> <p>20 authorities, two by Professor Mülbert and two by</p> <p>21 yourself. I want to ask you some questions in relation</p> <p>22 to each of them.</p> <p>23 The first case is in bundle 1, tab 29A.</p> <p>24 A. 29A, yes.</p> <p>25 Q. 29A?</p> <p style="text-align: right;">Page 53</p> | <p>1 A. Yes.</p> <p>2 Q. If you go to paragraph 18, and you look at the last</p> <p>3 sentence of paragraph 18 --</p> <p>4 A. Yes.</p> <p>5 Q. -- one of the grounds of challenge by the customer was</p> <p>6 that a calculation in respect of the repayment date was</p> <p>7 to be made, not in respect of the termination date.</p> <p>8 A. Yes.</p> <p>9 Q. What the customer was saying was the relevant date for</p> <p>10 the sum becoming due was not the termination date, but</p> <p>11 was the repayment date, yes?</p> <p>12 A. Yes.</p> <p>13 Q. If you go to paragraph 64, the court's conclusion, you</p> <p>14 will see from the first sentence, which is that the</p> <p>15 damages claim in respect of the prepayment compensation</p> <p>16 was due immediately?</p> <p>17 A. Yes.</p> <p>18 Q. That was so, despite the fact that the claimant needed</p> <p>19 to calculate the amount of the prepayment?</p> <p>20 A. (Interpreted) Yes, this is correct. In German</p> <p>21 prevailing opinion, such a damages claim can arise</p> <p>22 immediately with the prepayment before the actual due</p> <p>23 date.</p> <p>24 Q. Thank you.</p> <p>25 I think that answer answers my next question, but</p> <p style="text-align: right;">Page 55</p> |
| <p>1 A. Yes.</p> <p>2 Q. I want to ask you about the paragraph numbered 9, which</p> <p>3 is on page 3 of the copy.</p> <p>4 A. Yes.</p> <p>5 Q. I would like to ask you to read to yourself the first</p> <p>6 three sentences of that paragraph. (Pause)</p> <p>7 As I understand it, you accept that those statements</p> <p>8 are generally correct as a matter of German law?</p> <p>9 A. (Interpreted) I cannot generalise this -- I cannot refer</p> <p>10 it to a specific generalisation, but I would say that in</p> <p>11 principle this is correct.</p> <p>12 Q. Can I ask, do you accept that these principles are not</p> <p>13 limited simply to tort claims like the claim for damages</p> <p>14 to the vehicle in this case?</p> <p>15 A. (Interpreted) This does not just apply to tort cases but</p> <p>16 it also applies to contractual damages claims.</p> <p>17 Q. The second decision that Professor Mülbert referred to</p> <p>18 is at tab 39 and if you could have a look at that.</p> <p>19 A. Yes, okay, hmm.</p> <p>20 Q. It is a claim for damages following termination of</p> <p>21 a contract for cause.</p> <p>22 A. Yes. Yes.</p> <p>23 Q. What happened was that the claimant made a claim for</p> <p>24 a prepayment sum and the customer challenged the amount.</p> <p>25 That is correct, yes?</p> <p style="text-align: right;">Page 54</p> | <p>1 just in case: you accept that this case was correctly</p> <p>2 decided?</p> <p>3 A. Yes, I accept.</p> <p>4 Q. Those are the two main authorities that</p> <p>5 Professor Mülbert refers to. I want to look at the two</p> <p>6 main lines of authority that you refer to. Can we start</p> <p>7 with your third report, if you go to bundle 4, tab 12.</p> <p>8 A. Tab 12? (Pause)</p> <p>9 Yes.</p> <p>10 Q. Picking it up in the last sentence of paragraph 30,</p> <p>11 page 319 --</p> <p>12 A. Yes?</p> <p>13 Q. -- I hope you have that, the English version says, last</p> <p>14 sentence of paragraph 30:</p> <p>15 "As according to the wording and content of the</p> <p>16 contract, the reason for the establishment of the</p> <p>17 compensation claim and its amount depend on the</p> <p>18 requirements governed by clauses 8 and 9, the</p> <p>19 compensation cannot become due and payable until the</p> <p>20 creditor has carried out the summarisation required</p> <p>21 under clause 9(1) of the GMA."</p> <p>22 Then you have a footnote, footnote 3 --</p> <p>23 A. Yes.</p> <p>24 Q. -- which refers to Ernst and I would like to ask you</p> <p>25 some questions in relation to that, so if you could now</p> <p style="text-align: right;">Page 56</p> |

| | |
|--|---|
| <p>1 go, if you would to tab 45, bundle 1, tab 45.</p> <p>2 THE INTERPRETER: 45?</p> <p>3 A. Bundle 1, tab 45.</p> <p>4 MR DICKER: I hope you have some tabs behind 45, the extract</p> <p>5 I want is tab A. (Pause)</p> <p>6 THE INTERPRETER: This is the German and the English? Yes.</p> <p>7 MR DICKER: Just picking it up at the start, it is</p> <p>8 a paragraph numbered 5, do you have that?</p> <p>9 A. Yes.</p> <p>10 Q. What the author is saying in the first two sentences is</p> <p>11 that the determination of the performance time is based</p> <p>12 on the circumstances, particularly with consideration to</p> <p>13 the nature of the relationship. He says the</p> <p>14 determination is related to individual cases and as</p> <p>15 I understand it by that he means it depends on the</p> <p>16 facts.</p> <p>17 A. (Interpreted) That is correct. Whether the performance</p> <p>18 can be deducted from the circumstances depends on the</p> <p>19 actual structure concerned.</p> <p>20 Q. As I understand it, the two examples that you refer to</p> <p>21 expressly in your report are firstly just at</p> <p>22 footnote 79, the text at footnote 79, where the author</p> <p>23 says:</p> <p>24 "Under a work agreement the entrepreneur's duty to</p> <p>25 perform cannot become due before the time required to</p> <p style="text-align: center;">Page 57</p> | <p>1 A. (Interpreted) Obviously there is a difference between</p> <p>2 the situation of the German master agreement and the</p> <p>3 case which I have chosen. The reason why I have chosen</p> <p>4 this case is as follows.</p> <p>5 This is because of the absence of decisions and</p> <p>6 views in the literature with regards to due date in the</p> <p>7 GMA. I have tried to find examples with different types</p> <p>8 of contracts from which I could draw conclusions for the</p> <p>9 interpretation for clauses 7 to 9 GMA. The link with</p> <p>10 this is that according to 7 to 9, there is a provision</p> <p>11 for cooperation between the two parties with regards to</p> <p>12 the damages compensation claim.</p> <p>13 Q. The purpose of the deposit is to secure the claims which</p> <p>14 the landlord has.</p> <p>15 THE INTERPRETER: Could you repeat this?</p> <p>16 MR DICKER: I am sorry. The purpose of the deposit is to</p> <p>17 secure the claims which the landlord has.</p> <p>18 A. Yes.</p> <p>19 Q. He needs to be able to pay himself in a simple way by</p> <p>20 relying on the deposit.</p> <p>21 A. (Interpreted) This concerns the time after the</p> <p>22 termination of the contract. After that termination is</p> <p>23 the repayment is due by the landlord, but I explained</p> <p>24 that this -- (Pause)</p> <p>25 The claim is not due until the landlord has</p> <p style="text-align: center;">Page 59</p> |
| <p>1 produce the work has passed."</p> <p>2 That is one of the examples you refer to?</p> <p>3 A. (Interpreted) Yes, that's correct, this is one of the</p> <p>4 examples which I have mentioned but this example was not</p> <p>5 important, in my view.</p> <p>6 Q. Thank you.</p> <p>7 The second example you give is in the text at</p> <p>8 footnote 82, where the text, at least in English, says:</p> <p>9 "The tenant can demand repayment of his/her security</p> <p>10 deposit after the landlord tenant relationship is</p> <p>11 terminated once the amount of landlord's counter claims</p> <p>12 have been determined."</p> <p>13 A. (Interpreted) Well that is correct, this example had</p> <p>14 a certain significance in my view for the following</p> <p>15 reason.</p> <p>16 This is because the due date of the claim for</p> <p>17 restoration by the tenant depends on the contract with</p> <p>18 the other party, the landlord.</p> <p>19 In a very different contract body to the German</p> <p>20 master agreement, what was important, significant, in my</p> <p>21 view, was that the due date -- that the performance,</p> <p>22 only becomes due after the cooperation of the other</p> <p>23 party.</p> <p>24 Q. Can I suggest that there may be a difference between</p> <p>25 this sort of situation and the clause 9 situation.</p> <p style="text-align: center;">Page 58</p> | <p>1 indicated that he has no further claims. Even when the</p> <p>2 landlord says that he has no further claims, then the</p> <p>3 repayment becomes due.</p> <p>4 Q. That is because if the landlord had to return the</p> <p>5 deposit before he worked out whether or not he had any</p> <p>6 claims, he would lose his security.</p> <p>7 A. Yes. That is right.</p> <p>8 Q. I suggest that it is that fact that constitutes the</p> <p>9 circumstances that led the court to say it only becomes</p> <p>10 due when the calculation has been done.</p> <p>11 A. (Interpreted) The termination depends on a declaration</p> <p>12 by the landlord whether he still has any claims. Of</p> <p>13 course, this then gives, constitutes, a security for the</p> <p>14 landlord.</p> <p>15 Q. Could you take bundle 3, there is a case at tab 95 to</p> <p>16 which I think you refer.</p> <p>17 A. 95?</p> <p>18 Q. You should have a bundle of authorities --</p> <p>19 A. I think I have not the right one.</p> <p>20 THE INTERPRETER: Volume 3?</p> <p>21 MR DICKER: Volume 3, but of the cases, tab 95.</p> <p>22 A. Tab 95. Yes.</p> <p>23 Q. Thank you. There is one sentence I wanted to show you.</p> <p>24 It is in paragraph 9 and it is the last sentence of</p> <p>25 paragraph 9, the English translation reads --</p> <p style="text-align: center;">Page 60</p> |

| | |
|--|---|
| <p>1 A. Yes.</p> <p>2 Q. "From this it already follows that the landlord is at</p> <p>3 least permitted to retain the portion of the deposit</p> <p>4 that is reasonable to secure his claims from the tenancy</p> <p>5 until the expiration of the time limit granted to him,</p> <p>6 otherwise the rental deposit would not be suitable for</p> <p>7 its security function."</p> <p>8 What I want to suggest to you is that is the reason</p> <p>9 why the court held that the sum is not due from the</p> <p>10 landlord until the calculation has been done.</p> <p>11 A. (Interpreted) Yes, I have already confirmed that that is</p> <p>12 the actual reason.</p> <p>13 Q. Thank you.</p> <p>14 Could you take the German master agreement. There</p> <p>15 is a copy in English in core bundle, tab 9.</p> <p>16 I understand that there is a German language version.</p> <p>17 THE INTERPRETER: Is there a German version in there as</p> <p>18 well? (Pause)</p> <p>19 A. My Lord, I need it in German.</p> <p>20 MR DICKER: I understand.</p> <p>21 MR ALLISON: My Lord, I think people might be trying to</p> <p>22 locate it at the moment.</p> <p>23 MR DICKER: Bundle 5, tab 8.</p> <p>24 MR JUSTICE HILDYARD: Do you have it?</p> <p>25 A. Yes, I have it.</p> <p style="text-align: center;">Page 61</p> | <p>1 in principle. But this cannot lead to the conclusion</p> <p>2 that this is therefore also mandatory with respect to</p> <p>3 the German master agreement.</p> <p>4 What is important is that the content and aim of the</p> <p>5 contract have to be deduced from the termination</p> <p>6 provisions contained in sections 7 to 9 of the GMA.</p> <p>7 The circumstances pertaining to the cases we have</p> <p>8 just discussed, which lead with regard to the immediate</p> <p>9 falling due of the claim, do not lead to a conclusion</p> <p>10 that this is also the, applies to the present case, and</p> <p>11 this case has to be examined anew.</p> <p>12 The special feature of this particular contract lies</p> <p>13 in the fact that several individual transactions are</p> <p>14 being summarised within a unified, or unity contract.</p> <p>15 So that the individual, these individual transactions</p> <p>16 may give rise to various reciprocal claims and they have</p> <p>17 to be summarised in netting in one single final</p> <p>18 contract, or transaction, sorry.</p> <p>19 Q. Thank you.</p> <p>20 Can we take it in stages, please. The first point</p> <p>21 is 7(1) says that the agreement can only be terminated</p> <p>22 by either party for material reason. Yes?</p> <p>23 A. (Interpreted) That only refers to a termination -- not</p> <p>24 to anything else.</p> <p>25 THE INTERPRETER: Giving notice I think. It is</p> <p style="text-align: center;">Page 63</p> |
| <p>1 MR DICKER: Just reminding you of a couple of provisions,</p> <p>2 clause 7(1) --</p> <p>3 A. Yes.</p> <p>4 Q. -- if you turn to that.</p> <p>5 A. Yes.</p> <p>6 Q. 7(1), the English version, says:</p> <p>7 "Where transactions have been entered into, not yet</p> <p>8 fully settled, the agreement can only be terminated by</p> <p>9 either party for material reason. Material reason</p> <p>10 includes circumstances where payment or other</p> <p>11 performance due has not been received for whatever</p> <p>12 reason."</p> <p>13 A. Yes.</p> <p>14 Q. 7(1) is essentially concerned with a situation of where</p> <p>15 there is a breach.</p> <p>16 A. (Interpreted) Yes, 7(1) refers to where there is</p> <p>17 a breach. (Pause)</p> <p>18 Q. As I understand it, under German law, clause 7 has to</p> <p>19 conform with the guiding principles of the BGB</p> <p>20 concerning immediate termination.</p> <p>21 A. (Interpreted) No, I see this differently. The immediate</p> <p>22 claim arises from the conditions of the contract</p> <p>23 according to the circumstances under section 271(1) of</p> <p>24 the BGB. That is why I said with respect to the</p> <p>25 termination of the loan contract, that this was correct</p> <p style="text-align: center;">Page 62</p> | <p>1 a termination by giving notice of termination.</p> <p>2 MR DICKER: I am just focusing at the moment on 7(1).</p> <p>3 A. Yes.</p> <p>4 Q. The German master agreement are general business terms</p> <p>5 under German law, yes?</p> <p>6 A. Yes.</p> <p>7 Q. As a result, provisions for termination under this</p> <p>8 agreement need to satisfy certain principles of German</p> <p>9 law.</p> <p>10 A. (Interpreted) Under the reference to basic contractual</p> <p>11 freedom, the contracts are concluded totally</p> <p>12 independently, but of course they cannot offend or go</p> <p>13 against the basic principles of the general conditions</p> <p>14 of business, which are contained in the BGB. And</p> <p>15 because this does contain general conditions of</p> <p>16 business, they have to be compatible with section 305</p> <p>17 and following of the BGB.</p> <p>18 Q. One of the points that Professor Mülbart makes is that,</p> <p>19 because these are general business terms, the parties</p> <p>20 cannot do away all together with the need for a breach</p> <p>21 or cause for termination as a precondition to</p> <p>22 termination.</p> <p>23 A. (Interpreted) It is correct that the reason for</p> <p>24 termination, including the revocation of a contract, are</p> <p>25 amongst the important reasons for the termination, that</p> <p style="text-align: center;">Page 64</p> |

16 (Pages 61 to 64)

| | |
|--|--|
| <p>1 it has to be one of those important reasons for</p> <p>2 termination.</p> <p>3 MR DICKER: Thank you.</p> <p>4 My Lord, I wonder if that might be a convenient</p> <p>5 moment.</p> <p>6 MR JUSTICE HILDYARD: Yes, we will reassemble at 2.00.</p> <p>7 (1.03 pm)</p> <p>8 (The Luncheon Adjournment)</p> <p>9 (2.00 pm)</p> <p>10 MR JUSTICE HILDYARD: Good afternoon.</p> <p>11 A. Good afternoon.</p> <p>12 MR DICKER: Judge Fischer, I asked you before lunch about</p> <p>13 clause 7(1) of the German master agreement. I wanted to</p> <p>14 suggest to you that clause 7(2) also needs to satisfy</p> <p>15 the guiding principles of the BGB concerning</p> <p>16 an immediate termination.</p> <p>17 A. (Interpreted) Yes, it has to be in accordance with the</p> <p>18 BGB and also with the German insolvency law. But I said</p> <p>19 in my expert opinion that the conditions -- I assume</p> <p>20 that these conditions had been fulfilled.</p> <p>21 Q. I understand your point in relation to German insolvency</p> <p>22 law, and I will come to that.</p> <p>23 A. Okay.</p> <p>24 Q. We have in clause 7, various situations of</p> <p>25 termination --</p> <p style="text-align: right;">Page 65</p> | <p>1 a contract for cause.</p> <p>2 A. (Interpreted) 7, 8(1) and 9 are the basis for such</p> <p>3 claims, but this should not be seen in isolation but it</p> <p>4 should also include 8(2) and 9(2), because a separate</p> <p>5 view of those would not be in accordance with the</p> <p>6 meaning and intent of the clauses.</p> <p>7 Q. I was going to turn next to clause 9(2). As</p> <p>8 I understand it, your view is that the single</p> <p>9 compensation claim is not due immediately and you can</p> <p>10 see that, you say, when you look at clause 9(2)?</p> <p>11 A. (Interpreted) If I understand the question correctly, as</p> <p>12 it has been translated to me, I see in 7 to 9 the -- not</p> <p>13 the basis for a compensation claim but of an overall</p> <p>14 arrangement of anything which is due arising from</p> <p>15 termination.</p> <p>16 Of course taking full account of the events covered</p> <p>17 by 7 to 9, it is possible that a damages compensation</p> <p>18 claim may arise, but this is not made mandatory but may</p> <p>19 occur according to the circumstances.</p> <p>20 Q. 9(1) refers to a party entitled to damages having</p> <p>21 a damages claim. That's correct?</p> <p>22 A. (Interpreted) If a compensation claim exists in favour</p> <p>23 of the party which is not insolvent then that is</p> <p>24 a damages compensation claim.</p> <p>25 Q. Thank you.</p> <p style="text-align: right;">Page 67</p> |
| <p>1 A. Yes.</p> <p>2 Q. -- and that leads to a claim for damages. You will see</p> <p>3 that, as I am sure you know, clause 8(1) of the German</p> <p>4 master agreement which says:</p> <p>5 "In the event of termination the party giving notice</p> <p>6 or the solvent party as the case may be shall be</p> <p>7 entitled to claim damages."</p> <p>8 A. Yes.</p> <p>9 Q. As I think you pointed out this morning, that claim for</p> <p>10 damages is then rolled up together with any unpaid</p> <p>11 amounts --</p> <p>12 A. Yes.</p> <p>13 Q. -- and it produces a single compensation claim?</p> <p>14 A. (Interpreted) It is correct that any claims which arise</p> <p>15 before the end of the contract, according to -- then</p> <p>16 have to be summarised and taken together with the claims</p> <p>17 arising under 8.</p> <p>18 Q. Can I suggest to you that what we see in clauses 7, 8</p> <p>19 and 9(1) is a provision for a compensation claim upon</p> <p>20 an early termination of a contract for cause.</p> <p>21 THE INTERPRETER: Could you just ask the last part of the</p> <p>22 question.</p> <p>23 MR DICKER: Just to repeat my question, can I suggest to you</p> <p>24 that what we see in clauses 7, 8 and 9(1) is a provision</p> <p>25 for a compensation claim on an early termination of</p> <p style="text-align: right;">Page 66</p> | <p>1 Can we go through clause 9(2).</p> <p>2 A. Yes.</p> <p>3 Q. I want to see if you think I have it right. Obviously</p> <p>4 ultimately it is a matter for his Lordship --</p> <p>5 A. Yes.</p> <p>6 Q. -- but if you will allow me, 9(2) starts by saying:</p> <p>7 "A compensation claim against the party entitled to</p> <p>8 damages shall become due and payable only to the extent</p> <p>9 such party does not for any legal reason whatsoever have</p> <p>10 any claims against the other party."</p> <p>11 A. Yes.</p> <p>12 Q. That is the first sentence of 9(2), if you have that in</p> <p>13 German.</p> <p>14 This is dealing with a situation in which</p> <p>15 a compensation claim isn't being made by the party</p> <p>16 entitled to damages, it is being made against the party</p> <p>17 entitled to damages.</p> <p>18 A. Yes.</p> <p>19 (Interpreted) This is the 9(2) first sentence,</p> <p>20 concerns counter claims by the party which has become</p> <p>21 insolvent against the other party.</p> <p>22 Q. Take 7(1) as an example, it operates where the</p> <p>23 defaulting party is entitled to a compensation claim</p> <p>24 against the party entitled to damages.</p> <p>25 A. (Interpreted) 9(2) must be taken to mean that</p> <p style="text-align: right;">Page 68</p> |

| | |
|--|---|
| <p>1 a compensation claim against the party is to whom this</p> <p>2 is due, is only due if there is an excess. (Pause)</p> <p>3 So there has to be a surplus for a party which has</p> <p>4 become insolvent in the compensation claim by the party</p> <p>5 that is entitled to compensation.</p> <p>6 THE INTERPRETER: Does that make sense?</p> <p>7 A. (Interpreted) The claims under 9(2)(1) concern whether,</p> <p>8 under what conditions, the insolvent party has a claim,</p> <p>9 not just a claim that exists but a claim which is</p> <p>10 actually due.</p> <p>11 Q. What happens in this situation is that the party</p> <p>12 entitled to damages calculates whether he has a claim</p> <p>13 against the insolvent party, or the party who was in</p> <p>14 breach, yes?</p> <p>15 THE INTERPRETER: Could you repeat the question once more,</p> <p>16 so I can be sure --</p> <p>17 MR DICKER: Yes, perhaps it is easiest if you go to 9(2) and</p> <p>18 read the third sentence. In English it begins, "For the</p> <p>19 purpose of calculating ..."</p> <p>20 A. Yes.</p> <p>21 The second or the third?</p> <p>22 Q. The third.</p> <p>23 A. The third.</p> <p>24 (Interpreted) That is a provision for calculation.</p> <p>25 Q. What I was suggesting to you is the way it works is --</p> <p style="text-align: center;">Page 69</p> | <p>1 damages shall become due and payable only to the extent</p> <p>2 such a party does not for any legal reason whatsoever</p> <p>3 have any claims against the other party."</p> <p>4 If you were right it could simply have referred to</p> <p>5 the compensation claim, couldn't it?</p> <p>6 A. (Interpreted) I understand 9(2) first sentence, to</p> <p>7 concern claims for any legal reasons under any law which</p> <p>8 are within the scope of the GMA but not outside the GMA.</p> <p>9 I don't want to bother you again with the insolvency</p> <p>10 provisions which concerned other possibilities, other</p> <p>11 claims.</p> <p>12 Q. Judge Fischer, you have not bothered me yet with the</p> <p>13 insolvency provisions. That is still to come.</p> <p>14 The question of construction obviously is a matter</p> <p>15 for his Lordship. I think I have adequately dealt with</p> <p>16 that point.</p> <p>17 MR JUSTICE HILDYARD: His Lordship is feeling a little bit</p> <p>18 stuck actually.</p> <p>19 This may be difficult because we are operating on</p> <p>20 different versions. Although I understand this is to be</p> <p>21 an official translation. This is a standard</p> <p>22 translation; is that right?</p> <p>23 MR DICKER: As I understand it, yes.</p> <p>24 MR JUSTICE HILDYARD: In the version that I am looking at --</p> <p>25 A. Yes?</p> <p style="text-align: center;">Page 71</p> |
| <p>1 A. Yes.</p> <p>2 Q. -- the party entitled to damages works out whether it</p> <p>3 has any other claims against the insolvent party or the</p> <p>4 party in breach.</p> <p>5 A. (Interpreted) What is "other claims"? What is exactly</p> <p>6 meant by "other claims"? There can be only such claims</p> <p>7 as arise from the German master agreement, because that</p> <p>8 is the only thing that is provided for here.</p> <p>9 Q. If you go back to the first sentence of 9(2), it says in</p> <p>10 English:</p> <p>11 "A compensation claim against the party entitled to</p> <p>12 damages shall become due and payable only to the extent</p> <p>13 that such party does not for any legal reason whatsoever</p> <p>14 have any claims against the other party."</p> <p>15 Those are defined as counter claims. I was</p> <p>16 suggesting to you that the other claims are any other</p> <p>17 claims that the party entitled to damages may have.</p> <p>18 A. (Interpreted) I understood that this concerns only any</p> <p>19 claims arising from the contract and the master contract</p> <p>20 concerns the number 1 -- this concerns number 1 of the</p> <p>21 master contract. I understand the provision not to be</p> <p>22 a broad one but just compensation for those cases only</p> <p>23 and for counter claims arising under 7 to 9.</p> <p>24 Q. If you go back to the start of 9(2), it says:</p> <p>25 "A compensation claim against the party entitled to</p> <p style="text-align: center;">Page 70</p> | <p>1 MR JUSTICE HILDYARD: In 9(2) it reads:</p> <p>2 "A compensation claim against the party entitled to</p> <p>3 damages [the 'party entitled to damages' being a defined</p> <p>4 term] shall become due and payable only to the extent</p> <p>5 that such party does not for any legal reason whatever</p> <p>6 have any claims against the other party."</p> <p>7 Is "such party" the party entitled to damages?</p> <p>8 A. Yes.</p> <p>9 MR JUSTICE HILDYARD: Yes. It is only to the extent that</p> <p>10 the party entitled to damages did not for any legal</p> <p>11 reason whatsoever have any claims against the other</p> <p>12 party, and they are rather to the immediate eye defined</p> <p>13 oddly as counter claims?</p> <p>14 A. Yes.</p> <p>15 MR JUSTICE HILDYARD: Yes, and does this master agreement --</p> <p>16 I couldn't find whether it did or not, have any currency</p> <p>17 of account? Does it stipulate payments in euros?</p> <p>18 A. No, it doesn't have to be in euros.</p> <p>19 MR JUSTICE HILDYARD: It could be under any currency.</p> <p>20 MR DICKER: I think your Lordship will find that from the</p> <p>21 third sentence --</p> <p>22 MR JUSTICE HILDYARD: I see that for claims under this there</p> <p>23 is a currency conversion provision, but I was wondering</p> <p>24 whether there was any clue as to whether other claims</p> <p>25 were caught by reference to the currency, but I don't</p> <p style="text-align: center;">Page 72</p> |

| | |
|---|---|
| <p>1 think there are.</p> <p>2 A. (Interpreted) This could be correct and imaginable so</p> <p>3 long as it falls within the context of the German master</p> <p>4 agreement, but not goes beyond the German master</p> <p>5 agreement.</p> <p>6 MR JUSTICE HILDYARD: I mean I may be on a false track</p> <p>7 anyway, but so you should know what track I was on, all</p> <p>8 I was thinking was that if under the German master</p> <p>9 agreement, there was a specified currency of account</p> <p>10 under which all obligations were payable, the third</p> <p>11 sentence would naturally have to refer to claims other</p> <p>12 than claims under the German master agreement, because</p> <p>13 they would not otherwise be denominated in a currency</p> <p>14 other than euros.</p> <p>15 You have explained to me that obligations under the</p> <p>16 German master agreement could be under any currency,</p> <p>17 hence the need for conversion, therefore my thought is</p> <p>18 misplaced.</p> <p>19 I only wanted to give an insight about how lost</p> <p>20 I am.</p> <p>21 A. Thank you, my Lord.</p> <p>22 MR DICKER: Judge Fischer, can we just go to the penultimate</p> <p>23 sentence in 9(2).</p> <p>24 A. Yes.</p> <p>25 Q. "The party entitled to damages may set off the</p> <p style="text-align: center;">Page 73</p> | <p>1 absolutely right, is protection.</p> <p>2 A. (Interpreted) That is why I mentioned German insolvency</p> <p>3 law provisions, because the provisions of the GMA become</p> <p>4 non-effective if they are in breach of the mandatory</p> <p>5 insolvency laws, because insolvency law deals with</p> <p>6 all -- (Pause)</p> <p>7 May I ask, do you mean claims which have arisen</p> <p>8 before or after the insolvency?</p> <p>9 Q. I mean for the purposes of the meaning of 9(2), any</p> <p>10 claims.</p> <p>11 A. (Interpreted) If that broad construction is accepted,</p> <p>12 according to the insolvency provisions, the -- (Pause)</p> <p>13 The party which has the claim cannot set off, set</p> <p>14 off any claims arisen before the insolvency occurred.</p> <p>15 THE INTERPRETER: I am sorry.</p> <p>16 A. (Interpreted) According to the general insolvency rules,</p> <p>17 the party can set off claims which have arisen before</p> <p>18 the insolvency has occurred but not after insolvency has</p> <p>19 occurred.</p> <p>20 I must add, however, that I don't think this</p> <p>21 construction -- which I admit is possible according to</p> <p>22 the wording -- is the correct construction.</p> <p>23 MR DICKER: Now --</p> <p>24 A. (Interpreted) The GMA provisions are construed both in</p> <p>25 the handbook on banking law and in the Munchen</p> <p style="text-align: center;">Page 75</p> |
| <p>1 compensation claim of the other party against the</p> <p>2 counter claims calculated in accordance with sentence</p> <p>3 three."</p> <p>4 What I want to suggest to you is: this is very like</p> <p>5 the landlord and tenant cases you were referring to.</p> <p>6 I will explain what I mean and then ask you to comment.</p> <p>7 What I mean is that we have a situation in which the</p> <p>8 defaulting party, if I may call him that, has a claim</p> <p>9 against the party entitled to damages. The party</p> <p>10 entitled to damages is effectively able to say, "I only</p> <p>11 have to pay you the net amount ..."</p> <p>12 A. Yes.</p> <p>13 Q. "... after setting off any other claim that I may have</p> <p>14 against you."</p> <p>15 A. (Interpreted) I understand your question to mean --</p> <p>16 I hope I understand your question correctly, but I see</p> <p>17 9(2) as a protective norm --</p> <p>18 (Not interpreted) Not "I", he.</p> <p>19 THE INTERPRETER: He, sorry.</p> <p>20 A. (Interpreted) You see 9(2) as a protective norm which</p> <p>21 allows the non-insolvent party to set off any claims in</p> <p>22 order to protect the party.</p> <p>23 MR DICKER: Yes. Actually it doesn't matter whether the</p> <p>24 other claims are all other claims or just claims under</p> <p>25 the German master agreement. The point, you are</p> <p style="text-align: center;">Page 74</p> | <p>1 kommentar, which is the Munich commentary, as</p> <p>2 an interpretation always that the effect of 7, 8 and 9</p> <p>3 is the effect -- has the effect of a closeout netting,</p> <p>4 but no more.</p> <p>5 Q. You mentioned insolvency, and I will come to insolvency,</p> <p>6 but the termination does not need to have involved</p> <p>7 an insolvency, does it?</p> <p>8 A. (Interpreted) That's correct, the termination can be</p> <p>9 effected by revocation or also in insolvency law by</p> <p>10 an application for insolvency. It does not depend on</p> <p>11 insolvency proceedings to be opened.</p> <p>12 Q. Finally, the last sentence of 9(3).</p> <p>13 A. Yes.</p> <p>14 Q. Sorry, 9(2).</p> <p>15 A. 9(2).</p> <p>16 Q. It says in English:</p> <p>17 "To the extent that it fails to do so, the</p> <p>18 compensation claim shall become due and payable as soon</p> <p>19 as and to the extent that it exceeds the aggregate</p> <p>20 amount of counter claims."</p> <p>21 What I want to suggest to you is that this is just</p> <p>22 like the landlord and tenant cases, that the</p> <p>23 non-defaulting party, if I can call them that, is</p> <p>24 entitled only to pay the net amount to the defaulting</p> <p>25 party and is entitled to work out what that net amount</p> <p style="text-align: center;">Page 76</p> |

| | |
|--|---|
| <p>1 is before being liable to pay.</p> <p>2 THE INTERPRETER: Can I just ask back, "... and is entitled</p> <p>3 ..."</p> <p>4 MR DICKER: The non-defaulting party is only entitled to pay</p> <p>5 the net amount to the defaulting party and is entitled</p> <p>6 to work out what that net amount is before becoming</p> <p>7 liable to pay, before that sum becomes due.</p> <p>8 A. (Interpreted) I will try and explain it somewhat more</p> <p>9 extensively.</p> <p>10 The penultimate sentence in 9(2), so 9(2), read</p> <p>11 together with the last sentence of 9(2) is construed by</p> <p>12 me in such a way that the party which is not insolvent</p> <p>13 can set off.</p> <p>14 (Not interpreted) The party can choose.</p> <p>15 (Interpreted) Can choose to set off before .. so</p> <p>16 either to set off the amounts and in that way dissolve</p> <p>17 the counter claims or extinguish the counter claims, or</p> <p>18 they can omit the set off with the consequence that to</p> <p>19 the extent that then there is no compensation, damages</p> <p>20 compensation claim which arises to that extent.</p> <p>21 Can I just give an example. Assume that the party</p> <p>22 entitled to the damages compensation claim under 7 and 8</p> <p>23 amounts to 1,000 euros and the insolvent party has</p> <p>24 a counterclaim of 500 euros.</p> <p>25 Then the party entitled to compensation has two</p> <p style="text-align: center;">Page 77</p> | <p>1 A. Yes. Yes.</p> <p>2 MR JUSTICE HILDYARD: If it fails to do that, the</p> <p>3 compensation claim of the insolvent party then becomes</p> <p>4 due and payable, as long as and only to the extent that</p> <p>5 it exceeds the aggregate amount of the party entitled to</p> <p>6 damages' counterclaim. Is that right?</p> <p>7 A. (Interpreted) The question is, my Lord, if the party</p> <p>8 entitled to compensation does omit to set off, whether</p> <p>9 then the other party, the insolvent party, can ask for</p> <p>10 payment due to that amount.</p> <p>11 MR JUSTICE HILDYARD: Is there any express or implied time</p> <p>12 within which the party entitled to damages must apply</p> <p>13 the set off not?</p> <p>14 A. (Interpreted) I think if a party does not set off and</p> <p>15 the parties are faced with each other with claims of</p> <p>16 500 euros, both claims are not applicable and cannot --</p> <p>17 and enforceable, if there is a right of retention of the</p> <p>18 parties, one of the parties, so that we have a --</p> <p>19 I think it is called a pat position in chess, of the</p> <p>20 parties.</p> <p>21 My Lord, may I make one additional statement?</p> <p>22 MR JUSTICE HILDYARD: Sure.</p> <p>23 A. (Interpreted) The last sentence, in my view, it is</p> <p>24 essential that an additional argument that the payment</p> <p>25 is only enforceable, or is due --</p> <p style="text-align: center;">Page 79</p> |
| <p>1 possibilities, the first possibility is it makes a set</p> <p>2 off, and that the consequence is then that it has a due</p> <p>3 compensation claim of 500 euros.</p> <p>4 If there was no set off, there is then confronted</p> <p>5 1,000 euros of the party entitled to compensation, with</p> <p>6 500 with the other party and then sentence three says</p> <p>7 that the amount in the amount of the counterclaim, 500</p> <p>8 euros is not due.</p> <p>9 There is a claim of 1,000, but because of the</p> <p>10 counterclaim of 500, the insolvent party may refuse the</p> <p>11 counterclaim to the extent of the 500.</p> <p>12 Q. Yes. Judge Fischer, can I show you one --</p> <p>13 MR JUSTICE HILDYARD: Before you do, I am so sorry, can</p> <p>14 I simply clarify.</p> <p>15 MR DICKER: Of course.</p> <p>16 MR JUSTICE HILDYARD: In the last sentence of 9(2), it says:</p> <p>17 "To the extent that it fails ..."</p> <p>18 That is a reference to the party entitled to</p> <p>19 damages, yes?</p> <p>20 A. Hmm.</p> <p>21 MR JUSTICE HILDYARD: To the extent that the party entitled</p> <p>22 to damages fails to do something, and I read that as</p> <p>23 fails to set off the compensation claim of the other</p> <p>24 party against a counter claims calculation in accordance</p> <p>25 with sentence 3.</p> <p style="text-align: center;">Page 78</p> | <p>1 (Not interpreted) Is due --</p> <p>2 (Interpreted) When the due date has occurred under</p> <p>3 9(2).</p> <p>4 MR DICKER: Judge Fischer, what I want to suggest is that</p> <p>5 that postponement only applies in the case of 9(2), the</p> <p>6 draftsman has not used similar words in 9(1).</p> <p>7 A. (Interpreted) No, I don't accept that view. My view is</p> <p>8 that 7 to 9 constitutes a united, a unified regulation</p> <p>9 so that irrespective of -- (Pause)</p> <p>10 So that the due, the amount is only due after the</p> <p>11 proceedings have gone on -- have terminated.</p> <p>12 This also applies if in an individual case the</p> <p>13 insolvent party, the party which has become insolvent,</p> <p>14 does not have a claim.</p> <p>15 Insofar it is similar, and there I agree with you,</p> <p>16 to the landlord and the tenant case.</p> <p>17 The restitution in that case also only occurs when</p> <p>18 the landlord declares that he has no longer any -- he</p> <p>19 has no claims against the tenant.</p> <p>20 In this case too, it only occurs when it has been</p> <p>21 clarified what claims the party in insolvency has. And</p> <p>22 then the calculation process has been carried out.</p> <p>23 If there are counter claims from the party which has</p> <p>24 become insolvent, so then the proceedings start to run.</p> <p>25 If the declaration -- (Pause)</p> <p style="text-align: center;">Page 80</p> |

| | |
|--|---|
| <p>1 So when there are no counter claims, then once the 2 insolvency has been declared then the sums become due, 3 but not before the due date. Yes. 4 If the insolvent party has no counterclaim, then the 5 due date has occurred with the declaration of the 6 insolvency. 7 Q. Judge Fischer, I am conscious, this is a question of 8 construction ultimately for his Lordship but you dealt 9 with it in your report so I wanted to give you the 10 opportunity to comment on it. I would like to show you 11 one document in the bundles which contains a commentary 12 and show you two passages from that. It is in 13 bundle 2 -- 14 A. Bundle 2? 15 Q. I hope it is in your volume 2, tab 75. 16 THE INTERPRETER: Which tab? 17 MR DICKER: Tab 75. 18 THE INTERPRETER: 75. 19 MR DICKER: The first passage I wanted to show you was at 20 paragraph 50. 21 A. Yes. 22 Q. In paragraph 50, the author says: 23 "Two further points should be noted ..." 24 A. 15 or 50? 25 Q. 5-0.</p> <p style="text-align: center;">Page 81</p> | <p>1 maturity of the compensation claim of the other party is 2 postponed, which is a reference to the last sentence of 3 clause 9(2), I would suggest. 4 A. (Interpreted) I cannot agree with these comments, as set 5 out here. In my view they are not compatible with what 6 is set out in 9(2). 7 Q. Thank you. 8 Judge Fischer, I want to turn next to look at some 9 of the consequences of the competing constructions and 10 ask you about some views you express in your reports on 11 those. (Pause) 12 Clause 9(1) deals with the single compensation claim 13 and we have established that that single compensation 14 claim replaces unpaid amounts and includes the damages 15 claim in clause 8. And, to the extent necessary, any 16 claims and cross claims are netted off against each 17 other in 9(1) to produce this single claim, yes? 18 I am sorry, that was a yes? Thank you. 19 A. Yes. 20 Q. Thank you. 21 The purpose of the calculation method is to make the 22 party entitled to damages whole, in economic terms? 23 A. (Interpreted) Could you repeat the question because it 24 is -- 25 Q. The purpose of the calculation mechanism --</p> <p style="text-align: center;">Page 83</p> |
| <p>1 A. 5-0. 2 Q. In paragraph 50 the author says: 3 "Finally two points should be noted that do not 4 explicitly emerge in the wording of clause 7, 5 paragraph 3, clauses 8 and 9, paragraph 1." 6 It is the second point. Would you just mind reading 7 to yourself the third paragraph in paragraph 50. 8 (Pause) 9 I understand the author to be saying that in 10 relation to clause 9(1) the compensation claim comes 11 about automatically with the ending of the contract and 12 it doesn't depend on, and doesn't have to wait for, any 13 calculation to be done. 14 A. (Interpreted) German law distinguishes between the 15 rising of the claim and the becoming due of the claim. 16 What is said here is that the claim has 17 automatically arisen, but not that it is also due. 18 Q. Can I ask, before coming back to that, you to look at 19 paragraph 54, where the author deals with 9(2). 20 A. Yes. 21 Q. Again, if you wouldn't mind just reminding yourself of 22 that and then I will ask you a question. (Pause) 23 What the draftsman, the author, appears to be doing 24 here, I would suggest, is drawing a distinction with 25 clause 9(1), and saying that in relation to 9(2) the</p> <p style="text-align: center;">Page 82</p> | <p>1 A. Of 9(1)? 2 Q. -- of 9(1) is to put the party entitled to damages in 3 the same position as it would have been in if the 4 contract had been properly performed. 5 A. (Interpreted) Yes, the result will be that the party 6 will be in the same position as before. 7 Q. It was intended to provide a simplified way of 8 calculating the amount that was necessary to do that? 9 A. (Interpreted) Well, I wouldn't see this as a simplified 10 calculation, a priori. I would see it that from all the 11 claims of the individual parties, then there would be 12 one claim which would remain. 13 Q. Perhaps I was not entirely clear. I meant by 14 "simplified", simplified as compared to the parties 15 having to go to court and work out what all of the 16 amounts were? 17 A. (Interpreted) Of course it is a simplification to the 18 extent that instead of the very many claims to be 19 instituted, which the parties have is to institute, then 20 one payment remains which then has to be enforced. 21 Q. It is also simplified because the party entitled to 22 damages does the calculation and we don't need a court 23 and we don't need all the lawyers? 24 A. (Interpreted) Yes, if such conditions for compensation 25 claim are present, then one can proceed in this manner.</p> <p style="text-align: center;">Page 84</p> |

| | |
|--|--|
| <p>1 Yes.</p> <p>2 Q. I want to ask you about what you say happens to unpaid</p> <p>3 amounts. In other words, sums due under clause 3 of the</p> <p>4 master agreement.</p> <p>5 A. Yes.</p> <p>6 Q. Can I ask you to imagine a case in which a sum became</p> <p>7 due before termination --</p> <p>8 A. Yes.</p> <p>9 Q. -- and was already accruing interest under clause 3(4).</p> <p>10 A. Yes.</p> <p>11 Q. I suggest to you that the German master agreement cannot</p> <p>12 have the effect of stopping interest running on that sum</p> <p>13 and for interest only to start running again after the</p> <p>14 calculation has been done under section 9(1)?</p> <p>15 A. (Interpreted) I also think that 3(4), when there is</p> <p>16 already a default, but then a damages default claim</p> <p>17 arises and this claim does not then end, because of the</p> <p>18 proceedings contained in 7 to 9, the provisions</p> <p>19 contained in 7 to 9.</p> <p>20 THE INTERPRETER: This was half the ... (Pause)</p> <p>21 A. (Interpreted) The claim under 3(4) should however be</p> <p>22 included in the calculation under 9 and does not remain</p> <p>23 separate. But this cannot lead to the conclusion that</p> <p>24 a compensation claim cannot arise when after a default,</p> <p>25 no further damages claim arises.</p> <p style="text-align: right;">Page 85</p> | <p>1 Although the debtor, because of the insolvency, is</p> <p>2 not able to perform, the literature says that in such</p> <p>3 a case of default, the party in default is liable for</p> <p>4 anything that arises, any chance events arising after</p> <p>5 the default.</p> <p>6 Q. If that is true --</p> <p>7 A. (Interpreted) One more thing. There is the following</p> <p>8 principle. If someone has gone into default, he will</p> <p>9 remain in default insofar as he does not have a private</p> <p>10 law -- a right of retention, for example, according to</p> <p>11 private law.</p> <p>12 Q. What you say in relation to a situation where someone is</p> <p>13 insolvent, obviously applies also where there is</p> <p>14 a termination under 7(1)?</p> <p>15 A. (Interpreted) The decisive point is whether or not the</p> <p>16 default has occurred before insolvency has occurred or</p> <p>17 not, not when it has become due. I would emphasise</p> <p>18 that.</p> <p>19 The default, once it has occurred, is not stopped by</p> <p>20 the insolvency proceedings.</p> <p>21 So insolvency proceedings are opened before the</p> <p>22 default has occurred --</p> <p>23 THE INTERPRETER: I will repeat.</p> <p>24 A. (Interpreted) After the insolvency proceedings have been</p> <p>25 started, default can no longer occur because the</p> <p style="text-align: right;">Page 87</p> |
| <p>1 Maybe I may give an example as well.</p> <p>2 Under 3(4) the claim of 1,000 already exists, is</p> <p>3 already due before the end of the contract and the other</p> <p>4 party to the claim has fallen into default.</p> <p>5 When insolvency proceedings are opened, there is the</p> <p>6 claim of 1,000 plus an additional interest claim of 50.</p> <p>7 The 1,000 euros ought to be included in the</p> <p>8 compensation claim and also the 50, are both to be</p> <p>9 included in the compensation claim to be billed.</p> <p>10 Let us assume in addition to the 1,000 and 50 there</p> <p>11 will be another 2,000 euros. That would mean therefore</p> <p>12 there would be a total compensation claim of 3,050 but</p> <p>13 I must say that I have found no indications in</p> <p>14 literature or in case law which takes this.</p> <p>15 I think that the interest claim goes on running even</p> <p>16 during the insolvency period, the interest claim which</p> <p>17 arises from the 1,000, when the default has occurred.</p> <p>18 Q. As I understand it, the long and the short of it is we</p> <p>19 agree there cannot be a gap in the interest running on</p> <p>20 an unpaid amount under clause 3.</p> <p>21 A. (Interpreted) In a claim when a default has occurred</p> <p>22 beforehand, generally opinion in German literature</p> <p>23 recognises that default which has occurred before the</p> <p>24 insolvency has occurred does not cease with the</p> <p>25 insolvency.</p> <p style="text-align: right;">Page 86</p> | <p>1 defaulter has lost the control over his assets.</p> <p>2 So default, if default occurs before the insolvency</p> <p>3 proceedings, then the proceedings, the default applies,</p> <p>4 but after default occurs after insolvency proceedings</p> <p>5 are instituted, the default can no longer exist.</p> <p>6 (Not interpreted) Can't exist.</p> <p>7 THE INTERPRETER: Can't exist.</p> <p>8 A. (Not interpreted) Can't exist.</p> <p>9 (Interpreted) And default cannot actually occur,</p> <p>10 cannot arise.</p> <p>11 MR DICKER: I hesitate to interrupt, and it may be</p> <p>12 convenient to have a short break. Can I just before we</p> <p>13 do, just say this. I only have a day to ask you</p> <p>14 questions. It would help me, at least, if you could</p> <p>15 ensure you answer my question and, perhaps if I may</p> <p>16 respectfully say, confine your additions to what you</p> <p>17 feel is necessary.</p> <p>18 I only say that because my short question was</p> <p>19 whether there was any gap in interest running.</p> <p>20 My Lord, I wonder whether this would be a convenient</p> <p>21 moment.</p> <p>22 MR JUSTICE HILDYARD: I think counsel has a point, that he</p> <p>23 has a limited number of questions for you, limited by</p> <p>24 the day, and --</p> <p>25 A. Yes.</p> <p style="text-align: right;">Page 88</p> |

| | |
|--|--|
| <p>1 MR JUSTICE HILDYARD: -- although it is generally of course</p> <p>2 informative to know what the context is, I think we must</p> <p>3 allow him to choose the questions he thinks will</p> <p>4 illuminate and I must ask you to restrict your answers</p> <p>5 to those questions.</p> <p>6 If at any given time you think the answer that you</p> <p>7 give needs qualification, that is fine. But I think in</p> <p>8 your endeavour to assist me as much as possible,</p> <p>9 nevertheless we will have to restrict it to the answers</p> <p>10 that are required.</p> <p>11 A. Okay. Yes.</p> <p>12 MR JUSTICE HILDYARD: I think we are going to have five</p> <p>13 minutes now, and return to the fray thereafter.</p> <p>14 Do you wish to sit a bit late today or --</p> <p>15 MR DICKER: I am in your Lordship's hands. I am not making</p> <p>16 quite as much progress as I hoped.</p> <p>17 MR JUSTICE HILDYARD: It is very dense, difficult stuff.</p> <p>18 The only other suggestion I have, and I mention it now</p> <p>19 with deference to you, but just in case it assists, it</p> <p>20 may be that if you confine your responses in bite sized</p> <p>21 bits and then look at the interpreter to see whether</p> <p>22 that is a suitable bite sized bit for her, that that</p> <p>23 would be better. I just think that even though it puts</p> <p>24 a greater strain on you to be able to continue your</p> <p>25 pattern of thought, nevertheless bite sized bits will</p> <p style="text-align: right;">Page 89</p> | <p>1 is just an estimated time of drawing stumps.</p> <p>2 (3.31 pm)</p> <p>3 (A short adjournment)</p> <p>4 (3.41 pm)</p> <p>5 MR JUSTICE HILDYARD: Sorry to have kept you.</p> <p>6 MR DICKER: Dr Fischer I wanted to ask you a similar</p> <p>7 question about the claim for damages under clause 8 of</p> <p>8 the master agreement.</p> <p>9 This provision is also intended to ensure that the</p> <p>10 non-defaulting party receives -- I will rephrase that,</p> <p>11 is put in the same financial position as it would have</p> <p>12 been in if the contract had been properly performed.</p> <p>13 A. That's right.</p> <p>14 Q. It is to make him whole?</p> <p>15 A. Yes.</p> <p>16 Q. One thing he can do is enter into a replacement</p> <p>17 transaction?</p> <p>18 A. Yes.</p> <p>19 Q. Another thing he can do is calculate his damages, yes --</p> <p>20 A. Yes.</p> <p>21 Q. -- by reference to what he would have needed to pay --</p> <p>22 A. Yes.</p> <p>23 Q. -- and then, if you look at clause 8(1), about eight</p> <p>24 lines from the end of 8(1), it says, "At the time of</p> <p>25 giving notice, or becoming aware of the insolvency".</p> <p style="text-align: right;">Page 91</p> |
| <p>1 get us closer to the answer.</p> <p>2 A. Yes, okay.</p> <p>3 MR DICKER: My Lord, thank you.</p> <p>4 MR JUSTICE HILDYARD: That is the pessimism. Do you want to</p> <p>5 sit a bit later? I don't want to sit as long as</p> <p>6 yesterday because I found that I was pretty -- I was</p> <p>7 floating towards the end I think.</p> <p>8 MR DICKER: My Lord, I would wish to stop before your</p> <p>9 Lordship reaches that point.</p> <p>10 MR JUSTICE HILDYARD: Yes.</p> <p>11 MR DICKER: It may be useful to sit a little longer, I hope</p> <p>12 to finish shortly on the question of when clause 9</p> <p>13 becomes due. I then have an equal amount in relation</p> <p>14 to -- roughly equal amount, maybe slightly less, in</p> <p>15 relation to default, and then a few questions in</p> <p>16 relation to assignment. My best guess is that I am</p> <p>17 probably looking at finishing, I would hope, Monday</p> <p>18 lunchtime.</p> <p>19 MR JUSTICE HILDYARD: That is good news.</p> <p>20 Not that it is not enjoyable but it is just that we</p> <p>21 have other cases.</p> <p>22 If I say around 4.45 being when I can recognise my</p> <p>23 concentration will waiver -- is that about right? If</p> <p>24 you want to stop before then, well and good, and if you</p> <p>25 want five minutes more than that, well and good but that</p> <p style="text-align: right;">Page 90</p> | <p>1 A. Would you please repeat?</p> <p>2 Q. Yes, I am sorry, that was not a very helpful way of</p> <p>3 guiding you.</p> <p>4 If you go to 8(1).</p> <p>5 A. Yes.</p> <p>6 Q. Eight lines down there is a sentence that begins, in</p> <p>7 English with the words, "Such parties shall be</p> <p>8 entitled ..."</p> <p>9 It is the next sentence that I am concerned with,</p> <p>10 the next sentence in English reads:</p> <p>11 "If it refrains from entering into such substitute</p> <p>12 transactions, it may base the calculation of damages on</p> <p>13 that amount which it would have needed to pay ..."</p> <p>14 A. Yes.</p> <p>15 Q. Then there is a reference to various rates and things.</p> <p>16 Then it says in English:</p> <p>17 "... at the time of giving notice or upon becoming</p> <p>18 aware of the insolvency."</p> <p>19 A. The third sentence, or fourth. Yes, I think I know what</p> <p>20 you mean.</p> <p>21 Q. Can I just explain what I understand by that.</p> <p>22 A. Yes.</p> <p>23 Q. He may calculate his damages but if he does so, he does</p> <p>24 it by reference to the position at the time of giving</p> <p>25 notice or on becoming aware of the insolvency.</p> <p style="text-align: right;">Page 92</p> |

| | |
|--|---|
| <p>1 A. (Interpreted) The party entitled to claim has two 2 possibilities. 3 First of all, it can conclude replacement 4 business -- this is what is dealt with in the previous 5 paragraph. 6 The other one is to abstractly calculate what sort 7 of business, similar business, it could have conducted 8 within this time. 9 Q. My point was, in the second case -- 10 A. Yes. 11 Q. -- what he does is work out what he would have needed 12 to pay at the time of giving notice or upon becoming 13 aware of the insolvency. 14 A. Yes. 15 Q. Thank you. 16 Obviously it may take him some time to do the 17 calculation. 18 A. Yes. 19 Q. You could have a gap between the date he is given notice 20 and the date of the calculation. 21 A. Yes. 22 Q. As I understand it, your construction of the master 23 agreement means that he wouldn't receive interest for 24 that gap? 25 Just so we are clear, leaving aside for the moment</p> <p style="text-align: center;">Page 93</p> | <p>1 Q. However long the period is, whether it is short or long, 2 on your construction of clause 9, he will not get 3 interest for that period, that gap? 4 A. (Interpreted) No, no payment of interest. 5 Q. So he will not be made whole? 6 A. (Interpreted) If there is a case of insolvency, that is 7 right. 8 Q. Forget about insolvency. Just for the moment, assume 9 termination by notice. 10 A. Yes. Then he must -- 11 (Interpreted) Then he has to receive the full amount 12 of damages also including interest. 13 Q. Interest from the date that he was given notice of 14 termination? 15 A. Yes. 16 Q. Thank you. 17 One further point. Going back to 9(1), we have the 18 unpaid amounts under clause 3 and the damages claim 19 under clause 8 and they are both turned into one single 20 claim. 21 What I want to suggest to you -- it sounds like you 22 would agree -- if you ignore insolvency, those two 23 claims must be dealt with in the same way, as far as 24 interest is concerned. 25 A. (Interpreted) Both claims have to be treated in the same</p> <p style="text-align: center;">Page 95</p> |
| <p>1 any effect of insolvency. 2 A. Yes. 3 Q. Just assume a termination on notice. 4 A. (Interpreted) The party has to explain that if it had 5 conducted the replacement business, what its position 6 would then be. 7 It can either do a replacement business or calculate 8 on the basis of probability what it would have achieved 9 if it had made such or conducted such replacement 10 business. 11 Q. Just so we are clear, my point is this. Assume he 12 didn't enter into a replacement transaction. 13 A. Yes. 14 Q. What he has to calculate is how much he would have paid 15 on the day he is given notice. 16 I didn't phrase that very well. He has to 17 calculate, by reference to the day he was given notice, 18 how much he would have had to pay. What I am asking is, 19 assume that, because it is all very complicated, it 20 takes him a year to work out how much it would have cost 21 him. 22 A. (Interpreted) Well I think, and I say this on the basis 23 of all the commentaries which I have studied, that they 24 all assume that such a calculation would have been 25 possible a few days after the termination.</p> <p style="text-align: center;">Page 94</p> | <p>1 way as if the contract had continued to run, it has to 2 be treated exactly in the same way. 3 Q. Just as there is no gap in relation to an unpaid amount 4 under clause 3, there is also, as I think you have just 5 agreed, no gap in respect of a damages claim under 6 clause 8? 7 A. (Interpreted) Yes, of course. Apart from insolvency, 8 there is no gap in such a case. 9 Q. If interest has started on an unpaid amount under 10 clause 3, it continues running? 11 A. (Interpreted) I would limit this. In the commentary 12 I have not found anything to deal with this, to cover 13 this. I think if the default -- my view is if the 14 default has started, 2, 3, 4, then it has to continue to 15 run. 16 Q. There is a similar point in relation to clause 8, there 17 is also no gap? 18 A. (Interpreted) The same would also refer to clause 8. 19 Q. You don't have a situation in which the party entitled 20 to damages works out how much he would have needed on 21 day one, but then is not compensated for the period 22 until he actually does the calculation. 23 A. (Interpreted) He made this calculation in such a way 24 that he would not be in a worse situation than if the 25 contract had continued to run.</p> <p style="text-align: center;">Page 96</p> |

| | |
|---|--|
| <p>1 Q. Thank you.</p> <p>2 Can we turn now to the second topic, which is the</p> <p>3 concept of default. Can I start with a number of</p> <p>4 points, which I think are agreed --</p> <p>5 A. Yes.</p> <p>6 Q. -- so I hope we can take those shortly.</p> <p>7 A. Yes.</p> <p>8 Q. Firstly, a default must have occurred within the meaning</p> <p>9 of section 286 for a party to be able to make a damages</p> <p>10 interest claim.</p> <p>11 A. (Interpreted) Before a damages claim is to be made --</p> <p>12 that's correct.</p> <p>13 Q. The second point is: for a default to exist, the debtor</p> <p>14 must have failed to perform when performance was due?</p> <p>15 A. (Interpreted) The condition is that the debtor has not</p> <p>16 performed before the end of the due date for the</p> <p>17 performance.</p> <p>18 If the performance is due today, he will go into</p> <p>19 default tomorrow, not before.</p> <p>20 Q. That is the discussion we have been having this morning</p> <p>21 and in the earlier part of this afternoon.</p> <p>22 The third point is: the creditor then needs to serve</p> <p>23 a warning notice or rely on one of the exceptions?</p> <p>24 A. Yes, that's right.</p> <p>25 Q. I want to start by looking at one of the exceptions --</p> <p style="text-align: center;">Page 97</p> | <p>1 A. (Interpreted) This depends on the circumstances.</p> <p>2 Usually a definitive refusal of performance is explained</p> <p>3 to the other party and there could be other</p> <p>4 circumstances which would also have to be explained to</p> <p>5 the other party.</p> <p>6 MR DICKER: Again, it may be that I was not clear enough,</p> <p>7 and if so, I apologise, but my question was not about</p> <p>8 whether the other party has to know, my question was</p> <p>9 about the form which the serious and definitive refusal</p> <p>10 had to take, and I was suggesting --</p> <p>11 A. (Interpreted) Well, if you are just asking about the</p> <p>12 form and not about the person addressed, then I must say</p> <p>13 that there are no strict conditions as regards form.</p> <p>14 Q. I was suggesting to you that the serious and definitive</p> <p>15 refusal can be explicit or implicit.</p> <p>16 A. Yes. Explicit and implicit.</p> <p>17 Q. It may involve something that was said or it may depend</p> <p>18 on conduct of the defaulting party.</p> <p>19 A. (Interpreted) The conduct may, can, constitute</p> <p>20 a definite refusal of performance. Whether this is the</p> <p>21 case depends on the individual case.</p> <p>22 Q. Thank you.</p> <p>23 Professor Mülbart's view is that it is not necessary</p> <p>24 for the non-defaulting party to know.</p> <p>25 A. (Interpreted) I am of a different opinion, I think that</p> <p style="text-align: center;">Page 99</p> |
| <p>1 A. Yes.</p> <p>2 Q. -- serious and definitive refusal.</p> <p>3 A. Yes. Definitely for refusal, yes. Number 3.</p> <p>4 Q. Number 3, yes. As I understand it, the point for this</p> <p>5 exception, the reason why it is there, is because there</p> <p>6 is no point sending a warning notice to someone who has</p> <p>7 refused to perform.</p> <p>8 A. (Interpreted) Yes, it is correct that it makes no sense</p> <p>9 sending a warning notice to someone who has definitively</p> <p>10 refused to perform.</p> <p>11 Q. There is no point sending a warning notice if it would</p> <p>12 be an empty formality?</p> <p>13 A. Yes.</p> <p>14 Q. You agree with Professor Mülbart that there are strict</p> <p>15 requirements for a serious and definitive refusal?</p> <p>16 A. (Interpreted) Severe conditions, I agree with</p> <p>17 Professor Mülbart, severe conditions have to be imposed</p> <p>18 on this, on such a refusal.</p> <p>19 Q. I wanted to ask you about those requirements because</p> <p>20 there is not, if I may say, all that much detail on your</p> <p>21 report on them.</p> <p>22 My first point is this: a serious and definitive</p> <p>23 refusal can be explicit or implicit?</p> <p>24 Judge Fischer can I --</p> <p>25 THE INTERPRETER: No, it is all right.</p> <p style="text-align: center;">Page 98</p> | <p>1 a refusal to perform can be either explicit or implicit</p> <p>2 in the actions of the -- in actions, so that the party</p> <p>3 can see. The other party must be capable of being aware</p> <p>4 that the party in default is in default and is refusing</p> <p>5 to perform.</p> <p>6 Q. Can I give you an example that Professor Mülbart gave?</p> <p>7 A. Yes.</p> <p>8 Q. A seller agrees to sell a car, and he burns his car. He</p> <p>9 destroys it totally. Professor Mülbart's view, as</p> <p>10 I understand it, is that there would be no point sending</p> <p>11 a warning notice, that would just be an empty formality.</p> <p>12 A. (Interpreted) May I ask, does the seller still owe the</p> <p>13 purchase price, or does the buyer, sorry, still owe the</p> <p>14 purchase price to the seller or what is the situation in</p> <p>15 this case?</p> <p>16 Q. There is an agreement to sell. The seller agrees to</p> <p>17 sell his car, the buyer agrees to pay for it when he</p> <p>18 gets it, and the seller sets fire to his car.</p> <p>19 A. (Interpreted) In my view, burning the car does not</p> <p>20 constitute a definitive refusal. This may have been</p> <p>21 done in a state of drunkenness or rage but it does not</p> <p>22 constitute an express refusal to perform, made known to</p> <p>23 the other party.</p> <p>24 Q. Then, can I change the facts --</p> <p>25 A. Yes.</p> <p style="text-align: center;">Page 100</p> |

| | |
|---|---|
| <p>1 Q. -- very slightly?</p> <p>2 The seller was not drunk, he just didn't want to</p> <p>3 transfer the car to the buyer. In that --</p> <p>4 A. (Interpreted) Perhaps I didn't get it right. Has the</p> <p>5 seller not supplied the car and burnt it or has it been</p> <p>6 the purchaser who burnt it?</p> <p>7 Q. No, it is the seller who burnt it.</p> <p>8 A. (Interpreted) Yes, the seller has burnt the car which he</p> <p>9 is supposed to supply.</p> <p>10 Q. Mr Fischer, I hesitate but I could see that --</p> <p>11 THE INTERPRETER: No, it is all right.</p> <p>12 A. (Interpreted) This still depends on the circumstances.</p> <p>13 If beforehand there have been big tensions between the</p> <p>14 parties, and the seller for a sensible reason decides</p> <p>15 not to supply the car, then it may be the case that</p> <p>16 there is a definitive refusal, it cannot be excluded</p> <p>17 but, basically, just burning a car does not constitute</p> <p>18 a definite refusal.</p> <p>19 Well if the car is to be given or sold to a third</p> <p>20 person, and this is then going to be, becomes known to</p> <p>21 the purchaser, then I think it would constitute</p> <p>22 a definitive refusal.</p> <p>23 Yes.</p> <p>24 MR JUSTICE HILDYARD: My understanding of the essence of</p> <p>25 your reply is that if what is relied on is implicit, or</p> <p style="text-align: center;">Page 101</p> | <p>1 a serious and definitive refusal.</p> <p>2 A. (Interpreted) I see that differently.</p> <p>3 Well I see this differently, because if there are no</p> <p>4 additional circumstances which indicate without doubt</p> <p>5 that they are intended to constitute a definitive and</p> <p>6 serious refusal, that should be then expressed.</p> <p>7 MR JUSTICE HILDYARD: Can I ask this, does the act have to</p> <p>8 be communicated or evident to the other party?</p> <p>9 A. (Interpreted) The act does not have to be precisely,</p> <p>10 directly communicated to the other party but the act has</p> <p>11 to be done in such a way that the other party is made</p> <p>12 aware of it.</p> <p>13 MR DICKER: Could you just turn up bundle, I think it is in</p> <p>14 bundle 2, tab 70.</p> <p>15 Just to show you one point that my learned friend</p> <p>16 showed to Professor Mülbert, it is paragraph B94.</p> <p>17 A. 94?</p> <p>18 Q. 94, yes.</p> <p>19 A. Yes.</p> <p>20 Q. Where the author says in English:</p> <p>21 "The refusal to perform can be implied and be</p> <p>22 concluded from external circumstances. The debtor sells</p> <p>23 the merchandise to be delivered to a third party."</p> <p>24 There is no reference there to the third party</p> <p>25 having to be aware or capable of being aware of the fact</p> <p style="text-align: center;">Page 103</p> |
| <p>1 a fact, or an event. To qualify, that event must be</p> <p>2 explicable exclusively by reference to a refusal to pay.</p> <p>3 A. Yes.</p> <p>4 MR JUSTICE HILDYARD: It must be the only reason, is what</p> <p>5 you have said.</p> <p>6 A. Yes.</p> <p>7 MR JUSTICE HILDYARD: So that in an extreme example that you</p> <p>8 gave of the drunk or lunatic, you are telling me that</p> <p>9 drunkenness or lunacy might be the explanation rather</p> <p>10 than a refusal to pay and therefore the event would not</p> <p>11 be entirely unequivocal, a refusal to pay. Is that what</p> <p>12 you are telling me?</p> <p>13 A. Yes. Yes, I agree. Yes.</p> <p>14 MR DICKER: Again, my question, I am afraid, was slightly</p> <p>15 different --</p> <p>16 A. Yes.</p> <p>17 MR DICKER: -- but I am grateful for his Lordship's</p> <p>18 clarification of that. My question was -- let me go</p> <p>19 back.</p> <p>20 Whatever example you take, assume that it is</p> <p>21 intended as a serious and definitive refusal.</p> <p>22 Professor Mülbert gave the example of burning the car,</p> <p>23 assume the facts are sufficient. Professor Mülbert's</p> <p>24 view is that it is not necessary for the purchaser to</p> <p>25 know that the car has been burnt for there to be</p> <p style="text-align: center;">Page 102</p> | <p>1 the merchandise has been sold elsewhere.</p> <p>2 MR ALLISON: My Lord, just for clarification I think</p> <p>3 I actually showed Professor Mülbert 93 and 95, I think</p> <p>4 Mr Dicker took him to 94 during re-examination.</p> <p>5 MR JUSTICE HILDYARD: That does accord with my note, yes.</p> <p>6 MR DICKER: I stand corrected.</p> <p>7 A. (Interpreted) What it says in 94 is that the refusal to</p> <p>8 perform can be implied and can be concluded from</p> <p>9 external circumstances.</p> <p>10 The debtor sells the merchandise to be delivered to</p> <p>11 a third party. That is seen as a possible fact but not</p> <p>12 a mandatory, obligatory fact.</p> <p>13 Then it goes on to say:</p> <p>14 "But under circumstances, a self help sale can be</p> <p>15 intended with which the seller remains under contract."</p> <p>16 That is exactly what I wanted to say, that it</p> <p>17 depends on the circumstances, and that is whether</p> <p>18 a final refusal is known to the other party. It must be</p> <p>19 acknowledgeable, or recognisable without doubt by the</p> <p>20 parties that that has been the case.</p> <p>21 Q. Professor Mülbert refers to a serious and definitive</p> <p>22 refusal as a real act. By which I understand him to</p> <p>23 mean that it doesn't require a declaration of intent or</p> <p>24 a quasi declaration of intent. Do you agree with</p> <p>25 Professor Mülbert?</p> <p style="text-align: center;">Page 104</p> |

| | |
|--|---|
| <p>1 A. (Interpreted) I agree with Professor Mülbert that there 2 is no -- it does not need a declaration of intent. It 3 can also constitute a definitive refusal by a particular 4 act. 5 Q. Thank you. 6 A slightly different possibility. Assume that the 7 debtor made a generally available public statement that 8 he did not intend to perform. 9 A. (Interpreted) Well I think this is very theoretical but, 10 if so, if I assume that if that statement has been made 11 in public, that then the other party should also have 12 been able to have knowledge of it. 13 Q. In order to amount to a serious and definitive refusal, 14 it said it must amount to the debtor's last word, final 15 word. As I understand it, what that means is that it 16 cannot just be a negotiating stance, for example, on the 17 part of the debtor. 18 A. (Interpreted) Pure negotiations, even contradictory 19 negotiations, do not suffice. It has to be expressed 20 very clearly that this is viewed as a definitive and 21 final. 22 Q. One question about the timing of a serious and 23 definitive refusal. It is possible for the serious and 24 definitive refusal to occur either when the relevant 25 claim falls due --</p> <p style="text-align: center;">Page 105</p> | <p>1 THE INTERPRETER: That is not the right one. Okay. It is 2 only this one here? 3 A. Administration, yes, okay. 4 MR DICKER: It is a very short document, for something which 5 had such big consequences. 6 Paragraph 1 says it is an application of 7 Peter Robert Sherratt, and various other individuals, 8 they are the directors of LBIE. 9 A. Yes. 10 Q. If you go over the page to paragraph 7 it says that: 11 "The applicants believe that the company is or is 12 likely to become unable to pay its debts for the reasons 13 stated in the witness statement in support attached to 14 this application." 15 You will see in paragraph 9 it says, "A witness 16 statement in support of this application is attached". 17 A. Yes. 18 Q. I would like to show you the witness statement that is 19 referred to, it is in bundle 2(1), but before you turn 20 to it. 21 My Lord, this was a document which as I understand 22 it, was at least at one stage opposed for inclusion by 23 my learned friend's solicitors. I don't know whether 24 they maintain that opposition. My bundle still includes 25 a piece of paper saying, "The fourth respondent does not</p> <p style="text-align: center;">Page 107</p> |
| <p>1 A. Yes, that is possible. 2 Q. -- or after the relevant claim falls due? 3 A. (Interpreted) A final refusal can occur, either after 4 the claim becomes due or before, but the important thing 5 is that the effects only occur after a claim is due. 6 (Not interpreted) When the claim is due. 7 Q. If the serious and definitive refusal occurs before the 8 claim becomes due, it only takes effect when the claim 9 becomes due? There is only a default when the claim 10 becomes due? 11 A. Yes. 12 (Interpreted) But there too one has to say that the 13 default only occurs a day after the due date. 14 Q. I want to ask you about another example, this one 15 slightly less hypothetical. I want to ask you about the 16 effect of LBIE's application for an administration 17 order. 18 A. The administration? 19 Q. Can I ask you to turn up bundle 1 -- 20 A. Yes. 21 Q. -- and at tab 1 -- 22 A. Bundle 1? 23 Q. Bundle 1, tab 1. 24 It is not of the authorities bundle, we have 25 bundle 1, tab 1 of the trial bundles, yes?</p> <p style="text-align: center;">Page 106</p> | <p>1 agree to its inclusion". 2 MR JUSTICE HILDYARD: What is the position on this? 3 MR ALLISON: My Lord, no, we were just trying to ascertain 4 for what purpose it was going to be used. There is no 5 objection -- 6 MR JUSTICE HILDYARD: At one moment there was a dispute as 7 to the difference between the processes in Germany and 8 England, but -- 9 MR ALLISON: Indeed, as to how far and wide the enquiry may 10 be. 11 MR JUSTICE HILDYARD: -- it is not really being relied on 12 for that purpose? 13 MR ALLISON: Precisely, my Lord. 14 MR JUSTICE HILDYARD: Is that right? 15 MR DICKER: That's correct. 16 All I was proposing to do, Judge Fischer, is show 17 you some passages from the witness statement. 18 A. Yes. 19 Q. It is in bundle 2, tab 1 of the trial bundles. 20 A. Yes, Robert Sherratt, yes, okay. 21 Q. What I want to do is just show you some passages and 22 then at the end of it I want to ask you whether, in your 23 view, this was sufficient to amount to a serious and 24 definitive refusal, and if not why. 25 A. Yes.</p> <p style="text-align: center;">Page 108</p> |

| | |
|---|---|
| <p>1 Q. Can we start with the witness statement.</p> <p>2 A. Yes.</p> <p>3 Q. Doing it as quickly as I can, paragraph 1.1, Mr Sherratt</p> <p>4 says:</p> <p>5 "I am a vice chairman of Lehman Brothers, my role is</p> <p>6 chief legal office in Europe and Asia, I am a director</p> <p>7 of Lehman Brothers International Europe."</p> <p>8 A. Okay.</p> <p>9 Q. He says in 1.2, in the second sentence, that he is</p> <p>10 authorised by the board of directors of the company,</p> <p>11 that is LBIE, to make this statement.</p> <p>12 A. Yes.</p> <p>13 Q. In 1.2.3, on the next page --</p> <p>14 A. Yes?</p> <p>15 Q. -- he attaches a true copy of a resolution of the board</p> <p>16 of directors to apply for an administration order.</p> <p>17 A. Yes.</p> <p>18 Q. We have the board of directors of LBIE saying they want</p> <p>19 an administration order --</p> <p>20 A. Yes.</p> <p>21 Q. -- and Mr Sherratt swears the witness statement in</p> <p>22 support.</p> <p>23 A. Yes.</p> <p>24 Q. At 1.4 he describes the source of his knowledge --</p> <p>25 A. Source of knowledge, yes.</p> <p style="text-align: right;">Page 109</p> | <p>1 A. Yes.</p> <p>2 Q. If you go on to paragraph 6, there is a heading</p> <p>3 "Background to current difficulties".</p> <p>4 A. Yes.</p> <p>5 Q. Then 6.5, 6.6 and 6.7 are the relevant paragraphs.</p> <p>6 At the end of 6.5 he says:</p> <p>7 "The companies within the group are reliant upon</p> <p>8 receipt of cash from LBHI each day to enable it to make</p> <p>9 any payments."</p> <p>10 So before LBIE can make any payments it needs cash</p> <p>11 from LBHI.</p> <p>12 In 6.6 he says:</p> <p>13 "It is estimated that LBIE requires some 800 million</p> <p>14 in cash over the next 24 hours in order to settle</p> <p>15 payments contractually due to other financial</p> <p>16 institutions."</p> <p>17 Then he says in 6.7:</p> <p>18 "My understanding is that LBHI is no longer in</p> <p>19 a position to and will not provide any further cash to</p> <p>20 any of the group companies and is preparing to file for</p> <p>21 chapter 11 bankruptcy protection in the United States.</p> <p>22 Accordingly the company and indeed the other companies</p> <p>23 within the European group which are reliant upon</p> <p>24 guarantees and ongoing funding from the United States,</p> <p>25 cannot continue to trade."</p> <p style="text-align: right;">Page 111</p> |
| <p>1 Q. -- and he says:</p> <p>2 "I make this statement from facts and matters within</p> <p>3 my own knowledge, where information has been obtained</p> <p>4 from elsewhere I specify the source."</p> <p>5 Then he says:</p> <p>6 "The financial information contained in this</p> <p>7 statement has been confirmed to me by</p> <p>8 PriceWaterhouseCoopers, who have in turn obtained that</p> <p>9 information from employees of the companies. In each of</p> <p>10 these cases I believe the facts to be true."</p> <p>11 A. Yes.</p> <p>12 Q. Then in paragraph 2 he says the matter is "Urgent", and</p> <p>13 the last five lines he says:</p> <p>14 "In particular, in circumstances where further</p> <p>15 funding will not be provided from the United States, as</p> <p>16 described further below, and bearing in mind the opening</p> <p>17 of markets in which the administration companies</p> <p>18 operate, the administration companies need to enter into</p> <p>19 an insolvency process as a matter of urgency."</p> <p>20 A. Yes.</p> <p>21 Q. Then 3.4 he says he is going to set out the background</p> <p>22 to the group's difficulties and the --</p> <p>23 A. Yes.</p> <p>24 Q. -- company's financial position in paragraphs 6 and 7</p> <p>25 below.</p> <p style="text-align: right;">Page 110</p> | <p>1 A. Yes.</p> <p>2 Q. Then, finally, paragraph 7, over the page. In 7.1 he</p> <p>3 sets out a summary balance sheet, in 7.2 he says:</p> <p>4 "LBIE had a positive cash position as at</p> <p>5 31 August 2008."</p> <p>6 Then he says:</p> <p>7 "The excess after deduction of client monies is</p> <p>8 currently negligible."</p> <p>9 In other words, if you put aside money held on trust</p> <p>10 for clients, LBIE has negligible cash, so little or no</p> <p>11 cash, yes?</p> <p>12 A. Yes.</p> <p>13 Q. Then, 7.4:</p> <p>14 "Based on the above information, I am of the belief</p> <p>15 that notwithstanding its summary balance sheet, as set</p> <p>16 out above, in light of the cash requirements over the</p> <p>17 next 24 hours, the company is unable to pay its debts</p> <p>18 within the meaning given to that expression in</p> <p>19 section 123 of the English Insolvency Act 1986."</p> <p>20 What Mr Sherratt was saying in essence was that LBIE</p> <p>21 was unable to trade. It needed money from its parent</p> <p>22 company and it had been told that that money would not</p> <p>23 be coming and it had no alternative but to go into</p> <p>24 administration.</p> <p>25 A. Yes.</p> <p style="text-align: right;">Page 112</p> |

| | |
|--|--|
| <p>1 Q. The final piece of the jigsaw, before I ask you my 2 questions, is this: making an application for 3 an administration order in relation to a company like 4 LBIE is bound to have further consequences? 5 A. Of course, hmm. 6 Q. Any German master agreement will be automatically 7 terminated? 8 A. Yes. 9 Q. It is likely that other agreements will also terminate, 10 and the consequence of making the administration 11 application is likely to accelerate a lot of other 12 liabilities? 13 A. Yes. 14 Q. Once you make the application for an administration 15 order, effectively there is no turning back? 16 A. Okay, yes. 17 Q. Against that background, can I ask you first about the 18 express statements made by Mr Sherratt. 19 Mr Sherratt, I would suggest, was saying very 20 clearly that LBIE would not be performing its 21 obligations. That that was not a negotiating stance, it 22 was LBIE's final word. And those statements were made 23 in a witness statement to court on a public application. 24 If Mr Sherratt had said that, all those things, to 25 an individual creditor, would that have amounted to</p> <p style="text-align: center;">Page 113</p> | <p>1 perform, I can't perform". 2 A. (Interpreted) Taking account of what appears in the 3 literature and in the case law for a definitive refusal 4 to perform, which is subject to very strict conditions, 5 it is not sufficient to say, "I am not in a position, I 6 cannot pay", one has to say, "I do not wish to pay, I do 7 not want to pay". 8 In practice there are many cases where one party 9 says I cannot no longer pay. There is practically no 10 case when this constitutes a definitive refusal within 11 the meaning of 286(2), sentence 3. 12 Particularly not if this concerns a group, a number 13 of cases and not an individual case. As an insolvency 14 petitioner, I would know if any such insolvency 15 application would have been assumed to be in refusal 16 according to article 286 BGB, 286(2)(3). In my view 17 this has not occurred. 18 Q. I understand we are back to insolvency but just continue 19 to park that for a moment. 20 A. Okay. 21 MR JUSTICE HILDYARD: I hesitate to interrupt, and in any 22 event we are coming to the end of the witching hour. 23 What I am a little bit concerned about is in two aspects 24 and I would like you to consider this. 25 First of all I think it is important to keep to the</p> <p style="text-align: center;">Page 115</p> |
| <p>1 a serious and definitive refusal in your view? 2 A. (Interpreted) An unconditional serious and definitive 3 refusal, not necessarily, because it expresses not being 4 able to, not not intending to -- not wanting to. 5 He expresses only that LBIE at the time cannot 6 fulfill its obligations but this is not necessarily 7 definitive. It expresses no that he is incapable of 8 paying but if one looks further ahead, with a further 9 sight ahead, in my view that is still not even 10 sufficient because he only says, they cannot pay but not 11 that are not wanting to, or wishing to or have no 12 intention to pay. 13 Q. Objectively he is saying that LBIE will not perform its 14 obligations. 15 A. (Interpreted) This is correct, but factually it is 16 a fact that in perhaps not all but most insolvency 17 cases, it is a declaration is made that they cannot 18 fulfill, they cannot fulfill their obligations, meet 19 their obligations. 20 Q. Just take it in stages, focusing just on what 21 Mr Sherratt was saying, and imagine he said it to 22 a creditor. 23 A. To? 24 Q. To a creditor. 25 What Mr Sherratt was saying was, "I am not going to</p> <p style="text-align: center;">Page 114</p> | <p>1 words that were actually used, and not to gloss them. 2 The second is, I am a little bit worried that, 3 inevitably people look at things said in insolvency 4 context according to their perception of the insolvency 5 purpose or the procedure's purpose and the result. What 6 I am a bit worried about is it may be difficult to get 7 an answer which is helpful to me in those circumstances. 8 MR DICKER: My Lord, I am conscious of your Lordship's 9 second point. 10 MR JUSTICE HILDYARD: Yes. 11 MR DICKER: There are plainly potential differences between 12 policies underlying German insolvency law and English 13 administration and those may in turn feed through to 14 different treatments of different things. 15 My Lord, I was going to come to that. 16 MR JUSTICE HILDYARD: Yes. You see I think you might want 17 in order to get a more reliable answer, to have 18 referred, amongst other things to paragraph 8.1. 19 MR DICKER: Taking up -- 20 MR JUSTICE HILDYARD: In any event, it might be something 21 you want to take up under advisement. If you are asking 22 me to as it were accept from this witness an answer 23 whether this is a compliant 286 refusal, I think I would 24 be wary without him knowing the entire context. 25 MR DICKER: Just so your Lordship is aware, that is not the</p> <p style="text-align: center;">Page 116</p> |

| | |
|--|--|
| <p>1 exercise I am currently engaged on. The exercise I am</p> <p>2 currently engaged on is essentially trying to test how</p> <p>3 serious and definitive refusal operates in practice.</p> <p>4 Taking this essentially as a rather less hypothetical</p> <p>5 example.</p> <p>6 MR JUSTICE HILDYARD: That I understand, but the</p> <p>7 hypothetical may assume more than one is fully --</p> <p>8 MR DICKER: My Lord, I understand that. I wonder, given the</p> <p>9 time, if I can just ask Judge Fischer perhaps two</p> <p>10 further questions.</p> <p>11 The first is this. If a debtor comes to a creditor</p> <p>12 and says, "These are the facts, I am not going to</p> <p>13 perform, I wish it had not come to this but I am not</p> <p>14 going to perform", is that a serious and definitive</p> <p>15 refusal?</p> <p>16 A. (Interpreted) Actually, no, because he still says he</p> <p>17 cannot do it but not that he does not wish to do it.</p> <p>18 The word "Refusal" -- "Verweigerung" in German --</p> <p>19 constitutes a declaration of intent.</p> <p>20 Q. Not wishing to travel over old ground, but I thought in</p> <p>21 an earlier answer you gave you agreed with</p> <p>22 Professor Mülbert that a serious and definitive refusal</p> <p>23 was a real act and didn't require a declaration or</p> <p>24 a quasi declaration?</p> <p>25 A. (Interpreted) Even in a real act, to be assessed as such</p> <p style="text-align: right;">Page 117</p> | <p>1 a bit longer and you will have to burn the midnight oil</p> <p>2 but that will then give you Tuesday and Wednesday.</p> <p>3 I think you think that it will not take that long but</p> <p>4 just so that we don't have sudden surprises, I thought</p> <p>5 it best really to reserve you the Wednesday.</p> <p>6 MR DICKER: My Lord I spoke to my learned friend. Both of</p> <p>7 us are as confident as it is probably wise for us to be</p> <p>8 that that should be sufficient time.</p> <p>9 MR JUSTICE HILDYARD: Good.</p> <p>10 MR ALLISON: My Lord, yes.</p> <p>11 MR JUSTICE HILDYARD: Yes.</p> <p>12 You probably are very well aware of the rules that</p> <p>13 you are not to speak about this to anyone and you are to</p> <p>14 enjoy your weekend here.</p> <p>15 A. Thank you very much, I will do so.</p> <p>16 MR JUSTICE HILDYARD: We will meet again on Monday.</p> <p>17 (4.52 pm)</p> <p>18 (The hearing adjourned until 10.30 am on Monday</p> <p>19 23 November 2015)</p> <p style="text-align: right;">Page 119</p> |
| <p>1 from this real act must be concluded an actual refusal.</p> <p>2 MR ALLISON: My Lord, if it helps, the answer is at</p> <p>3 page 106, 15 to 18. He didn't just say "yes", there was</p> <p>4 a very clear answer in response to the real act point.</p> <p>5 MR JUSTICE HILDYARD: I will have a look at that. The page</p> <p>6 is where?</p> <p>7 MR ALLISON: It is 106 at lines 15 to 18.</p> <p>8 MR JUSTICE HILDYARD: Thank you.</p> <p>9 MR DICKER: My Lord, I am conscious of the time.</p> <p>10 MR JUSTICE HILDYARD: Is that a very bad place to stop?</p> <p>11 MR DICKER: No. I am sure for a variety of reasons, not</p> <p>12 least on this side, it would be a good time.</p> <p>13 MR JUSTICE HILDYARD: Let's stop.</p> <p>14 Can I mention this, that I believe there are in</p> <p>15 place arrangements for the matter that I had on</p> <p>16 Wednesday to be moved to Thursday. The purpose of</p> <p>17 telling you now is obvious, but it seems to me also that</p> <p>18 given that we are proceeding into Monday with the</p> <p>19 evidence, that it is only fair to you all to have</p> <p>20 a moment's consideration before replying. If you finish</p> <p>21 at the short adjournment, well and good. You will have</p> <p>22 a little bit more time and I will be in your hands</p> <p>23 whether you want to start immediately or whether you</p> <p>24 want a little time for reflection in the afternoon.</p> <p>25 If it goes on a bit longer, well then it goes on</p> <p style="text-align: right;">Page 118</p> | <p>1 I N D E X</p> <p>2</p> <p>3 Housekeeping1</p> <p>4 Evidence of8</p> <p>5 PROFESSOR PETER OTTO MÜLBERT</p> <p>6 (continued)</p> <p>7 Cross-examination by MR ALLISON8</p> <p>8 (continued)</p> <p>9</p> <p>10 Re-examination by MR DICKER23</p> <p>11</p> <p>12 Questions from THE BENCH37</p> <p>13 (The interpreter was sworn)44</p> <p>14</p> <p>15 JUDGE GERO FISCHER (sworn)44</p> <p>16</p> <p>17 Examination in-chief by MR ALLISON44</p> <p>18</p> <p>19 Cross-examination by MR DICKER47</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p> <p style="text-align: right;">Page 120</p> |

| A | | | | |
|---------------------------|--------------------------|---------------------------|---------------------------|---------------------------|
| ability 9:3 | address 44:17,19 | 49:14,16 57:24 | amounted 113:25 | argument 79:24 |
| able 7:11,24 15:20 | addressed 99:12 | 58:20 59:2 61:14 | amounts 66:11 | arguments 1:17 |
| 15:23 32:15 42:4 | adequate 7:25 | 62:8 63:3,21 | 77:16,23 83:14 | 7:18 |
| 42:15 47:16 | adequately 71:15 | 64:4,8 65:13 | 84:16 85:3 95:18 | arisen 75:7,14,17 |
| 59:19 74:10 87:2 | adjourned 119:18 | 66:4 70:7 72:15 | anew 63:11 | 82:17 |
| 89:24 97:9 | adjournment | 73:4,5,9,12,16 | answer 3:11 9:15 | arises 22:7 28:15 |
| 105:12 114:4 | 43:21 65:8 91:3 | 74:25 85:4,11 | 26:11 31:21 48:1 | 62:22 77:20 |
| absence 59:5 | 118:21 | 91:8 93:23 | 52:3,11,16,18 | 85:17,25 86:17 |
| absent 39:20,23 | administration | 100:16 113:6 | 55:25 88:15 89:6 | 87:4 |
| absolutely 4:1,20 | 106:16,18 107:3 | agreements 113:9 | 90:1 116:7,17,22 | arising 11:24,25 |
| 4:20,24 5:18 6:3 | 109:16,19 110:17 | agrees 100:8,16,17 | 117:21 118:2,4 | 13:20 28:23 48:7 |
| 75:1 | 110:18 112:24 | ahead 114:8,9 | answering 27:18 | 66:17 67:14 |
| abstractly 93:6 | 113:3,10,14 | aim 63:4 | answers 3:3 26:6 | 70:19,23 87:4 |
| accelerate 113:11 | 116:13 | albeit 29:14 | 52:25 55:25 89:4 | arose 6:20 9:16 |
| accept 31:6 41:20 | admit 75:21 | Allison 1:4,7,15 | 89:9 | arranged 33:11 |
| 54:7,12 56:1,3 | advance 3:18 5:5 | 3:23,25 4:4,7,15 | anticipated 22:18 | arrangement |
| 80:7 116:22 | adversarial 7:16 | 4:20,24 5:3,9,18 | anymore 7:8 | 67:14 |
| accepted 75:11 | advisement 116:21 | 5:21 6:3,8,15,23 | anyway 73:7 | arrangements |
| accord 104:5 | afraid 37:22 | 8:2,15,23,24 | Apart 96:7 | 118:15 |
| account 7:20 | 102:14 | 11:16 17:10,13 | apologise 99:7 | article 115:16 |
| 10:16 41:9 67:16 | afternoon 44:15 | 21:9 22:18,21 | apparent 24:1 | ascertain 18:20 |
| 72:17 73:9 115:2 | 47:5,6 65:10,11 | 26:1,16 27:20,25 | appeal 25:2 | 108:3 |
| accrued 39:13,18 | 97:21 118:24 | 29:11,17 30:1 | appeals 24:22 | Asia 109:6 |
| 42:25 | aggregate 76:19 | 43:10,23 44:8,14 | 32:20 35:17 | aside 48:12 93:25 |
| accruing 85:9 | 79:5 | 44:15 47:1 51:24 | appears 36:2 | 112:9 |
| accuracy 52:17 | agree 9:7,12 10:4 | 52:6 61:21 104:2 | 82:23 115:2 | asked 19:19 25:7 |
| achieved 94:8 | 10:22,24 13:21 | 108:3,9,13 118:2 | appendix 53:8 | 33:14 65:12 |
| acknowledgeable | 14:8,16 15:6 | 118:7 119:10 | applicable 16:5,9 | asking 32:5 94:18 |
| 104:19 | 16:3,4 17:22 | 120:6,11 | 16:10 22:12 | 99:11 116:21 |
| acknowledging | 19:1 23:11 48:4 | allow 29:12,25 | 24:10 79:16 | aspect 38:22 |
| 1:21 | 49:12,22 50:20 | 50:13 68:6 89:3 | applicants 107:11 | aspects 115:23 |
| act 33:20,22,25 | 51:8,15,18 52:20 | allowed 13:4 26:22 | application 1:20 | assert 9:4 10:14 |
| 34:21 48:10 | 53:9 80:15 83:4 | 41:4 42:23 | 76:10 106:16 | 20:10 |
| 103:7,9,10 | 86:19 95:22 | allows 74:21 | 107:6,14,16 | assessed 41:9 |
| 104:22 105:4 | 98:14,16 102:13 | alternative 112:23 | 113:2,11,14,23 | 117:25 |
| 112:19 117:23,25 | 104:24 105:1 | amount 9:18,19,21 | 115:15 | assets 88:1 |
| 118:1,4 | 108:1 | 9:22 10:21 14:18 | applies 48:21 49:4 | assign 39:17 |
| actions 100:2,2 | agreed 1:8 2:4 | 14:18,21,22 15:1 | 49:21 54:16 | assigned 10:9 |
| actual 55:22 57:19 | 4:15 5:1,3,5,7,8,9 | 18:21 24:4 25:14 | 63:10 80:5,12 | 38:15 41:19,22 |
| 61:12 118:1 | 5:9,10,13,15,23 | 32:16,22,22 42:5 | 87:13 88:3 | assignee 9:3,8,12 |
| add 21:8,14 75:20 | 12:12 18:7 26:19 | 54:24 55:19 | apply 15:25 21:4 | 10:1,14,17,25 |
| added 23:6 | 29:17 46:10 | 56:17 58:11 | 27:3 54:15 79:12 | 11:17 12:23 13:6 |
| addendum 2:5 | 49:17 96:5 97:4 | 74:11 76:20,24 | 109:16 | 14:2 38:6,25 |
| addition 86:10 | 117:21 | 76:25 77:5,6 | approach 28:1 | 39:3,7,18,20 40:9 |
| additional 8:9 | agreement 25:22 | 78:7,7 79:5,10 | approaching 8:7 | 40:12,15,22 41:4 |
| 14:7 15:21 79:21 | 26:23 27:5,6,14 | 80:10 84:8 86:20 | approved 5:10 | 41:21 42:3,12,21 |
| 79:24 86:6 103:4 | 27:17 28:6,10 | 90:13,14 92:13 | April 10:7,8 11:7 | 43:2 |
| additions 88:16 | 30:7 41:19 47:9 | 95:11 96:3,9 | arbitrarily 14:24 | assignee's 12:6,14 |
| | 47:11 48:2,6,7 | 105:13,14 108:23 | area 21:16 | assignment 9:2,14 |

| | | | | |
|--|---|---|---|---|
| 9:22 10:1,10,19 10:23 11:1 12:7 14:2 37:25 38:5 39:15,21 42:22 42:25 43:3 90:16 assignor 9:5,23 10:10 11:18 12:5 12:15 38:25 39:13 40:4,19 41:2,3,7 42:12,23 assignor's 41:12 assist 52:9 89:8 assistance 2:2 43:12 assists 89:19 assume 28:12 65:19 77:21 86:10 94:3,11,19 94:24 95:8 102:20,23 105:6 105:10 117:7 assumed 115:15 assuming 26:11 assumption 36:25 attached 107:13 107:16 attaches 109:15 attention 2:1 20:15 21:7,15 August 112:5 author 57:10,22 81:22 82:2,9,19 82:23 103:20 authorised 109:10 authorities 1:12 23:18 33:4 53:20 56:4 60:18 106:24 authority 1:22 2:19 3:12,13 8:9 12:9 56:6 automatic 22:11 automatically 82:11,17 113:6 available 38:24 42:3 105:7 award 14:17,17,24 15:12,16 awards 14:9 | aware 37:12,16 91:25 92:18,25 93:13 100:3 103:12,25,25 116:25 119:12 <hr/> B B 15:6,8,8 17:24 18:1,4 back 14:25 16:15 33:2 35:9 36:17 49:25 70:9,24 77:2 82:18 95:17 102:19 113:15 115:18 background 1:15 3:2 110:21 111:3 113:17 bad 118:10 balance 3:11 112:3 112:15 banking 75:25 bankruptcy 36:24 111:21 base 92:12 based 15:13,16 33:24 57:11 112:14 basic 64:10,13 basically 21:21 39:1 101:17 basis 7:6 12:2 29:8 30:22 44:3 67:2 67:13 94:8,22 batch 2:7 4:4,13 5:6 bearing 110:16 becoming 13:6 27:3 40:17 55:10 77:6 82:15 91:25 92:17,25 93:12 beginning 19:6 begins 20:1 69:18 92:6 behave 34:5 belief 112:14 believe 107:11 110:10 118:14 BENCH 37:20 120:8 | beneficial 19:23 20:3 benefit 41:3 48:18 52:3 best 26:10 90:16 119:5 better 37:24 38:25 40:23 89:23 beyond 36:23 73:4 BGB 14:14 21:3 32:12 48:15 62:19,24 64:14 64:17 65:15,18 115:16 big 101:13 107:5 bill 3:15 6:25 17:21 18:12,21 19:17 20:1 21:25 22:14 25:18 27:12,14 billed 86:9 bit 37:6 71:17 89:14,22 90:5 115:23 116:2,6 118:22,25 119:1 bite 89:20,22,25 bits 89:21,25 board 109:10,15 109:18 body 58:19 bonanza 40:7 borrow 15:9,10 borrowed 16:10 borrowing 15:13 borrows 15:10 bother 71:9 bothered 71:12 bottleneck 36:5 37:4 bottom 19:7 bound 113:4 breach 62:15,17 64:20 69:14 70:4 75:4 break 44:12 52:3 88:12 bridge 8:13 briefly 33:21 broad 24:14,16 | 70:22 75:11 broadly 23:10 50:19 51:7 broken 53:3 Brothers 109:5,7 brought 1:25 building 9:20 Bundesgerichts... 12:13 bundle 2:6,20,25 4:25 17:11 23:7 23:18 26:13 27:19 30:3 33:4 35:13 44:23 48:17 50:2,3 53:23 56:7 57:1 57:3 60:15,18 61:15,23 81:13 81:14 103:13,14 106:19,22,23,24 106:25 107:19,24 108:19 bundles 23:6 81:11 106:25 108:19 burden 3:7 burn 119:1 burning 100:19 101:17 102:22 burns 34:2 100:8 burnt 101:5,6,7,8 102:25 business 40:24 48:8 64:4,14,16 64:19 93:4,7,7 94:5,7,10 buyer 100:13,17 101:3 B91 33:15 B94 34:6 103:16 B95 34:23 <hr/> C calculate 25:5 55:19 91:19 92:23 93:6 94:7 94:14,17 calculated 74:2 calculates 69:12 calculating 24:20 | 25:1 69:19 84:8 calculation 19:11 19:15 51:22 55:6 60:10 61:10 69:24 78:24 80:22 82:13 83:21,25 84:10 84:22 85:14,22 92:12 93:17,20 94:24 96:22,23 call 8:18,18 43:23 74:8 76:23 called 30:13 79:19 calls 43:17 capable 100:3 103:25 car 100:8,8,17,18 100:19 101:3,5,8 101:15,17,19 102:22,25 carried 56:20 80:22 carrying 14:23 case 3:15 6:5,14,17 6:19,24,25 11:7 12:12 13:16 14:7 16:2,16,23 17:3,6 17:7,15 18:6 22:11,17 23:17 24:22 26:19 27:3 27:4,9 29:1,25 30:12 31:10,18 32:19 35:7,12 37:13 47:20 53:23 54:14 56:1 56:1 59:3,4 60:15 63:10,11 66:6 80:5,12,16 80:17,20 85:6 86:14 87:3 89:19 93:9 95:6 96:8 99:21,21 100:15 101:15 104:20 115:3,10,13 cases 2:6 14:20 21:16 23:16 24:9 24:17,18,20 35:1 35:2 37:16,17 54:15 57:14 |
|--|---|---|---|---|

| | | | | |
|--|--|---|--|--|
| 60:21 63:7 70:22 74:5 76:22 90:21 110:10 114:17 115:8,13 cash 111:8,10,14 111:19 112:4,10 112:11,16 catch 37:23 caught 72:25 cause 23:12 27:10 51:9 54:21 64:21 66:20 67:1 cease 86:24 cent 15:11,15 certain 8:3 22:5 33:19 58:14 64:8 cetera 41:10 chairman 109:5 challenge 55:5 challenged 54:24 chance 3:18 7:12 87:4 change 13:5,22 100:24 chapter 111:21 characterisation 30:18 characterising 29:9 check 15:5 28:8 chess 79:19 chief 109:6 chit-chat 8:19 choose 24:19 77:14,15 89:3 chosen 59:3,3 chronology 2:8,16 4:18 circumstances 18:16 21:21,23 21:24 22:2,6,9,11 24:2 32:11,13 34:9 48:23 49:5 49:9,20,23,23 51:20 57:12,18 60:9 62:10,23 63:7 67:19 99:1 99:4 101:12 103:4,22 104:9 | 104:14,17 110:14 116:7 cite 8:9 civil 21:11 claim 9:4,8,8,9,12 9:16,18,19,21 10:14,17,20,22 11:4,8,9,16,16,17 11:21,22,22,23 11:25 12:3,3,6 13:7,15,17,19,25 14:1,3 16:15 18:8,10,11 19:17 19:24 20:6,10 22:1 23:12 25:3 25:21,22 26:14 26:23,24 27:11 28:5,6,22,23,25 30:14,23,23 38:15 39:18,22 41:12,21 42:5,17 42:21 51:9 53:13 53:16,16,17 54:13,20,23 55:15,21 56:17 58:16 59:12,25 62:22 63:9 66:2 66:7,9,13,19,25 67:9,13,18,21,22 67:24 68:7,15,23 69:1,4,8,9,9,12 70:11,25 71:5 72:2 74:1,8,13 75:13 76:18 77:20,22 78:3,9 78:23 79:3 80:14 82:10,15,15,16 83:1,12,14,15,17 84:12,25 85:16 85:17,21,24,25 86:2,4,6,6,8,9,12 86:15,16,21 91:7 93:1 95:18,20 96:5 97:10,11 105:25 106:2,4,5 106:6,8,8,9 claimant 24:19,24 54:23 55:18 claiming 36:4 | 51:21 claims 12:19,21 13:3 24:24 37:4 38:17 54:13,16 58:11 59:13,17 60:1,2,6,12 61:4 63:16 66:14,16 67:3 68:10,20 69:7 70:3,5,6,6 70:14,15,16,17 70:19,23 71:3,7 71:11 72:6,11,13 72:22,24 73:11 73:12 74:2,21,24 74:24,24 75:7,10 75:14,17 76:20 77:17,17 78:24 79:15,16 80:19 80:21,23 81:1 83:16,16 84:11 84:18 95:23,25 clarification 30:2 102:18 104:2 clarified 80:21 clarify 11:19 38:23 40:2 41:20 78:14 clause 20:3 23:13 25:21 26:15 27:5 28:9 30:4,20 47:8,21 49:13 51:10 56:21 58:25 62:2,18 65:13,14,24 66:3 67:7,10 68:1 82:4,10,25 83:3 83:12,15 85:3,9 86:20 90:12 91:7 91:23 95:2,18,19 96:4,6,10,16,18 clauses 56:18 59:9 66:18,24 67:6 82:5 clear 5:22 34:11 49:3 51:14 84:13 93:25 94:11 99:6 118:4 clearly 105:20 113:20 client 112:7 | clients 4:6 112:10 closeout 27:2 76:3 closer 27:8,8 90:1 clue 72:24 code 21:12 combined 30:21 come 4:5 8:13 9:2 35:9 40:6,15 47:12 65:22 71:13 76:5 116:15 117:13 comes 21:23 40:24 82:10 117:11 coming 82:18 112:23 115:22 comment 31:17 35:11 74:6 81:10 commentaries 94:23 commentary 76:1 81:11 96:11 comments 2:13,15 5:4,25 83:4 communicated 103:8,10 companies 110:9 110:17,18 111:7 111:20,22 company 15:6,6,7 15:8,8,22 107:11 109:10 111:22 112:17,22 113:3 company's 110:24 comparative 40:11 compare 43:5 compared 84:14 comparison 30:22 compatible 64:16 83:5 compensated 96:21 compensation 13:3 15:24 23:4 23:12 25:22 26:14,23,24 28:5 28:6,23 30:23 47:8 51:9 55:15 56:17,19 59:12 66:13,19,25 67:9 | 67:13,17,22,24 68:7,15,23 69:1,4 69:5 70:11,22,25 71:5 72:2 74:1 76:18 77:19,20 77:22,25 78:3,5 78:23 79:3,8 82:10 83:1,12,13 84:24 85:24 86:8 86:9,12 competing 83:9 completely 40:16 compliant 116:23 complicated 94:19 concentration 90:23 concept 23:24 33:22 97:3 concern 69:7 71:7 concerned 7:5,15 24:10 57:19 62:14 71:10 92:9 95:24 115:23 concerning 47:23 62:20 65:15 concerns 47:7,15 59:21 68:20 70:18,20,20 115:12 conclude 93:3 concluded 34:9 64:11 103:22 104:8 118:1 conclusion 55:13 63:1,9 85:23 conclusions 8:6 59:8 condition 53:12 97:15 conditions 48:8 51:20 62:22 64:13,15 65:19 65:20 69:8 84:24 98:16,17 99:13 115:4 conduct 99:18,19 conducted 93:7 94:5,9 confident 119:7 |
|--|--|---|--|--|

| | | | | |
|--|--|---|--|---|
| confine 88:16 89:20 | context 6:10,20 7:2 16:15 17:2 22:7 31:24 32:12 36:2,11 37:2 73:3 89:2 116:4 116:24 | correct 3:10 5:18 22:4 36:12 37:2 45:22 47:18 48:5 49:6,15 53:10,11 54:8,11,25 55:20 57:17 58:3,13 62:25 64:23 66:14 67:21 73:2 75:22 76:8 97:12 98:8 108:15 114:15 | 51:7 court's 55:13 cover 96:12 covered 67:16 creditor 13:5,7,7 13:16,25 14:3 23:25 24:2 25:4 32:22 38:7,15,16 38:17 39:9 56:20 97:22 113:25 114:22,24 117:11 | 77:19,22 78:19 78:22 79:6,12 83:14,22 84:2,22 85:16,25 91:7,19 92:12,23 95:12 95:18 96:5,20 97:9,11 |
| confirmation 26:9 confirmed 27:22 61:11 110:7 conform 62:19 confronted 78:4 confused 19:19 conscious 81:7 116:8 118:9 consequence 19:23 77:18 78:2 113:10 consequences 83:9 107:5 113:4 consider 7:13 17:18 38:2 115:24 consideration 52:17 57:12 118:20 constitute 35:23 37:14 99:19 100:20,22 101:17 101:21 103:5 105:3 constitutes 60:8,13 80:8 115:10 117:19 construction 27:21 29:6 48:1,5,9 49:11 71:14 75:11,21,22 81:8 93:22 95:2 constructions 83:9 construed 75:24 77:11 contain 49:16 64:15 contained 49:20 63:6 64:14 85:18 85:19 110:6 contains 81:11 content 36:13 56:15 63:4 | continue 8:8 89:24 96:14 111:25 115:18 continued 1:23 8:21,23 96:1,25 120:5,6 continues 96:10 continuing 1:7 2:3 contract 1:17 23:11 24:25 25:4 25:8 26:17 27:10 30:25 34:2 51:8 51:19 54:21 56:16 58:17,19 59:22 62:22,25 63:5,12,14,18 64:24 66:15,20 67:1 70:19,19,21 82:11 84:4 86:3 91:12 96:1,25 104:15 contracting 34:15 contracts 59:8 64:11 contractual 54:16 64:10 contractually 49:7 111:15 contradictory 105:18 Contrary 20:18,23 control 88:1 convenient 43:16 65:4 88:12,20 conversion 72:23 73:17 cooperation 58:22 59:11 copy 16:17,18 51:1 54:3 61:15 109:15 core 27:18 30:3 61:15 | corrected 104:6 correctly 56:1 67:11 74:16 cost 41:11 94:20 costs 2:10 30:25 counsel 4:12 88:22 counter 58:11 68:20 70:15,23 72:13 74:2 76:20 77:17,17 78:24 80:23 81:1 counterclaim 77:24 78:7,10,11 79:6 81:4 counterparty 41:24,24 couple 62:1 course 8:15 19:14 20:14 27:24 44:8 44:24 60:13 64:12 67:16 78:15 84:17 89:1 96:7 113:5 court 2:24 13:3,6 13:21 14:9,17,24 15:12,15 17:4,18 18:6,10,11,15,18 18:24 19:4,10,14 20:19,20,25 21:1 21:10,20,20 24:22 25:2 31:18 32:20 33:24 35:16,24,25 44:17 47:17,23 60:9 61:9 84:15 84:22 113:23 courts 23:10 31:19 31:22 32:7 50:19 | cross 8:13 83:16 cross-examination 8:23 28:13,17,24 29:21 47:4 120:6 120:12 curious 16:24 currency 72:16,19 72:23,25 73:9,13 73:16 current 111:3 currently 112:8 117:1,2 customer 54:24 55:5,9 | date 18:8 19:10 23:24 24:5,6 48:25 55:6,7,9,10 55:11,23 58:16 58:21 59:6 80:2 81:3,5 93:19,20 95:13 97:16 106:13 day 31:17 88:13,24 94:15,17 96:21 106:13 111:8 days 94:25 deal 42:22 48:24 52:8 96:12 dealing 2:10 30:9 47:20 68:14 deals 37:13 75:5 82:19 83:12 dealt 71:15 81:8 93:4 95:23 debt 1:18 10:6,13 15:7 17:3,19 18:25 32:23 debtor 12:2 14:19 25:12,18 34:9,13 36:3,3 37:4 38:3 38:5,7,16 39:7,8 42:18 87:1 97:13 97:15 103:22 104:10 105:7,17 117:11 debtor's 11:22 38:19 105:14 debts 107:12 112:17 decide 17:4 18:10 decided 25:5 41:8 44:2 56:2 decides 7:6 47:17 101:14 decision 3:16 7:13 20:16 21:6 24:16 |

| | | | | |
|--|---|--|---|--|
| 24:22 29:7 32:20 35:16,25 47:17 47:19,22,24,24 54:17 decisions 3:9 33:25 59:5 decisive 87:15 declaration 53:11 60:11 80:25 81:5 104:23,24 105:2 114:17 117:19,23 117:24 declared 81:2 declares 80:18 deduce 35:25 deduced 63:5 deducted 57:18 deduction 112:7 default 10:6 11:23 11:23,25 12:4 14:19 15:9 17:6 48:21,24 85:16 85:16,24 86:4,17 86:21,23 87:3,3,5 87:8,9,16,19,22 87:25 88:2,2,3,4 88:5,9 90:15 96:13,14 97:3,8 97:13,19 100:4,4 106:9,13 defaulted 10:8 15:8 defaulter 88:1 defaulting 68:23 74:8 76:24 77:5 99:18 defences 38:24 39:8,10 deference 89:19 deferring 29:24 defined 18:16 24:1 70:15 72:3,12 definite 35:19,23 37:10 99:20 101:18 Definitely 98:3 definitive 33:1 34:16 37:15 98:2 98:15,22 99:2,9 | 99:14 100:20 101:16,22 102:21 103:1,5 104:21 105:3,13,20,23 105:24 106:7 108:24 114:1,2,7 115:3,10 117:3 117:14,22 definitively 98:9 delay 9:10 11:4,6 11:23 delivered 34:10,13 103:23 104:10 delivery 22:16 demand 23:25 24:2,3 58:9 demanded 49:10 denies 33:19 denominated 73:13 dense 89:17 depend 56:17 76:10 82:12 99:17 depends 9:16 15:3 15:4 16:1 48:1 57:15,18 58:17 60:11 99:1,21 101:12 104:17 deposit 6:20 7:2 10:15 31:15,25 32:14 58:10 59:13,16,20 60:5 61:3,6 described 36:4 110:16 describes 109:24 despite 55:18 destroys 100:9 detail 98:20 deterioration 38:18 determination 40:20 57:11,14 determine 25:13 determined 18:16 21:17 49:7 58:12 detrimental 20:9 Dicker 1:9,10 6:13 | 6:24 7:4,5 22:23 23:1,2 26:7,8,12 27:23 28:4,14,18 28:20 30:3 31:13 32:2,5 33:9,11,14 36:13 37:12,18 43:13 47:2,4,5 50:6,12,15,17 51:1 52:23 53:3 53:6 57:4,7 59:16 60:21 61:20,23 62:1 64:2 65:3,12 66:23 69:17 71:23 72:20 73:22 74:23 75:23 77:4 78:15 80:4 81:17,19 88:11 89:15 90:3 90:8,11 91:6 99:6 102:14,17 103:13 104:4,6 107:4 108:15 116:8,11,19,25 117:8 118:9,11 119:6 120:7,12 Dicker's 4:6 difference 25:20 26:3,4 58:24 59:1 108:7 differences 116:11 different 3:8,9 6:19 16:9 24:19 24:25 25:8 37:6 38:11 40:16 58:19 59:7 71:20 99:25 102:15 105:6 116:14,14 differently 11:20 33:11 34:5 62:21 103:2,3 differs 21:2 difficult 71:19 89:17 116:6 difficulties 29:23 42:9 110:22 111:3 directly 103:10 director 109:6 | directors 107:8 109:10,16,18 disagreed 29:23 discretion 14:10 discussed 21:14 24:21 63:8 discussing 4:11 13:13 discussion 8:18,25 97:20 dispute 108:6 dissolve 77:16 distinction 82:24 distinguish 38:1 distinguishes 82:14 document 27:21 33:3 46:4,17 81:11 107:4,21 documentation 28:2 documents 4:16 5:4 27:23 45:23 doing 21:11 82:23 109:3 doubt 103:4 104:19 Dr 91:6 drafters 31:2 draftsman 80:6 82:23 draw 20:15 21:6 21:14 59:8 drawing 82:24 91:1 drunk 101:2 102:8 drunkenness 100:21 102:9 due 1:18 16:15 17:3,19 18:7,11 18:12,18,25 20:6 22:1 23:5,14,24 24:5 25:3,14 26:20 32:15,23 47:15 48:25 49:1 51:11 55:10,16 55:22 56:19 57:25 58:16,21 58:22 59:6,23,25 | 60:3,10 61:9 62:11 63:9 67:9 67:14 68:8 69:2 69:2,10 70:12 71:1 72:4 76:18 77:7 78:2,8 79:4 79:10,25 80:1,2 80:10,10 81:2,3,5 82:15,17 85:3,7 86:3 87:17 90:13 97:14,16,18 105:25 106:2,4,5 106:6,8,9,10,13 111:15 duty 57:24 <hr/> E E 120:1 earlier 97:21 117:21 early 23:11 24:24 27:4,9 30:24 51:8 66:20,25 easier 52:1 easiest 50:2,15 52:24 69:17 economic 83:22 edge 29:12 effect 76:2,3,3 85:12 94:1 106:8 106:16 effected 76:9 effective 40:18,22 effectively 74:10 113:15 effects 106:5 eight 12:22 91:23 92:6 either 30:8 47:19 62:9 63:22 77:16 94:7 100:1 105:24 106:3 elaborate 32:6 elements 21:22 elicits 30:2 Ellis 4:11 emerge 82:4 emerges 5:16 emphasise 87:17 employees 110:9 |
|--|---|--|---|--|

| | | | | |
|--|--|---|---|---|
| empty 98:12 100:11 enable 111:8 endeavour 89:8 enforceable 79:17 79:25 enforced 84:20 enforcing 38:17 engaged 117:1,2 England 108:8 English 8:4 12:18 13:10 50:13,18 50:21,23 51:2 56:13 57:6 58:8 60:25 61:15 62:6 69:18 70:10 76:16 92:7,10,16 103:20 112:19 116:12 enjoy 119:14 enjoyable 90:20 enquiry 108:9 ensure 7:5 29:3 88:15 91:9 enter 91:16 94:12 110:18 entered 30:6 62:7 entering 92:11 entire 116:24 entirely 84:13 102:11 entitled 11:11 30:13,14,21 66:7 67:20 68:7,16,17 68:23,24 69:5,12 70:2,11,17,25 72:2,3,7,10 73:25 74:9,10 76:24,25 77:2,4,5,22,25 78:5,18,21 79:5,8 79:12 83:22 84:2 84:21 92:8 93:1 96:19 entitlement 39:14 entrepreneur's 57:24 equal 90:13,14 equivalent 29:1 Ernst 56:24 | essence 41:12 101:24 112:20 essential 25:19 79:24 essentially 28:5 62:14 117:2,4 established 83:13 establishment 56:16 estimated 91:1 111:13 et 41:10 Europe 109:6,7 European 111:23 euros 15:7,10,10 15:14 16:6,10 72:17,18 73:14 77:23,24 78:3,5,8 79:16 86:7,11 evening 4:9 event 30:11 66:5 102:1,1,10 115:22 116:20 events 67:16 87:4 evidence 8:21 44:16 45:4,15 118:19 120:4 evident 48:23 49:5 49:19 103:8 exact 16:24 exactly 31:18 32:22 39:11 70:5 96:2 104:16 examination 8:20 44:14 120:11 examined 63:11 example 10:5 14:21 16:5,8,11 34:1,12 40:23 42:13 58:4,7,13 68:22 77:21 86:1 87:10 100:6 102:7,20,22 105:16 106:14 117:5 examples 15:5 34:25 57:20 58:2 58:4 59:7 exceeds 76:19 79:5 | exception 1:19 98:5 exceptions 97:23 97:25 excess 69:2 112:7 excluded 101:16 exclusively 102:2 exercise 14:10 117:1,1 exercising 23:13 25:23 26:14,25 28:7 51:10 exert 34:20 exist 88:5,6,7,8 97:13 existence 12:3 53:13,16 existent 12:1 existing 11:22 53:12 exists 67:22 69:9 86:2 expert 3:10 44:5 45:2 65:19 experts 2:4 8:6 29:24 expiration 61:5 explain 31:21 33:21 35:24 38:13 74:6 77:8 92:21 94:4 explained 16:1 30:9 59:23 73:15 99:2,4 explaining 36:14 explains 20:20 explanation 8:10 31:22 36:1 102:9 explicable 102:2 explicit 98:23 99:15,16 100:1 explicitly 82:4 explored 27:21 express 79:11 83:10 100:22 113:18 expressed 3:9 11:20 28:11 103:6 105:19 | expresses 114:3,5 114:7 expressing 30:15 expression 112:18 expressly 12:13 57:21 extensively 77:9 extent 7:12 21:18 29:5 32:18 68:8 70:12 71:1 72:4 72:9 76:17,19 77:19,20 78:11 78:17,21 79:4 83:15 84:18 external 34:9 103:22 104:9 extinguish 77:17 extract 28:21 34:7 35:16 36:21 57:4 extraordinary 53:12,15 extreme 102:7 eye 72:12 | falls 16:15 18:12 25:3 32:23 49:1 73:3 105:25 106:2 false 73:6 far 7:25 95:23 108:9 fault 49:2 favour 23:12 25:23 26:14,24 28:7 51:9 67:22 feature 63:12 feed 116:13 feel 52:16 88:17 feeling 71:17 feels 7:23 fell 17:3 18:10 file 111:20 filing 35:22,22 fill 49:9 filling 49:25 final 6:5 19:3 20:17,20 33:20 33:22,25 63:17 104:18 105:14,21 106:3 113:1,22 finally 76:12 82:3 112:2 financial 91:11 110:6,24 111:15 find 13:9,10 23:7 23:17 35:12 47:16 48:17 50:8 59:7 72:16,20 fine 89:7 finish 9:1 90:12 118:20 finishing 90:17 fire 100:18 first 2:21 5:24 17:15 20:13 23:8 23:16,22 26:1,4 44:16 45:2 47:7 47:15 48:6 49:6 50:17 51:6 53:23 54:5 55:14 57:10 63:20 68:12,19 70:9 71:6 78:1 81:19 93:3 98:22 |
|--|--|---|---|---|

| | | | | |
|--|---|--|--|--|
| 113:17 115:25 117:11 firstly 57:21 97:8 Fischer 2:25 6:19 14:8 25:20 43:17 43:23 44:10,15 44:18 52:2,25 65:12 71:12 73:22 78:12 80:4 81:7 83:8 91:6 98:24 101:10 108:16 117:9 120:10 fits 42:10 five 40:6 89:12 90:25 110:13 flaw 8:5 floating 90:7 focusing 64:2 114:20 following 10:21 21:23 22:1 25:11 35:1 54:20 58:14 64:17 87:7 follows 21:17,21 35:20,21 36:23 39:1 59:4 61:2 footnote 2:20 56:22,22 57:22 57:22 58:8 foreclosing 36:5 foreign 8:4 Forget 95:8 form 99:9,12,13 formality 98:12 100:11 former 38:16 found 18:11 47:18 86:13 90:6 96:12 four 53:19 fourth 92:19 107:25 frank 1:21 Frankfurt 24:23 32:20 fray 89:13 freedom 64:11 Freiburg 44:18 Freshfields 1:12 | 2:14,22 4:17 5:11,24 Friday 1:1 2:11 4:9 friend 23:20 25:7 25:10 31:14 33:3 35:5,8 43:16 103:15 119:6 friend's 28:14,24 107:23 front 47:11 fruition 40:6 fulfill 114:6,18,18 fulfilled 65:20 full 67:16 95:11 fully 12:1 30:7 62:8 117:7 function 61:7 funding 2:10 110:15 111:24 funds 14:25 further 1:9,12 9:4 9:8,13 10:11,13 10:14,17 12:6 14:3 15:13 16:8 16:21 17:11 22:22 37:19 52:17 60:1,2 81:23 85:25 95:17 110:14,16 111:19 113:4 114:8,8 117:10 future 40:8 | German 1:24 7:6 8:7 13:11,14,18 13:18,23,24 23:10 25:17,22 26:23 27:5,6,13 27:16 28:1,5,9 29:15,24 31:1,2,3 31:19,22 32:7 33:24 34:12 44:19 47:8,11,23 47:25 48:2,3,6,7 48:13 49:13,16 50:10,11,19,24 50:25 51:7,24 53:10 54:8 55:20 57:6 58:19 59:2 61:14,16,17,19 62:18 63:3 64:4 64:5,8 65:13,18 65:21 66:3 68:13 70:7 73:3,4,8,12 73:16 74:25 75:2 82:14 85:11 86:22 113:6 116:12 117:18 Germany 44:19 51:19 108:7 Gero 44:10,18 120:10 give 15:5 17:14 35:11,13 45:4,16 58:7 63:16 73:19 77:21 81:9 86:1 89:7 100:6 119:2 given 7:23 19:22 32:14 44:19 89:6 93:19 94:15,17 95:13 101:19 112:18 117:8 118:18 gives 26:6 35:25 36:11 60:13 giving 28:1 30:11 63:25 64:1 66:5 91:25 92:17,24 93:12 gloss 116:1 GMA 23:13 26:15 51:11,16,17 53:9 | 56:21 59:7,9 63:6 71:8,8 75:3 75:24 go 2:24 3:12 4:25 5:14 12:10 19:3 26:2 27:18,20 29:19 34:6 44:23 46:1,23 52:4 55:2,13 56:7 57:1 64:12 68:1 69:17 70:9,24 73:22 84:15 92:4 97:18 102:18 107:10 111:2 112:23 goes 73:4 86:15 104:13 118:25,25 going 2:18 6:9 7:8 8:17,18 27:23 29:12 38:15 67:7 89:12 95:17 101:20 108:4 110:21 114:25 116:15 117:12,14 good 1:4,5,6 34:2 43:18 44:15 47:5 47:6 65:10,11 90:19,24,25 118:12,21 119:9 goods 25:9 26:18 governed 56:18 granted 61:5 grateful 43:11 102:17 great 8:13 41:11 greater 9:4 89:24 ground 117:20 grounds 55:5 group 111:7,20,23 115:12 group's 110:22 guarantees 111:24 guess 90:16 guided 8:6 guiding 62:19 65:15 92:3 | handbook 75:25 handful 1:11 2:6 hands 3:20 89:15 118:22 happened 7:7 11:1 54:23 happens 69:11 85:2 happy 4:22 heading 111:2 hear 26:2 heard 6:24 8:25 hearing 3:18 44:23 119:18 heating 3:15 16:16 17:20,21 20:7 held 61:9 112:9 help 21:9,12 44:24 88:14 104:14 helpful 92:2 116:7 helps 118:2 hereinafter 30:13 hesitate 88:11 101:10 115:21 HILDYARD 1:5 1:14 3:23 4:2,5 4:14,19,21 5:2,7 5:12,19 6:2,4,12 6:22 7:3 8:1,16 11:12,14 17:9,12 20:21,24 22:3,20 26:8 27:25 28:12 28:15,19 29:11 29:22 30:2 31:5 31:10,24 32:4 33:8,10,12 36:2 36:10,18,22 37:11,21 38:9,11 38:14,21 39:2,10 39:12,20 40:1 41:1,7,16 42:20 43:7,11,18 44:1 44:11 52:5,8,13 52:16,22 53:2,4 61:24 65:6,10 71:17,24 72:1,9 72:15,19,22 73:6 78:13,16,21 79:2 79:11,22 88:22 |
|--|---|--|--|--|

| | | | | |
|--|--|---|---|---|
| 89:1,12,17 90:4 90:10,19 91:5 101:24 102:4,7 103:7 104:5 108:2,6,11,14 115:21 116:10,16 116:20 117:6 118:5,8,10,13 119:9,11,16 his/her 58:9 hmm 54:19 78:20 113:5 holds 13:25 31:15 honed 44:4 hope 26:5 48:17 56:13 57:4 74:16 81:15 90:11,17 97:6 hoped 89:16 Hopefully 8:11 hoping 32:2 hour 115:22 hours 111:14 112:17 Housekeeping 1:3 120:3 huge 42:5 hypothetical 106:15 117:4,7 | 51:21,22 55:16 55:22 67:9 118:23 implication 35:19 implicit 98:23 99:15,16 100:1 101:25 implied 34:8 79:11 103:21 104:8 impolitely 52:18 important 1:15 6:25 17:4,6 19:10 29:8 58:5 58:20 63:4 64:25 65:1 106:4 115:25 imposed 98:17 imposition 52:9 incapable 114:7 include 50:7 67:4 included 85:22 86:7,9 includes 62:10 83:14 107:24 including 64:24 95:12 inclusion 107:22 108:1 independently 64:12 indicate 14:20 26:21 38:23 48:9 49:23 103:4 indicated 3:15,17 6:7 7:14 16:19 16:25 17:1,25 35:8 60:1 indications 86:13 individual 57:14 63:13,15,15 80:12 84:11 99:21 113:25 115:13 individuals 107:7 inevitably 116:3 inferred 36:8 49:8 information 1:9 110:3,6,9 112:14 informative 89:2 | informed 36:8 initial 5:4 injured 24:3 insight 73:19 InsO 48:10 insofar 53:11 80:15 87:9 insolvency 1:20 30:10 35:4,18,22 37:8,14 48:10,13 65:18,21 71:9,13 75:2,5,5,8,12,14 75:16,18,18 76:5 76:5,7,9,10,11 80:21 81:2,6 86:5,16,24,25 87:1,16,20,21,24 88:2,4 91:25 92:18,25 93:13 94:1 95:6,8,22 96:7 110:19 112:19 114:16 115:13,14,18 116:3,4,12 insolvent 27:3 67:23 68:21 69:4 69:8,13 70:3 77:12,23 78:10 79:3,9 80:13,13 80:24 81:4 87:13 instantly 41:17 institute 84:19 instituted 84:19 88:5 institutions 111:16 instructing 1:23 2:9 intend 105:8 intended 84:7 91:9 102:21 103:5 104:15 intending 114:4 intent 67:6 104:23 104:24 105:2 117:19 intention 114:12 interest 10:15,18 10:23 14:23,24 24:7 85:9,12,13 | 86:6,15,16,19 88:19 93:23 95:3 95:4,12,13,24 96:9 97:10 interests 7:19,20 International 109:7 interpret 52:14 interpretation 19:22 20:3 29:14 29:15,18 31:5 32:17 59:9 76:2 interpreted 44:20 47:10,18,22 48:5 48:24 49:6,15,22 51:17 52:20,21 53:11 54:9,15 55:20 57:17 58:3 58:13 59:1,21 60:11 61:11 62:16,21 63:23 64:10,23 65:17 66:14 67:2,11,22 68:19,25 69:7,24 70:5,18 71:6 73:2 74:15,18,20 75:2,11,16,24 76:8 77:8,14,15 79:7,14,23 80:1,2 80:7 82:14 83:4 83:23 84:5,9,17 84:24 85:15,21 86:21 87:7,15,24 88:6,8,9 93:1 94:4,22 95:4,6,11 95:25 96:7,11,18 96:23 97:11,15 98:8,16 99:1,11 99:19,25 100:12 100:19 101:4,8 101:12 103:2,9 104:7 105:1,9,18 106:3,6,12 114:2 114:15 115:2 117:16,25 interpreter 44:9 50:5,10,13,16,22 50:24 52:3,13 57:2,6 59:15 | 60:20 61:17 63:25 66:21 69:6 69:15 74:19 75:15 77:2 81:16 81:18 85:20 87:23 88:7 89:21 98:25 101:11 107:1 120:9 interrupt 88:11 115:21 invest 41:8 42:16 invested 14:22 15:2,23 40:5 42:14,14,15 investment 15:25 16:11 40:16 42:17 invite 44:6 invoice 7:1 21:25 22:10,14,16 25:9 25:14,15 26:18 26:20 27:14 29:1 involve 99:17 involved 76:6 involves 48:9 in-chief 44:14 120:11 irrelevant 29:22 30:17 irrespective 80:9 isolation 67:3 issue 18:12 37:24 39:2 47:17 issues 2:10,24 4:13 I-N-S-O 48:11 |
| I idea 13:24 21:18 52:6 ideally 52:25 identified 2:7 6:13 6:15,16 ignore 53:8 95:22 ignoring 51:16 ii 12:18 illuminate 89:4 illustrated 23:15 imaginable 73:2 imagine 85:6 114:21 immediate 24:3 31:7 62:20,21 63:8 65:16 72:12 immediately 4:17 18:19 20:6 23:14 25:3 49:10 51:11 | | | | J J 48:18 jigsaw 113:1 joint 2:4,5 14:8 23:6 46:6,9,15 50:7 Judge 2:25 6:19 14:8 25:20 43:17 43:23 44:10,15 52:2,25 65:12 71:12 73:22 78:12 80:4 81:7 83:8 98:24 108:16 117:9 |

| | | | | |
|--|---|--|---|--|
| 120:10 judgment 19:5,7 23:23 24:10 judicature 34:25 June 11:9,10 junior 4:12 JUSTICE 1:5,14 3:23 4:2,5,14,19 4:21 5:2,7,12,19 6:2,4,12,22 7:3 8:1,16 11:12,14 17:9,12 20:21,24 22:3,20 26:8 27:25 28:12,15 28:19 29:11,22 30:2 31:5,10,24 32:4 33:8,10,12 36:2,10,18,22 37:11,21 38:9,11 38:14,21 39:2,10 39:12,20 40:1 41:1,7,16 42:20 43:7,11,18 44:1 44:11 52:5,8,13 52:16,22 53:2,4 61:24 65:6,10 71:17,24 72:1,9 72:15,19,22 73:6 78:13,16,21 79:2 79:11,22 88:22 89:1,12,17 90:4 90:10,19 91:5 101:24 102:4,7 103:7 104:5 108:2,6,11,14 115:21 116:10,16 116:20 117:6 118:5,8,10,13 119:9,11,16 justify 36:24 | 40:13,15 43:15 44:12 46:23 66:3 73:7 89:2 92:19 99:8,24 102:25 107:23 115:14 knowing 116:24 knowledge 47:22 105:12 109:24,25 110:3 known 34:14,15 34:18 100:22 101:20 104:18 knows 1:13 2:8,17 7:16 18:24 KO 36:23 kommentar 76:1 | 114:5,13 LBIE's 106:16 113:22 lead 63:1,8,9 85:23 leads 19:22 66:2 learned 8:18 23:20 25:7,10 28:14,23 31:14 33:3 35:5 35:8 43:16 103:15 107:23 119:6 leave 48:12 53:8 leaving 93:25 led 60:9 left 12:13 legal 12:2 13:5,22 23:10 39:4,5,7 50:19 51:7 68:9 70:13 71:2,7 72:5,10 109:6 legally 24:6 Lehman 109:5,7 lender 32:15 lenient 38:17 letter 17:24 18:1,4 48:18 let's 10:4,15 52:8 53:5 118:13 liabilities 113:12 liable 77:1,7 87:3 lies 63:12 light 48:2 112:16 limit 61:5 96:11 limitation 17:5,18 19:16,24 22:14 limited 12:14 24:9 24:15,16 54:13 88:23,23 line 12:19 28:2,24 36:11,22 lines 12:22 19:6 35:2 56:6 91:24 92:6 110:13 118:7 link 59:9 liquidity 36:5 37:4 list 35:2 literature 23:10 50:19 51:7 59:6 | 86:14,22 87:2 115:3 litigation 7:16 little 71:17 90:11 112:10 115:23 116:2 118:22,24 loan 24:25 27:10 30:24 62:25 locate 61:22 locked 40:11 41:2 41:4,5 42:1 London 4:11 long 41:8,9,13,17 42:1,4 52:18 73:3 79:4 86:18 90:5 95:1,1 119:3 longer 40:12 80:18 87:25 88:5 90:11 111:18 115:9 118:25 119:1 look 3:19 12:9,17 14:7 16:20,21,22 44:16 45:18,23 46:17 53:6 54:18 55:2 56:5 67:10 82:18 83:8 89:21 91:23 116:3 118:5 looked 2:15 5:3 12:11 looking 9:3 71:24 90:17 97:25 looks 114:8 Lord 1:4,8,11,13 1:15 2:8,16,17 3:5,22,25 4:4,7 4:18,20,24 5:3,18 5:21 6:8,21 7:5 7:10,22 8:15,22 9:15 10:20 11:6 11:19 13:9,23 14:11,20 15:22 16:12,22 17:10 19:13,19 20:2,15 21:5,13,15 22:18 24:12,14 26:1 27:1 29:17,18,19 30:1,19 31:12 | 32:8,19 33:24 34:17 37:6,16,19 39:6 40:17 41:6 42:8 43:10,15,23 44:8 45:25 46:3 46:8,11,16,22 51:24 52:20 61:19,21 65:4 73:21 79:7,21 88:20 90:3,8 104:2 107:21 108:3,13 116:8 116:15 117:8 118:2,9 119:6,10 Lordship 7:6,16 27:22,24 28:21 28:22 29:3,7,8 32:3 45:9,20 46:2,14 49:12 53:1 68:4 71:15 71:17 72:20 81:8 90:9 116:25 Lordship's 89:15 102:17 116:8 Lord's 1:25 3:20 4:13 27:20 lose 60:6 loss 9:23,25 10:1 10:22,25 15:20 15:24 16:11 24:24 25:1 27:11 42:16 lost 3:7 10:15,18 24:13 52:19 73:19 88:1 lot 113:11 lump 15:21 lunacy 102:9 lunatic 102:8 lunch 65:12 Luncheon 65:8 lunchtime 90:18 |
| K keep 44:6 115:25 kept 91:5 key 6:8 kind 24:9 Kirkland 4:11 know 6:20 7:24 16:16 20:10 32:22 34:19 | L landlord 6:18 16:16 19:16 20:4 21:16 22:6 31:15 31:18,25 58:10 58:18 59:14,17 59:23,25 60:2,4 60:12,14 61:2,10 74:5 76:22 80:16 80:18 landlord's 58:11 language 31:3 61:16 larger 4:4 late 89:14 law 7:7 8:4,7 14:12 14:14,15 25:17 29:15,24 31:3 34:12 38:12 48:1 48:3,13 53:10 54:8 62:18 64:5 64:9 65:18,22 71:7 75:3,5,25 76:9 82:14 86:14 87:10,11 115:3 116:12 laws 75:5 lawyers 84:23 LBHI 111:8,11,18 LBIE 7:19 107:8 109:11,18 111:10 111:13 112:4,10 112:20 113:4,20 | M main 53:19 56:4,6 maintain 107:24 majority 25:17 making 14:16 89:15 113:2,10 mandatory 35:22 | | |

| | | | | |
|--|--|---|---|---|
| 63:2 67:18 75:4 104:12 manner 33:19 84:25 marked 23:21 33:15 markets 110:17 master 25:22 26:23 27:5,6,13 27:16 28:6,9 47:9,11 48:2,6,7 49:14,16 58:20 59:2 61:14 63:3 64:4 65:13 66:4 70:7,19,21 72:15 73:3,4,8,12,16 74:25 85:4,11 91:8 93:22 113:6 match 40:2 42:7 material 30:8 62:9 62:9 63:22 materialise 11:24 11:25 materials 1:24 3:18 matter 1:8 14:9 25:17 27:24 29:6 47:25 49:11 54:8 68:4 71:14 74:23 110:12,19 118:15 matters 7:6 29:16 110:2 maturity 83:1 mean 3:24,25 22:3 31:24 33:22 41:14 42:6 52:17 52:18 68:25 73:6 74:6,7,15 75:7,9 86:11 92:20 104:23 meaning 67:6 75:9 97:8 112:18 115:11 means 33:25 57:15 93:23 105:15 meant 14:20 32:6 32:8 70:6 84:13 measure 39:15 mechanism 83:25 | meet 114:18 119:16 meeting 46:20 memory 17:15 18:3,5 32:9 mention 44:1 89:18 118:14 mentioned 21:22 24:21 27:1 35:7 58:4 75:2 76:5 merchandise 34:10,13 103:23 104:1,10 method 25:5 83:21 methods 24:19 25:1 midnight 119:1 million 15:7,10,10 15:14,16,18,19 15:23 16:6,6,9 111:13 mind 12:21 36:12 82:6,21 110:16 minutes 89:13 90:25 misplaced 73:18 misread 21:5 missed 15:25 39:16 52:7 misunderstood 22:4 mix 40:2 42:6 moment 17:14 35:14 42:8 43:16 44:16 48:12 51:16 61:22 64:2 65:5 88:21 93:25 95:8 108:6 115:19 moment's 118:20 Monday 2:13 90:17 118:18 119:16,18 money 10:16 19:12,16 24:4 39:17 40:10 41:3 41:5,10,13,18,25 42:2,6,10,11,14 42:17,18,24 43:3 | 112:9,21,22 monies 112:7 month 10:13,19,21 11:1,5 months 10:9 morning 1:4,5,6 3:21 66:9 97:20 moved 118:16 muddled 37:22 Munchen 75:25 Munich 4:11 35:7 35:17 76:1 MÜLBERT 8:21 120:4 Mülbert 1:7,21 3:4 3:8,14,15,17 6:18 6:23 7:11,23 8:8 8:24 9:20 12:11 14:5 16:13 17:13 20:6,12 22:22 23:2 26:7,12 27:22 28:4 29:2 29:9,17 30:3 31:14 32:5,25 37:12,18 43:13 46:7,10,19,21 49:12,18 50:7 51:2,15 53:20 54:17 56:5 64:18 98:14,17 100:6 102:22 103:16 104:3,21,25 105:1 117:22 Mülbert's 28:20 29:4 53:7 99:23 100:9 102:23 | 26:19 34:14,15 34:18 44:12,24 61:19 64:8,20 73:17 76:6 84:22 84:23 105:2 110:18 needed 3:4 55:18 91:21 92:13 93:11 96:20 112:21 needs 7:11 15:8,9 34:19 52:16 59:19 65:14 89:7 97:22 111:10 negligible 112:8 112:10 negotiating 105:16 113:21 negotiations 105:18,19 neither 5:16 net 9:18 74:11 76:24,25 77:5,6 netted 83:16 netting 27:2 47:21 63:17 76:3 nevertheless 44:5 89:9,25 new 13:5,7,7,15,15 13:19,25 14:2 27:23 news 90:19 nice 26:2 non-defaulting 76:23 77:4 91:10 99:24 non-effective 75:4 non-insolvent 74:21 norm 74:17,20 normal 7:17 21:3 note 104:5 noted 37:17 81:23 82:3 notes 35:17 notice 1:19,19 4:6 30:12 63:25 64:1 66:5 91:25 92:17 92:25 93:12,19 | 94:3,15,17 95:9 95:13 97:23 98:6 98:9,11 100:11 notified 6:6 notwithstanding 112:15 November 1:1 119:19 number 70:20,20 88:23 97:3 98:3 98:4 115:12 numbered 54:2 57:8 |
| O | | | | |
| oath 44:4 object 5:17 7:22 8:10 24:4,5 objection 108:5 Objectively 114:13 obligation 22:7,9 22:13 obligations 73:10 73:15 113:21 114:6,14,18,19 obligatory 104:12 obligor 33:19 observation 19:4 obtained 110:3,8 obvious 27:12 118:17 obviously 7:11,20 7:22 13:16 16:23 29:5 59:1 68:3 71:14 87:13 93:16 occur 44:3 67:19 87:25 88:9 105:24 106:3,5 occurred 11:5,7 75:14,18,19 80:2 81:5 86:17,21,23 86:24 87:16,16 87:19,22 97:8 115:17 occurs 24:7 38:4 80:17,20 88:2,4 106:7,13 oddly 72:13 | | | | |
| N | | | | |
| N 120:1 name 44:17,18 naturally 73:11 nature 57:13 necessarily 114:3 114:6 necessary 7:24 21:6 83:15 84:8 88:17 99:23 102:24 necessity 43:5 need 3:12 7:20 | | | | |

| | | | | |
|--|--|---|--|---|
| offend 64:12 office 109:6 official 71:21 oh 24:13 40:5 oil 119:1 okay 6:4 20:8 43:7 45:17,25 47:14 54:19 65:23 89:11 90:2 107:1 107:3 108:20 109:8 113:16 115:20 old 34:2 117:20 OLG 35:7 omit 77:18 79:8 omitted 35:5 once 26:5 51:19 52:21 58:11 69:15 81:1 87:19 113:14 ongoing 111:24 onwards 40:21,25 opaque 5:12 open 12:13 35:3 37:14 opened 76:11 86:5 87:21 opening 35:18,21 36:24 37:8 110:16 open-ended 26:10 operate 110:18 operates 47:21 68:22 117:3 operating 71:19 opinion 27:2 29:22 51:18 55:21 65:19 86:22 99:25 opportunities 15:25 opportunity 7:23 7:25 16:11,20,21 16:22 35:11 39:16 41:11 81:10 opposed 107:22 opposition 107:24 orally 6:16,24 | order 34:20 49:9 74:22 105:13 106:17 109:16,19 111:14 113:3,15 116:17 original 13:11,19 OTTO 8:21 120:4 ought 86:7 outside 31:24 71:8 overall 67:13 overlooked 35:10 overnight 16:21 overpayment 19:25 owe 100:12,13 owed 10:7 15:7,18 18:21 19:12 31:16 owes 19:16 owns 14:1,2 <hr/> <p style="text-align: center;">P</p> <hr/> page 17:15,24 18:1 19:3 20:17,22 23:7 27:1 30:4 31:17 36:10 45:7 45:18 46:1,12,23 48:19 50:8,12 54:3 56:11 107:10 109:13 112:2 118:3,5 paid 32:23 42:25 94:14 paper 107:25 paragraph 3:16 18:4 20:18,22,23 21:2,10 23:8,21 24:12,14,15 33:15 50:17 51:6 54:2,6 55:2,3,13 56:10,14 57:8 60:24,25 81:20 81:22 82:2,5,5,7 82:7,19 93:5 103:16 107:6,10 107:15 109:3 110:12 111:2 112:2 116:18 paragraphs 6:15 110:24 111:5 | Pardon 11:13,15 parent 112:21 parity 44:6 park 115:19 part 2:1,7,7 4:4 5:5 12:2 14:14 14:21,25 15:2 20:16 21:5,7,17 40:1,2 42:11,12 66:21 97:21 105:17 particular 14:12 22:11 63:12 105:3 110:14 particularly 57:12 115:12 parties 18:7 59:11 64:19 79:15,18 79:18,20 84:11 84:14,19 92:7 101:14 104:20 party 23:12 24:3 25:23 26:14,25 27:3,15 28:7 30:8,11,12,13,21 34:10,14,15,18 34:19 39:3 51:9 51:21 58:18,23 62:9 63:22 66:5 66:6 67:20,23 68:7,9,10,15,16 68:20,21,23,24 69:1,3,4,8,11,13 69:13 70:2,3,4,11 70:13,14,17,25 71:2,3 72:2,3,5,6 72:7,7,10,12 73:25 74:1,8,9,9 74:21,22 75:13 75:17 76:23,25 77:4,5,12,14,21 77:23,25 78:5,6 78:10,18,21,24 79:3,5,7,9,9,12 79:14 80:13,13 80:21,23 81:4 83:1,22 84:2,5,21 86:4 87:3 91:10 93:1 94:4 96:19 | 97:9 99:3,5,8,18 99:24 100:2,3,4 100:23 103:8,10 103:11,23,24 104:11,18 105:11 115:8 passage 6:7,8,11 12:17 17:25 23:5 23:20 25:24 26:12 81:19 passages 81:12 108:17,21 passed 44:22 58:1 passing 35:17 pat 79:19 pattern 89:25 pause 12:24 17:16 18:4 19:8,12 20:25 35:14,15 52:10 54:6 56:8 57:5 59:24 61:18 62:17 69:2 75:6 75:12 80:9,25 82:8,22 83:11 85:20 pay 18:21,25 22:7 22:9,13 25:13 59:19 74:11 76:24 77:1,4,7 91:21 92:13 93:12 94:18 100:17 102:2,10 102:11 107:12 112:17 114:10,12 115:6,6,7,9 payable 7:1 23:14 30:21 51:11 56:19 68:8 70:12 71:1 72:4 73:10 76:18 79:4 paying 114:8 payment 22:12 36:6 62:10 79:10 79:24 84:20 95:4 payments 72:17 111:9,10,15 penultimate 19:5 73:22 77:10 people 61:21 116:3 | perception 116:4 perform 34:8 35:1 36:25 57:25 87:2 97:14 98:7,10 100:1,5,22 103:21 104:8 105:8 114:13 115:1,1,4 117:13 117:14 performance 23:25 24:1,3 33:18,19 48:22 48:25 49:1,4,10 49:17,24 53:17 57:11,17 58:21 62:11 97:14,17 97:18 99:2,20 performed 84:4 91:12 97:16 performing 113:20 period 9:13,22,24 10:10,12,18,23 11:9,10,11 15:9 17:5,19 19:24 22:15 40:17,18 42:21 86:16 95:1 95:3 96:21 permits 3:22 permitted 61:3 person 12:22 34:4 38:7 99:12 101:20 perspective 42:18 pertaining 63:7 pessimism 90:4 Peter 8:21 107:7 120:4 petition 35:3 37:13 petitioner 115:14 phrase 94:16 pick 8:25 12:10 picked 17:7 picking 56:10 57:7 piece 107:25 113:1 pity 8:13 place 5:2,19 9:19 49:24 51:22 118:10,15 |
|--|--|---|--|---|

| | | | | |
|--|---|--|---|--|
| <p>plainly 7:7 116:11 plaintiff 37:3 play 40:24 please 12:10 19:13 37:1 38:23 43:24 44:22,25 45:7 63:20 92:1 plus 86:6 pm 2:22 5:25 65:7 65:9 91:2,4 119:17 point 9:2 12:9 20:5 23:24 26:9 32:21 34:19 39:10 40:19,21,21,24 63:20 65:21 71:16 74:25 82:6 87:15 88:22 90:9 93:9 94:11 95:17 96:16 97:13,22 98:4,6,11,22 100:10 103:15 116:9 118:4 pointed 26:4 66:9 points 64:18 81:23 82:3 97:4 policies 116:12 pondered 13:12 portion 61:3 position 29:4 36:1 37:24 38:4,19,25 44:4 79:19 84:3 84:6 91:11 92:24 94:5 108:2 110:24 111:19 112:4 115:5 positive 112:4 possibilities 71:10 78:1 93:2 possibility 36:6 78:1 105:6 possible 52:2 67:17 75:21 89:8 94:25 104:11 105:23 106:1 possibly 15:5 postponed 83:2 postponement 80:5</p> | <p>potential 19:24 26:3 116:11 practically 115:9 practice 115:8 117:3 precisely 29:3 103:9 108:13 precondition 22:10,15 64:21 preconditioned 22:13 predicated 40:7 prepared 5:23 46:6 preparing 111:20 prepayment 54:24 55:15,19,22 present 35:1 63:10 84:25 presented 25:18 pretty 90:6 prevailing 51:18 55:21 previous 37:2 93:4 price 100:13,14 PriceWaterhous... 110:8 principal 36:3 37:3 principle 51:18 54:11 63:1 87:8 principles 24:10 48:3,12 54:12 62:19 64:8,13 65:15 prior 9:16 40:18 priori 84:10 priority 48:7 private 87:9,11 probabilities 3:11 probability 94:8 probably 6:8 50:2 90:17 119:7,12 problem 42:10 procedural 14:15 procedure 22:8 procedures 35:18 procedure's 116:5 proceed 41:5</p> | <p>84:25 proceeding 35:23 118:18 proceedings 35:4 37:8,14 45:5,16 76:11 80:11,24 85:18 86:5 87:20 87:21,24 88:3,3,4 process 2:1,3,7 4:22,24 5:15 7:21 80:22 110:19 processes 108:7 produce 58:1 83:17 produces 5:14 66:13 Professor 1:7,21 3:4,8,14,15,17 6:7,9,18,23 7:11 7:23 8:8,17,21,24 9:20 12:11 14:5 16:13 17:13 20:6 20:12 22:22 23:2 26:12 27:22 28:4 28:20 29:2,4,9,17 30:3 31:14 32:5 32:25 37:12,18 37:21 43:13 46:7 46:10,19,21 49:12,18 50:7 51:2,15 53:7,20 54:17 56:5 64:18 98:14,17 99:23 100:6,9 102:22 102:23 103:16 104:3,21,25 105:1 117:22 120:4 profit 24:24 42:16 profitable 40:24 profitably 15:23 profits 3:7 25:2 27:11 progress 89:16 project 40:5 41:8,9 41:21 42:1,4 proof 1:18 3:7 proper 8:7</p> | <p>properly 28:25 42:25 84:4 91:12 proposing 108:16 prospect 41:17 protect 74:22 protected 24:7 protecting 21:18 protection 38:3 75:1 111:21 protective 74:17 74:20 proved 15:20 provide 1:8,10 25:9 26:17 51:20 84:7 111:19 provided 1:10,12 2:13,14 4:2,7,17 5:4,24 8:5 14:13 16:18 25:15 35:20 46:19,21 70:8 110:15 provision 18:17 30:19 31:2 39:24 59:10 66:19,24 69:24 70:21 72:23 91:9 provisions 21:3,11 22:12 27:2,16 28:9 29:19 30:17 49:16 62:1 63:6 64:7 71:10,13 75:3,3,12,24 85:18 public 105:7,11 113:23 published 35:21 36:9 purchase 100:13 100:14 purchaser 101:6 101:21 102:24 Pure 105:18 purpose 6:13,17 7:2 31:6 32:14 33:22 59:13,16 69:19 83:21,25 108:4,12 116:5,5 118:16 purposes 17:19</p> | <p>75:9 pursuant 27:5 30:24 put 3:21 8:9 11:6 25:10 26:5,16 29:23 31:2 32:12 38:6 40:3,10,13 41:16 50:2 84:2 91:11 112:9 puts 89:23 putting 26:8</p> <hr/> <p style="text-align: center;">Q</p> <hr/> <p>qualification 89:7 qualify 102:1 quasi 104:24 117:24 question 12:13 13:13 14:25 16:24 19:13 22:19 25:19 26:1 26:4,10 27:18 29:6,12 30:18 42:9 46:23 49:2 49:19 52:25 53:6 55:25 66:22,23 67:11 69:15 71:14 74:15,16 79:7 81:7 82:22 83:23 88:15,18 90:12 91:7 99:7 99:8 102:14,18 105:22 questions 9:1 14:6 22:23 23:2 26:5 29:14 37:19,20 47:3,12 49:11 53:21 56:25 88:14,23 89:3,5 90:15 113:2 117:10 120:8 quick 14:6 quickly 109:3 quite 32:3 52:18 89:16</p> <hr/> <p style="text-align: center;">R</p> <hr/> <p>rage 100:21 ran 22:15 rate 14:17 16:1,5,9</p> |
|--|---|--|---|--|

| | | | | |
|---|--|---|--|---|
| 16:10 rates 16:9 92:15 reach 8:6 reached 9:7 reaches 90:9 reaching 29:7 read 8:4 19:8,21 22:3 51:4 54:5 69:18 77:10 78:22 reading 12:21 19:20 36:10,20 82:6 reads 60:25 72:1 92:10 real 104:22 117:23 117:25 118:1,4 realisable 41:17 really 8:10 39:2 108:11 119:5 reason 9:9 14:23 18:18 27:7,7 30:8 40:11 56:16 58:15 59:3 61:8 61:12 62:9,9,12 63:22 64:23 68:9 70:13 71:2 72:5 72:11 98:5 101:14 102:4 reasonable 8:1 34:4 61:4 reasoning 21:20 reasons 29:5 64:25 65:1 71:7 107:12 118:11 reassemble 65:6 recall 9:5 12:11,15 12:16 29:18,20 34:17 recalled 8:12 recalls 6:21 receipt 111:8 receive 25:13 93:23 95:11 received 2:11,21 3:17 4:8 17:21 62:11 receives 91:10 reciprocal 63:16 | recognisable 104:19 recognise 90:22 recognised 3:8 recognises 86:23 reconsideration 44:7 recovery 15:21 Red 40:13 refer 6:5,14 9:25 14:18 30:4 35:8 54:9 56:6 57:20 58:2 60:16 73:11 96:18 reference 35:3,6 40:20 51:16,17 53:8,9 64:10 72:25 78:18 83:2 91:21 92:15,24 94:17 102:2 103:24 referred 2:19 18:17 21:10 26:13 31:14 35:6 53:19 54:17 71:4 107:19 116:18 referring 9:23 23:16 74:5 refers 23:24 56:5 56:24 62:16 63:23 67:20 104:21 reflection 118:24 refrains 92:11 refresh 17:14 18:3 refreshed 18:5,5 refusal 33:1,18 34:8,16 35:1,19 35:24 36:25 37:10,15 98:2,3 98:15,18,23 99:2 99:9,15,20 100:1 100:20,22 101:16 101:18,22 102:2 102:10,11,21 103:1,6,21 104:7 104:18,22 105:3 105:13,23,24 106:3,7 108:24 | 114:1,3 115:3,10 115:15 116:23 117:3,15,18,22 118:1 refuse 78:10 refused 98:7,10 refusing 100:4 regard 63:8 regarded 26:24 28:22 29:1 30:17 35:18 regards 38:3 41:24 59:6,11 99:13 regret 30:19 regulation 80:8 related 57:14 relates 14:25 relation 1:11,16 3:6 9:1,21 14:6 15:19,21 29:4 53:21 56:25 65:21 82:10,25 87:12 90:13,15 90:16 96:3,16 113:3 relationship 57:13 58:10 relevant 2:24 3:16 4:13 7:6 10:2,25 11:4 27:18 28:10 30:17,22 55:9 105:24 106:2 111:5 reliable 38:7 116:17 reliant 111:7,23 relied 6:19 101:25 108:11 rely 6:6,17 34:20 97:23 relying 59:20 remain 84:12 85:22 87:9 remains 84:20 104:15 remember 11:18 23:17 25:24 52:14 remind 23:5 35:14 | reminding 62:1 82:21 rental 61:6 repaid 10:13 11:8 repayment 19:24 55:6,11 58:9 59:23 60:3 repeat 52:21 59:15 66:23 69:15 83:23 87:23 92:1 repeated 19:13 rephrase 91:10 replacement 91:16 93:3 94:5,7,9,12 replaces 83:14 reply 45:14,15 46:19,21 101:25 replying 118:20 report 2:23 6:10 13:14 28:4,16 37:17 38:23 45:2 45:13,14,24,25 51:2 56:7 57:21 81:9 98:21 reports 1:25 2:20 18:17 83:10 representative 7:18 require 8:12 25:18 104:23 117:23 required 21:25 24:5 56:20 57:25 89:10 requirement 33:23 requirements 14:13 56:18 98:15,19 112:16 requires 111:13 research 7:13 reserve 119:5 resolution 109:15 respect 9:13 15:15 38:4 39:14,16,21 41:21 42:21 55:6 55:7,15 62:24 63:2 96:5 respectfully 88:16 respond 7:24 respondent 107:25 | response 6:18 25:16 118:4 responses 89:20 responsibilities 14:1 responsibility 13:5 13:22 rest 15:17 33:13 35:20 restitution 80:17 restoration 24:4 58:17 restore 24:5 restrict 89:4,9 result 1:23 21:24 22:19 31:1 64:7 84:5 116:5 resulting 27:11 34:21 40:8 42:11 retain 61:3 retention 79:17 87:10 return 60:4 89:13 review 28:2 reviewed 2:12,23 4:10 revisions 4:16 revocation 64:24 76:9 re-examination 23:1,3 104:4 120:7 re-examine 29:2 right 4:14 6:7,12 11:12,14,15 15:14 22:16 23:13 24:19 25:24 26:15,25 27:25 28:7 29:14 29:16 31:7,9 32:3,4 36:3,7,15 38:9 39:4,17,21 45:6,11,14,17 46:8 51:10 60:7 60:19 68:3 71:4 71:22 75:1 79:6 79:17 87:10 90:23 91:13 95:7 97:24 98:25 |
|---|--|---|--|---|

| | | | | |
|---|---|--|--|---|
| 101:4,11 107:1 108:14 rights 34:21 39:3,5 39:7 41:19 rise 26:5 51:24 63:16 rising 82:15 Robert 107:7 108:20 role 109:5 rolled 66:10 root 11:21 rooted 11:17,21 roughly 90:14 rule 22:8 25:12 48:21 49:20 rules 15:24 21:17 29:15,18 48:2,12 75:16 119:12 Rum 40:13 run 17:5 19:17 80:24 96:1,15,25 running 7:18 85:12,13 86:15 86:19 88:19 96:10 | 70:24 76:16 78:6 78:16 81:22 82:2 87:2 91:24 92:16 103:20 104:7 107:6,10,15 109:4,9 110:1,5 110:12,13,21 111:6,12,17 112:3,6 114:10 115:9 117:12,16 Schwarze 33:6 scope 71:8 search 1:23 second 23:8 36:11 40:1 45:12 49:8 50:17 51:5 54:17 58:7 69:21 82:6 93:9 97:2,13 109:9 116:2,9 section 14:13 21:22 31:1 36:23 39:1 48:10,15 49:3,15,20 62:23 64:16 85:14 97:9 112:19 sections 52:10 53:2,3 63:6 secure 59:13,17 61:4 security 31:16 58:9 60:6,13 61:7 see 1:24 4:12 6:2 7:3 10:4 12:18 12:22 13:1 17:18 18:1,6,8,12,22 19:5 28:15 34:6 36:21 37:11 41:14 42:6 43:15 55:14 62:21 66:2 66:18,24 67:10 67:12 68:3 72:22 74:16,20 84:9,10 89:21 100:3 101:10 103:2,3 107:15 116:16 seek 6:6 seeking 29:2 seen 18:25 28:21 | 32:19 67:3 104:11 self 104:14 self-evident 53:14 53:15 sell 100:8,16,17 seller 25:9 26:17 34:2 100:8,12,14 100:16,18 101:2 101:5,7,8,14 104:15 selling 34:13 sells 34:9 103:22 104:10 sending 98:6,9,11 100:10 sense 29:24 69:6 98:8 sensible 101:14 sensitive 16:3 sent 2:8 5:11 19:18 20:1 sentence 18:15 19:5,6,8 20:17,20 23:8 37:2 50:17 51:4,5,6 53:7 55:3,14 56:10,14 60:23,24 68:12 68:19 69:18 70:9 71:6 72:21 73:11 73:23 74:2 76:12 77:10,11 78:6,16 78:25 79:23 83:2 92:6,9,10,19 109:9 115:11 sentences 23:22 54:6 57:10 separate 67:4 85:23 separately 41:22 series 14:6 serious 33:1 34:16 35:19,23 37:9,14 98:2,15,22 99:9 99:14 102:21 103:1,6 104:21 105:13,22,23 106:7 108:23 114:1,2 117:3,14 | 117:22 serve 97:22 serves 40:19 services 25:10 26:18 set 14:12 22:8,8 73:25 74:21 75:13,13,17 77:13,15,16,18 78:1,4,23 79:8,13 79:14 83:4,6 110:21 112:15 sets 100:18 112:3 setting 74:13 settle 111:14 settled 30:7 62:8 severe 98:16,17 shan't 36:16 sheet 112:3,15 Sherratt 107:7 108:20 109:3,21 112:20 113:18,19 113:24 114:21,25 short 1:16 2:22 43:21 86:18 88:12,18 91:3 95:1 107:4 118:21 shortly 90:12 97:6 show 22:5 27:16 50:6 60:23 78:12 81:10,12,19 103:15 107:18 108:16,21 showed 30:16 33:3 53:7 103:16 104:3 shown 28:21 33:6 34:23 53:19 side 2:18 5:16 7:15 118:12 sight 114:9 signature 45:10,11 45:21 46:2,3,15 46:16,25 significance 58:14 significant 58:20 similar 80:6,15 91:6 93:7 96:16 | simple 9:15 10:5 59:19 simplification 84:17 simplified 84:7,9 84:14,14,21 simply 54:13 71:4 78:14 single 23:4 26:23 30:23 47:8,10 63:17 66:13 67:8 83:12,13,17 95:19 sit 89:14 90:5,5,11 situation 21:2,3,25 24:23 25:8 26:16 27:8,9,12 31:15 32:11,13 47:20 58:25,25 59:2 62:14 68:14 69:11 74:7 87:12 96:19,24 100:14 situations 24:18 65:24 six 19:6 sized 89:20,22,25 slightly 7:15 11:20 25:7 90:14 101:1 102:14 105:6 106:15 slowly 44:23 small 4:16 smaller 14:18 sold 101:19 104:1 solicitors 107:23 solvent 30:12 66:6 somewhat 19:19 77:8 soon 2:14 4:15 76:18 sorry 5:21 8:17 17:10 20:5,21 21:5 22:20 24:12 24:13 26:1 33:9 33:11 41:6,7 42:8,19 51:24 53:4 59:16 63:18 74:19 75:15 76:14 78:13 |
| S sale 104:14 sales 34:2 satisfaction 22:15 satisfactory 7:8 satisfy 64:8 65:14 saving 29:13 saw 1:16 3:3 saying 3:9 12:5 18:24 19:10,14 21:11 32:8 37:1 42:20 55:9 57:10 68:6 82:9,25 107:25 109:18 112:20 113:19 114:13,21,25 says 13:3 18:18 20:25 21:1,21 23:23 34:7,24 50:18 51:6,15 56:13 57:13,23 58:8 60:2 62:6 63:21 66:4 70:9 | | | | |

| | | | | |
|--|---|---|---|---|
| 83:18 91:5 92:2 100:13 sort 7:13,17 58:25 93:6 sought 39:15 41:20 sounds 95:21 source 109:24,25 110:4 speak 33:18 119:13 speaker 51:25 speaks 33:17 special 39:21,23 39:24 42:22 63:12 specific 15:20 21:24 32:13,17 54:10 specifically 41:22 specified 48:22 49:4,13 73:9 specify 32:15 110:4 spectacles 28:1 spoke 119:6 stage 4:6 5:20,21 5:22 107:22 stages 52:8 63:20 114:20 stance 105:16 113:21 stand 104:6 standard 71:21 start 19:17,20 23:4 48:15 56:6 57:7 70:24 80:24 85:13 97:3,25 109:1 118:23 started 17:5 87:25 96:9,14 starting 20:18 starts 20:23 68:6 state 100:21 stated 107:13 statement 2:4,5 14:8 23:6 25:25 30:16 46:6,9,15 50:6,8 53:10 | 79:21 105:7,10 107:13,16,18 108:17 109:1,11 109:21 110:2,7 113:23 statements 24:8 54:7 113:18,22 states 25:2 30:5 110:15 111:21,24 Staudinger 36:21 stay 47:2 step 43:14 49:22 stipulate 72:17 stop 90:8,24 118:10,13 stopped 87:19 stopping 85:12 story 40:23 strain 89:24 strict 98:14 99:13 115:4 structure 57:19 stuck 71:18 studied 94:23 stuff 89:17 stumps 91:1 subject 14:11,13 22:10 29:13,14 42:22 115:4 submission 7:7 submits 37:3 submitting 20:19 substantive 14:12 14:14 substitute 92:11 sudden 119:4 suffered 9:9 10:11 suffice 37:9 105:19 sufficient 102:23 108:23 114:10 115:5 119:8 sufficiently 49:3 suggest 58:24 60:8 61:8 65:14 66:18 66:23 74:4 76:21 80:4 82:24 83:3 85:11 95:21 113:19 suggested 4:16 | 51:25 53:1 suggesting 69:25 70:16 99:10,14 suggestion 52:2 89:18 suit 43:19 suitable 61:6 89:22 sum 1:17 10:7 15:21 23:5 47:8 54:24 55:10 61:9 77:7 85:6,12 summarisation 56:20 summarised 63:14 63:17 66:16 summary 112:3,15 sums 26:20 31:16 47:15 81:2 85:3 supplemental 2:6 supplied 25:10 26:18 27:14 101:5 supply 22:13 101:9,15 support 1:22 107:13,16 109:22 supported 32:10 supposed 101:9 supposing 39:13 40:4 41:7 sure 2:17 17:2 35:9 47:2 52:23 66:3 69:16 79:22 118:11 surely 37:17 surplus 69:3 surprises 119:4 surprising 27:23 29:20 swears 109:21 sworn 44:2,9,10 120:9,10 sync 33:12,13 | 44:24 45:1,12,23 46:4,4,17,18 48:17 50:8 53:23 54:18 56:7,8 57:1,1,3,5 60:15 60:21,22 61:15 61:23 81:15,16 81:17 103:14 106:21,23,25 108:19 tabs 48:18 57:4 take 5:2,19 6:9 16:14,22 20:16 23:18 26:9 27:1 30:3 33:2 34:12 49:24 50:3,13 51:22 60:15 61:14 63:20 68:22 93:16 97:6 99:10 102:20 114:20 116:21 119:3 taken 7:20 24:13 36:17 66:16 68:25 takes 86:14 94:20 106:8 talk 26:13 talking 13:6 20:2,2 37:7,8 talks 13:15 30:20 task 2:17 telescreen 52:22 tell 15:17 telling 102:8,12 118:17 temporary 36:4 37:4 tenancy 61:4 tenant 17:21 18:20 18:24 19:12,16 19:23,25 20:4,9 21:16,18 22:7 31:16,18,25 58:9 58:10,17 74:5 76:22 80:16,19 tensions 101:13 term 41:8,9,17 42:1,4 72:4 | terminate 113:9 terminated 1:17 30:7 51:19 58:11 62:8 63:21 80:11 113:7 termination 23:11 23:13,14 24:25 25:4,23 26:15,25 27:4,10 28:7,23 30:11,24 31:8,8 47:21 51:8,10,12 53:15 54:20 55:7 55:10 59:22,22 60:11 62:20,25 63:5,23 64:1,1,7 64:21,22,24,25 65:2,16,25 66:5 66:20,25 67:15 76:6,8 85:7 87:14 94:3,25 95:9,14 terms 39:4 64:4,19 83:22 test 117:2 text 34:24 35:20 46:19 50:10,11 50:14,24,25 57:22 58:7,8 textbook 1:22 texts 36:9 thank 3:23 8:22 9:20 14:5,16 16:13 17:12,17 18:6 20:12,12,24 22:23 25:7 31:13 32:25 34:6,22 37:18 43:13 44:13,22 47:1,25 48:20 50:1,16 51:23 53:18 55:24 58:6 60:23 61:13 63:19 65:3 67:25 73:21 83:7 83:18,20 90:3 93:15 95:16 97:1 99:22 105:5 118:8 119:15 theoretical 105:9 theory 40:16 41:1 |
|--|---|---|---|---|

| | | | | |
|--|--|---|---|--|
| thing 7:10 16:14 33:2 34:23 44:1 70:8 87:7 91:16 91:19 106:4 things 3:9 38:2 92:15 113:24 116:3,14,18 think 1:8 2:19 3:4 3:5,12,13 6:16 7:14 8:8 9:7 11:20 15:3 16:14 19:19 21:5,9 22:18 23:21,22 25:17 26:8 27:7 27:25 29:11,12 29:13 32:1 33:6 33:6,12 34:23 35:5,7 36:20 38:22 42:20 43:8 43:13 44:5 48:19 49:2 50:25 52:10 53:19 55:25 60:16,19 61:21 63:25 66:9 68:3 71:15 72:20 73:1 75:20 79:14,19 85:15 86:15 88:22 89:2,6,7,12 89:23 90:7 92:19 94:22 96:4,13 97:4 99:25 101:21 103:13 104:2,3 105:9 115:25 116:16,23 119:3,3 thinking 73:8 thinks 26:3 89:3 third 12:18 17:24 20:17,22,22 34:10,14 36:18 45:24,25 56:7 69:18,21,22,23 72:21 73:10 82:7 92:19 97:22 101:19 103:23,24 104:11 thought 2:23 3:10 73:17 89:25 117:20 119:4 | three 23:22 35:2 45:23 54:6 74:3 78:6 three-month 10:18 three-page 6:9 Thursday 2:11 4:9 118:16 tied 41:13 time 2:21 5:11,24 8:11 11:22 12:4 17:3 23:25 24:1 25:3 31:8 32:1 34:19 39:14 40:6 40:8,25 41:9,13 43:15,18 48:22 49:4,7,8,17 57:11 57:25 59:21 61:5 79:11 89:6 91:1 91:24 92:17,24 93:8,12,16 114:5 117:9 118:9,12 118:22,24 119:8 timing 17:5 105:22 today 3:14 89:14 97:18 told 52:6 112:22 tomorrow 97:19 topic 47:7,15 97:2 tort 24:9,16 32:19 54:13,15 total 15:2 86:12 totally 64:11 100:9 touch 3:5 track 73:6,7 trade 111:25 112:21 transaction 63:18 91:17 94:12 transactions 30:6 62:7 63:13,15 92:12 transcript 32:10 transfer 9:17,18 10:21 13:17 40:17,19,21 101:3 transferee 11:9 transferred 9:17 translated 51:5,13 | 67:12 translation 2:21 4:23 5:1,8,10,16 5:23,25 8:5 52:1 60:25 71:21,22 translations 2:11 4:8,10,25 5:14,14 translator 2:9,13 2:15 4:15 5:3,5,7 5:9,10,13,23 translators 4:3,8 travel 117:20 treat 25:21 treated 95:25 96:2 treatment 8:3 treatments 116:14 tremendous 40:7 trial 106:25 108:19 tried 59:7 trigger 31:7 triggered 1:20 true 21:13 45:3 87:6 109:15 110:10 trust 112:9 try 19:14 77:8 trying 37:23 61:21 108:3 117:2 Tuesday 1:13 2:9 2:14,22,23 3:24 3:24,25 4:8,16,19 5:9 6:1,2 119:2 turn 17:24 33:1 34:1,4 44:23 45:7,12 62:4 67:7 83:8 97:2 103:13 106:19 107:19 110:8 116:13 turned 95:19 turning 113:15 twice 41:25 two 10:9 15:5 16:8 21:22 23:16 24:25 27:16 37:21 43:5 53:20 53:20 56:4,5 57:10,20 59:11 | 77:25 81:12,23 82:3 93:1 95:22 115:23 117:9 two-month 10:10 10:23 types 59:7 <hr/> U <hr/> ultimately 29:5,13 68:4 81:8 unable 107:12 112:17,21 unconditional 114:2 underlying 116:12 understand 6:10 11:7 13:24 17:2 23:15 25:21 28:24 33:21 37:1 37:24 41:1 42:13 47:16,25 48:21 49:3 54:7 57:15 57:20 61:16,20 62:18 65:21 67:8 67:11 70:21 71:6 71:20,23 74:15 74:16 82:9 86:18 92:21 93:22 98:4 100:10 104:22 105:15 107:21 115:18 117:6,8 understanding 5:13 10:20 13:9 13:12,18 14:11 16:12 21:1 22:17 27:13 33:24 34:3 34:11 37:5,6,7 38:2 42:9 101:24 111:18 understands 29:3 understood 4:21 24:12 29:8 31:10 40:23 70:18 unequivocal 102:11 unified 63:14 80:8 united 80:8 110:15 111:21,24 unity 63:14 unpaid 66:10 | 83:14 85:2 86:20 95:18 96:3,9 unreality 8:3 unsecured 7:19 unusual 51:20 urgency 110:19 Urgent 110:12 use 13:4 25:5 34:20 useful 90:11 Usually 99:2 utilities 19:25 <hr/> V <hr/> valuable 41:10 42:2 value 41:10 variety 118:11 various 38:2 63:16 65:24 92:15 107:7 vast 21:16 vehicle 23:16 54:14 venture 40:12 verifiable 18:12 version 13:10,14 13:18 56:13 61:16,17 62:6 71:24 versions 71:20 Verweigerung 117:18 vice 109:5 view 3:3,10 20:18 20:23 24:8 26:22 28:8,10,20 30:15 47:23 58:5,14,21 67:5,8 79:23 80:7,7 83:5 96:13 99:23 100:9,19 102:24 108:23 114:1,9 115:16 viewed 28:6 105:20 views 59:6 83:10 volume 12:10 33:5 33:7,10,14 36:19 44:22 60:20,21 |
|--|--|---|---|--|

| | | | | |
|---|---|---|---|--|
| 81:15 | whatsoever 36:1 68:9 70:13 71:2 72:11 | worse 96:24 | 11 111:21 | 3 17:11 18:1 20:22 35:13 54:3 56:22 60:15,20,21 78:25 82:5 85:3 86:20 95:18 96:4 96:10,14 98:3,4 115:11 |
| W | wholly 44:4 | worsening 38:4 | 11.50 43:20 | 3(4) 85:9,15,21 86:2 |
| wait 82:12 | wide 108:9 | wouldn't 82:21 84:9 93:23 | 11.55 43:22 | 3,050 86:12 |
| waiver 90:23 | wider 5:6 | writers 31:1 | 12 45:23 56:7,8 | 3.31 91:2 |
| want 23:4 32:11 33:2 35:12 37:23 40:2 47:7 50:6 51:4 53:21 54:2 56:5 57:5 61:8 68:3 71:9 74:4 76:21 80:4 83:8 85:2 90:4,5,24,25 95:21 97:25 101:2 106:14,15 108:21,22 109:18 115:7 116:16,21 118:23,24 | wise 119:7 | writing 13:14 | 123 112:19 | 3.4 110:21 |
| | wish 2:25 6:5,14 7:14 45:4,16 89:14 90:8 115:6 117:13,17 | wrong 28:25 29:16 36:12,15,15 51:25 | 13 46:4 | 3.41 91:4 |
| | wishing 114:11 117:20 | X | 14 12:10 | 30 11:10 56:10,14 |
| | witching 115:22 | X 120:1 | 15 23:7 26:13 50:8 81:24 118:3,7 | 305 64:16 |
| | withheld 14:22 15:1 | Y | 16 46:17 | 31 112:5 |
| | witness 1:6 3:21 26:2,6 28:17 107:13,15,18 108:17 109:1,21 113:23 116:22 | year 20:7 94:20 | 17 33:8 36:23 | 319 56:11 |
| | witness's 28:16 | years 40:6 | 17th 4:19 6:2 | 347 46:1 |
| | wonder 17:13 51:13 52:24 65:4 88:20 117:8 | yesterday 1:16 3:3 3:6,16 6:15,16,24 7:14 9:1,5 11:16 12:12 16:19,20 17:25 21:16 24:21 25:11 32:9 34:1,17 39:6 90:6 | 18 55:2,3 118:3,7 | 37 120:8 |
| | wondered 38:1 | 1 | 192 45:7,8 | 39 54:18 |
| | wondering 72:23 | 1 10:7,8 11:7,9 12:10 15:10,10 15:14,16,19,23 16:6,9 23:18 33:7 53:23 57:1 57:3 70:20,20 82:5 106:19,21 106:22,23,23,25 106:25 107:6 108:19 120:3 | 1986 112:19 | 390 46:12 |
| | word 13:23 35:4 36:13,20,21 105:14,15 113:22 117:18 | 1,000 77:23 78:5,9 86:2,6,7,10,17 | 2 | 4 |
| | wording 24:14,15 30:25 31:6 47:12 56:15 75:22 82:4 | 1.00 1:13 5:25 | 2 15:7 16:6 33:5,10 33:14 36:10 48:17 81:13,14 81:15 96:14 103:14 108:19 110:12 | 4 15:11,15 18:1 20:17 23:7 26:13 44:22 50:3,4 56:7 96:14 |
| | words 12:19,22 13:4 19:20 80:6 85:3 92:7 112:9 116:1 | 1.00 1:13 5:25 | 2(1) 107:19 | 4.45 90:22 |
| | work 23:3 57:24 58:1 76:25 77:6 84:15 93:11 94:20 | 1.03 65:7 | 2,000 86:11 | 4.52 119:17 |
| | worked 60:5 | 1.1 109:3 | 2.00 65:6,9 | 404 39:1 |
| | workings 27:13 | 1.2 109:9 | 2.30 40:14 | 44 120:9,10,11 |
| | works 10:4 15:6 19:11 22:5 69:25 70:2 96:20 | 1.2.3 109:13 | 20 1:1 | 45 57:1,1,2,3,4 |
| | worried 116:2,6 | 1.4 109:24 | 2008 112:5 | 47 120:12 |
| | worrying 41:2 | 10 45:12 | 2015 1:1 119:19 | 5 |
| | | 10th 3:24,25 4:8 | 208 30:4 | 5 57:8 61:23 |
| | | 10.00 2:22 | 23 44:20,21 119:19 120:7 | 5-0 81:25 82:1 |
| | | 10.30 1:2 119:18 | 24 111:14 112:17 | 50 81:20,22,24 82:2,7 86:6,8,10 |
| | | 104 48:10 | 241 45:18 | 500 77:24 78:3,6,7 78:10,11 79:16 |
| | | 106 118:3,7 | 252 14:13 | 527 23:7 50:8,12 |
| | | | 26 31:17 | 54 82:19 |
| | | | 27 48:19 | 543 46:23 |
| | | | 271 21:22 32:12 48:15,24 49:3,20 | 6 |
| | | | 271(1) 62:23 | 6 31:17 110:24 111:2 |
| | | | 286 97:9 115:16 116:23 | 6.5 111:5,6 |
| | | | 286(2) 115:11 | 6.6 111:5,12 |
| | | | 286(2)(3) 115:16 | |
| | | | 29 23:18 | |
| | | | 29A 23:19 53:23 53:24,25 | |
| | | | 3 | |
| ways 44:4 | | | | |
| Wednesday 118:16 119:2,5 | | | | |
| week 2:12 | | | | |
| weekend 2:12 4:10 119:14 | | | | |
| went 11:8 | | | | |
| Wentworth 5:11 | | | | |

| | | | | |
|--------------------------|----------------------------|--|--|--|
| 6.7 111:5,17 | 63:6 67:2,12,17 | | | |
| 64 55:13 | 70:23 76:2 80:8 | | | |
| | 82:5 85:18,19,22 | | | |
| 7 | 90:12 95:2 | | | |
| 7 59:9,10 62:18 | 107:15 | | | |
| 63:6 65:24 66:18 | 9(1) 30:20 56:21 | | | |
| 66:24 67:2,12,17 | 66:19,24 67:20 | | | |
| 70:23 76:2 77:22 | 80:6 82:10,25 | | | |
| 80:8 82:4 85:18 | 83:12,17 84:1,2 | | | |
| 85:19 107:10 | 85:14 95:17 | | | |
| 110:24 112:2 | 9(2) 67:4,7,10 68:1 | | | |
| 7(1) 23:13 26:15 | 68:6,12,19,25 | | | |
| 27:5 28:9 30:4 | 69:17 70:9,24 | | | |
| 51:10 62:2,6,14 | 71:6 72:1 73:23 | | | |
| 62:16 63:21 64:2 | 74:17,20 75:9 | | | |
| 65:13 68:22 | 76:14,15 77:10 | | | |
| 87:14 | 77:10,11 78:16 | | | |
| 7(2) 30:9 65:14 | 80:3,5 82:19,25 | | | |
| 7-0 33:9 | 83:3,6 | | | |
| 7.1 112:2 | 9(2)(1) 69:7 | | | |
| 7.2 112:3 | 9(3) 76:12 | | | |
| 7.4 112:13 | 93 104:3 | | | |
| 70 33:4,7,8,14 | 94 103:17,18 104:4 | | | |
| 103:14 | 104:7 | | | |
| 729 49:15 | 95 60:15,17,21,22 | | | |
| 75 81:15,17,18 | 104:3 | | | |
| 79 57:22,22 | 98 35:13 36:18 | | | |
| 8 | | | | |
| 8 17:9 31:1 44:24 | | | | |
| 45:1 56:18 61:23 | | | | |
| 66:17,18,24 76:2 | | | | |
| 77:22 82:5 83:15 | | | | |
| 91:7 95:19 96:6 | | | | |
| 96:16,18 120:4,6 | | | | |
| 8(1) 28:9 30:10 | | | | |
| 66:3 67:2 91:23 | | | | |
| 91:24 92:4 | | | | |
| 8(2) 67:4 | | | | |
| 8.1 116:18 | | | | |
| 800 111:13 | | | | |
| 82 58:8 | | | | |
| 83 48:17 | | | | |
| 9 | | | | |
| 9 23:21 24:12 | | | | |
| 25:21 30:4 47:8 | | | | |
| 49:13 54:2 56:18 | | | | |
| 58:25 59:9,10 | | | | |
| 60:24,25 61:15 | | | | |