

<p>1 Thursday, 19 November 2015</p> <p>2 (10.29 am)</p> <p>3 MR JUSTICE HILDYARD: Good morning.</p> <p>4 MR DICKER: My Lord, we now move on to the evidence in</p> <p>5 relation to the German law issues.</p> <p>6 MR JUSTICE HILDYARD: Yes.</p> <p>7 MR DICKER: Subject to your Lordship, I was proposing to</p> <p>8 call Professor Mülbert.</p> <p>9 MR JUSTICE HILDYARD: Indeed.</p> <p>10 Evidence of PROFESSOR PETER OTTO MÜLBERT (sworn)</p> <p>11 MR JUSTICE HILDYARD: Professor Mülbert, good morning, do</p> <p>12 sit down. Do you have a glass of water? If you need</p> <p>13 a break, let me know.</p> <p>14 <b>A. Thank you, my Lord.</b></p> <p>15 <b>Examination in-chief by MR DICKER</b></p> <p>16 MR DICKER: Professor Mülbert, can you just confirm again</p> <p>17 your name and address for the purposes of the</p> <p>18 transcript?</p> <p>19 <b>A. The full name is Peter Otto Mülbert. I have a title --</b></p> <p>20 <b>doctor, which in Germany is part of the name so I don't</b></p> <p>21 <b>know whether the full name from an English perspective</b></p> <p>22 <b>would be Dr Peter Otto Mülbert or just</b></p> <p>23 <b>Peter Otto Mülbert. The address is Eisgrubweg 9, 55116,</b></p> <p>24 <b>Mainz, Germany.</b></p> <p>25 Q. Thank you. Could you take one of the bundles which</p> <p style="text-align: center;">Page 1</p>	<p>1 to include is at pages 527 and 528. Can you confirm</p> <p>2 that?</p> <p>3 <b>A. It is tab?</b></p> <p>4 Q. Tab 15.</p> <p>5 <b>A. Tab 15.</b></p> <p>6 Q. It is behind a letter --</p> <p>7 <b>A. Yes.</b></p> <p>8 Q. -- and the text is at pages 527 and 528.</p> <p>9 <b>A. Yes.</b></p> <p>10 Q. Thank you.</p> <p>11 As I understand it, there is one matter that you</p> <p>12 would like to correct, or clarify. Can you go back to</p> <p>13 tab 13, which is the joint experts' report. It is</p> <p>14 paragraph 21 on page 358. You will see paragraph 21, in</p> <p>15 the English version says:</p> <p>16 "The experts are in agreement that no default can</p> <p>17 occur by serving a warning notice after the institution</p> <p>18 of a German insolvency proceeding."</p> <p>19 Can you now turn back to your consolidated report at</p> <p>20 tab 11 and go to page 263, paragraphs 89 to 91. I just</p> <p>21 wonder, can you explain the clarification that you would</p> <p>22 like to make to paragraph 21 of the joint experts'</p> <p>23 report?</p> <p>24 <b>A. Yes. The clarification regards paragraphs 90 and 91,</b></p> <p>25 <b>namely that the clarification is that this agreed</b></p> <p style="text-align: center;">Page 3</p>
<p>1 I hope you will have, it is marked volume 4 on the spine</p> <p>2 and it says "Foreign law expert reports."</p> <p>3 Just to confirm your evidence as far as it is in</p> <p>4 writing, could you turn to tab 7 of that bundle. Can</p> <p>5 you confirm that that is your first expert's report and</p> <p>6 it is your signature that appears on page 96 of the</p> <p>7 bundle at the end of the report? (Pause)</p> <p>8 <b>A. Yes, I can confirm that this is the first expert report.</b></p> <p>9 Q. You prepared a reply expert opinion, which I think you</p> <p>10 will find at tab 9. Again, just formally confirm it is</p> <p>11 your signature on page 207 of the bundle, if you would?</p> <p>12 <b>A. Yes, I can confirm that this is my signature.</b></p> <p>13 Q. Then a consolidated report at tab 11, and likewise,</p> <p>14 confirm your signature at page 277.</p> <p>15 <b>A. Yes, I can confirm that this is my signature.</b></p> <p>16 Q. Thank you.</p> <p>17 You and Herr Fischer prepared a joint report which</p> <p>18 you should have at tab 13. As I understand it, there</p> <p>19 was one section that you wanted to include in the joint</p> <p>20 report which was objected to by my learned friend's</p> <p>21 clients and which it was subsequently agreed should be</p> <p>22 admitted. I just wanted to show you the text of that as</p> <p>23 I understand it, which is at tab 15.</p> <p>24 It is a letter from Freshfields dated</p> <p>25 23 October 2015 and the text of the passage you wanted</p> <p style="text-align: center;">Page 2</p>	<p>1 <b>statement in 21 is, from my perspective, only true for</b></p> <p>2 <b>the estate, not the debtor as an entity or the debtor in</b></p> <p>3 <b>person.</b></p> <p>4 <b>This is explained in paragraph 90 of my report,</b></p> <p>5 <b>my Lord.</b></p> <p>6 Q. Thank you.</p> <p>7 Professor Mülbert, you have chosen to write your</p> <p>8 expert reports in English. Could you briefly describe</p> <p>9 to the court your experience of working in the English</p> <p>10 language and why you have chosen to produce your reports</p> <p>11 in English?</p> <p>12 <b>A. My Lord, I have written or authored several papers in</b></p> <p>13 <b>English. Most recently a paper on managing risk in the</b></p> <p>14 <b>financial system published in Oxford University Press,</b></p> <p>15 <b>but others as well. I wrote these papers always in</b></p> <p>16 <b>English myself and they were obviously reviewed by</b></p> <p>17 <b>a native speaker, but I was -- I thought that it might</b></p> <p>18 <b>be helpful to the court, and myself, if I would try to</b></p> <p>19 <b>produce the reports in English, given that it would be</b></p> <p>20 <b>difficult for a translator to adequately translate my</b></p> <p>21 <b>German into English. In order to be more clear and to</b></p> <p>22 <b>be more understandable, even for myself, I have chosen</b></p> <p>23 <b>to produce the report in German -- obviously not in</b></p> <p>24 <b>German but in English, I am sorry.</b></p> <p>25 Q. Thank you. You have behind you a number of bundles,</p> <p style="text-align: center;">Page 4</p>

<p>1 including German cases and textbooks, to which reference</p> <p>2 has been made both by yourself and Herr Fischer. We</p> <p>3 obviously have both English and German language</p> <p>4 versions. When my learned friend is questioning you, do</p> <p>5 you have a preference as to whether you are shown the</p> <p>6 German version or the English version?</p> <p>7 <b>A. I have a preference to be shown the German version, or</b></p> <p>8 <b>at least be able to consult the German version in order</b></p> <p>9 <b>to make sure that I perfectly understand what is --</b></p> <p>10 MR DICKER: Thank you, I am sure my learned friend will have</p> <p>11 had that in mind.</p> <p>12 Professor Mülbert, thank you very much. My learned</p> <p>13 friend will have some questions for you.</p> <p>14 Cross-examination by MR ALLISON</p> <p>15 MR ALLISON: Good morning, Professor Mülbert, have you given</p> <p>16 expert evidence in England before?</p> <p>17 <b>A. My Lord, I have never given expert evidence in England.</b></p> <p>18 Q. Let's just start by checking for your benefit that you</p> <p>19 understand the role of an expert in England. Do you</p> <p>20 understand that you are an independent expert whose role</p> <p>21 is to assist his Lordship in reaching decisions in this</p> <p>22 case?</p> <p>23 <b>A. I fully understand that my overriding duty is to the</b></p> <p>24 <b>court.</b></p> <p>25 Q. You understand therefore that you are not an advocate</p> <p style="text-align: center;">Page 5</p>	<p>1 of interest on the compensation claim, that's right,</p> <p>2 isn't it?</p> <p>3 <b>A. My Lord, could the question be rephrased?</b></p> <p>4 Q. Please, if you don't understand a question, please ask</p> <p>5 me to put it again and I will. Let me try again.</p> <p>6 You agree with Judge Fischer that when looking at</p> <p>7 the compensation claim payable on termination of the</p> <p>8 agreement, payable after termination, there is no</p> <p>9 provision in the German master agreement that provides</p> <p>10 for interest on that claim. That is agreed by you,</p> <p>11 isn't it?</p> <p>12 <b>A. Yes, yes, my Lord, that is agreed.</b></p> <p>13 Q. Thank you.</p> <p>14 You agree in particular don't you that clause 3, sub</p> <p>15 clause (4) has no interest right in relation to the</p> <p>16 termination claim?</p> <p>17 <b>A. We agree on that as well. Yes.</b></p> <p>18 Q. The second point is that you agree that, where you don't</p> <p>19 have a contractual entitlement, the question as a matter</p> <p>20 of German law is whether a claim for further damages for</p> <p>21 late payment can be made?</p> <p>22 <b>A. My Lord, the answer -- may I clarify that this is not</b></p> <p>23 <b>the only -- that this is only part of the answer. There</b></p> <p>24 <b>is -- may I expand or explain a bit in detail what</b></p> <p>25 <b>I have in mind?</b></p> <p style="text-align: center;">Page 7</p>
<p>1 for any party in these proceedings?</p> <p>2 <b>A. I understand that I am not an advocate, yes.</b></p> <p>3 Q. We are going to start with the default and insolvency</p> <p>4 issues that arise in this case. We will look at some of</p> <p>5 the underlying materials together. I was going to do it</p> <p>6 by reference to the English materials because they are</p> <p>7 translations that have been agreed by the parties via</p> <p>8 an agreed translator, but of course if you need to refer</p> <p>9 to the German as well please do say so.</p> <p>10 Once I have asked my questions and looked at the</p> <p>11 materials I would like to look at with you, just so you</p> <p>12 know, Mr Dicker can then ask you further questions and</p> <p>13 take you to further materials if he wishes.</p> <p>14 Let's start with where you and Judge Fischer have</p> <p>15 reached together, because I understand you have made</p> <p>16 considerable progress in relation to the default and</p> <p>17 insolvency issues in your joint statement. That's</p> <p>18 correct, isn't it?</p> <p>19 <b>A. We agreed on a number of issues in the joint statement.</b></p> <p>20 Q. Let's start there, because I think it will help, both me</p> <p>21 in the way I ask my questions and his Lordship in</p> <p>22 understanding the way the issues arise, if we can just</p> <p>23 check what is agreed before we look at the materials.</p> <p>24 First, you agree that the German master agreement</p> <p>25 does not contain a contractual provision for the payment</p> <p style="text-align: center;">Page 6</p>	<p>1 Q. Maybe let me just see if I can -- it might be quicker if</p> <p>2 I try and agree it with you. There is no contractual</p> <p>3 entitlement under the German master agreement, and</p> <p>4 therefore what you and Judge Fischer say is that</p> <p>5 section 288 of the German civil code is a relevant</p> <p>6 provision to consider?</p> <p>7 <b>A. Yes.</b></p> <p>8 Q. And there is an automatic entitlement in cases of delay</p> <p>9 under subsection 1 to a basic rate of interest, that is</p> <p>10 right, isn't it?</p> <p>11 <b>A. Yes.</b></p> <p>12 Q. You both agree that the question then is whether there</p> <p>13 can also be a claim for further damage under</p> <p>14 subsection 4?</p> <p>15 <b>A. Yes, that's right.</b></p> <p>16 Q. Thank you.</p> <p>17 The third point is that you agree with Judge Fischer</p> <p>18 that a claim for further damage must be proved? By that</p> <p>19 in other words I mean that it has to have been caused by</p> <p>20 the delay in payment and established to have been caused</p> <p>21 by the delay.</p> <p>22 <b>A. The claim for further damages pursuant to section 288,</b></p> <p>23 <b>paragraph 4, has in that sense to be proved.</b></p> <p>24 Q. Thank you.</p> <p>25 The fourth point is that you both agree that no</p> <p style="text-align: center;">Page 8</p>

<p>1 claim for further damage under section 288(4) may be 2 brought by a creditor unless it can establish that the 3 debtor was in default within the meaning of section 286 4 of the German civil code? 5 <b>A. We agree on that, yes.</b> 6 Q. Can we just turn up section 286, so we can see it 7 together before we look at the next point of agreement. 8 The German law issues translation should be labelled 9 "Volume 2 of 2" on the spine for my Lord's benefit as 10 well. 11 If we go to tab 83, right towards the back of that 12 volume, behind tab 83, you will find the provisions of 13 the German civil code. It is sub tab N that I would 14 like you to go to, which should, I hope be headed 15 "Section 286, default of the debtor", do you see that? 16 <b>A. Yes, I see that.</b> 17 Q. Just in case we need to look at with the next points. 18 The fifth point that you agree with Judge Fischer is 19 that a default cannot arise under this provision prior 20 to the time at which performance of the payment 21 obligation has fallen due. That's correct, isn't it? 22 <b>A. Yes, we agree on that.</b> 23 Q. The sixth point is you agree that is not enough alone. 24 You also need the service of a warning notice or for one 25 of the exceptions to that to apply?</p> <p style="text-align: center;">Page 9</p>	<p>1 Q. That is your agreed position -- 2 <b>A. Yes.</b> 3 Q. -- in the joint statement, isn't it? 4 <b>A. Yes.</b> 5 Q. The final point, perhaps an obvious one but important 6 here, is you agree that a warning notice cannot be 7 served once the debt has been repaid? 8 <b>A. Yes, we agree on that as well.</b> 9 Q. Thank you, Professor Mühlert. That is very helpful, to 10 Wentworth certainly and I am sure to his Lordship as 11 well. 12 Let's move to consider how a claim becomes due and 13 payable, how performance becomes due for the purpose of 14 section 286. We have agreed that the claim doesn't 15 arise unless you have a payment obligation that is due. 16 Now let's look at how that inter reacts with the 17 compensation claim under the German master agreement. 18 Before I look at the detail, the first point to 19 establish is you understand that the question of 20 construction of the agreement, so the actual question of 21 construing clauses 8 and 9, is one for his Lordship to 22 conduct having heard from you and Judge Fischer on the 23 relevant principles of German law? 24 <b>A. I understand that concept.</b> 25 Q. You also understand that Judge Fischer has said in his</p> <p style="text-align: center;">Page 11</p>
<p>1 <b>A. We agree on that as well.</b> 2 Q. You also agree, my seventh of your agreed points, that 3 the formal requirements for a warning notice under 4 section 286(1) are that the obligor must receive, the 5 words that you use together, "a clear definitive demand 6 from the obligee for payment of an amount that is due". 7 That a warning notice, isn't it? 8 <b>A. These are the requirements for warning notice.</b> 9 Q. Thank you. 10 The eighth point is that you agree that where 11 an obligor was not in default prior to the opening of 12 German insolvency proceedings, you cannot establish 13 a default by the service of a warning notice after the 14 commencement of German insolvency proceedings? 15 <b>A. My Lord, this relates to the clarification I just sought 16 for point 21. We agree that this is not possible with 17 respect to the estate.</b> 18 Q. We will come and look at the case in due course. Thank 19 you. 20 The ninth point -- I have 10 -- is that you agree 21 that filing a proof of debt in a German insolvency 22 proceeding does not establish a default under 23 section 286. 24 <b>A. We agree that according to the majority opinion in 25 Germany and the case law, this is not possible.</b></p> <p style="text-align: center;">Page 10</p>	<p>1 evidence, in both his first, second, third and fourth 2 reports, that the compensation claim doesn't become due 3 until after LBIE entered into administration. You have 4 seen that from his reports, haven't you? 5 <b>A. I have seen that, yes.</b> 6 Q. You didn't address the timing of a compensation claim in 7 your first or second reports, did you? I could not find 8 anything about it in those reports. 9 <b>A. At the moment I am not aware that I dealt with that 10 question in the first report and my reply, but I would 11 have to check the report.</b> 12 Q. At a relevant moment do check and come back to me, but 13 although Judge Fischer dealt with it in his first and 14 second reports, the first time that you dealt with the 15 timing issue was in your third report. Just so we 16 understand what your evidence is before we look at the 17 cases, your point can be put very shortly, as you say it 18 becomes due immediately on the automatic termination of 19 the German master agreement. That is what you say? 20 <b>A. That is what I say, yes.</b> 21 Q. Thank you. 22 Before looking at the reasons for disagreement, can 23 we just spend a moment seeing if we can agree the 24 relevant principles of construction as a matter of 25 German law, the principles for his Lordship to apply.</p> <p style="text-align: center;">Page 12</p>

<p>1 The first point, again, you may think an obvious one</p> <p>2 but an important one, is that you and Judge Fischer</p> <p>3 agree that the interpretation of a contract is based on</p> <p>4 the objective intentions of the parties. Don't you?</p> <p>5 <b>A. We agree on that, yes.</b></p> <p>6 Q. You would agree with Judge Fischer that the starting</p> <p>7 point, the primary source for ascertaining those</p> <p>8 intentions, is the words chosen in the contract?</p> <p>9 <b>A. We agree on that as well.</b></p> <p>10 Q. Just so we can see that, can we just look at one</p> <p>11 decision of Germany's highest court that makes the point</p> <p>12 clearly. If you could please be given authority</p> <p>13 bundle 1 and behind tab 30 of authority bundle 1 you</p> <p>14 should I hope find a 2009 decision of the</p> <p>15 Bundesgerichtshof, that is Germany's highest court,</p> <p>16 isn't it?</p> <p>17 <b>A. This is the highest court in civil law.</b></p> <p>18 Q. Sorry, I know there is a constitutional one as well, but</p> <p>19 for civil matters it is Germany's highest court? Thank</p> <p>20 you.</p> <p>21 Tab 30, just to see how the Bundesgerichtshof puts</p> <p>22 it, if you could turn to the second page. Do you see at</p> <p>23 the bottom of the page, paragraph 14A.</p> <p>24 <b>A. Yes.</b></p> <p>25 Q. The second sentence, what the court says is:</p> <p style="text-align: center;">Page 13</p>	<p>1 helpful if you think I have put a point you agree with,</p> <p>2 say yes and that is fine. But if you would like to</p> <p>3 expand, of course you may do so.</p> <p>4 You, as I understand your evidence, raise two</p> <p>5 different arguments in support of your assertion that</p> <p>6 the compensation claim becomes due on termination.</p> <p>7 First you seek to rely on section 271(1) of the German</p> <p>8 civil code, don't you, that is one provision you seek to</p> <p>9 rely on?</p> <p>10 <b>A. Yes, I rely on that provision.</b></p> <p>11 Q. We will look at that in a moment. The second point is</p> <p>12 you seek to draw a parallel between the German master</p> <p>13 agreement and the ISDA master agreement, don't you?</p> <p>14 <b>A. Again, my Lord, may I explain. It was not an exact</b></p> <p>15 <b>parallel, it was that the intentions of the drafters of</b></p> <p>16 <b>the German master agreement were such that they wanted</b></p> <p>17 <b>to replicate the effects of the ISDA master agreement.</b></p> <p>18 Q. Thank you, that is very helpful. We will look shortly</p> <p>19 to see whether that actually is a point that can be</p> <p>20 maintained when one looks at the two agreements</p> <p>21 together.</p> <p>22 Looking first at section 271 of the German civil</p> <p>23 code, if you could be given authorities bundle 2, and</p> <p>24 you may still have it, again behind the tab we were</p> <p>25 behind before, tab 83, and it is letter J this time. Do</p> <p style="text-align: center;">Page 15</p>
<p>1 "The interpretation of the agreement has to consider</p> <p>2 primarily the wording chosen by the contractual parties</p> <p>3 to the agreements and the intentions objectively</p> <p>4 declared by the parties which can be assumed from this</p> <p>5 wording."</p> <p>6 That is what you and Judge Fischer agree is the</p> <p>7 relevant principle?</p> <p>8 <b>A. Yes.</b></p> <p>9 Q. Sorry, I know that you nodded, it was very helpful but</p> <p>10 it is just so we can see the answers on the transcript</p> <p>11 as well.</p> <p>12 You would also agree with Judge Fischer that when</p> <p>13 one is dealing with a standardised contract, like the</p> <p>14 German master agreement, the words are particularly</p> <p>15 important. Aren't they?</p> <p>16 <b>A. My Lord, I would like to -- I cannot answer that as</b></p> <p>17 <b>a yes or no question. I would like to expand a bit on</b></p> <p>18 <b>that if you allow me to expand a bit.</b></p> <p>19 <b>The objective meaning to be derived from the words</b></p> <p>20 <b>in the contracts is what is particularly important, so</b></p> <p>21 <b>the objective understanding by a reader of the</b></p> <p>22 <b>provisions would be of particular importance in the</b></p> <p>23 <b>interpretation of the relevant general business term.</b></p> <p>24 Q. Thank you, that is very helpful. If you want to expand</p> <p>25 on answers at any point, please do just say. It is very</p> <p style="text-align: center;">Page 14</p>	<p>1 you see section 271, "Time of performance" just to check</p> <p>2 we are in the same place? Letter J? Thank you.</p> <p>3 Some probably very uncontroversial questions, but</p> <p>4 I think we need to explore it. The time of performance</p> <p>5 is the time from which the creditor would be able to</p> <p>6 demand performance; isn't it?</p> <p>7 <b>A. Yes.</b></p> <p>8 Q. With a money debt, it is the time from which the</p> <p>9 creditor could require payment?</p> <p>10 <b>A. Yes.</b></p> <p>11 Q. Let's just see how that works again in a decision of the</p> <p>12 Bundesgerichtshof. Bundle 1, this time, which again</p> <p>13 I think you might have, do you have volume 1 there.</p> <p>14 If we go to tab 26 of bundle 1, I think you have</p> <p>15 beaten me there but you should see a 2007 decision of</p> <p>16 the Bundesgerichtshof. There are just two paragraphs</p> <p>17 I would like to look at with you, the first is on the</p> <p>18 second page, paragraph 13, so expressly referring to</p> <p>19 section 286, the section which is relevant here, do you</p> <p>20 see that?</p> <p>21 What the court says is:</p> <p>22 "As is also the case in other instances,</p> <p>23 section 286(1) to (3) of the German civil code,</p> <p>24 a prerequisite for the occurrence of delay is that the</p> <p>25 creditor's claim should have fallen due for settlement."</p> <p style="text-align: center;">Page 16</p>

<p>1 You agree with that statement, don't you.</p> <p>2 <b>A. I agree with that statement, yes.</b></p> <p>3 Q. Then if we could just go down to paragraph 16 together.</p> <p>4 You see this addresses what is meant by "When something</p> <p>5 falls due for payment":</p> <p>6 "Other than what the court says the concept of</p> <p>7 payability defines the time as from which the creditor</p> <p>8 is able to require its payment."</p> <p>9 Do you see that, and you agree with that?</p> <p>10 <b>A. Yes.</b></p> <p>11 Q. Then you see that it says, "Such a date must be based</p> <p>12 primarily on the provisions agreed by the party". Do</p> <p>13 you see that?</p> <p>14 <b>A. Yes.</b></p> <p>15 Q. You agree with that?</p> <p>16 <b>A. Yes.</b></p> <p>17 Q. Then:</p> <p>18 "If a given period has been defined under such</p> <p>19 provisions then in a borderline case the assumption must</p> <p>20 be made in line with section 271(2) that the creditor is</p> <p>21 unable to demand settlement before that time."</p> <p>22 You agree with that?</p> <p>23 <b>A. Yes.</b></p> <p>24 Q. The next part I think is unnecessary because it just</p> <p>25 refers to the fact that someone can pay early if they</p> <p style="text-align: center;">Page 17</p>	<p>1 <b>order to understand the phrase "as soon as possible",</b></p> <p>2 <b>and to construe that phrase it would be necessary to</b></p> <p>3 <b>take other elements of the contract into account, so --</b></p> <p>4 Q. I think we agree with each other though that the five</p> <p>5 hours that I posed to you, that would mean section 271</p> <p>6 does not apply with immediate effect but the debt</p> <p>7 becomes due after the five hours. That's right, isn't</p> <p>8 it?</p> <p>9 <b>A. Yes.</b></p> <p>10 Q. Thank you.</p> <p>11 The next is how section 271 works. The German</p> <p>12 courts and the commentators frequently state that it is</p> <p>13 a gap filling provision, don't they?</p> <p>14 <b>A. They use that -- or an equivalent term.</b></p> <p>15 Q. They say it only operates if there is no express or</p> <p>16 implied agreement or nothing arising from the</p> <p>17 surrounding circumstances of the contract, don't they?</p> <p>18 <b>A. Yes.</b></p> <p>19 Q. Can we just see how the commentators put that in</p> <p>20 a couple of texts. The first one is in the same bundle,</p> <p>21 within bundle 2, behind tab 58. This is the commentary</p> <p>22 maybe you just referred to a moment ago when you said</p> <p>23 the Kruger commentary?</p> <p>24 <b>A. Pardon, I didn't mention Kruger commentary.</b></p> <p>25 Q. I am so sorry, do you have tab 58 in volume 2?</p> <p style="text-align: center;">Page 19</p>
<p>1 want, doesn't it?</p> <p>2 <b>A. Yes.</b></p> <p>3 Q. Put that one away for the moment. I don't want you to</p> <p>4 be burdened with paper too much. We are going back to</p> <p>5 section 271 itself, which I should have asked you to</p> <p>6 keep open, I hope you did, in volume 2, tab 83/J.</p> <p>7 The first point, looking at this section together,</p> <p>8 is you would agree that the parties can agree a date in</p> <p>9 their contract on which performance is due?</p> <p>10 <b>A. Yes.</b></p> <p>11 Q. You would agree that that can be expressed or implied?</p> <p>12 <b>A. Yes.</b></p> <p>13 Q. You would agree that even a relatively vague phrase such</p> <p>14 as "As soon as possible" would be enough to defer the</p> <p>15 debt becoming due, wouldn't it?</p> <p>16 <b>A. My Lord, my -- again, I cannot answer it simply by yes</b></p> <p>17 <b>or no.</b></p> <p>18 Q. Let me see if I can put the question a different way and</p> <p>19 see if we can help each other with where we get to. If</p> <p>20 a contract said, "Payment as soon as possible" or, "In</p> <p>21 five hours" for example, that would mean that you are</p> <p>22 not having an immediate payment obligation being assumed</p> <p>23 under this section. That's right, isn't it?</p> <p>24 <b>A. My Lord, that is definitely true for the five hours</b></p> <p>25 <b>period. "As soon as possible" still requires -- in</b></p> <p style="text-align: center;">Page 18</p>	<p>1 <b>A. That is article 60.</b></p> <p>2 Q. My bundles have a totally different system to yours,</p> <p>3 which is going to make for an interesting</p> <p>4 cross-examination. I am so sorry.</p> <p>5 <b>A. But it is still 58?</b></p> <p>6 Q. It is tab 58 that I would like. I am just going to show</p> <p>7 you one sentence in this, this is a discussion about</p> <p>8 section 271 and it is the very last sentence on the</p> <p>9 page. You see section 271 comes into effect only if</p> <p>10 there is no possibility of interpretation --</p> <p>11 <b>A. I see that.</b></p> <p>12 Q. -- and you agree with that?</p> <p>13 <b>A. Yes.</b></p> <p>14 Q. Thank you.</p> <p>15 Just one more to have a look at to see how another</p> <p>16 commentator puts it, because they all put it in very</p> <p>17 similar terms. Bundle 3, tab 99, another commentary on</p> <p>18 section 271. You will see what it says is:</p> <p>19 "Paragraph 1 contains no legal pre-supposition about</p> <p>20 a due date, but only fills in loopholes in the cases in</p> <p>21 which neither by law nor by agreement a due date has</p> <p>22 been agreed."</p> <p>23 <b>A. I see that, except that I cannot -- that I cannot see</b></p> <p>24 <b>from the document where the sentence is taken from.</b></p> <p>25 Q. You mean who it is written by or --</p> <p style="text-align: center;">Page 20</p>

5 (Pages 17 to 20)

<p>1 <b>A. Yes.</b></p> <p>2 Q. If you look at your index, you will see it is Artz, in</p> <p>3 Erman?</p> <p>4 <b>A. Thank you.</b></p> <p>5 Q. You would agree with that, because it is a filling of</p> <p>6 loopholes you agreed earlier it applies to filling</p> <p>7 loopholes?</p> <p>8 <b>A. Yes, I agree with that.</b></p> <p>9 Q. I think we have established you agree with</p> <p>10 Judge Fischer's evidence that section 271 only fills</p> <p>11 gaps when the time for performance is not apparent from</p> <p>12 the contract or the circumstances?</p> <p>13 <b>A. I agree with that.</b></p> <p>14 Q. You also agree, from what you have just said, that you</p> <p>15 can look at the circumstances to see whether there has</p> <p>16 been an agreement as to the time for performance?</p> <p>17 <b>A. I agree with that.</b></p> <p>18 Q. Those circumstances include the nature of the</p> <p>19 contractual obligation, don't they? Would you like me</p> <p>20 to show you something first?</p> <p>21 <b>A. Yes -- could we clarify what the nature of the --</b></p> <p>22 Q. Let's look at one passage together to see if you can</p> <p>23 agree it. I would be surprised if it was controversial.</p> <p>24 Tab 48, which should be in your volume 1, do you have</p> <p>25 tab 48, sub divider A.</p> <p style="text-align: right;">Page 21</p>	<p>1 <b>A. Yes.</b></p> <p>2 Q. You see that is headed "Determination based on the</p> <p>3 circumstances", yes?</p> <p>4 <b>A. Yes, I see that.</b></p> <p>5 Q. What the judge tells us is:</p> <p>6 "This method should be applied when there is no</p> <p>7 contractual agreement and statutory special</p> <p>8 regulations."</p> <p>9 Then what the judge says is:</p> <p>10 "The nature of the contractual obligation, the</p> <p>11 common usage and characteristics of the service must be</p> <p>12 taken into account."</p> <p>13 You would agree that the nature of the contractual</p> <p>14 obligation should be taken into account?</p> <p>15 <b>A. May I answer -- my Lord, may I give more detailed</b></p> <p>16 <b>answer.</b></p> <p>17 <b>I agree that Judge Gruneberg has written that, but</b></p> <p>18 <b>he does not explain what he means by at first glance at</b></p> <p>19 <b>least within these few sentences, he doesn't explain</b></p> <p>20 <b>what is meant by that, the nature of the contract, so --</b></p> <p>21 Q. Maybe I can just help you with that by looking at one of</p> <p>22 his examples. Within the same paragraph, so where he is</p> <p>23 looking at the same issue, if you go four lines up from</p> <p>24 the bottom of the paragraph, you should see a sentence</p> <p>25 beginning "The claim ..." do you see that?</p> <p style="text-align: right;">Page 23</p>
<p>1 <b>A. Yes.</b></p> <p>2 Q. I know, Professor Mülbert, you asked me the question</p> <p>3 last time, this is Judge Gruneberg in Palandt, so you</p> <p>4 know the text we are talking about.</p> <p>5 <b>A. Thank you.</b></p> <p>6 Q. Judge Gruneberg, he is a judge of the Bundesgerichtshof,</p> <p>7 isn't he?</p> <p>8 <b>A. Yes.</b></p> <p>9 Q. He is one of the nine judges of the 11th Senate, isn't</p> <p>10 he?</p> <p>11 <b>A. Yes.</b></p> <p>12 Q. That is the senate responsible for banking and finance</p> <p>13 law; isn't it?</p> <p>14 <b>A. That is true.</b></p> <p>15 Q. Paragraph 9 on the third page is what I would like to</p> <p>16 look at with you, do you see the subheading</p> <p>17 "Determination based on the circumstances"?</p> <p>18 <b>A. Excuse me, it is which page?</b></p> <p>19 Q. I am so sorry, it is the third page, if you turn in one,</p> <p>20 two, three --</p> <p>21 <b>A. It is A?</b></p> <p>22 Q. Yes, do you see a 9 on the left-hand side and then the</p> <p>23 letter B just next to it?</p> <p>24 <b>A. Yes.</b></p> <p>25 Q. Do you see that?</p> <p style="text-align: right;">Page 22</p>	<p>1 What the judge says is, giving an example of one of</p> <p>2 those cases, he says:</p> <p>3 "The claim for repayment of the deposit [in the case</p> <p>4 of a lease] is valid as soon as after termination of the</p> <p>5 rental agreement, the claim of the lessor have been</p> <p>6 defined with regard to the amount."</p> <p>7 What he is saying, isn't it, is that a tenant cannot</p> <p>8 demand payment of the deposit immediately, but only</p> <p>9 after the landlord has determined his deductions.</p> <p>10 That's correct, isn't it?</p> <p>11 <b>A. That's correct, yes.</b></p> <p>12 Q. Thank you.</p> <p>13 Where a calculation is required, as in this case,</p> <p>14 Judge Gruneberg says that performance is not due until</p> <p>15 the landlord has done that calculation. That is what he</p> <p>16 says, isn't it?</p> <p>17 <b>A. My Lord, I cannot answer by a simple yes or no but</b></p> <p>18 <b>I would like to give a more -- if you allow I would like</b></p> <p>19 <b>to give a more detailed answer.</b></p> <p>20 Q. Can I just try one more question and see if you need to.</p> <p>21 I think you may have agreed the point already</p> <p>22 a moment ago, is that in that case, until the landlord</p> <p>23 has worked out what has to be deducted from the deposit,</p> <p>24 the tenant cannot claim immediate payment of the</p> <p>25 deposit?</p> <p style="text-align: right;">Page 24</p>

<p>1 <b>A. That is right.</b></p> <p>2 Q. Thank you.</p> <p>3 You would agree that the German courts have also</p> <p>4 said that where a claim cannot be ascertained, its</p> <p>5 performance will not be due until you have ascertained</p> <p>6 how much has to be paid. That is right, isn't it?</p> <p>7 <b>A. My Lord, I would like -- I cannot answer that question</b></p> <p>8 <b>with a simple yes or no.</b></p> <p>9 Q. Can I maybe show you a case then, a decision of the</p> <p>10 Bundesgerichtshof in that context to see where we go?</p> <p>11 MR JUSTICE HILDYARD: Mr Allison, do you think he should be</p> <p>12 allowed to expand if he wishes to at this time? You can</p> <p>13 test it by reference to the next --</p> <p>14 MR ALLISON: I am not for a moment suggesting</p> <p>15 Professor Mülbart should not answer the questions, we</p> <p>16 were just going to look at an example together.</p> <p>17 MR JUSTICE HILDYARD: Which would you wish to do, do you</p> <p>18 wish to add to your previous answer now or would you</p> <p>19 rather see this case first?</p> <p>20 <b>A. I would like to give my previous answer now.</b></p> <p>21 MR JUSTICE HILDYARD: Yes.</p> <p>22 <b>A. Thank you, my Lord.</b></p> <p>23 <b>Regarding the landlord tenant case, it is obvious</b></p> <p>24 <b>that this was decided by the German court and</b></p> <p>25 <b>Judge Gruneberg just uses that -- cites that case, but</b></p> <p style="text-align: center;">Page 25</p>	<p>1 though that the general rule is that where a debtor</p> <p>2 cannot determine how much they have to pay before they</p> <p>3 receive an invoice, the amount does not become due until</p> <p>4 the invoice is provided?</p> <p>5 <b>A. My Lord, as a matter of German law, I think that the</b></p> <p>6 <b>majority would require the bill to be presented to the</b></p> <p>7 <b>debtor.</b></p> <p>8 Q. The debtor then knows how much they are paying?</p> <p>9 <b>A. The bill.</b></p> <p>10 Q. Can we then just look at one case, again it is</p> <p>11 a landlord case but it is in the Bundesgerichtshof, it</p> <p>12 is in bundle 5. Behind tab 3 you should have a ruling</p> <p>13 of the Bundesgerichtshof dated 19 December 1990. Do you</p> <p>14 have that?</p> <p>15 <b>A. Yes.</b></p> <p>16 Q. My Lord should have on the spine, I think it should be</p> <p>17 "Further German authorities", that should be what the</p> <p>18 spine says?</p> <p>19 MR JUSTICE HILDYARD: In tab 3 you say?</p> <p>20 MR ALLISON: My Lord, yes.</p> <p>21 MR DICKER: My Lord, can I just rise at this point. As</p> <p>22 I understand it, this is a new authority. It was</p> <p>23 indicated to us only on Tuesday evening. I only</p> <p>24 received a copy of the bundle of authorities this</p> <p>25 morning. When it was provided on Tuesday evening, as</p> <p style="text-align: center;">Page 27</p>
<p>1 <b>this statement is restricted to that situation and, for</b></p> <p>2 <b>my perspective, it is not obvious that this has anything</b></p> <p>3 <b>to do with the nature of the contractual obligation, but</b></p> <p>4 <b>it has a lot to do with the purpose of that deposit.</b></p> <p>5 <b>Therefore I cannot see, or I cannot see it as</b></p> <p>6 <b>an illustration of the nature of the contract.</b></p> <p>7 <b>Again, this -- so this would be the first answer,</b></p> <p>8 <b>my Lord, and there was a second question as to my</b></p> <p>9 <b>understanding, I haven't answered yet, but again it is</b></p> <p>10 <b>for you to decide whether to ask that, given the answer</b></p> <p>11 <b>to the second question or if you want me to answer the</b></p> <p>12 <b>subsequent question?</b></p> <p>13 <b>It is a statement, but a general statement as</b></p> <p>14 <b>regards what German courts have said. Do you want me to</b></p> <p>15 <b>answer it?</b></p> <p>16 MR JUSTICE HILDYARD: By all means describe what your</p> <p>17 understanding of that second question is.</p> <p>18 <b>A. Yes. My answer would be that the court in the landlord</b></p> <p>19 <b>tenant case has exactly said, but this is not what</b></p> <p>20 <b>German courts in general have said, that the claim only</b></p> <p>21 <b>falls due if the amount has been calculated or decided</b></p> <p>22 <b>in all cases.</b></p> <p>23 <b>It is just one case decided along these lines.</b></p> <p>24 MR ALLISON: Thank you, from that clarification, just two</p> <p>25 further questions before we move on. Would you agree</p> <p style="text-align: center;">Page 26</p>	<p>1 I understand it, copies of German authorities and</p> <p>2 translations were provided, apparently by the agreed</p> <p>3 translator, although this was the first that we had</p> <p>4 heard of this.</p> <p>5 I have not had a chance to look at these</p> <p>6 authorities, for obvious reasons. I don't know whether</p> <p>7 Professor Mülbart has had an opportunity to consider</p> <p>8 them. I do, my Lord, object to my learned friend simply</p> <p>9 rising and seeking to refer to these authorities without</p> <p>10 even indicating to your Lordship that we had indicated</p> <p>11 they were not agreed.</p> <p>12 The short position is they are not dealt with in any</p> <p>13 of Herr Fischer's reports, so the first reference we</p> <p>14 received was on Tuesday evening. We asked what the</p> <p>15 relevance of the authorities was, we were told that the</p> <p>16 relevance would be indicated to us. That has not</p> <p>17 happened yet. For my learned friend simply to rise at</p> <p>18 this stage and seek to put to Professor Mülbart</p> <p>19 an authority which he knows has not been agreed on our</p> <p>20 part, my Lord, in our respectful submission, is not</p> <p>21 an appropriate way of dealing with this.</p> <p>22 If my learned friend wants to refer to this bundle</p> <p>23 of authorities, in our submission he should make</p> <p>24 an application to do so and he should explain to your</p> <p>25 Lordship why they were only provided at this stage, why</p> <p style="text-align: center;">Page 28</p>

<p>1 they are not dealt with by Judge Fischer, what are the</p> <p>2 points to which they go and we should have</p> <p>3 an opportunity to respond.</p> <p>4 None of that has occurred and at the moment, in our</p> <p>5 respectful submission, my learned friend should not be</p> <p>6 permitted to proceed in the way that he would like.</p> <p>7 MR ALLISON: My Lord, I hope I can answer that quickly.</p> <p>8 This is a cross-examination of a foreign expert of law</p> <p>9 on issues of law. If there is a relevant authority that</p> <p>10 goes to the issues of law and the case that is being</p> <p>11 made by the expert in front of your Lordship, it is of</p> <p>12 course relevant material. It is no different to</p> <p>13 Mr Dicker bringing an authority in for the very first</p> <p>14 time during reply submissions on an issue of English</p> <p>15 law. Professor Mülbert has just given the answer that</p> <p>16 the landlord cases are different, he says, because they</p> <p>17 are concerned with deposits.</p> <p>18 This is a decision of the Bundesgerichtshof in the</p> <p>19 landlord context, but not in the context of a deposit,</p> <p>20 where it makes clear that a debt does not become due</p> <p>21 from a tenant until you ascertain how much has to be</p> <p>22 paid.</p> <p>23 MR JUSTICE HILDYARD: Well --</p> <p>24 MR ALLISON: It is a very short --</p> <p>25 MR JUSTICE HILDYARD: -- I am not sure you are right about</p> <p style="text-align: center;">Page 29</p>	<p>1 MR ALLISON: This case is not, my Lord.</p> <p>2 MR JUSTICE HILDYARD: No. I think that is Mr Dicker's</p> <p>3 point.</p> <p>4 MR ALLISON: The short answer to that in our respectful</p> <p>5 submission is that it would assist my Lord to hear the</p> <p>6 answer and to the extent that Mr Dicker wishes to</p> <p>7 re-examine in relation to the authority, of course he</p> <p>8 has every opportunity to do so.</p> <p>9 MR JUSTICE HILDYARD: There are two aspects here, apart from</p> <p>10 the unsatisfactory general nature of it.</p> <p>11 One is that Professor Mülbert should not be put at</p> <p>12 a disadvantage simply because you have sprung some</p> <p>13 evidence on him.</p> <p>14 The second is that Mr Dicker should not be put at</p> <p>15 a disadvantage in protecting his witness from being</p> <p>16 sprung and from directing his witness in re-examination</p> <p>17 for my assistance.</p> <p>18 Equally, I accept the overarching point that it</p> <p>19 would be a great pity if I were to proceed on</p> <p>20 an imperfect or incomplete examination of German law,</p> <p>21 which is unknown to me.</p> <p>22 I am sorry about this argument, Mr Mülbert.</p> <p>23 MR ALLISON: My Lord, they were not provided for the first</p> <p>24 time this morning. The agreed translations as</p> <p>25 I understand it were provided I think late on Tuesday</p> <p style="text-align: center;">Page 31</p>
<p>1 the analogy, are you, with late citation of English</p> <p>2 authority because my understanding, and you can correct</p> <p>3 me if I am wrong, my understanding is that in this</p> <p>4 court, German law is an issue of fact.</p> <p>5 MR ALLISON: My Lord, it is.</p> <p>6 MR JUSTICE HILDYARD: In this court therefore you are</p> <p>7 adducing evidence of that whenever you cite an authority</p> <p>8 of German law.</p> <p>9 MR ALLISON: My Lord, of course.</p> <p>10 MR JUSTICE HILDYARD: I think Mr Dicker's point is that it</p> <p>11 is late but the lateness has been compounded by what</p> <p>12 I understand from him to be a failure on your part to</p> <p>13 identify to him clearly the reasons why the evidence is</p> <p>14 being put forward late and to what purpose it is being</p> <p>15 adduced.</p> <p>16 MR ALLISON: My Lord, if I can answer that quickly, what</p> <p>17 these cases go to are to the answers given by</p> <p>18 Professor Mülbert and the evidence given by</p> <p>19 Professor Mülbert. They are all incredibly short.</p> <p>20 A number of the authorities in this bundle are actually</p> <p>21 translations of statutory provisions that</p> <p>22 Professor Mülbert cites in his report, but which were</p> <p>23 not in the bundles otherwise so we thought it important</p> <p>24 for those to make their way into the core bundle.</p> <p>25 MR JUSTICE HILDYARD: Is this referred to in his report?</p> <p style="text-align: center;">Page 30</p>	<p>1 night, maybe on Wednesday morning. They were not just</p> <p>2 provided today.</p> <p>3 I don't know whether Professor Mülbert has had</p> <p>4 a chance himself to look at them. If not, maybe we</p> <p>5 should give him the chance to read it carefully.</p> <p>6 MR JUSTICE HILDYARD: Professor Mülbert may be familiar with</p> <p>7 them. Mr Dicker, the overriding purpose of all this is</p> <p>8 to try and get into my head the German law as far as</p> <p>9 relevant. I am anxious that my understanding should not</p> <p>10 be artificially curtailed in this. There is a discrete</p> <p>11 point, at least as regards this authority, which</p> <p>12 Professor Mülbert, as I understand it, has begun to</p> <p>13 educate me about. Which is that there may be a rule as</p> <p>14 to landlord and tenant, and in particular deposit, which</p> <p>15 discloses no general principle. I do not know what he</p> <p>16 is going to tell me, but I suspect that is what it is.</p> <p>17 Do you need time or does your witness need time?</p> <p>18 We can ask you each in turn.</p> <p>19 MR DICKER: My Lord, I certainly do. As I said I only</p> <p>20 received this bundle this morning. I have not even had</p> <p>21 a chance to do more than open it.</p> <p>22 My Lord, we entirely accept the overarching</p> <p>23 principle. That is undoubtedly right but not, we say,</p> <p>24 if it would cause unfairness to this side.</p> <p>25 My learned friend did not explain the reason why</p> <p style="text-align: center;">Page 32</p>



<p>1 these authorities were not produced earlier, nor why 2 they didn't take the course that they required us to 3 take, namely to exhibit them to a further report by 4 Herr Fischer and to explain their relevance. 5 I mentioned that when they were provided to us we 6 were told the relevance would be explained. That didn't 7 happen. It still has not happened. The first time my 8 learned friend said anything along those lines was on 9 his feet 30 seconds ago. 10 My Lord, as far as I am concerned, I do need time. 11 The idea that later this afternoon I should be expected 12 to re-examine Professor Mülbert in relation to these 13 authorities, we say, is frankly obviously unfair. 14 I don't know what Professor Mülbert's position is, no 15 doubt he could explain it. I don't know whether there 16 are further materials he would like to research that he 17 is not able to, given that he is presently sitting in 18 court. My Lord, again that is obviously a matter for 19 him. 20 My Lord, your Lordship is plainly right in relation 21 to the overarching principle but not at the expense we 22 say of causing unfairness to this side with which we 23 cannot adequately deal. 24 MR JUSTICE HILDYARD: Can we take it in stages. 25 Professor Mülbert, are you familiar with this</p> <p style="text-align: center;">Page 33</p>	<p>1 <b>Lord understanding German law even better.</b> 2 MR JUSTICE HILDYARD: Mr Allison, this is not a particularly 3 satisfactory position. I can understand how these 4 things arise, but nevertheless I think Mr Dicker must be 5 right that it must be done fairly and it is impossible 6 for me to assess the extent to which this opens up 7 an avenue which would require the Professor in all good 8 conscience to have a look to see quite where it leads. 9 Are you able to proceed with your cross-examination 10 and park this, and then -- with apologies to all -- I am 11 going to suggest that it be reviewed over the short 12 adjournment and see whether it is a matter which can be 13 bottomed or whether, without wishing to sound rude to 14 anybody, this is a bit of a, as regards this particular 15 bit, storm in a tea cup. It may be something that 16 discloses only a small point which is discrete, 17 alternatively it may lead, as sometimes landlord and 18 tenant cases in this country do, to an unfathomable 19 iceberg. 20 MR ALLISON: Can I give my Lordship of course a yes, but 21 with two comments before I get to that yes. Just so 22 my Lord know the authorities, of which this is 23 a three-page report, were provided at 1.00 on Tuesday to 24 Freshfields. It is not that they have just been 25 provided this morning, they have had them since Tuesday</p> <p style="text-align: center;">Page 35</p>
<p>1 authority or this case or extract? 2 <b>A. Unfortunately not, for a very simple reason. It has to</b> 3 <b>do with landlord tenant case and, given the</b> 4 <b>specialisation among German academics I have written on</b> 5 <b>law on contracts but the vast area of landlord tenant</b> 6 <b>law I am not that -- I am not familiar with. So I am</b> 7 <b>not familiar with that case, this decision.</b> 8 MR JUSTICE HILDYARD: Looking at it, without committing 9 yourself, do you think this is a matter on which you 10 would need to undertake further research in order to 11 give me a full picture of the answer? 12 <b>A. Just from the heading, it says it is about the bill for</b> 13 <b>heating costs. It is obviously not about a deposit, but</b> 14 <b>it has a relationship to the situation where bills are</b> 15 <b>required for a debt to fall due. So I would have to</b> 16 <b>take a closer look at whether that particular decision</b> 17 <b>fits in with this more general body of law, I just</b> 18 <b>agreed to.</b> 19 <b>In order to do that, it would be very helpful if</b> 20 <b>I could be allowed -- if I have to give an answer to</b> 21 <b>that -- if I would be allowed to take a look at the</b> 22 <b>German version or the original German version of the</b> 23 <b>decision and obviously have to read it through, and to</b> 24 <b>familiarise myself.</b> 25 <b>This is I am afraid the best I can do and have your</b></p> <p style="text-align: center;">Page 34</p>	<p>1 with a day out of court yesterday. I don't know whether 2 Professor Mülbert has been provided with them in advance 3 or not. 4 <b>A. I have been provided with them yesterday evening.</b> 5 Q. You have had an opportunity to look at them? 6 <b>A. If I had disregarded everything else, I would have had</b> 7 <b>an opportunity to take --</b> 8 MR JUSTICE HILDYARD: You didn't spot it? Did you spot it 9 or didn't you spot it? 10 <b>A. I spot these decisions, but the bundle contains about</b> 11 <b>100 -- 60 decisions. It is difficult for me to</b> 12 <b>ascertain whether these -- it was impossible for me to</b> 13 <b>ascertain in the short period of time whether these</b> 14 <b>court decisions are of particular importance or just for</b> 15 <b>the questions at hand.</b> 16 MR JUSTICE HILDYARD: I am going to suggest we have a look 17 over the short adjournment to try and measure this. 18 I am anxious not to be circumscribed in trying to 19 understand the German law. 20 MR DICKER: I entirely understand that. Can I just make two 21 points. The first of all is we were promised with 22 an explanation as to why the cases are relevant. We 23 have not received it. It really would be very helpful, 24 if Kirkland &amp; Ellis can now provide that explanation, in 25 other words a proposition for which my learned friend is</p> <p style="text-align: center;">Page 36</p>

<p>1 going to contend each of the authorities stands for.</p> <p>2 That is the first.</p> <p>3 The second, with the greatest respect to my learned</p> <p>4 friend, I have not had any answer to. The translations</p> <p>5 that were provided to Freshfields on Tuesday while the</p> <p>6 rest of us were in court and which Professor Mülbert</p> <p>7 received late last night appear to have been translated</p> <p>8 by the agreed translator. That may have taken some</p> <p>9 time, we don't know when they were provided to the</p> <p>10 translator, nor has your Lordship heard any explanation</p> <p>11 as to why they were not given notice at that stage of</p> <p>12 these authorities.</p> <p>13 I would simply ask through your Lordship for that</p> <p>14 explanation to be provided.</p> <p>15 MR JUSTICE HILDYARD: Mr Allison, I think one of your tasks</p> <p>16 over the short adjournment is to provide an explanation</p> <p>17 as to when the German interpreters were first asked to</p> <p>18 perform this, but also I think if your instructing</p> <p>19 solicitors are able to provide a short explanation as to</p> <p>20 any authorities not mentioned in either the two experts'</p> <p>21 reports or not notified well in advance, what the</p> <p>22 proposition sought to be derived from them is.</p> <p>23 MR ALLISON: My Lord, of course. A great deal of this</p> <p>24 material is actually referred to by Professor Mülbert</p> <p>25 but didn't make it through into the agreed bundles.</p> <p style="text-align: center;">Page 37</p>	<p>1 paragraph we would like his comments on this afternoon.</p> <p>2 MR JUSTICE HILDYARD: Yes. Thank you.</p> <p>3 MR ALLISON: With that rather lengthy distraction -- for</p> <p>4 which I apologise, Professor Mülbert -- you just agreed</p> <p>5 that the general rule is that where someone does not</p> <p>6 know how much they have to pay until they get</p> <p>7 an invoice, I think you said the majority of the</p> <p>8 commentators take the approach that it doesn't become</p> <p>9 due until the debtor gets the invoice so they know how</p> <p>10 much they have to pay.</p> <p>11 The next point --</p> <p>12 MR JUSTICE HILDYARD: I think Mr Mülbert wants to comment on</p> <p>13 that.</p> <p>14 MR ALLISON: Of course.</p> <p>15 <b>A. Yes.</b></p> <p>16 <b>There must have been a misunderstanding. I can't</b></p> <p>17 <b>remember having said that. Maybe counsel could show me</b></p> <p>18 <b>where I have --</b></p> <p>19 MR JUSTICE HILDYARD: Let me see if I have understood what</p> <p>20 you have said. I think it was put to you that until the</p> <p>21 debtor received the bill or invoice, in the ordinary</p> <p>22 course, the majority opinion in Germany was that he was</p> <p>23 not required to pay until that time.</p> <p>24 <b>A. Yes.</b></p> <p>25 MR JUSTICE HILDYARD: Is that right?</p> <p style="text-align: center;">Page 39</p>
<p>1 MR JUSTICE HILDYARD: That is in a different category.</p> <p>2 MR ALLISON: My Lord, I said I had two points before</p> <p>3 Mr Dicker stood up, before I said yes. The first was</p> <p>4 seeing whether Professor Mülbert had been given them and</p> <p>5 already read them, which was yes, he has been supplied</p> <p>6 with them.</p> <p>7 The second was to try and help Professor Mülbert</p> <p>8 with this case, although it is only four pages, just to</p> <p>9 direct his attention to letter B on page 3.</p> <p>10 MR JUSTICE HILDYARD: Yes.</p> <p>11 MR ALLISON: The point where the court discusses the fact</p> <p>12 that something does not become due until you ascertain</p> <p>13 what is due by way of submitting a bill. That is the</p> <p>14 point.</p> <p>15 MR JUSTICE HILDYARD: Thank you. As I say, I don't want to</p> <p>16 be artificially constrained. This is a mercifully short</p> <p>17 case, there may be other more daunting cases for all</p> <p>18 I know to come but this one is, I think, capable of</p> <p>19 being bottomed over the short adjournment. Let us</p> <p>20 return to it then, you having alerted the Professor to</p> <p>21 the particular part of it you wish to --</p> <p>22 MR ALLISON: My Lord, of course. Of course we will ensure,</p> <p>23 to the extent that there are other cases within this</p> <p>24 bundle that we intend to take Professor Mülbert to,</p> <p>25 although he has already seen the cases, which particular</p> <p style="text-align: center;">Page 38</p>	<p>1 <b>A. That's right, but this only refers to situations where</b></p> <p>2 <b>the parties, their bill is required based on the</b></p> <p>3 <b>contract, there are many situations where no bill is</b></p> <p>4 <b>required and in situations where no bill is required,</b></p> <p>5 <b>the situation is different.</b></p> <p>6 MR JUSTICE HILDYARD: If the contract provides for payment</p> <p>7 without invoice, either expressly, implicitly or by the</p> <p>8 nature of the agreement, the person who owes the money</p> <p>9 must pay it without being reminded to do so?</p> <p>10 <b>A. Yes.</b></p> <p>11 MR JUSTICE HILDYARD: Is that right? I don't want to put</p> <p>12 words in your mouth.</p> <p>13 <b>A. I think there might be different, without being able to</b></p> <p>14 <b>ascertain the whole range of decisions that have been</b></p> <p>15 <b>rendered on that issue, but I think the majority -- or</b></p> <p>16 <b>at least some decisions will certainly say that the debt</b></p> <p>17 <b>falls due, even though the debtor does not exactly know</b></p> <p>18 <b>the amount he has to pay.</b></p> <p>19 MR JUSTICE HILDYARD: Right, I was going to ask you about</p> <p>20 that.</p> <p>21 Is it the majority view, or the unanimous view in</p> <p>22 Germany, that the debtor, before being required to pay,</p> <p>23 must know the sum that he must pay, by whatever process?</p> <p>24 <b>A. No, there is no general rule that a debtor must know</b></p> <p>25 <b>exactly the amount he has to pay for the debt to fall</b></p> <p style="text-align: center;">Page 40</p>

<p>1 <b>due. There is no such general rule.</b></p> <p>2 MR JUSTICE HILDYARD: That makes it quite difficult, doesn't</p> <p>3 it, for a debtor because he cannot really give a blank</p> <p>4 cheque? It makes it difficult.</p> <p>5 <b>A. Yes, that sometimes make it very difficult.</b></p> <p>6 MR JUSTICE HILDYARD: What is the solution to that?</p> <p>7 <b>A. The solution is that without the debt falling due -- the</b></p> <p>8 <b>sheer fact that the debt falls due does not imply any</b></p> <p>9 <b>additional consequences, in particular under German</b></p> <p>10 <b>civil law, it does not entail, except for certain</b></p> <p>11 <b>exceptions, that the debtor would have to pay default</b></p> <p>12 <b>interest, unless warning notice is served on him or</b></p> <p>13 <b>there is an exception from the requirement of a warning</b></p> <p>14 <b>notice.</b></p> <p>15 <b>Depending on the situation, the idea that a debt can</b></p> <p>16 <b>fall due without a debtor actually knowing the specific</b></p> <p>17 <b>amount he has to pay is also in some situations thought</b></p> <p>18 <b>to be a protection of the claimant -- of the creditor.</b></p> <p>19 <b>So in certain instances, may I refer your Lordship to</b></p> <p>20 <b>the amendments that I annexed to the Freshfields letter,</b></p> <p>21 <b>where I explain that, in some cases, for example the</b></p> <p>22 <b>early -- I cite the early termination of a loan</b></p> <p>23 <b>contract, the debt falls due immediately upon</b></p> <p>24 <b>termination, even though the debtor does not know the</b></p> <p>25 <b>exact amount he has to pay.</b></p> <p style="text-align: right;">Page 41</p>	<p>1 asking you what is meant by the word "immediately". My</p> <p>2 question to you was, even where it is engaged,</p> <p>3 "Immediately" is to be understood objectively, isn't it?</p> <p>4 <b>A. My Lord, may I explain a bit? "Immediately" is part of</b></p> <p>5 <b>a statutory provision and as such must be interpreted</b></p> <p>6 <b>along the lines of the rules developed by German courts</b></p> <p>7 <b>on the interpretation of German statutory provisions.</b></p> <p>8 <b>This is a general answer. It does not imply that</b></p> <p>9 <b>the rules of construction or of interpretation of German</b></p> <p>10 <b>statutes are not such that statutory provisions must be</b></p> <p>11 <b>only interpreted objectively, whatever that means in</b></p> <p>12 <b>that context.</b></p> <p>13 Q. Let me try a different question to see if we can agree.</p> <p>14 In a payment obligation case such as this, it would</p> <p>15 mean that the debtor must pay as quickly as possible by</p> <p>16 objective standards taking into account preparation time</p> <p>17 to pay, wouldn't it?</p> <p>18 <b>A. My Lord, I am not sure that that implies preparation</b></p> <p>19 <b>time. "Immediately" means without -- that the debtor,</b></p> <p>20 <b>since he knows that he has to pay, he must -- there</b></p> <p>21 <b>is -- that is the interpretation, he must pay</b></p> <p>22 <b>immediately, not being given any preparation time.</b></p> <p>23 Q. Can we just see then, behind tab 58, what Kruger has to</p> <p>24 say in relation to this very issue.</p> <p>25 If you go behind tab 58 -- I am so sorry, do you</p> <p style="text-align: right;">Page 43</p>
<p>1 MR ALLISON: My Lord, we will look at those in a moment.</p> <p>2 MR JUSTICE HILDYARD: I will let you explore it. I am sorry</p> <p>3 to interrupt.</p> <p>4 MR ALLISON: No, no, my Lord of course. Just so my Lord</p> <p>5 knows, there is nothing cited by Professor Mülbart in</p> <p>6 any of his reports by way of commentary or case law in</p> <p>7 support of this debt falling due at the early time of</p> <p>8 termination, apart from two cases, one a road traffic</p> <p>9 case and the other the prepayment case that</p> <p>10 Professor Mülbart has just referred to that we will look</p> <p>11 at in a moment.</p> <p>12 We have established that section 271 is a gap</p> <p>13 filling provision, that is where we were in relation to</p> <p>14 271, yes?</p> <p>15 <b>A. Yes.</b></p> <p>16 Q. Just indulge me with this, even if section 271 does</p> <p>17 apply, as you understand Judge Fischer says it doesn't</p> <p>18 apply here, but even if it does apply, the way it</p> <p>19 operates is that "immediately" is to be understood</p> <p>20 objectively, isn't it? Would you like to see the</p> <p>21 section again?</p> <p>22 <b>A. Yes.</b></p> <p>23 Q. If you go behind 83/J.</p> <p>24 This is, even if you are right and section 271 does</p> <p>25 apply in relation to the German master agreement, I am</p> <p style="text-align: right;">Page 42</p>	<p>1 have tab 58.</p> <p>2 <b>A. Yes, but it is a different bundle.</b></p> <p>3 Q. Right towards the back of that tab, the last page of</p> <p>4 proper text before one gets the footnotes, you should</p> <p>5 find paragraph 32 on the right-hand side?</p> <p>6 <b>A. Yes.</b></p> <p>7 Q. That's the paragraph I would like to look at with you.</p> <p>8 Do you see paragraph 32?</p> <p>9 <b>A. Yes.</b></p> <p>10 Q. You see what Kruger says is:</p> <p>11 "The term 'immediately' is to be understood</p> <p>12 objectively. This means that the debtor must pay as</p> <p>13 quickly as possible by objective standards, taking into</p> <p>14 account an approximately necessary preparation."</p> <p>15 Do you see that?</p> <p>16 <b>A. Yes.</b></p> <p>17 Q. What he says then is that "Immediately" doesn't mean the</p> <p>18 very same time, does it? There must be at least some</p> <p>19 opportunity to prepare to make the payment, that is what</p> <p>20 he is saying, isn't it?</p> <p>21 <b>A. That is what he says, yes.</b></p> <p>22 Q. It is difficult to see how a few minutes could be the</p> <p>23 sufficiently long period to prepare to make payment,</p> <p>24 let's say 20 minutes. That's right, isn't it?</p> <p>25 <b>A. My Lord, 20 minutes in times of internet banking is</b></p> <p style="text-align: right;">Page 44</p>

<p>1 <b>a very long time, so depending on -- I think in that</b></p> <p>2 <b>sense, depending on the circumstances, "immediately" can</b></p> <p>3 <b>mean immediately even within 20 minutes.</b></p> <p>4 Q. Looking at this case then, you would say that</p> <p>5 immediately in this case, when automatic termination was</p> <p>6 triggered only a matter of minutes before the</p> <p>7 administration order was made is objectively long enough</p> <p>8 for the debt to fall due?</p> <p>9 <b>A. My Lord, "in this case" refers to LBIE's administration</b></p> <p>10 <b>case? May the question be clarified?</b></p> <p>11 Q. Yes, of course. In this case what we are looking at is</p> <p>12 an application for an administration order made before</p> <p>13 markets opened on a Monday morning without telling</p> <p>14 anyone about it and the court making an administration</p> <p>15 order a few minutes later.</p> <p>16 Is your evidence that "Immediately" in section 271</p> <p>17 should be understood such that it has become due in the</p> <p>18 minute while the administration application was being</p> <p>19 heard by the court but before the court made</p> <p>20 an administration order?</p> <p>21 <b>A. My Lord, the answer to that is that "Immediately", as</b></p> <p>22 <b>Kruger states, has to be understood objectively, given</b></p> <p>23 <b>the interpretation following the rules of interpretation</b></p> <p>24 <b>of German statutory provisions. I still think that the</b></p> <p>25 <b>necessary preparations, that the question whether --</b></p> <p style="text-align: center;">Page 45</p>	<p>1 at them -- sorry, I have just been reminded may be</p> <p>2 before we embark on the authorities that this may be</p> <p>3 a convenient moment for both my Lord and the witness.</p> <p>4 MR JUSTICE HILDYARD: Yes, are you feeling like a break now?</p> <p>5 Yes, we will have a five-minute break.</p> <p>6 (11.51 am)</p> <p>7 (A short adjournment)</p> <p>8 (11.56 am)</p> <p>9 MR ALLISON: Professor Mülbert, we were just going to look</p> <p>10 at the two cases that you seek to rely on for the sum</p> <p>11 becoming due on the automatic termination.</p> <p>12 Two points before we look at those cases, would you</p> <p>13 agree that both of those cases arise in the context of</p> <p>14 a breach of duty by one of the parties, one a breach of</p> <p>15 duty of care, the car accident case, and the other</p> <p>16 a breach of contract, the loan prepayment case?</p> <p>17 <b>A. My Lord, the first case, namely the termination for</b></p> <p>18 <b>cause, there is a breach -- there is an element of</b></p> <p>19 <b>breach of duty and obviously the second is a tort law</b></p> <p>20 <b>case.</b></p> <p>21 Q. So yes? There is a breach of duty, one of tort and one</p> <p>22 of contract?</p> <p>23 <b>A. It is -- I am not sure, my Lord, whether from the</b></p> <p>24 <b>perspective of English law, you could say that there is</b></p> <p>25 <b>a breach of a duty of care -- it is a general tort case,</b></p> <p style="text-align: center;">Page 47</p>
<p>1 <b>which amount of time is required in order to make</b></p> <p>2 <b>necessary preparations. And whether there is required</b></p> <p>3 <b>adequate time for -- whether it is necessary to have</b></p> <p>4 <b>adequate preparation time for the payment or for</b></p> <p>5 <b>payments to be made, depends on the specific situation.</b></p> <p>6 <b>Therefore I still -- I would be surprised if German</b></p> <p>7 <b>courts in a case like this, would not -- I would be</b></p> <p>8 <b>surprised if German courts would not hold that</b></p> <p>9 <b>"Immediate" means right after, immediately after the</b></p> <p>10 <b>termination notice in a case of a termination notice,</b></p> <p>11 <b>immediately after the termination has been served.</b></p> <p>12 Q. After the service of a termination notice?</p> <p>13 <b>A. Yes.</b></p> <p>14 Q. Then, let's move to the two cases that you have</p> <p>15 identified that you say support the settlement sum</p> <p>16 becoming due immediately on the automatic termination.</p> <p>17 The first is a decision from 2008 of the</p> <p>18 Bundesgerichtshof arising out of a road traffic</p> <p>19 accident, do you remember that one?</p> <p>20 <b>A. Yes.</b></p> <p>21 Q. The second is a 2012 decision of the Frankfurt regional</p> <p>22 court, so several levels below, arising out of a breach</p> <p>23 of a loan agreement. That is the second one?</p> <p>24 <b>A. Yes.</b></p> <p>25 Q. Let's just see if we can agree two points before we look</p> <p style="text-align: center;">Page 46</p>	<p>1 <b>as I explained.</b></p> <p>2 Q. Your worry is the tort case, because crashing into a car</p> <p>3 is a tort, is that your point?</p> <p>4 <b>A. That is my point, yes.</b></p> <p>5 Q. Thank you.</p> <p>6 The second, again an obvious point, the cases do not</p> <p>7 arise in the context of a contractual netting procedure,</p> <p>8 do they?</p> <p>9 <b>A. Yes.</b></p> <p>10 Q. You agree with that, yes?</p> <p>11 <b>A. Yes, I agree with that.</b></p> <p>12 Q. Let's go to the first one. It is not actually referred</p> <p>13 to in your report, but we were provided with it after</p> <p>14 the joint meeting. It is bundle 1, tab 29A.</p> <p>15 I think it is referred to in the supplemental</p> <p>16 document you provided. If you have tab 29A, it should</p> <p>17 be there, I hope.</p> <p>18 Do you have it?</p> <p>19 <b>A. Yes.</b></p> <p>20 Q. The 2008 decision of the Bundesgerichtshof in relation</p> <p>21 to the road traffic accident?</p> <p>22 <b>A. Yes.</b></p> <p>23 Q. That case concerned physical damage to property; didn't</p> <p>24 it?</p> <p>25 <b>A. Yes.</b></p> <p style="text-align: center;">Page 48</p>

<p>1 Q. It was damage to a car as a result of a car accident?</p> <p>2 <b>A. Yes.</b></p> <p>3 Q. The questions for the court included the time at which</p> <p>4 the cost of the repairs became due; didn't it?</p> <p>5 <b>A. Yes.</b></p> <p>6 Q. The facts you would accept are very different to this</p> <p>7 case, aren't they?</p> <p>8 <b>A. Yes.</b></p> <p>9 Q. Can we look at paragraph 9 together, on page 3.</p> <p>10 Let's just look at the first two sentences together:</p> <p>11 "The concept the due date refers to the point in</p> <p>12 time when a creditor may demand performance."</p> <p>13 You agree with that?</p> <p>14 <b>A. Yes.</b></p> <p>15 Q. And if the time performance is not defined or is not</p> <p>16 apparent from the circumstances, that is when section</p> <p>17 271(1) applies. You agree with that?</p> <p>18 <b>A. Yes.</b></p> <p>19 Q. Perhaps you could just read to yourself the rest of the</p> <p>20 paragraph, before I ask you some questions. (Pause)</p> <p>21 <b>A. May I consult -- my Lord, may I consult the German</b></p> <p>22 <b>version of the decision?</b></p> <p>23 MR JUSTICE HILDYARD: Of course.</p> <p>24 MR ALLISON: Of course. My only comment, I understand that</p> <p>25 you had some German versions which were marked up with</p> <p style="text-align: center;">Page 49</p>	<p>1 already know that there has been a breach, is not</p> <p>2 comparable to a netting procedure after termination of</p> <p>3 a contract, is it?</p> <p>4 <b>A. Well, yes, the calculation is different, yes.</b></p> <p>5 Q. You agree?</p> <p>6 <b>A. Yes.</b></p> <p>7 Q. This case actually goes further and it doesn't say</p> <p>8 that -- what the court says is that a claim will only</p> <p>9 become due once the party -- and I am picking up the</p> <p>10 words in the English five lines up from the bottom:</p> <p>11 "... it will only become due as soon as the injured</p> <p>12 party has the information needed to assert his claims."</p> <p>13 Do you see that?</p> <p>14 <b>A. Yes.</b></p> <p>15 Q. The injured party has to have the information necessary</p> <p>16 to assert his claims before the claim becomes due; you</p> <p>17 would agree with that?</p> <p>18 <b>A. The problem is -- my Lord, I read the German version</b></p> <p>19 <b>different from the English translation.</b></p> <p>20 Q. It is an agreed translation. Let's see if we can agree</p> <p>21 things. The first thing you did agree is the due date</p> <p>22 is the same when the damage to the legally protected</p> <p>23 interest occurs, yes?</p> <p>24 Sorry, could you just --</p> <p>25 <b>A. Yes.</b></p> <p style="text-align: center;">Page 51</p>
<p>1 comments. If it is the German versions provided by</p> <p>2 Linklaters, the clean ones, I think that will be</p> <p>3 preferable.</p> <p>4 <b>A. My Lord, I did not mark -- I have no versions with</b></p> <p>5 <b>annotations. I have versions which highlighted, were</b></p> <p>6 <b>I highlighted some passages with a yellow highlighter.</b></p> <p>7 MR ALLISON: I think Linklaters do have clean versions in</p> <p>8 court as well, my Lord.</p> <p>9 MR JUSTICE HILDYARD: That is fine. I mean I am not sure</p> <p>10 yellow highlighting is going to give the answer to the</p> <p>11 case, but there we are.</p> <p>12 MR ALLISON: It is paragraph 9, if you could just read the</p> <p>13 rest of paragraph 9. (Pause)</p> <p>14 Do you have it, it is 29A.</p> <p>15 <b>A. Yes, I do have. (Pause)</b></p> <p>16 Q. Okay?</p> <p>17 <b>A. Yes.</b></p> <p>18 Q. You see the court refers to, "Then the due date is the</p> <p>19 same as the date when the damage to the legally</p> <p>20 protected interest occurred".</p> <p>21 In that case, it was obvious, wasn't it, that the</p> <p>22 damage to the legally protected interest occurred when</p> <p>23 the car crash occurred?</p> <p>24 <b>A. Yes.</b></p> <p>25 Q. The calculation of a claim in tort for breach, when you</p> <p style="text-align: center;">Page 50</p>	<p>1 Q. -- for the transcript. Thank you.</p> <p>2 You also agreed that a breach of duty giving rise to</p> <p>3 an immediate claim was different to a termination and</p> <p>4 a netting procedure, didn't you.</p> <p>5 <b>A. Yes.</b></p> <p>6 Q. The point that I was putting to you in the English is</p> <p>7 that what the court tells us in the translation agreed</p> <p>8 by the parties is that the claim becomes due when the</p> <p>9 injured party has the information needed to assert his</p> <p>10 claims.</p> <p>11 <b>A. My Lord, this is exactly the part where, according to my</b></p> <p>12 <b>understanding, the English translation deviates from</b></p> <p>13 <b>what the court says in German. What the court says in</b></p> <p>14 <b>German is that as soon as the injured party has the</b></p> <p>15 <b>information needed to assert his claims, he can put the</b></p> <p>16 <b>liability in default with the claim, with the claim due.</b></p> <p>17 <b>It doesn't say -- the short sentence "by making the</b></p> <p>18 <b>claim due" is not what it says in the German version.</b></p> <p>19 <b>The German version it says that he can put the liability</b></p> <p>20 <b>insurer in default with the claim due.</b></p> <p>21 Q. Just testing that point, it is a surprising one on the</p> <p>22 English translation because of the word "or". It says:</p> <p>23 "As soon as the injured party has the information</p> <p>24 needed to assert his claims, he can in principle put the</p> <p>25 liable party or his insurer in default."</p> <p style="text-align: center;">Page 52</p>

<p>1 Our translation appears to be talking about both the</p> <p>2 liable party and the liability insurer.</p> <p>3 <b>A. It says -- in this respect it says respectively, but my</b></p> <p>4 <b>point is, my Lord, not about whether it is the injured</b></p> <p>5 <b>party or the liability insurer, it is about the term "by</b></p> <p>6 <b>making the claim due". This is --</b></p> <p>7 Q. Do you say that in this case the Bundesgerichtshof went</p> <p>8 on to find, as a fact, that the claim was due</p> <p>9 immediately on the car crash taking place?</p> <p>10 <b>A. My Lord, that is my reading of paragraph 9 of that</b></p> <p>11 <b>decision.</b></p> <p>12 Q. Let's look at that point together. If you go to</p> <p>13 paragraph 1, do you see paragraph 1? We see in the</p> <p>14 first sentence that the traffic accident took place on</p> <p>15 12 December 2006?</p> <p>16 <b>A. Yes.</b></p> <p>17 Q. You see that. You would say the claim fell due then,</p> <p>18 from the answer you just gave me? Sorry, was that</p> <p>19 a yes?</p> <p>20 <b>A. From my understanding of my reading of paragraph 9,</b></p> <p>21 <b>I would say yes.</b></p> <p>22 Q. Can we now go to paragraph 18 together. Can we look at</p> <p>23 the last two lines, the last two sentences together --</p> <p>24 the court actually finds, doesn't it, that the repair</p> <p>25 claim was due at the latest at the time of the letter of</p> <p style="text-align: center;">Page 53</p>	<p>1 case before we look at the important point.</p> <p>2 The case concerned a cancelled loan; didn't it?</p> <p>3 <b>A. Yes.</b></p> <p>4 Q. A loan that the borrower had agreed but then decided not</p> <p>5 to take up, that's right?</p> <p>6 Professor Mülbart, was that a yes? I am so sorry,</p> <p>7 it didn't make its way on to the transcript.</p> <p>8 <b>A. It is -- I am sorry, I have -- may I just take a look at</b></p> <p>9 <b>the case --</b></p> <p>10 Q. Of course.</p> <p>11 <b>A. -- my Lord?</b></p> <p>12 Q. Of course. (Pause)</p> <p>13 <b>A. My Lord, could the question be repeated?</b></p> <p>14 Q. Of course. The question was, we agreed it concerned</p> <p>15 a cancelled loan.</p> <p>16 I am so sorry, would you mind just indicating</p> <p>17 whether you agree or not?</p> <p>18 <b>A. May I ask whether, my Lord, cancelled loan means a loan</b></p> <p>19 <b>being not taken out or --</b></p> <p>20 Q. Let me put it a different way. You agree the case</p> <p>21 concerned a loan that the borrower had agreed to take</p> <p>22 but then decided not to take up?</p> <p>23 <b>A. My Lord, may I just be given time to familiarise myself</b></p> <p>24 <b>with the facts because it is about -- the case is about</b></p> <p>25 <b>the calculation of prepayment fees which requires the</b></p> <p style="text-align: center;">Page 55</p>
<p>1 14 February, so some two months after the accident,</p> <p>2 doesn't it?</p> <p>3 <b>A. Yes, the court finds that it was due, at the latest.</b></p> <p>4 Q. That was the time at which the defendant had paid</p> <p>5 a certain amount of the claim, but the replacement value</p> <p>6 of the car, but had failed to pay the balance of the</p> <p>7 repair costs, that is right, isn't it?</p> <p>8 <b>A. My Lord, in order to give an answer, I would have to</b></p> <p>9 <b>fully familiarise myself with the facts of the case.</b></p> <p>10 Q. I am so sorry, it was one of the two cases you relied on</p> <p>11 Professor Mülbart, that is why I was just checking the</p> <p>12 question. Maybe we could just agree from paragraph 18</p> <p>13 that what the Bundesgerichtshof says is that the due</p> <p>14 date was at the latest some two months after the traffic</p> <p>15 accident, it doesn't say the due date was at the date of</p> <p>16 the accident, does it?</p> <p>17 <b>A. Yes.</b></p> <p>18 Q. I am so sorry, yes you agree with me?</p> <p>19 <b>A. Yes, I agree this is what the Bundesgerichtshof says.</b></p> <p>20 Q. Thank you. Let's move to the second case that you rely</p> <p>21 on. That is behind tab 39. This is a decision of the</p> <p>22 higher regional court of Frankfurt, do you see that,</p> <p>23 23 November 2011?</p> <p>24 <b>A. Yes.</b></p> <p>25 Q. Let's just see if we can agree the background to the</p> <p style="text-align: center;">Page 54</p>	<p>1 <b>loan to be taken out. Therefore I would like, if it is</b></p> <p>2 <b>permitted, I would like to familiarise myself again with</b></p> <p>3 <b>the facts of the case.</b></p> <p>4 Q. Professor Mülbart, it is one of your two authorities</p> <p>5 cited by you in your writing but if you do feel you need</p> <p>6 time, of course.</p> <p>7 <b>A. Thank you. (Pause)</b></p> <p>8 <b>Ah, my Lord, according to my understandings of the</b></p> <p>9 <b>fact of the case, the loan was taken out but was</b></p> <p>10 <b>terminated for cause later on.</b></p> <p>11 Q. Was terminated for cause by who, I am so sorry?</p> <p>12 <b>A. Was terminated for cause later on by the lender.</b></p> <p>13 Q. It was a breach of contract by the borrower that led to</p> <p>14 the cancellation of the loan by the lender?</p> <p>15 <b>A. Yes. My Lord, may I give further explanation or ...</b></p> <p>16 Q. I was going to take you to paragraph 57, which may</p> <p>17 answer the point that you were looking for.</p> <p>18 You see in the second sentence, what happened is the</p> <p>19 defendant, which was the bank, the lender, cancelled the</p> <p>20 disputed loan due to a breach of the borrower. As</p> <p>21 a result of that, they demanded damages due to</p> <p>22 non-fulfilment by the borrower, with regard to the</p> <p>23 damages that occurred as a result of the early repayment</p> <p>24 of the loan.</p> <p>25 Do you see that?</p> <p style="text-align: center;">Page 56</p>

<p>1 <b>A. Yes.</b></p> <p>2 Q. The bank had a claim for damages for breach of contract,</p> <p>3 didn't it?</p> <p>4 <b>A. Yes.</b></p> <p>5 Q. The non-performance by the borrower was the failure to</p> <p>6 fulfill the loan agreement which led to the</p> <p>7 cancellation?</p> <p>8 <b>A. Yes.</b></p> <p>9 Q. Can you just keep that case open and, if we can go to</p> <p>10 volume 4, not of the authorities but of the expert</p> <p>11 reports, where you saw your expert reports earlier,</p> <p>12 I don't know if you still have that --</p> <p>13 MR JUSTICE HILDYARD: It does appear to me, and I must be</p> <p>14 corrected, that the loan was taken out but for whatever</p> <p>15 reason there was a breach of the loan terms, it was</p> <p>16 called in early and the question is what the</p> <p>17 consequences were of those events.</p> <p>18 MR ALLISON: My Lord, absolutely.</p> <p>19 MR JUSTICE HILDYARD: Yes.</p> <p>20 MR ALLISON: It is not, in other words, an automatic</p> <p>21 termination case, it is a breach of contract case and</p> <p>22 how the claims work in that context.</p> <p>23 MR JUSTICE HILDYARD: No, all I wanted to clarify was that</p> <p>24 I think that the Professor was correct in his not</p> <p>25 accepting that it was a case where no loan was drawn</p> <p style="text-align: center;">Page 57</p>	<p>1 MR ALLISON: Is that a claim for loss of profits under</p> <p>2 section 252 of the German civil code?</p> <p>3 <b>A. That is -- yes.</b></p> <p>4 Q. Yes.</p> <p>5 Volume 4, you should have the expert reports, could</p> <p>6 you go to divider 16, please. In this you should find</p> <p>7 Judge Fischer's fourth report, do you see that? If you</p> <p>8 could turn to page 4, could you read paragraphs 8 and 9,</p> <p>9 please. (Pause)</p> <p>10 <b>A. I have, my Lord, in front of me the German version of</b></p> <p>11 <b>Judge Fischer's fourth report, so I do not know whether</b></p> <p>12 <b>to read out aloud these paragraphs or just read it by</b></p> <p>13 <b>myself.</b></p> <p>14 Q. I am so sorry, read it by yourself. You will find the</p> <p>15 English immediately in front of the German.</p> <p>16 <b>A. That would be divider --</b></p> <p>17 Q. It is divider 16, page 532, bottom right-hand number.</p> <p>18 <b>A. Thank you.</b></p> <p>19 Q. Have you found that?</p> <p>20 <b>A. Yes.</b></p> <p>21 Q. If you could just read those paragraphs to yourself,</p> <p>22 please.</p> <p>23 <b>A. That is paragraphs?</b></p> <p>24 Q. 8 and 9, please.</p> <p>25 <b>A. Sorry, they are not -- excuse me. My Lord, they are not</b></p> <p style="text-align: center;">Page 59</p>
<p>1 down, which is I think what was put to him. I do not</p> <p>2 know whether it makes any difference, but I just want to</p> <p>3 be sure of my factual basis.</p> <p>4 <b>A. My Lord, if you allow, I would briefly comment on</b></p> <p>5 <b>that --</b></p> <p>6 MR JUSTICE HILDYARD: Please.</p> <p>7 <b>A. -- whether there is a distinction.</b></p> <p>8 <b>Under German law there is no distinction made</b></p> <p>9 <b>between the situation where a borrower does not take out</b></p> <p>10 <b>the loan and the situation where the loan is terminated</b></p> <p>11 <b>for good cause. In both situations the bank will be</b></p> <p>12 <b>entitled to damages. However, there is a difference</b></p> <p>13 <b>insofar that in the second case, where the loan is</b></p> <p>14 <b>terminated for good cause, it is not only the claim for</b></p> <p>15 <b>damages but also the claim for the repayment of the</b></p> <p>16 <b>principal that the bank has.</b></p> <p>17 MR JUSTICE HILDYARD: I see. Once the bank has offered the</p> <p>18 money, if the borrower does not take it up, the bank</p> <p>19 nevertheless has a claim in respect of its loss for</p> <p>20 having allocated some money to the borrower, whether or</p> <p>21 not the borrower takes the opportunity?</p> <p>22 <b>A. It goes even beyond that. It is a claim for the loss of</b></p> <p>23 <b>profits the bank does not make because of the early</b></p> <p>24 <b>termination.</b></p> <p>25 MR JUSTICE HILDYARD: Thank you.</p> <p style="text-align: center;">Page 58</p>	<p>1 <b>on page 4, it is page 3 of the German version.</b></p> <p>2 MR JUSTICE HILDYARD: In the German they are page 540 as the</p> <p>3 bundle is numbered --</p> <p>4 <b>A. Yes.</b></p> <p>5 MR JUSTICE HILDYARD: -- in the English version they are at</p> <p>6 page 532, as the bundle is numbered.</p> <p>7 MR ALLISON: My Lord, yes.</p> <p>8 What Judge Fischer says, as you see, is that the</p> <p>9 case we have just looked at is very different because</p> <p>10 there was a breach of contract by the borrower which</p> <p>11 gave rise to an immediate right for damages.</p> <p>12 You see what he says there?</p> <p>13 <b>A. Yes.</b></p> <p>14 Q. You would agree that where one has a breach of contract,</p> <p>15 you do have an immediate right to assert a damage claim?</p> <p>16 <b>A. Yes, I do agree with that.</b></p> <p>17 Q. Would you also agree that in the case that we have just</p> <p>18 looked at, there was therefore, as a result, no dispute</p> <p>19 as to when the damages claim of the bank actually did</p> <p>20 fall due for payment.</p> <p>21 <b>A. Yes, I will agree this, because that is generally the</b></p> <p>22 <b>accepted principle.</b></p> <p>23 Q. As a result of the breach, yes. Thank you.</p> <p>24 That is all I wanted to ask you about section 271</p> <p>25 and the two authorities on which you seek to rely.</p> <p style="text-align: center;">Page 60</p>

<p>1 The second part of your evidence relevant to the</p> <p>2 timing of the compensation claim was your reference to</p> <p>3 the ISDA master agreement that we touched on earlier.</p> <p>4 I would like to ask you a few questions about that.</p> <p>5 What you say -- I don't know whether you can recall,</p> <p>6 if not by all means we will look at it together. You</p> <p>7 observed that the German master agreement has, as its</p> <p>8 overall objective, the aim of replicating under German</p> <p>9 law the ISDA master agreement.</p> <p>10 <b>A. That is my understanding from -- my Lord, this is my</b></p> <p>11 <b>understanding from the comments I found in the</b></p> <p>12 <b>literature on the ISDA master agreement, and of some</b></p> <p>13 <b>people that might even have been involved in drafting</b></p> <p>14 <b>the agreement but I don't know that.</b></p> <p>15 Q. Can we just see how you put it in your evidence, back</p> <p>16 within the volume we just had open.</p> <p>17 It is mentioned in your consolidated report, which</p> <p>18 you will find behind tab 11 at paragraph 67.</p> <p>19 Have you found that?</p> <p>20 <b>A. Yes.</b></p> <p>21 Q. You say:</p> <p>22 "The overall objective [the point I just made to</p> <p>23 you] is to replicate the ISDA master agreement and also</p> <p>24 its closeout netting provisions in particular."</p> <p>25 You cite one text in support of that proposition.</p> <p style="text-align: center;">Page 61</p>	<p>1 <b>A. I agree with respect to the consequences of the</b></p> <p>2 <b>termination.</b></p> <p>3 Q. You say that the parallel between the two agreements is</p> <p>4 important when working out when the compensation claim</p> <p>5 becomes due?</p> <p>6 <b>A. My Lord, this is, again, not a yes or no answer.</b></p> <p>7 Q. Can we look at paragraph 67.</p> <p>8 I am just going to show Professor Mülbert his</p> <p>9 evidence on the point.</p> <p>10 MR JUSTICE HILDYARD: Have a look at your evidence but if</p> <p>11 you want to qualify it, you must say so.</p> <p>12 <b>A. Yes.</b></p> <p>13 MR ALLISON: Back in paragraph 67, the second sentence, you</p> <p>14 say:</p> <p>15 "Therefore it would be surprising if post an English</p> <p>16 administration of the counterparty, the ISDA master</p> <p>17 agreement was capable of giving rise to an entitlement</p> <p>18 to default interest but the GMA was not."</p> <p>19 <b>A. Yes. May I now add my qualification?</b></p> <p>20 Q. Of course, if you wish to.</p> <p>21 <b>A. This is not meant to say -- "surprising" in that context</b></p> <p>22 <b>is not meant to say that is a -- that is something that</b></p> <p>23 <b>has to be taken into account by necessarily interpreting</b></p> <p>24 <b>the or in construing the contractual provision, it is</b></p> <p>25 <b>simply meant to say that from the perspective of market</b></p> <p style="text-align: center;">Page 63</p>
<p>1 Can we just turn that text up together. You will find</p> <p>2 that behind tab 43 of the German authorities.</p> <p>3 <b>A. That would be volume, sorry?</b></p> <p>4 Q. Sorry, volume 1, tab 43. This is the text you footnote</p> <p>5 at paragraph 67 in support of your evidence. Headed</p> <p>6 "Banking law" do you see that? I think it is footnote</p> <p>7 paragraph 1 that you rely on. That is right, isn't it?</p> <p>8 <b>A. Yes.</b></p> <p>9 Q. That is a general statement that it is intended to</p> <p>10 replicate it for the ISDA and in terms of closeout</p> <p>11 netting, yes?</p> <p>12 <b>A. My Lord, I am not sure whether this meant that this is</b></p> <p>13 <b>my statement in the report or the statement in the --</b></p> <p>14 Q. Sorry, in the authority we are just looking at, that is</p> <p>15 a general observation in relation to the parallel</p> <p>16 between material agreements without going into the</p> <p>17 detail of the provisions, isn't it?</p> <p>18 <b>A. Yes, that is true.</b></p> <p>19 Q. Thank you.</p> <p>20 Would you also agree that the relevant textbooks</p> <p>21 observe that the German master agreement contains a lot</p> <p>22 less detail than the ISDA master agreement?</p> <p>23 <b>A. Yes, I agree.</b></p> <p>24 Q. In particular a lot less detail in relation to</p> <p>25 termination and the consequences of termination?</p> <p style="text-align: center;">Page 62</p>	<p>1 <b>participants it would be surprising if there was such</b></p> <p>2 <b>a wide deviation between the operation of the German</b></p> <p>3 <b>master agreement and the ISDA master agreement, my Lord.</b></p> <p>4 Q. Let's just test your evidence that the German master</p> <p>5 agreement is intended to replicate in German law the</p> <p>6 ISDA master agreement.</p> <p>7 Three separate parts of the ISDA to look at.</p> <p>8 I don't know whether you have the core bundle there,</p> <p>9 access to the core bundle? If you could go to tab 7 of</p> <p>10 the core bundle, you should I hope find the ISDA master</p> <p>11 agreement. It is only here in case you don't agree with</p> <p>12 what the points I am about to make to you so we can look</p> <p>13 at the clauses together.</p> <p>14 The ISDA master agreement does not have automatic</p> <p>15 termination on bankruptcy unless the parties expressly</p> <p>16 provide for it; does it?</p> <p>17 <b>A. My Lord, I would have to consult the ISDA master</b></p> <p>18 <b>agreement with the help of counsel because I was not</b></p> <p>19 <b>asked to opine on the ISDA master agreement and I may</b></p> <p>20 <b>add that the first sentence of my expert opinion states</b></p> <p>21 <b>that the overall objective of the GMA is to replicate</b></p> <p>22 <b>under German law as best as possible, that is the manner</b></p> <p>23 <b>in which the ISDA master agreement operates, but it does</b></p> <p>24 <b>not -- since this only, this is not possible that it</b></p> <p>25 <b>mirrors the ISDA master agreement, there are inevitable</b></p> <p style="text-align: center;">Page 64</p>



<p>1 <b>deviations between the two.</b></p> <p>2 Q. To avoid needing to take you through all of the</p> <p>3 provisions, let's see if we can agree a proposition</p> <p>4 instead.</p> <p>5 On the assumption that the ISDA master agreement</p> <p>6 does not provide for automatic termination unless the</p> <p>7 parties specify that, you would agree that the</p> <p>8 termination for insolvency in the German master</p> <p>9 agreement, which is automatic, is materially different</p> <p>10 to the ISDA?</p> <p>11 <b>A. My Lord, it is materially different but it is</b></p> <p>12 <b>a deviation from the ISDA master agreement that the</b></p> <p>13 <b>German drafters of the German master agreement expressly</b></p> <p>14 <b>incorporated in order to make it possible for the</b></p> <p>15 <b>closeout netting under German law. This was</b></p> <p>16 <b>incorporated with a view to avoid any obstacles from</b></p> <p>17 <b>German insolvency code.</b></p> <p>18 Q. Let's just briefly explore why that is the case, because</p> <p>19 under German insolvency code there is a maximum period</p> <p>20 of five days after termination in which a netting has to</p> <p>21 take place, that is right, isn't it? It is a five-day</p> <p>22 period after insolvency in which the netting has to</p> <p>23 occur under section 104?</p> <p>24 <b>A. My Lord, may I -- since that is a general insolvency</b></p> <p>25 <b>provision and I would like to consult the provision.</b></p> <p style="text-align: center;">Page 65</p>	<p>1 <b>insolvency law in this matter so I relied on the German</b></p> <p>2 <b>materials explaining that.</b></p> <p>3 Q. You do agree though that the German master agreement has</p> <p>4 automatic default which, on the assumption that the ISDA</p> <p>5 does not have it unless the parties specify it, is</p> <p>6 a material difference between the two master agreements?</p> <p>7 <b>A. My Lord, I am sorry, it has automatic termination, not</b></p> <p>8 <b>automatic default.</b></p> <p>9 Q. I think I said -- I am so sorry, I meant automatic</p> <p>10 termination. One has automatic termination, the German</p> <p>11 master agreement, the ISDA master agreement does not,</p> <p>12 unless the parties elect it and that is a material</p> <p>13 difference between the two agreements?</p> <p>14 <b>A. That is an obvious difference between the two.</b></p> <p>15 Q. Thank you.</p> <p>16 The next is when the equivalent claim to the</p> <p>17 compensation claim under the German master agreement</p> <p>18 becomes due under the ISDA. If you could look in the</p> <p>19 ISDA that I have given to you, look at page 155, do you</p> <p>20 see the heading "Calculations"?</p> <p>21 <b>A. Yes.</b></p> <p>22 Q. If you could just read (i) and (ii) to yourself, just so</p> <p>23 you know (i) deals with the calculation of the</p> <p>24 settlement sum and (ii) deals with the day on which it</p> <p>25 becomes payable.</p> <p style="text-align: center;">Page 67</p>
<p>1 Q. Of course. It is my volume 2, I think it should be your</p> <p>2 volume 2 as well. Tab 84, section 104. The relevant</p> <p>3 provision is over the page at 104(3) that forces the</p> <p>4 closeout on the fifth working day at the latest.</p> <p>5 MR JUSTICE HILDYARD: Could you give me that reference</p> <p>6 again, I am terribly sorry?</p> <p>7 MR ALLISON: My Lord, of course. Tab 84, sub tab E --</p> <p>8 MR JUSTICE HILDYARD: Thank you.</p> <p>9 MR ALLISON: -- it is the second page, subsection (3).</p> <p>10 You said that the reason the German master agreement</p> <p>11 has automatic termination was to deal with the rules of</p> <p>12 German insolvency, yes.</p> <p>13 <b>A. Yes, I said that.</b></p> <p>14 Q. This is the relevant rule in relation to netting that</p> <p>15 takes place after insolvency, isn't it?</p> <p>16 <b>A. As -- my Lord, as the law currently stands. However,</b></p> <p>17 <b>the ISDA master agreement was drafted prior to</b></p> <p>18 <b>a revision of section 104 of the German insolvency code</b></p> <p>19 <b>and as I understand the reasons for the automatic</b></p> <p>20 <b>termination clause then was in order to avoid cherry</b></p> <p>21 <b>picking by the administrator that would have been</b></p> <p>22 <b>possible under section 104.</b></p> <p>23 <b>At that time when -- the reasons that I understand</b></p> <p>24 <b>from reading materials, from reading German materials on</b></p> <p>25 <b>that. Again, I am not familiar, I am not an expert in</b></p> <p style="text-align: center;">Page 66</p>	<p>1 You see in the payment date, the settlement sum</p> <p>2 becomes due on the day that notice of the amount payable</p> <p>3 is effective. It is when one party tells the other</p> <p>4 party what the claim is, do you see that?</p> <p>5 <b>A. Yes.</b></p> <p>6 Q. You say that in relation to the German master agreement</p> <p>7 it becomes payable at a much earlier time on the</p> <p>8 automatic termination?</p> <p>9 <b>A. I say that based on the lack of a provision -- of</b></p> <p>10 <b>a contractual provision -- to the effect of the ISDA</b></p> <p>11 <b>stipulation.</b></p> <p>12 Q. It doesn't then reflect the ISDA master agreement?</p> <p>13 <b>A. Yes, it does not.</b></p> <p>14 Q. Then, if we can look, the final area "interest", in</p> <p>15 section D(ii) that you just read, the last two sentences</p> <p>16 deal with interest. Do you see that the ISDA master</p> <p>17 agreement has an express contractual right to interest?</p> <p>18 <b>A. My Lord, may I be taken to the last two sentences again?</b></p> <p>19 Q. Of course, you see that the penultimate sentence talks,</p> <p>20 "Such amount will be paid ..." That is the settlement</p> <p>21 sum?</p> <p>22 <b>A. Yes.</b></p> <p>23 Q. "... together with [and we can miss the bracket]</p> <p>24 interest thereon."</p> <p>25 There is an express term for the payment of</p> <p style="text-align: center;">Page 68</p>

<p>1 interest; do you see that?</p> <p>2 <b>A. Yes.</b></p> <p>3 Q. Then you see that the interest is dealt with and is to</p> <p>4 be paid at the applicable rate, do you see that?</p> <p>5 <b>A. Yes.</b></p> <p>6 Q. Then, at page 160, you will see the definition of</p> <p>7 default rate, which applies in circumstances where there</p> <p>8 has been a default within insolvency. Do you see that?</p> <p>9 You would agree then that there is an express</p> <p>10 contractual right to interest in the ISDA master</p> <p>11 agreement that is missing in the German master</p> <p>12 agreement?</p> <p>13 <b>A. Yes.</b></p> <p>14 Q. Now, you previously --</p> <p>15 <b>A. Yes, I agree.</b></p> <p>16 Q. Thank you.</p> <p>17 You previously suggested in your evidence that</p> <p>18 clause 3(4) of the German master agreement could give</p> <p>19 an interest claim on the compensation claim. You no</p> <p>20 longer run that argument, do you?</p> <p>21 <b>A. My Lord, the answer is that I talked about clause 3(4)</b></p> <p>22 <b>in my report. I didn't opine on whether clause 3(4)</b></p> <p>23 <b>would be applicable to the closeout amount, I was simply</b></p> <p>24 <b>answering the question, the agreed question, put to me</b></p> <p>25 <b>and I did not opine in either direction. I agreed later</b></p> <p style="text-align: center;">Page 69</p>	<p>1 I was now going to move on to the question of the</p> <p>2 other requirements for a default under section 286.</p> <p>3 We agreed earlier that even if a claim is due, that</p> <p>4 is not enough on its own for there to be a default</p> <p>5 within section 286. That is right, isn't it?</p> <p>6 <b>A. Yes.</b></p> <p>7 Q. You also need the service of a warning notice or the</p> <p>8 application of one of the exceptions to the service of</p> <p>9 a warning notice?</p> <p>10 <b>A. Yes.</b></p> <p>11 Q. Could we just go back to section 286 together. It is</p> <p>12 behind tab 83, at letter N. You may need some</p> <p>13 assistance clearing some paper away; I am worrying you</p> <p>14 are being overburdened.</p> <p>15 <b>A. I wouldn't want to put the arch levers up like this</b></p> <p>16 <b>(Indicated), because that would obstruct my view, so ...</b></p> <p>17 Q. It should be volume 2, tab 83, letter N.</p> <p>18 <b>A. Thank you.</b></p> <p>19 Q. Do you have it?</p> <p>20 <b>A. Yes.</b></p> <p>21 Q. A couple of short questions before we look at the detail</p> <p>22 of your arguments.</p> <p>23 First, you would agree that the general rule is that</p> <p>24 a warning notice has to be served to trigger a default?</p> <p>25 <b>A. Yes, I agree.</b></p> <p style="text-align: center;">Page 71</p>
<p>1 <b>on with Dr Fischer that 3(4) does not apply to the</b></p> <p>2 <b>closeout amount, but this was due to the phrasing of the</b></p> <p>3 <b>questions of the agreed questions.</b></p> <p>4 Q. You accept now then that the contractual arrangements</p> <p>5 for interest in the German master agreement, of which</p> <p>6 there are none, are for the termination sum are</p> <p>7 materially different to those found in the ISDA master</p> <p>8 agreement?</p> <p>9 <b>A. My Lord, from the reading of the ISDA master agreement,</b></p> <p>10 <b>at this moment I agree.</b></p> <p>11 Q. Just drawing that together, would you accept that your</p> <p>12 attempt to draw a parallel between the German master</p> <p>13 agreement and the ISDA master agreement is made at</p> <p>14 a very high level of generality only?</p> <p>15 <b>A. Yes, I agree with that.</b></p> <p>16 Q. You would accept then that the interest provisions</p> <p>17 within the ISDA master agreement do not help you one way</p> <p>18 or another in working out interest entitlements under</p> <p>19 the German master agreement?</p> <p>20 <b>A. Yes, I accept that and if I may add, in my report I did</b></p> <p>21 <b>not rely on the ISDA master agreement, except for noting</b></p> <p>22 <b>that the -- except for the general observation made in</b></p> <p>23 <b>paragraph 67 of my report.</b></p> <p>24 Q. Professor Mülbert, thank you. I think that is all I was</p> <p>25 going to ask you about when the claim becomes due.</p> <p style="text-align: center;">Page 70</p>	<p>1 Q. We know that no warning notices were filed in the</p> <p>2 present case. Have you been told that?</p> <p>3 <b>A. I have been told.</b></p> <p>4 Q. In your third report you seek to develop for the first</p> <p>5 time two different arguments about default. The first,</p> <p>6 just to check that I understand them, is that you</p> <p>7 contend that while filing a proof in a German insolvency</p> <p>8 proceeding does not amount to a warning notice, this, to</p> <p>9 use your words, "... may be different in an English</p> <p>10 administration"?</p> <p>11 <b>A. Yes.</b></p> <p>12 Q. The second argument that you propose is that the</p> <p>13 administration application by LBIE's directors triggered</p> <p>14 a default within subsection 2 number 3 of this</p> <p>15 provision, in other words that it constituted a serious</p> <p>16 and definitive refusal of performance by LBIE?</p> <p>17 <b>A. Yes.</b></p> <p>18 Q. That's correct?</p> <p>19 <b>A. Yes.</b></p> <p>20 Q. Thank you.</p> <p>21 Let's start with the proof of debt and whether it</p> <p>22 can be construed as a warning notice. You are aware</p> <p>23 that a creditor can only pursue a claim for interest in</p> <p>24 a German insolvency proceeding for the period after</p> <p>25 commencement of insolvency if there was a default prior</p> <p style="text-align: center;">Page 72</p>

<p>1 to the commencement of insolvency?</p> <p>2 <b>A. My Lord, again, this is not a simple yes or no answer,</b></p> <p>3 <b>but goes back to the amendment to the joint statement.</b></p> <p>4 <b>I agreed that with respect to the insolvency estate, the</b></p> <p>5 <b>creditor can only pursue his claim by proceedings, by</b></p> <p>6 <b>the insolvency -- by the proceeding provided for by the</b></p> <p>7 <b>German insolvency code.</b></p> <p>8 Q. They cannot recover interest within that proceeding</p> <p>9 unless they have a default before the proceeding starts?</p> <p>10 <b>A. Yes.</b></p> <p>11 Q. As we have just heard, you agree with Judge Fischer that</p> <p>12 a proof of debt in a German insolvency proceeding would</p> <p>13 not amount to a warning notice?</p> <p>14 <b>A. Yes, I agree.</b></p> <p>15 Q. Let's now look at the requirements for a warning notice.</p> <p>16 Let me put a proposition to you to see if you agree with</p> <p>17 it. A warning notice requires an unequivocal demand for</p> <p>18 payment of a sum due. Do you agree with that?</p> <p>19 <b>A. Yes, I agree with that.</b></p> <p>20 Q. You would also agree, would you, that a warning notice</p> <p>21 requires the obligor to receive a clear definite demand</p> <p>22 from the obligee for the payment of an amount due?</p> <p>23 <b>A. Yes, I agree. However, this clear demand may be either</b></p> <p>24 <b>express or implied.</b></p> <p>25 Q. Can we just look at one decision of the</p> <p style="text-align: center;">Page 73</p>	<p>1 a warning notice.</p> <p>2 Would you agree with Judge Fischer that -- his</p> <p>3 evidence is that the filing of a proof of debt is not</p> <p>4 a request by a creditor to the debtor for the payment of</p> <p>5 the debt, it is actually a request to participate in the</p> <p>6 insolvency. Do you agree with that?</p> <p>7 <b>A. I agree with that, yes.</b></p> <p>8 Q. The commentators also speak with one voice on that</p> <p>9 issue, maybe let's just turn up one or two to see how</p> <p>10 they work. If we could look at what Judge Gruneberg</p> <p>11 says, behind tab 48, you should have some sub tabs</p> <p>12 within it and it is behind B and it is the second page</p> <p>13 behind B, paragraph 21, do you see that? It is the last</p> <p>14 sentence, where the judge expresses his opinion. He</p> <p>15 says:</p> <p>16 "On the other hand insufficient are: declaratory</p> <p>17 action; an action for future performance; and the</p> <p>18 registration of the receivable in case of insolvency</p> <p>19 proceedings."</p> <p>20 <b>A. I see that, yes.</b></p> <p>21 Q. Judge Gruneberg is saying that registering a claim in</p> <p>22 an insolvency process is not equivalent to a warning</p> <p>23 notice?</p> <p>24 <b>A. He says so, yes.</b></p> <p>25 Q. Let's also see how the point has been addressed by the</p> <p style="text-align: center;">Page 75</p>
<p>1 Bundesgerichtshof to see how that works. It is tab 28</p> <p>2 of the authorities. Do you have that?</p> <p>3 <b>A. Yes.</b></p> <p>4 Q. If we can look at paragraph 10 together, on page 82, you</p> <p>5 see next to 10, then there is a number 3, and we are</p> <p>6 told by the first sentence that:</p> <p>7 "The decision depends upon whether the appellant had</p> <p>8 already warned the respondent as defined by section 286,</p> <p>9 paragraph 1."</p> <p>10 Ie, a warning notice? Do you see that?</p> <p>11 <b>A. Yes.</b></p> <p>12 Q. Then paragraph 11 tells us what a warning notice is, the</p> <p>13 court expresses it in the following way:</p> <p>14 "It has to be a final payment demand that</p> <p>15 establishes default in any clear and specific request in</p> <p>16 which the creditor unambiguously expresses a demand for</p> <p>17 the performance owed."</p> <p>18 Do you see that?</p> <p>19 <b>A. Yes.</b></p> <p>20 Q. There is no mention there of any possibility of</p> <p>21 an implied request, is there?</p> <p>22 <b>A. My Lord, it does not say it must be express or implied,</b></p> <p>23 <b>it simply says that it must be expressed unambiguously.</b></p> <p>24 Q. Let's look at the reasons why a proof of debt in</p> <p>25 a German insolvency proceeding is not considered to be</p> <p style="text-align: center;">Page 74</p>	<p>1 Bundesgerichtshof. If you go to tab 37 -- sorry, there</p> <p>2 is one more before we go there. It is tab 59A, it is</p> <p>3 one of the other prominent commenters so we see at least</p> <p>4 one more, it is the commentary in Staudinger.</p> <p>5 <b>A. Volume 2, is it?</b></p> <p>6 MR JUSTICE HILDYARD: Just at the end of volume 1.</p> <p>7 MR ALLISON: I think it might be in your volume 1, it is in</p> <p>8 my volume 2.</p> <p>9 <b>A. Yes, thank you, my Lord.</b></p> <p>10 Q. It should be the very first page of sub divider A,</p> <p>11 paragraph 66. Do you have that, paragraph 66?</p> <p>12 <b>A. Yes.</b></p> <p>13 Q. The bit that I wanted to show you was the last sentence,</p> <p>14 where the authors express the view that the filing of</p> <p>15 claims in the insolvency does not replace the caveat, ie</p> <p>16 the need to serve a warning notice, because it does not</p> <p>17 contain any request for payment to the debtor. Do you</p> <p>18 see that?</p> <p>19 <b>A. Could you take me please -- could I please be taken to</b></p> <p>20 <b>the paragraph you were just reading from? It is</b></p> <p>21 <b>section 286 but the paragraph you were just reading</b></p> <p>22 <b>from.</b></p> <p>23 Q. I just want to check we are in the same place. I was at</p> <p>24 tab 59A. Do you have a copy --</p> <p>25 <b>A. Yes.</b></p> <p style="text-align: center;">Page 76</p>

<p>1 Q. The paragraph number was 66, top left-hand number?</p> <p>2 MR JUSTICE HILDYARD: It begins "Bringing a declaratory</p> <p>3 action."</p> <p>4 <b>A. The same page is in here twice.</b></p> <p>5 MR ALLISON: I see. The point I think is the same in both,</p> <p>6 is that the author has expressed the view that the</p> <p>7 filing of a claim in an insolvency does not replace the</p> <p>8 need for a warning notice, because it does not include</p> <p>9 a request for payment. You would agree with that?</p> <p>10 <b>A. I would agree with that, yes.</b></p> <p>11 Q. Thank you.</p> <p>12 The next place was the decision of the</p> <p>13 Bundesgerichtshof at tab 37 where they consider the</p> <p>14 question. Do you have tab 37.</p> <p>15 <b>A. Yes.</b></p> <p>16 Q. Do you see number 3, the third question in the headnote,</p> <p>17 makes clear the issue being considered, one of the</p> <p>18 issues was: does the filing of a bankruptcy claim in the</p> <p>19 table of claims entail a payment request justifying the</p> <p>20 default of the bankrupt debtor? Do you see that?</p> <p>21 <b>A. I see that, yes.</b></p> <p>22 Q. Then if we can turn, there is just one paragraph that</p> <p>23 deals with it, it is the very last page, and it is the</p> <p>24 very last paragraph of the report. Do you see that what</p> <p>25 the court says is the question to ask is: whether the</p> <p style="text-align: center;">Page 77</p>	<p>1 <b>A. Yes.</b></p> <p>2 Q. You say that in a German insolvency proceeding, in your</p> <p>3 third report, that the proof in a German insolvency</p> <p>4 proceeding is directed to the insolvency administrator</p> <p>5 and not the debtor as a person?</p> <p>6 <b>A. Yes.</b></p> <p>7 Q. Were you aware that under English insolvency law the</p> <p>8 obligation is to file your proof with the administrator,</p> <p>9 not with the company?</p> <p>10 <b>A. I am aware of that based on the short summary on the</b></p> <p>11 <b>English administration.</b></p> <p>12 Q. Can we just look at what Judge Fischer has to say about</p> <p>13 this in his third report, so it is volume 4, behind</p> <p>14 tab 12.</p> <p>15 My Lord, I think the next questions may take about</p> <p>16 five minutes, I don't know whether that is a convenient</p> <p>17 moment or whether I should plough on?</p> <p>18 MR JUSTICE HILDYARD: If it is going to be about five</p> <p>19 minutes and you then come to a natural break --</p> <p>20 MR ALLISON: My Lord, it will be about five minutes and then</p> <p>21 it is a natural break.</p> <p>22 MR JUSTICE HILDYARD: Then let's carry on.</p> <p>23 MR ALLISON: Thank you.</p> <p>24 It is tab 12, Professor Mülbart, paragraphs 37, 38,</p> <p>25 and 39 is where Judge Fischer explains what has to</p> <p style="text-align: center;">Page 79</p>
<p>1 plaintiff went into default because the defendant filed</p> <p>2 its claim in the bankruptcy proceedings against the</p> <p>3 plaintiff's assets?</p> <p>4 <b>A. Yes, I see that.</b></p> <p>5 Q. Yes? Then you see that the court answered that question</p> <p>6 no and, reading what they say, they say it is to be</p> <p>7 answered in the negative because the filing of the</p> <p>8 bankruptcy claim to be entered in the schedule of claims</p> <p>9 entails no demand made to the debtor for payment. Do</p> <p>10 you see that?</p> <p>11 <b>A. Yes, I see that.</b></p> <p>12 Q. The same point that was being made by the authors, you</p> <p>13 don't have a demand for payment being made by proof of</p> <p>14 debt?</p> <p>15 <b>A. Yes, my Lord.</b></p> <p>16 <b>May I just add one observation as to the authority.</b></p> <p>17 <b>I think you said it was the German federal high court --</b></p> <p>18 Q. I am so sorry, it was the Reichsgericht, wasn't it?</p> <p>19 <b>A. Which, my Lord, would be the predecessor to the</b></p> <p>20 <b>Bundesgerichtshof.</b></p> <p>21 Q. To the Bundesgerichtshof. Thank you Professor Mülbart.</p> <p>22 You seek to draw a distinction between the filing of</p> <p>23 a proof of debt in a German insolvency proceeding and</p> <p>24 the filing of a proof of debt in an English</p> <p>25 administration, don't you?</p> <p style="text-align: center;">Page 78</p>	<p>1 happen under German law.</p> <p>2 Could you just have a look at those paragraphs and</p> <p>3 see whether you agree with the points he makes, so for</p> <p>4 example, in paragraph 37, do you agree with the point</p> <p>5 that he makes that filing a claim in a German insolvency</p> <p>6 proceeding is not the same as serving a demand, because</p> <p>7 when those proceedings are instituted the debtor has</p> <p>8 forfeited the power to dispose of its assets?</p> <p>9 It is page 321, I am so sorry.</p> <p>10 <b>A. Yes. And, please, I was -- the page is different from</b></p> <p>11 <b>the organisation, the English and German version are</b></p> <p>12 <b>different in that respect. My Lord, I was a bit</b></p> <p>13 <b>confused. May I be taken again to the paragraph you</b></p> <p>14 <b>were reading from.</b></p> <p>15 Q. Of course, it was paragraph 37, to see whether you agree</p> <p>16 with what Judge Fischer says. He says at the end of</p> <p>17 that paragraph that the filing of a claim in a German</p> <p>18 insolvency proceeding is not -- and the not means not</p> <p>19 a warning notice -- because when those proceedings are</p> <p>20 instituted, the debtor has forfeited the power to</p> <p>21 dispose of its assets. Do you agree with that?</p> <p>22 <b>A. Yes.</b></p> <p>23 Q. Then, paragraph 38, Judge Fischer summarises important</p> <p>24 aspects of German insolvency law and in the second</p> <p>25 sentence he says:</p> <p style="text-align: center;">Page 80</p>

<p>1 "Once insolvency proceedings have been instituted, 2 insolvency creditors can pursue their claims only as 3 provided under insolvency law." 4 Do you agree with that? 5 <b>A. I agree -- my Lord, I agree based on section 87 of the 6 German insolvency code cited by Judge Fischer which will 7 prevent a German court from admitting --</b> 8 Q. The claims cannot be brought outside the insolvency 9 proceeding. That is the point, isn't it? 10 <b>A. Yes.</b> 11 Q. Instead, as he says in the next sentence, "They must 12 file their claims, proofs of debt for entry in the 13 schedule". 14 <b>A. Yes.</b> 15 Q. Then he says at the bottom, after they have been filed 16 in the schedule the last sentence: 17 "... the debtor's assets are distributed among the 18 creditors in accordance with the terms of the insolvency 19 code." 20 Do you agree with that? 21 <b>A. Yes.</b> 22 Q. Over the page, he says that: 23 "If a court action or the service is a demand for 24 payment in summary debt recovery proceedings, which 25 a legal action is equivalent to a warning notice are</p> <p style="text-align: center;">Page 81</p>	<p>1 MR JUSTICE HILDYARD: Thank you. 2 2.05. 3 (1.06 pm) 4 (The Luncheon Adjournment) 5 (2.05 pm) 6 MR ALLISON: Good afternoon, Professor Mülbert. 7 <b>A. Good afternoon.</b> 8 Q. We had just finished looking at the proof of debt, which 9 was your first argument for the triggering of a default 10 by way of a warning notice. I was now going to turn to 11 your second argument, which, as we established before 12 lunch, is that the administration application by the 13 directors of LBIE constituted a serious and definitive 14 refusal by LBIE to perform, thereby engaging one of the 15 exceptions. 16 Before looking at the statute and some of the cases, 17 can we just see if we can agree a few propositions in 18 relation to this theory of yours. 19 The first is that you have not cited any German 20 authority which suggests that an application to commence 21 insolvency proceedings should be viewed as a serious and 22 definitive refusal to perform, have you? 23 <b>A. No, I haven't.</b> 24 Q. It is correct, is it not, that a creditor can only seek 25 interest within a German insolvency for the period after</p> <p style="text-align: center;">Page 83</p>
<p>1 invalid for the above reasons, the same holds all the 2 more true for the warning notice itself." 3 What he does two lines on, he says: 4 "No insolvency creditor is supposed to be able to 5 gain an advantage over the community of creditors 6 through its own actions against the debtor." 7 Do you agree with that? 8 <b>A. My Lord, I agree with that provided that Judge Fischer 9 implies that this is true with the distribution of the 10 estate.</b> 11 Q. Just recapping, you agree that after a German insolvency 12 proceeding creditors cannot bring legal proceedings 13 against the debtor, they have to file their claims in 14 the insolvency schedule? 15 <b>A. My Lord, I agree they cannot bring an action before 16 a German court.</b> 17 Q. You agree that what the creditors have to do is to file 18 a proof of debt and then participate in any distribution 19 of the assets? 20 <b>A. Yes, I agree with that.</b> 21 MR ALLISON: Thank you Professor. 22 That is a convenient moment, if it is for my Lord? 23 MR JUSTICE HILDYARD: Yes, 2.05. 24 Are you on track Mr Allison? 25 MR ALLISON: Almost exactly, my Lord, yes.</p> <p style="text-align: center;">Page 82</p>	<p>1 that insolvency, if there was a default before 2 insolvency? I think that is something we looked at this 3 morning as well. 4 <b>A. My Lord, yes, with respect to the claims he pursued 5 against the estate.</b> 6 Q. Against the insolvent estate, yes. Thank you. 7 <b>A. Yes.</b> 8 Q. We also established before lunch that you agree with 9 Judge Fischer that the filing of a proof of debt in 10 a German insolvency does not trigger the default. 11 <b>A. Yes.</b> 12 Q. The point that you raise in these proceedings would be 13 potentially important in German insolvencies generally, 14 wouldn't it? 15 <b>A. My Lord --</b> 16 Q. The suggestion that an application could be an exception 17 to a warning notice. 18 <b>A. My Lord, that could be of -- that would be of interest 19 to German substantive law, yes.</b> 20 Q. Thank you. 21 We agreed before though, there is no authority that 22 supports it in Germany. 23 <b>A. There is -- my Lord, there is no prior authority.</b> 24 Q. Just focusing on the words, "Serious and definitive 25 refusal to perform", you would agree that the cases and</p> <p style="text-align: center;">Page 84</p>

21 (Pages 81 to 84)

<p>1 the commentators consistently say those words are</p> <p>2 subject to strict requirements?</p> <p>3 <b>A. My Lord, the commentators and the cases say that there</b></p> <p>4 <b>are strict requirements for a serious or definite</b></p> <p>5 <b>refusal to be -- yes.</b></p> <p>6 Q. Thank you very much. In fact, as you acknowledge in</p> <p>7 your report, the commentators who have looked at the</p> <p>8 point say that an application to commence insolvency</p> <p>9 proceedings does not constitute a serious and definitive</p> <p>10 refusal to perform.</p> <p>11 <b>A. My Lord, there is one decision by a -- my Lord, before</b></p> <p>12 <b>I answer the question, may the question be rephrased,</b></p> <p>13 <b>please?</b></p> <p>14 Q. Yes, we will come back to them later but, just to flag</p> <p>15 the point now, for my Lord, the -- in the commentaries,</p> <p>16 Schwarze and Staudinger says that an application for</p> <p>17 insolvency would not be a serious and definitive refusal</p> <p>18 to perform. That is right, isn't it? Would you like to</p> <p>19 see that?</p> <p>20 <b>A. Yes. Yes.</b></p> <p>21 Q. It is bundle 2, tab 70. (Pause)</p> <p>22 It is paragraph 95, do you see paragraph 95?</p> <p>23 <b>A. Yes, I have looked.</b></p> <p>24 Q. Where the commentators start by saying there is not</p> <p>25 a refusal to perform present in the following cases --</p> <p style="text-align: center;">Page 85</p>	<p>1 exceptions to the warning notice listed in</p> <p>2 subsection (2). Do you see that?</p> <p>3 <b>A. Yes.</b></p> <p>4 Q. One of the exceptions is:</p> <p>5 "The debtor seriously and definitively refuses to</p> <p>6 perform."</p> <p>7 In your expert report, you rely on section 323(4)</p> <p>8 don't you? You can find that at S.</p> <p>9 <b>A. My Lord, may I qualify the answer? I rely on</b></p> <p>10 <b>section 323, paragraphs 2 and 4 in conjunction.</b></p> <p>11 Q. Paragraph 4, just looking at it, paragraph 4 says, "The</p> <p>12 creditor may revoke the contract before performance is</p> <p>13 due if it is obvious that the requirements for</p> <p>14 revocation are met".</p> <p>15 Do you see that?</p> <p>16 <b>A. Yes.</b></p> <p>17 Q. It uses the test of obvious, doesn't it?</p> <p>18 <b>A. Yes.</b></p> <p>19 Q. Not the test of serious and definitive refusal to</p> <p>20 perform.</p> <p>21 <b>A. My Lord, this is true but may I explain the working</b></p> <p>22 <b>of -- the main part is a section, from my reading of</b></p> <p>23 <b>that provision the main part is paragraph 2, where it</b></p> <p>24 <b>says that the specification can be dispensed with if,</b></p> <p>25 <b>(1), the debtor is serious and definitely refuses to</b></p> <p style="text-align: center;">Page 87</p>
<p>1 do you see those words?</p> <p>2 <b>A. Yes.</b></p> <p>3 Q. Then you see a whole long list of matters, and if you</p> <p>4 turn over the page you see the penultimate one is the</p> <p>5 petition to open insolvency proceedings alone. Do you</p> <p>6 see that?</p> <p>7 <b>A. Yes, I see that.</b></p> <p>8 Q. They refer to a case of the Munich courts that we will</p> <p>9 come back to in due course.</p> <p>10 You say that the parallel should be drawn in this</p> <p>11 case, between a serious and definitive refusal to</p> <p>12 perform under section 286(2) and an obvious test under</p> <p>13 section 323(4), that is the section you rely on, isn't</p> <p>14 it?</p> <p>15 <b>A. Could you please -- my Lord, could the question be, the</b></p> <p>16 <b>first part of the question --</b></p> <p>17 Q. Shall I try again?</p> <p>18 <b>A. Yes, and may I take a look at the pertinent provision,</b></p> <p>19 <b>namely 280 --</b></p> <p>20 Q. Of course, we will look at it in detail in a moment, but</p> <p>21 you will find it behind tab 83, behind N, you find</p> <p>22 default?</p> <p>23 <b>A. Yes.</b></p> <p>24 Q. We looked at this before lunch, warning notice is the</p> <p>25 general rule in subsection 1 and then there are the</p> <p style="text-align: center;">Page 86</p>	<p>1 <b>perform. And the prerequisites for that to happen are</b></p> <p>2 <b>relaxed based on paragraph 4, if it is obvious before</b></p> <p>3 <b>the performance is due that the preconditions set out in</b></p> <p>4 <b>paragraph 2 will be met.</b></p> <p>5 Q. Thank you. Just on 323(4), you would agree that the</p> <p>6 test of whether something is obvious may be satisfied by</p> <p>7 something other than a serious and definitive refusal to</p> <p>8 perform?</p> <p>9 <b>A. Yes.</b></p> <p>10 Q. For example, the cases in the textbooks talk about</p> <p>11 an alternative way of satisfying it, being where there</p> <p>12 is a high probability of non-performance, that is</p> <p>13 correct, isn't it?</p> <p>14 <b>A. That's correct.</b></p> <p>15 Q. Let's see how your case develops in relation to this</p> <p>16 provision, but let's start with section 286, which is</p> <p>17 the key provision for his Lordship.</p> <p>18 If you turn to letter N, you should find that. Do</p> <p>19 you have section 286, letter N?</p> <p>20 <b>A. N?</b></p> <p>21 Q. Yes.</p> <p>22 <b>A. Sorry, yes.</b></p> <p>23 Q. Let's see if we can agree the basic framework. The</p> <p>24 exception you seek to rely on is section 286(2), number</p> <p>25 3.</p> <p style="text-align: center;">Page 88</p>

<p>1 <b>A. Yes.</b></p> <p>2 Q. Can we look at what the legislative history of that</p> <p>3 provision is. If you turn forward to tab 87A, do you</p> <p>4 have 87A?</p> <p>5 <b>A. Yes.</b></p> <p>6 Q. Then what is said, looking first at page 145, is that:</p> <p>7 "A mere delay of performance beyond the due date</p> <p>8 does not result in any significant legal disadvantages."</p> <p>9 That is the general point. Then the next sentence,</p> <p>10 the third sentence, talking about the need for default,</p> <p>11 it says:</p> <p>12 "This requires the fault of the debtor and awarding</p> <p>13 notice or equivalent circumstance."</p> <p>14 Do you see that?</p> <p>15 <b>A. My Lord, could it be clarified which part of --</b></p> <p>16 Q. Of course, it is the very first paragraph on page 145</p> <p>17 headed, "With the default of the debtor, preliminary</p> <p>18 remark". It is the third sentence that I am looking at</p> <p>19 with you, beginning, "This requires ..."</p> <p>20 Do you see that?</p> <p>21 <b>A. Yes.</b></p> <p>22 Q. "This requires the fault of the debtor and a warning</p> <p>23 notice or equivalent circumstance."</p> <p>24 Yes?</p> <p>25 <b>A. Yes.</b></p> <p style="text-align: center;">Page 89</p>	<p>1 <b>thinks that on balance the interests of the creditors</b></p> <p>2 <b>are to be put above the interest of the creditor and</b></p> <p>3 <b>therefore the warning notice is not required.</b></p> <p>4 <b>If I may take your Lord to section 286, paragraph 2,</b></p> <p>5 <b>number 4, there you will find that the idea of</b></p> <p>6 <b>a balancing of interests is most clearly expressed and</b></p> <p>7 <b>most clearly comes across. The idea is that the general</b></p> <p>8 <b>idea with paragraph 3 and, or numbers 3 and 4, are that</b></p> <p>9 <b>it is the interest of the creditor that prevail over the</b></p> <p>10 <b>interests of the debtor. Therefore not requiring</b></p> <p>11 <b>a warning notice.</b></p> <p>12 Q. Two points from that. First, you must recognise that</p> <p>13 the insolvency of the debtor is not one of the triggers</p> <p>14 listed within 286 for not needing a warning notice?</p> <p>15 <b>A. Yes, obviously not.</b></p> <p>16 Q. Second, let's just look at what the legislative history</p> <p>17 says about the two exceptions.</p> <p>18 If you turn over to page 146 behind tab 87A, and we</p> <p>19 are going right towards the bottom of the first column,</p> <p>20 where you will see what is said is that:</p> <p>21 "Paragraph 2, number 3 [the serious and definitive</p> <p>22 refusal to perform] is new in comparison to the</p> <p>23 applicable law."</p> <p>24 It draws attention to two other statutory provisions</p> <p>25 where there is the similar language, doesn't it, you</p> <p style="text-align: center;">Page 91</p>
<p>1 Q. Then it says, "... with these warning notice</p> <p>2 substitutes". Do you see that as well?</p> <p>3 <b>A. Yes.</b></p> <p>4 Q. We agreed earlier that a warning notice requires a clear</p> <p>5 definite demand from the obligor to the obligee for</p> <p>6 payment of an amount due, yes?</p> <p>7 <b>A. Yes.</b></p> <p>8 Q. The logic of the words here, is that one would expect</p> <p>9 the equivalent circumstances, or the substitutes to be</p> <p>10 seen as something equal to a warning notice, wouldn't</p> <p>11 one?</p> <p>12 <b>A. My Lord, this is again an answer I cannot just give by</b></p> <p>13 <b>saying yes or no. I would like to expand a bit on that.</b></p> <p>14 <b>The warning notice -- I think it must be understood</b></p> <p>15 <b>from the perspective of the purpose of the warning</b></p> <p>16 <b>notice, the warning notice which has the purpose of</b></p> <p>17 <b>inducing the creditor -- the debtor to pay on time and</b></p> <p>18 <b>to make it clear that he will suffer consequences,</b></p> <p>19 <b>negative consequences, if he does not pay in time.</b></p> <p>20 <b>The cases where the law dispenses with the</b></p> <p>21 <b>requirement of a warning notice are situations where,</b></p> <p>22 <b>for different reasons, there is no need for a warning</b></p> <p>23 <b>notice to be given because there is no need because the</b></p> <p>24 <b>debtor either knows that he will suffer negative</b></p> <p>25 <b>consequences or, whether for other reasons, the law</b></p> <p style="text-align: center;">Page 90</p>	<p>1 have the similar language of serious and definitive</p> <p>2 refusal in 281(2) and 323(2), don't you?</p> <p>3 <b>A. Yes.</b></p> <p>4 Q. Then it says that:</p> <p>5 "The case law regarding the dispensability of the</p> <p>6 warning notice or a warning notice surrogate is to be</p> <p>7 deepened. This pertains to the generally acknowledged</p> <p>8 case of an earnest and final refusal to fulfill from the</p> <p>9 debtor..."</p> <p>10 <b>A. Yes.</b></p> <p>11 Q. That is what it is aimed at, isn't it? It is an earnest</p> <p>12 and final refusal to fulfill?</p> <p>13 <b>A. Yes.</b></p> <p>14 Q. It also goes on to say, doesn't it, that the paragraph</p> <p>15 you just referred to, which is not developed in the</p> <p>16 joint statement to any great extent, paragraph 2, number</p> <p>17 4:</p> <p>18 "... is also new and the provisions specify special</p> <p>19 circumstances that justify the immediate onset of</p> <p>20 default in consideration of the mutual interests. This</p> <p>21 case group is also acknowledged in the case law. It</p> <p>22 should not be extended beyond the current formulation."</p> <p>23 You see that?</p> <p>24 <b>A. Yes.</b></p> <p>25 Q. There is no suggestion that 323(4) or 286(2)/(4) would</p> <p style="text-align: center;">Page 92</p>

<p>1 be triggered by an application for insolvency</p> <p>2 proceedings in either the case law or the literature, is</p> <p>3 there?</p> <p>4 <b>A. No, not in the materials.</b></p> <p>5 Q. And not referred to in any of your reports either?</p> <p>6 <b>A. My Lord, could the question be clarified?</b></p> <p>7 Q. I think your answer was, "...not in the materials". You</p> <p>8 don't refer in your reports to any materials that</p> <p>9 support it applying where there is an application for</p> <p>10 insolvency proceedings; do you?</p> <p>11 <b>A. No.</b></p> <p>12 Q. Thank you.</p> <p>13 That is 286. If we could now look at section 323</p> <p>14 and see how it works differently.</p> <p>15 That is tab 83S.</p> <p>16 This is 323, and let's see if we can agree what this</p> <p>17 provision is aimed at. It concerns the revocation of</p> <p>18 a contract where there has been a breach of contract by</p> <p>19 reason of non-performance or defective performance,</p> <p>20 doesn't it?</p> <p>21 <b>A. Yes.</b></p> <p>22 Q. 323(1) requires a grace period to be specified before</p> <p>23 the exercise to revoke is actually taken up; doesn't it?</p> <p>24 <b>A. Yes, it does.</b></p> <p>25 Q. The setting of the grace period is dispensed with under</p> <p style="text-align: center;">Page 93</p>	<p>1 the word "obvious" is broader than, "A serious and</p> <p>2 definitive refusal to perform."</p> <p>3 You would agree with that, wouldn't you?</p> <p>4 <b>A. My Lord, I am sorry, could the question be rephrased?</b></p> <p>5 <b>The reason being that "obvious" deals with the</b></p> <p>6 <b>preconditions for the dispense, not with the</b></p> <p>7 <b>preconditions for dispense, therefore I am not sure</b></p> <p>8 <b>what --</b></p> <p>9 Q. Shall I try again?</p> <p>10 <b>A. Yes, please.</b></p> <p>11 Q. We have agreed the test is obvious. That is the test,</p> <p>12 whether something is obvious, yes? Whether or not the</p> <p>13 fulfilment of the contract performance is obvious?</p> <p>14 <b>A. I am sorry, my Lord, if I had spoken such, that would</b></p> <p>15 <b>have been a mistake. I am not aware that I said this</b></p> <p>16 <b>and I would not want to say this. May I explain what</b></p> <p>17 <b>I truly mean?</b></p> <p>18 <b>The test is not obvious, but the test is whether it</b></p> <p>19 <b>is obvious that the requirements for the revocation will</b></p> <p>20 <b>be met and, as I explained earlier in my statement, the</b></p> <p>21 <b>requirements for the revocation are set out in</b></p> <p>22 <b>paragraphs 1 and 2 of section 323.</b></p> <p>23 Q. Are you saying then that where there is a serious</p> <p>24 probability of non-performance, that would not fall</p> <p>25 within section 323(4)?</p> <p style="text-align: center;">Page 95</p>
<p>1 certain circumstances in 323(4), yes? I am so sorry,</p> <p>2 323(2), I misspoke.</p> <p>3 <b>A. Yes.</b></p> <p>4 Q. That is the provision that has the same language that we</p> <p>5 saw in section 286(2)(3) isn't it?</p> <p>6 <b>A. Yes.</b></p> <p>7 Q. Moving on to subsection (4), this is not about the right</p> <p>8 to revoke after a breach of contract, is it?</p> <p>9 <b>A. Yes. Yes. This is.</b></p> <p>10 Q. You agree with me?</p> <p>11 <b>A. Yes, I agree with you.</b></p> <p>12 Q. Thank you very much.</p> <p>13 It is about the right to revoke in anticipation of</p> <p>14 a breach of contract.</p> <p>15 <b>A. Yes.</b></p> <p>16 Q. It is dealing with a different situation to section 286,</p> <p>17 which requires performance to actually have been due,</p> <p>18 yes?</p> <p>19 <b>A. Yes -- it applies to different situations, yes.</b></p> <p>20 Q. The word used is "obvious" isn't it?</p> <p>21 <b>A. Pardon? My Lord, the word used in paragraph 4 is</b></p> <p>22 <b>"obvious"?</b></p> <p>23 Q. Yes.</p> <p>24 <b>A. Yes.</b></p> <p>25 Q. I would suggest to you that, as a matter of language,</p> <p style="text-align: center;">Page 94</p>	<p>1 <b>A. My Lord, again, could the question be rephrased?</b></p> <p>2 Q. You just told my Lord that when looking at section</p> <p>3 323(4), you look back to section 323(2) and the things</p> <p>4 listed there. You said that, yes?</p> <p>5 <b>A. Yes.</b></p> <p>6 Q. My next question to you was: do you not agree that</p> <p>7 a serious probability of performance, of</p> <p>8 non-performance, would fall within section 323(4) even</p> <p>9 though it is not listed above?</p> <p>10 <b>A. My Lord, a serious probability of non-performance would</b></p> <p>11 <b>surrender the rights to revoke the contract under 323,</b></p> <p>12 <b>in conjunction with paragraph (4).</b></p> <p>13 Q. Where do you see that in section 323?</p> <p>14 <b>A. My Lord, again the preconditions for the right to revoke</b></p> <p>15 <b>the contract are listed in paragraphs 1 and 2. You have</b></p> <p>16 <b>to have the non-performance, that is paragraph 1, and</b></p> <p>17 <b>you have the requirement for a grace period, also, at</b></p> <p>18 <b>paragraph 1. The requirement for a grace period is done</b></p> <p>19 <b>away with pursuant to paragraph 2.</b></p> <p>20 <b>Paragraph 4 extends the right in case of</b></p> <p>21 <b>an anticipatory breach.</b></p> <p>22 MR JUSTICE HILDYARD: What does "obvious" mean, do you</p> <p>23 think, in the context, does it mean certain or highly</p> <p>24 probable?</p> <p>25 <b>A. Highly probable, yes.</b></p> <p style="text-align: center;">Page 96</p>



<p>1 MR ALLISON: Subparagraph 2 of section 323 you would agree</p> <p>2 is only dealing with the dispensation of the grace</p> <p>3 period, when you can dispense with it?</p> <p>4 <b>A. Yes.</b></p> <p>5 Q. Can we just look in view of the difficulty we had with</p> <p>6 that question at what Judge Gruneberg says about</p> <p>7 section 323(4). If you go to tab 48 if you go to the</p> <p>8 very end of that tab, paragraph 23, can I just ask you</p> <p>9 to read that paragraph to yourself.</p> <p>10 MR JUSTICE HILDYARD: 48 --</p> <p>11 MR ALLISON: I am so sorry, 48E, sub tab E, which is</p> <p>12 Judge Gruneberg's commentary on section 323.</p> <p>13 MR JUSTICE HILDYARD: Yes.</p> <p>14 MR ALLISON: Then the very last paragraph should be a 23 in</p> <p>15 the left-hand column, beginning with a number 5.</p> <p>16 <b>A. Yes.</b></p> <p>17 Q. Could you just read that to yourself, please?</p> <p>18 <b>A. May I take a look again -- may I take a look at the</b></p> <p>19 <b>German?</b></p> <p>20 Q. Of course. (Pause)</p> <p>21 <b>A. Yes.</b></p> <p>22 Q. Looking at it together, and looking at the second</p> <p>23 sentence together in the English which begins, "The</p> <p>24 cases this encapsulates ..."</p> <p>25 Do you see that?</p> <p style="text-align: center;">Page 97</p>	<p>1 <b>or no, but I accept that there are additional situations</b></p> <p>2 <b>where an anticipatory breach may give rise to the right</b></p> <p>3 <b>of revocation but Judge Gruneberg relies on, by</b></p> <p>4 <b>expressly saying that the one case would be the serious</b></p> <p>5 <b>and definite refusal relates to -- relies on the two</b></p> <p>6 <b>situations listed in paragraph 2, dispensing with the</b></p> <p>7 <b>requirement for a grace period. But he goes on -- at</b></p> <p>8 <b>least that is my reading of this sentence -- that he</b></p> <p>9 <b>says even if it is necessary to have a grace period, it</b></p> <p>10 <b>is you still can revoke the contract.</b></p> <p>11 <b>In that sense, "Obvious" is not expanding, it is not</b></p> <p>12 <b>about the preconditions, as the preconditions are the</b></p> <p>13 <b>ones listed in, set out in paragraphs 1 and 2. It is</b></p> <p>14 <b>about whether the preconditions required by law are</b></p> <p>15 <b>obvious, if that is highly probable or not.</b></p> <p>16 MR JUSTICE HILDYARD: Do I have it right that 2, in your</p> <p>17 opinion, relates to an actual refusal, 4 relates to</p> <p>18 a prospective refusal and the prospect of the refusal to</p> <p>19 come within 4 has, in the words of Gruneberg I think,</p> <p>20 have to be a matter of virtual certainty.</p> <p>21 <b>A. My Lord, that goes -- that is along the lines, except</b></p> <p>22 <b>that prospective refusal is an anticipatory refusal to</b></p> <p>23 <b>perform.</b></p> <p>24 MR JUSTICE HILDYARD: It has not yet happened, but it is</p> <p>25 obvious it is going to happen?</p> <p style="text-align: center;">Page 99</p>
<p>1 <b>A. Yes.</b></p> <p>2 Q. What Judge Gruneberg tells us is:</p> <p>3 "The cases this encapsulates are in particular those</p> <p>4 in which the obligor prior to the due date refuses</p> <p>5 seriously and conclusively to render performance, the</p> <p>6 trust in his ability to performance has ceased to</p> <p>7 exist."</p> <p>8 And then:</p> <p>9 "... or if it is obvious from the circumstances that</p> <p>10 the obligee is unable to render performance by the end</p> <p>11 of subsequent timeframe which will have been set after</p> <p>12 performance falling due."</p> <p>13 Do you see that?</p> <p>14 <b>A. Yes.</b></p> <p>15 Q. Judge Gruneberg is telling us that section 323(4) is not</p> <p>16 just looking at the exceptions to a warning notice to</p> <p>17 a reminder in section 323(1), he is telling us it also</p> <p>18 includes the case where it becomes obvious from the</p> <p>19 circumstances that the obligee is unable to render</p> <p>20 performance, isn't he?</p> <p>21 <b>A. Yes.</b></p> <p>22 Q. You must accept now that section 323(4) is wider than</p> <p>23 just the things listed within section 323(2), the word</p> <p>24 "obvious" goes wider.</p> <p>25 <b>A. My Lord, may I -- again, the answer is not a simple yes</b></p> <p style="text-align: center;">Page 98</p>	<p>1 <b>A. It is obvious that in the future you will refuse to</b></p> <p>2 <b>perform.</b></p> <p>3 MR JUSTICE HILDYARD: I was quizzing you on obvious.</p> <p>4 I think you said it was not certain and you said highly</p> <p>5 likely and I think Judge Gruneberg says "virtually</p> <p>6 certain". Would you accept virtually certain?</p> <p>7 <b>A. I would accept virtually certain as ...</b></p> <p>8 MR ALLISON: Just let's see what one other commentator says</p> <p>9 about it behind tab 45, at tab 45D, where Ernst also</p> <p>10 makes the point that the word "obvious" in section 323,</p> <p>11 paragraph 4 is wider than a serious and definitive</p> <p>12 refusal to perform.</p> <p>13 Do you have 45D there?</p> <p>14 <b>A. Yes, I have.</b></p> <p>15 Q. It is paragraph 132 that I was going to look at with</p> <p>16 you.</p> <p>17 <b>A. Again, my Lord, may I --</b></p> <p>18 MR JUSTICE HILDYARD: It says wider.</p> <p>19 <b>A. May I take a look at the German version?</b></p> <p>20 MR ALLISON: Of course. The bit that I am interested in</p> <p>21 looking at with you, it is the first six lines, the</p> <p>22 final word is the word "performance" before article 78.</p> <p>23 MR JUSTICE HILDYARD: I think the word "wider" may be</p> <p>24 causing semantic difficulty.</p> <p>25 MR ALLISON: Maybe I will try a slightly different way of</p> <p style="text-align: center;">Page 100</p>

<p>1 putting it. What the commentators tell us is it is not 2 only a serious and definitive refusal to perform, but 3 also includes cases as Ernst says where for other 4 reasons it is evident that there will be no due 5 performance without the debtor having refused 6 performance.</p> <p>7 <b>A. Yes.</b></p> <p>8 <b>My Lord, that is the reading but in my opinion the</b> 9 <b>reading does not depend on the word "obvious", it</b> 10 <b>depends on the fact that the provision sets out that</b> 11 <b>these requirements can -- that under this requirement</b> 12 <b>set out by paragraph 4, there is the right for the</b> 13 <b>creditor to revoke the contract but it is in that sense,</b> 14 <b>it is again, from my reading and, and I think from the</b> 15 <b>reading also of Judge Gruneberg, obvious relates to the</b> 16 <b>degree of probability that these facts will be given if</b> 17 <b>they were to happen later on would give the creditor the</b> 18 <b>right to revoke the contract.</b></p> <p>19 Q. Professor Mülbert, that is incredibly helpful and 20 I think we are agreeing that when one is answering the 21 section 323(4) question, what you are looking at is the 22 degree of probability of that occurring. That is the 23 question.</p> <p>24 <b>A. Yes. There is -- you have the elements and the</b> 25 <b>prospective elements and you have the probability that</b></p> <p style="text-align: right;">Page 101</p>	<p>1 language in section 286(2)(3) being very different to 2 the language in section 323(4) is to look at the cases 3 in commentaries on the relevant provision.</p> <p>4 Can we now just look at some cases in commentary on 5 section 286(2)(3), the exception you say is engaged. 6 The first case is at tab 28 of the authorities bundle. 7 Do you have tab 28?</p> <p>8 <b>A. Yes, I do.</b></p> <p>9 Q. We looked at this case a little earlier. The part that 10 I would like to look at with you now is on page 81. The 11 point that I am going to put to you is that the 12 exceptions to section 286(1) should be construed 13 narrowly; shouldn't they?</p> <p>14 <b>A. My Lord, could I please be taken to the specific</b> 15 <b>sentence?</b></p> <p>16 Q. Professor Mülbert, I am sorry, I think it actually may 17 be a duff reference. I am so sorry, where I think I am 18 meant to go -- I am so sorry, it is there, in the middle 19 just below the middle of the page, in the English, it 20 begins with the words, "In light of ...", do you see 21 that?</p> <p>22 Can you see the words, "In light of ..."?</p> <p>23 <b>A. "Protection in the right of the rights established"?</b></p> <p>24 Q. Page 81 --</p> <p>25 <b>A. Yes.</b></p> <p style="text-align: right;">Page 103</p>
<p>1 <b>they will occur, yes.</b></p> <p>2 Q. There was one other commentator that I was just going to 3 look at who makes a very similar point. It is at 4 tab 67.</p> <p>5 MR JUSTICE HILDYARD: I think that is in volume 2.</p> <p>6 MR ALLISON: My Lord, certainly in my volume 2. I think it 7 may be in everyone else's.</p> <p>8 Do you have tab 67?</p> <p>9 <b>A. Yes. Yes.</b></p> <p>10 Q. This is a commentary also on section 323(4), do you see 11 the heading at the top "Withdraw prior to the due date" 12 paragraph 4, that is a reference to section 323(4)?</p> <p>13 What the commentator says -- if I could ask you to 14 read the first four lines -- is that it does include 15 a serious and definitive refusal to perform. He uses 16 the words, "Earnest and definitive refusal to perform" 17 but it also includes other cases and those other cases 18 are the ones we just discussed which is when, with 19 a certain degree of probability, you can say there will 20 be a breach of contract.</p> <p>21 <b>A. Yes, I agree with that.</b></p> <p>22 Q. You do agree with that?</p> <p>23 That is section 323 and what the commentators have 24 said in relation to the test for the word "obvious". 25 What I was going to do now, having seen that the</p> <p style="text-align: right;">Page 102</p>	<p>1 Q. -- we are looking not in the bottom paragraph, the 2 paragraph above it --</p> <p>3 <b>A. Yes.</b></p> <p>4 Q. -- and we are looking -- I think it is 10 lines up from 5 the end of the paragraph, "In light of these clear 6 legislative guidelines ..."</p> <p>7 Do you see that?</p> <p>8 <b>A. Yes.</b></p> <p>9 Q. It is focusing on section 286, paragraph 2, which is the 10 exceptions to the service of a warning notice, isn't it?</p> <p>11 <b>A. Yes.</b></p> <p>12 Q. It says, "In light of these clear legislative 13 guidelines, an expansive interpretation of section 286, 14 paragraph 2, number 1, is out of the question."</p> <p>15 <b>A. Yes.</b></p> <p>16 Q. You would agree that the courts have indicated that you 17 should construe the exceptions to the service of 18 a warning notice narrowly?</p> <p>19 <b>A. My Lord, I think I already answered on that previously</b> 20 <b>by saying that -- may I just restate my answer?</b></p> <p>21 <b>The courts are very often, or there are several</b> 22 <b>courts that have said, among them the German federal</b> 23 <b>high court, that these provisions must be interpreted in</b> 24 <b>a strict sense in order to prevent the creditor from</b> 25 <b>easily going away, or walking away, from a contract.</b></p> <p style="text-align: right;">Page 104</p>

<p>1       <b>Strict in that sense is, according to my</b></p> <p>2       <b>understanding, is to be distinguished from a narrow</b></p> <p>3       <b>interpretation. It means that it must be -- it is not</b></p> <p>4       <b>enough for the debtor to say that he won't pay because</b></p> <p>5       <b>of -- for some reason -- it must be, as the courts have</b></p> <p>6       <b>several times put it, the final word of the letter to</b></p> <p>7       <b>say, no, I am not going to perform. In that sense,</b></p> <p>8       <b>I prefer the expression "Strict interpretation" over the</b></p> <p>9       <b>"Narrow interpretation."</b></p> <p>10      Q. Thank you, that is helpful.</p> <p>11       Picking up on what you said in relation to the final</p> <p>12       word, you would agree, then, that a serious and</p> <p>13       definitive refusal to perform requires that the debtor</p> <p>14       unambiguously gives its final word that it won't</p> <p>15       perform?</p> <p>16      <b>A. Yes, that is the gist of -- my Lord, that is the gist of</b></p> <p>17       <b>what the German courts said on that.</b></p> <p>18      Q. Would you also agree that, as well as it needing to be,</p> <p>19       as you agree, an unambiguous final word that they will</p> <p>20       not perform, it needs to be something that is</p> <p>21       communicated by the debtor to the creditor?</p> <p>22      <b>A. My Lord, again, the answer to this question is: more no</b></p> <p>23       <b>than yes.</b></p> <p>24       <b>May I explain why I have chosen that phrase?</b></p> <p>25       <b>The communication means, implies, an element of</b></p> <p style="text-align: center;">Page 105</p>	<p>1       now?</p> <p>2      <b>A. Yes, I have it now.</b></p> <p>3      Q. First in relation to paragraph 91, you see that</p> <p>4       Staudinger says that you can only speak of a refusal of</p> <p>5       performance if the obligor denies performance in</p> <p>6       a certain manner as a final act, do you see that?</p> <p>7      <b>A. Yes.</b></p> <p>8      Q. Do you agree with that?</p> <p>9      <b>A. Yes.</b></p> <p>10     Q. Then you see he goes on to say, in the second sentence,</p> <p>11       "The horizon of the obligee, the recipient is the</p> <p>12       decisive factor".</p> <p>13       Then:</p> <p>14       "Such refusal must be considered as the last word of</p> <p>15       the obligor so that a change of the decision appears to</p> <p>16       be ruled out."</p> <p>17       Do you agree with that?</p> <p>18     <b>A. Yes.</b></p> <p>19     Q. Then, skipping over the cases, he refers for that</p> <p>20       proposition, he says that "Strict requirements should be</p> <p>21       imposed on the assumption that the obligor denies</p> <p>22       performance as a final act, do you see that?</p> <p>23     <b>A. Yes.</b></p> <p>24     Q. Then the next passage is just below it, at paragraph 93,</p> <p>25       and he says:</p> <p style="text-align: center;">Page 107</p>
<p>1       <b>a declaration from, and German courts and also some</b></p> <p>2       <b>commentators have held that it is not necessary to be</b></p> <p>3       <b>a declaration on the part of the debtor, but it can be</b></p> <p>4       <b>what is termed a simple act implying that they will not</b></p> <p>5       <b>be -- that they will not perform. In that sense,</b></p> <p>6       <b>communication is, from my understanding, not the</b></p> <p>7       <b>appropriate description of that fact.</b></p> <p>8      MR JUSTICE HILDYARD: Unequivocal conduct would suffice?</p> <p>9      <b>A. Yes.</b></p> <p>10     MR ALLISON: In view of that, can we just look at what the</p> <p>11       commentators have said on the point, starting with</p> <p>12       Staudinger at tab 70.</p> <p>13     <b>A. Tab 70?</b></p> <p>14     Q. Tab 70, yes. You should I hope find the translation of</p> <p>15       Staudinger there. There were two passages that -- three</p> <p>16       passages actually, that I was going to look at with you.</p> <p>17       The first is paragraph 91. If you could read the first</p> <p>18       three sentences.</p> <p>19     <b>A. My Lord, I am sorry. I can't find 91 behind --</b></p> <p>20     MR JUSTICE HILDYARD: There a little bit of a break. Maybe</p> <p>21       there is a green page or -- I have a green page in</p> <p>22       between. That is it, and then one more over. That is</p> <p>23       the one.</p> <p>24     <b>A. Okay, thank you.</b></p> <p>25     MR ALLISON: Professor Mülbart, I am sorry, do you have it</p> <p style="text-align: center;">Page 106</p>	<p>1       "The refusal to perform is to be classified as</p> <p>2       a commercial type action."</p> <p>3       Then going down three lines he starts to explain</p> <p>4       this and he says:</p> <p>5       "The statement must issue from the creditor or</p> <p>6       a representative."</p> <p>7       Do you agree with that? That you have to have</p> <p>8       a statement from the creditor or its representative?</p> <p>9     <b>A. My Lord, I do not agree with the requirement of</b></p> <p>10       <b>an explicit statement by the creditor if he conducts</b></p> <p>11       <b>himself in a way that can be understood to be a definite</b></p> <p>12       <b>refusal, I would submit that this is enough to qualify</b></p> <p>13       <b>as such an act.</b></p> <p>14     Q. You would disagree with Staudinger when he says that the</p> <p>15       refusal must be declared to the creditor or the person</p> <p>16       authorised by the creditor?</p> <p>17     <b>A. Yes, I do disagree with him.</b></p> <p>18     Q. Let's just see what another commentator says in those</p> <p>19       circumstances, tab 59A --</p> <p>20     MR JUSTICE HILDYARD: Can I just ask you about B94, sorry.</p> <p>21       Is that a different point, or the point you were on,</p> <p>22       "The refusal to perform can be implied and be concluded</p> <p>23       from external circumstances"?</p> <p>24     <b>A. My Lord, this is the point I wanted to make.</b></p> <p>25     MR JUSTICE HILDYARD: Yes.</p> <p style="text-align: center;">Page 108</p>

27 (Pages 105 to 108)

<p>1 <b>A. Also may I draw your Honour's attention to the first</b>  2 <b>sentence of paragraph B93, where the author in</b>  3 <b>Staudinger says and explicitly acknowledges that the</b>  4 <b>German federal high court took a different position</b>  5 <b>regarding the requirement of a declaration on</b>  6 <b>a transaction like act.</b>  7 <b>The abbreviation, it starts, in brackets, it starts</b>  8 <b>by saying compare, and then the AA is the German</b>  9 <b>expression not translated into English, I think, of</b>  10 <b>saying, "of a different opinion".</b>  11 MR ALLISON: Thank you. We saw earlier and Staudinger goes  12 on at paragraph 95 expressly to consider what does not  13 constitute a refusal to perform. Doesn't he?  14 <b>A. Yes.</b>  15 Q. He says that one thing that is not a last word is  16 an application to open insolvency proceedings?  17 <b>A. Yes, my Lord we saw that. He simply stated that without</b>  18 <b>giving any explanation, simply by referring to a -- by</b>  19 <b>reference to a core decision of the Munich court of</b>  20 <b>appeals.</b>  21 Q. Finally, let's just see what Judge Gruneberg says on the  22 provision as well, behind tab 48 at letter B.  23 <b>A. B?</b>  24 Q. Yes, absolutely. It is the third page, it is  25 paragraph 24C. Do you have a page headed, "Refusal to  Page 109</p>	<p>1 <b>A. Yes.</b>  2 Q. We have already looked at section 323(4) and established  3 that it includes when something is likely on the  4 probabilities from the circumstances. We are now though  5 looking at section 323(2)(1), which is the debtor  6 seriously and definitively refuses to perform.  7 Would you agree that the German courts and the  8 German commentators take the same view in relation to  9 this provision as they do in relation to the exception  10 to section 286 that we have just looked at?  11 <b>A. Yes, I do.</b>  12 Q. In other words, you would agree that the courts and the  13 commentators have emphasised the strict requirements,  14 including that it be the last word of the debtor?  15 <b>A. Yes, may I add, for the benefit of your Honour, that is</b>  16 <b>because it is the very same wording, it is not in</b>  17 <b>similar language, it is the same language used in the</b>  18 <b>two provisions. That is why they used the same ...</b>  19 Q. The courts have used phrases such as, "The debtor  20 unambiguously and with certainty expressed his will as  21 his last word". Do you agree with that?  22 <b>A. My Lord, I can't remember whether any court has said</b>  23 <b>this in exactly these words but it sounds about right.</b>  24 Q. If you would like to see it, the case is in bundle 5, if  25 you would like to see it, where I took the quote from.  Page 111</p>
<p>1 perform"?  2 <b>A. I do.</b>  3 <b>MR JUSTICE HILDYARD: 48?</b>  4 MR ALLISON: My Lord, yes, 48, sub tab B and it is the third  5 page of that section, headed "Refusal to perform", where  6 the judge is considering section 286(2)(3).  7 MR JUSTICE HILDYARD: After a green page again.  8 MR ALLISON: Yes.  9 MR JUSTICE HILDYARD: Yes.  10 MR ALLISON: You will see that what the judge says in the  11 last two sentences, that:  12 "Strict requirements must be placed on determining  13 the existence of an earnest and conclusive refusal to  14 perform, the refusal must be able to be deemed the last  15 word."  16 That is Judge Gruneberg's position.  17 <b>A. Yes.</b>  18 Q. Do you agree with that?  19 <b>A. I think it reflects the general German position on that.</b>  20 Q. We saw earlier that the section in section 323, that has  21 its parallel in the default exception, is section  22 323(2)(1), would you like to see that again?  23 <b>A. Yes, please.</b>  24 Q. It is tab 83S.  25 Do you have that section 323?  Page 110</p>	<p>1 The expression is required as the last word of the  2 debtor.  3 Maybe in fairness I should show it to you. It is  4 bundle 5, tab 11. If you feel you would like longer to  5 answer on this case, it is one of the ones that we  6 discussed this morning.  7 MR JUSTICE HILDYARD: Is this --  8 MR ALLISON: It is to show the question. I am going to just  9 show the passage so the witness can see, in fairness,  10 the formulation I just put.  11 MR DICKER: My Lord, it is not an entirely satisfactory  12 process. We left it I think this morning expecting to  13 receive a list of propositions for which these cases  14 were said to stand as authority. We have not had it.  15 The most we have had is a table indicating which  16 paragraphs in the various authorities my learned friend  17 would like to refer to.  18 We have no idea what Judge Fischer's own views in  19 relation to these cases are. I do not know what  20 proposition my learned friend intends to put to  21 Professor Mülbert, I have no idea whether  22 Judge Fischer --  23 MR JUSTICE HILDYARD: I take your general point, but on the  24 particular point, I think all that is confirming that  25 the same approach is taken to the same words and  Page 112</p>

<p>1 Mr Allison has focused on the word "expression", and I</p> <p>2 have a feeling I know what the witness will want to say</p> <p>3 about that.</p> <p>4 Ie, that expression by conduct as well as by</p> <p>5 words -- I think I have got the hang of this.</p> <p>6 MR DICKER: My Lord, I am confident as always your Lordship</p> <p>7 has.</p> <p>8 Can we perhaps leave it on this basis and see how it</p> <p>9 goes.</p> <p>10 MR JUSTICE HILDYARD: All right.</p> <p>11 Mr Allison, do I have wrong the two points you</p> <p>12 wanted? The second one, I think you have your answer.</p> <p>13 The first one, I think the witness was perfectly</p> <p>14 prepared to sort of accept that that may have been said</p> <p>15 by a German court, if it has been said, well so be it.</p> <p>16 Would you like to see the words to satisfy yourself?</p> <p>17 <b>A. Yes, and again, I had a look at the German original and</b></p> <p>18 <b>the German original probably can be translated by using</b></p> <p>19 <b>the word "expression", but expression conveys the</b></p> <p>20 <b>meaning of some communicative act which is lacking from</b></p> <p>21 <b>the German wording, because the German wording --</b></p> <p>22 <b>according to my reading of the German -- simply says</b></p> <p>23 <b>that if somebody had looked at the behaviour of the</b></p> <p>24 <b>debtor, it would have been obvious for him that the</b></p> <p>25 <b>debtor would not perform.</b></p> <p style="text-align: center;">Page 113</p>	<p>1 <b>it was not the answer but I think the answer was that</b></p> <p>2 <b>you could translate it into English by using the word</b></p> <p>3 <b>"expression" but that would convey a communicative act,</b></p> <p>4 <b>which is not meant at least according to my</b></p> <p>5 <b>understanding of German, which is obviously somewhat</b></p> <p>6 <b>limited, because others would read it different but my</b></p> <p>7 <b>reading would be that it is not implies a communicative</b></p> <p>8 <b>act. That is all I want to say on that.</b></p> <p>9 Q. When you say that though, do you mean it doesn't need to</p> <p>10 be an oral statement by someone or do you say it is</p> <p>11 something they don't actually need to be aware of?</p> <p>12 Which is it?</p> <p>13 <b>A. My Lord, it is not an oral statement to be made, it can</b></p> <p>14 <b>be -- can be an act and it must not be an act meant to</b></p> <p>15 <b>be directed to the creditor. That is what I wanted to</b></p> <p>16 <b>say.</b></p> <p>17 MR JUSTICE HILDYARD: Presumably, would it have to be known</p> <p>18 to the creditor?</p> <p>19 <b>A. My Lord, at the end of the day, yes, because without the</b></p> <p>20 <b>creditor getting knowledge of the fact, he would never</b></p> <p>21 <b>be, would know, about the right ... but let me make up</b></p> <p>22 <b>an example, this isn't a top example so I know that it</b></p> <p>23 <b>might be difficult but if, according to my</b></p> <p>24 <b>understanding, if somebody who has entered into a sales</b></p> <p>25 <b>contract takes the good and burns the good, that, apart</b></p> <p style="text-align: center;">Page 115</p>
<p>1 MR JUSTICE HILDYARD: I think we have the same general</p> <p>2 approach under our law, which is that you can make clear</p> <p>3 something by conduct, as you can by words, but sometimes</p> <p>4 it is more difficult by conduct, since conduct is often</p> <p>5 more equivocal than words -- or sometimes more equivocal</p> <p>6 than words.</p> <p>7 Beyond that, Mr Allison, do you want to bring out</p> <p>8 more than that?</p> <p>9 MR ALLISON: My Lord, the authorities for provision, having</p> <p>10 been raised by Professor Mülbert, all talk about the</p> <p>11 need for an expression of the last word by the debtor.</p> <p>12 MR JUSTICE HILDYARD: I think you can take it he does not</p> <p>13 agree with that but Mr Fischer may say otherwise,</p> <p>14 I don't know.</p> <p>15 MR ALLISON: Just to maybe take the answer that was given,</p> <p>16 what Professor Mülbert says is you may not need</p> <p>17 a communicative act.</p> <p>18 Just picking that up --</p> <p>19 MR JUSTICE HILDYARD: Right.</p> <p>20 MR ALLISON: I have done you a disservice,</p> <p>21 Professor Mülbert, what you say is:</p> <p>22 "It can be expressed in words but 'expression'</p> <p>23 conveys the meaning of some communicative act."</p> <p>24 That was your answer.</p> <p>25 <b>A. The answer I -- I think it was not -- my Lord, I think</b></p> <p style="text-align: center;">Page 114</p>	<p>1 <b>from all other legal remedies, derived from sales law,</b></p> <p>2 <b>that I think would qualify as a serious and definitive</b></p> <p>3 <b>refusal to perform. That is the general idea I wanted</b></p> <p>4 <b>to convey.</b></p> <p>5 MR ALLISON: That is very helpful but you agree that, in</p> <p>6 that context, also it has to be the final word of the</p> <p>7 debtor, there has to be no chance of them changing their</p> <p>8 mind?</p> <p>9 <b>A. Yes. My Lord, if I may add, in a case where you burn</b></p> <p>10 <b>a piece of furniture -- of whatever, it is only once,</b></p> <p>11 <b>there is no way of changing your mind afterwards and</b></p> <p>12 <b>performing.</b></p> <p>13 Q. Putting it another way, a degree of probability is not</p> <p>14 enough. It has to be the final word of the debtor?</p> <p>15 <b>A. Yes, it has to be the final word of the debtor, yes.</b></p> <p>16 Q. Thank you.</p> <p>17 You rely on only one case in support of your</p> <p>18 argument there does not need to be an actual</p> <p>19 communication across the line from the debtor to the</p> <p>20 creditor to trigger the provision. That case can be</p> <p>21 found at tab 12 of the authorities bundle. It is the</p> <p>22 case footnoted for the proposition at paragraph 119 of</p> <p>23 your third report that you don't need to communicate the</p> <p>24 intention seriously and definitively not to perform.</p> <p>25 This was not a case concerning section 286(2)(3),</p> <p style="text-align: center;">Page 116</p>

<p>1 the serious and definitive refusal exception, was it?</p> <p>2 <b>A. It was not a case.</b></p> <p>3 Q. I am so sorry?</p> <p>4 <b>A. It was not a case.</b></p> <p>5 Q. It was not a case concerning one of the other exceptions</p> <p>6 in the German civil code that also uses the language</p> <p>7 serious and definitive refusal to perform; was it?</p> <p>8 <b>A. My Lord, may the question be --</b></p> <p>9 Q. Of course, let me try. You said it is not a case</p> <p>10 concerning section 286(2)(3)?</p> <p>11 <b>A. Yes.</b></p> <p>12 Q. Serious and definitive refusal to perform?</p> <p>13 <b>A. Yes.</b></p> <p>14 Q. It is also not a case on the equivalent provision in</p> <p>15 section 323, is it?</p> <p>16 <b>A. No, it is not a case on section 3 --</b></p> <p>17 Q. It is not actually a case that considers a provision of</p> <p>18 the German code that has the words "Serious and</p> <p>19 definitive refusal to perform", is it?</p> <p>20 <b>A. My Lord, it is a case on a provision that no longer, in</b></p> <p>21 <b>the current version of the German civil code, exists.</b></p> <p>22 <b>Therefore it was a former ...</b></p> <p>23 Q. It is a case on the old section 634, isn't it?</p> <p>24 <b>A. Yes.</b></p> <p>25 Q. That was not in the authorities bundle, what we have</p> <p style="text-align: center;">Page 117</p>	<p>1 if remedying it is impossible or if it is refused by the</p> <p>2 contractor?</p> <p>3 <b>A. Yes.</b></p> <p>4 Q. In those circumstances you don't need to set a time</p> <p>5 period to remedy the defect, do you?</p> <p>6 <b>A. Yes.</b></p> <p>7 Q. Let's just have a look at the decision together.</p> <p>8 Bundle 1, tab 12. Could we start by looking at the</p> <p>9 facts together, which you will find in paragraphs 2A and</p> <p>10 2B. I am on the first full page of the report, page 2</p> <p>11 of 3, in 2A and 2B. Would you like to have a moment to</p> <p>12 remind yourself?</p> <p>13 <b>A. I would like to take a look at the German version,</b></p> <p>14 <b>please.</b></p> <p>15 Q. Of course. (Pause)</p> <p>16 <b>A. Yes, I have refamiliarised myself with that.</b></p> <p>17 Q. Thank you. Let's just try and summarise the key facts.</p> <p>18 The debtor had initially refused to remedy the defect,</p> <p>19 that is right?</p> <p>20 <b>A. Hmm.</b></p> <p>21 Q. I don't think -- the transcript was just catching up.</p> <p>22 The creditor did not though elect one remedy or the</p> <p>23 other at that point, did it?</p> <p>24 <b>A. No.</b></p> <p>25 Q. The debtor then said that he would remedy the defect,</p> <p style="text-align: center;">Page 119</p>
<p>1 done to help you look at this case is we now have that</p> <p>2 in the further authorities bundle. You can see the</p> <p>3 wording of the provision, it is behind tab 9B.</p> <p>4 I just propose to give you a minute</p> <p>5 Professor Mülbart just to remind yourself of the</p> <p>6 provision first.</p> <p>7 <b>A. Yes. (Pause)</b></p> <p>8 Q. Have you had a chance to have a look at that?</p> <p>9 <b>A. Yes.</b></p> <p>10 Q. Thank you.</p> <p>11 Let's just see if we can agree on the role of 634</p> <p>12 before we look at the case you rely on. The provision</p> <p>13 is about defective works, isn't it? That is what it is</p> <p>14 there for?</p> <p>15 <b>A. Yes.</b></p> <p>16 Q. It gives the creditor a right to elect either (1), to</p> <p>17 have the defect remedies or, (2), to get a reduction of</p> <p>18 the price?</p> <p>19 <b>A. Yes.</b></p> <p>20 Q. You agree with that?</p> <p>21 <b>A. Yes.</b></p> <p>22 Q. The remedies require a grace period to be set, don't</p> <p>23 they?</p> <p>24 <b>A. Yes.</b></p> <p>25 Q. There is though an exception at subsection 2, you see,</p> <p style="text-align: center;">Page 118</p>	<p>1 didn't he?</p> <p>2 <b>A. Yes.</b></p> <p>3 Q. And the creditor then tried to claim compensation?</p> <p>4 <b>A. Yes.</b></p> <p>5 Q. Just looking at paragraph 2C together, the reasoning of</p> <p>6 the court. It says:</p> <p>7 "The Court of Appeal ruled correctly the setting of</p> <p>8 a deadline was not dispensable because the debtor</p> <p>9 initially refused to provide the subsequent</p> <p>10 improvement."</p> <p>11 Even though the debtor originally said no, that was</p> <p>12 not enough:</p> <p>13 "... if the contractor is not willing to provide</p> <p>14 subsequent improvement, this initially results only in</p> <p>15 the option for the client to assert a claim for</p> <p>16 compensation of damages without setting a deadline."</p> <p>17 Then it says:</p> <p>18 "The refusal does not result in any further</p> <p>19 consequences for that moment."</p> <p>20 Dropping down a paragraph, the court then addresses</p> <p>21 the limited refusal and it says:</p> <p>22 "The limited effect of the refusal means, among</p> <p>23 other things, that the option to demand compensation of</p> <p>24 damages without setting a deadline can be suspended</p> <p>25 again."</p> <p style="text-align: center;">Page 120</p>

<p>1 There was not the option for the creditor to elect</p> <p>2 either remedy there?</p> <p>3 <b>A. Yes.</b></p> <p>4 Q. Thank you. Then it goes on to say:</p> <p>5 "The refusal is not a legal declaration that</p> <p>6 modifies the contractual relationship to which the</p> <p>7 contractor can be bound, it merely constitutes</p> <p>8 a behaviour which makes it easier to not set</p> <p>9 an otherwise required deadline."</p> <p>10 You rely on this case, don't you, to say that you</p> <p>11 don't need to communicate a serious and definitive</p> <p>12 refusal.</p> <p>13 <b>A. Yes, my Lord, I rely on that case in line with other</b></p> <p>14 <b>German commentators. Opinions are divided on that.</b></p> <p>15 Q. This is the only case you cite in your expert reports in</p> <p>16 support of the proposition. Would you agree that the</p> <p>17 German court here did not even consider whether</p> <p>18 a refusal had to be communicated?</p> <p>19 <b>A. My Lord, if the refusal is not a declaration on the part</b></p> <p>20 <b>of the creditor, or an act similar to a declaration,</b></p> <p>21 <b>there was no need for the courts to go into the question</b></p> <p>22 <b>of whether the communication is necessary or not.</b></p> <p>23 Q. That is a yes to my question. The court didn't consider</p> <p>24 it?</p> <p>25 <b>A. That is a qualified yes. Namely that the court did not</b></p> <p style="text-align: right;">Page 121</p>	<p>1 MR JUSTICE HILDYARD: No, I think I was wondering about</p> <p>2 a question but think that is fine.</p> <p>3 MR ALLISON: My Lord I will do my very best to finish today.</p> <p>4 We have gone a little bit more slowly after lunch than</p> <p>5 I had hoped, but we may well get there.</p> <p>6 MR JUSTICE HILDYARD: Within reason and subject to</p> <p>7 everyone's, including the witness's endurance, I will</p> <p>8 sit a little bit late in order to finish it off if that</p> <p>9 would assist you.</p> <p>10 MR DICKER: My Lord, that may deal with that.</p> <p>11 I was just going to raise this, if we were to run</p> <p>12 over till tomorrow with Professor Mülbert, obviously</p> <p>13 Judge Fischer requires a translator -- that is probably</p> <p>14 unfair, we require a translator. It does mean that</p> <p>15 according to the chancery guide, that takes somewhere</p> <p>16 between three and four times as long as it might</p> <p>17 otherwise do. We may be slightly pushed on timing as</p> <p>18 far as he is concerned, certainly if we were to overrun</p> <p>19 and potentially in any event.</p> <p>20 MR JUSTICE HILDYARD: What if you do overrun? What would be</p> <p>21 your response, as it were, to that? Would you be asking</p> <p>22 for us to continue with it on Monday, or what?</p> <p>23 MR DICKER: My Lord, I think that may be a question for</p> <p>24 review tomorrow. As I understand it, Judge Fischer can</p> <p>25 be available on Monday.</p> <p style="text-align: right;">Page 123</p>
<p>1 <b>consider it, but that the court had no reason to</b></p> <p>2 <b>consider it.</b></p> <p>3 Q. Actually, in this case it was communicated, wasn't it,</p> <p>4 by the debtor? There was a communication. It</p> <p>5 originally said it wasn't willing to do the works,</p> <p>6 didn't it?</p> <p>7 <b>A. As far as -- my Lord, as far as I remember the case,</b></p> <p>8 <b>yes.</b></p> <p>9 Q. There is nothing in this case which deals with whether</p> <p>10 one needs to communicate a serious and definitive</p> <p>11 refusal to perform?</p> <p>12 <b>A. My Lord, there is nothing on the facts of the case, it</b></p> <p>13 <b>is just the statement of the court in the decision</b></p> <p>14 <b>saying that it is not a declaration on the part of the</b></p> <p>15 <b>debtor.</b></p> <p>16 Q. As we saw earlier, you correctly acknowledge in your</p> <p>17 report that Schwarze and Staudinger actually does</p> <p>18 address the question and says that you do need to</p> <p>19 communicate.</p> <p>20 <b>A. My Lord, as I stated before, there is disagreement as to</b></p> <p>21 <b>the requirements.</b></p> <p>22 MR ALLISON: My Lord, unless my Lord had any questions on</p> <p>23 that particular point, I don't know whether this might</p> <p>24 be a convenient moment. I think I have rather gone over</p> <p>25 the halfway point.</p> <p style="text-align: right;">Page 122</p>	<p>1 MR ALLISON: He can.</p> <p>2 MR DICKER: Sorry, Professor Mülbert said it was</p> <p>3 Herr Fischer but, regardless, as I understand it,</p> <p>4 Judge Fischer can be available on Monday. That may not</p> <p>5 be ideal because those two days had been scheduled for</p> <p>6 closing submissions. I wonder if we might just see how</p> <p>7 we get on tomorrow.</p> <p>8 MR JUSTICE HILDYARD: Are you indicating to me that it is</p> <p>9 not beyond the realms of fantasy that you may need the</p> <p>10 Wednesday?</p> <p>11 The various moving parts, it is obviously wrong for</p> <p>12 Professor Mülbert not to be here when Professor Fischer</p> <p>13 is being cross-examined, so I think they need both to be</p> <p>14 available. I can accommodate you till 5.00 tomorrow and</p> <p>15 5.00 today, but quite often it is very, very tiring for</p> <p>16 the witness and for counsel, and in some cases even for</p> <p>17 the judge.</p> <p>18 I don't want an excessively long day for fear of</p> <p>19 focus vanishing.</p> <p>20 From my own point of view, and notwithstanding the</p> <p>21 clarity of the injunction that fixed-end trials must end</p> <p>22 on the fixed day, I would not necessarily hold to that</p> <p>23 under all circumstances if that were what you would</p> <p>24 prefer. I will let you think about that.</p> <p>25 MR DICKER: My Lord, I am very grateful.</p> <p style="text-align: right;">Page 124</p>

<p>1 MR JUSTICE HILDYARD: Five minutes. 2 (3.24 pm) 3 (A short adjournment) 4 (3.29 pm) 5 MR ALLISON: We just finished looking at the only authority 6 you relied on for not needing to communicate a serious 7 and definitive refusal not to perform. We also looked 8 earlier at the commentator saying that there would be no 9 refusal of performance in the case of a filing of 10 an insolvency application. 11 Could we look at Judge Fischer's report together, 12 please. In the volume that has the expert reports, 13 behind tab 12. 14 <b>A. Thank you.</b> 15 Q. His third report, and it is page 325, paragraph 49. 16 Could I just ask you to read that. (Pause) 17 <b>A. Yes.</b> 18 Q. I think you acknowledged earlier, there is no case or 19 commentator to support your view that the provision is 20 engaged on the filing of an application for insolvency, 21 is there? 22 <b>A. My Lord, I acknowledge that in line with my report.</b> 23 Q. Thank you. 24 Even if section 323(4) was relevant to the question 25 of default, and we have already explored the reasons why Page 125</p>	<p>1 244 on the last page. (Pause) 2 <b>A. My Lord, I am asked to take a look at the question at</b> 3 <b>footnote 242?</b> 4 Q. If you turn to the very last page of the -- do you see 5 one up from the bottom, number 244? 6 <b>A. Oh, I understood 242.</b> 7 Q. Thank you, if you could just read that as well. (Pause) 8 <b>A. Yes.</b> 9 Q. You would agree that even section 323, paragraph 4, 10 which is not based on a serious and definitive refusal 11 to perform would not on the author's view be triggered 12 by an application for insolvency proceedings? 13 <b>A. Yes.</b> 14 <b>Yes, my Lord may I qualify that "yes"? The</b> 15 <b>commentator at the end of the day does not take</b> 16 <b>a definite stance, but indicates that he would probably</b> 17 <b>in favour of that. He does not -- it is not as comes</b> 18 <b>across I think also from the English translation, it is</b> 19 <b>not a definite statement.</b> 20 Q. That, though, makes sense, I would suggest, in view of 21 the author's view that to allow it to be relied on would 22 infringe the insolvency administrator's right to choose 23 which contracts to continue and which contracts not to 24 continue? 25 <b>A. This -- my Lord, this is indeed the problem or the</b> Page 127</p>
<p>1 we say it is not, it doesn't actually help you, does it? 2 Let's have a look at tab 45 together. 3 MR JUSTICE HILDYARD: Of the authorities? 4 MR ALLISON: I am so sorry, yes, of the authorities. 5 Tab 45, it should be in your volume 1, 6 Professor Mülbert. It is behind sub tab D, which we 7 looked at earlier in the context of section 323(4). 8 The paragraph that I would like to look at with you 9 now is what the author says in relation to insolvency. 10 You will find that at the penultimate page of the tab, 11 paragraph 140. 12 Perhaps -- 13 <b>A. Excuse me, page 140?</b> 14 Q. No, paragraph 140. Can I just check we are at the same 15 place. It is tab 45, letter D -- 16 <b>A. Yes.</b> 17 Q. -- and if you turn right to the back of that tab, and 18 then if you turn in one more page, you should find 19 paragraph 140. Do you see it? 20 <b>A. Starting with, "Additional problems"?</b> 21 Q. Absolutely, yes. 22 Would you mind just reading that paragraph to 23 yourself. (Pause) 24 <b>A. Yes -- may I see the German version ...</b> 25 Q. Also if you could have a look at the text for footnote Page 126</p>	<p>1 <b>concern the commentator is dealing with in</b> 2 <b>paragraph 140, that this right only arises upon the</b> 3 <b>commencement of a German insolvency proceeding, so,</b> 4 <b>prior to that, it is open to debate whether that concern</b> 5 <b>should also extend to anything that happens prior to the</b> 6 <b>commencement of insolvency proceedings.</b> 7 Q. Thank you, Professor Mülbert, just pausing there to see 8 where we have reached on the default and insolvency 9 issues before we look at the damages points and the 10 assignment points. We have seen that your first 11 argument, that a proof of debt in LBIE's insolvency may 12 constitute a warning notice is not something that is 13 supported by any authorities, haven't we? 14 <b>A. My Lord, it is indeed not supported by any authorities,</b> 15 <b>but for the fact that no authority ever dealt with the</b> 16 <b>question of whether -- as far as I am aware of -- the</b> 17 <b>proof of debt in a foreign insolvency application</b> 18 <b>qualifies as such.</b> 19 Q. You acknowledge that to the extent the courts and the 20 writers have looked at proof of debt in a German 21 insolvency proceeding, they all say it does not 22 constitute a warning notice? 23 <b>A. Yes.</b> 24 Q. We have also just looked at your alternative case based 25 on section 286(2)(3), namely that the administration Page 128</p>



<p>1 application was a serious and definitive refusal to</p> <p>2 perform.</p> <p>3 I think you fairly acknowledged again then, when we</p> <p>4 were looking at the materials, there is no support for</p> <p>5 that argument in the authorities or the textbooks, is</p> <p>6 there?</p> <p>7 <b>A. Yes, I acknowledge that much.</b></p> <p>8 Q. We looked together at Judge Fischer's careful</p> <p>9 explanation between the interrelationship on the one</p> <p>10 hand of default and the other of insolvency. He</p> <p>11 explained why there was no default prior to the</p> <p>12 administration order, didn't he? We saw that together.</p> <p>13 <b>A. My Lord, we looked at Judge Fischer's explanation and,</b></p> <p>14 <b>yes, he explained it according to his interpretation of</b></p> <p>15 <b>and reading of the facts and interpretation of German</b></p> <p>16 <b>law, there was no default.</b></p> <p>17 Q. He said as a matter of German law, the issue of</p> <p>18 an insolvency application would not trigger the</p> <p>19 exception to the need to serve a warning notice, didn't</p> <p>20 he?</p> <p>21 <b>A. That is in addition what he said, yes. What he says,</b></p> <p>22 <b>yes.</b></p> <p>23 Q. He said that because of the parallels between the way</p> <p>24 one proves in a German insolvency and the way one proves</p> <p>25 in an English insolvency, that the same conclusions</p> <p style="text-align: right;">Page 129</p>	<p>1 <b>A. I am not an expert in insolvency law as compared to</b></p> <p>2 <b>Dr Fischer.</b></p> <p>3 Q. Thank you, Professor Mülbert, I would like to move away</p> <p>4 from the insolvency and default issues now on to the</p> <p>5 topic of damages and under section 288(4), in particular</p> <p>6 how the German courts analyse a claim for further</p> <p>7 damage.</p> <p>8 I think I can put one point out of the way very</p> <p>9 quickly. There is a disagreement between you and</p> <p>10 Judge Fischer in relation to how one characterises</p> <p>11 section 288(1), isn't there?</p> <p>12 <b>A. Yes, my Lord, there is a disagreement on that.</b></p> <p>13 Q. Judge Fischer says that it is not part of the law of</p> <p>14 damages because you have a fixed basic rate claim,</p> <p>15 whereas you say it is part of the law of damages. Is</p> <p>16 that a fair characterisation?</p> <p>17 <b>A. Yes. Yes, my Lord, that is a fair characterisation.</b></p> <p>18 Q. Perhaps being able to save time, I think you agree and</p> <p>19 I think Judge Fischer also agrees that whether it is</p> <p>20 part of the law of damages or whether it is not, is not</p> <p>21 actually necessary for part of the questions that need</p> <p>22 to be determined by the court here?</p> <p>23 <b>A. My Lord, we didn't say so in our joint statement. We</b></p> <p>24 <b>said that the -- may I go --</b></p> <p>25 Q. Would you like to see the joint statement? Would that</p> <p style="text-align: right;">Page 131</p>
<p>1 should follow in relation to an English insolvency. We</p> <p>2 saw that as well, didn't we?</p> <p>3 <b>A. Yes, my Lord, he said as much.</b></p> <p>4 Q. Can you just help me in relation to Judge Fischer. It</p> <p>5 is my understanding that he sat as a judge in Germany's</p> <p>6 highest court for around 12 years. That is right, isn't</p> <p>7 it?</p> <p>8 <b>A. My Lord, I haven't closely followed Judge Fischer's</b></p> <p>9 <b>career within the judiciary but that might be about</b></p> <p>10 <b>right.</b></p> <p>11 Q. Are you aware that he was the presiding judge of the 9th</p> <p>12 senate, which is responsible for insolvency law?</p> <p>13 <b>A. My Lord, I am fully aware of that fact.</b></p> <p>14 Q. He was the presiding judge of that senate for some</p> <p>15 five years.</p> <p>16 <b>A. My Lord, I don't know the exact term of office as</b></p> <p>17 <b>a presiding -- but ...</b></p> <p>18 Q. Professor Mülbert, you very helpfully produced</p> <p>19 a detailed CV for the purpose of these proceedings,</p> <p>20 listing your areas of expertise. You don't mention</p> <p>21 insolvency in that, do you?</p> <p>22 <b>A. My Lord, I did limited work on insolvency law.</b></p> <p>23 Q. I think you very fairly volunteered the point earlier</p> <p>24 today that you are not an expert in insolvency law.</p> <p>25 That is right, isn't it?</p> <p style="text-align: right;">Page 130</p>	<p>1 help?</p> <p>2 <b>A. Yes.</b></p> <p>3 Q. Of course. It is in the bundle with the authorities and</p> <p>4 it is behind tab 13.</p> <p>5 <b>A. I guess that would be the one.</b></p> <p>6 Q. Do you have tab 13, Professor Mülbert?</p> <p>7 <b>A. Yes.</b></p> <p>8 Q. Page 352, that is what I was thinking of. Number 5 at</p> <p>9 page 352.</p> <p>10 <b>A. What we agreed upon is stated very clearly, and I think</b></p> <p>11 <b>very accurately, in the last part of the sentence,</b></p> <p>12 <b>number 5, namely that the characterisation or nature of</b></p> <p>13 <b>the claim has no bearing on the prerequisites for the</b></p> <p>14 <b>claim to be made by the creditor.</b></p> <p>15 Q. Because if you have the relevant default under</p> <p>16 section 286, whether it is damages or not, you still get</p> <p>17 the basic rate?</p> <p>18 <b>A. Yes.</b></p> <p>19 Q. Thank you.</p> <p>20 Let's then -- because I think nothing will turn on</p> <p>21 it -- move on to section 252, and the way in which</p> <p>22 damages are assessed by the German courts.</p> <p>23 As a general proposition, you and Judge Fischer both</p> <p>24 agree that the normal way for calculating damages is to</p> <p>25 demonstrate and prove what you would have done with the</p> <p style="text-align: right;">Page 132</p>

<p>1 money that has been withheld, that is right, isn't it?</p> <p>2 Sorry, I am referring to the concrete mode.</p> <p>3 <b>A. My Lord, there are different ways to -- for different</b></p> <p>4 <b>persons there are different ways to calculate and to</b></p> <p>5 <b>claim damages. If you refer to the concrete mode of</b></p> <p>6 <b>claiming damages, then you would have to prove, but</b></p> <p>7 <b>depending on the type of damage you are claiming, you</b></p> <p>8 <b>would have to prove how you have spent the money, it</b></p> <p>9 <b>depends on the damage you are claiming compensation for,</b></p> <p>10 <b>what you have to prove.</b></p> <p>11 Q. I think by that you mean that, for example, there is</p> <p>12 a different way of looking at things when one is looking</p> <p>13 at lost profits under section 252 of the civil code?</p> <p>14 <b>A. My Lord, not only that, but if you claim damages for</b></p> <p>15 <b>a damage suffered because your car was hit, then you</b></p> <p>16 <b>would have to demonstrate very different facts.</b></p> <p>17 <b>Therefore, it depends on the kind of damage you are</b></p> <p>18 <b>going to claim compensation for, what is required by</b></p> <p>19 <b>you.</b></p> <p>20 Q. Thank you. I think the main issue in relation to</p> <p>21 damages is going to be lost profits and when the burden</p> <p>22 of proof can be relaxed, which we will come to in</p> <p>23 a moment, because that is where you and Judge Fischer</p> <p>24 part company.</p> <p>25 It is correct, isn't it, that the way that the</p> <p style="text-align: center;">Page 133</p>	<p>1 behind letter H, do you have that? Tab 83, letter H.</p> <p>2 It should be section 252, "Lost profits".</p> <p>3 <b>A. Yes, I have it.</b></p> <p>4 Q. Thank you.</p> <p>5 Just looking at it in general first, you would agree</p> <p>6 that a claimant still to get lost profits -- apart from</p> <p>7 the special rule which we will look at in a moment --</p> <p>8 has to plead and prove the type of investment that it</p> <p>9 would have made in the usual course?</p> <p>10 <b>A. Yes. Yes.</b></p> <p>11 Q. Can we just look at one decision, to make that clear,</p> <p>12 tab 19 of bundle 1. (Pause)</p> <p>13 Do you have that?</p> <p>14 <b>A. Yes.</b></p> <p>15 Q. If you go to the third page of the report, under (ii),</p> <p>16 you see a reference to section 252 in the second</p> <p>17 paragraph after (ii). You also see the court making</p> <p>18 clear that normally you would have to demonstrate and</p> <p>19 prove -- I am seven lines down -- referring to</p> <p>20 section 287 of the civil procedure code that we have</p> <p>21 just looked at:</p> <p>22 "According to which the latter needs only to</p> <p>23 demonstrate and prove the circumstances within the</p> <p>24 context of section 287 of the civil procedure code,</p> <p>25 which would in the normal course of things or under the</p> <p style="text-align: center;">Page 135</p>
<p>1 courts assess damages is addressed by section 287 of the</p> <p>2 German civil procedure code?</p> <p>3 <b>A. That is correct. That is the basis for assessing</b></p> <p>4 <b>damages.</b></p> <p>5 Q. Can we just have a look at that together. It is behind</p> <p>6 tab 85, sub tab B.</p> <p>7 <b>A. Yes.</b></p> <p>8 Q. Do you have it? A couple of quick questions. This</p> <p>9 provision applies to damages claimed generally, doesn't</p> <p>10 it?</p> <p>11 <b>A. Yes.</b></p> <p>12 Q. What it tells you is that the assessment of damages is</p> <p>13 in the discretion of the court, doesn't it?</p> <p>14 <b>A. Yes.</b></p> <p>15 Q. Section 286, which you will find at the previous tab,</p> <p>16 tells you again what the court will look at when</p> <p>17 exercising its discretion.</p> <p>18 <b>A. Yes.</b></p> <p>19 Q. Because of that discretion, because damages are assessed</p> <p>20 by the court in the exercise of their discretion, there</p> <p>21 is a limited power to interfere with a trial judge's</p> <p>22 assessment of damages, isn't there?</p> <p>23 <b>A. Yes, there is.</b></p> <p>24 Q. If we can just frame where you and Judge Fischer part</p> <p>25 company by going to section 252, which you should find</p> <p style="text-align: center;">Page 134</p>	<p>1 special circumstances of the case likely result in</p> <p>2 profits being made."</p> <p>3 That is the normal rule, isn't it, you have to prove</p> <p>4 the investment that you would have made?</p> <p>5 <b>A. My Lord, I take that as a question that as a normal rule</b></p> <p>6 <b>without section 252?</b></p> <p>7 Q. Do you say that, under section 252, you don't need to</p> <p>8 demonstrate and prove, unless one is in the simplified</p> <p>9 method, what would happen in the ordinary course?</p> <p>10 <b>A. My Lord, could the question please be rephrased.</b></p> <p>11 Q. Of course. Let me try again. Would you agree that</p> <p>12 under section 252 a claimant still needs to plead and</p> <p>13 prove the type of investment they would make in the</p> <p>14 normal course?</p> <p>15 <b>A. Yes, I would agree to that.</b></p> <p>16 Q. Thank you.</p> <p>17 You suggest in your third report that</p> <p>18 a non-negligible probability of profit may be enough.</p> <p>19 Would you like to look at that? It is paragraph 53 of</p> <p>20 your third report. So behind tab 11, paragraph 53.</p> <p>21 <b>A. Yes.</b></p> <p>22 Q. You refer to the fact a non-negligible probability may</p> <p>23 suffice, but then you say:</p> <p>24 "Other decisions however stipulate far stricter</p> <p>25 requirements action. For example, it has been held that</p> <p style="text-align: center;">Page 136</p>

<p>1 the creditor has to detail the specific investment he</p> <p>2 would have undertaken if he had received the funds on</p> <p>3 the due date."</p> <p>4 Do you see that?</p> <p>5 <b>A. Yes, I see that.</b></p> <p>6 Q. Would it be accurate to say that the majority view, both</p> <p>7 of the commentators and the courts, is that you need to</p> <p>8 prove those matters on the balance of probabilities?</p> <p>9 <b>A. My Lord, according to my reading, the question of -- the</b></p> <p>10 <b>term "probability" hardly ever shows up and in the</b></p> <p>11 <b>decisions I cited, the term probability, especially in</b></p> <p>12 <b>the second decision, was not used. I stand to be</b></p> <p>13 <b>corrected but as I seem to remember, it was not used.</b></p> <p>14 <b>It is not, at least, according to my understanding,</b></p> <p>15 <b>German courts and commentators do not apply a strict</b></p> <p>16 <b>probability threshold.</b></p> <p>17 MR ALLISON: My Lord, without wishing to descend into the</p> <p>18 debate once more, I would like to show Professor Mülbert</p> <p>19 one of the cases in the further bundle in which the</p> <p>20 highest German court does actually speak expressly in</p> <p>21 terms of probability.</p> <p>22 It goes to the answer that was just given, where the</p> <p>23 court does use, in the paragraph we identified, the word</p> <p>24 "probability".</p> <p>25 MR DICKER: My Lord, I must, I am afraid, again record our</p> <p style="text-align: center;">Page 137</p>	<p>1 cases in bundle 5 actually as my Lord will have noted</p> <p>2 during cross-examination for that reason.</p> <p>3 The only reason I think I should put, in fairness</p> <p>4 this one, is because the Bundesgerichtshof does speak</p> <p>5 expressly in terms of probability and then allow</p> <p>6 Professor Mülbert the opportunity to see if he wishes to</p> <p>7 change his answer.</p> <p>8 MR JUSTICE HILDYARD: Mr Allison, Mr Dicker, this is</p> <p>9 unsatisfactory and I do think that you should have, by</p> <p>10 now, have made good your indication, that you would</p> <p>11 explain the reasons for the late entry of this evidence.</p> <p>12 That would have forestalled debate, or at least</p> <p>13 reduced it.</p> <p>14 Mr Dicker, the problem I see here is that it would</p> <p>15 be -- this may be an important point to the standard of</p> <p>16 proof required. I don't see that I can in all</p> <p>17 conscience, shut my eyes.</p> <p>18 MR DICKER: I am making it plain I was not ultimately</p> <p>19 inviting your Lordship to do that. What we do say is we</p> <p>20 must have an equal opportunity to respond and at the</p> <p>21 moment I don't know how long that will take.</p> <p>22 My Lord, I do respectfully repeat -- your Lordship</p> <p>23 I am sure will have noted Mr Allison has still not</p> <p>24 answered when these documents were given to the</p> <p>25 translator.</p> <p style="text-align: center;">Page 139</p>
<p>1 objection. We still have not had an explanation of when</p> <p>2 these documents were provided to the translator,</p> <p>3 although we have now asked I think on four or five</p> <p>4 occasions.</p> <p>5 My Lord, it is not a matter entirely without</p> <p>6 significance because the agreed procedure was that</p> <p>7 authorities to which either party wanted to refer would</p> <p>8 be sent to the translator and each side would then have</p> <p>9 an opportunity to comment to the translator before the</p> <p>10 final version was produced.</p> <p>11 Although these apparently have been produced by the</p> <p>12 translator, it was done without our knowledge and</p> <p>13 without the practice which had been agreed between the</p> <p>14 parties, namely comments to the translator to ensure</p> <p>15 that the final version was indeed one everyone regarded</p> <p>16 as accurate. That has not been done and your Lordship</p> <p>17 has not been provided with an explanation as to why or</p> <p>18 when.</p> <p>19 MR ALLISON: My Lord, they were provided on Tuesday by the</p> <p>20 agreed translator, the normal practice has been then</p> <p>21 people then notify any issues with the translation.</p> <p>22 No issues with the translation have been notified</p> <p>23 since they were provided with on Tuesday. The reason</p> <p>24 why I wanted to go to a very short decision was just to</p> <p>25 address that point. I have missed most of the other</p> <p style="text-align: center;">Page 138</p>	<p>1 MR JUSTICE HILDYARD: No. I think, Mr Allison, your point</p> <p>2 as to whether there were any complaints about their</p> <p>3 product has rather missed the point as to when they were</p> <p>4 first alerted that they had a job to do. Mr Dicker's</p> <p>5 point there, as I understand it, is that before you gave</p> <p>6 them the job, or at the same time that you gave them the</p> <p>7 job, you should have notified Mr Dicker and his clients</p> <p>8 that you had found these additional authorities.</p> <p>9 I am anxious that we should not sort of lose a lot</p> <p>10 of time but I shall want you to explain to me when this</p> <p>11 was as a matter of fairness and good order, but I do</p> <p>12 want to see this -- I do think it is fair to the witness</p> <p>13 and to me to see this and if Mr Dicker feels that some</p> <p>14 qualification or some further case needs to be put in</p> <p>15 order that I should have a full picture, we will have to</p> <p>16 work out some opportunity for him to do so.</p> <p>17 I cannot tell, this may -- to coin a phrase from the</p> <p>18 early afternoon -- for all I know not be the last word.</p> <p>19 MR ALLISON: We hope, due to the matters we have covered</p> <p>20 already, may not even be a point that comes into play</p> <p>21 for your Lordship when deciding whether or not this can</p> <p>22 be a rate applicable to the debt, but --</p> <p>23 MR JUSTICE HILDYARD: I don't know.</p> <p>24 MR ALLISON: What I can say is I will make sure I get</p> <p>25 precise instructions --</p> <p style="text-align: center;">Page 140</p>

<p>1 MR JUSTICE HILDYARD: There seem to be two rival thoughts in  2 what you have shown to me. One is a non-negligible  3 possibility and the other is a probability likelihood,  4 if you like.  5 If the highest German court has opined once, or  6 possibly more times, it would be interesting to see it  7 but Mr Dicker must have a chance to review it.  8 MR ALLISON: My Lord, of course and in fairness to  9 Professor Mülbert he does just reference the  10 non-negligible probability and then go on himself in his  11 report to say that other decisions stipulate far  12 stricter requirements and proving each element.  13 MR JUSTICE HILDYARD: All right, well let's have a look at  14 it.  15 Mr Dicker, you must tell me what you need in respect  16 of it.  17 MR ALLISON: It is tab 4. In the context of section 252  18 that we are looking at at the moment.  19 Could I just ask you to read the paragraph "In case  20 of dispute ..."  21 MR JUSTICE HILDYARD: Sorry, where is that?  22 MR ALLISON: I am so sorry, it is on the second page of the  23 report, number 1, not letter A but the paragraph  24 underneath.  25 "In case of dispute ..."</p> <p style="text-align: right;">Page 141</p>	<p>1 <b>the standard of -- it is more certain than not is the</b>  2 <b>one to be applied and it is not -- if they were to take</b>  3 <b>that standard, I would not disagree with that. Because</b>  4 <b>but ultimately there is no I think established standards</b>  5 <b>so far.</b>  6 Q. That is very helpful. I just thought in fairness  7 I should ask your view as an expert on the point.  8 Moving then to the even more simplified method, that  9 is what you call it, which is the method of calculating  10 losses from foregone investment opportunities that both  11 you and Judge Fischer agree applies to banks, but you  12 say, I think, that it may be available to other  13 investors as well? That's right, isn't it?  14 <b>A. Yes, that is right.</b>  15 Q. Let's just see if we can agree how the standard  16 applicable to banks works. They have to plead and prove  17 an outline of their loan portfolio, don't they? That is  18 part of the way that they do it?  19 <b>A. My Lord, may I take you to paragraph 55 of my report,</b>  20 <b>where I explained in detail that it depends on the type</b>  21 <b>of the bank. The general standard established by the</b>  22 <b>German federal high court in one of its earliest</b>  23 <b>decisions was that depends on the profitability of the</b>  24 <b>different lines of business of banks.</b>  25 <b>Therefore it does not -- you have to take into</b></p> <p style="text-align: right;">Page 143</p>
<p>1 MR JUSTICE HILDYARD: The last paragraph on the page?  2 MR ALLISON: My Lord, yes. That was a quicker way of  3 explaining it, I am sorry.  4 <b>A. My Lord, I do not -- I do not want to dispute that the</b>  5 <b>German federal high court just ruled that, until you</b>  6 <b>refer first to an earlier decision where he also</b>  7 <b>employed that test. But, as you can see from the two</b>  8 <b>decisions I refer to in my report, the standard of</b>  9 <b>probability is not used consistently by all senates of</b>  10 <b>the German federal high court at all times.</b>  11 <b>So this is -- therefore I think Dr Fischer and</b>  12 <b>I agree that, if he would be questioned, because we</b>  13 <b>agreed as much at least in oral communication that the</b>  14 <b>standard of proof here is somewhat uncertain.</b>  15 Q. Maybe in fairness to you Professor Mülbert, because you  16 mentioned other cases, in your view as an expert in  17 matters of German law, do you think that the test is  18 that something should be more likely than not to qualify  19 under section 252, or do you think something being  20 non-negligible should be enough?  21 <b>A. That is -- my Lord, that is a very personal assessment,</b>  22 <b>given the divergence of decisions by the German federal</b>  23 <b>high court. Both standards seem to make sense to me at</b>  24 <b>first glance and it might well be that German courts at</b>  25 <b>the end of the day, German federal high courts say that</b></p> <p style="text-align: right;">Page 142</p>	<p>1 <b>account all lines of business and you have to weigh the</b>  2 <b>importance of the different lines of business in order</b>  3 <b>to determine an average profitability of the bank. If</b>  4 <b>it is a credit bank, it is simply the loan business, you</b>  5 <b>would have to check the profitability of the loan</b>  6 <b>portfolio, you would have to take into account if the</b>  7 <b>bank as a universal bank is engaging in other activities</b>  8 <b>as well, you would have to take into account that</b>  9 <b>activities as well.</b>  10 Q. Just exploring how the courts looked at that in view of  11 your answer, could you please go to bundle 1, tab 5.  12 You should, I hope, find a decision of the  13 Bundesgerichtshof. Do you see the way the basic  14 principle is summarised at number 1? (Pause)  15 <b>A. Yes, I see.</b>  16 Q. Without wishing to ask you to read too much of the  17 decision, I think it would probably be helpful for you  18 to see what the court says, starting on page 5 of 9,  19 using the little numbers on the bottom left-hand corner.  20 Do you see the 5 of 9?  21 <b>A. Yes.</b>  22 Q. Do you see the penultimate paragraph beginning, "The  23 abstract calculation of damages ..."?  24 <b>A. Yes.</b>  25 Q. Do you see that?</p> <p style="text-align: right;">Page 144</p>

<p>1 <b>A. Yes.</b></p> <p>2 Q. If you could kindly read from there, all the way through</p> <p>3 to just above number 3 on page 7 of 9. (Pause)</p> <p>4 <b>A. Yes. (Pause)</b></p> <p>5 <b>Yes, I see that a lot may be directed to the</b></p> <p>6 <b>exact --</b></p> <p>7 MR JUSTICE HILDYARD: I think we have been given our</p> <p>8 homework --</p> <p>9 MR ALLISON: In fairness to you, Professor Mülbert, rather</p> <p>10 than reading far too much to you, I was just asking you</p> <p>11 to remind yourself of the case before I ask you some</p> <p>12 questions.</p> <p>13 You would agree that what the court says is that you</p> <p>14 look at what the typical business of the bank is? I am</p> <p>15 thinking in particular on page 6 of 9, the second</p> <p>16 paragraph:</p> <p>17 "If the bank only primarily executes one [I think</p> <p>18 that should be] type of lending transaction, eg issuing</p> <p>19 mortgages, loans at purely mortgage banks, this is the</p> <p>20 typical business of the company."</p> <p>21 <b>A. Yes.</b></p> <p>22 Q. Then you see in the next paragraph:</p> <p>23 "In contrast, universal banks and most special banks</p> <p>24 to which the claimant belongs work with their freely</p> <p>25 available funds in a different matter."</p> <p style="text-align: center;">Page 145</p>	<p>1 presenting the documents necessary for determining the</p> <p>2 truth, without which a judicial estimate would be up in</p> <p>3 the air."</p> <p>4 Do you see that?</p> <p>5 <b>A. Yes.</b></p> <p>6 Q. Therefore the court goes on, without wanting to read too</p> <p>7 much to you, that:</p> <p>8 "The bank demanding compensation of damages must</p> <p>9 therefore demonstrate the circumstances relevant for the</p> <p>10 calculation of the average profit, in particular the</p> <p>11 standard earnings of all types of transactions it</p> <p>12 executes and the particularities of its business</p> <p>13 structure at the time in question. Particularly high</p> <p>14 demands must be placed on the burden of proof with</p> <p>15 regard to special banks."</p> <p>16 Then the court says why the bank in this case has</p> <p>17 not managed to discharge the burden of proof:</p> <p>18 "This burden of proof is not fulfilled by the</p> <p>19 claimant with the submission she would have generated</p> <p>20 a profit of 7.5 per cent of the capital during [the</p> <p>21 years that are stated] had she been able to utilise the</p> <p>22 owed sum in a profitable manner. The average interest</p> <p>23 earned during this period of time was at times ..."</p> <p>24 Then the court looks at all of the different sorts</p> <p>25 of loans that were made available at that time, doesn't</p> <p style="text-align: center;">Page 147</p>
<p>1 Essentially the court goes on to say they have</p> <p>2 a broader book of business.</p> <p>3 <b>A. Yes.</b></p> <p>4 Q. Then it says that in relation to those banks:</p> <p>5 "Therefore one cannot assume [with those banks] that</p> <p>6 there is a typical course of business with typical</p> <p>7 profit perspectives. It is also prohibited to single</p> <p>8 out a certain type of transaction for instance current</p> <p>9 account credit and use them as the basis for the</p> <p>10 measurement of the loss of profit."</p> <p>11 Do you see that?</p> <p>12 <b>A. Yes.</b></p> <p>13 Q. It has to be an average of all of the business?</p> <p>14 <b>A. My Lord, it even has to be a weighted average, depending</b></p> <p>15 <b>on the relative importance of the different lines of</b></p> <p>16 <b>business.</b></p> <p>17 Q. Then you see at the bottom of the page, the comment</p> <p>18 that, when you are looking at loss of profits, apart</p> <p>19 from the simplified method, you have to prove them:</p> <p>20 "The damaged party must present and prove such</p> <p>21 concrete circumstances upon which the abstract</p> <p>22 calculation depends. Therefore abstract calculation</p> <p>23 also requires substantiation. In addition the</p> <p>24 application of [the rule we looked at earlier] does not</p> <p>25 relieve the damaged party from the requirement of</p> <p style="text-align: center;">Page 146</p>	<p>1 it?</p> <p>2 <b>A. Yes.</b></p> <p>3 Q. It does it by looking at the German federal bank</p> <p>4 reports, doesn't it?</p> <p>5 <b>A. May I add --</b></p> <p>6 Q. Of course, please.</p> <p>7 <b>A. The court, what he did, according to my understanding of</b></p> <p>8 <b>the case, he thought that it was improbable and at the</b></p> <p>9 <b>end of that paragraph just read out to you, the court</b></p> <p>10 <b>says that that he thinks, based on the publicly</b></p> <p>11 <b>available figures that:</b></p> <p>12 <b>"The claimant had based its calculations on damages</b></p> <p>13 <b>on the most lucrative transactions."</b></p> <p>14 <b>He in a way said that because of that he thought</b></p> <p>15 <b>that the claimant had not fulfilled its burden of proof</b></p> <p>16 <b>for that reason.</b></p> <p>17 <b>It was a kind of I think he exerted a kind of</b></p> <p>18 <b>control based on publicly available statistics.</b></p> <p>19 Q. It was done on the basis of publicly available</p> <p>20 statistics, you just said?</p> <p>21 <b>A. Yes.</b></p> <p>22 Q. Yes.</p> <p>23 If we can look at a slightly more recent case of the</p> <p>24 Bundesgerichtshof on the same issue, behind tab 11.</p> <p>25 Just if you could remind yourself of number 1 at the top</p> <p style="text-align: center;">Page 148</p>

<p>1 of the page, the key point that we are looking at the</p> <p>2 case for. (Pause)</p> <p>3 Have you seen that?</p> <p>4 <b>A. Yes.</b></p> <p>5 Q. Thank you.</p> <p>6 Then if we can turn to page 5 of 9, where the court</p> <p>7 starts to address the claim for loss of profits. If we</p> <p>8 could look at the bottom of the page, and pick up where</p> <p>9 the court says:</p> <p>10 "The bank shall be compensated for the benefits it</p> <p>11 would have received had it otherwise invested in the</p> <p>12 outstanding funds upon timely repayment."</p> <p>13 Then it says:</p> <p>14 "The bank is not required to concretely demonstrate</p> <p>15 and prove this option in accordance with the federal</p> <p>16 court's ruling. Like other salespersons the bank is</p> <p>17 entitled to calculate its damages abstractly."</p> <p>18 That is the abstract method under 252 that we</p> <p>19 discussed earlier, isn't it?</p> <p>20 <b>A. Yes.</b></p> <p>21 Q. Then, what it goes on to say though is that it is</p> <p>22 assumed that a credit bank would have utilised withheld</p> <p>23 funds in a profitable manner in the framework of its</p> <p>24 business operations, namely by concluding new loan</p> <p>25 agreements and with borrowers at standard bank interest</p> <p style="text-align: center;">Page 149</p>	<p>1 bank in an unreasonable manner to disclose internal</p> <p>2 operational data. If it demands the standard nominal</p> <p>3 market interest rate as part of the abstract calculation</p> <p>4 of damages, a bank does not need to disclose which</p> <p>5 interest rates it calculates for the different types of</p> <p>6 loans, how it refinances its loans and what proportion</p> <p>7 of refinancing costs, administrative expenses and profit</p> <p>8 comprise the nominal interest it charges."</p> <p>9 It goes on to say that the average interest rate of</p> <p>10 the standard nominal market interest rates can then be</p> <p>11 calculated based on the interest statistics of the</p> <p>12 German federal bank."</p> <p>13 Again, it is looking to the published German federal</p> <p>14 bank statistics to work out what can be claimed without</p> <p>15 having to demonstrate it. That is right, isn't it?</p> <p>16 <b>A. Yes, that is -- that is right. May I clarify that point</b></p> <p>17 <b>somewhat further?</b></p> <p>18 Q. Of course, please do.</p> <p>19 <b>A. If the bank wants to avoid disclosing its business</b></p> <p>20 <b>operational structure then it can rely on the publicly</b></p> <p>21 <b>available data. That is what was said here.</b></p> <p>22 Q. If the bank does not want to rely on publicly available</p> <p>23 data but wants to claim more than that for its loss of</p> <p>24 profits, if we go down to number 3, the court tells us</p> <p>25 what they have to do then:</p> <p style="text-align: center;">Page 151</p>
<p>1 rates during the time in question."</p> <p>2 Then:</p> <p>3 "The debtor must compensate the nominal interest</p> <p>4 rates as default damages if the debtor pays on time that</p> <p>5 would have been earned in this manner, but which were</p> <p>6 lost due to the default."</p> <p>7 The next key point, it is saying it is okay in</p> <p>8 relation to nominal interest rates but:</p> <p>9 "If the bank executes different kinds of credit</p> <p>10 transactions for which different standard nominal bank</p> <p>11 interest rates apply, it can only calculate its damages</p> <p>12 based on an average rate which is based on its special</p> <p>13 business structure and on the proportion of different</p> <p>14 types of credit in its total credit transaction volume."</p> <p>15 In other words, the court is saying that you cannot</p> <p>16 just pick the most profitable part of your business, you</p> <p>17 have to look at all of it, isn't it?</p> <p>18 <b>A. Yes, that is what the court said in this earlier ruling</b></p> <p>19 <b>and what he reiterates in this ruling.</b></p> <p>20 Q. Two more passages to look at when the court then</p> <p>21 develops the point. If we go to page 7 of 9, at number</p> <p>22 3, it says:</p> <p>23 "The objection cannot be made against the default</p> <p>24 interest calculation method of the ruling from the</p> <p>25 federal court of justice claiming that it forces the</p> <p style="text-align: center;">Page 150</p>	<p>1 "If the bank does not wish to demand interest based</p> <p>2 on an abstract calculation of damages, hence at</p> <p>3 an average interest rate of the standard nominal market</p> <p>4 interest rates appropriate for the composition of its</p> <p>5 lending business, but instead demands a higher interest</p> <p>6 rate, it must concretely demonstrate and prove, while</p> <p>7 waiving all easements on the burden of proof, of the</p> <p>8 abstract calculation of damages that is based on the</p> <p>9 peculiarities of its business structure or the</p> <p>10 circumstances of the individual case, it could have</p> <p>11 invested the withheld funds at a higher interest rate</p> <p>12 had it been paid back on time."</p> <p>13 In other words, if the bank says, "Well the market</p> <p>14 average rates published by the German federal bank are</p> <p>15 not enough, we want more", they actually have to prove</p> <p>16 that loss, don't they?</p> <p>17 <b>A. My Lord, from my understanding of the case, the court</b></p> <p>18 <b>did not talk about the abstract calculation but said, if</b></p> <p>19 <b>the bank wants to apply a concrete calculation of its</b></p> <p>20 <b>damages, then the requirements set out in this</b></p> <p>21 <b>subparagraph (3) apply.</b></p> <p>22 <b>If I just may introduce my understanding of the</b></p> <p>23 <b>German translation. The sentence starts, according to</b></p> <p>24 <b>my understanding, that by the court saying: if the bank</b></p> <p>25 <b>does not want to rely on an abstract calculation, then</b></p> <p style="text-align: center;">Page 152</p>

38 (Pages 149 to 152)

<p>1 <b>it has to satisfy the demands here in paragraph 3.</b></p> <p>2 Q. In those circumstances it would need to prove the higher</p> <p>3 losses that it has sustained?</p> <p>4 <b>A. In line with what we established previously, that the</b></p> <p>5 <b>concrete way of calculating the damages, you have to</b></p> <p>6 <b>demonstrate and prove the pertinent facts.</b></p> <p>7 Q. It is right that if you are looking at the standard</p> <p>8 rate, if you are trying to rely on the standard rate,</p> <p>9 that is the standard market interest rate for the</p> <p>10 investment type that generates the lowest interest</p> <p>11 earnings. You see that in the middle of the page in the</p> <p>12 second paragraph of number 3.</p> <p>13 <b>A. Yes, I see that.</b></p> <p>14 Q. You agree the court is saying that if you want to rely</p> <p>15 on market rates, it is the lowest standard market rates</p> <p>16 for the type of investment business? (Pause)</p> <p>17 <b>A. My Lord, I disagree with that statement that it must</b></p> <p>18 <b>apply the lowest market rates. According to my reading,</b></p> <p>19 <b>it must apply the market rates for the different lines</b></p> <p>20 <b>of business, or different types of business it operates,</b></p> <p>21 <b>not one lowest market rate. That follows from</b></p> <p>22 <b>the bank -- may I take your Lordship to the second but</b></p> <p>23 <b>last sentence of this first paragraph, starting with:</b></p> <p>24 <b>"The bank must merely demonstrate what proportion of</b></p> <p>25 <b>the total volume of the transactions dealt with what</b></p> <p style="text-align: center;">Page 153</p>	<p>1 <b>A. Yes, but I wanted to -- my Lord, I wanted to point out</b></p> <p>2 <b>that the wording of the decisions and the wording of the</b></p> <p>3 <b>decision we just talked about is different and also the</b></p> <p>4 <b>earlier decision, namely the decision cited in footnote</b></p> <p>5 <b>23, also said that banks, something along the lines of,</b></p> <p>6 <b>"Banks, like other merchants, can apply that abstract</b></p> <p>7 <b>way of calculating but there are difference because of</b></p> <p>8 <b>the specificities of the banking business ..."</b></p> <p>9 Q. There is no case, for example, that says that a hedge</p> <p>10 fund can use this method. Is there?</p> <p>11 <b>A. There is no case saying that a hedge fund can ...</b></p> <p>12 Q. There is no case saying that a financial institution</p> <p>13 other than a bank can use this method; is there?</p> <p>14 <b>A. My Lord, again, there is no case dealing with the hedge</b></p> <p>15 <b>fund or with other financial institutions. I stand to</b></p> <p>16 <b>be corrected, there might be one other -- there is no</b></p> <p>17 <b>case at the level of the German federal high court</b></p> <p>18 <b>dealing with a hedge fund or with another financial</b></p> <p>19 <b>institution.</b></p> <p>20 <b>The language used by the federal High Court, the</b></p> <p>21 <b>German federal high court, both in its decisions in --</b></p> <p>22 <b>the decision cited in footnote 23 and the decision cited</b></p> <p>23 <b>in footnote 24 are much broader than simply dealing with</b></p> <p>24 <b>banks.</b></p> <p>25 Q. It was only a bank's claim being considered in those</p> <p style="text-align: center;">Page 155</p>
<p>1 <b>types of loan represent ..."</b></p> <p>2 <b>Then it goes on to say that to these different types</b></p> <p>3 <b>of loans, the market rates will be applied.</b></p> <p>4 Q. That is in circumstances though where a bank does not</p> <p>5 want to itemise its business, isn't it? That is what</p> <p>6 the paragraph tells us.</p> <p>7 <b>A. My Lord, yes, within the abstract way of calculating</b></p> <p>8 <b>damages.</b></p> <p>9 Q. Thank you.</p> <p>10 Can we just see what Judge Gruneberg says in</p> <p>11 relation to the simplified method at tab 48. Tab 48C,</p> <p>12 I am now moving on to the divergence between you and</p> <p>13 Judge Fischer. We have seen the cases, the only cases</p> <p>14 refer to banks being able to claim this rate. The cases</p> <p>15 we have just looked at are both bank cases, aren't they?</p> <p>16 <b>A. My Lord, again, the answer is not a simple yes or no.</b></p> <p>17 <b>The answer is, the cases were about banks but the court</b></p> <p>18 <b>said that banks, like any other merchants -- I seem to</b></p> <p>19 <b>recall that this was read to you aloud -- can apply the</b></p> <p>20 <b>abstract method of calculating basis.</b></p> <p>21 <b>Again, may I take you to my report in section --</b></p> <p>22 Q. Of course, I think it is paragraph 56 of your report.</p> <p>23 <b>A. Yes, paragraph 56.</b></p> <p>24 Q. I was going to show you what Judge Gruneberg says in</p> <p>25 relation to who can benefit from it.</p> <p style="text-align: center;">Page 154</p>	<p>1 cases, wasn't it?</p> <p>2 <b>A. Yes.</b></p> <p>3 Q. You properly mention in your report that the German</p> <p>4 court has considered and rejected the idea that</p> <p>5 an insurance company could benefit from this method of</p> <p>6 proof?</p> <p>7 <b>A. My Lord, there is one decision by a court of first</b></p> <p>8 <b>instance and you find this slide in my report in</b></p> <p>9 <b>paragraph 56, footnote 30, it is the court of first</b></p> <p>10 <b>instance and the subsequent court, the subsequent</b></p> <p>11 <b>appellate court.</b></p> <p>12 <b>But these decisions were rendered prior to the</b></p> <p>13 <b>decision -- as far as I remember -- rendered by the</b></p> <p>14 <b>German federal high court in 1974, which would be the</b></p> <p>15 <b>decision in cited in footnote 23.</b></p> <p>16 Q. You acknowledge that company said it is only banks, and</p> <p>17 insurance companies cannot benefit from the method of</p> <p>18 proof.</p> <p>19 <b>A. I acknowledge that, my Lord, these decisions, that</b></p> <p>20 <b>insurance companies cannot benefit from that, yes.</b></p> <p>21 Q. I think we had a detour, we were going to look at what</p> <p>22 one of the judges of the banking senate in the</p> <p>23 Bundesgerichtshof thinks of the issue. It was tab 48,</p> <p>24 sub tab C. The first part of the paragraph addresses</p> <p>25 the point that we were looking at in the other cases,</p> <p style="text-align: center;">Page 156</p>

<p>1 which is that the average calculation takes the typical</p> <p>2 market interest rates into account. The point that</p> <p>3 I was going to look at with you begins, do you see the</p> <p>4 BB, about seven lines up from the bottom?</p> <p>5 <b>A. Yes.</b></p> <p>6 Q. What Judge Gruneberg says is that:</p> <p>7 "All other creditors must show and prove the</p> <p>8 interest lost specifically. The creditor may not invoke</p> <p>9 prima facie evidence because the default interest is</p> <p>10 considerably higher than the yield received on a typical</p> <p>11 average investment in funds."</p> <p>12 Judge Gruneberg says in contrast to his discussion</p> <p>13 about banks above, that all other creditors must show</p> <p>14 and prove the interest lost specifically, doesn't he?</p> <p>15 <b>A. My Lord, he does and paragraph 56 of my report says</b></p> <p>16 <b>exactly that. Indeed paragraph 56 ends with that quote.</b></p> <p>17 Q. One of the reasons for that is likely to be that, how</p> <p>18 does one work out what the typical market interest rate</p> <p>19 is for people other than banks? The courts look at the</p> <p>20 published federal rates for banks, don't they?</p> <p>21 <b>A. My Lord, may the question be repeated?</b></p> <p>22 Q. Of course. We established earlier when looking at the</p> <p>23 two bank cases that the court looks at the published</p> <p>24 rates by the German federal bank for the type of</p> <p>25 business of the bank?</p> <p style="text-align: center;">Page 157</p>	<p>1 they wanted to do it?</p> <p>2 <b>A. Yes.</b></p> <p>3 Q. That is everything I wanted to ask you in relation to</p> <p>4 damages.</p> <p>5 I am mindful of the time. I did have a few</p> <p>6 questions in relation to assignment as my last area.</p> <p>7 I am very much in my Lord's and Professor Mülbert's</p> <p>8 hands as to whether we should try and finish this</p> <p>9 evening or not.</p> <p>10 MR JUSTICE HILDYARD: As a guesstimate, how long do you</p> <p>11 think?</p> <p>12 MR ALLISON: I would be very surprised if we are not</p> <p>13 finished by 5.00, but it depends on the answers. The</p> <p>14 early part of this afternoon took a little longer than</p> <p>15 it did this morning.</p> <p>16 MR JUSTICE HILDYARD: First of all, how are you feeling, it</p> <p>17 is always a strain having to give evidence, even more so</p> <p>18 in a language which is not your own?</p> <p>19 <b>A. Thank you, my Lord. If I could just get up, my back</b></p> <p>20 <b>starts hurting.</b></p> <p>21 MR JUSTICE HILDYARD: Would you like to have a five-minute</p> <p>22 break now or we could come back in the morning, which</p> <p>23 would you --</p> <p>24 <b>A. I prefer to have a five-minute break now.</b></p> <p>25 MR JUSTICE HILDYARD: A five-minute break now?</p> <p style="text-align: center;">Page 159</p>
<p>1 <b>A. Yes, we did.</b></p> <p>2 Q. The short point for you is that there are no such</p> <p>3 publicly available published rates in relation to other</p> <p>4 investors, are there?</p> <p>5 <b>A. There are not, yes, I agree.</b></p> <p>6 Q. Thank you.</p> <p>7 <b>A. But -- but -- I agree but may I, my Lord, add something.</b></p> <p>8 MR JUSTICE HILDYARD: Sure.</p> <p>9 <b>A. These publicly statistics or publicly made available</b></p> <p>10 <b>statistics are used, are referred to by the court in</b></p> <p>11 <b>order to alleviate the burden on the bank to disclose</b></p> <p>12 <b>its business, its different lines of business and the</b></p> <p>13 <b>details on its line of business. It is for that reason</b></p> <p>14 <b>that it allows the banks to rely on these public</b></p> <p>15 <b>statistics.</b></p> <p>16 <b>If a bank, while using the abstract method of</b></p> <p>17 <b>calculation, would want to disclose that part of this</b></p> <p>18 <b>business, then there would be no need to rely on the</b></p> <p>19 <b>publicly available statistics. The same holds true for</b></p> <p>20 <b>every other business entity. If they wish to, they</b></p> <p>21 <b>could satisfy that stricter standard and so there is no</b></p> <p>22 <b>need for other business operations to rely on public</b></p> <p>23 <b>statistics, it just makes it more difficult for them.</b></p> <p>24 Q. Professor Mülbert, thank you.</p> <p>25 They would be subject to the stricter standard if</p> <p style="text-align: center;">Page 158</p>	<p>1 MR ALLISON: My Lord, thank you.</p> <p>2 MR JUSTICE HILDYARD: I have a problem which I had not</p> <p>3 remembered on the Wednesday, because, though apparently</p> <p>4 I am promised judgment writing time, it seems to have</p> <p>5 been filled up by another matter. I could make some</p> <p>6 arrangements but the sooner I know whether I will need</p> <p>7 to, the more likely I am in being successful.</p> <p>8 MR DICKER: I understand that.</p> <p>9 MR JUSTICE HILDYARD: I mean it does -- putting my cards on</p> <p>10 the table, I am concerned that today has been a long day</p> <p>11 for everybody and translation does increase the time in</p> <p>12 getting to the same place.</p> <p>13 MR DICKER: The difficulty always is one never knows quite</p> <p>14 how long it is going to increase it by, which is --</p> <p>15 MR JUSTICE HILDYARD: Yes, against that and although harsh</p> <p>16 I have simply followed the timetable recommended to me,</p> <p>17 by which I do not mean to sound excessively pious.</p> <p>18 I just mean to remind you that that is the position.</p> <p>19 If you do need further time and if you do think that</p> <p>20 that will have a knock-on effect, because you must have</p> <p>21 proper time to consider your submissions, because then</p> <p>22 they will be a lot more useful to me and you think that</p> <p>23 the matter could be met by at least a half day on the</p> <p>24 Wednesday, for example, then the sooner I know that, the</p> <p>25 more leverage I have with listings.</p> <p style="text-align: center;">Page 160</p>



<p>1 MR DICKER: My Lord, can I indicate for our part on this  2 side that I think that may be necessary. My learned  3 friend is going to take, he thinks, until 5.00. There  4 is then re-examination and there are a few points on  5 which I would obviously wish to --  6 MR JUSTICE HILDYARD: Yes.  7 MR DICKER: We are going to start --  8 MR JUSTICE HILDYARD: Professor Mülbart may have to come  9 back tomorrow anyway. Does that effect your  10 preference -- I am perfectly happy you should have 5 or  11 10 minutes now and then we go on until 5.10. I quite  12 understand it is a very long day and I don't want you to  13 feel that you were not at your tip top best at the end  14 of the day, because that happens to us all.  15 Which would you prefer --  16 <b>A. Thank you, my Lord. I would prefer to continue the</b>  17 <b>cross-examination --</b>  18 MR JUSTICE HILDYARD: Try and get that done and then  19 re-examination tomorrow.  20 Let us have a generous five minutes so people can  21 stretch their legs and then we will go on until 5.10 or  22 5.15.  23 (4.36 pm)  24 (A short adjournment)  25 (4.42 pm)</p> <p style="text-align: center;">Page 161</p>	<p>1 Q. Do you see that?  2 <b>A. Yes, I see that.</b>  3 Q. He essentially says that in order to protect the  4 interests of the assignor, there needs to be  5 a limitation so the assignment cannot disadvantage the  6 creditor, that is right, isn't it?  7 <b>A. That is --</b>  8 Q. I misspoke, I am so sorry.  9 He says in order to protect the interests of the  10 debtor, there must be a limitation so that the  11 assignment cannot place them in a worse position. That  12 is right, isn't it?  13 <b>A. My Lord, the answer is I think he says that the</b>  14 <b>assignee -- the debtor, cannot be put in a worse</b>  15 <b>position with respect to any legal objections.</b>  16 Q. He says at paragraph 105, in view with the case that we  17 will look at in a moment, that there is a general  18 principle that contracts cannot be made that impose  19 obligations on third parties and that supports the view  20 that the change of creditor cannot entail greater  21 obligations for the debtor, including in the sphere of  22 damages. Do you see that?  23 <b>A. My Lord, I see that but these he refers -- referring to</b>  24 <b>sections 404, 406 and 407 BGB he refers to provisions</b>  25 <b>that protect the debtor against any deterioration of his</b></p> <p style="text-align: center;">Page 163</p>
<p>1 MR ALLISON: Professor Mülbart, the final area of my  2 questions is looking at the issue of assignment of  3 a claim under the German master agreement.  4 Two different things to look at, first the higher  5 claim point, I think you understand what I mean by that.  6 Just start by outlying what is agreed, you and  7 Judge Fischer agree that after a claim is assigned, the  8 further damage is to be assessed by reference to the  9 claims of the assignee --  10 <b>A. Yes.</b>  11 Q. -- but before the assignment, the further damage is to  12 be assessed by reference to the claims of the assigner?  13 <b>A. Yes.</b>  14 Q. Thank you.  15 Where you part company is whether there is  16 a limitation placed on the amount of recovery that the  17 assignee can make. That is right, isn't it?  18 <b>A. Yes.</b>  19 Q. Can we look at what Judge Fischer says in relation to  20 this in his very first report, which you will find  21 behind tab 8 of volume 4. What I would like you to have  22 a look at is paragraphs 104 to 106, pages 153 and 154.  23 Just to remind yourself of the way Judge Fischer puts  24 the point. (Pause)  25 <b>A. Yes.</b></p> <p style="text-align: center;">Page 162</p>	<p>1 <b>position with respect to legal objections he may have.</b>  2 Q. Thank you. Can we just look at paragraph 125 of your  3 report to see how you put the point.  4 Page 272, sorry I didn't give you a page reference.  5 You say that provided it is included in the transfer, it  6 would be calculated by reference to the assignor's  7 losses for the period prior and by reference to the  8 assignee's losses to the period to follow. Then you  9 say:  10 "That is the case even if the effect is that the  11 debtor may have to pay more as a consequence for the  12 assignment."  13 You footnote at footnote 98 a decision of the  14 Bundesgerichtshof, don't you?  15 <b>A. Yes, I do.</b>  16 Q. Can we just, before we look at that --  17 <b>A. I do, but may I just add that there is a bracket after</b>  18 <b>that slide saying, "Not taking a stand" and in order to</b>  19 <b>clarify that bracket I wanted to indicate -- I am sorry,</b>  20 <b>my Lord, if that does not come across that clearly as it</b>  21 <b>should have been -- that this indicates that the German</b>  22 <b>federal high court left that question open.</b>  23 Q. That is very helpful, Professor Mülbart, because that is  24 where I was going to go with you next, because  25 Judge Fischer tells us the court left the point open.</p> <p style="text-align: center;">Page 164</p>

<p>1 Can we just have a very quick look at it then, in view</p> <p>2 of that I think we only need to be very quick. It is at</p> <p>3 tab 14 of the bundle. Decision 25 September 1991 of the</p> <p>4 Bundesgerichtshof.</p> <p>5 MR JUSTICE HILDYARD: In volume 1 of the authorities.</p> <p>6 <b>A. Sorry.</b></p> <p>7 MR ALLISON: 1-4.</p> <p>8 <b>A. I misunderstood. I thought it was tab 40.</b></p> <p>9 Q. I am so sorry, 1-4.</p> <p>10 <b>A. Yes.</b></p> <p>11 Q. This is case in which the default took place after the</p> <p>12 assignment had been made, isn't it?</p> <p>13 <b>A. Yes.</b></p> <p>14 Q. I think we now agree there is no suggestion by the</p> <p>15 Bundesgerichtshof that an assignee could claim more than</p> <p>16 the assignor, is there?</p> <p>17 <b>A. My Lord, there is no suggestion to that but there is no</b></p> <p>18 <b>suggestion to the contrary. It just says -- the court</b></p> <p>19 <b>just says that it doesn't have to take a stand on the</b></p> <p>20 <b>question.</b></p> <p>21 Q. Because they -- just to pick up the key words, when</p> <p>22 talking about whether, at the bottom of the page, in</p> <p>23 cases where the assignee's damages are higher than they</p> <p>24 would have been if he were the individual assignor, they</p> <p>25 say that can be left open?</p> <p style="text-align: center;">Page 165</p>	<p>1 on the assignee."</p> <p>2 You will see that the view expressed by Peters is</p> <p>3 consistent with Judge Fischer, that you should not be</p> <p>4 able to have a higher claim for further damage by</p> <p>5 an assignee.</p> <p>6 <b>A. Yes, my Lord, but there are some who support that</b></p> <p>7 <b>proposition and some German authors who support the</b></p> <p>8 <b>contrary proposition. If I may take my Lord again back</b></p> <p>9 <b>to the decision of the German federal high court, I just</b></p> <p>10 <b>mentioned, he lists all those supporters and those who</b></p> <p>11 <b>do not agree that the assignee should be entitled to</b></p> <p>12 <b>claim higher damages, or, put differently, whether there</b></p> <p>13 <b>is a cap on the claim or not.</b></p> <p>14 Q. I am just showing you the ones which support the view of</p> <p>15 Judge Fischer. You have referenced others in your</p> <p>16 report. The next one I wanted just to look at with you</p> <p>17 is at tab 80, which is a piece by Professor Junker?</p> <p>18 There are two key passages I think that we can pick</p> <p>19 up to save having to read all of it. If you go to</p> <p>20 page 10, top left-hand number page 10, do you have that?</p> <p>21 <b>A. Yes.</b></p> <p>22 Q. Page 10, reading in the second paragraph, the second</p> <p>23 sentence, it says:</p> <p>24 "The fact that the debtor always had to expect</p> <p>25 a change in creditor by assignment is beyond doubt in</p> <p style="text-align: center;">Page 167</p>
<p>1 <b>A. Yes.</b></p> <p>2 Q. They expressly leave the point open, but they do cite</p> <p>3 a text, Peters, that is Judge Peters, isn't it?</p> <p>4 <b>A. My Lord, I am not aware whether Peters was a judge or</b></p> <p>5 <b>not, according to my understanding he was a Professor of</b></p> <p>6 <b>law at a German university and maybe he was a judge.</b></p> <p>7 <b>I simply would not know and I cannot see why the</b></p> <p>8 <b>question whether he was a judge or not would make his --</b></p> <p>9 <b>with all due respect.</b></p> <p>10 MR JUSTICE HILDYARD: I am not a Professor.</p> <p>11 <b>A. That helps. In German it would carry more weight.</b></p> <p>12 MR ALLISON: Can we just have a look together at what Peters</p> <p>13 says, bundle 2, tab 81.</p> <p>14 This is an excerpt from the commentary that was cited</p> <p>15 in the Bundesgerichtshof, by the court that we have just</p> <p>16 seen the reference to. The passage that I would like to</p> <p>17 show to you is under the heading "Summary", on the</p> <p>18 right-hand side, do you see that?</p> <p>19 <b>A. Yes.</b></p> <p>20 Q. "If the debtor of an assigned claim becomes liable for</p> <p>21 damages because of impossibility of performance or</p> <p>22 default, he must only pay compensation for the</p> <p>23 assignee's loss up to the amount that the assignor too</p> <p>24 would have suffered had the assignment not taken place.</p> <p>25 The corresponding burden of presentation and proof falls</p> <p style="text-align: center;">Page 166</p>	<p>1 view of the provisions which allow assignment in the</p> <p>2 civil code. However the question remains as to whether</p> <p>3 this change in creditors without its consent is allowed</p> <p>4 to be disadvantageous for the debtor. The application</p> <p>5 of the principle of the freedom of contracts and its</p> <p>6 concrete expression in sections 404, 406 and following</p> <p>7 [the sections referenced by Judge Fischer] answer this</p> <p>8 question in the negative. While the debtors should not</p> <p>9 have relied on the person of the assignor because it</p> <p>10 should not have assumed that ultimately the assignor</p> <p>11 would be the recipient of the payment owed by it, it had</p> <p>12 every right to rely on the assignor to the extent that</p> <p>13 it was allowed to base its assessment of the financial</p> <p>14 risk associated with entering into its contractual</p> <p>15 obligations on the assignor. This also creates the</p> <p>16 basis for the protection for reliance on existing law</p> <p>17 postulated by Seetzen in favour of the assignee.</p> <p>18 "This protection can be based only on the fact that</p> <p>19 the debtor had every right to assume that it would not</p> <p>20 be burdened with higher risks than those found in the</p> <p>21 person of its contract partner, with this the debtor is</p> <p>22 protected ultimately by freedom of contract."</p> <p>23 What is said by Professor Junker is that contractual</p> <p>24 freedom means that the debtor should not be subject to</p> <p>25 any higher risks. That is right, isn't it?</p> <p style="text-align: center;">Page 168</p>

<p>1 <b>A. My Lord, this is what my esteemed colleague says and</b>  2 <b>that I do not agree with him. May I explain why I do</b>  3 <b>not agree with him?</b>  4 <b>Thank you, my Lord.</b>  5 <b>The freedom of contract applies in that context to</b>  6 <b>both parties, the debtor but also the creditor who, as</b>  7 <b>a part of the freedom of contract, is allowed to</b>  8 <b>transfer that claim. You have both parties and they can</b>  9 <b>both rely on the debt principle. What the law actually</b>  10 <b>does is, by providing for sections 404, 406 and 407 to</b>  11 <b>offer a certain degree of protection to the debtor.</b>  12 <b>In my reading of the law, of the German provisions,</b>  13 <b>and the reading of others, this is the extent of</b>  14 <b>protection offered to the debtor.</b>  15 <b>Likewise, if you would want to protect the debtor</b>  16 <b>against the change in the person any stronger than that,</b>  17 <b>then you would -- then in the case of the creditor</b>  18 <b>passing away and the heir being a very different person</b>  19 <b>from the creditor, you would have also to protect him</b>  20 <b>against not the legal effects from that but also from</b>  21 <b>the financial effects from that.</b>  22 <b>As I understand German law, there is no protection</b>  23 <b>against that. This has led me to the conclusion that</b>  24 <b>sections 404, 406 and 407 of the BGB protects against</b>  25 <b>certain deteriorations of that, a legal position of the</b></p> <p style="text-align: center;">Page 169</p>	<p>1 that is the evidence you have to deal with.  2 MR ALLISON: Let's look at the Bundesgerichtshof decision  3 that Judge Fischer cites as an example of debtor  4 protection being applied outside the strict requirements  5 of the civil code.  6 That is at tab 25 of the bundle.  7 MR JUSTICE HILDYARD: Can I just clarify for my own mind on  8 this, and I am so sorry, but as regards what you have  9 called the factual result, are you saying anymore than  10 this, that once you allow assignment, the assignee might  11 be a less reliable person than the assignor --  12 <b>A. Yes.</b>  13 MR JUSTICE HILDYARD: -- and there is nothing much one can  14 do about that if you have allowed assignment?  15 <b>A. Yes.</b>  16 MR JUSTICE HILDYARD: Thank you.  17 MR ALLISON: This is a decision in relation to a debtor's  18 right to appropriate. Where I was going to take you is  19 to pages 342 and 343. Section 366 is concerned with the  20 right to appropriate, isn't it? (Pause)  21 <b>A. I am sorry, my attention was diverted.</b>  22 Q. Of course, I will start again. It is a decision of the  23 Bundesgerichtshof on a debtor's right to appropriate  24 payments.  25 <b>A. Yes.</b></p> <p style="text-align: center;">Page 171</p>
<p>1 <b>debtor. That should not be the case, it is protected</b>  2 <b>against that but not against a factual deterioration of</b>  3 <b>his position.</b>  4 Q. That is very helpful. You will notice that the  5 materials we looked at do not draw that distinction  6 between legal and factual that you seek to draw, do  7 they?  8 <b>A. My Lord, the materials we have looked so far at do not</b>  9 <b>draw that distinction but that distinction can be</b>  10 <b>inferred from the materials and from in particular, what</b>  11 <b>I think is even more important, from the law. As it</b>  12 <b>stands in sections 398 and following.</b>  13 Q. Although you agree that Judge Fischer relies on those  14 sections in particular sections 404, 405 and 406 to say  15 that there is a general principle of debtor protection?  16 MR DICKER: My Lord, I don't want my learned friend to be  17 putting a false case. Paragraph 104 of Judge Fischer's  18 report says:  19 "In established case law, the German federal court  20 of justice interprets the provision as stating the legal  21 position of the debtor should not be made worse by  22 a transfer of the claim to the new creditor."  23 MR ALLISON: Mr Dicker can ask Judge Fischer about that if  24 he wishes --  25 MR JUSTICE HILDYARD: I think he is just reminding you that</p> <p style="text-align: center;">Page 170</p>	<p>1 Q. There had been a partial assignment which was only  2 disclosed to the debtor after he had made a payment.  3 The question was, could the right of appropriation be  4 exercised afterwards? The passage I would like to show  5 to you, page 342 gives the facts that I have just  6 mentioned, the fact that there was a partial assignment  7 and it was considered with the right to appropriation.  8 <b>A. Yes.</b>  9 Q. Over the page, it was said that:  10 "Once the partial assignment had been notified, it  11 was said there was no justification to stop the debtor  12 from subsequently exercising his performance  13 determination right in analogous application of  14 section 366, only the notification provided him with the  15 opportunity to exercise his option as guaranteed by the  16 provision allowing the right to appropriation."  17 It is the next paragraph which is the key one, which  18 discusses the principle of debtor protection. Could  19 I just ask you to read that. (Pause)  20 Paragraph number 2.  21 <b>A. Yes. (Pause)</b>  22 Q. You will see that what the court did is engaged the  23 principle of debtor protection to allow the debtor to  24 rely on a right of appropriation which was not otherwise  25 available under the statute.</p> <p style="text-align: center;">Page 172</p>

<p>1 <b>A. Yes.</b></p> <p>2 Q. It is not a case that can be distinguished by saying</p> <p>3 that it doesn't protect against factual detriments, is</p> <p>4 it?</p> <p>5 <b>A. It offers an additional -- my Lord, sorry, it entitles</b></p> <p>6 <b>the debtor to say after the transfer had been effected</b></p> <p>7 <b>that payment is directed in a different way and in that</b></p> <p>8 <b>sense he offers, based on the idea of a legal protection</b></p> <p>9 <b>of the debtor, it offers an additional -- it entitles</b></p> <p>10 <b>the -- it offers an additional right to the creditor --</b></p> <p>11 <b>to the debtor.</b></p> <p>12 <b>In that sense it is -- from my understanding, it is</b></p> <p>13 <b>about the protection of the legal situation of the</b></p> <p>14 <b>creditor -- of the debtor. Excuse me. Not about the</b></p> <p>15 <b>protection against anything purely factual.</b></p> <p>16 Q. The court expressly says that invoking the principle of</p> <p>17 debtor protection, that the assignment should not place</p> <p>18 the debtor in a worse position than he would be in</p> <p>19 without it, doesn't it?</p> <p>20 <b>A. Yes, the court explicitly says that.</b></p> <p>21 Q. There is no suggestion that they are only talking about</p> <p>22 legal detriments, rather than factual detriments, is</p> <p>23 there?</p> <p>24 <b>A. My Lord, the court makes no such explicit suggestion but</b></p> <p>25 <b>he relies -- at the beginning of that paragraph he</b></p> <p style="text-align: center;">Page 173</p>	<p>1 Just one more series of short questions on</p> <p>2 assignment. Could you please go to Judge Fischer's</p> <p>3 second report, which you will find behind tab 10. The</p> <p>4 bit that I would like you to look at is at page 222.</p> <p>5 (Pause)</p> <p>6 You will see Judge Fischer is addressing the damages</p> <p>7 claims of the assignee. At B he says, "There are no</p> <p>8 future damages claims of the assignee that could be</p> <p>9 transferred. Whether damage is incurred after the</p> <p>10 assignment must be determined solely from the position</p> <p>11 of the assignee."</p> <p>12 That is an accurate statement, isn't it?</p> <p>13 <b>A. My Lord, I am sorry, I don't want to be seen as</b></p> <p>14 <b>inattentive but I understood 220?</b></p> <p>15 Q. Do you have Judge Fischer's second report there?</p> <p>16 <b>A. It starts on page 209?</b></p> <p>17 Q. It does.</p> <p>18 <b>A. Yes.</b></p> <p>19 Q. It is page 222. It is paragraph 46, where he is dealing</p> <p>20 with the damages claims of the assignee. He says:</p> <p>21 "There are no future damages claims of the assignee</p> <p>22 that could be transferred. Whether damages occurred</p> <p>23 after the assignment must be determined solely from the</p> <p>24 position of the assignee."</p> <p>25 I think the first line is meant to say "assignor",</p> <p style="text-align: center;">Page 175</p>
<p>1 <b>relies on sections 404 and following and thus these</b></p> <p>2 <b>provisions protect against the deterioration in the</b></p> <p>3 <b>legal position of the debtor, there is no need for the</b></p> <p>4 <b>court to make that qualification, because it follows</b></p> <p>5 <b>from the statute.</b></p> <p>6 Q. One last question, maybe you have a different reading,</p> <p>7 the court was not protecting, from what it says, against</p> <p>8 the imposition of an additional obligation, was it,</p> <p>9 an extra legal burden?</p> <p>10 <b>A. The protection -- my Lord, the protection offered to the</b></p> <p>11 <b>debtor in legal terms is not only with respect to the</b></p> <p>12 <b>imposition of additional rights or anything like that,</b></p> <p>13 <b>but also against the loss of defences or objections he</b></p> <p>14 <b>might have, which is the basic, the starting principle</b></p> <p>15 <b>in section 404. You are protected against the loss of</b></p> <p>16 <b>objections you could raise, or defences you could raise</b></p> <p>17 <b>against the creditor because of the transfer.</b></p> <p>18 <b>Against the loss of those objections, you would have</b></p> <p>19 <b>been able to raise against the original creditor of the</b></p> <p>20 <b>claim. Therefore the legal position is not to be</b></p> <p>21 <b>understood solely in the terms that there are additional</b></p> <p>22 <b>legal obligations in play but also against the loss of</b></p> <p>23 <b>legal remedies or legal defence objections that the</b></p> <p>24 <b>debtor might have had without the transfer taking place.</b></p> <p>25 Q. Thank you, Professor Mülbart.</p> <p style="text-align: center;">Page 174</p>	<p>1 but he can be asked about that.</p> <p>2 Do you agree that after -- I am so sorry, he is</p> <p>3 correct.</p> <p>4 Do you agree that any damages after the assignment</p> <p>5 have to be determined solely from the position of the</p> <p>6 assignee?</p> <p>7 <b>A. Yes, I agree.</b></p> <p>8 Q. Therefore you would agree that that is a claim of the</p> <p>9 assignee and not one that is transferred by the</p> <p>10 assignor?</p> <p>11 <b>A. My Lord, I would not agree, simply because any claim for</b></p> <p>12 <b>damages that is based on any event that happened prior</b></p> <p>13 <b>to the transfer, in my opinion cannot arise</b></p> <p>14 <b>independently from that event after the transfer had</b></p> <p>15 <b>taken place. It would be, from my perspective, odd to</b></p> <p>16 <b>say that the transferee has, because of the, for</b></p> <p>17 <b>example, breach of contract that happened prior to the</b></p> <p>18 <b>transfer, has a separate right, a separate claim on the</b></p> <p>19 <b>debtor, just because of that.</b></p> <p>20 <b>Therefore I think that the claim, the claim that the</b></p> <p>21 <b>assignee is entitled to make is rooted in the claims</b></p> <p>22 <b>transferred. Therefore I refer to the idea of the</b></p> <p>23 <b>future claims be transferred by -- in transferring</b></p> <p>24 <b>claims.</b></p> <p>25 Q. What about a situation in which the assignor has not</p> <p style="text-align: center;">Page 176</p>

<p>1 sustained any damages, so it doesn't have any claim for</p> <p>2 further damage. It cannot be sensible, can it, to speak</p> <p>3 about the assignor transferring a claim for further</p> <p>4 damage that the assignee can assert at a later date?</p> <p>5 <b>A. My Lord, my understanding of the working of German law</b></p> <p>6 <b>in that respect differs from that. I cannot imagine</b></p> <p>7 <b>that the assignee should have an independent whatever,</b></p> <p>8 <b>separate claim for damages for anything that happened</b></p> <p>9 <b>before the transfer taking place, since he only -- he</b></p> <p>10 <b>derives his position from the transferor, there must be</b></p> <p>11 <b>some element of transfer in that transfer.</b></p> <p>12 <b>Otherwise, at least from my understanding, it would</b></p> <p>13 <b>be odd to say that the transferee is entitled to</b></p> <p>14 <b>damages, even though he has no relationship with the</b></p> <p>15 <b>debtor whatsoever.</b></p> <p>16 Q. Let's see if we can agree on this --</p> <p>17 MR JUSTICE HILDYARD: For the period prior to the</p> <p>18 assignment?</p> <p>19 <b>A. Yes.</b></p> <p>20 MR JUSTICE HILDYARD: Yes.</p> <p>21 MR ALLISON: Let's see if we can agree on this. The</p> <p>22 assignment affects the change in legal responsibility,</p> <p>23 doesn't it, in respect to the debt owed?</p> <p>24 <b>A. My Lord, may the question be rephrased?</b></p> <p>25 Q. Yes, maybe it is quickest, let's look at tab 14</p> <p style="text-align: center;">Page 177</p>	<p>1 expert evidence before, that obviously he is still</p> <p>2 giving evidence and he shall not discuss the case with</p> <p>3 anyone.</p> <p>4 MR JUSTICE HILDYARD: That is quite right, under our</p> <p>5 rules -- I don't know whether the same applies in your</p> <p>6 courts -- once you are in the witness box, you are not</p> <p>7 allowed to discuss the case with anyone, which will be</p> <p>8 a merciful relief I think.</p> <p>9 The only reservation I have as regards that is lest</p> <p>10 you need to confer on a strictly controlled basis with</p> <p>11 regard to the single case that I allowed to be put.</p> <p>12 Do you see what I mean?</p> <p>13 MR DICKER: Yes, I do.</p> <p>14 MR JUSTICE HILDYARD: I think Mr Allison is going to agree</p> <p>15 with me that you fully understand the rules and will not</p> <p>16 go beyond them, so I am content to rely on that.</p> <p>17 There may be an exception, if you suddenly spot that</p> <p>18 the case that Mr Allison brought out late was subject to</p> <p>19 some refinement or review, well then you must, I think</p> <p>20 be able to share it with everybody.</p> <p>21 Timing, a couple of things occur to me. I mean,</p> <p>22 possibly being of a pessimistic frame of mind I cannot</p> <p>23 see us finishing the expert evidence tomorrow. It is</p> <p>24 just one of those things that is not going to happen,</p> <p>25 I think, unless I have completely misunderstood your</p> <p style="text-align: center;">Page 179</p>
<p>1 together --</p> <p>2 MR JUSTICE HILDYARD: Can I just ask, Mr Allison -- I mean</p> <p>3 speaking for myself, entirely personally, I feel that my</p> <p>4 focus is not as sharp as I would like it to be.</p> <p>5 I apologise for that, but how much longer do you have?</p> <p>6 I am just wondering, as there is to be</p> <p>7 re-examination tomorrow, and with all deference to the</p> <p>8 witness, I am just wondering whether it would be better</p> <p>9 to finish this tomorrow and give everyone a chance to</p> <p>10 sharpen up, certainly in my case.</p> <p>11 MR ALLISON: My Lord, of course. We have one more case to</p> <p>12 look at and then a few more questions after that. Of</p> <p>13 course, if my Lord thinks that is the best course.</p> <p>14 Housekeeping</p> <p>15 MR JUSTICE HILDYARD: I am so sorry about this, but I just</p> <p>16 feel it has been a very long day and if I felt that you</p> <p>17 could be freed at the end of the day, I would soldier on</p> <p>18 but as you are still to return tomorrow, and we will not</p> <p>19 liberate you until then, I think it would be better for</p> <p>20 me at any rate if we were to return to the fray</p> <p>21 tomorrow. I am sorry not to be able to complete you,</p> <p>22 but I just feel I am not focusing as well as I should.</p> <p>23 So tomorrow --</p> <p>24 MR DICKER: I am sure your Lordship will, but just to remind</p> <p>25 perhaps Professor Mülbert, because he has not given</p> <p style="text-align: center;">Page 178</p>	<p>1 tack with the witness.</p> <p>2 I think I will try and make efforts to extend into</p> <p>3 Wednesday and defer my matter on Wednesday, at least</p> <p>4 until 2.00. Do you think that that will give you</p> <p>5 sufficient time?</p> <p>6 MR DICKER: I would hope so, yes.</p> <p>7 We presently have, until your Lordship just spoke,</p> <p>8 intended to have Monday and Tuesday for closing</p> <p>9 submissions.</p> <p>10 My Lord, I would have thought the parties can do it</p> <p>11 in substantially less time than that.</p> <p>12 MR JUSTICE HILDYARD: Right. Okay, so we may gain time</p> <p>13 where we have lost. Yes.</p> <p>14 Right, well let me know, if you want me to block out</p> <p>15 Wednesday morning, I shall do so and I think you are</p> <p>16 saying do as a matter of being a boy scout?</p> <p>17 MR ALLISON: My Lord, I think that may be prudent because</p> <p>18 apart from anything else we will not know until close of</p> <p>19 play tomorrow just how much of Judge Fischer's evidence</p> <p>20 is left to be given.</p> <p>21 MR DICKER: I am hoping we may make up some. Not</p> <p>22 guaranteeing --</p> <p>23 MR JUSTICE HILDYARD: You want a bit more time. I will</p> <p>24 confirm that through my clerk.</p> <p>25 Another matter, and I am sorry to raise it now, but</p> <p style="text-align: center;">Page 180</p>

<p>1 we discussed very quickly -- in particular between me</p> <p>2 and Mr Trower -- the relationship with the earlier</p> <p>3 judgment of Mr Justice David Richards and the question</p> <p>4 of whether I would need, if I were to do that, further</p> <p>5 guidance in that regard. The relationship seems to me</p> <p>6 stronger than I originally thought, on the one hand, but</p> <p>7 less clearly defined in my mind than I would dearly</p> <p>8 love.</p> <p>9 MR DICKER: Yes.</p> <p>10 MR JUSTICE HILDYARD: Also I think I indicated that if that</p> <p>11 matter had to be taken forward, I thought that York</p> <p>12 should be given an opportunity to have their penny</p> <p>13 worth. When would that be accommodated?</p> <p>14 MR DICKER: My Lord, speaking for our part, both for the</p> <p>15 reasons your Lordship gave and also our inability to</p> <p>16 deal with that in practice in this hearing, not before</p> <p>17 we finish on Wednesday.</p> <p>18 MR JUSTICE HILDYARD: No, so we will have to have an extra</p> <p>19 time to deal with that?</p> <p>20 MR TROWER: My Lord, I think what we had anticipated was</p> <p>21 that when we get to the end of this, in other words once</p> <p>22 the evidence and the submissions on German law are out</p> <p>23 of the way, we would just circle back and have a further</p> <p>24 discussion with your Lordship about the timetable for</p> <p>25 that.</p> <p style="text-align: center;">Page 181</p>	<p>1 place particular reliance upon, but that will be</p> <p>2 a matter for my Lord.</p> <p>3 MR JUSTICE HILDYARD: Anyway, that is that, is it? You are</p> <p>4 not going to try any further --</p> <p>5 MR ALLISON: In view of quite how loudly the objection was</p> <p>6 made I have sought to limit myself to as few of those as</p> <p>7 is necessary.</p> <p>8 MR JUSTICE HILDYARD: If you are going to try on reflection</p> <p>9 to get in more -- the more you try and get in, the more</p> <p>10 I will expect by way of justification. I think that</p> <p>11 Mr Dicker should be entitled to some explanation which</p> <p>12 means that he is not taken by surprise.</p> <p>13 Are you content with that?</p> <p>14 MR DICKER: My Lord, on the assumption given that something</p> <p>15 has gone in, some explanation at least is required at</p> <p>16 this stage, yes.</p> <p>17 MR JUSTICE HILDYARD: Yes, I mean I think that you, as I,</p> <p>18 pretty much know why that was put in but do you need any</p> <p>19 further explanation?</p> <p>20 MR DICKER: I would like to have the proposition stated.</p> <p>21 The other thing obviously, we respectfully invited</p> <p>22 was an answer from my learned friend perhaps only as</p> <p>23 a matter of courtesy as to why they were not provided to</p> <p>24 us at an earlier stage.</p> <p>25 MR JUSTICE HILDYARD: It is, but that is forensic rather</p> <p style="text-align: center;">Page 183</p>
<p>1 I think the parties had in mind that written</p> <p>2 submissions may be able to deal with it, but your</p> <p>3 Lordship will have a more rounded view once you have</p> <p>4 heard the whole of this on whether that is in fact the</p> <p>5 case.</p> <p>6 MR JUSTICE HILDYARD: I think I may take a leaf out of</p> <p>7 Lord Justice David Richards's book, which is to say</p> <p>8 written submissions in the first place but if I need</p> <p>9 some guidance, then I will call you in for oral --</p> <p>10 unless any of you wishes to have oral submissions, in</p> <p>11 which case of course I would allow that.</p> <p>12 MR TROWER: Yes, that seems most convenient.</p> <p>13 MR JUSTICE HILDYARD: Anyway, we don't have to fit that in.</p> <p>14 Mr Allison, I don't wish you to be sort of -- to</p> <p>15 some extent this is collateral, but I think you should</p> <p>16 explain to me the basis on which there was a delay and</p> <p>17 I think you should provide --</p> <p>18 MR ALLISON: My Lord, of course.</p> <p>19 MR JUSTICE HILDYARD: It may be that it can be very short</p> <p>20 because you have only in the event relied on one and</p> <p>21 a half, you have had a half go, I don't know whether you</p> <p>22 are going to return to it, and you have had a one</p> <p>23 allowed in because I wanted it.</p> <p>24 MR ALLISON: It may be because of Professor Mülbart's</p> <p>25 ultimate answer is not an authority my Lord needs to</p> <p style="text-align: center;">Page 182</p>	<p>1 than substantive.</p> <p>2 10.30 tomorrow? Have a good evening.</p> <p>3 (5.27 pm)</p> <p>4 (The hearing adjourned until 10.30 am the following day)</p> <p>5</p> <p>6</p> <p>7</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p> <p style="text-align: center;">Page 184</p>

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