

<p>1 Wednesday, 11 November 2015</p> <p>2 (10.30 am)</p> <p>3 MR JUSTICE HILDYARD: Good morning.</p> <p>4 Opening submissions by MR ZACAROLI (continued)</p> <p>5 MR ZACAROLI: Good morning, my Lord.</p> <p>6 My Lord, I finished off yesterday with the first of</p> <p>7 my three points in relation to the question of whether</p> <p>8 the cost of funding, with the emphasis on funding, is</p> <p>9 limited to borrowing and the reason for the use of the</p> <p>10 language in the first place, the "cost of funding"</p> <p>11 language, was because no benchmark rate was available in</p> <p>12 the multiple currencies that were to be used in the</p> <p>13 multicurrency form of master agreement, which is</p> <p>14 a strong indication that the draftsman, we say, intended</p> <p>15 to reference borrowing when he used the term "funding".</p> <p>16 The second point focuses on the context of the</p> <p>17 wording of the definition within the master agreement</p> <p>18 itself.</p> <p>19 The context of course is to identify a rate of</p> <p>20 interest, the word "interest" is used throughout the</p> <p>21 agreement. Two subsidiary points, cost of funding has</p> <p>22 to be such that it can be translated into a per annum</p> <p>23 rate, because the default rate is a per annum rate,</p> <p>24 based upon the cost of funding. It is relative to</p> <p>25 time.</p> <p style="text-align: center;">Page 1</p>	<p>1 time that it is used.</p> <p>2 Those are two central features, in fact they are the</p> <p>3 two core elements of borrowing.</p> <p>4 We identify those features not because they are</p> <p>5 features of borrowing, but because they are features</p> <p>6 dictated by the need to identify a rate for the purposes</p> <p>7 of calculating the time value of money.</p> <p>8 The fact that the period of time is uncertain or may</p> <p>9 be, I suggest usually would be uncertain, at the point</p> <p>10 of default is irrelevant. The definition is predicated</p> <p>11 on there being a point of time in the future when the</p> <p>12 funding is no longer required. In submissions I think</p> <p>13 on Monday my learned friend Mr Dicker misunderstood our</p> <p>14 case on this. He set up we suggest an Aunt Sally to be</p> <p>15 shot down, what he said that our case was, this is</p> <p>16 page 106 of Day 1's transcript for your Lordship's note</p> <p>17 if you need it. He says:</p> <p>18 "We say that the definition impliedly requires the</p> <p>19 funding that is obtained to be repaid at the end of the</p> <p>20 period."</p> <p>21 That is not what we say. We don't say you have to</p> <p>22 borrow something in the market and the only funding</p> <p>23 which counts is borrowing for this precise period that</p> <p>24 the default is outstanding. Indeed, it is common ground</p> <p>25 under issue 12, that the question of the length, the</p> <p style="text-align: center;">Page 3</p>
<p>1 Secondly, a trite point perhaps but wherever the</p> <p>2 reference to interest is found it is always with the</p> <p>3 words "it is to be daily compounded based on the number</p> <p>4 of days elapsed". It is clearly referencing interest</p> <p>5 payable over time.</p> <p>6 Stepping back, the essential purpose of interest is</p> <p>7 payment by time for the use of money. It is an old</p> <p>8 concept, we have referenced Blackstone's commentaries,</p> <p>9 Mann's legal aspects of money in the skeleton, I needn't</p> <p>10 take my Lord to those, they are well-known concepts.</p> <p>11 Indeed it is accepted, the Senior Creditor Group's</p> <p>12 skeleton and oral submissions accept that the function</p> <p>13 and purpose of the default rate is to compensate the</p> <p>14 payee for the lost time value of money.</p> <p>15 The "cost of funding" language must be read in the</p> <p>16 light of its purpose, ie to produce a rate reflective of</p> <p>17 the time value of money. It is inherent in a payment</p> <p>18 for the use of money that it is used for a period or</p> <p>19 periods, ie one is looking at the price to be paid in</p> <p>20 exchange for having that money, in this case a sum equal</p> <p>21 to the relevant amount, for a period of time.</p> <p>22 Two things follow from that. First of all it is</p> <p>23 necessarily something which after a period of time you</p> <p>24 will have to give back.</p> <p>25 Secondly, the cost of that must be relative to the</p> <p style="text-align: center;">Page 2</p>	<p>1 term of the borrowing which you are allowed to rely</p> <p>2 upon, is not fixed as matter of definition, that is</p> <p>3 controlled by the good faith and rationality test.</p> <p>4 What we do say is the definition implies that</p> <p>5 funding is something that is inherently repayable,</p> <p>6 however. That is the essence of the definition. The</p> <p>7 third point on the meaning of funding as borrowing falls</p> <p>8 back on the general law. We say that under the general</p> <p>9 law time value of money is to be assessed by what it</p> <p>10 would cost to borrow that money in the market. We have</p> <p>11 referenced in the skeleton the case of Tate &amp; Lyle, the</p> <p>12 judge was Mr Justice Forbes at first instance on the</p> <p>13 question of interest. We set out the entire relevant</p> <p>14 passage in the skeleton, and unless my Lord wants me to</p> <p>15 take you to it I will not go to that now. It is</p> <p>16 a well-known passage, which underlies the entire</p> <p>17 approach of the Commercial Court to the payment of</p> <p>18 interest.</p> <p>19 Namely that it is to be assessed by the cost of what</p> <p>20 it would cost to borrow the sum, not in that case what</p> <p>21 it would cost the particular claimant to borrow the sum,</p> <p>22 but someone having the attributes of the claimant in the</p> <p>23 market to borrow the sum. There is a difference between</p> <p>24 that and the default rate and indeed the cost of funding</p> <p>25 rates throughout the master agreement, because those do</p> <p style="text-align: center;">Page 4</p>

<p>1 reference the cost to one or other or both of the</p> <p>2 parties, but we say that is the only difference between</p> <p>3 what is identified as a cost of funding in the</p> <p>4 master agreement and the general law.</p> <p>5 The general law we submit is indeed part of the</p> <p>6 relevant factual matrix in which any agreement made</p> <p>7 under English law is to be construed.</p> <p>8 A question was raised, I think again on Monday,</p> <p>9 about whether my Lord is allowed to look at this case</p> <p>10 through English spectacles. We submit my Lord is</p> <p>11 allowed and indeed must look at the case through English</p> <p>12 spectacles, there are no other spectacles that would fit</p> <p>13 my Lord in a court in England when you are construing an</p> <p>14 agreement governed by English law, which we are here.</p> <p>15 MR JUSTICE HILDYARD: I must accommodate the fact that the</p> <p>16 parties, both or either, may be foreign incorporated or</p> <p>17 otherwise foreign?</p> <p>18 MR ZACAROLI: Indeed, but that doesn't change the</p> <p>19 construction of the terms of the agreement.</p> <p>20 MR JUSTICE HILDYARD: Can I just while I remember it, and</p> <p>21 I raise this with diffidence, I decided a case called</p> <p>22 Bellis v Challinor, which was a case on interest. It</p> <p>23 was a supplemental judgment to a judgment which was</p> <p>24 reversed in the Court of Appeal, but I can't remember</p> <p>25 whether this one passed muster or was simply never</p> <p style="text-align: center;">Page 5</p>	<p>1 payable under section 6(e), whether you were the</p> <p>2 defaulting party or not, if you have chosen second</p> <p>3 method under the 2002 agreement in any event.</p> <p>4 In that very case the court commented that the</p> <p>5 agreement uses phrases that are intended to be</p> <p>6 illuminated by reference to the common law. The case is</p> <p>7 the Anthracite decision of Mr Justice Briggs. It is in</p> <p>8 authorities bundle 2, tab 49, the relevant passage is on</p> <p>9 paragraphs 116 and 117.</p> <p>10 Paragraph 116, my Lord could perhaps read that to</p> <p>11 himself, it just describes the body of case law that has</p> <p>12 grown up around the definition of "loss and market</p> <p>13 quotation", in particular noting subparagraph 3.</p> <p>14 (Pause)</p> <p>15 The part I rely on is paragraph 117, which again if</p> <p>16 my Lord would read. (Pause)</p> <p>17 MR JUSTICE HILDYARD: Yes.</p> <p>18 MR ZACAROLI: Of course we don't say that where the</p> <p>19 agreement uses the word "interest" it has to have the</p> <p>20 meaning under common law, of course not, but we do say</p> <p>21 that the terms such as interest are illuminated by</p> <p>22 reference to the common law, and that is why it is</p> <p>23 important to see what the general background of the</p> <p>24 common law approach to the valuation of the time use of</p> <p>25 money is.</p> <p style="text-align: center;">Page 7</p>
<p>1 tested. But I can't remember whether it has anything of</p> <p>2 importance or at least even relevance to either side of</p> <p>3 the court. I felt I should mention it because it</p> <p>4 carries forward or at least deals with</p> <p>5 Mr Justice Forbes's classic statement, so that you have</p> <p>6 a go at it if you want to. It is Bellis v Challinor in</p> <p>7 about 2013 or so.</p> <p>8 MR ZACAROLI: My Lord, I am grateful.</p> <p>9 MR JUSTICE HILDYARD: It might have been Challinor v Bellis</p> <p>10 actually, I can't remember.</p> <p>11 MR ZACAROLI: We will find that, I am grateful, my Lord.</p> <p>12 MR JUSTICE HILDYARD: Yes.</p> <p>13 MR ZACAROLI: I was going to take my Lord to one authority,</p> <p>14 it is one of the authorities that is often cited for the</p> <p>15 proposition that when you are dealing with the ISDA</p> <p>16 master agreement, concepts of the general common law are</p> <p>17 not relevant because it is a self-contained code, and in</p> <p>18 particular -- and we would say not just in particular</p> <p>19 but actually what this point is focused on entirely is</p> <p>20 the fact that the ISDA master agreement operates by way</p> <p>21 of two-way closeout, so traditional concepts of damages</p> <p>22 for breach don't apply to the extent that those only</p> <p>23 apply in favour of a non-defaulting party. In the</p> <p>24 master agreement you get the closeout amount, although</p> <p>25 that is not the definition, but whatever the sums</p> <p style="text-align: center;">Page 6</p>	<p>1 MR JUSTICE HILDYARD: I mean it is a contract, it has</p> <p>2 selected English law, it would be bizarre if having done</p> <p>3 so it required the judge to tread blind. He is bound to</p> <p>4 be informed by the law he is charged to administer.</p> <p>5 MR ZACAROLI: My Lord, yes.</p> <p>6 That deals with the first of my sub-headings under</p> <p>7 issue 11, focusing on the word "funding" in the phrase</p> <p>8 "cost of funding". I am now going to turn to the word</p> <p>9 cost, but also in context of "cost of funding". There</p> <p>10 are a number of sub-points here, I think ultimately</p> <p>11 there will be six but whether it looks like that at the</p> <p>12 end we will see.</p> <p>13 MR JUSTICE HILDYARD: Can I just ask this, and tell me if</p> <p>14 I am speaking out of turn. Do you place any reliance on</p> <p>15 the 1 per cent spread in the case of default as</p> <p>16 indicating or tending to suggest an interest rate rather</p> <p>17 than recovery, which is a proxy in that way, rather than</p> <p>18 a full recovery in commercial terms?</p> <p>19 MR ZACAROLI: I will come to the 1 per cent spread in due</p> <p>20 course, which we say is -- just to preview what we say</p> <p>21 about it, which is not an answer to my Lord's point</p> <p>22 I don't think. What we say about it is that is there</p> <p>23 because it is the compensation for having to deal with</p> <p>24 the defaulting party, there is again English common law</p> <p>25 which tells us that 1 per cent added to an interest rate</p> <p style="text-align: center;">Page 8</p>

<p>1 in cases of default is justifiable and doesn't offend</p> <p>2 the principle on penalties, because it compensates you</p> <p>3 for the additional cost of having to deal with the</p> <p>4 defaulter.</p> <p>5 In part it is an answer because the additional cost</p> <p>6 is reflected in that 1 per cent, so to that extent we do</p> <p>7 rely upon that, but let me think further about whether</p> <p>8 I can say anything more about that.</p> <p>9 MR JUSTICE HILDYARD: It may be a neutral point, because</p> <p>10 1 per cent may be a proxy for the, let's call them,</p> <p>11 administration or difficulty costs, over and above</p> <p>12 whatever measure you choose.</p> <p>13 MR ZACAROLI: Yes.</p> <p>14 MR JUSTICE HILDYARD: Yes.</p> <p>15 MR ZACAROLI: My Lord, turning then to cost. The first</p> <p>16 point is a simple one, namely that we rely upon what we</p> <p>17 say is the ordinary meaning of "cost" according to its</p> <p>18 dictionary definition of being the price paid for</p> <p>19 something. I should preface this by saying the point</p> <p>20 I am aiming at here is that cost is limited to the price</p> <p>21 of transacting with your counterparty in raising the</p> <p>22 relevant sum.</p> <p>23 For that reason it excludes any consequential</p> <p>24 losses, financial detriments, benefits given elsewhere,</p> <p>25 which is the SCG's case and excludes -- which may be</p> <p style="text-align: center;">Page 9</p>	<p>1 counterparty, because a rate clearly is limited to what</p> <p>2 you are paying the other side to the transaction of</p> <p>3 borrowing. There is an indication there that it is not</p> <p>4 meant to go further and include extraneous losses and</p> <p>5 detriments, et cetera.</p> <p>6 The third point is the absence in any literature,</p> <p>7 ISDA guide or authority that refers to the cost of</p> <p>8 funding the relevant amount meaning the expanded</p> <p>9 definition relied on by the Senior Creditor Group and</p> <p>10 Goldmans. It is fair to say that there is little by way</p> <p>11 of commentary on the meaning of the phrase in any text,</p> <p>12 and certainly no case in England -- or as we have been</p> <p>13 able to find in the United States -- has actually</p> <p>14 considered the meaning. We do say it would be very</p> <p>15 surprising, particularly given the common law background</p> <p>16 to how you calculate the time value of money, if under</p> <p>17 this agreement there was such an expansive meaning which</p> <p>18 brought into play such complicated concepts such as</p> <p>19 WACC, CAPM, consequential losses, et cetera.</p> <p>20 I make this point by way of aside really, but it is</p> <p>21 notable that insofar as there is evidence of claims</p> <p>22 having been asserted in the Lehmans' worldwide estate to</p> <p>23 date, those rates are generally consistent with being</p> <p>24 reliant on borrowing rates as opposed to the expansive</p> <p>25 higher rate you will get by cost of equity.</p> <p style="text-align: center;">Page 11</p>
<p>1 subsumed within that -- things like professional fees</p> <p>2 paid to third parties for a service, namely</p> <p>3 a professional service. One is focusing on the price</p> <p>4 you pay to the counterparty for raising the sum. That,</p> <p>5 as we say, is consistent with the definition in the</p> <p>6 dictionary of cost, price to be paid for something,</p> <p>7 particularly when used in conjunction with</p> <p>8 a transaction, which it is here.</p> <p>9 To get one point out of the way, the definition of</p> <p>10 cost of default rate undoubtedly depends upon</p> <p>11 a transaction. "Cost of funding", that means entering</p> <p>12 into a transaction to raise the sum. It does not mean</p> <p>13 allocating some part of your own assets already to,</p> <p>14 "Well I will use that to fill the gap". It is talking</p> <p>15 about going to a third party to raise the money.</p> <p>16 That is of funding, "if it were to fund" raises</p> <p>17 exactly the same concept, but hypothetically rather than</p> <p>18 actually.</p> <p>19 The second point is just to hark back briefly to my</p> <p>20 earlier point about the context when the cost of funding</p> <p>21 phrase was first introduced. That is as the alternative</p> <p>22 to a benchmark rate of interest in cases where there is</p> <p>23 no available benchmark, you are identifying</p> <p>24 multicurrency contracts.</p> <p>25 That suggests that it is limited to what you pay the</p> <p style="text-align: center;">Page 10</p>	<p>1 The cross-reference is to Mr Lomas's 11th witness</p> <p>2 statement, paragraphs 80 to 92, where he analyses</p> <p>3 various claims that had been put in in the early days of</p> <p>4 the Lehman collapse under ISDA claims, where people had</p> <p>5 referenced a rate of interest under the ISDA</p> <p>6 master agreement. He also notes that the similar</p> <p>7 research done by Mr Bingham on behalf of Wentworth --</p> <p>8 that is also in evidence -- is to the same effect</p> <p>9 broadly.</p> <p>10 MR JUSTICE HILDYARD: What does that really go to?</p> <p>11 Commercial expectation, or --</p> <p>12 MR ZACAROLI: I make it by way of aside.</p> <p>13 MR JUSTICE HILDYARD: -- lack of ingenuity, or I mean</p> <p>14 I don't know.</p> <p>15 MR ZACAROLI: It is clearly not relevant to construction as</p> <p>16 such, it is relevant in this sense that it would be</p> <p>17 surprising if there were this generally accepted</p> <p>18 expansive meaning of the phrase if that was not referred</p> <p>19 to in any text, article or guide or indeed reflected in</p> <p>20 any claim so far as submitted. People are holding off</p> <p>21 to make claims in the light of this court's judgment, of</p> <p>22 course, but it is helpful to that limited extent.</p> <p>23 The fourth point, my Lord, is the consequence of our</p> <p>24 argument. I just want to expand on this a little, is</p> <p>25 that the expansive meaning of "cost" to include</p> <p style="text-align: center;">Page 12</p>

<p>1 consequential losses and payments to third parties fall</p> <p>2 outside the definition.</p> <p>3 It is important to remember that the expansive</p> <p>4 definition works in two directions. First of all it is</p> <p>5 said that the consequential effects on the relevant</p> <p>6 payee, for example the fact that it is even if it is</p> <p>7 limited to borrowing, that borrowing has increased its</p> <p>8 WACC, its CAPM, the expected return on its shareholders,</p> <p>9 the cost of maintaining that return, in the light of</p> <p>10 increased leverage, that is relied upon. It has not,</p> <p>11 I think, been something pressed much orally in argument</p> <p>12 but it is undoubtedly there in the position paper of the</p> <p>13 Senior Creditor Group and therefore I respond to it.</p> <p>14 Secondly, additional payments made to third parties</p> <p>15 by way of compensation for professional services are</p> <p>16 also sought to be included. The first of those is</p> <p>17 offside we say, because it is in the nature of</p> <p>18 a consequential loss and damage. The master agreement</p> <p>19 uses the concept of loss in various areas, as my Lord</p> <p>20 has seen, in contradistinction to cost. Loss is a much</p> <p>21 more expansive term and can include your loss of</p> <p>22 opportunity to make a profit in other areas,</p> <p>23 consequential losses, et cetera.</p> <p>24 One thing is clear about the default rate definition</p> <p>25 is that it does not use the concept of loss but uses the</p> <p style="text-align: center;">Page 13</p>	<p>1 In the general run of the mill cases where these</p> <p>2 provision are relied upon. Of course this is not</p> <p>3 a general run of the mill case where these provisions</p> <p>4 are relied upon, because we are looking at so far seven</p> <p>5 years of interest. In general these provisions are</p> <p>6 intended to work in the context of an ongoing market</p> <p>7 where there is a default, the parties close out and they</p> <p>8 move on. There will be interest payments to sort out</p> <p>9 within that context. We suggest it is unreal to think</p> <p>10 that in those circumstances the question of well what if</p> <p>11 the bank charges an upfront fee for the lending would be</p> <p>12 relevant, you know what rate you can borrow at without</p> <p>13 having to pay large upfront syndication or arrangement</p> <p>14 fees. It is an unlikely area, but we say in a case</p> <p>15 where it was in fact required of you to pay a fee to the</p> <p>16 bank to borrow that forms part of the cost of borrowing</p> <p>17 and no doubt you would amortise that fee over the life</p> <p>18 of the loan to arrive at an annual rate. But a fee paid</p> <p>19 to a third party is clearly outside that concept.</p> <p>20 The fifth point is that in any event the expansive</p> <p>21 definition we would say is offside or outlawed, because</p> <p>22 it introduces enormous complexities and therefore risk</p> <p>23 of delay, which would have been outside the</p> <p>24 contemplation of the draftsman. It is important in this</p> <p>25 regard -- this will take a little time to develop -- to</p> <p style="text-align: center;">Page 15</p>
<p>1 concept of cost of a replacement. For that reason alone</p> <p>2 claims to consequential losses are outside the</p> <p>3 definition.</p> <p>4 The second direction which was payments to third</p> <p>5 parties is outside the definition, we say, because it is</p> <p>6 not a cost of the funding at all. It is a cost of</p> <p>7 a completely separate service, of which you have had the</p> <p>8 benefit. There may well be immense complications in</p> <p>9 dissecting the costs you have had to pay to third</p> <p>10 parties, where you are relying upon some rights issue or</p> <p>11 syndicated loan et cetera to work out which part could</p> <p>12 probably be referable to the claimed sum.</p> <p>13 In any event, it is offside because it is not a cost</p> <p>14 of the funding.</p> <p>15 The point made against us here was well if the</p> <p>16 bank's solicitors want paying by you, you the borrower,</p> <p>17 then that would be a cost and so this doesn't work. We</p> <p>18 accept that if a bank will only lend to us on the basis</p> <p>19 that if we pay its own charges as some sort of up front</p> <p>20 fee, that is a cost of the borrowing. It is part of the</p> <p>21 price. That is entirely different, because it is part</p> <p>22 of the price then. The fact that the bank wanted to be</p> <p>23 paid that price because of its own external costs or</p> <p>24 expenses is irrelevant. Another bank might not have</p> <p>25 charged that.</p> <p style="text-align: center;">Page 14</p>	<p>1 recall that the expression occurs "in all applicable</p> <p>2 rates" under the 1992 master agreement and "multiple</p> <p>3 rates" in the 2002 agreement.</p> <p>4 Cost of funding, the relevant amount, or cost of</p> <p>5 funding, the sum to be paid, is the same phrase used in</p> <p>6 each different applicable rate under the 1992 agreement.</p> <p>7 It is expressly accepted by Goldman Sachs in their reply</p> <p>8 skeleton, paragraph 27.1, that the phrase ...</p> <p>9 (Fire alarm sounds)</p> <p>10 (10.55 am)</p> <p>11 MR JUSTICE HILDYARD: I am surprised about that, I knew that</p> <p>12 at 11 o'clock we ...</p> <p>13 (A short break)</p> <p>14 MR JUSTICE HILDYARD: I think we were meant to observe a</p> <p>15 two-minute silence, I don't know if they will tell us</p> <p>16 about that.</p> <p>17 MR ZACAROLI: I was saying that Goldman Sachs in their reply</p> <p>18 skeleton accept that the phrase must have the same</p> <p>19 meaning wherever it occurs in the concept of defining</p> <p>20 the different applicable rates of interest throughout</p> <p>21 the master agreement. We say that self-evidently must</p> <p>22 be the case, we cited authority to support that</p> <p>23 proposition in our skeleton. I don't think I have heard</p> <p>24 express consent to that from the Senior Creditor Group,</p> <p>25 but we say it is pretty obvious that that must be the</p> <p style="text-align: center;">Page 16</p>

4 (Pages 13 to 16)

<p>1 case, unless there is good reason to show that it must</p> <p>2 mean something different.</p> <p>3 There was one point my learned friend Mr Dicker did</p> <p>4 make in this context. He developed a thesis which</p> <p>5 appeared to suggest that the cost of funding language is</p> <p>6 somehow different or the approach to it is different if</p> <p>7 dealing with a non-default rate, because it is there</p> <p>8 concerned with disgorging the benefit that you are</p> <p>9 holding on to, rather than compensation for loss. I was</p> <p>10 proposing to deal with that next.</p> <p>11 MR JUSTICE HILDYARD: Let's wait until ...</p> <p>12 (Two minutes silence observed)</p> <p>13 MR ZACAROLI: My Lord, we suggest that thesis is wrong, the</p> <p>14 cost of funding language is the same and has exactly the</p> <p>15 same meaning wherever it is used.</p> <p>16 The only difference between the different exercises</p> <p>17 is whether it is an actual exercise or a hypothetical</p> <p>18 one. That is one of the differences between the</p> <p>19 non-default rate and the default rate. It is evident</p> <p>20 from the wording but it wasn't something identified when</p> <p>21 my Lord was being taken through the definition. It may</p> <p>22 be just worth turning up the definitions, in the 1992</p> <p>23 agreement, tab 7 of the core bundle. Page 160 for the</p> <p>24 default rate, which is of course, "If it were to fund or</p> <p>25 of funding the relevant amount". Contrasted with the</p> <p style="text-align: center;">Page 17</p>	<p>1 defaulting party being in default may well have a higher</p> <p>2 cost of funding because of its default than the</p> <p>3 non-defaulting party. In other words, it would cost it</p> <p>4 more to get people to lend to it given its state of</p> <p>5 being in default, and it would be unfair to burden the</p> <p>6 non-defaulting party, insofar as it owes money to the</p> <p>7 defaulting party, to pay at an interest rate that was</p> <p>8 inflated by the reason of its counterparty's default.</p> <p>9 That rationale ceases to apply of course when it is</p> <p>10 the non-defaulting party who is failing to pay an amount</p> <p>11 which has now become due.</p> <p>12 There are two periods, from the early termination</p> <p>13 date to the date it becomes payable: non-default rate</p> <p>14 payable in that period because the non-defaulting party</p> <p>15 is not at fault in not paying, you don't know what to</p> <p>16 pay until it is calculated, but thereafter it is at</p> <p>17 fault and therefore it is itself in a default. Although</p> <p>18 it is not, capitalised term, a defaulting party.</p> <p>19 The termination rate involves no fault on either</p> <p>20 side. The termination is as a result of an event of</p> <p>21 termination, not an event of default. Therefore neither</p> <p>22 side should have the advantage of its funding costs</p> <p>23 being the source and therefore it is the arithmetic mean</p> <p>24 of both.</p> <p>25 That sum of course is payable irrespective of which</p> <p style="text-align: center;">Page 19</p>
<p>1 non-default rate on page 162, where it is, "A rate per</p> <p>2 annum equal to the cost to the non-defaulting party if</p> <p>3 it were to fund the relevant amount". So the words "of</p> <p>4 funding" are not there.</p> <p>5 The obvious rationale for that is because the</p> <p>6 non-default rate applies where the non-defaulting party</p> <p>7 is the payer and it would therefore never need to fund</p> <p>8 the amount. But that is the only reason for the</p> <p>9 difference. When one gets to the termination rate,</p> <p>10 page 163, the "if it were to fund" language comes back</p> <p>11 in.</p> <p>12 MR JUSTICE HILDYARD: The reason for it is the relevant</p> <p>13 party will not be out of the money?</p> <p>14 MR ZACAROLI: That is right, yes, yes.</p> <p>15 The rationale for the differences between the rates</p> <p>16 we submit is obvious, if one just stands back and looks</p> <p>17 at this in the round. The default rate is the</p> <p>18 counterparty certifying its cost of funding, consistent</p> <p>19 with the original rationale being, "Well, there is no</p> <p>20 benchmark rate so you have to certify whatever it would</p> <p>21 cost you wherever you can get the money".</p> <p>22 The non-default rate is payable to a defaulting</p> <p>23 party in every case, that is where it arises. It is</p> <p>24 a reasonable assumption that the draftsman, we say, has</p> <p>25 made. Where a defaulting party, or rather the</p> <p style="text-align: center;">Page 18</p>	<p>1 of those parties is the paying party or the receiving</p> <p>2 party, it is neutral completely as between the two</p> <p>3 parties.</p> <p>4 We say that itself gives the lie to the suggestion</p> <p>5 that the rationale of the cost if it were to fund, where</p> <p>6 you are the paying party, is the fact that you are</p> <p>7 disgorging a benefit as opposed to compensating for</p> <p>8 a loss. It is a neutral mechanism for determining --</p> <p>9 the determination of which party's cost of funding is</p> <p>10 relevant does not point either to the disgorgement</p> <p>11 theory or to a compensating the victim theory, which</p> <p>12 I will come on to later, that Mr Foxtan seemed to be</p> <p>13 advancing in his submissions.</p> <p>14 The draftsman has of course catered for the</p> <p>15 additional burden of the 1 per cent in the case of</p> <p>16 a default rate for the reasons that I have already been</p> <p>17 through. My Lord, the case that I could take my Lord</p> <p>18 to, although it is a fairly obvious proposition, is the</p> <p>19 case of Lordsvale Finance, that my learned friend</p> <p>20 Mr Dicker took you to I think, but only briefly, for</p> <p>21 a different point.</p> <p>22 MR JUSTICE HILDYARD: I am being stupid about this. The</p> <p>23 termination rate means a rate per annum equal to the</p> <p>24 arithmetic mean of the cost to each party. What you say</p> <p>25 that means is you look at each party's certified cost of</p> <p style="text-align: center;">Page 20</p>

<p>1 funding, add them up, and divide by two?</p> <p>2 MR ZACAROLI: Yes.</p> <p>3 My Lord, I was moving on then to the point about the</p> <p>4 1 per cent addition for the default rate.</p> <p>5 MR JUSTICE HILDYARD: Yes.</p> <p>6 MR ZACAROLI: The case in the bundle which explains this</p> <p>7 point is Lordsvale Finance, a case my Lord was taken to</p> <p>8 briefly yesterday I think. It may be worth just turning</p> <p>9 up to see the explanation or the generally accepted</p> <p>10 explanation for 1 per cent for being not a penalty. It</p> <p>11 is at authorities bundle 1, tab 27.</p> <p>12 One of the issues in the case, as you will see from</p> <p>13 the top of the headnote, was the second paragraph,</p> <p>14 Interest Rate:</p> <p>15 "Agreements providing for payment of additional</p> <p>16 1 per cent interest while borrower in default -- Whether</p> <p>17 increase in rate of interest unenforceable as</p> <p>18 a penalty."</p> <p>19 Mr Justice Colman begins dealing with this issue at</p> <p>20 page 164 just below letter G. He refers to the</p> <p>21 defendant's contention that 1 per cent is in terrorem,</p> <p>22 its sole function being to ensure compliance of the</p> <p>23 agreements, a particularly important point for English</p> <p>24 banking law.</p> <p>25 Then the critical passage is at page 166, in the</p> <p style="text-align: center;">Page 21</p>	<p>1 is payable at the non-default rate by reference to the</p> <p>2 cost, I have said "of funding", of course cost if it</p> <p>3 were to fund, of party B.</p> <p>4 Then the remainder of the period until it is paid</p> <p>5 it is the default rate, ie the cost of funding or if it</p> <p>6 were to fund of party A.</p> <p>7 That is an example where both parties' cost of</p> <p>8 funding would need to be calculated for those two</p> <p>9 different periods. Of course that is a short period,</p> <p>10 but the Lehman case has shown that in many cases it is</p> <p>11 some months before a calculation notice has been served</p> <p>12 and held to have been not unreasonable to do so.</p> <p>13 The next possibility, over the page, is where there</p> <p>14 is a termination event rather than an event of default.</p> <p>15 In such a case interest is payable for the first period</p> <p>16 at the termination rate, that is by reference to the</p> <p>17 arithmetic mean of the cost of funding to party A and</p> <p>18 the cost of funding to party B. For the remainder of</p> <p>19 the period it is the cost of funding of party B.</p> <p>20 I am assuming my Lord will take it from me that</p> <p>21 those are correct conclusions, that the underlying</p> <p>22 explanation is in our skeleton as to how the rates work</p> <p>23 and in what circumstances. That is the conclusion of</p> <p>24 how the default rate and the non-default rate work and</p> <p>25 the termination rate work in the different</p> <p style="text-align: center;">Page 23</p>
<p>1 break after letter F:</p> <p>2 "Where however the loan agreement provides ..."</p> <p>3 If my Lord could read that paragraph. (Pause)</p> <p>4 MR JUSTICE HILDYARD: Yes.</p> <p>5 MR ZACAROLI: Before expanding on the sort of complications</p> <p>6 that arise if the phrase is expanded in the way</p> <p>7 suggested, can I remind my Lord of the different rates</p> <p>8 which could or often would be applicable to a single sum</p> <p>9 payable under section 6(e). This is best done by</p> <p>10 reference to our skeleton and the annex to the skeleton,</p> <p>11 it is bundle 3, tab 3, at the very end, page 88 of the</p> <p>12 bundle is the annex.</p> <p>13 In the third and fourth paragraphs, so the second</p> <p>14 and third possibilities that we here identify, we give</p> <p>15 examples of where the interest payable on a section 6(e)</p> <p>16 amount would involve multiple rates and multiple</p> <p>17 parties' costs of funding. The first is where, as</p> <p>18 paragraph 3 says:</p> <p>19 "Party A suffers an event of default, the parties</p> <p>20 have opted a second method and loss and the termination</p> <p>21 amount is owed to party A."</p> <p>22 Ie owed to the defaulting party.</p> <p>23 The two periods are from the early termination date</p> <p>24 until the date the payment becomes due, and we have</p> <p>25 given it just about a month, and in that period interest</p> <p style="text-align: center;">Page 22</p>	<p>1 circumstances, but you end up with that situation.</p> <p>2 My Lord can see straight away that the calculation</p> <p>3 of the relevant rate of interest is invariably not just</p> <p>4 based on one party's cost of funding, but both and</p> <p>5 possibly an arithmetic mean of both for different</p> <p>6 periods.</p> <p>7 We submit that if the "cost of funding" expression</p> <p>8 is to include all consequential financial detriments,</p> <p>9 benefits conferred on others, and is based on what it</p> <p>10 would cost you to raise equity as opposed to borrow the</p> <p>11 money, then substantial complications are involved,</p> <p>12 which give significant risk of delay.</p> <p>13 First of all, it involves highly subjective</p> <p>14 judgments, for example as to causation between the fact</p> <p>15 that you have borrowed and the particular detriment or</p> <p>16 benefit conferred or expense that you are relying upon</p> <p>17 to be brought within the definition.</p> <p>18 Secondly, there is issues about where you draw the</p> <p>19 line. How far do you go in saying a loss, a financial</p> <p>20 detriment, is consequential? What is the precise causal</p> <p>21 nexus required between the fact that you have borrowed</p> <p>22 or would have been required to borrow and that the other</p> <p>23 loss you claim, and what about offsetting benefits, for</p> <p>24 example if you have to borrow sums is there a tax</p> <p>25 advantage to you overall in that tax year?</p> <p style="text-align: center;">Page 24</p>

6 (Pages 21 to 24)

<p>1 Then the causation itself will be difficult to</p> <p>2 disentangle in any case from the detriments caused to</p> <p>3 you by the default itself. It is a consequential loss not</p> <p>4 of having to borrow the sum, but a consequential loss</p> <p>5 because you are suffering a defaulting counterparty.</p> <p>6 I believe it to be common ground that the financial</p> <p>7 detriment caused to you or losses caused to you by</p> <p>8 reason of the default are not relevant to the cost of</p> <p>9 funding the relevant amount on any view. If it is not</p> <p>10 common ground it clearly must be correct that that be</p> <p>11 so. If only because consequential losses flowing from</p> <p>12 the default would have absolutely no part to play in the</p> <p>13 calculation of the cost of funding or cost if it were to</p> <p>14 fund of the non-defaulting party, because it is</p> <p>15 certifying its cost of funding, when it owes the</p> <p>16 relevant sum. The fact of not being paid a relevant sum</p> <p>17 cannot be a relevant consideration in that calculation.</p> <p>18 MR JUSTICE HILDYARD: Maybe I have become confused.</p> <p>19 I thought the position on that side of the court was</p> <p>20 that all costs relevant to plugging the hole are</p> <p>21 recoverable --</p> <p>22 MR ZACAROLI: That is what I understand it to be.</p> <p>23 MR JUSTICE HILDYARD: -- and measured by cost of funding,</p> <p>24 which they say is an expansive concept.</p> <p>25 MR ZACAROLI: Yes, I am dealing here with what I think is</p> <p style="text-align: center;">Page 25</p>	<p>1 MR DICKER: I don't know if it would help your Lordship and</p> <p>2 perhaps my learned friend if I were just to confirm the</p> <p>3 position. Your Lordship is right in that respect, my</p> <p>4 learned friend has raised two different situations, as</p> <p>5 I understand it. The first is where you are owed a sum</p> <p>6 of money which has not been paid, and the question is:</p> <p>7 can you take into account the consequence of that</p> <p>8 defaulted debt in working out what your cost of funding</p> <p>9 is?</p> <p>10 We say the answer to that is yes. The practical</p> <p>11 reason why the answer is yes is because if you go out</p> <p>12 and you try and borrow money, the lender will have</p> <p>13 a look at your assets, one of which is the defaulted sum</p> <p>14 and take that into account in deciding how much to</p> <p>15 charge you.</p> <p>16 There is then a second and separate question, which</p> <p>17 is if you choose to borrow a sum of money to plug the</p> <p>18 gap, that borrowing may itself increase the company's</p> <p>19 leverage and the cost of plugging the gap may therefore,</p> <p>20 not necessarily stop simply with the interest you have</p> <p>21 to pay on that borrowing. The effect of borrowing may</p> <p>22 have further implications, increasing further costs of</p> <p>23 borrowing, costs of equity et cetera. We say that is</p> <p>24 a separate issue, can that be taken account?</p> <p>25 In relation to that issue, we say the answer is also</p> <p style="text-align: center;">Page 27</p>
<p>1 common ground, which is that it doesn't include the</p> <p>2 costs of the fact of you dealing with a defaulting</p> <p>3 counterparty.</p> <p>4 MR JUSTICE HILDYARD: Illustrate the difference for me?</p> <p>5 MR ZACAROLI: As I understand their case, it is if I have to</p> <p>6 go out and borrow the sum, that could have consequential</p> <p>7 effects on my cost of equity, et cetera.</p> <p>8 The alternative is the fact that I am facing</p> <p>9 a counterparty that has defaulted, ie I now have on my</p> <p>10 balance sheet a claim which is perhaps worthless or</p> <p>11 worth much less than it was, that fact alone could give</p> <p>12 rise to consequential losses to me. Those consequential</p> <p>13 losses are not part of, as I understand it, their case,</p> <p>14 because they are focusing on the losses caused by having</p> <p>15 to go out and borrow an extra sum to fill the gap.</p> <p>16 I can't point to any more specific example of a loss</p> <p>17 which would fall within the first or the second, but if</p> <p>18 one can imagine there being --</p> <p>19 MR JUSTICE HILDYARD: I think Mr Dicker and Mr Foxton, or</p> <p>20 both, accepted that opportunity costs was not</p> <p>21 recoverable and so your ability as an entity to</p> <p>22 undertake various other activities, for example, even if</p> <p>23 thwarted by the gap is not recoverable, only the gap,</p> <p>24 the funding cost of the gap is recoverable, that is as</p> <p>25 I understand it.</p> <p style="text-align: center;">Page 26</p>	<p>1 yes.</p> <p>2 My Lord, so far as your Lordship's point is</p> <p>3 concerned, general opportunity costs. Your Lordship is</p> <p>4 absolutely right, those don't come into the calculation.</p> <p>5 That is because the approach the draftsman has taken is</p> <p>6 to say you shouldn't be entitled to claim, as it were,</p> <p>7 your opportunity loss. What you should be entitled to</p> <p>8 claim is the cost of funding to plug the gap and if you</p> <p>9 can plug the gap then essentially you should have sorted</p> <p>10 out --</p> <p>11 MR JUSTICE HILDYARD: You do say that, as it were, knock on</p> <p>12 damage of the gap is recoverable? The knock on damage</p> <p>13 to, for example, your credit status?</p> <p>14 MR DICKER: Knock on -- consequences which increase your</p> <p>15 cost of funding, in other words, if it is part of your</p> <p>16 cost of funding, then the answer is yes. We do say</p> <p>17 that.</p> <p>18 MR JUSTICE HILDYARD: Cost of funding generally?</p> <p>19 MR DICKER: Yes, if you go out and -- in a sense we are on</p> <p>20 common ground --</p> <p>21 MR JUSTICE HILDYARD: I am trying to see whether you are or</p> <p>22 aren't in common ground.</p> <p>23 MR DICKER: We are on common ground to this extent, as</p> <p>24 I understand it. The basic fact that your weighted</p> <p>25 average cost of capital will remain the same, regardless</p> <p style="text-align: center;">Page 28</p>

<p>1 of whether the business is funded entirely by debt or  2 entirely by equity. That is because the investor,  3 whether he be a lender or a shareholder, will  4 essentially be bearing exactly the same risks in those  5 two situations.</p> <p>6 That also remains true regardless of the precise mix  7 of funding. It is slightly counter intuitive. It is  8 the product of two gentlemen I mentioned yesterday,  9 Miller and Modigliani, who won a Nobel prize for that,  10 but the consequence of that, it logically follows, that  11 if you borrow a substantial sum and dramatically  12 increase your leverage as a result, of course that has  13 implications elsewhere on your cost of funding. We say,  14 and this is a separate point, that cost is a cost which  15 you can also take into account.</p> <p>16 MR JUSTICE HILDYARD: You will have another go in reply. At  17 moment my feeling is that the line between opportunity  18 cost and the other sort of costs, may be clearer, but  19 there is a wavy line as to what is referable to the  20 borrowing which you are entitled to measure by whatever  21 standard. You are not in fact in agreement, are you?</p> <p>22 MR ZACAROLI: I don't believe so. I think the position is  23 this, I am grateful for my learned friend's explanation,  24 but he said there were two aspects --</p> <p>25 MR JUSTICE HILDYARD: There are three aspects; aren't there?</p> <p style="text-align: center;">Page 29</p>	<p>1 level of your gaps made you into a sort of poor bank,  2 even if not a bad bank, so that you had little chance  3 except at exorbitant rates and costs of raising  4 finance. Mr Dicker says that is recoverable and you say  5 it wouldn't be?</p> <p>6 MR ZACAROLI: That again is not quite -- we say that is not  7 recoverable as a head of loss. Of course if the  8 question is, as we say it is: what it would cost you to  9 borrow? There is an impact on what anybody else would  10 be prepared to lend to you --</p> <p>11 MR JUSTICE HILDYARD: To borrow that bit?</p> <p>12 MR ZACAROLI: Yes, that bit. Your cost of borrowing will go  13 up, or it may go up because you have a defaulted asset,  14 if your asset is so large it will have an effect on your  15 borrowing. We accept there is an indirect consequence  16 or indirect effect, but it is a market question, it is:  17 what price would I have to pay somebody else? And that  18 has changed because of my poor financial state.</p> <p>19 We accept that only, everything else, ie claiming  20 some sort of head of loss, consequential loss, because  21 of that is wrong. Also -- for reasons I will come on  22 to -- we say relying upon your cost of funding to be the  23 cost of funding the relevant amount is simply wrong.  24 I have not dealt with that yet, I will come on to that.</p> <p>25 The point I was making before I diverted myself into</p> <p style="text-align: center;">Page 31</p>
<p>1 MR ZACAROLI: There is the opportunity costs which is  2 offside, and we are agreed.</p> <p>3 MR JUSTICE HILDYARD: We are all agreed on that, common  4 ground, that all of those things which you could have  5 done or you say you might have done with the benefit of  6 no gap out of the -- it is cost rather than what else  7 you might have done?</p> <p>8 MR ZACAROLI: Yes.</p> <p>9 Then he says there are two other aspects, the first  10 is the consequential effects on for example your  11 leverage, because you have had to go out and borrow  12 funds. That was what I have been dealing with as  13 I understand to be their case and I am suggesting that  14 is offside for all the reasons I am now dealing with.</p> <p>15 MR JUSTICE HILDYARD: Yes.</p> <p>16 MR ZACAROLI: The other aspect is the effect on your balance  17 sheet of having a defaulted asset, it is said increases  18 your general cost of funds.</p> <p>19 I don't understand that to be a separate head of  20 loss as it were, but is encompassed within my learned  21 friends' cases that you look to your general cost of  22 borrowing as the proxy for the cost of funding the  23 relevant amount.</p> <p>24 MR JUSTICE HILDYARD: This is probably a wrong analogy, and  25 in any event it is far too extreme, but supposing the</p> <p style="text-align: center;">Page 30</p>	<p>1 the case they are making is that the consequential  2 losses that we know they are claiming as a result of you  3 having to borrow, involve substantial complications of  4 causation, et cetera.</p> <p>5 Those complications are magnified where the exercise  6 is a hypothetical one, because you are then having to  7 look to see well if I was to raise this sum of money,  8 what do I think that would have had -- what effect do  9 I think that would have had on my overall cost of  10 funding, on the leverage of my assets generally. There  11 are clearly multiple subjective judgments involved as to  12 consequence, causation and computation.</p> <p>13 Again, complications are multiplied where the  14 termination rate applies, because both parties have to  15 undergo that exercise.</p> <p>16 We do say it is counter intuitive, to say the least,  17 that the paying party, where the termination rate  18 applies, would be required to certify all consequential  19 financial detriments to it if it were to have borrowed  20 GBP 100 million, say if that is the number, in order to  21 increase the effective rate of interest it has to pay.</p> <p>22 Goldman Sachs in their reply skeleton,  23 paragraph 27.2, say that the answer to this point lies  24 in the fact that it may not be rational for the paying  25 party to certify its cost of equity or presumably these</p> <p style="text-align: center;">Page 32</p>



<p>1 consequential matters, because it is not having to 2 borrow any sums, it is only have having to certify if it 3 were to fund. We suggest that confuses two things, 4 first of all the question of what loss has been caused 5 by the default with the question of what does it cost to 6 fund the relevant amount.</p> <p>7 In particular it ignores the fact that the 8 definition either does or does not include these various 9 expansive elements. If the definition does include 10 these expansive elements then either party has to comply 11 with the definition. You cannot not do so because you 12 are on the side that if you were to include them it 13 would increase the amount that you had to pay. It would 14 be irrational or perhaps in bath faith for you to do so, 15 knowing that those costs are part of the definition, to 16 exclude them.</p> <p>17 Just to round up on that fifth point, we submit that 18 those levels of complication -- which I as a preview 19 will be adding to when we come to CAPM and WACC later 20 on -- are simply outside, we would say, the ambit of the 21 exercise the draftsman intended, particularly given the 22 history of the clause and why the wording was there in 23 the first place.</p> <p>24 The sixth and final point on this issue, or 25 sub-issue, is the fact that under the 2002 agreement</p> <p style="text-align: center;">Page 33</p>	<p>1 1992 and 2002 ISDA agreements, when considering the 2 meaning of default rate.</p> <p>3 There are a few points here to make in response to 4 what submissions have been made to my Lord on these 5 points. It is said that the relationship with loss is 6 instructive, that pricing models are allowed under the 7 definition of the closeout amount under the 2002 8 agreement and therefore implicitly under the 1992 9 agreement, so why not under the cost of funding 10 language?</p> <p>11 My Lord's instinctive reaction yesterday was that 12 models are appropriate in a loss calculation but not 13 when it comes to interest. In our submission my Lord's 14 instinct is right, and we suggest it is underpinned by 15 the following analysis. Loss relates to the loss of the 16 benefit or burden, depending on whether you are the 17 paying party, from future performance of the terminated 18 transactions. At least that is a very large element of 19 the calculation of loss.</p> <p>20 Under an ISDA master agreement there could be any 21 number of transactions, capital T, conducted pursuant to 22 it, all of them are terminated on default and they all 23 have to be valued.</p> <p>24 That calculation, and let's stick to the 1992 25 agreement for the moment, is conducted on one of two</p> <p style="text-align: center;">Page 35</p>
<p>1 there was a reintroduction in some circumstances of 2 a benchmark rate, an overnight rate payable between 3 banks or offered by a bank to a relevant party.</p> <p>4 In particular the termination rate in some instances 5 requires the arithmetic mean to be identified of, on the 6 one hand, an overnight rate and on the other hand the 7 cost of funding to the other party.</p> <p>8 We don't suggest this is a determinative point, 9 although when read in the context of why the cost of 10 funding language is there in the first place to contrast 11 with the benchmark rate, we suggest it indicates at 12 least the drafter was contemplating an arithmetical mean 13 between two broadly similar concepts, ie it was intended 14 that both parts of the equation were borrowing rates.</p> <p>15 In contrast it is unlikely, we say, the drafter 16 intended, which it would have to have done on the SCG's 17 case, that you are trying to find the arithmetic mean 18 between on the one hand the overnight rate offered to 19 party A and on the other hand a wide-ranging enquiry as 20 to the financial detriments, offset against financial 21 benefits, suffered by party B.</p> <p>22 My Lord, the next point I was going to deal with was 23 to respond at this point to submissions made I think 24 yesterday about the assistance which you can get from 25 the definitions of loss and closeout amount under the</p> <p style="text-align: center;">Page 34</p>	<p>1 bases. Either by reference to market quotation, which 2 simply means the price that you would be charged by 3 somebody else for entering into a replacement 4 transaction, "I would have had all of these rights under 5 these transactions to replace them and it costs X, that 6 is what I claim from you as the settlement amount".</p> <p>7 No models are necessary for that, because it is just 8 what players in the market would charge you for entering 9 into those replacements. The alternative is loss where 10 models are clearly required, because there is a very 11 broad definition of loss, it is all losses and costs 12 caused by termination of the terminated transactions.</p> <p>13 Just to take an obvious perhaps example, but 14 a complicated one, if you enter into a cross-currency 15 interest rate swap, then elements involved in the 16 calculation of the closeout amount, if you are doing it 17 on the basis of loss, will include the likely movements 18 in currency rates over the life of each contract, so 19 that you can work out what would be paid or received on 20 each payment date under the contract, and also the 21 likely movements in interest rates over the same period, 22 relating to the same payment dates in the future. It 23 could be many years in the future. Finally, the net 24 present value of each of those payment streams, taking 25 into account all of those future curves about interest</p> <p style="text-align: center;">Page 36</p>

<p>1 rate and currency.</p> <p>2 Essential for some form of modelling to identify the</p> <p>3 loss this those circumstances.</p> <p>4 In contrast, the default rate is determined solely</p> <p>5 by reference to the cost, if you actually entered into</p> <p>6 a transaction to replace the money, or if you were to</p> <p>7 have done so.</p> <p>8 It is much more similar to market quotation in that</p> <p>9 sense, it is the price of replacement rather than some</p> <p>10 modelling exercise. For that reason alone the</p> <p>11 suggestion that because the definition of loss</p> <p>12 incorporates modelling, it must mean the draftsman</p> <p>13 thought that the default rate cost of funding language</p> <p>14 also incorporated modelling is simply wrong.</p> <p>15 The second point is to note -- this point was noted</p> <p>16 I think, I am going to mix my learned friends up,</p> <p>17 I thought it was Mr Foxton, it might have been</p> <p>18 Mr Dicker. The point made was that the definition of</p> <p>19 "loss" itself includes the words "cost of funding", and</p> <p>20 it does. It is perhaps worth reminding my Lord of the</p> <p>21 wording. The core bundle, tab 7. Loss's definition is</p> <p>22 at page 161 of the bundle.</p> <p>23 The phrase -- first of all it is worth just</p> <p>24 remembering that this definition is very broad:</p> <p>25 "Loss' means with respect to this agreement or one</p> <p style="text-align: center;">Page 37</p>	<p>1 The short point is one gets no help at all from the</p> <p>2 fact that the words cost of funding are used within the</p> <p>3 definition of loss in interpreting the meaning of the</p> <p>4 phrase "cost of funding the relevant amount".</p> <p>5 MR JUSTICE HILDYARD: Do you say the draftsman used the same</p> <p>6 phrase "cost of funding" differently in this context or</p> <p>7 do you say that although those words are invested with</p> <p>8 a different meaning according to the words they are</p> <p>9 associated with?</p> <p>10 MR ZACAROLI: I do in this context --</p> <p>11 MR JUSTICE HILDYARD: Of the relevant amount, which you</p> <p>12 stress as investing cost of funding with a certain</p> <p>13 meaning which looks as if it is different from cost of</p> <p>14 funding in the loss definition?</p> <p>15 MR ZACAROLI: Yes, and the point really is that in each of</p> <p>16 the applicable rates there are two points, really, one</p> <p>17 is the context of the use of the words is to identify</p> <p>18 a rate of interest, not here, not here, but in the</p> <p>19 applicable rates.</p> <p>20 Secondly, it is always defined by reference to the</p> <p>21 cost of funding a particular amount to one or other of</p> <p>22 the parties. You cannot look at the phrase "cost of</p> <p>23 funding" and say that has some meaning of its own. The</p> <p>24 entire phrase, the entire context needs to be looked at,</p> <p>25 cost of funding the relevant amount in each of the</p> <p style="text-align: center;">Page 39</p>
<p>1 or more terminated transactions, and a party, the</p> <p>2 termination currency equivalent of an amount that party</p> <p>3 reasonably determines in good faith to be its total</p> <p>4 losses and costs in connection with this agreement."</p> <p>5 What appears thereafter is all by way of inclusion,</p> <p>6 not by way of definition, so:</p> <p>7 "Including any loss of bargain, cost of funding or</p> <p>8 ..."</p> <p>9 The words "cost of funding" there are in a wholly</p> <p>10 different context to the context in which they are used</p> <p>11 in the definition of the default rate or indeed any of</p> <p>12 the applicable rates, because in all of the applicable</p> <p>13 rates cost of funding is always tied to the cost of</p> <p>14 funding a particular sum, the relevant amount or the</p> <p>15 amount payable under 2(e) or whatever it might be.</p> <p>16 Here it is at large. I don't propose to enter into</p> <p>17 an exposition of what "cost of funding" there can</p> <p>18 encompass generally, but I would submit it can at least</p> <p>19 encompass things like the cost of having to fund the</p> <p>20 entry into a, perhaps the provision of security in</p> <p>21 relation to a replacement collateralised transaction.</p> <p>22 That is one example, perhaps, it may include</p> <p>23 elements of interest it may not, but it is clearly at</p> <p>24 large there and not confined to cost of funding</p> <p>25 a specific amount.</p> <p style="text-align: center;">Page 38</p>	<p>1 applicable rates. It has the same meaning there. That</p> <p>2 is different from the way it is used here.</p> <p>3 MR JUSTICE HILDYARD: I mean, I know you have covered this</p> <p>4 at least in part, one cannot avoid the question buzzing</p> <p>5 around in one's mind is: why didn't they use the word</p> <p>6 "borrow"?</p> <p>7 MR ZACAROLI: I don't have an answer to that, other than we</p> <p>8 know the reason the phrase cost of funding was used or</p> <p>9 at least the strong indication of why it was used,</p> <p>10 because there wasn't an available benchmark rate, so it</p> <p>11 was focusing on borrowing.</p> <p>12 Beyond that I don't have an answer. But the</p> <p>13 question here is, in a sense it is not an appropriate</p> <p>14 question when considering interpretation of the contract</p> <p>15 to ask what other words might have been used or it is</p> <p>16 not a very helpful -- with respect to my Lord, it is not</p> <p>17 a very helpful way of trying to construe the words. One</p> <p>18 has to look at the words that have been used and the</p> <p>19 context in which they have been used to identify their</p> <p>20 meaning.</p> <p>21 MR JUSTICE HILDYARD: You are entitled to suppose that the</p> <p>22 draftsmen have selected the words advisedly.</p> <p>23 MR ZACAROLI: Yes.</p> <p>24 MR JUSTICE HILDYARD: If there is another obvious selection</p> <p>25 you assume that the choice was advised. That is as</p> <p style="text-align: center;">Page 40</p>

10 (Pages 37 to 40)

<p>1 I understand it what one's approach is likely to have to</p> <p>2 be, isn't it? You have to find some reason for the</p> <p>3 selection of the word assuming it to be careful and</p> <p>4 rational.</p> <p>5 MR ZACAROLI: With respect, my Lord, it is dangerous to go</p> <p>6 beyond the applicable matrix in order to answer that</p> <p>7 question. Yes, it is sensible to ask why was this word</p> <p>8 used in the context of the agreement, but to ask well</p> <p>9 actually there could have been some other word out there</p> <p>10 which you could have used here and didn't, we submit</p> <p>11 that is not an appropriate approach just to consider</p> <p>12 what other phraseology the draftsman might have used.</p> <p>13 MR JUSTICE HILDYARD: You explain it by reference to the</p> <p>14 1987 agreements, the draftsmen burdened by history, as</p> <p>15 it were, was swept into the word "funding".</p> <p>16 MR ZACAROLI: One of our arguments of course, but then the</p> <p>17 context in which it is found necessarily implies</p> <p>18 something which is the core elements of borrowing.</p> <p>19 MR JUSTICE HILDYARD: Yes, that I understand. You have to</p> <p>20 look at what he was really getting at and if the</p> <p>21 definition really is consistent or either wholly or</p> <p>22 obviously most clearly with borrowing, that is what he</p> <p>23 meant.</p> <p>24 MR ZACAROLI: Yes.</p> <p>25 MR JUSTICE HILDYARD: Yes.</p> <p style="text-align: center;">Page 41</p>	<p>1 a decision of Mr Justice Briggs, another Lehman case,</p> <p>2 indeed it is the Lehman case which is in the bundles at</p> <p>3 authorities bundle 2, tab 53. We have handed up</p> <p>4 a separate authority to my Lord, which is the first</p> <p>5 instance decision, which went to the Court of Appeal,</p> <p>6 being the decision in tab 53.</p> <p>7 MR JUSTICE HILDYARD: 53.</p> <p>8 MR ZACAROLI: Yes. It may be convenient just to slot it</p> <p>9 behind the Court of Appeal decision in tab 53.</p> <p>10 The Court of Appeal decision is the one which I will</p> <p>11 come to in a moment, which is where Lady Justice Arden</p> <p>12 refers to the overarching principle of commercially</p> <p>13 reasonable procedures which I will come back to deal</p> <p>14 with. This was the appeal from this case.</p> <p>15 It is right to point out that this decision of</p> <p>16 Mr Justice Briggs was overturned by the Court of Appeal,</p> <p>17 but we submit there is nothing in the relevant point in</p> <p>18 this decision, which I am going to come to, which is</p> <p>19 impaired by anything the Court of Appeal said. They</p> <p>20 didn't deal with this particular point.</p> <p>21 The point is at the very end of the decision. It is</p> <p>22 paragraph 81 and following. Under the heading "The</p> <p>23 remaining issues", what the judge was here having to</p> <p>24 determine was what is the test of challenge to</p> <p>25 a certificate of the closeout amount under the 2002</p> <p style="text-align: center;">Page 43</p>
<p>1 MR ZACAROLI: As I say, the key point is the context within</p> <p>2 the definition of loss is wholly different. There is no</p> <p>3 connection between the words cost of funding and having</p> <p>4 to raise a particular sum, or the cost of having to</p> <p>5 raise a particular sum. Indeed there is no context at</p> <p>6 all for that wording other than it is cost of funding</p> <p>7 generally can be included in your loss calculation.</p> <p>8 My Lord, the third point in this context is a point</p> <p>9 my learned friend Mr Dicker made yesterday, that the</p> <p>10 grounds of challenge under the 1992 agreement, and the</p> <p>11 2002 agreement, the grounds of challenge of the</p> <p>12 certificate are the same. Namely irrationality and good</p> <p>13 faith, those being the only circumstances in which you</p> <p>14 can challenge certification of loss or closeout amount.</p> <p>15 The first point to note is that this is not</p> <p>16 a question of construction as such or there may be</p> <p>17 elements of construction involved, but the draftsman has</p> <p>18 not told you whether the certificate is conclusive or</p> <p>19 binding those words are not used. You have to look at</p> <p>20 the general law to understand how the courts will react</p> <p>21 to a discretion being given to one party under a party</p> <p>22 to certify something, Socimer is the answer.</p> <p>23 We say that my learned friend is wrong in any event</p> <p>24 to say that the test for challenge under the general law</p> <p>25 is the same under either agreement. That is because of</p> <p style="text-align: center;">Page 42</p>	<p>1 agreement.</p> <p>2 Can my Lord read to himself paragraphs 81 and 82.</p> <p>3 (Pause)</p> <p>4 He was faced with deciding between Wednesbury</p> <p>5 unreasonableness and an objective standard and plumped</p> <p>6 for an objective standard given the words "commercially</p> <p>7 reasonable procedures to achieve or produce</p> <p>8 a commercially reasonable result".</p> <p>9 My Lord, picking up on the words of</p> <p>10 Lady Justice Arden in the same tab now but in the Court</p> <p>11 of Appeal judgment. The wording is in paragraph 57 of</p> <p>12 her judgment in the Court of Appeal.</p> <p>13 MR JUSTICE HILDYARD: 57?</p> <p>14 MR ZACAROLI: Paragraph 57, yes. It was subparagraph 7</p> <p>15 my Lord picked up on yesterday:</p> <p>16 "The principle that the determining party should use</p> <p>17 commercially reasonable procedures when determining</p> <p>18 a closeout amount was to be an overarching principle."</p> <p>19 One needs to go to the users' guide for the 2002</p> <p>20 agreement to see how far that overarching principle</p> <p>21 extends. My submission is it extend to -- as indeed</p> <p>22 hinted here -- the determination of the closeout amount.</p> <p>23 It has nothing to do with identifying the rate of</p> <p>24 interest. Interest calculation is not part of the</p> <p>25 closeout amount.</p> <p style="text-align: center;">Page 44</p>

<p>1 There is also another important point to pick up on</p> <p>2 from the users' guide when we look at it on this point,</p> <p>3 which is that the users' guide makes clear that the quid</p> <p>4 pro quo for the more flexible test, the increased</p> <p>5 flexibility which was introduced in the 2002 agreement,</p> <p>6 the quid pro quo was the introduction of objectivity and</p> <p>7 transparency. The more expansive and flexibility</p> <p>8 allowable under the 2002 agreement was matched with an</p> <p>9 objective approach to calculation of your closeout</p> <p>10 amount.</p> <p>11 The users' guide is in bundle 5 at tab 6.</p> <p>12 My Lord, I notice the time, it would not be an</p> <p>13 inconvenient moment to take a break if that is suitable</p> <p>14 for the shorthand writers.</p> <p>15 MR JUSTICE HILDYARD: Yes.</p> <p>16 (11.50 am)</p> <p>17 (A short break)</p> <p>18 (11.55 am)</p> <p>19 MR ZACAROLI: Could I take you first to the 2002 agreement</p> <p>20 just to see the definition of "closeout amount" before</p> <p>21 we look at the users' guide. That is in the core</p> <p>22 bundle, tab 8, page 192. My Lord has seen this before,</p> <p>23 so we can take it quite shortly.</p> <p>24 At the bottom of 192 closeout amount is defined as:</p> <p>25 "With respect to each terminated transaction or</p> <p style="text-align: center;">Page 45</p>	<p>1 And to address some of the weaknesses in market</p> <p>2 quotation. Then at the bottom of that paragraph, the</p> <p>3 last two lines:</p> <p>4 "Balanced by the interest of increased flexibility</p> <p>5 was the need to ensure that the new provisions</p> <p>6 incorporated certain objectivity and transparency</p> <p>7 requirements that were felt to be lacking, particularly</p> <p>8 in the definition of 'loss' in the 1992 agreement."</p> <p>9 The draftsman had thought that allowing this</p> <p>10 additional flexibility required some greater measure of</p> <p>11 control, namely that they had to be reasonable,</p> <p>12 objectively reasonable.</p> <p>13 This brings into play or reinforces the bigger</p> <p>14 distinction between loss or closeout amount language and</p> <p>15 the cost of funding language, because the loss</p> <p>16 calculation is by reference to market standards. It is</p> <p>17 about what you could replace a transaction with in the</p> <p>18 market.</p> <p>19 The information necessary or relevant to that</p> <p>20 calculation is essentially information as to the market.</p> <p>21 That is something which the payor and payee would have</p> <p>22 equal access to, it is market information. The cost of</p> <p>23 funding language is personalised to this extent, that it</p> <p>24 asks what would it cost you to fund. That information</p> <p>25 is exclusively within the knowledge of the relevant</p> <p style="text-align: center;">Page 47</p>
<p>1 group of transactions the amount of the losses or costs</p> <p>2 to the determining party that would or would be incurred</p> <p>3 under the prevailing circumstances ... in replacing or</p> <p>4 providing the economic equivalent of [various things]."</p> <p>5 Then the language on page 193, the fourth paragraph:</p> <p>6 "In determining a closeout amount the determining</p> <p>7 party may consider any relevant information, including,</p> <p>8 without limitation, one or more of the following types</p> <p>9 of information ..."</p> <p>10 You have seen those possibilities before. Then at</p> <p>11 the bottom of the page:</p> <p>12 "Commercially reasonable procedures used in</p> <p>13 determining a closeout amount may include the</p> <p>14 following ..."</p> <p>15 You have seen that.</p> <p>16 That is described in the users' guide at bundle 5,</p> <p>17 tab 6, page 235, paragraph 5(a) headed "Closeout</p> <p>18 amount":</p> <p>19 "One of the more significant amendments is the</p> <p>20 inclusion of a single measure of damages provision."</p> <p>21 The second paragraph:</p> <p>22 "Closeout amount is a payment measure developed to</p> <p>23 offer greater flexibility to the party making the</p> <p>24 determination of the amount due upon the designation of</p> <p>25 the occurrence of an early termination date ..."</p> <p style="text-align: center;">Page 46</p>	<p>1 certifying party.</p> <p>2 That is fine when the task is a limited one: what</p> <p>3 would it cost you to go out and borrow? Just looking at</p> <p>4 how that works in conjunction with the irrationality and</p> <p>5 good faith test there is readily available information</p> <p>6 in the market as to what borrowing rates generally are,</p> <p>7 what banks are generally willing to lend at. Therefore</p> <p>8 the counterparty, the non-certifying party, will know,</p> <p>9 will be alerted to a red flag when he sees</p> <p>10 a certification of a rate which is substantially more</p> <p>11 than what people generally can borrow at in the market.</p> <p>12 That doesn't mean that it is wrong; it means that</p> <p>13 the red flag is raised and the question can be asked.</p> <p>14 The control mechanism of irrationality works within</p> <p>15 those modest confines, if the concept is expanded to</p> <p>16 include cost of equity, WACC, CAPM, of the particular</p> <p>17 entity, consequential losses caused to that entity,</p> <p>18 amounts it has paid to third party by way of fees, there</p> <p>19 is no way of the counterparty knowing where an asserted</p> <p>20 rate is within reasonable parameters. The information</p> <p>21 is all on one side, so the test of irrationality and</p> <p>22 good faith has a lot to do. Indeed we say it is not</p> <p>23 really workable in those context.</p> <p>24 MR JUSTICE HILDYARD: It would be very blunt, it would only</p> <p>25 be a figure which was so astounding as to challenge good</p> <p style="text-align: center;">Page 48</p>

<p>1 sense of itself.</p> <p>2 MR ZACAROLI: Yes.</p> <p>3 Against that background, the suggestion that the</p> <p>4 draftsman must have intended the references to models</p> <p>5 and modelling in the 2002 definition of closeout amount</p> <p>6 to be implicitly read into the definition of default</p> <p>7 rate and for all these expansive concepts to be</p> <p>8 included, we say enters into the realms of fantasy, he</p> <p>9 cannot have meant it to go that broad. It becomes an</p> <p>10 unworkable provision.</p> <p>11 Putting it another way, the context, that it is left</p> <p>12 up to one party to certify its cost of funding the</p> <p>13 relevant amount, combined with limitations on that</p> <p>14 challenge, support the view that the exercise was</p> <p>15 intended to be within a relatively confined scope.</p> <p>16 MR JUSTICE HILDYARD: I was a bit unclear about this</p> <p>17 yesterday, I didn't know -- I think you said they</p> <p>18 weren't seeking to import the commercially reasonable</p> <p>19 language into what you regard as the wholly different</p> <p>20 exercise.</p> <p>21 MR ZACAROLI: Yes.</p> <p>22 MR JUSTICE HILDYARD: You were going to discuss whether they</p> <p>23 were or weren't. I suppose you would have it both ways.</p> <p>24 You would say if they don't, there is no justification</p> <p>25 for a model. If they do then the model must be leavened</p> <p style="text-align: center;">Page 49</p>	<p>1 the moment that modelling is to be implied into this</p> <p>2 separate exercise, and imports an objective standard</p> <p>3 entirely inconsistent in this separate exercise.</p> <p>4 Because you would have to review all the private</p> <p>5 information that would lead to you being able to assess</p> <p>6 whether the commercially objective standard had been</p> <p>7 fulfilled or not.</p> <p>8 MR ZACAROLI: I would say that, but my principal answer is</p> <p>9 it isn't.</p> <p>10 MR JUSTICE HILDYARD: Your principal argument is that you</p> <p>11 don't carry over.</p> <p>12 MR ZACAROLI: Yes. There are additional complications if</p> <p>13 you do carry over, because that then creates</p> <p>14 a difference between the 1992 agreement and the 2002</p> <p>15 agreement, but I think it is common ground there is no</p> <p>16 difference in the meaning of cost of funding language</p> <p>17 between the two, but if as a result of some textual</p> <p>18 interpretation you are to transport the commercially</p> <p>19 reasonable measures in the 2002 agreement and the</p> <p>20 definition of default rate there, what is the basis for</p> <p>21 doing this under the 1992 agreement, I don't know?</p> <p>22 MR JUSTICE HILDYARD: I just lay down the marker because</p> <p>23 Mr Dicker and others can have another go to correct me</p> <p>24 in due course, but my understanding is that the approach</p> <p>25 was twofold. That is to say 2002, in respect of loss,</p> <p style="text-align: center;">Page 51</p>
<p>1 by objectivity -- leavened by objectivity such as, query</p> <p>2 Judge Chapman, to introduce review by the court. That</p> <p>3 would completely undermine the central and agreed</p> <p>4 objectivity of a reasonably limited enquiry and</p> <p>5 a certain result.</p> <p>6 MR ZACAROLI: I think there are two different points within</p> <p>7 this.</p> <p>8 The first is a sort of contextual or textual one.</p> <p>9 Do the commercially reasonable procedures that one sees</p> <p>10 in the --</p> <p>11 MR JUSTICE HILDYARD: Yes, are they to be read into the</p> <p>12 separate exercise, the cost of funding?</p> <p>13 MR ZACAROLI: Yes, to which my answer is no.</p> <p>14 MR JUSTICE HILDYARD: You say no. I think I asked you the</p> <p>15 question yesterday as to whether you understood them to</p> <p>16 be saying yes and you were going to clarify that</p> <p>17 overnight, but for the moment I am thinking that they do</p> <p>18 say yes.</p> <p>19 MR ZACAROLI: I have not spoken to my learned friend.</p> <p>20 I looked at the transcript which gave me the same</p> <p>21 thought, so ...</p> <p>22 MR JUSTICE HILDYARD: I think they do say yes.</p> <p>23 MR ZACAROLI: Yes.</p> <p>24 MR JUSTICE HILDYARD: You say that the price of that cannot</p> <p>25 be any different in the separate exercise, assuming for</p> <p style="text-align: center;">Page 50</p>	<p>1 imported language which only expressed that which was</p> <p>2 implicit in the earlier form. That argument appears to</p> <p>3 be not straightforward, if I can put it that way, in</p> <p>4 light of the users' guide for 2002, which appears to</p> <p>5 acknowledge a difference, with a different price.</p> <p>6 MR ZACAROLI: Yes, yes.</p> <p>7 MR JUSTICE HILDYARD: I am partly making this point so I can</p> <p>8 remind myself when reading the transcript -- I am so</p> <p>9 sorry -- but also in order to give Mr Dicker and others</p> <p>10 a chance to re-direct me on a subsequent occasion.</p> <p>11 MR ZACAROLI: Yes. That however is the first point, which</p> <p>12 I have given my Lord the answer to that first point.</p> <p>13 The second point is a slightly broader one, which is</p> <p>14 leaving aside these textual points, we are identifying</p> <p>15 a difference between the calculation process in loss and</p> <p>16 closeout amount being one which is dependent upon market</p> <p>17 information, and therefore something which is --</p> <p>18 MR JUSTICE HILDYARD: I understand that.</p> <p>19 MR ZACAROLI: Yes.</p> <p>20 MR JUSTICE HILDYARD: It is much easier to test fulfilment</p> <p>21 of an objective standard by market information than by</p> <p>22 purely private information.</p> <p>23 MR ZACAROLI: Yes.</p> <p>24 MR JUSTICE HILDYARD: The Judge Chapman decision, again in</p> <p>25 Lehmans, was that on closeout or what --</p> <p style="text-align: center;">Page 52</p>

<p>1 MR ZACAROLI: I believe it was loss under the 1992</p> <p>2 agreement, yes, it is not considering the 2002</p> <p>3 agreement.</p> <p>4 MR JUSTICE HILDYARD: She did not, I think, admit of the</p> <p>5 possibility of judicial review by reference to an</p> <p>6 objective standard.</p> <p>7 MR ZACAROLI: No, and that is the view taken here.</p> <p>8 Mr Justice David Richards in a case called Fondazione,</p> <p>9 earlier this year. He didn't decide the point, but it</p> <p>10 is common ground that the standard of challenge to</p> <p>11 a calculation statement of loss is the Wednesbury</p> <p>12 principle. Under the 1992 agreement, again not</p> <p>13 considering the 2002 agreement.</p> <p>14 The only authority on the 2002 agreement -- at least</p> <p>15 on this point, so far as I am aware, is</p> <p>16 Mr Justice Briggs's decision at first instance in the</p> <p>17 Lehman decision we have looked at.</p> <p>18 MR JUSTICE HILDYARD: Which does import the objective</p> <p>19 standard. I mean Socimer is a case where the parties</p> <p>20 expressly or implicitly agreed that one person's</p> <p>21 decision should bind the other, with the further</p> <p>22 implication that the court is not to review it except on</p> <p>23 irrationality or good faith grounds.</p> <p>24 MR ZACAROLI: Yes.</p> <p>25 MR JUSTICE HILDYARD: That is what Socimer says.</p> <p style="text-align: center;">Page 53</p>	<p>1 on the basis that you are having to compensate your</p> <p>2 victim. This was in the context of the default rate,</p> <p>3 that you are compensating your victim, which justifies</p> <p>4 an expansive view. We say that doesn't work given that</p> <p>5 the same concept of cost of funding a particular amount</p> <p>6 underpins other interest rates where there is no victim,</p> <p>7 in particular the termination rate. So that analysis</p> <p>8 doesn't justify the expansive view.</p> <p>9 My Lord, that then is the end of the second</p> <p>10 sub-heading of my submissions, namely focusing on the</p> <p>11 word "cost" within the definition of cost of funding the</p> <p>12 relevant amount.</p> <p>13 Although my third heading was to revisit the word</p> <p>14 cost from a slightly different perspective, and that is</p> <p>15 our submission that cost means what has to be paid.</p> <p>16 This has been characterised during submission by my</p> <p>17 learned friends -- we say wrongly characterised -- as</p> <p>18 our submission is cost means lowest cost. That is not</p> <p>19 the way we put it, and it is not the way we put it in</p> <p>20 our skeleton either.</p> <p>21 The way we have put it and do put it is that cost is</p> <p>22 to be equated with what you have to pay, what you are</p> <p>23 required to pay. It is best illustrated in the</p> <p>24 hypothetical case. It applies both to the hypothetical</p> <p>25 and the actual, but just consider it for the moment in</p> <p style="text-align: center;">Page 55</p>
<p>1 MR ZACAROLI: Yes.</p> <p>2 MR JUSTICE HILDYARD: But to get into Socimer there has to</p> <p>3 be an implicit or express agreement that the judge is to</p> <p>4 be the certifying party --</p> <p>5 MR ZACAROLI: Yes.</p> <p>6 MR JUSTICE HILDYARD: -- subject only to irrationality and</p> <p>7 good faith.</p> <p>8 MR ZACAROLI: But I think the parties are to be the</p> <p>9 determining party, I think my Lord meant.</p> <p>10 MR JUSTICE HILDYARD: The determining party.</p> <p>11 MR ZACAROLI: Yes.</p> <p>12 MR JUSTICE HILDYARD: The court is to have no input unless</p> <p>13 irrationality or good faith are indicated.</p> <p>14 MR ZACAROLI: Yes, and in a sense and if it does have input</p> <p>15 what it is doing is putting itself into the shoes of the</p> <p>16 party who was entitled to make that determination, which</p> <p>17 is the difference between the two standards as --</p> <p>18 MR JUSTICE HILDYARD: That may be the same thing really,</p> <p>19 because you have to assume that the shoes fit unless the</p> <p>20 rationality test is offended.</p> <p>21 MR ZACAROLI: Yes.</p> <p>22 One final point on this section, where I am dealing</p> <p>23 with the points that were raised yesterday on the loss,</p> <p>24 and closeout calculation matters. My learned friend</p> <p>25 Mr Foxton said that you could justify the expansive view</p> <p style="text-align: center;">Page 54</p>	<p>1 the hypothetical case. Cost, if I were to fund, means</p> <p>2 what I would have to pay if I went into the market to</p> <p>3 replace the amount. To take, in a sense, the trite</p> <p>4 example that I think we have put in the skeleton and my</p> <p>5 learned friend picked up on yesterday, if bank A is</p> <p>6 willing to lend to me at 10 per cent but bank B at</p> <p>7 2 per cent, I wouldn't have to pay 10 per cent because</p> <p>8 I could get away with paying 2 per cent. It is that</p> <p>9 sense that we mean cost means what you have to pay.</p> <p>10 This is important, because the irrationality test</p> <p>11 cannot operate in a vacuum. If the question is simply:</p> <p>12 has the relevant payee acted irrationally in certifying</p> <p>13 its cost of funding, and cost doesn't have this</p> <p>14 anchorage. It just means anything amount that you have</p> <p>15 in fact paid or in fact could have paid then you are not</p> <p>16 acting irrationally if you certify any amount you could</p> <p>17 have paid.</p> <p>18 MR JUSTICE HILDYARD: This is not definitional, this is</p> <p>19 certificate.</p> <p>20 MR ZACAROLI: We say it is definitional, cost means what you</p> <p>21 have to pay is definitional, I am talking about the</p> <p>22 rationality test because there has to be a definition to</p> <p>23 which the rationality test --</p> <p>24 MR JUSTICE HILDYARD: You say within a notion of cost in</p> <p>25 this context, is what you have to pay?</p> <p style="text-align: center;">Page 56</p>

<p>1 MR ZACAROLI: Yes.</p> <p>2 It is because cost is defined in that way that it</p> <p>3 would be irrational for the party to choose the</p> <p>4 10 per cent as opposed to the 2 per cent from bank A or</p> <p>5 bank B. It is because cost means what I have to pay</p> <p>6 that it becomes irrational. Without that anchoring</p> <p>7 it is very difficult to apply the irrationality test.</p> <p>8 In our skeleton we illustrated this by taking away</p> <p>9 for the purposes of argument the concept of</p> <p>10 certification. Because if the words have a meaning they</p> <p>11 must have that meaning whether or not there is -- it is</p> <p>12 an objective standard or one which a party is entitled</p> <p>13 to certify.</p> <p>14 If the test were objective that is the default rate</p> <p>15 means the cost to the relevant payee if it were to fund</p> <p>16 the relevant amount, and if the relevant payee has two</p> <p>17 options, 10 per cent and 2 per cent, then we say very</p> <p>18 clearly that the cost to it there is the 2 per cent not</p> <p>19 the 10 per cent.</p> <p>20 I of course am building into that analysis all other</p> <p>21 things being equal, which is a very important</p> <p>22 qualification on this point. This point cannot be taken</p> <p>23 too far and we don't try to take it too far, that you</p> <p>24 have to build in other things being equal.</p> <p>25 If that is right when the test is purely objective,</p> <p style="text-align: right;">Page 57</p>	<p>1 features of equity.</p> <p>2 Just by way of a preliminary point, when it came to</p> <p>3 my learned friend Mr Dicker's submissions as to whether</p> <p>4 the cost of equity is included within the definition,</p> <p>5 his submission did savour something of the bootstraps</p> <p>6 perspective, because his submission really was:</p> <p>7 "If you take our case that funding includes equity,</p> <p>8 well we all know that equity has a cost in the outside</p> <p>9 world and therefore that must be the costs incorporated</p> <p>10 into the definition."</p> <p>11 We say that assumes what he needs to prove, namely</p> <p>12 that the cost of funding the relevant amount, as matter</p> <p>13 of construction, does encompass the cost of equity, the</p> <p>14 cost of issuing equity. We rely on a number of reasons</p> <p>15 to say why cost of equity is excluded, again my Lord had</p> <p>16 an instinctive view to this. What I aim to do is to</p> <p>17 identify a number of underpinnings for that instinctive</p> <p>18 view being correct.</p> <p>19 MR JUSTICE HILDYARD: I took Mr Dicker's point to be</p> <p>20 negative really rather than positive, that is to say he</p> <p>21 was addressing any supposition on my part that equity</p> <p>22 had no cost and therefore was excluded on that ground.</p> <p>23 I took him to be saying of course it does have</p> <p>24 a cost, and my further question: yes, but is it</p> <p>25 a measurable cost? He said yes, and that is the more</p> <p style="text-align: right;">Page 59</p>
<p>1 the meaning doesn't change just because it is one party</p> <p>2 who is obliged to certify the relevant rate.</p> <p>3 When it comes to applying the test of rationality to</p> <p>4 what you would have had to pay, of course you are</p> <p>5 entitled to take into account more than just the</p> <p>6 headline rate. But that is what the rationality test</p> <p>7 bites on.</p> <p>8 My Lord, that is in a nutshell what we say about the</p> <p>9 meaning of cost being what you have to pay.</p> <p>10 The fourth sub-heading then was equity and why we</p> <p>11 say equity is not included within the definition of</p> <p>12 default rate.</p> <p>13 Just to recap the two points that we say are</p> <p>14 implicit in the concept of the definition, because the</p> <p>15 definition necessarily implies the price of</p> <p>16 a transaction to obtain replacement funding for the</p> <p>17 period that it remains outstanding. The two particular</p> <p>18 features that are implied from that are (1), that the</p> <p>19 funding is something you are going to have to repay at</p> <p>20 some point.</p> <p>21 Secondly, that what you are paying for it relates to</p> <p>22 the time that you use that money.</p> <p>23 Those are obviously the core features of borrowing</p> <p>24 and our overall point -- which I will take some time to</p> <p>25 develop -- is a simple one: those features are not</p> <p style="text-align: right;">Page 58</p>	<p>1 difficult question.</p> <p>2 As I understood it, it was essentially to ensure</p> <p>3 that I didn't strip out equity on a false basis that he</p> <p>4 made those submissions.</p> <p>5 MR ZACAROLI: Yes, I am prepared to accept that.</p> <p>6 MR JUSTICE HILDYARD: Yes.</p> <p>7 MR ZACAROLI: We are not focusing just on cost here. We are</p> <p>8 focusing on whether because of the definition cost of</p> <p>9 funding the relevant amount, because of what that</p> <p>10 imports, equity is within all of that --</p> <p>11 MR JUSTICE HILDYARD: You say equity doesn't satisfy, it</p> <p>12 goes outside the features?</p> <p>13 MR ZACAROLI: Yes, the first point is just to identify the</p> <p>14 fundamental nature of equity. I hesitate to deal with</p> <p>15 this at any length, my Lord knows perfectly well what</p> <p>16 equity is and what its fundamental features are.</p> <p>17 I propose to deal with this very shortly, unless my Lord</p> <p>18 wants any further reference to authority. We have dealt</p> <p>19 with it at some length in the skeleton.</p> <p>20 The two essential features of equity we say are</p> <p>21 first of all it is a right to participate in the assets.</p> <p>22 To paraphrase the classic definition of a share,</p> <p>23 Mr Justice Farwell in the Borland's Trustee case. It is</p> <p>24 an interest in a company measured by a sum of money.</p> <p>25 Its purpose is first and foremost of liability and</p> <p style="text-align: right;">Page 60</p>

15 (Pages 57 to 60)

<p>1 secondary as an interest in the company. It is made up 2 of the various rights contained in the articles, and 3 critically for this context, it includes the right to 4 a sum of money which may be less or more than the sum 5 invested. Because it is dependent on the fortunes of 6 the company as to what you may or may not get back on 7 a winding up or on a reduction of capital if that 8 happens. That is the first feature.</p> <p>9 The second feature is the return on that amount 10 invested is measured not by time but by a share in the 11 profits of the enterprise if any.</p> <p>12 Taking the first feature, the return of the sum 13 invested. You are only entitled on a winding up to get 14 back whatever is left measured by the sum of money you 15 put in. So your proportionate share is measured by the 16 nominal value of the shares you put in, but that is all. 17 You may or may not get back that amount, you can get 18 more or less. You can only get back the capital prior 19 to a winding up in prescribed circumstances, controlled 20 circumstances, where a reduction of capital is 21 permitted.</p> <p>22 My Lord will well know the concept of maintenance of 23 capital from Trevor v Whitworth, again in the bundle, we 24 needn't turn it up. It has existed in our law for 25 a long time. As far as the additional return is</p> <p style="text-align: center;">Page 61</p>	<p>1 reference to time, the time that the investment has been 2 in the company. It is measured by a share of profit.</p> <p>3 One authority is worth turning up just to make 4 a point, because it makes the point very neatly and that 5 is the Bond v Barrow Haematite Steel decision, bundle 6 AB1 at tab 5. The first three lines of the headnote 7 show:</p> <p>8 "The question whether a company has profits 9 available for distribution must be answered according to 10 the circumstances of a particular case, the nature of 11 the company, the evidence of competent witnesses."</p> <p>12 Perhaps an obvious point, but there are two passages 13 just to highlight in the judgment of Mr Justice Farwell, 14 he begins the judgment on 361. The contention that he 15 is dealing with in the first five lines of his judgment 16 is that of the plaintiffs:</p> <p>17 "They say they are entitled by contract to be paid 18 a preferential dividend out of the balance of the credit 19 of the profit and loss account in each year, and that 20 the company cannot appropriate any part of that balance 21 to reserve or carry over one shilling until they have 22 been paid in full."</p> <p>23 Just to note on page 362, I should actually point 24 out at the bottom of 361, first of all, the last five 25 lines of that paragraph. The first point depended on</p> <p style="text-align: center;">Page 63</p>
<p>1 concerned, whether that be by way of dividends or by 2 other redemption premium, that is only payable out of 3 profits, it is measured by the company's profits and 4 only recoverable out of them.</p> <p>5 Those are essential features of equity. Whether it 6 be ordinary or preference shares one is talking about. 7 That is the essential features. The only difference 8 with a preference share is that measured in comparison 9 to some other issue of shares -- it always must be 10 measured by reference to some other issue of shares -- 11 one or more of the rights of the shareholder take 12 precedence over the other shareholders, whether it is 13 a return or profits or whatever.</p> <p>14 For my Lord's note, we have set out the particular 15 features of preference shares in our skeleton at 16 pages 63-65. Again, unless my Lord particularly wants 17 to be taken to the underlying law I didn't propose doing 18 so, these are well-known concepts, to my Lord certainly.</p> <p>19 It is true that a fixed dividend on preference 20 shares may mimic a return based on interest or based on 21 an interest rate, because there may be a fixed 22 percentage entitlement in each year of account. 23 Dependent on profits in that year of account. It is 24 fundamentally not a payment of interest, and it is 25 fundamentally not a payment that is measured by</p> <p style="text-align: center;">Page 62</p>	<p>1 the construction of the original articles, the special 2 resolutions creating the preference shares. Over the 3 page, picking it up in the fifth line towards the end of 4 the line:</p> <p>5 "It is argued that the provisions as to the 6 declaration of a dividend do not apply to the shares on 7 which a fixed preferential dividend is payable. In my 8 opinion that is not so, the necessity for the 9 declaration of a dividend as a condition precedent to an 10 action to recover is stated in general terms in Lindley 11 on Companies, and where the reserve fund article applies 12 it is obvious that such a declaration is essential for 13 the shareholder has no right to any payment until the 14 corporate body has determined that the money can 15 properly be paid away, it is urged this puts the 16 preference shareholders at the mercy of the company, but 17 the preference shareholders come in on these terms and 18 this argument does not carry much weight in an action 19 such as this where bona fides is conceded."</p> <p>20 That is just by way of note that an obvious point 21 that preferential dividends depends still on the 22 declaration by the company.</p> <p>23 The relevant passage I want to refer my Lord to is 24 page 363. The top of the page, the second sentence of 25 the first paragraph:</p> <p style="text-align: center;">Page 64</p>

16 (Pages 61 to 64)



<p>1 "Stress has been laid on the word 'interest' and in 2 my opinion that word has slipped in per incuriam and 3 should be read as 'dividend'."</p> <p>4 The next sentence:</p> <p>5 "Interest is not an apt word to express through 6 a term to which a shareholder is entitled in respect of 7 shares paid up in due course and not by way of advance. 8 Interest is compensation for the delay in payment and is 9 not accurately applied to the share of profits of 10 trading, although it may be used as an inaccurate mode 11 of expressing the measure of the share of those 12 profits."</p> <p>13 Correspondingly, if one looks at the question of 14 cost, the company is under no obligation to pay 15 a particular return, it depends upon profits and other 16 matters, the profits have to be distributable profits 17 for a start not just any profits.</p> <p>18 MR JUSTICE HILDYARD: There used to be an argument as to 19 whether you could build into a preference share a right, 20 even without a declaration year by year, provided it 21 came out of distributable profit, which wouldn't offend 22 the statute.</p> <p>23 MR ZACAROLI: There is one case we have in the bundle if 24 my Lord wants to see it, there is an Australian case, 25 the name escapes me, but I can find it in a minute --</p> <p style="text-align: center;">Page 65</p>	<p>1 MR ZACAROLI: As I say, you can perhaps come on to the 2 hybrid instrument point later, but you can draft 3 something which in fact is borrowing, although you may 4 call it something else.</p> <p>5 MR JUSTICE HILDYARD: You say it is an irreducible feature 6 of a share participation in the profits of the company, 7 that it is always subject to a declaration by the 8 directors --</p> <p>9 MR ZACAROLI: Yes.</p> <p>10 MR JUSTICE HILDYARD: -- they couldn't for example make 11 a declaration in effect in advance, because that would 12 be to fetter their discretion and would be invalid on 13 other grounds.</p> <p>14 MR ZACAROLI: Yes, that is just looking at this from the 15 perspective of whether it is a cost. The other feature 16 namely it is not a payment that is measurable by 17 reference to time but by reference to profit, is 18 actually a fundamental point that underlies all of this. 19 That is, as it were, the legal explanation and lest it 20 be said that my Lord shouldn't be focusing on legal 21 concept of equity here, because the spectacles are too 22 confined, we submit that is not right. You are required 23 to look at the fundamental aspects of what is borrowing 24 and what is not, but lest it be said. The explanation 25 for why equity is simply outside of the ambit here, is</p> <p style="text-align: center;">Page 67</p>
<p>1 Heesh and something, where the court there, the question 2 is whether preference shareholders are entitled as of 3 right to be paid a dividend. It comes down to 4 construction of the relevant instrument, because you can 5 draft something which is called a preference share, but 6 actually has all the attributes of debt. It is not the 7 terminology that labels are the determinate here, that 8 cannot be right.</p> <p>9 There is a Hong Kong case cited in that case, where 10 the court did take the view that the company was under 11 an absolute obligation to pay dividends. That gives 12 rise to a different problem, which wasn't resolved, 13 which is: what is the remedy if the obligation is 14 breached? Because the statutes and the general law 15 prevents payments except out of profits and if there is 16 nevertheless an absolute obligation the company is in 17 breach of contract, but to remedy that by a decree 18 of specific performance requiring payment would 19 contravene the statute, so that is just left hanging as 20 it were.</p> <p>21 MR JUSTICE HILDYARD: If out of non-distributable profits.</p> <p>22 MR ZACAROLI: Exactly, yes.</p> <p>23 MR JUSTICE HILDYARD: But if restricted, then the argument 24 was put that is no difference from having a hypothecated 25 fund or limited recourse?</p> <p style="text-align: center;">Page 66</p>	<p>1 amply explained in the textbook that my learned friend 2 cited yesterday called The Real Cost of Capital. Just 3 to go back to that briefly, I think that is to be found 4 at authorities bundle 4A, tab 139A.</p> <p>5 MR JUSTICE HILDYARD: Was there not a decision of 6 Lady Justice Arden -- I mean for various reasons company 7 lawyers sought to reduce the rights attributable to 8 shares in certain circumstances whereby to render them 9 as close to valueless as could be. And so the 10 participation right would be knocked down some fraction, 11 voting rights would be excluded, and dividend rights 12 would be non-existent. The question was: was it still 13 a share? I have a recollection of this, maybe I am -- 14 I could well be imagining, but I think she did address 15 this.</p> <p>16 MR ZACAROLI: We will see if we can find it. 139A.</p> <p>17 MR JUSTICE HILDYARD: Yes.</p> <p>18 MR ZACAROLI: Starting before the introduction on page 2 19 the numbering is at the top of the page.</p> <p>20 MR JUSTICE HILDYARD: Yes.</p> <p>21 MR ZACAROLI: "This chapter deals with the concepts that 22 underpin the application of cost of capital, companies 23 obtain capital from both shareholders' equity and 24 lenders' debt, both types of capital come at a cost. 25 This is because investors require a return to reflect</p> <p style="text-align: center;">Page 68</p>

<p>1 the opportunity costs associated with committing their</p> <p>2 money over a period of time. For debt this cost is the</p> <p>3 rate of interest that the lender charges. This varies</p> <p>4 with the amount of risk to which the lender is exposed.</p> <p>5 In the case of equity things are more complicated,</p> <p>6 companies do not have a contractual obligation to reward</p> <p>7 shareholders at a specified rate. Indeed shareholders</p> <p>8 can receive negative returns if stock prices fall and</p> <p>9 dividends are not paid.</p> <p>10 "The cost of equity is the return on the investment</p> <p>11 that the shareholders expect to receive whilst not</p> <p>12 guaranteed, firms that do not meet these required</p> <p>13 returns will find it difficult to attract equity capital</p> <p>14 with a damaging impact on their businesses and the</p> <p>15 valuation of those businesses."</p> <p>16 Just in terms of what cost is, cost is, as we say</p> <p>17 it is, the price you pay in transacting. There is</p> <p>18 simply no such thing in relation to equity as explained</p> <p>19 there. The price you pay to your counterparty, there is</p> <p>20 no obligation to pay any amount to a counterparty with</p> <p>21 equity. Your costs are some slightly more amorphous</p> <p>22 concept of well if you don't give them the return they</p> <p>23 anticipate, they might go away. The share price might</p> <p>24 thus fall and your business will be damaged in some way</p> <p>25 which is very difficult, if not impossible, to measure</p> <p style="text-align: center;">Page 69</p>	<p>1 imports to what is required by the funding, two</p> <p>2 features, namely it is something which has to be repaid</p> <p>3 because you only have it for a period of time and the</p> <p>4 payments for that thing being relative to the time you</p> <p>5 have it and measured by reference to that time. They</p> <p>6 are simply not present in equity.</p> <p>7 The second point is to pick up on my very first</p> <p>8 opening comment yesterday, that what the draftsman has</p> <p>9 undoubtedly done is rather than allowing the relevant</p> <p>10 payee to charge its lost opportunity to make profit to</p> <p>11 the defaulting party or the other party, it is only</p> <p>12 allowed to charge the cost to it of raising the relevant</p> <p>13 amount.</p> <p>14 If cost of equity is to be included within the cost</p> <p>15 of raising the relevant amount, then it either does or</p> <p>16 runs a very real risk in many cases, and in many cases</p> <p>17 it will involve precisely that, namely compensating or</p> <p>18 rather requiring the paying party to pay interest based</p> <p>19 upon its profits, the profits that it was going to make</p> <p>20 from the money. It cuts across that very clear</p> <p>21 distinction the draftsman has drawn.</p> <p>22 Let me explain that by the following. The measure</p> <p>23 of anticipated return to shareholders is directly linked</p> <p>24 to the profits of the company. Clearly only payable out</p> <p>25 of profits. To take a concrete example, and these are</p> <p style="text-align: center;">Page 71</p>
<p>1 other than by some guesstimate.</p> <p>2 The point is reiterated at page 5, where the authors</p> <p>3 distinguish debt from equity at the bottom of page 5,</p> <p>4 bullet point "Debt":</p> <p>5 "The companies may drawdown bank loans or issue</p> <p>6 bonds, a firm must promise to make payments over the</p> <p>7 period of the loan is outstanding ... whereas debt,</p> <p>8 firms view shares as representing a claim on the value</p> <p>9 of the firm after the debt has repaid, shareholders</p> <p>10 receive dividend payments, and the firm can benefit from</p> <p>11 any increase in the value of shares. Cost of debt is</p> <p>12 very simple, a simple proxy by the rate of interest</p> <p>13 paid."</p> <p>14 The first three lines of that paragraph:</p> <p>15 "Why is there a cost of equity?"</p> <p>16 Again the first four lines of that paragraph explain</p> <p>17 the much more complex picture that because there is no</p> <p>18 commitment to pay a certain level of dividend share</p> <p>19 prices can fall as well as go up:</p> <p>20 "... there is no clearly defined contractual cost of</p> <p>21 raising capital through issuing equity ...</p> <p>22 "But while the payments ... That does not mean that</p> <p>23 equity finance is free ..."</p> <p>24 Because of the knock-on effect it can have. To go</p> <p>25 back to the definition of the "default rate" and what it</p> <p style="text-align: center;">Page 70</p>	<p>1 examples which are particularly apposite in the context</p> <p>2 of hedge funds, and remember that much of the debt in</p> <p>3 this case has been purchased by hedge funds, who claim</p> <p>4 of course that it is their cost of funding as the</p> <p>5 purchaser that must be taken into account, I am leaving</p> <p>6 that point aside for the moment. It is particularly</p> <p>7 apposite in relation to hedge funds.</p> <p>8 A concrete example, where a company has made profits</p> <p>9 such that it has say paid dividends of 10 per cent on</p> <p>10 its shares to its shareholders in the previous year,</p> <p>11 perhaps previous years. Investors therefore expect,</p> <p>12 leaving everything aside, a 10 per cent return on their</p> <p>13 investment. That is dependent on the company continuing</p> <p>14 to make profits in that year such that it can pay that</p> <p>15 dividend. That return is not a legal liability but an</p> <p>16 expectation, the consequences of not meeting it though</p> <p>17 are perhaps that shareholders will walk away, or no one</p> <p>18 else will invest.</p> <p>19 To calculate the interest payable by the defaulting</p> <p>20 party on the basis that that anticipated return is your</p> <p>21 cost of equity, in essence requires the defaulting party</p> <p>22 to guarantee the anticipated profit under the default</p> <p>23 rate definition. Because you are saying that is the</p> <p>24 anticipated profit, that is therefore the anticipated</p> <p>25 return my shareholders expect, that is my cost of</p> <p style="text-align: center;">Page 72</p>

18 (Pages 69 to 72)

<p>1 equity, I can say my cost of equity is my cost of funds, 2 you have to pay me my cost of funds for that period. 3 It does, we say, immediately cut across that very 4 clear distinction the draftsman has drawn between cost 5 of replacing the sum as opposed to replenishing the 6 anticipated profit you would have made. 7 The third point is that the inappropriateness of 8 equity, as falling within the definition, is 9 demonstrated by the models and modelling which underpins 10 the Senior Creditor Group's and Goldman Sachs' case. 11 The reliance on models is of course critical, 12 standing back for a moment and asking what is happening 13 in the real world in the Lehman context, or in any other 14 context. The notion of a company actually going out to 15 raise equity to fill a funding gap is highly unlikely, 16 to put it at its lowest. Certainly in the run of the 17 mill situations which will arise under the ISDA 18 master agreement, ie in most of the circumstances in 19 which it is intended to be used. We are in an abnormal 20 world where there is a default left outstanding for many 21 years -- although in fact now paid, but it was 22 outstanding for many years -- because of the horrendous 23 financial circumstances surrounding Lehman's collapse. 24 But in the run-of-the-mill case one is having to 25 identify the cost of funding. Perhaps in relation to</p> <p style="text-align: center;">Page 73</p>	<p>1 MR ZACAROLI: That just explains why models are so important 2 to the creditors' claims. The principal model which 3 underpins their case is the capital asset pricing model, 4 CAPM. That involves three aspects. The three aspects 5 are described in a number of places in the bundles and 6 if my Lord wants me to take you to them I can, but just 7 to state what they are first of all. 8 It involves a risk free rate, essentially Treasury 9 bonds' rates, combined with or multiplied by the firm's 10 equity beta. That is a measure of the riskiness of 11 entity compared with the market, 1 is the same, less 12 than 1 is worse or more than 1 is better, or it may be 13 the other way round, I am not sure, but it is relative 14 risk. 15 The third element is the equity market risk premium, 16 which is the riskiness of investing in the Stock Market 17 as against the risk free rate. It is a market wide 18 risk. 19 Each of those second and third components are 20 subject to highly subjective judgment calls, but 21 importantly it is very clear that they are demonstrably 22 not linked to the time value of money, but to extraneous 23 factors. Principally the anticipated profit levels of 24 the relevant entity, and the risks that those profit 25 levels may or may not be achieved by reference to that</p> <p style="text-align: center;">Page 75</p>
<p>1 quite short periods. Sometimes required to do so at 2 great speed, because it is necessary to determine for 3 example a closeout amount on or as soon as after the 4 termination date as is reasonably practicable, and one 5 of the component elements in a closeout amount may well 6 be an unpaid amount. An unpaid amount is defined as 7 something that wasn't paid, plus interest, can be at the 8 default rate. 9 MR JUSTICE HILDYARD: One can see it might be the occasion 10 but not the reason. 11 MR ZACAROLI: I am not sure which way round that is being 12 put. 13 MR JUSTICE HILDYARD: A default may be the occasion for 14 equity funding if blended with other reasons, but it may 15 not be likely to be the reason for equity funding. 16 MR ZACAROLI: I understand that. Indeed, that is another 17 point I will come on to, it is true that many banks, or 18 at least some banks, entered upon a substantial capital 19 raising exercise in the immediate aftermath of the 20 Lehman's collapse. 21 MR JUSTICE HILDYARD: We have the evidence from 22 Goldman Sachs. 23 MR ZACAROLI: Perhaps I will leave that to come on to that 24 later. 25 MR JUSTICE HILDYARD: Yes, okay.</p> <p style="text-align: center;">Page 74</p>	<p>1 entity's risk rating and the market risk generally. 2 That is a very long way from a payment made in order 3 to purchase the use of money for a period of time. 4 Added to that for a creditor, relevant payee, to 5 certify the cost of funding the relevant amount by 6 reference to its cost of capital, whether that be, well, 7 WACC, which incorporates -- it is weighted cost of debt 8 and equity, is flawed for the simple reason that that 9 calculation is concerned with the cost to it of funding 10 its entire asset base, not the cost at which it could go 11 out and raise an additional sum equal to the relevant 12 amount. 13 Of course, raising that amount for the limited 14 period that it remains outstanding. For the moment I am 15 going to develop that point in a little while when 16 I actually address the arguments that Goldman Sachs and 17 the SCG make against us, but just the headline point is 18 that their skeleton, their argument and that includes 19 the SCG's skeleton argument, are replete with references 20 to the ways in which entities fund themselves as being 21 the proper proxy for the default rate. 22 An entity's cost of funding itself, we submit as an 23 overarching point, has nothing to do with the cost to it 24 of going out into the market or if it were to go into 25 the market to raise the relevant sum. I will come back</p> <p style="text-align: center;">Page 76</p>

<p>1 to that in due course.</p> <p>2 The next point is that that is demonstrated further,</p> <p>3 the inappropriateness of WACC as a proxy for your cost</p> <p>4 if you were to fund the relevant amount, is demonstrated</p> <p>5 by the fact that it is based at least to some extent on</p> <p>6 historic costs.</p> <p>7 I think the point was made by my learned friend</p> <p>8 Mr Dicker that it is us that make this point that it is</p> <p>9 based on history, but actually it is the</p> <p>10 Senior Creditors' Group that make the point in their</p> <p>11 skeleton. The skeleton is bundle 3 at tab 2. It is</p> <p>12 page 27 of the bundle and it is paragraph 55.1 of the</p> <p>13 skeleton. They say:</p> <p>14 "In the case of the cost of equity the most commonly</p> <p>15 used model is CAPM."</p> <p>16 Then the second sentence on line five starts:</p> <p>17 "CAPM calculates the cost of equity by predicting</p> <p>18 the future returns required by investors through the</p> <p>19 examination of historic returns."</p> <p>20 In a sense that is an obviously correct proposition.</p> <p>21 If you are relying upon your cost of funding, your WACC,</p> <p>22 let's say you are in fact certifying in the days</p> <p>23 following an early termination date, and let's say you</p> <p>24 are certifying for the purposes of trying to identify</p> <p>25 the interest payable as part of an unpaid amount, so</p> <p style="text-align: center;">Page 77</p>	<p>1 accurate guide to what it is or cannot be an accurate</p> <p>2 proxy for what you would have to pay if you went to the</p> <p>3 market now and borrowed.</p> <p>4 Just to give a different example, one where the term</p> <p>5 early termination date does coincide with a market-wide</p> <p>6 catastrophe such that borrowing rates perhaps have been</p> <p>7 relatively modest until that point and then the market</p> <p>8 falls off a cliff and borrowing rates are increased</p> <p>9 dramatically, arguing against our interests in the sense</p> <p>10 of the overall case here, but the reality is that your</p> <p>11 costs of borrowing then would be much higher than your</p> <p>12 historic costs, because actually to go out now is</p> <p>13 a particularly difficult time. The reverse may be true</p> <p>14 if the markets moved the other way.</p> <p>15 So the next point is that CAPM is subject to highly</p> <p>16 subjective judgments and constant variation.</p> <p>17 The point here is that because of these necessary</p> <p>18 attributes of CAPM as a calculation measure we say it is</p> <p>19 inherently unlikely that the draftsman would have</p> <p>20 contemplated that this would be a source of calculating</p> <p>21 the default rate or any interest rate under the</p> <p>22 master agreement.</p> <p>23 There is a decision of Mrs Justice Gloster that I am</p> <p>24 going to take my Lord to next, called Masri v</p> <p>25 Consolidated Contractors International which makes good</p> <p style="text-align: center;">Page 79</p>
<p>1 this is not a catastrophic default case but it is a case</p> <p>2 where simply your counterparty has not paid and you</p> <p>3 anticipate being paid quite quickly, but part of the</p> <p>4 process is that rate of interest on the unpaid amount.</p> <p>5 If you identify or if you rely upon your WACC in order</p> <p>6 to calculate the interest rate by definition it must be</p> <p>7 based upon history, because you have assets and you have</p> <p>8 borrowed in relation to those assets, and you have</p> <p>9 issued equity in the past. There is a cost associated</p> <p>10 with each level of borrowing, subordinated debt, equity,</p> <p>11 other forms of borrowing, different rates depending upon</p> <p>12 the risk that the particular investor is prepared to</p> <p>13 take, and the weighted average then is a number which is</p> <p>14 a product of your existing historically agreed upon</p> <p>15 borrowing.</p> <p>16 On the other hand, and I will come on to this next,</p> <p>17 the calculation of WACC is something which is, according</p> <p>18 to a case we will look at in a moment, something which</p> <p>19 has to be constantly under review. Again I suppose that</p> <p>20 is an obvious point that the cost of your borrowing will</p> <p>21 change with each particular investment that you enter</p> <p>22 into and each particular new borrowing that you incur.</p> <p>23 So you constantly have to review that, that calculation.</p> <p>24 But the simple point here is that it at least in</p> <p>25 part depends upon history and therefore is not an</p> <p style="text-align: center;">Page 78</p>	<p>1 that point, but also explains the circumstances in which</p> <p>2 CAPM might be appropriate as opposed to circumstances</p> <p>3 where it is not. Where it might be appropriate is in</p> <p>4 relation to investment decisions. So if you are</p> <p>5 deciding to make an investment then CAPM is a relevant</p> <p>6 consideration, self-evidently because one of the things</p> <p>7 that you would take account of there is, is this</p> <p>8 investment a good use of my capital or could I make more</p> <p>9 from it by putting it elsewhere. So I am looking at</p> <p>10 models about returns for that purpose.</p> <p>11 The decision is in AB1, authorities bundle 1, at</p> <p>12 tab 36A. It is right at the back of the bundle.</p> <p>13 This is a judgment which follows on a previous</p> <p>14 judgment in which liability had been determined. The</p> <p>15 particular point at issue here is the rate of interest</p> <p>16 that should be charged upon a running account between</p> <p>17 the parties that was established pursuant to an</p> <p>18 agreement between them.</p> <p>19 In very broad terms one of the parties contended</p> <p>20 that the running account should be regarded as</p> <p>21 essentially an investment decision and therefore the</p> <p>22 appropriate measure of interest should be based upon</p> <p>23 CAPM analysis. The other said, no, it is actually akin</p> <p>24 to a borrowing and therefore should be measured by</p> <p>25 reference to an interest rate.</p> <p style="text-align: center;">Page 80</p>

<p>1 So starting at the beginning of the judgment to give</p> <p>2 the context, paragraph 1(i):</p> <p>3 "There was an agreement in 1992 between Mr Masri on</p> <p>4 the one hand and CCIC and CC Oil and Gas on the other,</p> <p>5 which provided for Mr Masri to benefit from a</p> <p>6 10 per cent share of CCC's 10 per cent interest in</p> <p>7 a particular oil concession in South Yemen.</p> <p>8 "The agreement required Mr Masri to make capital</p> <p>9 contributions from time to time as and when called upon</p> <p>10 to do so."</p> <p>11 Or cash calls. So in subparagraph (iv):</p> <p>12 "From November 1992 to February 1993, CCC made cash</p> <p>13 calls on Mr Masri which Mr Masri did not pay, save for</p> <p>14 a single payment of 1.5 million. In not paying he acted</p> <p>15 in breach of contract. After 5 February they made no</p> <p>16 further cash call on him because there was an agreement</p> <p>17 reached that he need not pay further cash calls on the</p> <p>18 promise of providing a guarantee in favour of CCC."</p> <p>19 Subparagraph (vi):</p> <p>20 "He did not want to tie up unencumbered funds either</p> <p>21 by paying the cash calls or by providing a guarantee.</p> <p>22 Therefore by April/May 1993 his refusal to pay cash</p> <p>23 calls amounted to a repudiatory breach of the 1992</p> <p>24 agreement."</p> <p>25 Subparagraph (viii):</p> <p style="text-align: center;">Page 81</p>	<p>1 decision on CCC's behalf to terminate it. On the</p> <p>2 contrary, in my judgment, CCC waived those breaches and</p> <p>3 decided to proceed on the basis that no further cash</p> <p>4 calls would be made on him, and his obligations and</p> <p>5 entitlements under the 1992 agreements would be debited</p> <p>6 to a running account."</p> <p>7 Turning over to paragraph 19, the question which she</p> <p>8 then asks just above paragraph 19:</p> <p>9 "What was a reasonable rate of interest? Simple or</p> <p>10 compound?"</p> <p>11 And can I pick up the argument of Mr Aldous on</p> <p>12 behalf of Mr Masri -- I think it is Mr Masri -- he says:</p> <p>13 "... on the other hand, on the basis of the evidence</p> <p>14 given by CCC's expert accountant ... Mr Hughes,</p> <p>15 submitted that the most appropriate measure of</p> <p>16 a reasonable rate of interest for the long-term funding</p> <p>17 provided by the running account was the appropriate cost</p> <p>18 of capital for CCC for the concession. That in turn, he</p> <p>19 submitted, was to be calculated by reference to a WACC</p> <p>20 for the concession, a calculation which combines equity</p> <p>21 and debt funding as appropriate, the equity funding</p> <p>22 component being calculated by reference to a widely used</p> <p>23 methodology known as CAPM."</p> <p>24 Then he gave three reasons why that was so. First:</p> <p>25 "... that in May 1993 CCC's funding of Mr Masri</p> <p style="text-align: center;">Page 83</p>
<p>1 "However, the counterparty decided to waive those</p> <p>2 breaches; instead acceded to a suggestion to debit</p> <p>3 Mr Masri's continuing obligations to a running account</p> <p>4 together with interest thereon, with a view subsequently</p> <p>5 to reaching some sort of amicable compromise to bring Mr</p> <p>6 Masri's interests in both the concession and the</p> <p>7 projects to an end."</p> <p>8 So that is the background. That is where you see</p> <p>9 the running account created.</p> <p>10 The previous judgment of Mrs Justice Gloster is</p> <p>11 summarised at paragraphs 12 and 13 relevantly of this</p> <p>12 judgment. At paragraph 12 she notes:</p> <p>13 "In paragraph 108 of the earlier judgment</p> <p>14 I concluded as follows. 'In my judgment the evidence,</p> <p>15 on proper analysis, shows that although as I have held</p> <p>16 CCC was entitled to determine the 1992 agreement</p> <p>17 Mr Khoury never in fact decided to do so. Instead ....</p> <p>18 he decided to waive Mr Masri's continued failure to pay</p> <p>19 his cash calls and put up a guarantee and instead to</p> <p>20 accede to the suggestion ..."</p> <p>21 About the running account.</p> <p>22 Then:</p> <p>23 "Accordingly, I hold that on the evidence there was</p> <p>24 no acceptance by CCC of Mr Masri's repudiatory breach of</p> <p>25 the 1992 agreement in the sense of there being no</p> <p style="text-align: center;">Page 82</p>	<p>1 would have to be repaid from the credits applied to the</p> <p>2 running account, and was therefore dependent upon the</p> <p>3 success of the concession; and secondly ..."</p> <p>4 MR JUSTICE HILDYARD: Where are you now?</p> <p>5 MR ZACAROLI: Perhaps my Lord could read paragraph 24, I was</p> <p>6 going to read most of it. Paragraph 24 which sets out</p> <p>7 Mr Aldous's submissions about CAPM being the appropriate</p> <p>8 measure of interest. (Pause)</p> <p>9 MR JUSTICE HILDYARD: Yes.</p> <p>10 MR ZACAROLI: I rely particularly on the middle of that</p> <p>11 paragraph, just above the second hole-punch:</p> <p>12 "Accordingly he [and he was for CCC in fact,</p> <p>13 Mr Aldous] submitted that the proper approach to</p> <p>14 interest was to regard the funding of the running</p> <p>15 account by CCC as CCC agreeing to 'carry' Mr Masri's</p> <p>16 interest in the concession, rather than as a loan to</p> <p>17 Mr Masri, with CCC taking the risk of Mr Masri's</p> <p>18 participation, without the potential reward of</p> <p>19 a successful investment ... and to calculate the</p> <p>20 appropriate rate of interest accordingly, based on the</p> <p>21 return required for an 'investment' ..."</p> <p>22 That is one side of the argument.</p> <p>23 First of all the learned judge rejected the</p> <p>24 submission at paragraph 26 that it should be regarded as</p> <p>25 short-term funding, and for that reason concluded at 27</p> <p style="text-align: center;">Page 84</p>

<p>1 that the relevant interest should be calculated on</p> <p>2 a compound basis as opposed to simple. That is one</p> <p>3 point, but the important point is the next one. At 28</p> <p>4 she says:</p> <p>5 "The real battle between the experts and indeed the</p> <p>6 parties was whether in the circumstances the</p> <p>7 'investment' or WACC approach incorporating the CAPM</p> <p>8 element was the correct one, or whether the borrowing</p> <p>9 rate approach was the correct one. They agreed that if</p> <p>10 an investment approach were the correct approach the</p> <p>11 method should be based on a WACC calculation."</p> <p>12 At 29 she concludes:</p> <p>13 "In my judgment the investment or WACC approach</p> <p>14 incorporating the CAPM element would not have been</p> <p>15 objectively a reasonable method for CCC and Mr Masri to</p> <p>16 have adopted in May 1993."</p> <p>17 The first reason she gives which is less important</p> <p>18 for us, but it is the conclusion that she doesn't agree</p> <p>19 with the characterisation of the running account as</p> <p>20 involving a freestanding investment decision. At 31 she</p> <p>21 says:</p> <p>22 "It was not in any meaningful sense an investment."</p> <p>23 Paragraph 32 is the most important paragraph to</p> <p>24 read, could my Lord read 32 to himself. (Pause)</p> <p>25 MR JUSTICE HILDYARD: I have done 32.</p> <p style="text-align: center;">Page 85</p>	<p>1 the Senior Creditor Group, who are essentially</p> <p>2 purchasers of other party's debt. As indeed are we,</p> <p>3 I make no comment about that, that is just a fact of the</p> <p>4 background. But if your cost of equity is the</p> <p>5 appropriate measure, then what is actually being said</p> <p>6 here is:</p> <p>7 "We, as a hedge fund, have come into buy this debt</p> <p>8 off the original counterparties. We want to assert that</p> <p>9 it is our cost of equity that is the relevant rate of</p> <p>10 interest."</p> <p>11 Of course we say that is wrong because of issue 10,</p> <p>12 but I will come on to that, but just to understand what</p> <p>13 is going on.</p> <p>14 As a purchaser they no doubt would have taken an</p> <p>15 investment decision in which they would have taken</p> <p>16 account of the likely return, applying all sorts of</p> <p>17 models to this asset as opposed to any other assets they</p> <p>18 could have entered into, including the opportunity cost</p> <p>19 of doing this as opposed to something else. They want</p> <p>20 to then rely upon that headline number they come up</p> <p>21 with, which we are told would be north of 8 per cent,</p> <p>22 otherwise there is no point in us being here, but</p> <p>23 probably substantially north of that. They want to rely</p> <p>24 upon that as their cost of equity, as their cost of</p> <p>25 funds to charge the defaulting party, LBIE.</p> <p style="text-align: center;">Page 87</p>
<p>1 MR ZACAROLI: I am grateful, then 33:</p> <p>2 "Third, the experts themselves agreed they had never</p> <p>3 come across a situation in which contracting parties had</p> <p>4 been required to agree anything by reference to a CAPM</p> <p>5 calculation."</p> <p>6 In other words, they both recognised it was not</p> <p>7 a recognised contractual tool for the calculation of</p> <p>8 interest rate going forward. We rely upon this case for</p> <p>9 the proposition I made a moment ago, namely the</p> <p>10 complications, the complexities, inherent in identifying</p> <p>11 a cost of funding by reference to CAPM is simply outside</p> <p>12 we say the reasonable ambit of what the draftsman in</p> <p>13 1992 or 2002 or 1987 would have had in mind by cost of</p> <p>14 funding the relevant amount, where the purpose is</p> <p>15 clearly to identify an interest rate for an amount that</p> <p>16 is outstanding. It is much more akin to the loan -- or</p> <p>17 it is indeed directly akin to the loan analysis rather</p> <p>18 than the investment analysis.</p> <p>19 We say for similar reasons as the learned judge</p> <p>20 applied there, it simply would have been outside the</p> <p>21 contemplation of the draftsman or any parties to ISDA at</p> <p>22 the time they entered into it.</p> <p>23 In that context it is worth just stepping back and</p> <p>24 seeing how this is being deployed in this case. Not by</p> <p>25 Goldman Sachs, who are an original counterparty, but by</p> <p style="text-align: center;">Page 86</p>	<p>1 We say it is a wholly different thing for the</p> <p>2 capital cost of the hedge fund's investment decision to</p> <p>3 be turned around and charged to LBIE under those</p> <p>4 circumstances.</p> <p>5 Can I just finish this point?</p> <p>6 MR JUSTICE HILDYARD: Yes, of course.</p> <p>7 MR ZACAROLI: The effect is compounded because the hedge</p> <p>8 funds also base the cost of funding on its investors'</p> <p>9 expected returns, based on historic performance. Hedge</p> <p>10 funds that purchased Lehman debt low, because that was</p> <p>11 what happened of course, as debt was distressed value in</p> <p>12 the early years. Make an enormous profit because it</p> <p>13 turns out there is a full return on the debt. That</p> <p>14 profit feeds into the investors' expectations of return</p> <p>15 and therefore the problem is compounded because those</p> <p>16 great profits are turned around and LBIE is being</p> <p>17 charged effectively with the profits the hedge fund has</p> <p>18 managed to make on buying the Lehman debt.</p> <p>19 I am not criticising any of that as a commercial</p> <p>20 matter. What I am saying is that that outcome, we say,</p> <p>21 is a very long way indeed from (a), what would have been</p> <p>22 in the ISDA draftsman's contemplation when drafting the</p> <p>23 agreement and (b), a very long way from identifying an</p> <p>24 appropriate proxy or measure for the time value of</p> <p>25 money. Therefore for those reasons it is outside the</p> <p style="text-align: center;">Page 88</p>

22 (Pages 85 to 88)

<p>1 definition.</p> <p>2 My Lord, that is a convenient moment.</p> <p>3 MR JUSTICE HILDYARD: 2.00 pm.</p> <p>4 (1.00 pm)</p> <p>5 (The short adjournment)</p> <p>6 (2.00 pm)</p> <p>7 MR ZACAROLI: Can I start by rounding off the point I was</p> <p>8 making just before the short adjournment about the</p> <p>9 inappropriateness of the WACC being used in this</p> <p>10 context.</p> <p>11 The point is that WACC is appropriate when you are</p> <p>12 making investment decisions, because you are comparing</p> <p>13 the return on that investment with what other investment</p> <p>14 you might make and you obviously want to make a greater</p> <p>15 investment here than you would elsewhere. That has no</p> <p>16 relevance in this context because there is no question</p> <p>17 of an investment being made in the context of</p> <p>18 the default rate, it is the opposite. You have not been</p> <p>19 paid something you should have been paid. It is a zero</p> <p>20 return. In those contexts what you are doing is going</p> <p>21 into the market to replace that which you should have</p> <p>22 already had and the incentive very clearly is to do so</p> <p>23 at the lowest possible cost to you.</p> <p>24 It would be perverse in those circumstances to</p> <p>25 incorporate into the calculation of what you would be</p> <p style="text-align: center;">Page 89</p>	<p>1 My Lord put to me the question this morning do I say</p> <p>2 it has a different meaning there. Now, I said yes,</p> <p>3 because the context is different.</p> <p>4 My Lord, I would like to erase that and replace it</p> <p>5 with the following nuanced answer. The nuanced answer</p> <p>6 is this, we are not here to define of course the</p> <p>7 definition of loss or the meaning of cost of funding</p> <p>8 within that definition. There may be all sorts of</p> <p>9 arguments that could be levied on both sides if one was</p> <p>10 focusing on that clause.</p> <p>11 My principal response, however, would be this, that</p> <p>12 insofar as cost of funding in that definition is</p> <p>13 intended to identify the cost of raising money, then we</p> <p>14 would say its meaning would indeed be informed by the</p> <p>15 meaning it has elsewhere in the agreement. So to that</p> <p>16 extent it would have the same meaning as cost of funding</p> <p>17 the relevant amount in the default rate or the other</p> <p>18 applicable rates.</p> <p>19 If we are wrong about that and we don't need to</p> <p>20 determine that question as such, then my answer is that</p> <p>21 I gave this morning. Namely to the extent that it means</p> <p>22 anything different it is because it is devoid of the</p> <p>23 context which arises in the definition of the various</p> <p>24 applicable rates. That context essentially being the</p> <p>25 cost of raising money for a period of time to fill a gap</p> <p style="text-align: center;">Page 91</p>
<p>1 paying to replace that sum concepts based upon profit</p> <p>2 and return that are inherent in the concept of the WACC.</p> <p>3 My Lord, those were the principal reasons why from</p> <p>4 a legal and practical perspective the draftsman did not</p> <p>5 intend by the use of the words "cost of funding the</p> <p>6 relevant amount" to include equity, cost of issuing</p> <p>7 equity.</p> <p>8 I turn to deal now with arguments that do cover</p> <p>9 similar ground, but these are the arguments specifically</p> <p>10 posed against us by my opponents on the other side of</p> <p>11 the court.</p> <p>12 The first point I am going to take up is that it is</p> <p>13 said our construction is contrary to the plain wording.</p> <p>14 We have failed to have regard to the plain word</p> <p>15 "funding", which it is said we are reading down to mean</p> <p>16 "borrowing".</p> <p>17 I am not going to reiterate what I have said</p> <p>18 already, I hope by what I have said already my Lord</p> <p>19 understands our case to be in its context that the</p> <p>20 expression clearly denotes borrowing and not more.</p> <p>21 I do, however, want to go back on something I said</p> <p>22 this morning when I have gone too far in a concession or</p> <p>23 a submission I made, on reflection. This is in the</p> <p>24 context of the meaning of cost of funding in the loss</p> <p>25 definition.</p> <p style="text-align: center;">Page 90</p>	<p>1 caused by the non-payment of the sum, in order to arrive</p> <p>2 at an interest rate. That context puts beyond doubt the</p> <p>3 question: does it mean anything other than borrowing?</p> <p>4 That context is not there, I accept, in the</p> <p>5 definition of loss, so if it does have a different</p> <p>6 meaning that is the reason, but my first submission</p> <p>7 would be to reverse what I said this morning, you would</p> <p>8 expect it to have the same meaning and its meaning would</p> <p>9 be informed by how it is used elsewhere in the</p> <p>10 agreement.</p> <p>11 MR JUSTICE HILDYARD: Does that lead to a sort of double</p> <p>12 calculation or recovery?</p> <p>13 MR ZACAROLI: No, it cannot do that. Is my Lord thinking</p> <p>14 because you then -- cost of funding on the loss going</p> <p>15 forward?</p> <p>16 MR JUSTICE HILDYARD: Yes.</p> <p>17 MR ZACAROLI: It cannot do that, because it is only -- the</p> <p>18 answer to that is this. The loss must be calculated as</p> <p>19 of the early termination date, which would necessarily</p> <p>20 exclude any suggestion that you are losing because of</p> <p>21 time thereafter. You create the number upon which</p> <p>22 interest is payable at the applicable rate going</p> <p>23 forward, under the defined terms. No, no question of</p> <p>24 double-counting.</p> <p>25 My Lord, there is another nuance here, which is that</p> <p style="text-align: center;">Page 92</p>

<p>1 a point picked up by my learned friend Mr Foxton, unpaid</p> <p>2 amounts, that is the definition unpaid amounts, includes</p> <p>3 interest from the date it wasn't paid to the early</p> <p>4 termination date.</p> <p>5 The definition of loss, if you are claiming loss as</p> <p>6 opposed to market quotation, there is no addition of</p> <p>7 unpaid amounts. If you are claiming on the basis of the</p> <p>8 market quotation that your claim is made up of two</p> <p>9 things, the settlement amount, which is based on the</p> <p>10 quotation, plus the average or the difference between</p> <p>11 unpaid amounts either way. That second component is</p> <p>12 missing in the calculation of loss. It is just your</p> <p>13 loss.</p> <p>14 The loss definition includes words which make it</p> <p>15 clear that your loss includes any loss arising, because</p> <p>16 of the non-payment or nondelivery of an obligation that</p> <p>17 arose prior to the early termination date. That is part</p> <p>18 of the definition of unpaid amount, what was not paid</p> <p>19 earlier.</p> <p>20 What the definition of loss says is rather than</p> <p>21 having separate calculation for it, it is all wrapped up</p> <p>22 in this broad explanation of what loss constitutes.</p> <p>23 There cannot be double-counting there, because --</p> <p>24 perhaps I will just pick up the definition. If my Lord</p> <p>25 takes up the definition of "loss", page 161 of the core</p> <p style="text-align: center;">Page 93</p>	<p>1 reasonable belief of the party making the determination</p> <p>2 produce a commercially reasonable result."</p> <p>3 In that context you get both loss and you still add</p> <p>4 in the unpaid amounts, because that is part of the</p> <p>5 settlement amount which is only half of the amount</p> <p>6 payable under second method and market quotation. When</p> <p>7 you then look at loss, the definition of loss has to</p> <p>8 exclude this provision about losses caused by</p> <p>9 non-payment of the earlier amounts where loss is</p> <p>10 applicable because it is coming in as a default from</p> <p>11 market quotation.</p> <p>12 That is a point of detail that is not particularly</p> <p>13 relevant to my argument, but I thought my Lord should</p> <p>14 just see that, it is an example where double-counting is</p> <p>15 specifically excluded.</p> <p>16 We say that really my Lord gains no assistance</p> <p>17 either way from the fact that unpaid amounts, the</p> <p>18 concept of previous payments that were not made, is</p> <p>19 dealt with wholly differently under the loss</p> <p>20 calculation, than it is under market quotation. It is</p> <p>21 just matter of mechanics.</p> <p>22 MR JUSTICE HILDYARD: Then it is all squeezed out in 2002,</p> <p>23 because you no longer have that default?</p> <p>24 MR ZACAROLI: Exactly, yes.</p> <p>25 MR JUSTICE HILDYARD: Sorry, "default" is a bad word to use</p> <p style="text-align: center;">Page 95</p>
<p>1 bundle, tab 7, just below halfway through the</p> <p>2 definition:</p> <p>3 "Loss includes losses and costs or gains in respect</p> <p>4 of any payment or delivery required to have been made</p> <p>5 assuming satisfaction of each applicable condition</p> <p>6 precedent on or before the relevant early termination</p> <p>7 date and not made except so as to avoid duplication if</p> <p>8 section 6(e)(i)(1), or (3) or 6(e)(ii)(2)(a) applies."</p> <p>9 What those exceptions deal with is the case where</p> <p>10 you claim loss because you have defaulted to it from</p> <p>11 market quotation.</p> <p>12 I don't know if my Lord has been made aware of this</p> <p>13 particular aspect of the agreement, but if your claim is</p> <p>14 based upon market quotation, then let's just follow it</p> <p>15 through, under section 6(e). If we pick up for example</p> <p>16 6(e)(i)(3), the second method of market quotation, if</p> <p>17 that applies then your claim is equal to the sum of the</p> <p>18 settlement amount plus the balance of the unpaid</p> <p>19 amounts.</p> <p>20 The settlement amount is itself defined on page 162,</p> <p>21 the bottom of the page:</p> <p>22 "Settlement amount is the termination currency</p> <p>23 equivalent of the market quotations and (b), such</p> <p>24 party's loss [capital L] for each transaction for which</p> <p>25 a quotation cannot be determined or would not in the</p> <p style="text-align: center;">Page 94</p>	<p>1 alternative.</p> <p>2 MR ZACAROLI: Yes.</p> <p>3 That is the point of correction I wish to make to</p> <p>4 my Lord on this morning's submissions.</p> <p>5 There was another point just to go back on. It was</p> <p>6 point I made to my Lord that asking what else the</p> <p>7 draftsman might have used in place of the words he did</p> <p>8 use, is not a helpful approach to construction. What</p> <p>9 I had in mind then was a passage in</p> <p>10 Lord Justice Lewison's book on the interpretation of</p> <p>11 contracts. I hope my Lord has been handed a copy of</p> <p>12 that, or is about to be if not. (Handed)</p> <p>13 MR JUSTICE HILDYARD: One second. (Pause)</p> <p>14 Yes, thanks.</p> <p>15 MR ZACAROLI: Paragraph 2.13, the heading is "Why not say</p> <p>16 it?" The black bold text is:</p> <p>17 "Since almost any dispute about the interpretation</p> <p>18 of a contract involves rival meanings, it is seldom</p> <p>19 helpful to ask why the parties did not adopt one of</p> <p>20 those rival meanings in their contract."</p> <p>21 The author says:</p> <p>22 "One question which is frequently posed for forensic</p> <p>23 effect is to ask:</p> <p>24 "If the parties meant that, why did they not say</p> <p>25 it?"</p> <p style="text-align: center;">Page 96</p>



<p>1 "It is, however, it is inherent in most disputes 2 about the interpretation of a contract that the words in 3 question are susceptible of more than one meaning." 4 Then he quotes from Lord Justice Mance in <i>Dodson v</i> 5 <i>Peter H Dodson Insurance Services</i>: 6 "It is almost always possible to say after the event 7 that the point could have been put beyond doubt ..." 8 Then: 9 "In <i>Charrington v Wooder Lord Dunedin</i> said: 10 "I do not think it rests with either party to say to 11 the other: 12 "If the meaning is as you contend, why did you not 13 express it otherwise?" 14 At the end of that quote: 15 "It therefore comes back to the question what is the 16 true interpretation of the expression in the contract?" 17 Really our approach to construction is based upon 18 looking at the words the draftsman has used in the 19 context he has used them, in the light of the 20 explanations given for the words in the users' guide 21 which are admissible background. 22 MR JUSTICE HILDYARD: I mean this is a slightly different 23 case than that, isn't it? I mean one remembers 24 contractual disputes where you offer different 25 phraseology, this focuses on a word --</p> <p style="text-align: center;">Page 97</p>	<p>1 MR JUSTICE HILDYARD: Exactly. 2 MR ZACAROLI: The word is not used in the definition. 3 MR JUSTICE HILDYARD: No, but -- 4 MR ZACAROLI: Yes, the definition is there to arrive at 5 a rate of interest. We also rely upon the internal 6 wording. 7 MR JUSTICE HILDYARD: I understand that. 8 MR ZACAROLI: Yes. 9 MR JUSTICE HILDYARD: Do we need to put this anywhere? 10 MR ZACAROLI: I am sure we do -- 11 MR JUSTICE HILDYARD: In due course. 12 MR ZACAROLI: Yes. 13 My Lord, as opposed to our approach to construction, 14 we say that the other side of the court has essentially 15 fallen into the error of seeing that a phrase is used in 16 the agreement, "cost of funding", and taken that out of 17 its context and said well that is a phrase, or at least 18 cost of funds has a phrase in the commercial corporate 19 finance world, where everyone knows what it means, it 20 means the cost of funding all your assets and that is 21 what the draftsman therefore must have meant. 22 I know it is not put quite as bluntly as that, but 23 we say that is in substance what is happening here, and 24 that is why the elision is so often made in the way that 25 the case is put, to saying it is well-known how parties</p> <p style="text-align: center;">Page 99</p>
<p>1 MR ZACAROLI: I take your point. 2 MR JUSTICE HILDYARD: -- which has a common or garden 3 meaning, which on your submission fits the bill. The 4 question is: why did the word, which has a common or 5 garden meaning and fits the bill, get displaced in the 6 draftsman's approach? 7 It is a slightly different -- 8 MR ZACAROLI: It is slightly different, nevertheless the key 9 point remains that you have to look at the words the 10 draftsman has used and interpret the meaning from the 11 context. That point we submit is nowhere near 12 sufficient to outweigh the indications which we rely 13 upon as to show why the draftsman could not have 14 intended the expansive meaning asserted by the Senior 15 Creditor Group. 16 MR JUSTICE HILDYARD: Do I have this right? You emphasise 17 very much the words interest, cost, compound and the 18 various examples, the various necessary criteria for 19 those concepts? 20 MR ZACAROLI: Yes. 21 MR JUSTICE HILDYARD: In a way the word you emphasise most 22 is "interest" to some extent; isn't it? 23 MR ZACAROLI: Yes, in the sense that that is the whole 24 purpose of the definition is to arrive at a rate of 25 interest.</p> <p style="text-align: center;">Page 98</p>	<p>1 funded themselves or fund their own assets or their own 2 enterprise. But that is an unlawful elision, we say. 3 We don't suggest that cost of equity is an unknown 4 concept, we don't suggest equity doesn't have a cost. 5 We have never suggested anything like that, what we 6 suggest is it is not cost within the meaning of the 7 phrase. 8 The reason it is wrong, we say, to place any 9 reliance on the fact that entities do fund themselves in 10 a variety of ways is because that has nothing to do with 11 the question of what would it cost to fund the relevant 12 amount. 13 To pick up on a point that my Lord was discussing 14 with my learned friends over the last two days, it is 15 a transaction specific exercise and has to be. It is 16 the cost of funding. The "funding" word there is 17 actually performing the role of identifying it is 18 a transaction, it is performing, it is cost of funding 19 or if you had funded. The broader concept, the 20 corporate finance concept of "cost of funds" has nothing 21 to do with that. 22 Just to make good the point that the theory behind 23 it is based upon funding all of your assets, I will take 24 my Lord to the annex to Mr McKee's witness statement. 25 I know that this is not wholly relied upon anymore.</p> <p style="text-align: center;">Page 100</p>

<p>1 My Lord will remember that there was a case put forward 2 at an earlier stage, and we dealt with this in our 3 skeleton because we weren't entirely clear what place it 4 was left, if at all in my learned friend's argument, but 5 the case was you look at the nature of the asset, and 6 the cost of funding is all to do with the riskiness of 7 the particular asset.</p> <p>8 That has gone, but the second basis in the McKee 9 argument remains, which is actually built on the first, 10 it is not just the asset, it is all of your assets.</p> <p>11 The witness statement is to be found at bundle 2, 12 tab 5.</p> <p>13 MR JUSTICE HILDYARD: This isn't his third witness 14 statement?</p> <p>15 MR ZACAROLI: Yes, it is.</p> <p>16 MR JUSTICE HILDYARD: Is it in the core bundle?</p> <p>17 MR ZACAROLI: Yes, it is. It is the one I am looking at. 18 It is the wrong reference, it was in fact tab 4.</p> <p>19 MR JUSTICE HILDYARD: My note is that the second basis 20 calculation, that is still relied on?</p> <p>21 MR ZACAROLI: Yes, yes.</p> <p>22 If my Lord has the document, it is not the one 23 I have marked up but if you look at paragraph 18 of the 24 document, it is headed "second basis of calculation". 25 Page 49 of the core. Could my Lord just read</p> <p style="text-align: center;">Page 101</p>	<p>1 There are two points in response to this. The first 2 is a more technical one, namely what is admissible 3 background for the purposes of construing the 4 master agreement. We do adopt what appeared in the 5 joint administrators' skeleton on this, the point they 6 took, based upon the decision of Mr Justice Briggs in 7 LBSF v Carlton, that the facts concerning banks' 8 regulatory capital requirements are not admissible 9 background for the purposes of construing an agreement 10 that is intended for use amongst people other than 11 banks.</p> <p>12 Can I remind my Lord of the two key paragraphs in 13 that decision which explain why. The decision is at the 14 authorities bundle 2, tab 46.</p> <p>15 The passage begins at paragraph 24, where the 16 learned judge is asked to make an assumption or has made 17 an assumption about if 2(a)(iii) were regarded as a walk 18 away clause it would give problems to banks from 19 a regulatory capital perspective. Then paragraphs 25 20 and 26 are the key paragraphs. (Pause)</p> <p>21 MR JUSTICE HILDYARD: Were you arguing against or for this 22 being as part of the matrix?</p> <p>23 MR ZACAROLI: I wasn't in this case.</p> <p>24 MR JUSTICE HILDYARD: Weren't you? Oh, no. It is Firth 25 Rixson.</p> <p style="text-align: center;">Page 103</p>
<p>1 paragraphs 18 and 19. (Pause)</p> <p>2 MR JUSTICE HILDYARD: Yes.</p> <p>3 MR ZACAROLI: It is very clear, it is a theory based upon 4 what it costs to fund all of your assets.</p> <p>5 It is of course not suggested by either the Senior 6 Creditor Group or Goldman Sachs that cost of funds has 7 such a known notorious or invariable meaning in any 8 particular market that that is the meaning that has to 9 be incorporated into the master agreement. That is 10 absolutely not what they are saying, there is no 11 suggestion of that.</p> <p>12 They have simply, we say, lifted the phrase out of 13 its context and identified that it is a phrase which has 14 a known meaning in other contexts, ie what is your cost 15 of capital for business reasons, and tried to 16 incorporate that meaning we say by an impermissible leap 17 between construction and what happens in the corporate 18 finance world.</p> <p>19 The third point I was going to deal with in terms of 20 response to submissions made against us is the reliance 21 by both the Senior Creditor Group and Goldman Sachs on 22 the fact that banks are major ISDA users, and that banks 23 have regulatory capital requirements means the default 24 rate must have been intended to include the cost of 25 raising equity funding.</p> <p style="text-align: center;">Page 102</p>	<p>1 MR ZACAROLI: Yes. He is remembering a comment I had made 2 in a different case.</p> <p>3 MR JUSTICE HILDYARD: That is very flattering.</p> <p>4 MR ZACAROLI: I think a point he rejected.</p> <p>5 MR JUSTICE HILDYARD: I cannot remember what level of detail 6 of the regulatory requirements was sought to be included 7 as part of the factual matrix.</p> <p>8 MR ZACAROLI: That appeared in expert evidence the court had 9 admitted, which is referred to on the previous page, 10 paragraph 20.</p> <p>11 MR JUSTICE HILDYARD: Yes, 19 and 20.</p> <p>12 MR ZACAROLI: Yes, yes.</p> <p>13 MR JUSTICE HILDYARD: Your point is that Mr Justice Briggs 14 appears to wave that away, not on the basis of the 15 particular nuances or detail but simply on the basis 16 that the document is addressed not to the bank but to 17 the customer and the customer is not to be supposed to 18 be bothered by regulatory requirements affecting the 19 non-addressee?</p> <p>20 MR ZACAROLI: Yes, yes.</p> <p>21 The point that was made against us was -- I am 22 reminded to show my Lord paragraph 28, which reinforces 23 the point.</p> <p>24 MR JUSTICE HILDYARD: Because if you did this 25 Mr Justice Briggs thought you would, as it were, be</p> <p style="text-align: center;">Page 104</p>

26 (Pages 101 to 104)

<p>1 peering into the mindset of one of the parties rather</p> <p>2 than using a matrix of fact for proper purposes.</p> <p>3 MR ZACAROLI: Yes, what was said against us on this point</p> <p>4 was in essence that this is an issue which is of less</p> <p>5 concern to a court where the attempt is to expand the</p> <p>6 scope of the clause as opposed to limit the scope of the</p> <p>7 clause, a point my learned friend Mr Foxton made.</p> <p>8 We say that is not right. The question is what does</p> <p>9 the clause mean. An expansive construction of the</p> <p>10 clause has the potential for disadvantaging a counter</p> <p>11 party, a nonbank counterparty. It is the fact that</p> <p>12 there is a potential for disadvantage in the clause, in</p> <p>13 the reading of the clause, which suggests why that party</p> <p>14 should not be stuck with that disadvantage through</p> <p>15 a factual matrix not known to it, or through reliance on</p> <p>16 facts not known to it or not reasonably known to it.</p> <p>17 Limit or expand is irrelevant. The question is just</p> <p>18 what is the meaning, because if the meaning is X it</p> <p>19 could work to our disadvantage, or a party's</p> <p>20 disadvantage, and in those circumstances it shouldn't be</p> <p>21 arrived at through a process of construction relying</p> <p>22 upon what was known only to one of the parties.</p> <p>23 MR JUSTICE HILDYARD: Does that go any further than saying</p> <p>24 that the absolutely anything which Lord Hoffmann</p> <p>25 referred to is absolutely anything which would be known</p> <p style="text-align: center;">Page 105</p>	<p>1 circumstances, so what? Because the question here is</p> <p>2 not how they fund themselves, but how they could go out</p> <p>3 to transact to raise the amount.</p> <p>4 Linked to this at paragraph 47 of the skeleton</p> <p>5 argument, Goldman Sachs relies on the fact that a bank</p> <p>6 may, as a result of the default itself, have to raise</p> <p>7 equity. We suggest, I think it is probably common</p> <p>8 ground, that it is highly unlikely that the entity would</p> <p>9 need to raise equity to fund the relevant amount.</p> <p>10 Certainly in the run-of-the-mill cases in which the ISDA</p> <p>11 master agreement is operating, the only times it might</p> <p>12 do is in an extreme case like this where a particular</p> <p>13 counterparty has an enormous exposure to Lehmans, which</p> <p>14 it is not going to get paid for many years. These are</p> <p>15 the exceptional cases.</p> <p>16 MR JUSTICE HILDYARD: I think Mr Foxton said maybe, maybe</p> <p>17 not to that, it is perfectly possible that it could, and</p> <p>18 in the particular factual circumstances which did as</p> <p>19 matter of fact arise, it is and some others did.</p> <p>20 MR ZACAROLI: We take issue with that proposition and we say</p> <p>21 that that submission would be correct if one is using</p> <p>22 default in a completely different sense. Banks did go</p> <p>23 out and raise capital, substantial sums of capital,</p> <p>24 immediately in the aftermath of the Lehmans' collapse.</p> <p>25 It may be that that was as a consequence of the Lehman</p> <p style="text-align: center;">Page 107</p>
<p>1 to the addressee and people like him?</p> <p>2 MR ZACAROLI: Yes.</p> <p>3 MR JUSTICE HILDYARD: It is no more than that, is it?</p> <p>4 MR ZACAROLI: No.</p> <p>5 MR JUSTICE HILDYARD: At that stage you are not wondering</p> <p>6 what it means, you are wondering what is admissible to</p> <p>7 determine what it means.</p> <p>8 MR ZACAROLI: Yes, indeed. I would say it comes to the same</p> <p>9 thing, that you are relying upon something inadmissible</p> <p>10 to determine its meaning, a meaning which would</p> <p>11 prejudice a person who wasn't privy to that.</p> <p>12 MR JUSTICE HILDYARD: Yes.</p> <p>13 MR ZACAROLI: That is the sort of technical point, but</p> <p>14 actually our main response to this is it involves the</p> <p>15 non sequitur that I have already been dealing with,</p> <p>16 namely the mere fact that banks, let's assume everybody</p> <p>17 did know about it. The mere fact that banks fund</p> <p>18 themselves through a variety of instruments and variety</p> <p>19 of sources is irrelevant to the question of what it</p> <p>20 would cost that entity or any entity to go into the</p> <p>21 market to raise the particular sum.</p> <p>22 By definition the fact that banks are required to</p> <p>23 maintain a particular ratio of equity and debt is doubly</p> <p>24 irrelevant, because that just explains why it is that</p> <p>25 they would particularly need to raise equity in certain</p> <p style="text-align: center;">Page 106</p>	<p>1 default in the sense of Lehmans' collapse, but the</p> <p>2 suggestion that that follows from that, the completely</p> <p>3 different proposition that a counterparty who was</p> <p>4 required to raise the relevant amount or identify the</p> <p>5 cost to it if it were to raise the relevant amount,</p> <p>6 would say actually for that relevant amount, because</p> <p>7 I need to raise it I would go and issue equity, is</p> <p>8 completely different.</p> <p>9 By conflating the concepts of default we accept that</p> <p>10 there may well have been counterparties raising funds in</p> <p>11 that context, but not in order to fund the relevant</p> <p>12 amount.</p> <p>13 We also don't accept the prior premise, which is</p> <p>14 that the fact that banks went out to raise funds in</p> <p>15 October and November, and September maybe, 2008, was</p> <p>16 a consequence of Lehmans' default. Lehmans' default was</p> <p>17 a consequence of a much wider financial crisis. It may</p> <p>18 itself have been a proximate cause of some other things,</p> <p>19 but it was also itself caused by the financial state at</p> <p>20 the time. My Lord well knows that the credit crunch</p> <p>21 began before September 2008, it was already well under</p> <p>22 way. So to say that every bank's raising of capital,</p> <p>23 even Goldman Sachs' raising of capital was only as</p> <p>24 a response to Lehmans' default would be too simplistic.</p> <p>25 However, I accept there is no evidence either way on</p> <p style="text-align: center;">Page 108</p>

27 (Pages 105 to 108)

<p>1 that, so it is speculation. But one certainly cannot</p> <p>2 make that presumption.</p> <p>3 MR JUSTICE HILDYARD: There is a difference between the</p> <p>4 occasion and the cause, as I prematurely said this</p> <p>5 morning.</p> <p>6 MR ZACAROLI: Yes.</p> <p>7 MR JUSTICE HILDYARD: It is possible that because it all</p> <p>8 happened at once in a frightening sort of way, that the</p> <p>9 problems under these agreements, and the problems more</p> <p>10 generally, were the occasion for raising equity funding,</p> <p>11 as being the only means of doing so in a difficult</p> <p>12 credit environment. It doesn't mean that it was the</p> <p>13 cause of that --</p> <p>14 MR ZACAROLI: Yes.</p> <p>15 MR JUSTICE HILDYARD: -- or that you can say which of them</p> <p>16 was or what other factors might also have contributed.</p> <p>17 MR ZACAROLI: Indeed, but on any view, whatever that wider</p> <p>18 cause was, it is not going to have been in anything</p> <p>19 other than the most extreme case. The fact that</p> <p>20 a particular sum owed by a defaulting bank had not been</p> <p>21 paid.</p> <p>22 MR JUSTICE HILDYARD: I don't know -- the draftsman might</p> <p>23 have been a particularly pessimistic sort, I don't know.</p> <p>24 He might have contemplated that possibility, I think</p> <p>25 that is the point that is left open.</p> <p style="text-align: center;">Page 109</p>	<p>1 to 1 or 2 per cent.</p> <p>2 MR JUSTICE HILDYARD: My memory is going, Goldman Sachs</p> <p>3 placed quite a lot of their shares, or whatever they are</p> <p>4 called, with Berkshire Hathaway, or is that a different</p> <p>5 institution, am I getting confused?</p> <p>6 MR ZACAROLI: I am not entirely sure, it is not the entity</p> <p>7 itself which placed the equity, it is a parent entity</p> <p>8 which placed the equity. It is also a parent entity</p> <p>9 which raised the borrowing. It is not the entity</p> <p>10 itself, I don't take a point about that.</p> <p>11 MR JUSTICE HILDYARD: No, I am sorry I can't remember</p> <p>12 whether I am imagining it --</p> <p>13 MR FOXTON: The preferred equity was taken up by</p> <p>14 Berkshire Hathaway.</p> <p>15 MR JUSTICE HILDYARD: That was the placing documentation you</p> <p>16 showed me?</p> <p>17 MR FOXTON: My Lord, yes.</p> <p>18 MR ZACAROLI: It would be really fanciful to suggest that</p> <p>19 that raising of capital, and/or debt, in such enormous</p> <p>20 sums, was the consequence of not being paid the</p> <p>21 defaulted sum, no more than tens of millions of pounds</p> <p>22 under the ISDA master agreement. It is a perfect</p> <p>23 example of there being no possible realistic connection</p> <p>24 between the single default here and the need to raise</p> <p>25 equity or the need to go out and borrow such large sums.</p> <p style="text-align: center;">Page 111</p>
<p>1 MR ZACAROLI: We would suggest it is simply too extreme an</p> <p>2 example to play any part in the construction of the</p> <p>3 clause.</p> <p>4 MR JUSTICE HILDYARD: Yes.</p> <p>5 MR ZACAROLI: What Goldman Sachs itself did is a good</p> <p>6 illustration of this.</p> <p>7 MR JUSTICE HILDYARD: Yes.</p> <p>8 MR ZACAROLI: My Lord probably has this point from our</p> <p>9 skeleton. I make this point by way of illustration.</p> <p>10 Mr Weber's evidence, bundle 2, tab 6 or it will be</p> <p>11 in the core as well, no doubt if I can find it, but we</p> <p>12 needn't turn it up unless my Lord wants to see it.</p> <p>13 The point is this, Goldmans was owed under a single</p> <p>14 ISDA master agreement a certain sum of money. I think</p> <p>15 we have said it is GBP 36 million in our skeleton, and</p> <p>16 I don't think any particular response has been received,</p> <p>17 it is tens of millions, anyway. Its particular exposure</p> <p>18 to Lehmans under the ISDA master agreement was that sum.</p> <p>19 What it in fact did, according to its evidence, was to</p> <p>20 go out into the market around that time, so after the</p> <p>21 Lehmans' collapse, and raise billions in equity. It</p> <p>22 also borrowed billions at extremely low rates of</p> <p>23 interest from the Federal Reserve.</p> <p>24 There are two different types of raising of money.</p> <p>25 The rates of interest ranged from less than 1 per cent</p> <p style="text-align: center;">Page 110</p>	<p>1 It illustrates the point that that is responsive to</p> <p>2 default in the much wider sense than we are concerned</p> <p>3 with under the definition of the default rate.</p> <p>4 If my Lord has Mr Weber's evidence, it is bundle 2,</p> <p>5 tab 6. This point is a further -- I am responding now</p> <p>6 to Mr Foxton's point that it would cause consternation</p> <p>7 among commercial parties if they discovered they could</p> <p>8 not use cost of equity in certifying a default rate</p> <p>9 under the master agreement or a rate of interest under</p> <p>10 the master agreement.</p> <p>11 I make this point only in response to that, to note,</p> <p>12 as Mr Weber points out, that Goldmans have submitted</p> <p>13 a claim and we are told that the claim they will submit</p> <p>14 is going to be 10 per cent, in the order of that, or</p> <p>15 more, based on costs of equity no doubt, they have in</p> <p>16 fact --</p> <p>17 MR FOXTON: On that point, it may matter more to others</p> <p>18 outside this courtroom, the figures that I gave</p> <p>19 your Lordship yesterday were by reference to simple</p> <p>20 interest figures, in terms of compound I think they have</p> <p>21 equivalent to a range of 6.8-11 per cent, and we are</p> <p>22 going to be in the lower part of that range.</p> <p>23 That was more to correct something I had said</p> <p>24 yesterday than anything that my learned friend was</p> <p>25 saying, but now seemed an appropriate time.</p> <p style="text-align: center;">Page 112</p>

<p>1 MR ZACAROLI: I am grateful for that correction, but the</p> <p>2 point I am making here is that Goldman Sachs did in fact</p> <p>3 submit claims in the Lehman's US bankruptcy.</p> <p>4 MR JUSTICE HILDYARD: They swallowed their consternation</p> <p>5 then.</p> <p>6 MR ZACAROLI: Precisely, because the rates were in one case</p> <p>7 as low as 0.7 per cent and in the other 3.7 per cent, so</p> <p>8 that is the only point I make.</p> <p>9 Mr Foxton also relied upon the Sal Oppenheim v LBF</p> <p>10 case of Mr Justice Burton.</p> <p>11 MR JUSTICE HILDYARD: Yes.</p> <p>12 MR ZACAROLI: I don't think we need to turn that up, because</p> <p>13 the only points I make about that are that was a case</p> <p>14 about what evidence was necessary in order to establish</p> <p>15 the rate you would have borrowed at if you were to have</p> <p>16 borrowed. It was all about borrowing, no question of</p> <p>17 anything else. For what it is worth the parties in that</p> <p>18 case were limiting themselves to borrowing rates.</p> <p>19 It so happened that the particular entity could not</p> <p>20 have borrowed because of its liquidation. However, its</p> <p>21 parent, also in an insolvency procedure, did have access</p> <p>22 to borrowing. All that the court found was that that</p> <p>23 facility represented something which the borrower could</p> <p>24 have access to and therefore the cost of that facility</p> <p>25 was the cost the borrower itself could have borrowed at.</p> <p style="text-align: center;">Page 113</p>	<p>1 MR ZACAROLI: What is said is that you can look at the</p> <p>2 common law to illuminate the understanding of the words</p> <p>3 in the master agreement. We accept that of course. The</p> <p>4 common law relied upon is a statement which says:</p> <p>5 "If you are claiming damages for late payment it</p> <p>6 could be in one of three ways: (1), based on the cost of</p> <p>7 borrowing that money; (2), based on the lost opportunity</p> <p>8 of not having had the money and the profits you could</p> <p>9 have made or; (3), some other loss flowing from the</p> <p>10 non-payment."</p> <p>11 The draftsman of the master agreement has identified</p> <p>12 a contractual remedy which adopts the first of those</p> <p>13 very expressly and only the first of those.</p> <p>14 For reasons which I have already explained earlier</p> <p>15 on, we say that the appropriate common law reference or</p> <p>16 light that illuminates this question is the approach</p> <p>17 taken in Tate &amp; Lyle by Mr Justice Forbes.</p> <p>18 Then while we are in this skeleton, just a quick</p> <p>19 reference to paragraph 34.3. I am referring simply to</p> <p>20 the point made in 34.3, but also made in a number of</p> <p>21 other places by the Senior Creditor Group but it is an</p> <p>22 appropriate point to point it out. At the bottom of</p> <p>23 page 16 of the skeleton, the last line:</p> <p>24 "As Judge Chapman noted in Lehman Brothers v Intel</p> <p>25 Corporation in the context of the definition of loss</p> <p style="text-align: center;">Page 115</p>
<p>1 That is all the judge was deciding.</p> <p>2 It is also worth noting however that where you have</p> <p>3 an insolvent relevant payee, one in an insolvency</p> <p>4 process, that raises particular problems of its own, not</p> <p>5 an issue which we are needing to address in these</p> <p>6 proceedings, we are not here concerned with how you</p> <p>7 would approach the certificate of a default rate by</p> <p>8 a party in liquidation. It is not an issue for today,</p> <p>9 but there are issues there which go beyond what we need</p> <p>10 to discuss here and explain -- of course the rate of</p> <p>11 interest was very high, because you are talking about an</p> <p>12 insolvent entity, whether that was right or wrong is for</p> <p>13 another day. It is not a matter that my Lord needs to</p> <p>14 be concerned with, but it does raise specific problems</p> <p>15 of its own.</p> <p>16 Another point made against us by Goldman Sachs,</p> <p>17 although this time in their skeleton, but I will deal</p> <p>18 with it in case it is come back to. Paragraphs 39 and</p> <p>19 40 of their skeleton, could my Lord please turn that up,</p> <p>20 it is the skeleton bundle 3, tab 4, paragraphs 39 and</p> <p>21 40.</p> <p>22 Could my Lord please read those two paragraphs. It</p> <p>23 is there they quote the decision of the House of Lords</p> <p>24 in Sempra Metals. (Pause)</p> <p>25 MR JUSTICE HILDYARD: Yes.</p> <p style="text-align: center;">Page 114</p>	<p>1 it is misplaced hyperbole to suggest that permitting</p> <p>2 non-defaulting parties to choose their own methodologies</p> <p>3 would create unacceptable uncertainty. In any event,</p> <p>4 the certainty sought by the drafter is not the certainty</p> <p>5 that the relevant payment would be calculated</p> <p>6 a particular way, but that it would be conclusive and</p> <p>7 legally enforceable."</p> <p>8 The broad point made against us is that the ISDA</p> <p>9 master agreement is intended to cover a whole range of</p> <p>10 different types of transaction. That is the driver for</p> <p>11 loss being determined or defined expansively without</p> <p>12 limitation and it is why a closeout amount under the</p> <p>13 2002 agreement is similarly and even more flexibly and</p> <p>14 expansively defined.</p> <p>15 To reiterate our response in our skeleton, we are</p> <p>16 here not concerned with the definition of loss, so</p> <p>17 everything that is said by Judge Chapman in that case</p> <p>18 concerning the importance of leaving the definition</p> <p>19 flexible and open has no relevance to this question.</p> <p>20 Indeed, the question here is completely different to</p> <p>21 the one in Intel. There it was a question of whether</p> <p>22 a particular calculation of loss was one which the party</p> <p>23 would be confined to. Here we are simply looking at the</p> <p>24 wording and trying to construe its meaning. This is</p> <p>25 a construction case; that wasn't a construction case.</p> <p style="text-align: center;">Page 116</p>

<p>1 Moreover, interest is the same, the definition of</p> <p>2 interest or the components of the applicable rate are</p> <p>3 the same throughout the master agreement irrespective of</p> <p>4 the transaction which underlies the agreement. The</p> <p>5 nature of the transaction is irrelevant. It doesn't</p> <p>6 matter that there could be all sorts of different types</p> <p>7 of transactions, because interest is only relevant to</p> <p>8 the stage where there is a sum of money owing by one to</p> <p>9 the other and you are trying to work out the cost</p> <p>10 incurred by a party in replacing that sum.</p> <p>11 I turn now then to the question of hybrid</p> <p>12 instruments, because our case is that the core qualities</p> <p>13 of equity mean that it simply plays no role in the</p> <p>14 calculation of the default rate. What is said is that</p> <p>15 entities fund themselves through a mixture of</p> <p>16 instruments, some equity, some debt, some hybrid.</p> <p>17 I can deal with this quite shortly, I think. For</p> <p>18 the reasons we have already developed as a matter of</p> <p>19 definition, the cost of funding requires to you look at</p> <p>20 what it would cost to borrow the relevant amount in the</p> <p>21 market. The fact that entities fund themselves through</p> <p>22 a variety of instruments is irrelevant to that question.</p> <p>23 The core question is that the payments which the entity</p> <p>24 is required to make, in consideration for the funding,</p> <p>25 correspond to payments in consideration for having the</p> <p style="text-align: center;">Page 117</p>	<p>1 of analysing the requirement for the definition, we say</p> <p>2 it is, and I will provide the answer to that, but</p> <p>3 my Lord has what we say are the critical elements.</p> <p>4 The example given by Goldman Sachs was the</p> <p>5 preference shares that were in fact issued. They can be</p> <p>6 seen or they are described at authorities bundle 4A,</p> <p>7 tab 143. This is one where we do have at least the bare</p> <p>8 bones of the provision, we have not seen the instrument</p> <p>9 itself. We can see from the bare bones of this</p> <p>10 provision, or this instrument, that first of all, as my</p> <p>11 learned friend candidly accepted, the dividends are only</p> <p>12 payable if declared by the company's board of directors,</p> <p>13 so they are subject to all of the restrictions on</p> <p>14 declaration of dividends. The return in terms of the</p> <p>15 price, cost, if that be it, for the equity, is subject</p> <p>16 to that requirement.</p> <p>17 You will see from the last sentence of the second</p> <p>18 paragraph, the paragraph that begins dividends on the</p> <p>19 preferred stock. At the very end:</p> <p>20 "The preferred stock has no maturity date and will</p> <p>21 rank senior to the outstanding common stock and pari</p> <p>22 passu with other outstanding series of preferred stock,</p> <p>23 with respect to payments of dividends and distributions</p> <p>24 in liquidation."</p> <p>25 It doesn't have the feature of borrowing that the</p> <p style="text-align: center;">Page 119</p>
<p>1 benefit of that money for a time. Is the core</p> <p>2 requirements of borrowing, to go back on what I have</p> <p>3 said before.</p> <p>4 If they do, then they fulfil the requirements of the</p> <p>5 definition and they can be relied upon. If they don't,</p> <p>6 they cannot.</p> <p>7 If you identify a single cost that is the</p> <p>8 consideration for entering into a hybrid instrument,</p> <p>9 which does not by definition, because it is hybrid,</p> <p>10 fulfil the description of the definition, you cannot</p> <p>11 rely upon it. We made the point in our skeleton you</p> <p>12 might be able to disentangle bits of cost, actually</p> <p>13 I think the better point is that cost is simply not one</p> <p>14 you can rely upon, because it doesn't relate to</p> <p>15 a payment for the time value of money.</p> <p>16 We don't have before us every conceivable type of</p> <p>17 instrument through which an entity could choose to go</p> <p>18 out into the market and raise the relevant sum -- it</p> <p>19 would be a terrible hearing if we did -- but in every</p> <p>20 case it will be a question of construction and there</p> <p>21 will be matters, transactions at the borders, as in any</p> <p>22 case, as to whether a particular transaction fulfils the</p> <p>23 necessary requirements of the definition.</p> <p>24 I will come on later to the questions the joint</p> <p>25 administrators have asked in case that is a helpful way</p> <p style="text-align: center;">Page 118</p>	<p>1 sum itself is one which is required to be repaid at some</p> <p>2 point.</p> <p>3 If the question were asked: is this particular</p> <p>4 raising of capital by preferred shares in or outside the</p> <p>5 definition? We would say the answer is very clearly</p> <p>6 outside, because it doesn't fulfil the essential</p> <p>7 requirements of the definition.</p> <p>8 My Lord, whatever words the draftsman had used --</p> <p>9 MR JUSTICE HILDYARD: Yes, sorry, I am wondering about the</p> <p>10 maturity date. I mean you could have preference shares</p> <p>11 which fell in in the sense of being called on at</p> <p>12 a different date.</p> <p>13 MR ZACAROLI: Yes, you could.</p> <p>14 MR JUSTICE HILDYARD: You would say maturity date wasn't an</p> <p>15 appropriate phrase, that it is a redemption date or</p> <p>16 what?</p> <p>17 MR ZACAROLI: Yes, you can have preference shares which are</p> <p>18 redeemable on a particular date.</p> <p>19 MR JUSTICE HILDYARD: At the election of the holder for</p> <p>20 example or at the election of the company or both,</p> <p>21 either of them?</p> <p>22 MR ZACAROLI: This one is the company's election in fact,</p> <p>23 but you could have one --</p> <p>24 MR JUSTICE HILDYARD: I am not sure how much to read into</p> <p>25 what you are saying. Are you saying that a provision</p> <p style="text-align: center;">Page 120</p>

<p>1 for a redemption at whoever's election in the case of</p> <p>2 a preference share is not a maturity date and it doesn't</p> <p>3 operate in the same way as a debt?</p> <p>4 MR ZACAROLI: We say it doesn't operate in the same way as</p> <p>5 debt, because it is still subject to the requirement to</p> <p>6 be payable out of profits.</p> <p>7 MR JUSTICE HILDYARD: Yes, but that could be equated to</p> <p>8 a limited recourse?</p> <p>9 MR ZACAROLI: Yes, it could, my Lord. As I say, at the</p> <p>10 edges there may be instruments which have some</p> <p>11 similarities with what is at the core of the definition.</p> <p>12 It may be difficult to determine whether they are</p> <p>13 inside or outside of the line. If I structured a debt</p> <p>14 or a borrowing on the basis that there was limited</p> <p>15 recourse, the reality here, my Lord, is that that is --</p> <p>16 assuming it is within the definition of borrowing, it is</p> <p>17 highly unlikely to be one which I can sensibly rely upon</p> <p>18 given the requirement of what I would have to pay if</p> <p>19 I were to go out and raise the funds, because the cost</p> <p>20 of doing so is likely to be significantly greater than</p> <p>21 if you were to offer all of her assets by way of</p> <p>22 recourse.</p> <p>23 When one gets within the outer corners, it may be</p> <p>24 academic because actually it is something that in the</p> <p>25 real world could never be relied upon, but the fact that</p> <p style="text-align: center;">Page 121</p>	<p>1 to use. It is not a payment by reference to the time.</p> <p>2 It goes back to two fundamental features of borrowing</p> <p>3 and equity.</p> <p>4 MR JUSTICE HILDYARD: Yes, yes.</p> <p>5 MR ZACAROLI: I was going on to say, my Lord, that whatever</p> <p>6 words a draftsman uses in a contract there is scope --</p> <p>7 given the ingenuity of parties and their legal</p> <p>8 advisers -- to argue about what they mean. One point</p> <p>9 made against us was that we are here raising questions</p> <p>10 of construction, which surely the draftsman would never</p> <p>11 have intended to be raised. Unfortunately it is beyond</p> <p>12 the draftsman's remit to prevent questions of</p> <p>13 construction over the words he or she uses.</p> <p>14 Yes, the ISDA master agreement uses the phrase</p> <p>15 "borrowed funds" in a completely different context.</p> <p>16 There will be arguments there about what borrowed funds</p> <p>17 means in various context, there could well be arguments</p> <p>18 about instruments that look like borrowing but aren't or</p> <p>19 have most of the features, but maybe not some. There</p> <p>20 will always be scope for argument about the meaning of</p> <p>21 words and also about, given the variety of instruments</p> <p>22 that can be dreamt up, whether they fit within or</p> <p>23 without the definition.</p> <p>24 That doesn't mean the court is not able to define</p> <p>25 a term like "cost of funding the relevant amount", based</p> <p style="text-align: center;">Page 123</p>
<p>1 there may be difficult questions at the borders is not</p> <p>2 a reason to shy away from identifying what is at the</p> <p>3 core of the definition.</p> <p>4 MR JUSTICE HILDYARD: I am sorry, I am just trying to</p> <p>5 organise my mind. At the core really is participation,</p> <p>6 isn't it?</p> <p>7 MR ZACAROLI: The core of?</p> <p>8 MR JUSTICE HILDYARD: Of a share.</p> <p>9 MR ZACAROLI: Yes.</p> <p>10 MR JUSTICE HILDYARD: That is the single thing which is not</p> <p>11 present in what one would ordinarily call a borrowing?</p> <p>12 MR ZACAROLI: Yes.</p> <p>13 MR JUSTICE HILDYARD: It doesn't sometimes look as if you</p> <p>14 are taking much of a punt on the commercial activities</p> <p>15 of the company, in the sense you have a variable return</p> <p>16 according to it, save that you are (a), dependent on the</p> <p>17 declaration, as you have explained to me, and (b), it is</p> <p>18 the sort of characteristic of a share that you have some</p> <p>19 participation in the adventure.</p> <p>20 MR ZACAROLI: Yes, and therefore to flip that on its head</p> <p>21 the cost, in inverted commas, for the moment of the</p> <p>22 company of that investment or that --</p> <p>23 MR JUSTICE HILDYARD: Is keeping the participants sweet?</p> <p>24 MR ZACAROLI: Yes, and it is not relevant or is not by</p> <p>25 reference to the time you have that money in your hands</p> <p style="text-align: center;">Page 122</p>	<p>1 upon what the terms of that expression require as core</p> <p>2 elements within that definition.</p> <p>3 With that, can I turn to the administrators' series</p> <p>4 of questions. It is best picked up in their skeleton,</p> <p>5 which is at bundle 3, tab 1.</p> <p>6 MR JUSTICE HILDYARD: Yes.</p> <p>7 MR ZACAROLI: Page 19, paragraph 65.</p> <p>8 MR JUSTICE HILDYARD: Yes.</p> <p>9 MR ZACAROLI: I just simply propose to run through these and</p> <p>10 I hope that the reason for the answer that I will give</p> <p>11 is clear from the submissions I have made so far, but if</p> <p>12 not I can hopefully clarify.</p> <p>13 The first question is: whether the relevant cost</p> <p>14 must involve the incurring of an obligation, whether</p> <p>15 actual or hypothetical, to pay a sum of money?</p> <p>16 To which we say the answer is yes. The cost is the</p> <p>17 price to be paid in exchange for the borrowing. It is</p> <p>18 the funding, to use a neutral term for the moment.</p> <p>19 Question 2 must that obligation be incurred when</p> <p>20 obtaining the funding and as part of the bargain?</p> <p>21 The answer follows from the answer to the first,</p> <p>22 it is part of the bargain for the transaction, so yes.</p> <p>23 The third question: is it a cost if what is incurred</p> <p>24 is a discretionary obligation?</p> <p>25 We say no. If I am offered funding on terms that</p> <p style="text-align: center;">Page 124</p>

<p>1 I may or may not pay for it, then that is not a cost.</p> <p>2 Two reasons, I suppose, (1), it is simply not part of</p> <p>3 the price. Secondly, it wouldn't represent the amount</p> <p>4 I have to pay if I could pay nothing for it.</p> <p>5 The same answer therefore follows to question 4, if</p> <p>6 the amount is discretionary, again no, not a cost. If</p> <p>7 there were a lowest amount I had to pay then maybe that</p> <p>8 would be, but the amount is completely discretionary,</p> <p>9 the answer is no.</p> <p>10 The fifth question: whether the cost must be cost of</p> <p>11 funding the relevant amount to address the cash</p> <p>12 shortfall caused by non-payment or whether it can be the</p> <p>13 cost of funding some other amount or other wider</p> <p>14 purposes?</p> <p>15 We submit it is the former. Just to expand on that</p> <p>16 briefly. It touches on a discussion my Lord was having</p> <p>17 with my learned friends yesterday, I think, that the</p> <p>18 wording of the definition very clearly requires an</p> <p>19 amount to required to fund the relevant amount, not an</p> <p>20 amount required to replenish your assets generally or to</p> <p>21 fund yourself generally. The cost here is very</p> <p>22 deliberately transaction specific, the actual or</p> <p>23 hypothetical transaction.</p> <p>24 Just to expand on that, it doesn't necessarily mean</p> <p>25 that because an entity in fact went out and borrowed</p> <p style="text-align: center;">Page 125</p>	<p>1 transaction.</p> <p>2 The final one, whether it includes only the lowest</p> <p>3 cost. This, we would suggest, mischaracterises the</p> <p>4 point.</p> <p>5 MR JUSTICE HILDYARD: It is the have to pay point.</p> <p>6 MR ZACAROLI: It is the have to pay point, yes. I have made</p> <p>7 our case on that.</p> <p>8 There is then the administrators' additional</p> <p>9 question, which asks: what happens if an entity cannot</p> <p>10 borrow?</p> <p>11 They have raised this issue in their skeleton</p> <p>12 argument. Our principal response to this is that it is</p> <p>13 a question which need not be answered by the court at</p> <p>14 the moment, because there isn't any evidence of</p> <p>15 a particular issue involving a particular counterparty</p> <p>16 where this point has arisen. It may be dangerous to</p> <p>17 embark on answering questions where the point as yet has</p> <p>18 not been identified as one which needs answering.</p> <p>19 MR JUSTICE HILDYARD: Where is the question?</p> <p>20 MR ZACAROLI: I have not made a note, let me just find it.</p> <p>21 (Pause)</p> <p>22 I am hearing it might be in their position paper, in</p> <p>23 which case let me just find that. (Pause)</p> <p>24 My Lord, I am told it is paragraph 52 of their</p> <p>25 skeleton, I am grateful for that. I had not made a note</p> <p style="text-align: center;">Page 127</p>
<p>1 let's say GBP 500 million, in circumstances where it was</p> <p>2 owed GBP 100 million. It doesn't mean that that</p> <p>3 borrowing is irrelevant to the question. The question</p> <p>4 is: what would it cost to fund the relevant amount? As</p> <p>5 in the Sal Oppenheim v LBF case, it may be that that</p> <p>6 ability to draw on a facility of that amount is evidence</p> <p>7 of what it would cost you if you were to go out and</p> <p>8 borrow the relevant amount. We don't say that you</p> <p>9 cannot certify a cost of funding merely because you have</p> <p>10 gone out and borrowed a much greater amount. That</p> <p>11 clearly can be relied upon as evidence of what it would</p> <p>12 cost if you had gone out to borrow the relevant amount,</p> <p>13 but the question must always be focused on what it would</p> <p>14 cost to fund the relevant amount.</p> <p>15 Clearly cost of raising equity to address an</p> <p>16 inadequate capital ratio is not allowed.</p> <p>17 The sixth question, whether the cost of funding</p> <p>18 includes any loss of profits or consequential losses</p> <p>19 resulting from the non-payment of the relevant amount,</p> <p>20 my Lord will know our answer to that is no for the</p> <p>21 reasons I have given at length already.</p> <p>22 Similarly question 7, whether it includes the</p> <p>23 professional or arrangement fees incurred.</p> <p>24 No, it doesn't for the reasons that we have given.</p> <p>25 They are outside the concept of price of the</p> <p style="text-align: center;">Page 126</p>	<p>1 of where it was, I am sorry.</p> <p>2 MR JUSTICE HILDYARD: Yes.</p> <p>3 MR ZACAROLI: That is the question. As I say, we would</p> <p>4 first of all submit that it may be dangerous to answer</p> <p>5 it without knowing what the circumstances underlying it</p> <p>6 are in any particular case, and therefore no need to,</p> <p>7 but also that there may be different answers depending</p> <p>8 upon what reason is give for the relevant payee being</p> <p>9 unable to borrow.</p> <p>10 Can I first of all deal with what we say is another</p> <p>11 mischaracterisation of our case here. It was suggested</p> <p>12 by my learned friend Mr Dicker that we have taken the</p> <p>13 position in correspondence that in an extreme case where</p> <p>14 there was no ability to raise money by borrowing, then</p> <p>15 a relevant payee could resort to the cost of equity. My</p> <p>16 Lord, to clarify for yet another time -- we have done</p> <p>17 this in correspondence and our skeleton -- what we said</p> <p>18 in that correspondence, what we were asked to do in that</p> <p>19 correspondence is to confirm our position that as</p> <p>20 a matter of construction the default rate was limited to</p> <p>21 borrowing. The letter from my solicitors, I think it</p> <p>22 was in June this year, gave that confirmation.</p> <p>23 It went on to say if we are wrong about that it</p> <p>24 would in any event be an extreme case where it would be</p> <p>25 rational or in good faith for a relevant payee to rely</p> <p style="text-align: center;">Page 128</p>



<p>1 upon its costs of raising equity. That was clearly 2 a fall back position in the sense that if we are wrong 3 as matter of construction, it wasn't relevant to 4 construction. We do not suggest and have not suggested 5 that cost of equity comes into play at all in the 6 definitional context.</p> <p>7 Turning to the reason why it may be difficult to 8 answer this question in the abstract, let's just take 9 two different possibilities.</p> <p>10 The first is that the relevant payee cannot borrow 11 because it is precluded from doing so at that time 12 because of particular regulatory requirements about 13 capital ratios. Another example might be if it cannot 14 borrow because commercially no one will lend to it. Two 15 different situations.</p> <p>16 Dealing with the first situation, we say the fact 17 that you have reached the limits of borrowing, in 18 accordance with regulatory requirements to do with 19 ratios, does not mean that you cannot borrow. It just 20 means you have to sort your ratios out first, and 21 "sorting your ratios out", to use that rather loose 22 phrase, can be done in a number of ways.</p> <p>23 Yes, one reaction might be to raise capital, but 24 there are other ways in which you can deal with the 25 problem.</p> <p style="text-align: center;">Page 129</p>	<p>1 To take the example of a person that no one will 2 lend to or an entity that no one will lend to because 3 they are of such bad credit risk that they simply won't 4 touch them. We would suggest the problem here is a much 5 broader one than trying to determine whether the clause 6 is limited to borrowing or equity. The reality is that 7 with someone in that position no one will advance money 8 to them at all, whether it be for lending or equity.</p> <p>9 Indeed, if you are willing to lend equity or advance 10 equity you are taking a higher risk on that entity. If 11 you are willing to do that, why wouldn't you be willing 12 to lend? It is actually a much broader problem and 13 serves absolutely no useful purpose in considering that 14 problem to determine whether our definition is correct 15 or not.</p> <p>16 Again, we would say that we have offered two 17 potential answers. The first answer is one the joint 18 administrators themselves have suggested to this 19 question, which they put forward at paragraph 25, 20 subparagraph 4 of their position paper limited to issues 21 11-13, volume 1, tab 17, page 413. What they say is in 22 such a situation, if you cannot borrow you have no 23 funding costs and therefore the default rate is zero 24 plus 1 per cent, ie the spread.</p> <p>25 MR JUSTICE HILDYARD: I mean most of the questions they ask</p> <p style="text-align: center;">Page 131</p>
<p>1 It is not me just saying that. That is how it is 2 explained by Mr Ben Cohen in an article which 3 Goldman Sachs have inserted in bundle AB4A, at tab 136. 4 Within that article it is pages 26 to 27. On page 26, 5 in the middle of the page, a sub-heading "Channels of 6 adjustment". There are there set out four ways in which 7 a bank can seek to correct a capital ratio problem.</p> <p>8 Could my Lord just read to the bottom of the page 9 and the second small paragraph at the top of the next 10 page. (Pause)</p> <p>11 MR JUSTICE HILDYARD: Yes.</p> <p>12 MR ZACAROLI: There are a number of things that a bank could 13 do. It is not that it cannot borrow, it just has to 14 take certain steps to correct the rest of its position 15 before it can do so. The language of the definition is 16 capable of dealing with that by reference to the 17 hypothetical. A bank may choose not to borrow for 18 a variety of reasons, in which case it clearly is 19 looking at the hypothetical. It may be temporarily 20 precluded from doing so because of capital ratio issues, 21 in which case you look at the hypothetical.</p> <p>22 There are ways around that problem which the clause 23 itself identifies, which we would suggest is at least 24 one possible answer to the question if it needs to be 25 answered.</p> <p style="text-align: center;">Page 130</p>	<p>1 are designed to test rival contentions. This one 2 appears to be more a question of a possible hypothetical 3 event.</p> <p>4 MR ZACAROLI: Yes.</p> <p>5 MR JUSTICE HILDYARD: It doesn't seem to, at present 6 advised, until redirected, doesn't immediately cast 7 light on one or other of the proposed solutions?</p> <p>8 MR ZACAROLI: No, for the reason I have just given we would 9 certainly say that is a correct analysis. We have 10 obviously not heard my learned friends on this yet, it 11 may be that I will need to reply to them if they deal 12 with. They didn't choose to deal with this question.</p> <p>13 Our primary position is you don't need to deal with 14 it, it doesn't cast light and it is a hypothetical 15 position that has not so far arisen. As I say, the 16 other answer we suggest is that since the default rate 17 definition incorporates within it an assumption that if 18 you don't borrow you could have done, the assumption is 19 there, that if the assumed position simply doesn't exist 20 then you can fall back to what would have been the 21 position if that assumption had been correct, so you 22 could have gone and borrowed in the market. In other 23 words, remove the disability which it is assumed you 24 don't have. It is one approach, but the right answer 25 may depend upon the circumstances in which you are</p> <p style="text-align: center;">Page 132</p>

<p>1 unable to borrow.</p> <p>2 MR JUSTICE HILDYARD: The problem is caused at that level by</p> <p>3 the phraseology of what it could have --</p> <p>4 MR ZACAROLI: Yes.</p> <p>5 MR JUSTICE HILDYARD: If it were a generic solution, the</p> <p>6 problem wouldn't arise? By which I mean if you simply</p> <p>7 adopted the English courts' ordinary approach outside</p> <p>8 the contractual framework, interest is simply a generic</p> <p>9 response. You don't have to show you would or wouldn't</p> <p>10 have or what your rate was.</p> <p>11 MR ZACAROLI: Yes, I accept that is the problem and that is</p> <p>12 why the question has been asked, but the response may</p> <p>13 well depend upon a myriad of circumstances in which that</p> <p>14 problem has arisen.</p> <p>15 MR JUSTICE HILDYARD: Yes.</p> <p>16 MR ZACAROLI: Is that a convenient moment for a shorthand</p> <p>17 writers' break?</p> <p>18 MR JUSTICE HILDYARD: Yes.</p> <p>19 (3.15 pm)</p> <p>20 (A short break)</p> <p>21 (3.20 pm)</p> <p>22 MR ZACAROLI: My Lord, that concludes the substance of my</p> <p>23 suspicions on issue 11, save to go back on one thing.</p> <p>24 I have been asked to make it clear that when we accept</p> <p>25 that cost of funds, cost of equity does have a meaning</p> <p style="text-align: center;">Page 133</p>	<p>1 MR ZACAROLI: It is not part of Waterfall, because Waterfall</p> <p>2 is dealing with generic issues. That would be an issue</p> <p>3 which affects particular counterparties.</p> <p>4 MR JUSTICE HILDYARD: Right.</p> <p>5 MR ZACAROLI: It may be most convenient to pick up on</p> <p>6 issue 12, my Lord, next. Then I thought I would go to</p> <p>7 issue 10 and come back to 13 and 14 at the end because</p> <p>8 13 and 14 are rather slightly different points, but 12</p> <p>9 goes together with 11 although I suspect and hope that</p> <p>10 the answer to 12 that we give would be clear from</p> <p>11 everything that I have submitted so far.</p> <p>12 Issue 12 can be found in bundle 1, behind tab 1B.</p> <p>13 It is also in the core bundle.</p> <p>14 MR JUSTICE HILDYARD: Yes.</p> <p>15 MR ZACAROLI: As phrased -- so question 12 assumes that cost</p> <p>16 of funding the relevant amount means cost of borrowing,</p> <p>17 so that is the world we are in. Then number 1 asks:</p> <p>18 should such borrowing be assumed to have recourse solely</p> <p>19 to the relevant payee's claim against LBIE, to the rest</p> <p>20 of relevant payee's unencumbered assets.</p> <p>21 I think on our side, or my side certainly, I had</p> <p>22 understood this question to be a hangover from the</p> <p>23 point, that was being argued, that the cost of funding</p> <p>24 was related to the cost of funding the claim itself, and</p> <p>25 nothing more, which is a point that has clearly been</p> <p style="text-align: center;">Page 135</p>
<p>1 and in a sense which you could use those words, we are</p> <p>2 not to be taken to accept that the way in which "cost of</p> <p>3 funding" is described in my learned friends' submissions</p> <p>4 and evidence is necessarily a widely understood and</p> <p>5 known concept. It is not relevant for my Lord's</p> <p>6 decision, but just to make sure that that point is</p> <p>7 understood. We don't accept that it necessarily</p> <p>8 describes it correctly.</p> <p>9 I have left to deal with then issues 12 to 14,</p> <p>10 insofar as anything needs to be said about them in</p> <p>11 addition, and issue 10.</p> <p>12 MR JUSTICE HILDYARD: Why are you bothered about that, that</p> <p>13 last point, I am just trying to weigh. I mean, they</p> <p>14 have produced illustrations from textbooks as to what it</p> <p>15 means. There are measurements issues possibly. They</p> <p>16 say not. You say it doesn't enter the frame anyway, why</p> <p>17 are you bothered?</p> <p>18 MR ZACAROLI: If we are wrong about that it and it does</p> <p>19 enter the frame, then there is a question about whether</p> <p>20 they are appropriate models as a matter of rationality</p> <p>21 and good faith.</p> <p>22 MR JUSTICE HILDYARD: How is that going to be dealt with?</p> <p>23 MR ZACAROLI: It is not. If there is an issue it will be</p> <p>24 dealt with on a case by case basis.</p> <p>25 MR JUSTICE HILDYARD: I see, okay.</p> <p style="text-align: center;">Page 134</p>	<p>1 abandoned.</p> <p>2 As phrased the question asks should you assume that</p> <p>3 the recourse is limited to the claim against LBIE? We</p> <p>4 suggest the answer is clearly no. No such assumption</p> <p>5 should be made. Which I think is the short answer to</p> <p>6 it. I don't think one needs to get into the question of</p> <p>7 whether there is any other assumptions made about what</p> <p>8 assets a particular payee may or may not have available</p> <p>9 to support borrowing, but clearly there should not be an</p> <p>10 assumption that it is limited to the claim against LBIE.</p> <p>11 The second question: should the cost of borrowing</p> <p>12 include incremental cost of incurring additional debt or</p> <p>13 weighted average cost on all of its borrowings?</p> <p>14 The definition requires the relevant payee to</p> <p>15 certify what it did or what it would have cost it to</p> <p>16 fund the relevant amount. The relevant amount is</p> <p>17 clearly an incremental addition to its overall</p> <p>18 borrowing, so in that sense the answer is the first half</p> <p>19 of that question. It is certainly not directing you to</p> <p>20 certify what your weighted average cost of borrowing is.</p> <p>21 We would say the answer is the first of those,</p> <p>22 assuming that is understood to mean what it would cost</p> <p>23 you to go and raise the relevant sum, the relevant</p> <p>24 amount in the market.</p> <p>25 The third question: should the cost include any</p> <p style="text-align: center;">Page 136</p>

<p>1 impact on the cost of the relevant payee's equity</p> <p>2 capital attributable to such borrowing. For the reasons</p> <p>3 that I have already dealt with at some length we say the</p> <p>4 answer to that is no. That is a consequential loss, not</p> <p>5 included within the concept of cost of funding the</p> <p>6 relevant amount. Then 12.4 is agreed, it is common</p> <p>7 ground that there is no particular limit on the nature</p> <p>8 of the funding that you are entitled to rely upon. You</p> <p>9 can fund overnight or from time to time.</p> <p>10 I then turn, my Lord, to issue 10. Issue 10 is</p> <p>11 concerned with the meaning of "relevant payee". As</p> <p>12 my Lord will know, our case is that relevant payee means</p> <p>13 whichever of the parties to the agreement is entitled to</p> <p>14 payment of the closeout amount under section 6(e).</p> <p>15 That, of course, is what it means in the context of</p> <p>16 the default rate applying to the amount payable under</p> <p>17 section 6(e). It also applies to other amounts, but for</p> <p>18 the present purposes that is what it means. Noting, as</p> <p>19 is common ground, that there is a distinction between</p> <p>20 a party to the agreement and the person to whom the</p> <p>21 right to payment under section 6(e) has been assigned,</p> <p>22 that person does not become a party to the agreement</p> <p>23 merely by that transfer of a single right.</p> <p>24 The starting point is to note the general</p> <p>25 prohibition on transfer of rights and obligations under</p> <p style="text-align: center;">Page 137</p>	<p>1 split out into subparagraphs, (a) is its one that was</p> <p>2 already there and (b) is the new one:</p> <p>3 "Allowing the transfer of any part, all or any part</p> <p>4 of its interest in any amount payable to it from</p> <p>5 a defaulting party under section 6(e)."</p> <p>6 The explanation for that change is provided in the</p> <p>7 users' guide at tab 5 of bundle 5, page 141 of the</p> <p>8 bundle. Under the heading "Section 7, transfer" it</p> <p>9 describes the clause first of all, the section. Then in</p> <p>10 the last five lines of that paragraph. It refers first</p> <p>11 of all to the second exception of the transferred amount</p> <p>12 under section 6E, and says:</p> <p>13 "This second exception was added to allow for</p> <p>14 certain transactions in the marketplace in which a party</p> <p>15 transfers amount payable to it from a defaulting party</p> <p>16 under section 6(e) as part of another financing</p> <p>17 transaction."</p> <p>18 It has been modified to make clear that granting</p> <p>19 a security interest constitutes a transfer for the</p> <p>20 purposes of section 7. So a limited purpose drove the</p> <p>21 inclusion of the new provision.</p> <p>22 MR JUSTICE HILDYARD: It says it has to be as part of</p> <p>23 another financing transaction.</p> <p>24 MR ZACAROLI: It doesn't say it has to be, it says the</p> <p>25 purpose of doing it was to allow that to happen.</p> <p style="text-align: center;">Page 139</p>
<p>1 the ISDA master agreement. There is a point here based</p> <p>2 upon what we have described as the architecture of the</p> <p>3 agreement which requires one to start with 1987.</p> <p>4 Bundle 5, tab 1, my Lord will recall that the</p> <p>5 default rate is defined in exactly the same terms as you</p> <p>6 find them in the 1992 agreement. At page 8, section 7</p> <p>7 is headed "Transfer". You will see that:</p> <p>8 "Subject to section 6(b) and to any exception</p> <p>9 provided in the schedule, neither this agreement nor any</p> <p>10 interest or obligation in or under this agreement may be</p> <p>11 transferred by either party without the prior consent of</p> <p>12 the other, other than pursuant to a consolidation or</p> <p>13 amalgamation with or merge into or transfer of all or</p> <p>14 substantial of its assets to another entity and any</p> <p>15 purported transfer without such consent will be void."</p> <p>16 What is missing from there that we see later on is</p> <p>17 any allowance of the transfer of the section 6(e)</p> <p>18 amount, it was a blanket prohibition subject only to</p> <p>19 exceptions in relation to consolidations or</p> <p>20 amalgamations.</p> <p>21 The 1992 agreement, just to pick it up briefly,</p> <p>22 section 7 appears in the same bundle or in the core</p> <p>23 bundle. Section 7 is at page 157 of the core.</p> <p>24 My Lord has been taken to this and there you have</p> <p>25 the addition of subparagraph (b), or the exception is</p> <p style="text-align: center;">Page 138</p>	<p>1 MR JUSTICE HILDYARD: Yes, but the actual provision is not</p> <p>2 so limited, it is just limited in the way in which</p> <p>3 Mr Dicker described, is that right? Do you accept that?</p> <p>4 MR ZACAROLI: That it is limited ...</p> <p>5 MR JUSTICE HILDYARD: To the amount owed under 6(e) by</p> <p>6 a defaulting party.</p> <p>7 MR ZACAROLI: Yes, indeed. That is because although</p> <p>8 a non-defaulting party might be in, small d, default of</p> <p>9 paying the section 6(e), he is not a defaulting party,</p> <p>10 capitalised term.</p> <p>11 The starting point is to see the how the clause</p> <p>12 developed and the reason why it developed, and against</p> <p>13 the backdrop of a general prohibition on transfer of any</p> <p>14 rights and obligations under the master agreement.</p> <p>15 Just to point out under section 7(a), it is an</p> <p>16 obvious point but section 7(b) is the transfer of any</p> <p>17 amount or part of the amount owing under section 6(e).</p> <p>18 Let me just pick it up.</p> <p>19 MR JUSTICE HILDYARD: In 2002 there's additional wording</p> <p>20 which do not make any, do not introduce any change so</p> <p>21 far as relevant here?</p> <p>22 MR ZACAROLI: Correct. Indeed I accept that because the</p> <p>23 2002 users' guide explains that change as one saying</p> <p>24 "making clear that", so this agreement, the 2002</p> <p>25 agreement makes clear that.</p> <p style="text-align: center;">Page 140</p>

<p>1 MR JUSTICE HILDYARD: The words of apparent extension do not</p> <p>2 matter, page 185, is that right?</p> <p>3 MR ZACAROLI: The words "together with an amount"?</p> <p>4 MR JUSTICE HILDYARD: Yes.</p> <p>5 MR ZACAROLI: We say it makes no difference, no. We say the</p> <p>6 meaning that the 1992 agreement has is the same under</p> <p>7 the 2002. I think both parties accept that, although</p> <p>8 they use a reverse way of arguing the point, so my</p> <p>9 learned friend will say whatever the 2002 agreement</p> <p>10 means so did the 1992. We say the reverse, that you</p> <p>11 start with the 1992 and the explanation for the addition</p> <p>12 of the 7(b) in 1992, if that has a given meaning that</p> <p>13 meaning remained the same in the 2002.</p> <p>14 MR JUSTICE HILDYARD: Yes.</p> <p>15 MR ZACAROLI: The point I was going to make was that 7(a),</p> <p>16 both in the 1992 and the 2002 agreement, that is</p> <p>17 a transfer of this agreement, ie the whole thing.</p> <p>18 MR JUSTICE HILDYARD: Yes.</p> <p>19 MR ZACAROLI: With that background we go on to explain why</p> <p>20 the draftsman has used the phrase "relevant payee" and</p> <p>21 we say it is readily explainable when you look at the</p> <p>22 context in which those words are used and the purposes</p> <p>23 to which the relevant rate has to be applied.</p> <p>24 The first point to note is that the default rate is</p> <p>25 applicable in four different circumstances under the --</p> <p style="text-align: center;">Page 141</p>	<p>1 definition before, but just to remind my Lord, this</p> <p>2 relates to the similar concept of payments that were not</p> <p>3 made during the life of the transaction, but which</p> <p>4 remain unpaid at the point in time you reach an early</p> <p>5 termination date. At that point it is this definition</p> <p>6 which takes over. The unpaid amount includes interest</p> <p>7 from the date the payment should have been made up until</p> <p>8 the early termination date. You will see that over the</p> <p>9 page at page 164:</p> <p>10 "The unpaid amounts paid, together with interest</p> <p>11 from and including the dates the obligations would have</p> <p>12 been required to have been made or performed to (but</p> <p>13 excluding) the early termination date at the applicable</p> <p>14 rate."</p> <p>15 Relevant payee in the definition of "default rate"</p> <p>16 can there only mean one or other party to the agreement,</p> <p>17 for the same reasons that I have given. Even though</p> <p>18 this sum is one which is transferable, because the</p> <p>19 unpaid amount is an amount which forms part of the</p> <p>20 settlement amount, which is the section 6(e) payment</p> <p>21 which can be transferred. Nevertheless, even though</p> <p>22 it is going to be paid to somebody else, relevant payee</p> <p>23 can only mean the original counterparty here.</p> <p>24 It would be absurd otherwise, because this rate of</p> <p>25 interest is used to calculate the unpaid amount forming</p> <p style="text-align: center;">Page 143</p>
<p>1 sorry, I am focusing on the 1992 agreement to start</p> <p>2 with.</p> <p>3 Under the 1992 agreement it is used in four</p> <p>4 different places or for four different purposes.</p> <p>5 The first is under section 2(e) on page 149. That</p> <p>6 is unpaid amounts or failure to pay an amount due whilst</p> <p>7 the agreement is ongoing, ie before an early termination</p> <p>8 date. Section 6(e) begins:</p> <p>9 "Prior to the occurrence or effective designation of</p> <p>10 an early termination date, if a party defaults in the</p> <p>11 performance of an obligation then interest accrues at</p> <p>12 the default rate."</p> <p>13 Just to make the point that the word "party" is used</p> <p>14 there both to refer to the party who has to pay and the</p> <p>15 party who has to receive. It is the party that defaults</p> <p>16 is required to pay interest to the other party at the</p> <p>17 default rate.</p> <p>18 The only meaning which "relevant payee" can possibly</p> <p>19 have there is to one or other parties to the agreement.</p> <p>20 Of course that sum is not assignable. That sum is</p> <p>21 pre-early termination and can therefore never be</p> <p>22 something which is transferred.</p> <p>23 The second purpose or use of the phrase "default</p> <p>24 rate" is in relation to unpaid amounts. Page 163 of the</p> <p>25 same document. I know my Lord has looked at this</p> <p style="text-align: center;">Page 142</p>	<p>1 part of the amount due under section 6(e) on which</p> <p>2 global sum interest is then payable going forwards at</p> <p>3 the default rate itself. To change the rate of interest</p> <p>4 here by reference to who the payee is would mean you are</p> <p>5 changing the amount of the settlement sum, which simply</p> <p>6 cannot be right. That is a fixed sum as of the</p> <p>7 calculation being made.</p> <p>8 The third use of the phrase is in relation to</p> <p>9 section 6(d):</p> <p>10 "In circumstances where the closeout amount is due</p> <p>11 to the defaulting party ..."</p> <p>12 Because, as my Lord has seen, section 6(d)(ii) under</p> <p>13 the heading "Payment date" the payment required under</p> <p>14 section 6(e) will be paid together with interest at the</p> <p>15 applicable rate."</p> <p>16 The applicable rate, if it is the non-defaulting</p> <p>17 party who is the paying party, is still the default rate</p> <p>18 from the period after the calculation statement became</p> <p>19 effective.</p> <p>20 Here again "relevant payee" can only refer to the</p> <p>21 original parties, the parties. Because this sum is not</p> <p>22 transferable. An amount owing by a non-defaulting party</p> <p>23 is not transferable under section 7(b).</p> <p>24 The fourth circumstance is the reverse of that,</p> <p>25 under section 6(d) where the amount is payable by the</p> <p style="text-align: center;">Page 144</p>

<p>1 defaulting party. In that circumstance default rate is 2 again applicable, and in that circumstance it is an 3 amount which is transferable under section 7(b). 4 Of the four uses or four circumstances in which the 5 default rate applies, it is only in this one where there 6 is any possibility of "relevant payee" meaning someone 7 other than a party to the agreement, because it could, 8 in a linguistic sense, mean someone else. 9 Even here there is a perfectly good explanation for 10 the use of the term relevant payee which does not 11 indicate that it was intended to refer to a third party 12 assignee. I will explain as we have in the skeleton why 13 relevant payee is the only term as opposed to for 14 example "relevant party" or to identify one or other 15 party by name, those simply wouldn't have worked and 16 therefore this term had to be used in the default rate. 17 Just looking at section 6(d)(ii). The amount that 18 will become payable under section 6(d)(ii) could become 19 payable in a variety of circumstances and would attract 20 the default rate in any of them. We are looking now at 21 the amount really from the date on which the calculation 22 statement becomes effective until date of payment, so 23 the second period under section 6(d)(ii). 24 That amount could become payable to a defaulting 25 party in circumstances where a second method has been</p> <p style="text-align: center;">Page 145</p>	<p>1 Relevant party simply could not have been used in 2 this context. 3 Relevant payee works precisely because it could be 4 any of those four parties I have mentioned, defined 5 parties as defaulting party, non-defaulting party or 6 either party on a termination event. 7 One point made against us is the word relevant is 8 surplusage, because it could just say "the party". The 9 word has an operative effect, it identifies which of the 10 particular parties is going to be paid the sum of money. 11 It is no more surplusage than the word "relevant" before 12 the word "amount" in the same definition, because there 13 is only one amount payable. It is a bad point in short. 14 Even if it were strictly unnecessary, it certainly 15 performs a function, if not a necessary function it does 16 perform one by identifying which of the parties is 17 referred to, the relevant payee. 18 Similarly where the default rate applies to 19 section 2(e), I have already made the point there that 20 it can only be one of the parties, but relevant payee 21 also succinctly identifies which of the two parties is 22 the one whose cost of funding is to count. "Relevant 23 party" would not have worked there for the same reason, 24 because merely saying relevant party, "Well, which of 25 them? The paying party? The receiving party? We don't</p> <p style="text-align: center;">Page 147</p>
<p>1 chosen, it could be an amount owed to a non-defaulting 2 party, or it could be owing to one or other party, small 3 P, in circumstances where there has been an early 4 termination consequent upon an early termination event, 5 such that there is neither a defaulting party nor 6 a non-defaulting party, because those terms don't apply 7 where the termination is consequent upon an early 8 termination event. The definition of defaulting party 9 is following an event of default, a person who has 10 defaulted. 11 There is four different possibilities, defaulting 12 party, non-defaulting party, party A or party B, if 13 there is a termination event. 14 The draftsman could not, therefore, have used the 15 phrase "payable to the defaulting party" or to the 16 non-defaulting party" because that wouldn't have worked, 17 it could be due to one or other of them or to neither. 18 The drafter could not have used the phrase "relevant 19 party", because there would be nothing to tell you which 20 of the parties was relevant. The point of this 21 definition is to explain that it is the person who is 22 going to receive the money whose cost of funding should 23 be taken into account. As opposed to in a different 24 circumstance the person who is going to pay the money. 25 That is the non-default rate.</p> <p style="text-align: center;">Page 146</p>	<p>1 know". So relevant payee has to be used there as well. 2 That is true in each of the places the default rate 3 applies, relevant payee performs the function of 4 identifying which of the parties -- which of their cost 5 of funding is to be taken into account. 6 My learned friend Mr Dicker referred to a number of 7 other places where "party" is used in the 8 master agreements to show that the draftsman had 9 deliberately used "party" where he meant to in 10 contradistinction to "relevant payee". 11 Just dealing with those briefly. The first was in 12 this agreement, termination rate. But there the word, 13 the words "each party" makes perfect sense, because the 14 termination rate only ever applies as between the two 15 parties to the agreement. 16 MR JUSTICE HILDYARD: Where are you looking at? 17 MR ZACAROLI: The definition of "termination rates", 18 page 163 of the master agreement. 19 MR JUSTICE HILDYARD: I have it, yes. There they -- 20 MR ZACAROLI: Yes, that is right, yes, but it is obviously 21 involving both of them, the words each party, the word 22 party makes obvious sense there, whereas relevant payee 23 would not. 24 The non-default rate, the previous page, page 126. 25 The reason that the defined term has been used there is</p> <p style="text-align: center;">Page 148</p>

<p>1 because the draftsman could use the defined term. Where</p> <p>2 you can you presumably should do. He can do so because</p> <p>3 it is only ever the non-defaulting party that would be</p> <p>4 the paying party.</p> <p>5 He contrasts that with section 6(d)(ii). In</p> <p>6 section 6(d)(ii) it is true that the word "party" is not</p> <p>7 used.</p> <p>8 However, section 6(d)(ii) is explaining what should</p> <p>9 be in the calculation statements, ie the amount</p> <p>10 determined to be payable, and that amount is to be</p> <p>11 identified or put into the calculation statement under</p> <p>12 6(d)(i). 6(d)(i) makes it clear that it is each party</p> <p>13 makes the calculation on its part of the amounts if any</p> <p>14 contemplated by section 6(e) and will provide to the</p> <p>15 other party a statement showing what is due and payable</p> <p>16 to it.</p> <p>17 Reading 6(d)(ii) in isolation it is true that it is</p> <p>18 devoid of reference to "parties", but it can only be</p> <p>19 read in conjunction with 6(d)(i), which clearly</p> <p>20 identifies it is something which passes between the two</p> <p>21 parties identifying the amounts payable from one to the</p> <p>22 other.</p> <p>23 The explanation given by my learned friend for why</p> <p>24 it is that when it comes to the default rate, why the</p> <p>25 term relevant payee is used is because in one of the</p> <p style="text-align: right;">Page 149</p>	<p>1 payee?</p> <p>2 The answer is clearly no. We know why the change</p> <p>3 was made, it was for the limited purpose of enabling</p> <p>4 people to transact, trade, in the amount for financing</p> <p>5 purposes.</p> <p>6 Two supplemental points, the first is the one</p> <p>7 my Lord noted, picking up on that about section 8 which</p> <p>8 deals with contractual currency and payments in</p> <p>9 currency. Essentially a form of currency conversion</p> <p>10 claim. That must apply to the section 6(e) amount as</p> <p>11 anything else, and therefore is something that would</p> <p>12 transfer across to the transferee, and yet section 8</p> <p>13 uses the word "party".</p> <p>14 It is a small point but it supports the fact that</p> <p>15 the choice of relevant payee in the default rate is</p> <p>16 clearly not because the amount under section 6(e) can be</p> <p>17 transferred to a third party.</p> <p>18 The other supplemental point is this, there is</p> <p>19 another instance, and I have not taken my Lord through</p> <p>20 the provisions of the 2002 agreement in detail, and</p> <p>21 I don't propose to do so. It is essentially the same</p> <p>22 analysis, as to where relevant payee works and is needed</p> <p>23 for the purposes of identifying who is to be receiving</p> <p>24 the amount, but there is one example in that agreement</p> <p>25 of the "relevant payee" being used in circumstances</p> <p style="text-align: right;">Page 151</p>
<p>1 circumstances in which it can be used the payment can be</p> <p>2 transferred to third parties. He cited that as the</p> <p>3 reason why "relevant payee" was chosen there.</p> <p>4 This is where one can draw assistance from the</p> <p>5 background, the history. I have shown my Lord the 1987</p> <p>6 agreement, which contained exactly the same definition</p> <p>7 of "default rate" and the same general prohibition on</p> <p>8 transfer without allowing the section 6(e) amount to be</p> <p>9 transferred. In that context my learned friend's</p> <p>10 explanation is no explanation at all. We say the reason</p> <p>11 for why relevant payee was used is for the reasons</p> <p>12 I have already explained. It needed to be used to</p> <p>13 distinguish which party was the one receiving the</p> <p>14 relevant sum and that is enough.</p> <p>15 Once that explanation falls away there is no</p> <p>16 explanation that supports my learned friend's case as to</p> <p>17 why relevant payee was used.</p> <p>18 If that was the meaning which relevant payee had</p> <p>19 under the 1987 agreement, and it must be the meaning</p> <p>20 there because in no circumstances could it refer to</p> <p>21 anyone else. Relevant payee clearly meant whichever</p> <p>22 party was owed the money. A question would be: did the</p> <p>23 change in 1992 to allow a transfer under section 7(b),</p> <p>24 did that mean the draftsman intended a different</p> <p>25 interpretation to be given to default rate, relevant</p> <p style="text-align: right;">Page 150</p>	<p>1 which can only mean "party".</p> <p>2 MR JUSTICE HILDYARD: Sorry, can only what?</p> <p>3 MR ZACAROLI: Only be used in the sense of meaning a party</p> <p>4 MR JUSTICE HILDYARD: Right.</p> <p>5 MR ZACAROLI: That is under the definition of "applicable</p> <p>6 deferral rate", page 192 of the bundle.</p> <p>7 This is unfortunately rather complex, because the</p> <p>8 applicable deferral rate applies differently in a whole</p> <p>9 different set of circumstances. The relevant one is</p> <p>10 (c), because that applies for the purposes of, amongst</p> <p>11 other things, the definition of applicable closeout rate</p> <p>12 in (a)(iv) on page 191, you will see there is a whole</p> <p>13 list of circumstances it applies to. One of them is</p> <p>14 clause (a)(iv) of the definition of applicable closeout</p> <p>15 rate.</p> <p>16 That is the wrong one, it is 9(h)(i)(C) on page 187.</p> <p>17 What I am identifying is a circumstance which relates to</p> <p>18 a payment due before early termination and therefore</p> <p>19 cannot be part of the amount transferred under</p> <p>20 section 6(e). You will see under 9(h)(i)(C), it is:</p> <p>21 "Where a party fails to make a payment due to the</p> <p>22 occurrence of illegality or force majeure event."</p> <p>23 Does my Lord have page 187, clause --</p> <p>24 MR JUSTICE HILDYARD: Yes.</p> <p>25 MR ZACAROLI: Very grateful. This applies, you will see at</p> <p style="text-align: right;">Page 152</p>

<p>1 the top of the page, prior to early termination.</p> <p>2 MR JUSTICE HILDYARD: Yes.</p> <p>3 MR ZACAROLI: It relates, therefore, to payments that should</p> <p>4 have been made that weren't due to the occurrence of</p> <p>5 illegality or force majeure. You will see at the end of</p> <p>6 the paragraph:</p> <p>7 "The interest is payable at the applicable deferral</p> <p>8 rate."</p> <p>9 We then go back to the definition of "applicable</p> <p>10 deferral rate" and for that purpose clause (c) applies</p> <p>11 and it is:</p> <p>12 "The arithmetic mean of a benchmark rate owed to one</p> <p>13 and the cost of funding to the relevant payee on the</p> <p>14 other hand."</p> <p>15 Relevant payee there can only mean one of the</p> <p>16 parties to the agreement.</p> <p>17 My Lord, the next point we make is looking at the</p> <p>18 words in the 1992 agreement in section 7(b), what</p> <p>19 a party is permitted to transfer, under section 7(b), is</p> <p>20 all or any part of its interest in any amount payable to</p> <p>21 it from a defaulting party.</p> <p>22 MR JUSTICE HILDYARD: Will you give me one second. (Pause)</p> <p>23 MR ZACAROLI: Yes.</p> <p>24 MR JUSTICE HILDYARD: Right, yes.</p> <p>25 MR ZACAROLI: What is transferable under section 7(b) is:</p> <p style="text-align: center;">Page 153</p>	<p>1 the cost of funding of anyone else, including an</p> <p>2 assignee, is not something which was ever payable to the</p> <p>3 assignor.</p> <p>4 It therefore couldn't be an amount payable to it and</p> <p>5 therefore couldn't be assigned.</p> <p>6 My Lord, our next point is to look at the purpose of</p> <p>7 the prohibition on assignment, transfer, and the reasons</p> <p>8 for the exceptions to that prohibition.</p> <p>9 Generally we say the agreement is structured so as</p> <p>10 to protect each party against the risks arising from the</p> <p>11 financial state of its counterparty. One of those</p> <p>12 provisions that does that is the restriction on</p> <p>13 assignment of the agreement by one or other party to</p> <p>14 anybody else.</p> <p>15 I accept my learned friend's point to this extent,</p> <p>16 that one of the primary reasons for that is because the</p> <p>17 agreement works on the basis of the importance of</p> <p>18 closeout netting between the parties. It is very</p> <p>19 important that you have the party you know you set out</p> <p>20 to deal with on the other side of the equation, when you</p> <p>21 are dealing with closeout netting and all the risks that</p> <p>22 gives rise to.</p> <p>23 It is not limited there, because given that cost of</p> <p>24 funding in all of the applicable interest rates is</p> <p>25 dependent on the cost of funding to one or other of the</p> <p style="text-align: center;">Page 155</p>
<p>1 "All or any part of a party's interest in any amount</p> <p>2 payable to it from a defaulting party."</p> <p>3 We say the words "to it" are important here.</p> <p>4 MR JUSTICE HILDYARD: Yes.</p> <p>5 MR ZACAROLI: It is common ground that a right to interest</p> <p>6 on a sum payable under section 6(e) is transferable</p> <p>7 under this clause, it is transferable. The only clause</p> <p>8 that can have that effect is this clause, section 7(b),</p> <p>9 because nowhere else do you find a right to transfer the</p> <p>10 rights of interest separately. I think it must be</p> <p>11 common ground that it is section 7(b) which enables the</p> <p>12 amount payable by way of interest to be transferred to</p> <p>13 someone else.</p> <p>14 The governing words "to it" therefore must cover</p> <p>15 both the principal sum and the interest payable on it,</p> <p>16 otherwise there is nowhere you can find the right to</p> <p>17 transfer the interest.</p> <p>18 Default interest is only ever payable to the</p> <p>19 assignor when it is calculated by reference to the</p> <p>20 assignor's cost of funding, because there are no</p> <p>21 circumstances in which the rate of interest payable to</p> <p>22 the assignor could be calculated by reference to anyone</p> <p>23 else's cost of funding. It is the party, it is only its</p> <p>24 cost of funding which is relevant.</p> <p>25 Put another way, interest calculated by reference to</p> <p style="text-align: center;">Page 154</p>	<p>1 parties, there is a risk if there was a right freely to</p> <p>2 transfer, the right to claim interest on that basis, of</p> <p>3 being on each counterparty and each of them this works</p> <p>4 for, each of them being exposed to unknown unagreed</p> <p>5 risks because of the financial state of anybody to whom</p> <p>6 rights under section 6(e) might have been transferred</p> <p>7 to.</p> <p>8 We do say that is an important part of the</p> <p>9 background to construction of the phrase relevant payee.</p> <p>10 The exceptions to the general prohibition on assignment</p> <p>11 are consistent with that point. The first exception is</p> <p>12 by consent, well if you consent you only consent when</p> <p>13 you know who the new counterparty will be.</p> <p>14 The other exceptions are effectively under 7(a),</p> <p>15 where there is an agreement, the transfer is pursuant to</p> <p>16 a consolidation, amalgamation, merger, transfer into</p> <p>17 another entity, in which case you have the protection of</p> <p>18 the events of default or termination events. Credit</p> <p>19 event upon merger and merger without assumption, where</p> <p>20 that transfer is going to or has damaged the credit</p> <p>21 rating of your counterparty, putting it very bluntly.</p> <p>22 The detail is in our skeleton, but the broad point</p> <p>23 is they are there -- the exceptions mean that that right</p> <p>24 to transfer does not damage the core proposition that</p> <p>25 you don't want to be exposed to credit risk of some</p> <p style="text-align: center;">Page 156</p>

<p>1 third party.</p> <p>2 We say to put it at its lowest it would be</p> <p>3 surprising if by the introduction of the ability to</p> <p>4 transfer any or all part of the amount payable under</p> <p>5 section 6(e) the draftsman had intended to expose each</p> <p>6 counterparty to that unknown and unmanageable risk.</p> <p>7 The next point is by reference to the general law</p> <p>8 backdrop against which the English court needs to</p> <p>9 construe the agreement. There are three points here.</p> <p>10 The first is that the general law provides part of</p> <p>11 the relevant matrix against which the agreement is to be</p> <p>12 construed.</p> <p>13 The second is that as a principle of general law</p> <p>14 a party should not be exposed to any additional burden</p> <p>15 by an assignment of its counterparty's rights.</p> <p>16 Thirdly, although not conclusive, we say that</p> <p>17 general proposition of law is a strong indication that</p> <p>18 the parties did not intend to expose each other to the</p> <p>19 credit risk of unknown third parties unless they had</p> <p>20 made that clear in the contract.</p> <p>21 As to the first point, it is a point that we have</p> <p>22 come across already in the course of my submissions, we</p> <p>23 have cited in our skeleton argument a passage from</p> <p>24 Lord Justice Lewison's book on interpretation of</p> <p>25 contracts. Unless my Lord wants to see it -- I think</p> <p style="text-align: center;">Page 157</p>	<p>1 proposition remains."</p> <p>2 Then there is one decision where that principle has</p> <p>3 been referred to positively. That is in authorities</p> <p>4 bundle 2, tab 55, the case of Equitas v Walsham. It is</p> <p>5 a decision of Mr Justice Males in the Commercial Court</p> <p>6 in 2013.</p> <p>7 The issue arose in the following circumstances.</p> <p>8 Equitas had taken assignment of various syndicates'</p> <p>9 claims against brokers. The claims arose from wrongful</p> <p>10 non-payment or retention of premiums or amounts payable</p> <p>11 under policies by the brokers. That retention or</p> <p>12 non-payment had happened over a number of years.</p> <p>13 There was a claim for damages by Equitas as assignee</p> <p>14 of the rights of the syndicates, and the damages were</p> <p>15 calculated by reference to the lost profits which the</p> <p>16 receiving party would have made had the payments been</p> <p>17 made on time. My Lord can immediately see there is an</p> <p>18 issue there about whose profits are relevant for that</p> <p>19 purpose, is it the assignor or the assignee?</p> <p>20 Just to cut to the chase, the syndicates were</p> <p>21 unable -- insofar as the claim related to the</p> <p>22 pre-assignment period, there was no evidence of any</p> <p>23 profits the syndicates would have made, so the court</p> <p>24 defaulted to a benchmark rate of interest. Equitas did</p> <p>25 produce evidence of the profits it would have made, so</p> <p style="text-align: center;">Page 159</p>
<p>1 my Lord has already accepted this point from me on other</p> <p>2 matters, so I don't propose to take my Lord to it unless</p> <p>3 you want to see it. It makes the point that you don't</p> <p>4 interpret agreements in a vacuum; they are interpreted</p> <p>5 against the legal background under the system of law in</p> <p>6 which they were made.</p> <p>7 The second point, about the general position as</p> <p>8 concerns assignees not being entitled to burden the</p> <p>9 counterparty with additional burdens, there are two</p> <p>10 authorities to look at there. The first is</p> <p>11 Snell on Equity, authorities bundle 4, tab 81, page 42.</p> <p>12 It is paragraph 3-027 and it is the first five lines of</p> <p>13 that paragraph.</p> <p>14 "In general an assignee cannot recover more from the</p> <p>15 debtor than the assignor would have. The purpose of the</p> <p>16 principle is to prevent the assignment from prejudicing</p> <p>17 the debtor. This would happen if for example he had to</p> <p>18 pay damages to the assignee that he would not have had</p> <p>19 to pay to the assignor if the assignment had not taken</p> <p>20 place."</p> <p>21 It goes on to say:</p> <p>22 "It has proved problematic in cases where the</p> <p>23 defendant has provided negligent building or surveying</p> <p>24 services to a proprietor of land and then discusses the</p> <p>25 difficulties that arise there, but the general</p> <p style="text-align: center;">Page 158</p>	<p>1 one of the questions although in the end it didn't need</p> <p>2 to be decided but was considered by the judge was: could</p> <p>3 Equitas rely upon the profits that it would have made as</p> <p>4 damages against the brokers?</p> <p>5 The court decided that, as I say, it didn't need to</p> <p>6 decide this point but had it had to do so it would have</p> <p>7 decided that Equitas could not rely upon its own costs</p> <p>8 lost profits, because that would infringe the principle</p> <p>9 that that would impose an additional burden on the</p> <p>10 counterparty by way of assignment.</p> <p>11 Starting at the beginning of the judgment,</p> <p>12 paragraph 1, he says in the first sentence what the</p> <p>13 action is about:</p> <p>14 "... about the duties of Lloyd's brokers to pass on</p> <p>15 to their reinsured principals' money received from</p> <p>16 reinsurers in settlement claims and by way of return of</p> <p>17 premium, and to pass to on to reinsurers payments of</p> <p>18 premiums received from the reinsured."</p> <p>19 I am going to pick up just a couple of sentence as</p> <p>20 we go through. Paragraph 8:</p> <p>21 "It is Equitas's case that during this period</p> <p>22 Walsham failed to remit syndicates substantial funds it</p> <p>23 had received, these fall broadly into two categories."</p> <p>24 Then paragraph 9:</p> <p>25 "Cases where it is said that Walsham did eventually</p> <p style="text-align: center;">Page 160</p>



<p>1 pay over the funds received, but only after substantial</p> <p>2 delay, have been referred to as the settled claims. In</p> <p>3 those cases Equitas's claim is for loss of investment</p> <p>4 income during the period of delay. In round figures,</p> <p>5 the total amount said to have been paid late is about</p> <p>6 5.2 million and the loss on investment income said to</p> <p>7 have been suffered as a result of the late payment is</p> <p>8 about GBP 9.8 million."</p> <p>9 The assignment is referred briefly in the middle of</p> <p>10 paragraph 16 towards the bottom of page 403, the</p> <p>11 left-hand side. It refers to the fact that:</p> <p>12 "... there was to be compulsory reinsurance by</p> <p>13 Equitas of 100 per cent of syndicates' liabilities in</p> <p>14 respect of non-life business for the 1992 and all prior</p> <p>15 years of account, in return for which Equitas would take</p> <p>16 an assignment of all the rights, title and interest of</p> <p>17 those syndicates in relation to that business, including</p> <p>18 any claims that the syndicates had against brokers."</p> <p>19 Paragraph 33, page 405 contains a summary of the</p> <p>20 parties' positions. At the bottom of the page:</p> <p>21 "In summary, it is Equitas's case that it is</p> <p>22 entitled to recover funds held by Walsham pursuant to</p> <p>23 duties owed by Walsham to remit such funds reasonably</p> <p>24 promptly upon receipt, such duties arising as a matter</p> <p>25 of contract, tort and restitution, the duties were owed</p> <p style="text-align: center;">Page 161</p>	<p>1 damages mean? Does it mean bigger amounts or different</p> <p>2 heads? Isn't that the point?</p> <p>3 MR ZACAROLI: I will come on to that decision, there is</p> <p>4 a better explanation of that point in</p> <p>5 Lord Justice Staughton's judgment in that same case that</p> <p>6 my Lord saw yesterday.</p> <p>7 There is an obvious difference between they Equitas</p> <p>8 case and ours, in that here we are construing a contract</p> <p>9 which permits assignment. So I accept that. This</p> <p>10 clearly cannot be determinative, because we have here</p> <p>11 a contract which needs to be interpreted, whereas there</p> <p>12 was no contract permitting assignment, it is just an</p> <p>13 assignment which took place out of the blue so far as</p> <p>14 the counterparty was concerned, but the general</p> <p>15 proposition is deployed, absent that point, in</p> <p>16 relatively similar circumstances. Ie looking to the</p> <p>17 particular identity of the recipient party to determine</p> <p>18 whether its attributes, its loss of profits, in that</p> <p>19 case, were the ones that were entitled to be looked at.</p> <p>20 In our case it is your ability, or the cost to you of</p> <p>21 raisings the relevant amounts by way of funding.</p> <p>22 What we say however is that that as a general</p> <p>23 proposition is something which is relevant to construing</p> <p>24 any permission to assign, because we would say that the</p> <p>25 imposition of additional burdens by way of assignment on</p> <p style="text-align: center;">Page 163</p>
<p>1 to the syndicates so that Equitas is entitled to bring</p> <p>2 a claim in its capacity as assignee, but were also owed</p> <p>3 to Equitas directly following and as a result of</p> <p>4 reconstruction and renewal."</p> <p>5 He goes on then over the next pages to consider the</p> <p>6 substance of the claims. The relevant passage I rely</p> <p>7 upon is at the very end of the judgment or near the end</p> <p>8 of the judgment on page 421, paragraphs 129, this is</p> <p>9 under the heading "Issue C revisited, remoteness". The</p> <p>10 point arises in these paragraphs, 129:</p> <p>11 "Secondly, Walsham does not contend the damages are</p> <p>12 too remote, even to the extent that Equitas is able to</p> <p>13 advance a claim for breach of an obligation owed to it</p> <p>14 directly, as distinct from a claim as assignee of the</p> <p>15 syndicates."</p> <p>16 Then in 130:</p> <p>17 "Walsham accepts that Equitas is able to advance</p> <p>18 such a claim for breach of the DAC letter, which it</p> <p>19 acknowledges created the direct obligation owed to</p> <p>20 Equitas."</p> <p>21 Which is why what he then goes on to deal with is</p> <p>22 obiter, because he didn't need to deal with it.</p> <p>23 Could my Lord then read paragraphs 131 and 132,</p> <p>24 which contains the meat of the point. (Pause)</p> <p>25 MR JUSTICE HILDYARD: You still have -- what does greater</p> <p style="text-align: center;">Page 162</p>	<p>1 the counterparty is something which would only be agreed</p> <p>2 to by clear wording. There is nothing in the wording</p> <p>3 here which suggests that was the purpose of allowing the</p> <p>4 section 6(e) amount to be assigned, indeed on the</p> <p>5 contrary, the purpose of allowing it to be assigned was</p> <p>6 for an entirely different reason not connected with</p> <p>7 exposing each party to excessive, unknown, unmanageable</p> <p>8 risks of unknown counterparties.</p> <p>9 It is probably relevant here to pick up the case</p> <p>10 that my Lord was taken to yesterday, it is L/M</p> <p>11 International, authorities bundle 1, tab 24.</p> <p>12 My Lord was shown the passage from</p> <p>13 Lord Justice Millett's judgment on page 31. Just to</p> <p>14 note that the sentence after the passage my Lord was</p> <p>15 shown, the learned judge says:</p> <p>16 "I prefer however not to enter upon this question."</p> <p>17 He expressed he wasn't deciding the point, does</p> <p>18 your Lordship have page 31, I think you were shown the</p> <p>19 passage --</p> <p>20 MR JUSTICE HILDYARD: Yes.</p> <p>21 MR ZACAROLI: The passage you were shown or read was:</p> <p>22 "We have heard much argument on ..."</p> <p>23 It is the following paragraph, because, he says, the</p> <p>24 assignment was by way of security, so it was an</p> <p>25 irrelevant question.</p> <p style="text-align: center;">Page 164</p>

<p>1 Lord Justice Staughton also considered this point,  2 at page 22. Just to note by way of background this is  3 where there had been an assignment of an agreement, it  4 wasn't just an assignment of a right to payment under  5 the agreement, the agreement itself was assigned.  6 Lord Justice Staughton starts on page 22 in the middle  7 of the page:  8 "When the benefit of a contract is assigned the  9 character of the obligation is not changed. Before the  10 assignment the managers were in some respects obliged to  11 act on instructions and directions of the developers.  12 The assignment could not change that and render  13 themselves to the orders of Shire Trust. A new  14 agreement would be needed to do that."  15 And then the next paragraph:  16 "It is also well established that an assignment  17 cannot increase the damages which a contract breaker has  18 to pay. That appears in Dawson v Great Northern Railway  19 [and the other case there mentioned]."  20 Then the second paragraph over the page:  21 "Where the breach of contract has occurred before  22 the assignment and the assignor suffered loss the  23 assignee can recover for that loss but no more.  24 "The question here is what the assignee can recover  25 when the breach of contract occurs after the assignment.</p> <p style="text-align: center;">Page 165</p>	<p>1 more weight to be placed on one or the other, and  2 anything that fell from the lips of Lord Justice Millett  3 is taken with great respect, but the point is explained  4 more succinctly by Lord Justice Staughton as to what the  5 difference is between the two circumstances.  6 MR JUSTICE HILDYARD: Perhaps the most telling point, is  7 this right, is the quotation from Dawson v Great  8 Northern City Railway:  9 "The debtor is not to be put in any worse position  10 by reason of the assignment."  11 MR ZACAROLI: Yes, that is the overall proposition, yes.  12 As my Lord has seen, that principle was applied  13 obiter again, but in the decision of Mr Justice Males in  14 circumstances which are closely aligned to this case to  15 explain the difference between what is and what is not  16 assignable.  17 MR JUSTICE HILDYARD: It is a nice statement, but of course  18 it all depends on the contract to determine whether it  19 is in a worse position, because a contract may be  20 pregnant with a whole load of risks which eventuate  21 differently in the hands of the assignee, and that is  22 the point.  23 MR ZACAROLI: Yes, which is why we place particular emphasis  24 on the most recent decision, the context is there  25 explained, the principles are applied in that context</p> <p style="text-align: center;">Page 167</p>
<p>1 In my judgment the rule ought to be the same and the  2 assignee should have what the assignor could have  3 recovered but no more. In many cases the amount would  4 be the same, for example where there are defects in the  5 construction of a building the costs will be the same  6 whether carried out for the assignor or the assignee,  7 but even if there is no general rule to that effect  8 I would reach that conclusion on the construction of the  9 assignment in the present case in the context of the  10 overall arrangements the manifest object of the  11 assignment was to allow Shire Trust to recover by way of  12 security such sums as might become due to the developers  13 under the management contract."  14 MR JUSTICE HILDYARD: Lord Justice Staughton deals with this  15 in reverse order, is that right. Lord Justice Millett  16 deals with the second passage first, is that right,  17 I haven't quite got the hang of this.  18 Lord Justice Staughton appears to deal with the  19 general point and then says that is the general point,  20 but in any event if I am wrong about the general point  21 ...  22 MR ZACAROLI: Yes.  23 MR JUSTICE HILDYARD: Whereas Lord Justice Millett deals  24 with the second point first and says that is the ratio.  25 MR ZACAROLI: Yes, I am not suggesting that there is any</p> <p style="text-align: center;">Page 166</p>	<p>1 which has a very clear resonance on the facts of this  2 case, subject of course to the point that we are here  3 dealing with a point of construction of the underlying  4 agreement.  5 This is merely by way of background, but we do say  6 it undoubtedly supports the view that absent something  7 which obviously was intended to impose these additional  8 unknowable risks on each counterparty, the court should  9 construe these words in the way we say they should,  10 relevant payee --  11 MR JUSTICE HILDYARD: It is a factor in favour of your  12 construction, because the court is ordinarily or the  13 common law is ordinarily against assumption of unknown  14 and unprotected risk, but it all slightly depends on  15 whether the original contract was pregnant with the  16 risk. It sort of begs the question, doesn't it? It  17 would be perfectly possible to fashion a contract which  18 provided --  19 MR ZACAROLI: Yes.  20 MR JUSTICE HILDYARD: -- for the assignment of a right and  21 accepted that the consequences in the hands of another  22 might be much more dire.  23 MR ZACAROLI: Yes.  24 MR JUSTICE HILDYARD: I am trying to work out in my own mind  25 whether it is illuminating or not illuminating, perhaps</p> <p style="text-align: center;">Page 168</p>

<p>1 I had better dwell on that.</p> <p>2 MR ZACAROLI: We say it is, because -- it is not divorced</p> <p>3 from all the other points that I have made, and in the</p> <p>4 context of a clause where the explanation for why</p> <p>5 a permission to assign was granted in the 1992 agreement</p> <p>6 which didn't previously exist, namely to enable</p> <p>7 financing transactions on the back of it, in</p> <p>8 circumstances where the agreement is generally designed</p> <p>9 to protect each party against unknown credit exposure of</p> <p>10 third parties. In those circumstances we suggest that</p> <p>11 it is supportive, because if the contract were construed</p> <p>12 so as to impose such unknown burdens on each of the</p> <p>13 counterparty without them being able to control it, it</p> <p>14 would cut across the underlying general law principle</p> <p>15 that generally assignments should not burden the other</p> <p>16 counterparty.</p> <p>17 My Lord, I have one more point on this issue,</p> <p>18 issue 10. I think only one more. If my Lord would like</p> <p>19 me to finish this now I can.</p> <p>20 MR JUSTICE HILDYARD: Yes, of course, if that suits you.</p> <p>21 MR ZACAROLI: Yes, it does.</p> <p>22 That is this, that the wording in the default rate</p> <p>23 definition is "relevant payee" not "relevant payees",</p> <p>24 that may sound like a small point, but we say it is</p> <p>25 quite significant.</p> <p style="text-align: center;">Page 169</p>	<p>1 substance -- is that relevant payee means the entity who</p> <p>2 is or was entitled to receive payment from time to time</p> <p>3 and to the period of such entitlement. He has to have</p> <p>4 that rather more convoluted explanation, because he</p> <p>5 cannot say relevant payee means whoever the sum is</p> <p>6 payable to. If that was his case it would mean that it</p> <p>7 meant once the transfer has been made from A to B you</p> <p>8 are now looking solely at B's cost of funding, whereas</p> <p>9 he accepts -- I think we would say rightly accepts --</p> <p>10 that it cannot have been intended to create a new</p> <p>11 history, entirely counterfactual new history, once the</p> <p>12 assignment has been made to party B.</p> <p>13 Therefore, the re-writing of the clause, which is</p> <p>14 required, in order for the Senior Creditor Group to</p> <p>15 succeed on this point is greater than merely putting an</p> <p>16 "s" after "relevant payee".</p> <p>17 If you take up the clause, the definition of</p> <p>18 "default rate", page 160 of the core, in order to work</p> <p>19 in the way which the Senior Creditor Group skeleton says</p> <p>20 it works, you would have to read the clause in this way:</p> <p>21 "A rate per annum equal to the cost without proof or</p> <p>22 evidence of any actual cost to each of the relevant</p> <p>23 payees, for the period during which such payee was</p> <p>24 entitled to payment of the relevant amount plus</p> <p>25 1 per cent per annum."</p> <p style="text-align: center;">Page 171</p>
<p>1 On the Senior Creditor Group's case for the costs of</p> <p>2 the assignee, the transferee, to be taken into account,</p> <p>3 the cost of funding to be taken into account, there must</p> <p>4 necessarily always be two relevant payees, transfer is</p> <p>5 permitted only of the amount payable under section 6(e).</p> <p>6 That amount is not calculated until on or after the</p> <p>7 early termination date. The draftsman cannot have</p> <p>8 envisaged, we suggest, other than in the very rarest of</p> <p>9 case, an assignment of transfer of that amount until it</p> <p>10 had been calculated and indeed it being calculated on</p> <p>11 precisely the same day as the early termination date.</p> <p>12 Certainly in the cases of automatic termination you have</p> <p>13 no advance warning of the event.</p> <p>14 There is bound to be a period of time between the</p> <p>15 early termination date and the date that the amount</p> <p>16 payable under section 6(e) is assigned, it cannot be</p> <p>17 transferred until the amount is known. Indeed, until</p> <p>18 the calculation is done you don't know which party is</p> <p>19 the payor or the payee. There will always be a period</p> <p>20 of time where the amount is owed to the original party.</p> <p>21 Therefore, wherever it is to operate so as to attract</p> <p>22 the costs of funding of an assignee there will always</p> <p>23 have to have been two payees.</p> <p>24 The way that the point is put by my learned friend</p> <p>25 in the skeleton -- I think orally he repeated the same</p> <p style="text-align: center;">Page 170</p>	<p>1 You cannot just read it as meaning the person who</p> <p>2 whom the sum is payable, because that goes too far, and</p> <p>3 adding the "s" doesn't help you, because you don't know</p> <p>4 for each period each of their cost of funding is to be</p> <p>5 relevant. You have to have reference to the plurality</p> <p>6 and the delineation of which cost of funding is relevant</p> <p>7 for which period.</p> <p>8 I did say that was the last point, I have a couple</p> <p>9 of very small additions, if I may. One is that the</p> <p>10 construction which enables each successive assignee to</p> <p>11 certify its cost of funding introduces a whole level of</p> <p>12 complexities, which we say goes beyond what the</p> <p>13 draftsman would have intended here.</p> <p>14 A complaint is made against us that on our case it</p> <p>15 means that the assignee, the transferee, is someone who</p> <p>16 has to undertake the exercise of identifying the cost of</p> <p>17 funding to the transferor for the relevant period the</p> <p>18 transferor had the debt -- sorry for the entire period,</p> <p>19 I am sorry, when the transferor no longer has any</p> <p>20 interest in it.</p> <p>21 That may be true, but two points in response. Their</p> <p>22 case also requires two entities' costs of funding to be</p> <p>23 taken into account, a complexity which we say was not</p> <p>24 envisaged.</p> <p>25 Secondly, they also still have to certify the cost</p> <p style="text-align: center;">Page 172</p>

<p>1 of funds to the original party for the period the</p> <p>2 original party had it, at a time when the original party</p> <p>3 no longer has any interest in it. The problem arises</p> <p>4 even on their case. It is true that the period of time</p> <p>5 is longer when the cost of funding of the original party</p> <p>6 is relevant on our case, but nevertheless they are</p> <p>7 having to look at the original party's cost of funding</p> <p>8 and certify that in the capacity as assignee at some</p> <p>9 date down the line.</p> <p>10 Assuming, which I am making here -- an assumption</p> <p>11 that the original assignor has not already certified its</p> <p>12 cost of funding, but then if there has been no payment</p> <p>13 and no sign of payment for a while, why would it have</p> <p>14 done so? There is no need to do so until such time as</p> <p>15 you are looking at a payment being made.</p> <p>16 The final point on this is the fact that the</p> <p>17 construction favoured by my learned friend leads to</p> <p>18 perverse incentives. We deal with in this our skeleton,</p> <p>19 my learned friend responded orally. I will just make</p> <p>20 this point, that what was said against us -- we say that</p> <p>21 it gives an incentive to purchasers to set up an SPV</p> <p>22 which has a high cost of funding because it has no</p> <p>23 existing lenders willing to lend to it. The effect of</p> <p>24 that is to give it a very high cost of funding, which it</p> <p>25 can then charge back to the defaulting entity and in</p> <p style="text-align: center;">Page 173</p>	<p>1 amount. The response doesn't really answer the point.</p> <p>2 We don't say it is a determinative point, we say</p> <p>3 it is something the court ought to be wary of in</p> <p>4 allowing this open-ended certification of cost of funds</p> <p>5 of any unknown third party.</p> <p>6 That is all I have to say on issue 10, I do still</p> <p>7 have to deal with issues 13 and 14. I would prefer to</p> <p>8 deal with those first thing on Monday, it won't take</p> <p>9 more than a few moments, but I think I would like to</p> <p>10 consider those over the next day or so, if my Lord</p> <p>11 permits.</p> <p>12 We are ahead of time and likely to be substantially</p> <p>13 ahead of time by the time Monday is finished, I am told</p> <p>14 with some confidence by my learned friend.</p> <p>15 Housekeeping</p> <p>16 MR TROWER: I will not take anything like the 3.75 hours</p> <p>17 that I have in the timetable.</p> <p>18 MR JUSTICE HILDYARD: That was your reply, was it?</p> <p>19 MR TROWER: Yes, the idea was that if I had any substantive</p> <p>20 submissions to make that I should go between Mr Zacaroli</p> <p>21 and Mr Dicker's reply. I have one or two things that</p> <p>22 I want to draw your Lordship's attention to, but they</p> <p>23 are not of any great length. On the assumption</p> <p>24 Mr Zacaroli is going to finish fairly quickly on Monday</p> <p>25 morning, I think my learned friends can confidently</p> <p style="text-align: center;">Page 175</p>
<p>1 this case get substantial sums, rates of interest way</p> <p>2 above what the market would have been looking at over</p> <p>3 the period.</p> <p>4 MR JUSTICE HILDYARD: I think they think that might be</p> <p>5 controlled by good faith.</p> <p>6 MR ZACAROLI: No, because its cost of funding is genuinely</p> <p>7 high.</p> <p>8 MR JUSTICE HILDYARD: On your example it is all a put-up</p> <p>9 job, isn't it?</p> <p>10 MR ZACAROLI: It is not a put up job, it is just taking</p> <p>11 commercial advantage of a situation. I don't suggest</p> <p>12 that is bad faith; it is commercial selfishness.</p> <p>13 MR JUSTICE HILDYARD: Canniness, yes.</p> <p>14 MR ZACAROLI: But it is commercial.</p> <p>15 What is said against us is:</p> <p>16 "Well, that doesn't really work because the</p> <p>17 purchaser has had to fund the debt. It had to buy it</p> <p>18 and in so doing has incurred the cost which it now wants</p> <p>19 to reclaim from the defaulted party."</p> <p>20 Again, looking at this in the real world the</p> <p>21 purchaser is going to be buying this at a discount, this</p> <p>22 is a distressed debt. No doubt in most cases bought at</p> <p>23 a discount, yet the purchaser is trying to recover its</p> <p>24 cost of copying, the total nominal sum, notwithstanding</p> <p>25 it has only had to outlay a substantially smaller</p> <p style="text-align: center;">Page 174</p>	<p>1 expect to be on their feet in reply before lunch on</p> <p>2 Monday.</p> <p>3 MR JUSTICE HILDYARD: Right.</p> <p>4 MR TROWER: Whereas on the present timetable they are not</p> <p>5 estimated to be on their feet until Tuesday. That is</p> <p>6 why Mr Zacaroli is correct to say we are well ahead of</p> <p>7 time.</p> <p>8 MR JUSTICE HILDYARD: Yes.</p> <p>9 With apologies for losing you two days I should</p> <p>10 certainly like to defer the last bit of Mr Zacaroli's</p> <p>11 submissions until Monday, because frankly one reaches</p> <p>12 a saturation point, not of listening to Mr Zacaroli,</p> <p>13 which is an eternal pleasure, but nevertheless the full</p> <p>14 understanding slips away I think. I would much rather</p> <p>15 do that.</p> <p>16 Is there anything that any of you want specifically</p> <p>17 to suggest that I read over the next few days? I shall</p> <p>18 be reading the transcripts in order to remind myself of</p> <p>19 the various submissions made, and poring over the core</p> <p>20 bundle, and in particular 7 and 8.</p> <p>21 Where was Judge Chapman's decision?</p> <p>22 MR TROWER: I think that is in bundle 4(4) of the</p> <p>23 authorities, tab 128.</p> <p>24 MR JUSTICE HILDYARD: Sorry?</p> <p>25 MR TROWER: 4(4) of the authorities, tab 128.</p> <p style="text-align: center;">Page 176</p>

<p>1 MR JUSTICE HILDYARD: Yes, I think I had better have a look  2 at that. Is there anything else within reason that you  3 want, particularly that you feel I should look at or  4 remind myself of?  5 MR TROWER: Not from our side.  6 MR FOXTON: Not by way of additional reading, but just by  7 way of forewarning to your Lordship, I think Mr Dicker  8 and I anticipated that I might go before him in reply  9 order, so we would finish off as it were in reverse  10 order to the order in which we had all made our original  11 submissions.  12 I can't believe anyone has any great concern as to  13 the order in which Mr Dicker and I reply, but that is  14 what we were proposing to do.  15 MR JUSTICE HILDYARD: There was a slight concern.  16 MR ZACAROLI: It is simply -- we had made the point that  17 Goldman Sachs came into the case on the base that they  18 would go second and not duplicate what the SCG had said  19 and not vice versa. I am not going to make a big point  20 of it, we have laid our marker down, it is for my Lord  21 to decide, but I am not going to make any great point  22 about it.  23 MR JUSTICE HILDYARD: I have not really thought about it to  24 be honest, I am not sure I am particularly bothered.  25 Should I be?</p> <p style="text-align: right;">Page 177</p>	<p>1 I N D E X  2 PAGE  3 Opening submissions by MR ZACAROLI .....1  4 (continued)  5  6 Housekeeping .....175  7  8  9  10  11  12  13  14  15  16  17  18  19  20  21  22  23  24  25</p> <p style="text-align: right;">Page 179</p>
<p>1 MR TROWER: I don't think the administrators have a view  2 that your Lordship should be bothered, I think it is  3 really a matter for your Lordship.  4 MR DICKER: What I can do is to assure your Lordship that if  5 that is the order I will do my level best not to  6 duplicate any comments.  7 MR JUSTICE HILDYARD: He had to think on his feet what you  8 were saying in his place and now he is going first and  9 you will have to do the reverse, as long as there isn't  10 repetition it doesn't really matter to me.  11 MR DICKER: It gives me at least the advantage hopefully of  12 being able to spend a little more time on German law,  13 before your Lordship has the pleasure of that in the  14 last half of next week.  15 MR JUSTICE HILDYARD: Very good, thank you very much.  16 (4.40 pm)  17 (The hearing was adjourned until Monday 16 November 2015 at  18 10.30 am)  19  20  21  22  23  24  25</p> <p style="text-align: right;">Page 178</p>	

<b>A</b>				
<b>abandoned</b> 136:1	87:16 146:23	<b>administer</b> 8:4	80:18 81:3,8,16	<b>alternative</b> 10:21
<b>ability</b> 26:21 126:6	148:5 161:15	<b>administration</b>	81:24 82:16,25	26:8 36:9 96:1
128:14 157:3	170:2,3 172:23	9:11	88:23 91:15	<b>amalgamation</b>
163:20	<b>accountant</b> 83:14	<b>administrators</b>	92:10 94:13	138:13 156:16
<b>able</b> 11:13 51:5	<b>accrues</b> 142:11	103:5 118:25	99:16 102:9	<b>amalgamations</b>
118:12 123:24	<b>accurate</b> 79:1,1	124:3 127:8	103:4,9 107:11	138:20
162:12,17 169:13	<b>accurately</b> 65:9	131:18 178:1	110:14,18 111:22	<b>ambit</b> 33:20 67:25
178:12	<b>achieve</b> 44:7	<b>admissible</b> 97:21	112:9,10 115:3	86:12
<b>abnormal</b> 73:19	<b>achieved</b> 75:25	103:2,8 106:6	115:11 116:9,13	<b>amendments</b>
<b>absence</b> 11:6	<b>acknowledge</b> 52:5	<b>admit</b> 53:4	117:3,4 123:14	46:19
<b>absent</b> 163:15	<b>acknowledges</b>	<b>admitted</b> 104:9	137:13,20,22	<b>amicable</b> 82:5
168:6	162:19	<b>adopt</b> 96:19 103:4	138:1,3,6,9,10,21	<b>amorphous</b> 69:21
<b>absolute</b> 66:11,16	<b>act</b> 165:11	<b>adopted</b> 85:16	140:14,24,25	<b>amortise</b> 15:17
<b>absolutely</b> 25:12	<b>acted</b> 56:12 81:14	133:7	141:6,9,16,17	<b>amount</b> 2:21 6:24
28:4 102:10	<b>acting</b> 56:16	<b>adopts</b> 115:12	142:1,3,7,19	11:8 16:4 17:25
105:24,25 131:13	<b>action</b> 64:10,18	<b>advance</b> 65:7	143:16 145:7	18:3,8 19:10
<b>abstract</b> 129:8	160:13	67:11 131:7,9	148:12,15,18	22:16,21 25:9
<b>absurd</b> 143:24	<b>activities</b> 26:22	162:13,17 170:13	150:6,19 151:20	30:23 31:23 33:6
<b>AB1</b> 63:6 80:11	122:14	<b>advancing</b> 20:13	151:24 153:16,18	33:13 34:25 35:7
<b>AB4A</b> 130:3	<b>actual</b> 17:17 55:25	<b>advantage</b> 19:22	155:9,13,17	36:6,16 38:2,14
<b>academic</b> 121:24	124:15 125:22	24:25 174:11	156:15 157:9,11	38:15,25 39:4,11
<b>accede</b> 82:20	140:1 171:22	178:11	165:3,5,5,14	39:21,25 42:14
<b>acceded</b> 82:2	<b>add</b> 21:1 95:3	<b>adventure</b> 122:19	168:4 169:5,8	43:25 44:18,22
<b>accept</b> 2:12 14:18	<b>added</b> 8:25 76:4	<b>advised</b> 40:25	<b>agreements</b> 21:15	44:25 45:10,20
16:18 31:15,19	139:13	132:6	21:23 35:1 41:14	45:24 46:1,6,13
60:5 92:4 108:9	<b>adding</b> 33:19	<b>advisedly</b> 40:22	83:5 109:9 148:8	46:18,22,24
108:13,25 115:3	172:3	<b>advisers</b> 123:8	158:4	47:14 49:5,13
133:11,24 134:2	<b>addition</b> 21:4 93:6	<b>aftermath</b> 74:19	<b>ahead</b> 175:12,13	52:16 55:5,12
134:7 140:3,22	134:11 136:17	107:24	176:6	56:3,14,16 57:16
141:7 155:15	138:25 141:11	<b>ago</b> 86:9	<b>aim</b> 59:16	59:12 60:9 61:9
163:9	<b>additional</b> 9:3,5	<b>agree</b> 85:18 86:4	<b>aiming</b> 9:20	61:17 69:4,20
<b>acceptance</b> 82:24	13:14 20:15	<b>agreed</b> 30:2,3 50:3	<b>akin</b> 80:23 86:16	71:13,15 74:3,5,6
<b>accepted</b> 2:11	21:15 47:10	53:20 78:14 85:9	86:17	74:6 76:5,12,13
12:17 16:7 21:9	51:12 61:25	86:2 137:6 164:1	<b>alarm</b> 16:9	77:4,25 78:4
26:20 119:11	76:11 127:8	<b>agreeing</b> 84:15	<b>Aldous</b> 83:11	86:14,15 90:6
158:1 168:21	136:12 140:19	<b>agreement</b> 1:13,17	84:13	91:17 93:9,18
<b>accepts</b> 162:17	157:14 158:9	1:21 4:25 5:4,6	<b>Aldous's</b> 84:7	94:18,20,22 95:5
171:9,9	160:9 163:25	5:14,19 6:16,20	<b>alerted</b> 48:9	95:5 100:12
<b>access</b> 47:22	168:7 177:6	6:24 7:3,5,19	<b>aligned</b> 167:14	107:3,9 108:4,5,6
113:21,24	<b>additions</b> 172:9	11:17 12:6 13:18	<b>allocating</b> 10:13	108:12 116:12
<b>accommodate</b>	<b>address</b> 47:1 68:14	16:2,3,6,21 17:23	<b>allow</b> 139:13,25	117:20 123:25
5:15	76:16 114:5	22:2 29:21 33:25	150:23 166:11	125:3,6,7,8,11,13
<b>account</b> 27:7,14,24	125:11 126:15	35:8,9,20,25	<b>allowable</b> 45:8	125:19,19,20
29:15 36:25 58:5	<b>addressed</b> 104:16	37:25 38:4 41:8	<b>allowance</b> 138:17	126:4,6,8,10,12
62:22,23 63:19	<b>addressee</b> 106:1	42:10,11,25 44:1	<b>allowed</b> 4:1 5:9,11	126:14,19 135:16
72:5 80:7,16,20	<b>addressing</b> 59:21	44:20 45:5,8,19	35:6 71:12	136:16,16,24
82:3,9,21 83:6,17	<b>adjourned</b> 178:17	47:8 51:14,15,19	126:16	137:6,14,16
84:2,15 85:19	<b>adjournment</b> 89:5	51:21 53:2,3,12	<b>allowing</b> 47:9 71:9	138:18 139:4,11
	89:8	53:13,14 54:3	139:3 150:8	139:15 140:5,17
	<b>adjustment</b> 130:6	73:18 79:22	164:3,5 175:4	140:17 141:3

142:6 143:6,19 143:19,20,25 144:1,5,10,22,25 145:3,17,21,24 146:1 147:12,13 149:9,10 150:8 151:4,10,16,24 152:19 153:20 154:1,12 155:4 157:4 161:5 164:4 166:3 170:5,6,9,15,17 170:20 171:24 175:1 <b>amounted</b> 81:23 <b>amounts</b> 48:18 93:2,2,7,11 94:19 95:4,9,17 137:17 142:6,24 143:10 149:13,21 159:10 163:1,21 <b>amply</b> 68:1 <b>analogy</b> 30:24 <b>analyses</b> 12:2 <b>analysing</b> 119:1 <b>analysis</b> 35:15 55:7 57:20 80:23 82:15 86:17,18 132:9 151:22 <b>anchorage</b> 56:14 <b>anchoring</b> 57:6 <b>ands</b> 31:3 <b>and/or</b> 111:19 <b>annex</b> 22:10,12 100:24 <b>annual</b> 15:18 <b>annum</b> 1:22,23 18:2 20:23 171:21,25 <b>answer</b> 8:21 9:5 27:10,11,25 28:16 32:23 40:7 40:12 41:6 42:22 50:13 51:8 52:12 91:5,5,20 92:18 119:2 120:5 124:10,16,21,21 125:5,9 126:20 128:4 129:8 130:24 131:17	132:16,24 135:10 136:4,5,18,21 137:4 151:2 175:1 <b>answered</b> 63:9 127:13 130:25 <b>answering</b> 127:17 127:18 <b>answers</b> 128:7 131:17 <b>Anthracite</b> 7:7 <b>anticipate</b> 69:23 78:3 <b>anticipated</b> 71:23 72:20,22,24,24 73:6 75:23 177:8 <b>anybody</b> 31:9 155:14 156:5 <b>anymore</b> 100:25 <b>anyway</b> 110:17 134:16 <b>apologies</b> 176:9 <b>apparent</b> 141:1 <b>appeal</b> 5:24 43:5,9 43:10,14,16,19 44:11,12 <b>appeared</b> 17:5 103:4 104:8 <b>appears</b> 38:5 52:2 52:4 104:14 132:2 138:22 165:18 166:18 <b>applicable</b> 16:1,6 16:20 22:8 38:12 38:12 39:16,19 40:1 41:6 91:18 91:24 92:22 94:5 95:10 117:2 141:25 143:13 144:15,16 145:2 152:5,8,11,14 153:7,9 155:24 <b>application</b> 68:22 <b>applied</b> 65:9 84:1 86:20 141:23 167:12,25 <b>applies</b> 18:6 32:14 32:18 55:24 64:11 94:8,17 137:17 145:5	147:18 148:3,14 152:8,10,13,25 153:10 <b>apply</b> 6:22,23 19:9 57:7 64:6 146:6 151:10 <b>applying</b> 58:3 87:16 137:16 <b>apposite</b> 72:1,7 <b>approach</b> 4:17 7:24 17:6 28:5 41:1,11 45:9 51:24 84:13 85:7 85:9,10,10,13 96:8 97:17 98:6 99:13 114:7 115:16 132:24 133:7 <b>appropriate</b> 35:12 40:13 41:11 63:20 80:2,3,22 83:15,17,21 84:7 84:20 87:5 88:24 89:11 112:25 115:15,22 120:15 134:20 <b>April/May</b> 81:22 <b>apt</b> 65:5 <b>architecture</b> 138:2 <b>Arden</b> 43:11 44:10 68:6 <b>area</b> 15:14 <b>areas</b> 13:19,22 <b>argue</b> 123:8 <b>argued</b> 64:5 135:23 <b>arguing</b> 79:9 103:21 141:8 <b>argument</b> 12:24 13:11 51:10 52:2 57:9 64:18 65:18 66:23 76:18,19 83:11 84:22 95:13 101:4,9 107:5 123:20 127:12 157:23 164:22 <b>arguments</b> 41:16 76:16 90:8,9 91:9 123:16,17	<b>arisen</b> 127:16 132:15 133:14 <b>arises</b> 91:23 162:10 173:3 <b>arising</b> 93:15 155:10 161:24 <b>arithmetic</b> 19:23 20:24 23:17 24:5 34:5,17 153:12 <b>arithmetical</b> 34:12 <b>arose</b> 93:17 159:7 159:9 <b>arrangement</b> 15:13 126:23 <b>arrangements</b> 166:10 <b>arrises</b> 18:23 <b>arrive</b> 15:18 92:1 98:24 99:4 <b>arrived</b> 105:21 <b>article</b> 12:19 64:11 130:2,4 <b>articles</b> 61:2 64:1 <b>aside</b> 11:20 12:12 52:14 72:6,12 <b>asked</b> 48:13 50:14 103:16 118:25 120:3 128:18 133:12,24 <b>asking</b> 73:12 96:6 <b>asks</b> 47:24 83:8 127:9 135:17 136:2 <b>aspect</b> 30:16 94:13 <b>aspects</b> 2:9 29:24 29:25 30:9 67:23 75:4,4 <b>assert</b> 87:8 <b>asserted</b> 11:22 48:19 98:14 <b>assess</b> 51:5 <b>assessed</b> 4:9,19 <b>asset</b> 30:17 31:13 31:14 75:3 76:10 87:17 101:5,7,10 <b>assets</b> 10:13 27:13 32:10 60:21 78:7 78:8 87:17 99:20 100:1,23 101:10 102:4 121:21	125:20 135:20 136:8 138:14 <b>assign</b> 163:24 169:5 <b>assignable</b> 142:20 167:16 <b>assigned</b> 137:21 155:5 164:4,5 165:5,8 170:16 <b>assignee</b> 145:12 155:2 158:14,18 159:13,19 162:2 162:14 165:23,24 166:2,6 167:21 170:2,22 172:10 172:15 173:8 <b>assignees</b> 158:8 <b>assignment</b> 155:7 155:13 156:10 157:15 158:16,19 159:8 160:10 161:9,16 163:9 163:12,13,25 164:24 165:3,4 165:10,12,16,22 165:25 166:9,11 167:10 168:20 170:9 171:12 <b>assignments</b> 169:15 <b>assignor</b> 154:19,22 155:3 158:15,19 159:19 165:22 166:2,6 173:11 <b>assignor's</b> 154:20 <b>assistance</b> 34:24 95:16 150:4 <b>associated</b> 39:9 69:1 78:9 <b>assume</b> 40:25 54:19 106:16 136:2 <b>assumed</b> 132:19 132:23 135:18 <b>assumes</b> 59:11 135:15 <b>assuming</b> 23:20 41:3 50:25 94:5 121:16 136:22 173:10
--	---	---	---	--

<b>assumption</b> 18:24 103:16,17 132:17 132:18,21 136:4 136:10 156:19 168:13 173:10 175:23	43:13 61:6,14,17 61:18 68:3 70:25 73:12 76:25 80:12 86:23 90:21 96:5 97:15 114:18 118:2 123:2 129:2 132:20 133:23 135:7 153:9 169:7 173:25	71:18 77:5,9 78:7 80:22 84:20 85:11 88:9 90:1 93:9 94:14 97:17 100:23 102:3 103:6 112:15 115:6,7 123:25 138:1	<b>better</b> 75:12 118:13 163:4 169:1 177:1	129:19 130:13,17 131:22 132:18 133:1
<b>assumptions</b> 136:7			<b>beyond</b> 40:12 41:6 92:2 97:7 114:9 123:11 172:12	<b>borrowed</b> 24:15 24:21 32:19 78:8 79:3 110:22 113:15,16,20,25 123:15,16 125:25 126:10 132:22
<b>assure</b> 178:4			<b>big</b> 177:19	<b>borrower</b> 14:16 21:16 113:23,25
<b>astounding</b> 48:25			<b>bigger</b> 47:13 163:1	<b>borrowing</b> 1:9,15 3:3,5,23 4:1,7 11:3,24 13:7,7 14:20 15:16 27:18,21,21,23 29:20 30:22 31:12,15 34:14 40:11 41:18,22 48:6 58:23 67:3 67:23 78:10,11 78:15,20,22 79:6 79:8,11 80:24 85:8 90:16,20 92:3 111:9 113:16,18,22 115:7 118:2 119:25 121:14,16 122:11 123:2,18 124:17 126:3 128:14,21 129:17 131:6 135:16,18 136:9,11,18,20 137:2
<b>attempt</b> 105:5	<b>backdrop</b> 140:13 157:8	<b>bases</b> 36:1	<b>bill</b> 98:3,5	
<b>attention</b> 175:22	<b>background</b> 7:23 11:15 49:3 82:8 87:4 97:21 103:3 103:9 141:19 150:5 156:9 158:5 165:2 168:5	<b>basic</b> 28:24	<b>billions</b> 110:21,22	
<b>attract</b> 69:13 145:19 170:21		<b>basis</b> 14:18 36:17 51:20 55:1 60:3 72:20 83:3,13 85:2 93:7 101:8 101:19,24 104:14 104:15 121:14 134:24 155:17 156:2	<b>bind</b> 53:21	
<b>attributable</b> 68:7 137:2			<b>binding</b> 42:19	
<b>attributes</b> 4:22 66:6 79:18 163:18			<b>Bingham</b> 12:7	
<b>Aunt</b> 3:14	<b>bad</b> 31:2 95:25 131:3 147:13 174:12	<b>bath</b> 33:14	<b>bit</b> 31:11,12 49:16 176:10	
<b>Australian</b> 65:24		<b>battle</b> 85:5	<b>bites</b> 58:7	
<b>author</b> 96:21		<b>bearing</b> 29:4	<b>bits</b> 118:12	
<b>authorities</b> 6:14 7:8 21:11 43:3 68:4 80:11 103:14 119:6 158:10,11 159:3 164:11 176:23,25	<b>balance</b> 26:10 30:16 63:18,20 94:18	<b>began</b> 108:21	<b>bizarre</b> 8:2	
<b>authority</b> 6:13 11:7 16:22 43:4 53:14 60:18 63:3	<b>Balanced</b> 47:4	<b>beginning</b> 81:1 160:11	<b>black</b> 96:16	
<b>authors</b> 70:2	<b>bank</b> 14:18,22,24 15:11,16 31:1,2 34:3 56:5,6 57:4 57:5 70:5 104:16 107:5 109:20 130:7,12,17	<b>begins</b> 21:19 63:14 103:15 119:18 142:8	<b>Blackstone's</b> 2:8	
<b>automatic</b> 170:12		<b>begs</b> 168:16	<b>blanket</b> 138:18	
<b>available</b> 1:11 10:23 40:10 48:5 63:9 136:8	<b>banking</b> 21:24	<b>behalf</b> 12:7 83:1 83:12	<b>blended</b> 74:14	
<b>average</b> 28:25 78:13 93:10 136:13,20	<b>bankruptcy</b> 113:3	<b>belief</b> 95:1	<b>blind</b> 8:3	
<b>avoid</b> 40:4 94:7	<b>banks</b> 34:3 48:7 74:17,18 102:22 102:22 103:7,11 103:18 106:16,17 106:22 107:22 108:14	<b>believe</b> 25:6 29:22 53:1 177:12	<b>blue</b> 163:13	
<b>aware</b> 53:15 72:17 94:12	<b>bank's</b> 14:16 108:22	<b>Bellis</b> 5:22 6:6,9	<b>blunt</b> 48:24	
	<b>bare</b> 119:7,9	<b>Ben</b> 130:2	<b>bluntly</b> 99:22 156:21	
<b>B</b>	<b>bargain</b> 38:7 124:20,22	<b>benchmark</b> 1:11 10:22,23 18:20 34:2,11 40:10 153:12 159:24	<b>board</b> 119:12	
<b>b</b> 23:3,18,19 34:21 56:6 57:5 88:23 94:23 122:17 138:25 139:2 146:12 171:7,12	<b>Barrow</b> 63:5	<b>benefit</b> 14:8 17:8 20:7 24:16 30:5 35:16 70:10 81:5 118:1 165:8	<b>body</b> 7:11 64:14	
<b>back</b> 2:6,24 4:8 10:19 18:10,16	<b>base</b> 76:10 88:8 177:17	<b>benefits</b> 9:24 24:9 24:23 34:21	<b>bold</b> 96:16	
	<b>based</b> 1:24 2:3 24:4,9 62:20,20	<b>Berkshire</b> 111:4 111:14	<b>bona</b> 64:19	
		<b>best</b> 22:9 55:23 124:4 178:5	<b>Bond</b> 63:5	
		<b>beta</b> 75:10	<b>bonds</b> 70:6 75:9	
			<b>bones</b> 119:8,9	
			<b>book</b> 96:10 157:24	
			<b>bootstraps</b> 59:5	
			<b>borders</b> 118:21 122:1	
			<b>Borland's</b> 60:23	
			<b>borrow</b> 3:22 4:10 4:20,21,23 15:12 15:16 24:10,22 24:24 25:4 26:6 26:15 27:12,17 29:11 30:11 31:9 31:11 32:3 33:2 40:6 48:3,11 111:25 117:20 126:8,12 127:10 128:9 129:10,14	
				<b>borrowings</b> 136:13
				<b>bothered</b> 104:18 134:12,17 177:24 178:2
				<b>bottom</b> 45:24 46:11 47:2 63:24 70:3 94:21 115:22 130:8 161:10,20
				<b>bought</b> 174:22
				<b>bound</b> 8:3 170:14
				<b>breach</b> 6:22 66:17 81:15,23 82:24 162:13,18 165:21 165:25



<b>breached</b> 66:14	35:16 157:14	<b>called</b> 5:21 53:8	43:1,2,14 53:8,19	109:4,13,18
<b>breaches</b> 82:2 83:2	158:8 160:9	66:5 68:2 79:24	55:24 56:1 59:7	112:6
<b>break</b> 16:13 22:1	169:15	81:9 111:4	60:23 63:10	<b>caused</b> 25:2,7,7
45:13,17 133:17	<b>burdened</b> 41:14	120:11	65:23,24 66:9,9	26:14 33:4 36:12
133:20	<b>burdens</b> 158:9	<b>calls</b> 75:20 81:11	69:5 72:3 73:10	48:17 92:1 95:8
<b>breaker</b> 165:17	163:25 169:12	81:13,17,21,23	73:24 75:3 77:14	108:19 125:12
<b>briefly</b> 10:19	<b>Burton</b> 113:10	82:19 83:4	78:1,1,18 79:10	133:2
20:20 21:8 68:3	<b>business</b> 29:1	<b>candidly</b> 119:11	86:8,24 90:19	<b>CC</b> 81:4
125:16 138:21	69:24 102:15	<b>Canniness</b> 174:13	94:9 97:23 99:25	<b>CCC</b> 81:12,18
148:11 161:9	161:14,17	<b>capable</b> 130:16	101:1,5 103:23	82:16,24 83:2,18
<b>Briggs</b> 7:7 43:1,16	<b>businesses</b> 69:14	<b>capacity</b> 162:2	104:2 107:12	84:12,15,15,17
103:6 104:13,25	69:15	173:8	109:19 113:6,10	85:15
<b>Briggs's</b> 53:16	<b>buy</b> 87:7 174:17	<b>capital</b> 28:25	113:13,18 114:18	<b>CCC's</b> 81:6 83:1
<b>bring</b> 82:5 162:1	<b>buying</b> 88:18	35:21 61:7,18,20	116:17,25,25	83:14,25
<b>brings</b> 47:13	174:21	61:23 68:2,22,23	117:12 118:20,22	<b>CCIC</b> 81:4
<b>broad</b> 36:11 37:24	<b>buzzing</b> 40:4	68:24 69:13	118:25 121:1	<b>ceases</b> 19:9
49:9 80:19 93:22	<b>B's</b> 171:8	70:21 74:18 75:3	126:5 127:7,23	<b>cent</b> 8:15,19,25 9:6
116:8 156:22		76:6 80:8 81:8	128:6,11,13,24	9:10 20:15 21:4
<b>broader</b> 52:13	<b>C</b>	83:18 88:2 94:24	130:18,21 134:24	21:10,16,21 56:6
100:19 131:5,12	<b>c</b> 152:10 153:10	102:15,23 103:8	134:24 137:12	56:7,7,8 57:4,4
<b>broadly</b> 12:9	162:9	103:19 107:23,23	150:16 156:17	57:17,17,18,19
34:13 160:23	<b>calculate</b> 11:16	108:22,23 111:19	159:4 160:21	72:9,12 81:6,6
<b>brokers</b> 159:9,11	72:19 78:6 84:19	120:4 126:16	161:21 163:5,8	87:21 110:25
160:4,14 161:18	143:25	129:13,23 130:7	163:19,20 164:9	111:1 112:14,21
<b>Brothers</b> 115:24	<b>calculated</b> 19:16	130:20 137:2	165:19 166:9	113:7,7 131:24
<b>brought</b> 11:18	23:8 83:19,22	<b>capitalised</b> 19:18	167:14 168:2	161:13 171:25
24:17	85:1 92:18 116:5	140:10	170:1,9 171:6	<b>central</b> 3:2 50:3
<b>build</b> 57:24 65:19	154:19,22,25	<b>CAPM</b> 11:19 13:8	172:14,22 173:4	<b>certain</b> 39:12 47:6
<b>building</b> 57:20	159:15 170:6,10	33:19 48:16 75:4	173:6 174:1	50:5 68:8 70:18
158:23 166:5	170:10	77:15,17 79:15	177:17	106:25 110:14
<b>built</b> 101:9	<b>calculates</b> 77:17	79:18 80:2,5,23	<b>cases</b> 9:1 10:22	130:14 139:14
<b>bullet</b> 70:4	<b>calculating</b> 3:7	83:23 84:7 85:7	15:1 23:10 30:21	<b>certainly</b> 11:12
<b>bundle</b> 7:8 17:23	79:20	85:14 86:4,11	71:16,16 107:10	62:18 73:16
21:6,11 22:11,12	<b>calculation</b> 23:11	<b>careful</b> 41:3	107:15 158:22	107:10 109:1
37:21,22 43:3	24:2 25:13,17	<b>Carlton</b> 103:7	160:25 161:3	132:9 135:21
45:11,22 46:16	28:4 35:12,19,24	<b>carried</b> 166:6	166:3 170:12	136:19 147:14
61:23 63:5 65:23	36:16 42:7 44:24	<b>carries</b> 6:4	174:22	170:12 176:10
68:4 77:11,12	45:9 47:16,20	<b>carry</b> 51:11,13	<b>cash</b> 81:11,12,16	<b>certainty</b> 116:4,4
80:11,12 94:1	52:15 53:11	63:21 64:18	81:17,21,22	<b>certificate</b> 42:12
101:11,16 103:14	54:24 76:9 78:17	84:15	82:19 83:3	42:18 43:25
110:10 112:4	78:23 79:18	<b>case</b> 2:20 3:14,15	125:11	56:19 114:7
114:20 119:6	83:20 85:11 86:5	4:11,20 5:9,11,21	<b>cast</b> 132:6,14	<b>certification</b> 42:14
124:5 130:3	86:7 89:25 92:12	5:22 7:4,6,11	<b>catastrophe</b> 79:6	48:10 57:10
135:12,13 138:4	93:12,21 95:20	8:15 9:25 11:12	<b>catastrophic</b> 78:1	175:4
138:22,23 139:7	101:20,24 116:22	15:3,14 16:22	<b>categories</b> 160:23	<b>certified</b> 20:25
139:8 152:6	117:14 144:7,18	17:1 18:23 20:15	<b>catered</b> 20:14	173:11
158:11 159:4	145:21 149:9,11	20:17,19 21:6,7	<b>causal</b> 24:20	<b>certify</b> 18:20 32:18
164:11 176:20,22	149:13 170:18	21:12 23:10,15	<b>causation</b> 24:14	32:25 33:2 42:22
<b>bundles</b> 43:2 75:5	<b>call</b> 9:10 67:4	25:2 26:5,13	25:1 32:4,12	49:12 56:16
<b>burden</b> 19:5 20:15	81:16 122:11	30:13 32:1 34:17	<b>cause</b> 108:18	57:13 58:2 76:5

126:9 136:15,20 172:11,25 173:8 <b>certifying</b> 18:18 25:15 48:1 54:4 56:12 77:22,24 112:8 <b>cetera</b> 11:5,19 13:23 14:11 26:7 27:23 32:4 <b>challenge</b> 42:10,11 42:14,24 43:24 48:25 49:14 53:10 <b>Challinor</b> 5:22 6:6 6:9 <b>chance</b> 31:2 52:10 <b>change</b> 5:18 58:1 78:21 139:6 140:20,23 144:3 150:23 151:2 165:12 <b>changed</b> 31:18 165:9 <b>changing</b> 144:5 <b>Channels</b> 130:5 <b>Chapman</b> 50:2 52:24 115:24 116:17 <b>Chapman's</b> 176:21 <b>chapter</b> 68:21 <b>character</b> 165:9 <b>characterisation</b> 85:19 <b>characterised</b> 55:16,17 <b>characteristic</b> 122:18 <b>charge</b> 27:15 36:8 71:10,12 87:25 173:25 <b>charged</b> 8:4 14:25 36:2 80:16 88:3 88:17 <b>charges</b> 14:19 15:11 69:3 <b>Charrington</b> 97:9 <b>chase</b> 159:20 <b>choice</b> 40:25 151:15	<b>choose</b> 9:12 27:17 57:3 116:2 118:17 130:17 132:12 <b>chosen</b> 7:2 146:1 150:3 <b>circumstance</b> 144:24 145:1,2 146:24 152:17 <b>circumstances</b> 15:10 23:23 24:1 34:1 37:3 42:13 46:3 61:19,20 63:10 68:8 73:18 73:23 80:1,2 85:6 88:4 89:24 105:20 107:1,18 126:1 128:5 132:25 133:13 141:25 144:10 145:4,19,25 146:3 150:1,20 151:25 152:9,13 154:21 159:7 163:16 167:5,14 169:8,10 <b>cited</b> 6:14 16:22 66:9 68:2 150:2 157:23 <b>City</b> 167:8 <b>claim</b> 12:20 24:23 26:10 28:6,8 36:6 70:8 72:3 93:8 94:10,13,17 112:13,13 135:19 135:24 136:3,10 151:10 156:2 159:13,21 161:3 162:2,13,14,18 <b>claimant</b> 4:21,22 <b>claimed</b> 14:12 <b>claiming</b> 31:19 32:2 93:5,7 115:5 <b>claims</b> 11:21 12:3 12:4,21 14:2 75:2 113:3 159:9 159:9 160:16 161:2,18 162:6 <b>clarify</b> 50:16	124:12 128:16 <b>classic</b> 6:5 60:22 <b>clause</b> 33:22 91:10 103:18 105:6,7,9 105:10,12,13 110:3 130:22 131:5 139:9 140:11 152:14,23 153:10 154:7,7,8 169:4 171:13,17 171:20 <b>clear</b> 13:24 45:3 71:20 73:4 75:21 93:15 101:3 102:3 124:11 133:24 135:10 139:18 140:24,25 149:12 157:20 164:2 168:1 <b>clearer</b> 29:18 <b>clearly</b> 2:4 11:1 12:15 15:19 25:10 32:11 36:10 38:23 41:22 57:18 70:20 71:24 86:15 89:22 90:20 120:5 125:18 126:11,15 129:1 130:18 135:25 136:4,9 136:17 149:19 150:21 151:2,16 163:10 <b>cliff</b> 79:8 <b>close</b> 15:7 68:9 <b>closely</b> 167:14 <b>closeout</b> 6:21,24 34:25 35:7 36:16 42:14 43:25 44:18,22,25 45:9 45:20,24 46:6,13 46:17,22 47:14 49:5 52:16,25 54:24 74:3,5 116:12 137:14 144:10 152:11,14 155:18,21 <b>code</b> 6:17 <b>Cohen</b> 130:2	<b>coincide</b> 79:5 <b>collapse</b> 12:4 73:23 74:20 107:24 108:1 110:21 <b>collateralised</b> 38:21 <b>Colman</b> 21:19 <b>combined</b> 49:13 75:9 <b>combines</b> 83:20 <b>come</b> 8:19 20:12 28:4 31:21,24 33:19 43:11,13 43:18 64:17 67:1 68:24 74:17,23 76:25 78:16 86:3 87:7,12,20 114:18 118:24 135:7 157:22 163:3 <b>comes</b> 18:10 35:13 58:3 66:3 97:15 106:8 129:5 149:24 <b>coming</b> 95:10 <b>commas</b> 122:21 <b>comment</b> 71:8 87:3 104:1 <b>commentaries</b> 2:8 <b>commentary</b> 11:11 <b>commented</b> 7:4 <b>comments</b> 178:6 <b>commercial</b> 4:17 8:18 12:11 88:19 99:18 112:7 122:14 159:5 174:11,12,14 <b>commercially</b> 43:12 44:6,8,17 46:12 49:18 50:9 51:6,18 95:2 129:14 <b>commitment</b> 70:18 <b>committing</b> 69:1 <b>common</b> 3:24 6:16 7:6,20,22,24 8:24 11:15 25:6,10	26:1 28:20,22,23 30:3 51:15 53:10 98:2,4 107:7 115:2,4,15 119:21 137:6,19 154:5,11 168:13 <b>commonly</b> 77:14 <b>companies</b> 64:11 68:22 69:6 70:5 <b>company</b> 60:24 61:1,6 63:2,8,11 63:20 64:16,22 65:14 66:10,16 67:6 68:6 71:24 72:8,13 73:14 120:20 122:15,22 <b>company's</b> 27:18 62:3 119:12 120:22 <b>compared</b> 75:11 <b>comparing</b> 89:12 <b>comparison</b> 62:8 <b>compensate</b> 2:13 55:1 <b>compensates</b> 9:2 <b>compensating</b> 20:7,11 55:3 71:17 <b>compensation</b> 8:23 13:15 17:9 65:8 <b>competent</b> 63:11 <b>complaint</b> 172:14 <b>completely</b> 14:7 20:2 50:3 107:22 108:2,8 116:20 123:15 125:8 <b>complex</b> 70:17 152:7 <b>complexities</b> 15:22 86:10 172:12 <b>complexity</b> 172:23 <b>compliance</b> 21:22 <b>complicated</b> 11:18 36:14 69:5 <b>complication</b> 33:18 <b>complications</b> 14:8 22:5 24:11 32:3,5,13 51:12
--	--	--	---	--

86:10	<b>conclusion</b> 23:23	126:18 137:4	<b>contemplated</b>	168:15,17 169:11
<b>comply</b> 33:10	85:18 166:8	<b>consider</b> 41:11	79:20 109:24	<b>contracting</b> 86:3
<b>component</b> 74:5	<b>conclusions</b> 23:21	46:7 55:25 162:5	149:14	<b>Contractors</b> 79:25
83:22 93:11	<b>conclusive</b> 42:18	175:10	<b>contemplating</b>	<b>contracts</b> 10:24
<b>components</b> 75:19	116:6 157:16	<b>consideration</b>	34:12	96:11 157:25
117:2	<b>concrete</b> 71:25	25:17 80:6	<b>contemplation</b>	<b>contractual</b> 69:6
<b>compound</b> 83:10	72:8	117:24,25 118:8	15:24 86:21	70:20 86:7 97:24
85:2 98:17	<b>condition</b> 64:9	<b>considered</b> 11:14	88:22	115:12 133:8
112:20	94:5	160:2 165:1	<b>contend</b> 97:12	151:8
<b>compounded</b> 2:3	<b>conducted</b> 35:21	<b>considering</b> 35:1	162:11	<b>contradistinction</b>
88:7,15	35:25	40:14 53:2,13	<b>contended</b> 80:19	13:20 148:10
<b>compromise</b> 82:5	<b>conferred</b> 24:9,16	131:13	<b>contention</b> 21:21	<b>contrary</b> 83:2
<b>compulsory</b>	<b>confidence</b> 175:14	<b>consistent</b> 10:5	63:14	90:13 164:5
161:12	<b>confidently</b> 175:25	11:23 18:18	<b>contentions</b> 132:1	<b>contrast</b> 34:10,15
<b>computation</b>	<b>confined</b> 38:24	41:21 156:11	<b>context</b> 1:16,19	37:4
32:12	49:15 67:22	<b>Consolidated</b>	8:9 10:20 15:6,9	<b>Contrasted</b> 17:25
<b>conceded</b> 64:19	116:23	79:25	17:4 34:9 38:10	<b>contrasts</b> 149:5
<b>conceivable</b>	<b>confines</b> 48:15	<b>consolidation</b>	38:10 39:6,10,17	<b>contravene</b> 66:19
118:16	<b>confirm</b> 27:2	138:12 156:16	39:24 40:19 41:8	<b>contributed</b>
<b>concept</b> 2:8 10:17	128:19	<b>consolidations</b>	41:17 42:1,5,8	109:16
13:19,25 14:1	<b>confirmation</b>	138:19	48:23 49:11 55:2	<b>contributions</b> 81:9
15:19 16:19	128:22	<b>constant</b> 79:16	56:25 61:3 72:1	<b>control</b> 47:11
25:24 48:15 55:5	<b>conflating</b> 108:9	<b>constantly</b> 78:19	73:13,14 81:2	48:14 169:13
57:9 58:14 61:22	<b>confused</b> 25:18	78:23	86:23 89:10,16	<b>controlled</b> 4:3
67:21 69:22 90:2	111:5	<b>consternation</b>	89:17 90:19,24	61:19 174:5
95:18 100:4,19	<b>confuses</b> 33:3	112:6 113:4	91:3,23,24 92:2,4	<b>convenient</b> 43:8
100:20 126:25	<b>conjunction</b> 10:7	<b>constitutes</b> 93:22	95:3 97:19 98:11	89:2 133:16
134:5 137:5	48:4 149:19	139:19	99:17 102:13	135:5
143:2	<b>connected</b> 164:6	<b>construction</b> 5:19	108:11 115:25	<b>conversion</b> 151:9
<b>concepts</b> 2:10 6:16	<b>connection</b> 38:4	12:15 42:16,17	123:15,17 129:6	<b>convoluted</b> 171:4
6:21 11:18 34:13	42:3 111:23	59:13 64:1 66:4	137:15 141:22	<b>copy</b> 96:11
49:7 62:18 68:21	<b>consent</b> 16:24	90:13 96:8 97:17	147:2 150:9	<b>copying</b> 174:24
90:1 98:19 108:9	138:11,15 156:12	99:13 102:17	166:9 167:24,25	<b>core</b> 3:3 17:23
<b>concern</b> 105:5	156:12,12	105:9,21 110:2	169:4	37:21 41:18
177:12,15	<b>consequence</b> 12:23	116:25,25 118:20	<b>contexts</b> 89:20	45:21 58:23
<b>concerned</b> 17:8	27:7 29:10 31:15	123:10,13 128:20	102:14	93:25 101:16,25
28:3 62:1 76:9	32:12 107:25	129:3,4 156:9	<b>contextual</b> 50:8	110:11 117:12,23
112:2 114:6,14	108:16,17 111:20	166:5,8 168:3,12	<b>continued</b> 1:4	118:1 121:11
116:16 137:11	<b>consequences</b>	172:10 173:17	82:18 179:3	122:3,5,7 124:1
163:14	28:14 72:16	<b>construe</b> 40:17	<b>continuing</b> 72:13	135:13 138:22,23
<b>concerning</b> 103:7	168:21	116:24 157:9	82:3	156:24 171:18
116:18	<b>consequent</b> 146:4	168:9	<b>contract</b> 8:1 36:18	176:19
<b>concerns</b> 158:8	146:7	<b>construed</b> 5:7	36:20 40:14	<b>corners</b> 121:23
<b>concession</b> 81:7	<b>consequential</b> 9:23	157:12 169:11	63:17 66:17	<b>corporate</b> 64:14
82:6 83:18,20	11:19 13:1,5,18	<b>construing</b> 5:13	81:15 96:18,20	99:18 100:20
84:3,16 90:22	13:23 14:2 24:8	103:3,9 163:8,23	97:2,16 123:6	102:17
<b>concluded</b> 82:14	24:20 25:3,4,11	<b>contained</b> 61:2	157:20 161:25	<b>Corporation</b>
84:25	26:6,12,12 30:10	150:6	163:8,11,12	115:25
<b>concludes</b> 85:12	31:20 32:1,18	<b>contains</b> 161:19	165:8,17,21,25	<b>correct</b> 23:21
133:22	33:1 48:17	162:24	166:13 167:18,19	25:10 51:23

59:18 77:20 85:8 85:9,10 107:21 112:23 130:7,14 131:14 132:9,21 140:22 176:6 <b>correction</b> 96:3 113:1 <b>correctly</b> 134:8 <b>correspond</b> 117:25 <b>correspondence</b> 128:13,17,18,19 <b>Correspondingly</b> 65:13 <b>cost</b> 1:8,10,21,24 2:15,25 4:10,19 4:20,21,24 5:1,3 8:8,9,9 9:3,5,15 9:17,20 10:6,10 10:11,20 11:7,25 12:25 13:9,20 14:1,6,6,13,17,20 15:16 16:4,4 17:5,14 18:2,18 18:21 19:2,3 20:5,9,24,25 23:2 23:2,5,7,17,18,19 24:4,7,10 25:8,13 25:13,15,23 26:7 26:24 27:8,19 28:8,15,16,18,25 29:13,14,14,18 30:6,18,21,22 31:8,12,22,23 32:9,25 33:5 34:7,9 35:9 37:5 37:13,19 38:7,9 38:13,13,17,19 38:24 39:2,4,6,12 39:13,21,22,25 40:8 42:3,4,6 47:15,22,24 48:3 48:16 49:12 50:12 51:16 55:5 55:11,11,14,15 55:18,18,21 56:1 56:9,13,13,20,24 57:2,5,15,18 58:9 59:4,8,12,13,14 59:15,22,24,25 60:7,8 65:14	67:15 68:2,22,24 69:2,10,16,16 70:11,15,20 71:12,14,14 72:4 72:21,25 73:1,1,2 73:4,25 76:5,6,7 76:9,10,22,23 77:3,14,17,21 78:9,20 83:17 86:11,13 87:4,9 87:18,24,24 88:2 88:8 89:23 90:5 90:6,24 91:7,12 91:13,16,25 92:14 98:17 99:16,18,20 100:3,4,6,11,16 100:18,20 101:6 102:6,14,24 106:20 108:5 112:8 113:24,25 115:6 117:9,19 117:20 118:7,12 118:13 119:15 121:19 122:21 123:25 124:13,16 124:23 125:1,6 125:10,10,13,21 126:4,7,9,12,14 126:15,17 127:3 128:15 129:5 133:25,25 134:2 135:15,16,23,24 136:11,12,13,15 136:20,22,25 137:1,5 146:22 147:22 148:4 153:13 154:20,23 154:24 155:1,23 155:25 163:20 170:3 171:8,21 171:22 172:4,6 172:11,16,25 173:5,7,12,22,24 174:6,18,24 175:4 <b>costs</b> 9:11 14:9,23 19:22 22:17 25:20 26:2,20 27:22,23 28:3	29:18 30:1 31:3 33:15 36:5,11 38:4 46:1 59:9 69:1,21 77:6 79:11,12 94:3 102:4 112:15 129:1 131:23 160:7 166:5 170:1,22 172:22 <b>count</b> 147:22 <b>counter</b> 29:7 32:16 105:10 171:11 <b>counterparties</b> 87:8 108:10 135:3 164:8 <b>counterparty</b> 9:21 10:4 11:1 18:18 25:5 26:3,9 48:8 48:19 69:19,20 78:2 82:1 86:25 105:11 107:13 108:3 127:15 143:23 155:11 156:3,13,21 157:6 158:9 160:10 163:14 164:1 168:8 169:13,16 <b>counterparty's</b> 19:8 157:15 <b>counts</b> 3:23 <b>couple</b> 160:19 172:8 <b>course</b> 1:19 7:18 7:20 8:20 12:22 15:2 17:24 19:9 19:25 20:14 23:2 23:9 29:12 31:7 41:16 51:24 57:20 58:4 59:23 65:7 72:4 73:11 76:13 77:1 87:11 88:6,11 91:6 99:11 102:5 114:10 115:3 137:15 142:20 157:22 167:17 168:2 169:20 <b>court</b> 4:17 5:13,24 6:3 7:4 25:19	43:5,9,10,16,19 44:10,12 50:2 53:22 54:12 66:1 66:10 90:11 99:14 104:8 105:5 113:22 123:24 127:13 157:8 159:5,23 160:5 168:8,12 175:3 <b>courtroom</b> 112:18 <b>courts</b> 42:20 133:7 <b>court's</b> 12:21 <b>cover</b> 90:8 116:9 154:14 <b>covered</b> 40:3 <b>create</b> 92:21 116:3 171:10 <b>created</b> 82:9 162:19 <b>creates</b> 51:13 <b>creating</b> 64:2 <b>credit</b> 28:13 63:18 108:20 109:12 131:3 156:18,20 156:25 157:19 169:9 <b>creditor</b> 2:11 11:9 13:13 16:24 73:10 76:4 87:1 98:15 102:6,21 115:21 170:1 171:14,19 <b>creditors</b> 75:2 77:10 <b>credits</b> 84:1 <b>crisis</b> 108:17 <b>criteria</b> 98:18 <b>critical</b> 21:25 73:11 119:3 <b>critically</b> 61:3 <b>criticising</b> 88:19 <b>cross-currency</b> 36:14 <b>cross-reference</b> 12:1 <b>crunch</b> 108:20 <b>currencies</b> 1:12 <b>currency</b> 36:18 37:1 38:2 94:22	151:8,9,9 <b>curves</b> 36:25 <b>customer</b> 104:17 104:17 <b>cut</b> 73:3 159:20 169:14 <b>cuts</b> 71:20 <hr/> <b>D</b> <hr/> <b>d</b> 140:8 179:1 <b>DAC</b> 162:18 <b>daily</b> 2:3 <b>damage</b> 13:18 28:12,12 156:24 <b>damaged</b> 69:24 156:20 <b>damages</b> 6:21 46:20 115:5 158:18 159:13,14 160:4 162:11 163:1 165:17 <b>damaging</b> 69:14 <b>dangerous</b> 41:5 127:16 128:4 <b>date</b> 11:23 19:13 19:13 22:23,24 36:20 46:25 74:4 77:23 79:5 92:19 93:3,4,17 94:7 119:20 120:10,12 120:14,15,18 121:2 142:8,10 143:5,7,8,13 144:13 145:21,22 170:7,11,15,15 173:9 <b>dates</b> 36:22 143:11 <b>David</b> 53:8 <b>Dawson</b> 165:18 167:7 <b>day</b> 3:16 114:13 170:11 175:10 <b>days</b> 2:4 12:3 77:22 100:14 176:9,17 <b>deal</b> 8:23 9:3 17:10 34:22 43:13,20 60:14,17 90:8 94:9 102:19 114:17 117:17
---	---	--	---	--

128:10 129:24 132:11,12,13 134:9 155:20 162:21,22 166:18 173:18 175:7,8 <b>dealing</b> 6:15 17:7 21:19 25:25 26:2 30:12,14 54:22 63:15 106:15 129:16 130:16 135:2 148:11 155:21 168:3 <b>deals</b> 6:4 8:6 68:21 151:8 166:14,16 166:23 <b>dealt</b> 31:24 60:18 95:19 101:2 134:22,24 137:3 <b>debit</b> 82:2 <b>debited</b> 83:5 <b>debt</b> 27:8 29:1 66:6 68:24 69:2 70:3,4,7,9,11 72:2 76:7 78:10 83:21 87:2,7 88:10,11,13,18 106:23 111:19 117:16 121:3,5 121:13 136:12 172:18 174:17,22 <b>debtor</b> 158:15,17 167:9 <b>decide</b> 53:9 160:6 177:21 <b>decided</b> 5:21 82:1 82:17,18 83:3 160:2,5,7 <b>deciding</b> 27:14 44:4 80:5 114:1 164:17 <b>decision</b> 7:7 43:1,5 43:6,9,10,15,18 43:21 52:24 53:16,17,21 63:5 68:5 79:23 80:11 80:21 83:1 85:20 87:15 88:2 103:6 103:13,13 114:23 134:6 159:2,5 163:3 167:13,24	176:21 <b>decisions</b> 80:4 89:12 <b>declaration</b> 64:6,9 64:12,22 65:20 67:7,11 119:14 122:17 <b>declared</b> 119:12 <b>decree</b> 66:17 <b>default</b> 1:23 2:13 3:10,24 4:24 8:15 9:1 10:10 13:24 15:7 17:19 17:24 18:17 19:1 19:2,5,8,17,21 20:16 21:4,16 22:19 23:5,14,24 25:3,8,12 33:5 35:2,22 37:4,13 38:11 49:6 51:20 55:2 57:14 58:12 70:25 72:22 73:20 74:8,13 76:21 78:1 79:21 89:18 91:17 95:10,23,25 102:23 107:6,22 108:1,9,16,16,24 111:24 112:2,3,8 114:7 117:14 128:20 131:23 132:16 137:16 138:5 140:8 141:24 142:12,17 142:23 143:15 144:3,17 145:1,5 145:16,20 146:9 147:18 148:2 149:24 150:7,25 151:15 154:18 156:18 169:22 171:18 <b>defaulted</b> 26:9 27:8,13 30:17 31:13 94:10 111:21 146:10 159:24 174:19 <b>defaulter</b> 9:4 <b>defaulting</b> 7:2 8:24 18:22,25	19:1,7,18 22:22 25:5 26:2 71:11 72:19,21 87:25 109:20 139:5,15 140:6,9 144:11 145:1,24 146:5,8 146:11,15 147:5 153:21 154:2 173:25 <b>defaults</b> 142:10,15 <b>defects</b> 166:4 <b>defendant</b> 158:23 <b>defendant's</b> 21:21 <b>defer</b> 176:10 <b>deferral</b> 152:6,8 153:7,10 <b>define</b> 91:6 123:24 <b>defined</b> 39:20 45:24 57:2 70:20 74:6 92:23 94:20 116:11,14 138:5 147:4 148:25 149:1 <b>defining</b> 16:19 <b>definition</b> 1:17 3:10,18 4:2,4,6 6:25 7:12 9:18 10:5,9 11:9 13:2 13:4,24 14:3,5 15:21 17:21 24:17 33:8,9,11 33:15 35:7 36:11 37:11,18,21,24 38:6,11 39:3,14 41:21 42:2 45:20 47:8 49:5,6 51:20 55:11 56:22 58:11,14 58:15 59:4,10 60:8,22 70:25 72:23 73:8 78:6 89:1 90:25 91:7 91:8,12,23 92:5 93:2,5,14,18,20 93:24,25 94:2 95:7 98:24 99:2 99:4 106:22 112:3 115:25 116:16,18 117:1 117:19 118:5,9	118:10,23 119:1 120:5,7 121:11 121:16 122:3 123:23 124:2 125:18 130:15 131:14 132:17 136:14 143:1,5 143:15 146:8,21 147:12 148:17 150:6 152:5,11 152:14 153:9 169:23 171:17 <b>definitional</b> 56:18 56:20,21 129:6 <b>definitions</b> 17:22 34:25 <b>delay</b> 15:23 24:12 65:8 161:2,4 <b>deliberately</b> 125:22 148:9 <b>delineation</b> 172:6 <b>delivery</b> 94:4 <b>demonstrably</b> 75:21 <b>demonstrated</b> 73:9 77:2,4 <b>denotes</b> 90:20 <b>depend</b> 132:25 133:13 <b>depended</b> 63:25 <b>dependent</b> 52:16 61:5 62:23 72:13 84:2 122:16 155:25 <b>depending</b> 35:16 78:11 128:7 <b>depends</b> 10:10 64:21 65:15 78:25 167:18 168:14 <b>deployed</b> 86:24 163:15 <b>described</b> 46:16 75:5 119:6 134:3 138:2 140:3 <b>describes</b> 7:11 134:8 139:9 <b>description</b> 118:10 <b>designation</b> 46:24 142:9	<b>designed</b> 132:1 169:8 <b>detail</b> 95:12 104:5 104:15 151:20 156:22 <b>determinate</b> 66:7 <b>determination</b> 20:9 44:22 46:24 54:16 95:1 <b>determinative</b> 34:8 163:10 175:2 <b>determine</b> 43:24 74:2 82:16 91:20 106:7,10 121:12 131:5,14 163:17 167:18 <b>determined</b> 37:4 64:14 80:14 94:25 116:11 149:10 <b>determines</b> 38:3 <b>determining</b> 20:8 44:16,17 46:2,6,6 46:13 54:9,10 <b>detriment</b> 24:15 24:20 25:7 <b>detriments</b> 9:24 11:5 24:8 25:2 32:19 34:20 <b>develop</b> 15:25 58:25 76:15 <b>developed</b> 17:4 46:22 117:18 140:12,12 <b>developers</b> 165:11 166:12 <b>devoid</b> 91:22 149:18 <b>Dicker</b> 3:13 17:3 20:20 26:19 27:1 28:14,19,23 31:4 37:18 42:9 51:23 52:9 77:8 128:12 140:3 148:6 177:7,13 178:4 178:11 <b>Dicker's</b> 59:3,19 175:21 <b>dictated</b> 3:6
---	--	--	---	--

<b>dictionary</b> 9:18 10:6	86:17 162:3,14	64:21 66:11 69:9	150:4 175:22	<b>effects</b> 13:5 26:7 30:10
<b>difference</b> 4:23 5:2 17:16 18:9 26:4 51:14,16 52:5,15 54:17 62:7 66:24 93:10 109:3 141:5 163:7 167:5,15	<b>directors</b> 67:8 119:12	72:9 119:11,14 119:18,23	<b>drawdown</b> 70:5	<b>either</b> 5:16 6:2 19:19 20:10 33:8 33:10 36:1 41:21 42:25 55:20 71:15 81:20 93:11 95:17 97:10 102:5 108:25 120:21 138:11 147:6
<b>differences</b> 17:18 18:15	<b>disability</b> 132:23	<b>divorced</b> 169:2	<b>dreamt</b> 123:22	<b>elapsed</b> 2:4
<b>different</b> 14:21 16:6,20 17:2,6,6 17:16 20:21 22:7 23:9,25 24:5 27:4 38:10 39:8 39:13 40:2 42:2 49:19 50:6,25 52:5 55:14 66:12 78:11 79:4 88:1 91:2,3,22 92:5 97:22,24 98:7,8 104:2 107:22 108:3,8 110:24 111:4 116:10,20 117:6 120:12 123:15 128:7 129:9,15 135:8 141:25 142:4,4 146:11,23 150:24 152:9 163:1 164:6	<b>disadvantage</b> 105:12,14,19,20	<b>document</b> 101:22 101:24 104:16 142:25	<b>driver</b> 116:10	<b>election</b> 120:19,20 120:22 121:1
<b>differences</b> 17:18 18:15	<b>disadvantaging</b> 105:10	<b>documentation</b> 111:15	<b>drove</b> 139:20	<b>element</b> 35:18 75:15 85:8,14
<b>different</b> 14:21 16:6,20 17:2,6,6 17:16 20:21 22:7 23:9,25 24:5 27:4 38:10 39:8 39:13 40:2 42:2 49:19 50:6,25 52:5 55:14 66:12 78:11 79:4 88:1 91:2,3,22 92:5 97:22,24 98:7,8 104:2 107:22 108:3,8 110:24 111:4 116:10,20 117:6 120:12 123:15 128:7 129:9,15 135:8 141:25 142:4,4 146:11,23 150:24 152:9 163:1 164:6	<b>discount</b> 174:21 174:23	<b>Dodson</b> 97:4,5	<b>due</b> 8:19 19:11 22:24 46:24 51:24 65:7 77:1 99:11 142:6 144:1,10 146:17 149:15 152:18,21 153:4 166:12	<b>elements</b> 3:3 33:9 33:10 36:15 38:23 41:18 42:17 74:5 119:3 124:2
<b>different</b> 14:21 16:6,20 17:2,6,6 17:16 20:21 22:7 23:9,25 24:5 27:4 38:10 39:8 39:13 40:2 42:2 49:19 50:6,25 52:5 55:14 66:12 78:11 79:4 88:1 91:2,3,22 92:5 97:22,24 98:7,8 104:2 107:22 108:3,8 110:24 111:4 116:10,20 117:6 120:12 123:15 128:7 129:9,15 135:8 141:25 142:4,4 146:11,23 150:24 152:9 163:1 164:6	<b>discovered</b> 112:7	<b>doing</b> 36:16 51:21 54:15 62:17 87:19 89:20 109:11 121:20 129:11 130:20 139:25 174:18	<b>Dunedin</b> 97:9	<b>elision</b> 99:24 100:2
<b>different</b> 14:21 16:6,20 17:2,6,6 17:16 20:21 22:7 23:9,25 24:5 27:4 38:10 39:8 39:13 40:2 42:2 49:19 50:6,25 52:5 55:14 66:12 78:11 79:4 88:1 91:2,3,22 92:5 97:22,24 98:7,8 104:2 107:22 108:3,8 110:24 111:4 116:10,20 117:6 120:12 123:15 128:7 129:9,15 135:8 141:25 142:4,4 146:11,23 150:24 152:9 163:1 164:6	<b>discretion</b> 42:21 67:12	<b>double</b> 92:11	<b>duplicate</b> 177:18 178:6	<b>else's</b> 154:23
<b>different</b> 14:21 16:6,20 17:2,6,6 17:16 20:21 22:7 23:9,25 24:5 27:4 38:10 39:8 39:13 40:2 42:2 49:19 50:6,25 52:5 55:14 66:12 78:11 79:4 88:1 91:2,3,22 92:5 97:22,24 98:7,8 104:2 107:22 108:3,8 110:24 111:4 116:10,20 117:6 120:12 123:15 128:7 129:9,15 135:8 141:25 142:4,4 146:11,23 150:24 152:9 163:1 164:6	<b>discretionary</b> 124:24 125:6,8	<b>double-counting</b> 92:24 93:23 95:14	<b>duplication</b> 94:7	<b>embark</b> 127:17
<b>different</b> 14:21 16:6,20 17:2,6,6 17:16 20:21 22:7 23:9,25 24:5 27:4 38:10 39:8 39:13 40:2 42:2 49:19 50:6,25 52:5 55:14 66:12 78:11 79:4 88:1 91:2,3,22 92:5 97:22,24 98:7,8 104:2 107:22 108:3,8 110:24 111:4 116:10,20 117:6 120:12 123:15 128:7 129:9,15 135:8 141:25 142:4,4 146:11,23 150:24 152:9 163:1 164:6	<b>discuss</b> 49:22 114:10	<b>doubly</b> 106:23	<b>duties</b> 160:14 161:23,24,25	<b>emphasis</b> 1:8 167:23
<b>different</b> 14:21 16:6,20 17:2,6,6 17:16 20:21 22:7 23:9,25 24:5 27:4 38:10 39:8 39:13 40:2 42:2 49:19 50:6,25 52:5 55:14 66:12 78:11 79:4 88:1 91:2,3,22 92:5 97:22,24 98:7,8 104:2 107:22 108:3,8 110:24 111:4 116:10,20 117:6 120:12 123:15 128:7 129:9,15 135:8 141:25 142:4,4 146:11,23 150:24 152:9 163:1 164:6	<b>discusses</b> 158:24	<b>doubt</b> 15:17 87:14 92:2 97:7 110:11 112:15 174:22	<b>dwel</b> 169:1	<b>emphasise</b> 98:16 98:21
<b>different</b> 14:21 16:6,20 17:2,6,6 17:16 20:21 22:7 23:9,25 24:5 27:4 38:10 39:8 39:13 40:2 42:2 49:19 50:6,25 52:5 55:14 66:12 78:11 79:4 88:1 91:2,3,22 92:5 97:22,24 98:7,8 104:2 107:22 108:3,8 110:24 111:4 116:10,20 117:6 120:12 123:15 128:7 129:9,15 135:8 141:25 142:4,4 146:11,23 150:24 152:9 163:1 164:6	<b>discussing</b> 100:13	<b>draft</b> 66:5 67:2	<b>E</b>	<b>enable</b> 169:6
<b>different</b> 14:21 16:6,20 17:2,6,6 17:16 20:21 22:7 23:9,25 24:5 27:4 38:10 39:8 39:13 40:2 42:2 49:19 50:6,25 52:5 55:14 66:12 78:11 79:4 88:1 91:2,3,22 92:5 97:22,24 98:7,8 104:2 107:22 108:3,8 110:24 111:4 116:10,20 117:6 120:12 123:15 128:7 129:9,15 135:8 141:25 142:4,4 146:11,23 150:24 152:9 163:1 164:6	<b>discussion</b> 125:16	<b>drafting</b> 88:22	<b>earlier</b> 10:20 52:2 53:9 82:13 93:19 95:9 101:2 115:14	<b>enables</b> 154:11 172:10
<b>different</b> 14:21 16:6,20 17:2,6,6 17:16 20:21 22:7 23:9,25 24:5 27:4 38:10 39:8 39:13 40:2 42:2 49:19 50:6,25 52:5 55:14 66:12 78:11 79:4 88:1 91:2,3,22 92:5 97:22,24 98:7,8 104:2 107:22 108:3,8 110:24 111:4 116:10,20 117:6 120:12 123:15 128:7 129:9,15 135:8 141:25 142:4,4 146:11,23 150:24 152:9 163:1 164:6	<b>disentangle</b> 25:2 118:12	<b>draftsman</b> 1:14 15:24 18:24 20:14 28:5 33:21 37:12 39:5 41:12 42:17 47:9 49:4 71:8,21 73:4 79:19 86:12,21 90:4 96:7 97:18 98:10,13 99:21 109:22 115:11 120:8 123:6,10 141:20 146:14 148:8 149:1 150:24 157:5 170:7 172:13	<b>early</b> 12:3 19:12 22:23 46:25 77:23 79:5 88:12 92:19 93:3,17 94:6 142:7,10 143:4,8,13 146:3 146:4,7 152:18 153:1 170:7,11 170:15	<b>encompass</b> 38:18 38:19 59:13
<b>different</b> 14:21 16:6,20 17:2,6,6 17:16 20:21 22:7 23:9,25 24:5 27:4 38:10 39:8 39:13 40:2 42:2 49:19 50:6,25 52:5 55:14 66:12 78:11 79:4 88:1 91:2,3,22 92:5 97:22,24 98:7,8 104:2 107:22 108:3,8 110:24 111:4 116:10,20 117:6 120:12 123:15 128:7 129:9,15 135:8 141:25 142:4,4 146:11,23 150:24 152:9 163:1 164:6	<b>disgorgement</b> 20:10	<b>draftsman's</b> 88:22 98:6 123:12	<b>effect</b> 12:8 27:21 30:16 31:14,16 32:8 67:11 70:24 88:7 96:23 147:9 154:8 166:7 173:23	<b>encompassed</b> 30:20
<b>different</b> 14:21 16:6,20 17:2,6,6 17:16 20:21 22:7 23:9,25 24:5 27:4 38:10 39:8 39:13 40:2 42:2 49:19 50:6,25 52:5 55:14 66:12 78:11 79:4 88:1 91:2,3,22 92:5 97:22,24 98:7,8 104:2 107:22 108:3,8 110:24 111:4 116:10,20 117:6 120:12 123:15 128:7 129:9,15 135:8 141:25 142:4,4 146:11,23 150:24 152:9 163:1 164:6	<b>disgorging</b> 17:8 20:7	<b>draftsmen</b> 40:22 41:14	<b>effective</b> 32:21 142:9 144:19 145:22	<b>enforceable</b> 116:7
<b>different</b> 14:21 16:6,20 17:2,6,6 17:16 20:21 22:7 23:9,25 24:5 27:4 38:10 39:8 39:13 40:2 42:2 49:19 50:6,25 52:5 55:14 66:12 78:11 79:4 88:1 91:2,3,22 92:5 97:22,24 98:7,8 104:2 107:22 108:3,8 110:24 111:4 116:10,20 117:6 120:12 123:15 128:7 129:9,15 135:8 141:25 142:4,4 146:11,23 150:24 152:9 163:1 164:6	<b>displace</b> 98:5	<b>draw</b> 24:18 126:6	<b>edges</b> 121:10	<b>England</b> 5:13 11:12
<b>different</b> 14:21 16:6,20 17:2,6,6 17:16 20:21 22:7 23:9,25 24:5 27:4 38:10 39:8 39:13 40:2 42:2 49:19 50:6,25 52:5 55:14 66:12 78:11 79:4 88:1 91:2,3,22 92:5 97:22,24 98:7,8 104:2 107:22 108:3,8 110:24 111:4 116:10,20 117:6 120:12 123:15 128:7 129:9,15 135:8 141:25 142:4,4 146:11,23 150:24 152:9 163:1 164:6	<b>dispute</b> 96:17		<b>effectively</b> 88:17 156:14	<b>English</b> 5:7,10,11 5:14 8:2,24 21:23 133:7 157:8
<b>different</b> 14:21 16:6,20 17:2,6,6 17:16 20:21 22:7 23:9,25 24:5 27:4 38:10 39:8 39:13 40:2 42:2 49:19 50:6,25 52:5 55:14 66:12 78:11 79:4 88:1 91:2,3,22 92:5 97:22,24 98:7,8 104:2 107:22 108:3,8 110:24 111:4 116:10,20 117:6 120:12 123:15 128:7 129:9,15 135:8 141:25 142:4,4 146:11,23 150:24 152:9 163:1 164:6	<b>disputes</b> 97:1,24			<b>enormous</b> 15:22 88:12 107:13 111:19
<b>different</b> 14:21 16:6,20 17:2,6,6 17:16 20:21 22:7 23:9,25 24:5 27:4 38:10 39:8 39:13 40:2 42:2 49:19 50:6,25 52:5 55:14 66:12 78:11 79:4 88:1 91:2,3,22 92:5 97:22,24 98:7,8 104:2 107:22 108:3,8 110:24 111:4 116:10,20 117:6 120:12 123:15 128:7 129:9,15 135:8 141:25 142:4,4 146:11,23 150:24 152:9 163:1 164:6	<b>dissecting</b> 14:9			<b>enquiry</b> 34:19 50:4
<b>different</b> 14:21 16:6,20 17:2,6,6 17:16 20:21 22:7 23:9,25 24:5 27:4 38:10 39:8 39:13 40:2 42:2 49:19 50:6,25 52:5 55:14 66:12 78:11 79:4 88:1 91:2,3,22 92:5 97:22,24 98:7,8 104:2 107:22 108:3,8 110:24 111:4 116:10,20 117:6 120:12 123:15 128:7 129:9,15 135:8 141:25 142:4,4 146:11,23 150:24 152:9 163:1 164:6	<b>distinct</b> 162:14			<b>ensure</b> 21:22 47:5 60:2
<b>different</b> 14:21 16:6,20 17:2,6,6 17:16 20:21 22:7 23:9,25 24:5 27:4 38:10 39:8 39:13 40:2 42:2 49:19 50:6,25 52:5 55:14 66:12 78:11 79:4 88:1 91:2,3,22 92:5 97:22,24 98:7,8 104:2 107:22 108:3,8 110:24 111:4 116:10,20 117:6 120:12 123:15 128:7 129:9,15 135:8 141:25 142:4,4 146:11,23 150:24 152:9 163:1 164:6	<b>distinction</b> 47:14 71:21 73:4 137:19			
<b>different</b> 14:21 16:6,20 17:2,6,6 17:16 20:21 22:7 23:9,25 24:5 27:4 38:10 39:8 39:13 40:2 42:2 49:19 50:6,25 52:5 55:14 66:12 78:11 79:4 88:1 91:2,3,22 92:5 97:22,24 98:7,8 104:2 107:22 108:3,8 110:24 111:4 116:10,20 117:6 120:12 123:15 128:7 129:9,15 135:8 141:25 142:4,4 146:11,23 150:24 152:9 163:1 164:6	<b>distinguish</b> 70:3 150:13			
<b>different</b> 14:21 16:6,20 17:2,6,6 17:16 20:21 22:7 23:9,25 24:5 27:4 38:10 39:8 39:13 40:2 42:2 49:19 50:6,25 52:5 55:14 66:12 78:11 79:4 88:1 91:2,3,22 92:5 97:22,24 98:7,8 104:2 107:22 108:3,8 110:24 111:4 116:10,20 117:6 120:12 123:15 128:7 129:9,15 135:8 141:25 142:4,4 146:11,23 150:24 152:9 163:1 164:6	<b>distressed</b> 88:11 174:22			
<b>different</b> 14:21 16:6,20 17:2,6,6 17:16 20:21 22:7 23:9,25 24:5 27:4 38:10 39:8 39:13 40:2 42:2 49:19 50:6,25 52:5 55:14 66:12 78:11 79:4 88:1 91:2,3,22 92:5 97:22,24 98:7,8 104:2 107:22 108:3,8 110:24 111:4 116:10,20 117:6 120:12 123:15 128:7 129:9,15 135:8 141:25 142:4,4 146:11,23 150:24 152:9 163:1 164:6	<b>distributable</b> 65:16,21			
<b>different</b> 14:21 16:6,20 17:2,6,6 17:16 20:21 22:7 23:9,25 24:5 27:4 38:10 39:8 39:13 40:2 42:2 49:19 50:6,25 52:5 55:14 66:12 78:11 79:4 88:1 91:2,3,22 92:5 97:22,24 98:7,8 104:2 107:22 108:3,8 110:24 111:4 116:10,20 117:6 120:12 123:15 128:7 129:9,15 135:8 141:25 142:4,4 146:11,23 150:24 152:9 163:1 164:6	<b>distribution</b> 63:9			
<b>different</b> 14:21 16:6,20 17:2,6,6 17:16 20:21 22:7 23:9,25 24:5 27:4 38:10 39:8 39:13 40:2 42:2 49:19 50:6,25 52:5 55:14 66:12 78:11 79:4 88:1 91:2,3,22 92:5 97:22,24 98:7,8 104:2 107:22 108:3,8 110:24 111:4 116:10,20 117:6 120:12 123:15 128:7 129:9,15 135:8 141:25 142:4,4 146:11,23 150:24 152:9 163:1 164:6	<b>distributions</b> 119:23			
<b>different</b> 14:21 16:6,20 17:2,6,6 17:16 20:21 22:7 23:9,25 24:5 27:4 38:10 39:8 39:13 40:2 42:2 49:19 50:6,25 52:5 55:14 66:12 78:11 79:4 88:1 91:2,3,22 92:5 97:22,24 98:7,8 104:2 107:22 108:3,8 110:24 111:4 116:10,20 117:6 120:12 123:15 128:7 129:9,15 135:8 141:25 142:4,4 146:11,23 150:24 152:9 163:1 164:6	<b>diverted</b> 31:25			
<b>different</b> 14:21 16:6,20 17:2,6,6 17:16 20:21 22:7 23:9,25 24:5 27:4 38:10 39:8 39:13 40:2 42:2 49:19 50:6,25 52:5 55:14 66:12 78:11 79:4 88:1 91:2,3,22 92:5 97:22,24 98:7,8 104:2 107:22 108:3,8 110:24 111:4 116:10,20 117:6 120:12 123:15 128:7 129:9,15 135:8 141:25 142:4,4 146:11,23 150:24 152:9 163:1 164:6	<b>divide</b> 21:1			
<b>different</b> 14:21 16:6,20 17:2,6,6 17:16 20:21 22:7 23:9,25 24:5 27:4 38:10 39:8 39:13 40:2 42:2 49:19 50:6,25 52:5 55:14 66:12 78:11 79:4 88:1 91:2,3,22 92:5 97:22,24 98:7,8 104:2 107:22 108:3,8 110:24 111:4 116:10,20 117:6 120:12 123:15 128:7 129:9,15 135:8 141:25 142:4,4 146:11,23 150:24 152:9 163:1 164:6	<b>dividend</b> 62:19 63:18 64:6,7,9 65:3 66:3 68:11 70:10,18 72:15			
<b>different</b> 14:21 16:6,20 17:2,6,6 17:16 20:21 22:7 23:9,25 24:5 27:4 38:10 39:8 39:13 40:2 42:2 49:19 50:6,25 52:5 55:14 66:12 78:11 79:4 88:1 91:2,3,22 92:5 97:22,24 98:7,8 104:2 107:22 108:3,8 110:24 111:4 116:10,20 117:6 120:12 123:15 128:7 129:9,15 135:8 141:25 142:4,4 146:11,23 150:24 152:9 16				

<b>enter</b> 36:14 38:16 78:21 134:16,19 164:16	94:17 171:21	64:12 120:6	119:4 120:20	<b>expect</b> 69:11 72:11
<b>entered</b> 37:5 74:18 86:22 87:18	<b>equated</b> 55:22 121:7	<b>essentially</b> 28:9 29:4 47:20 60:2	129:13 131:1	72:25 92:8 176:1
<b>entering</b> 10:11 36:3,8 118:8	<b>equation</b> 34:14 155:20	75:8 80:21 87:1 91:24 99:14	145:14 151:24	<b>expectation</b> 12:11
<b>enterprise</b> 61:11 100:2	<b>Equitas</b> 159:4,8,13 159:24 160:3,7	151:9,21	158:17 166:4 174:8	72:16
<b>enters</b> 49:8	161:13,15 162:1 162:3,12,17,20	<b>establish</b> 113:14	<b>examples</b> 22:15 72:1 98:18	<b>expectations</b> 88:14
<b>entire</b> 4:13,16 39:24,24 76:10	163:7	<b>established</b> 80:17 165:16	<b>exception</b> 138:8,25 139:11,13 156:11	<b>expected</b> 13:8 88:9
172:18	<b>Equitas's</b> 160:21 161:3,21	<b>estate</b> 11:22	<b>exceptional</b> 107:15	<b>expense</b> 24:16
<b>entirely</b> 6:19 14:21 29:1,2 51:3	<b>equity</b> 11:25 24:10 26:7 27:23 29:2	<b>estimated</b> 176:5	<b>exceptions</b> 94:9 138:19 155:8	<b>expenses</b> 14:24
101:3 111:6	32:25 48:16	<b>et</b> 11:5,19 13:23 14:11 26:7 27:23	156:10,14,23	<b>expert</b> 83:14 104:8
164:6 171:11	58:10,11 59:1,4,7	32:4	<b>excessive</b> 164:7	<b>experts</b> 85:5 86:2
<b>entities</b> 76:20	59:8,13,14,15,21	<b>eternal</b> 176:13	<b>exchange</b> 2:20 124:17	<b>explain</b> 41:13
100:9 117:15,21	60:3,10,11,14,16	<b>event</b> 7:3 14:13 15:20 19:20,21	<b>exclude</b> 33:16 92:20 95:8	70:16 71:22
172:22	60:20 62:5 67:21	22:19 23:14,14	<b>excluded</b> 59:15,22 68:11 95:15	103:13 114:10
<b>entitled</b> 28:6,7 29:20 40:21	67:25 68:23 69:5	30:25 42:23 97:6	<b>excludes</b> 9:23,25	141:19 145:12
54:16 57:12 58:5	69:10,13,18,21	116:3 128:24	<b>excluding</b> 143:13	146:21 167:15
61:13 63:17 65:6	70:3,15,21,23	132:3 146:4,8,9	<b>exclusively</b> 47:25	<b>explainable</b> 141:21
66:2 82:16 137:8	71:6,14 72:21	146:13 147:6	<b>exercise</b> 17:17 32:5,15 33:21	<b>explained</b> 68:1
137:13 158:8	73:1,1,8,15 74:14	152:22 156:19	37:10 49:14,20	69:18 115:14
161:22 162:1	74:15 75:10,15	166:20 170:13	50:12,25 51:2,3	122:17 130:2
163:19 171:2,24	76:8 77:14,17	<b>events</b> 156:18,18	74:19 100:15	150:12 167:3,25
<b>entitlement</b> 62:22 171:3	78:9,10 83:20,21	<b>eventually</b> 160:25	172:16	<b>explaining</b> 149:8
<b>entitlements</b> 83:5	87:4,9,24 90:6,7	<b>eventuate</b> 167:20	<b>exercises</b> 17:16	<b>explains</b> 21:6 75:1
<b>entity</b> 26:21 48:17	100:3,4 102:25	<b>everybody</b> 106:16	<b>exist</b> 132:19 169:6	80:1 106:24
48:17 75:11,24	106:23,25 107:7	<b>evidence</b> 11:21 12:8 63:11 74:21	<b>existed</b> 61:24	140:23
106:20,20 107:8	107:9 108:7	82:14,23 83:13	<b>existing</b> 78:14 173:23	<b>explanation</b> 21:9
111:6,7,8,9	109:10 110:21	104:8 108:25	<b>exorbitant</b> 31:3	21:10 23:22
113:19 114:12	111:7,8,13,25	110:10,19 112:4	<b>expand</b> 12:24 105:5,17 125:15	29:23 67:19,24
117:23 118:17	112:8,15 117:13	113:14 126:6,11	<b>expanded</b> 11:8 22:6 48:15	93:22 139:6
125:25 127:9	117:16 119:15	127:14 134:4	<b>expanding</b> 22:5	141:11 145:9
131:2,10 138:14	123:3 126:15	159:22,25 171:22	<b>expansive</b> 11:17 11:24 12:18,25	149:23 150:10,10
156:17 171:1	128:15 129:1,5	<b>evident</b> 17:19	13:3,21 15:20	150:15,16 163:4
173:25	131:6,8,9,10	<b>exactly</b> 10:17 17:14 29:4 66:22	25:24 33:9,10	169:4 171:4
<b>entity's</b> 76:1,22	133:25 137:1	95:24 99:1 138:5	45:7 49:7 54:25	<b>explanations</b> 97:20
<b>entry</b> 38:20	158:11	150:6	55:4,8 98:14	<b>expose</b> 157:5,18
<b>environment</b> 109:12	<b>equivalent</b> 38:2 46:4 94:23	<b>examination</b> 77:19	105:9	<b>exposed</b> 69:4
<b>envisaged</b> 170:8 172:24	112:21	<b>example</b> 13:6 23:7 24:14,24 26:16	<b>expanded</b> 11:8 22:6 48:15	156:4,25 157:14
<b>equal</b> 2:20 18:2 20:23 47:22	<b>erase</b> 91:4	26:22 28:13	<b>expanding</b> 22:5	<b>exposing</b> 164:7
57:21,24 76:11	<b>error</b> 99:15	30:10 36:13	<b>expansive</b> 11:17 11:24 12:18,25	<b>exposition</b> 38:17
	<b>escapes</b> 65:25	38:22 56:4 67:10	13:3,21 15:20	<b>exposure</b> 107:13
	<b>essence</b> 4:6 72:21 105:4	71:25 72:8 74:3	25:24 33:9,10	110:17 169:9
	<b>essential</b> 2:6 37:2 60:20 62:5,7	79:4 94:15 95:14	45:7 49:7 54:25	<b>express</b> 16:24 54:3
		110:2 111:23	55:4,8 98:14	65:5 97:13
			105:9	<b>expressed</b> 52:1 164:17
			<b>expansively</b> 116:11,14	<b>expressing</b> 65:11
				<b>expression</b> 16:1 24:7 90:20 97:16
				124:1

<b>expressly</b> 16:7 53:20 115:13 <b>extend</b> 44:21 <b>extends</b> 44:21 <b>extension</b> 141:1 <b>extent</b> 6:22 9:6 12:22 28:23 47:23 77:5 91:16 91:21 98:22 155:15 162:12 <b>external</b> 14:23 <b>extra</b> 26:15 <b>extraneous</b> 11:4 75:22 <b>extreme</b> 30:25 107:12 109:19 110:1 128:13,24 <b>extremely</b> 110:22	168:1 <b>factual</b> 5:6 104:7 105:15 107:18 171:11 <b>failed</b> 90:14 160:22 <b>failing</b> 19:10 <b>fails</b> 152:21 <b>failure</b> 82:18 142:6 <b>fair</b> 11:10 <b>fairly</b> 20:18 175:24 <b>faith</b> 4:3 33:14 38:3 42:13 48:5 48:22 53:23 54:7 54:13 128:25 134:21 174:5,12 <b>fall</b> 13:1 26:17 69:8,24 70:19 129:2 132:20 160:23 <b>fallen</b> 99:15 <b>falling</b> 73:8 <b>falls</b> 4:7 79:8 150:15 <b>false</b> 60:3 <b>fanciful</b> 111:18 <b>fantasy</b> 49:8 <b>far</b> 12:20 15:4 24:19 28:2 30:25 44:20 53:15 57:23,23 61:25 90:22 124:11 132:15 135:11 140:21 163:13 172:2 <b>Farwell</b> 60:23 63:13 <b>fashion</b> 168:17 <b>fault</b> 19:15,17,19 <b>favour</b> 6:23 81:18 168:11 <b>favoured</b> 173:17 <b>feature</b> 61:8,9,12 67:5,15 119:25 <b>features</b> 3:2,4,5,5 58:18,23,25 59:1 60:12,16,20 62:5 62:7,15 71:2	123:2,19 <b>February</b> 81:12,15 <b>Federal</b> 110:23 <b>fee</b> 14:20 15:11,15 15:17,18 <b>feeds</b> 88:14 <b>feel</b> 177:3 <b>feeling</b> 29:17 <b>fees</b> 10:1 15:14 48:18 126:23 <b>feet</b> 176:1,5 178:7 <b>fell</b> 120:11 167:2 <b>felt</b> 6:3 47:7 <b>fetter</b> 67:12 <b>fides</b> 64:19 <b>fifth</b> 15:20 33:17 64:3 125:10 <b>figure</b> 48:25 <b>figures</b> 112:18,20 161:4 <b>fill</b> 10:14 26:15 73:15 91:25 <b>final</b> 33:24 54:22 127:2 173:16 <b>Finally</b> 36:23 <b>finance</b> 20:19 21:7 31:4 70:23 99:19 100:20 102:18 <b>financial</b> 9:24 24:8 24:19 25:6 31:18 32:19 34:20,20 73:23 108:17,19 155:11 156:5 <b>financing</b> 139:16 139:23 151:4 169:7 <b>find</b> 6:11 11:13 34:17 41:2 65:25 68:16 69:13 110:11 127:20,23 138:6 154:9,16 <b>fine</b> 48:2 <b>finish</b> 88:5 169:19 175:24 177:9 <b>finished</b> 1:6 175:13 <b>Fire</b> 16:9 <b>firm</b> 70:6,9,10 <b>firms</b> 69:12 70:8 <b>firm's</b> 75:9	<b>first</b> 1:6,10 2:22 4:12 8:6 9:15 10:21 13:4,16 22:17 23:15 24:13 26:17 27:5 30:9 33:4,23 34:10 37:23 42:15 43:4 45:19 50:8 52:11,12 53:16 60:13,21 60:25 61:8,12 63:6,15,24,25 64:25 70:14,16 71:7 75:7 83:24 84:23 85:17 90:12 92:6 101:9 103:1 115:12,13 119:10 124:13,21 128:4,10 129:10 129:16,20 131:17 136:18,21 139:9 139:10 141:24 142:5 148:11 151:6 156:11 157:10,21 158:10 158:12 160:12 166:16,24 175:8 178:8 <b>Firth</b> 103:24 <b>fit</b> 5:12 54:19 123:22 <b>fits</b> 98:3,5 <b>five</b> 63:15,24 77:16 139:10 158:12 <b>fixed</b> 4:2 62:19,21 64:7 144:6 <b>flag</b> 48:9,13 <b>flattering</b> 104:3 <b>flawed</b> 76:8 <b>flexibility</b> 45:5,7 46:23 47:4,10 <b>flexible</b> 45:4 116:19 <b>flexibly</b> 116:13 <b>flip</b> 122:20 <b>flowing</b> 25:11 115:9 <b>focused</b> 6:19 126:13 <b>focuses</b> 1:16 97:25	<b>focusing</b> 8:7 10:3 26:14 40:11 55:10 60:7,8 67:20 91:10 142:1 <b>follow</b> 2:22 94:14 <b>following</b> 35:15 43:22 46:8,14 71:22 77:23 91:5 146:9 159:7 162:3 164:23 <b>follows</b> 29:10 80:13 82:14 108:2 124:21 125:5 <b>Fondazione</b> 53:8 <b>Forbes</b> 4:12 115:17 <b>Forbes's</b> 6:5 <b>force</b> 152:22 153:5 <b>foreign</b> 5:16,17 <b>foremost</b> 60:25 <b>forensic</b> 96:22 <b>forewarning</b> 177:7 <b>form</b> 1:13 37:2 52:2 151:9 <b>former</b> 125:15 <b>forming</b> 143:25 <b>forms</b> 15:16 78:11 143:19 <b>fortunes</b> 61:5 <b>forward</b> 6:4 86:8 92:15,23 101:1 131:19 <b>forwards</b> 144:2 <b>found</b> 2:2 41:17 68:3 101:11 113:22 135:12 <b>four</b> 70:16 130:6 141:25 142:3,4 145:4,4 146:11 147:4 <b>fourth</b> 12:23 22:13 46:5 58:10 144:24 <b>Foxton</b> 20:12 26:19 37:17 54:25 93:1 105:7 107:16 111:13,17 112:17 113:9
<b>F</b>				
<b>F</b> 22:1 <b>faced</b> 44:4 <b>facility</b> 113:23,24 126:6 <b>facing</b> 26:8 <b>fact</b> 3:2,8 5:15 6:20 13:6 14:22 15:15 20:6 24:14 24:21 25:16 26:2 26:8,11 28:24 29:21 32:24 33:7 33:25 39:2 56:15 56:15 67:3 73:21 77:5,22 82:17 84:12 87:3 95:17 100:9 101:18 102:22 105:2,11 106:16,17,22 107:5,19 108:14 109:19 110:19 112:16 113:2 117:21 119:5 120:22 121:25 125:25 129:16 151:14 161:11 173:16 <b>factor</b> 168:11 <b>factors</b> 75:23 109:16 <b>facts</b> 103:7 105:16				



177:6	117:15,21 125:19	126:9,17 131:23	150:7 156:10	90:21 96:5
<b>Foxton's</b> 112:6	125:21 126:4,14	134:3 135:16,23	157:7,10,13,17	105:23 106:20
<b>fraction</b> 68:10	136:16 137:9	135:24 137:5,8	158:7,14,25	107:2,22 108:7
<b>frame</b> 134:16,19	174:17	146:22 147:22	163:14,22 166:7	110:20 111:25
<b>framework</b> 133:8	<b>fundamental</b>	148:5 153:13	166:19,19,20	114:9 118:2,17
<b>frankly</b> 176:11	60:14,16 67:18	154:20,23,24	169:14	121:19 126:7
<b>free</b> 70:23 75:8,17	67:23 123:2	155:1,24,25	<b>generally</b> 11:23	133:23 135:6
<b>freely</b> 156:1	<b>fundamentally</b>	163:21 170:3,22	12:17 21:9 28:18	136:23 141:19
<b>freestanding</b> 85:20	62:24,25	171:8 172:4,6,11	32:10 38:18 42:7	153:9 160:20
<b>frequently</b> 96:22	<b>funded</b> 29:1 100:1	172:17,22 173:5	48:6,7,11 76:1	175:20 177:8,18
<b>friend</b> 3:13 17:3	100:19	173:7,12,22,24	109:10 125:20,21	<b>goes</b> 60:12 123:2
20:19 27:2,4	<b>funding</b> 1:8,8,10	174:6	155:9 169:8,15	135:9 158:21
42:9,23 50:19	1:15,21,24 2:15	<b>funds</b> 30:12,18	<b>generic</b> 133:5,8	162:5,21 172:2
54:24 56:5 59:3	3:12,19,22 4:5,7	72:2,3,7 73:1,2	135:2	172:12
68:1 77:7 93:1	4:24 5:3 8:7,8,9	81:20 87:25 88:8	<b>gentlemen</b> 29:8	<b>going</b> 6:13 8:8
105:7 112:24	10:11,16,20 11:8	88:10 99:18	<b>genuinely</b> 174:6	10:15 34:22
119:11 128:12	14:6,14 16:4,5	100:20 102:6	<b>German</b> 178:12	37:16 43:18
141:9 148:6	17:5,14,25 18:4	108:10,14 121:19	<b>getting</b> 41:20	49:22 50:16
149:23 170:24	18:18 19:2,22	123:15,16 133:25	111:5	58:19 71:19
173:17,19 175:14	20:9 21:1 22:17	160:22 161:1,22	<b>give</b> 2:24 22:14	73:14 76:15,24
<b>friends</b> 30:21	23:2,5,8,17,18,19	161:23 173:1	24:12 26:11 52:9	79:24 84:6 86:8
37:16 55:17	24:4,7 25:9,13,15	175:4	69:22 79:4 81:1	87:13 89:20
100:14 125:17	25:23 26:24 27:8	<b>fund's</b> 88:2	103:18 124:10	90:12,17 92:14
132:10 134:3	28:8,15,16,18	<b>further</b> 9:7 11:4	128:8 135:10	92:22 102:19
175:25	29:7,13 30:22	27:22,22 53:21	153:22 173:24	107:14 109:18
<b>friend's</b> 29:23	31:22,23 32:10	59:24 60:18 77:2	<b>given</b> 9:24 11:15	111:2 112:14,22
101:4 150:9,16	34:7,10 35:9	81:16,17 83:3	19:4 22:25 33:21	123:5 134:22
155:15	37:13,19 38:7,9	105:23 112:5	42:21 44:6 52:12	141:15 143:22
<b>frightening</b> 109:8	38:13,14,17,24	<b>future</b> 3:11 35:17	55:4 83:14 97:20	144:2 146:22,24
<b>front</b> 14:19	39:2,4,6,12,14,21	36:22,23,25	119:4 121:18	147:10 156:20
<b>fulfil</b> 118:4,10	39:23,25 40:8	77:18	123:7,21 126:21	160:19 174:21
120:6	41:15 42:3,6		126:24 132:8	175:24 177:19,21
<b>fulfilled</b> 51:7	47:15,23 49:12	<b>G</b>	141:12 143:17	178:8
<b>fulfilment</b> 52:20	50:12 51:16 55:5	<b>G</b> 21:20	149:23 150:25	<b>Goldman</b> 16:7,17
<b>fulfils</b> 118:22	55:11 56:13	<b>gains</b> 94:3 95:16	155:23	32:22 73:10
<b>full</b> 8:18 63:22	58:16,19 59:7,12	<b>gap</b> 10:14 26:15,23	<b>gives</b> 20:4 66:11	74:22 76:16
88:13 176:13	60:9 71:1 72:4	26:23,24 27:18	85:17 155:22	86:25 102:6,21
<b>function</b> 2:12	73:15,25 74:14	27:19 28:8,9,12	173:21 178:11	107:5 108:23
21:22 147:15,15	74:15 76:5,9,22	30:6 73:15 91:25	<b>global</b> 144:2	110:5 111:2
148:3	77:21 83:16,21	<b>gaps</b> 31:1	<b>Gloster</b> 79:23	113:2 114:16
<b>fund</b> 10:16 17:24	83:21,25 84:14	<b>garden</b> 98:2,5	82:10	119:4 130:3
18:3,7,10 20:5	84:25 86:11,14	<b>Gas</b> 81:4	<b>go</b> 4:15 6:6 11:4	177:17
23:3,6 25:14	88:8 90:5,15,24	<b>GBP</b> 32:20 110:15	12:10 24:19 26:6	<b>Goldmans</b> 11:10
33:3,6 38:19	91:7,12,16 92:14	126:1,2 161:8	26:15 27:11	110:13 112:12
47:24 56:1 57:15	99:16,20 100:16	<b>general</b> 4:8,8 5:4,5	28:19 29:16	<b>good</b> 1:3,5 4:3
64:11 66:25	100:16,18,23	6:16 7:23 15:1,3	30:11 31:12,13	17:1 38:3 42:12
76:20 77:4 87:7	101:6 102:25	15:5 28:3 30:18	41:5 44:19 48:3	48:5,22,25 53:23
88:17 100:1,9,11	109:10 117:19,24	30:21 42:20,24	49:9 51:23 68:3	54:7,13 79:25
102:4 106:17	123:25 124:18,20	64:10 66:14	69:23 70:19,24	80:8 100:22
107:2,9 108:11	124:25 125:11,13	137:24 140:13	76:10,24 79:12	110:5 128:25

<p>134:21 145:9 174:5 178:15 <b>governed</b> 5:14 <b>governing</b> 154:14 <b>granted</b> 169:5 <b>granting</b> 139:18 <b>grateful</b> 6:8,11 29:23 86:1 113:1 127:25 152:25 <b>great</b> 74:2 88:16 165:18 167:3,7 175:23 177:12,21 <b>greater</b> 46:23 47:10 89:14 121:20 126:10 162:25 171:15 <b>ground</b> 3:24 25:6 25:10 26:1 28:20 28:22,23 30:4 51:15 53:10 59:22 90:9 107:8 137:7,19 154:5 154:11 <b>grounds</b> 42:10,11 53:23 67:13 <b>group</b> 11:9 13:13 16:24 46:1 77:10 87:1 98:15 102:6 102:21 115:21 171:14,19 <b>Group's</b> 2:11 73:10 170:1 <b>grown</b> 7:12 <b>guarantee</b> 72:22 81:18,21 82:19 <b>guaranteed</b> 69:12 <b>guesstimate</b> 70:1 <b>guide</b> 11:7 12:19 44:19 45:2,3,11 45:21 46:16 52:4 79:1 97:20 139:7 140:23</p> <hr/> <p><b>H</b></p> <p><b>H</b> 97:5 <b>Haematite</b> 63:5 <b>half</b> 95:5 136:18 178:14 <b>halfway</b> 94:1 <b>hand</b> 34:6,6,18,19</p>	<p>78:16 81:4 83:13 153:14 <b>handed</b> 43:3 96:11 96:12 <b>hands</b> 122:25 167:21 168:21 <b>hang</b> 166:17 <b>hanging</b> 66:19 <b>hangover</b> 135:22 <b>happen</b> 139:25 158:17 <b>happened</b> 88:11 109:8 113:19 159:12 <b>happening</b> 73:12 99:23 <b>happens</b> 61:8 102:17 127:9 <b>hark</b> 10:19 <b>Hathaway</b> 111:4 111:14 <b>head</b> 30:19 31:7,20 122:20 <b>headed</b> 46:17 101:24 138:7 <b>heading</b> 43:22 55:13 96:15 139:8 144:13 162:9 <b>headline</b> 58:6 76:17 87:20 <b>headnote</b> 21:13 63:6 <b>heads</b> 163:2 <b>heard</b> 16:23 132:10 164:22 <b>hearing</b> 118:19 127:22 178:17 <b>hedge</b> 72:2,3,7 87:7 88:2,7,9,17 <b>Heesh</b> 66:1 <b>held</b> 23:12 82:15 161:22 <b>help</b> 27:1 39:1 172:3 <b>helpful</b> 12:22 40:16,17 96:8,19 118:25 <b>hesitate</b> 60:14 <b>high</b> 114:11</p>	<p>173:22,24 174:7 <b>higher</b> 11:25 19:1 79:11 131:10 <b>highlight</b> 63:13 <b>highly</b> 24:13 73:15 75:20 79:15 107:8 121:17 <b>HILDYARD</b> 1:3 5:15,20 6:9,12 7:17 8:1,13 9:9 9:14 12:10,13 16:11,14 17:11 18:12 20:22 21:5 22:4 25:18,23 26:4,19 28:11,18 28:21 29:16,25 30:3,15,24 31:11 39:5,11 40:3,21 40:24 41:13,19 41:25 43:7 44:13 45:15 48:24 49:16,22 50:11 50:14,22,24 51:10,22 52:7,18 52:20,24 53:4,18 53:25 54:2,6,10 54:12,18 56:18 56:24 59:19 60:6 60:11 65:18 66:21,23 67:5,10 68:5,17,20 74:9 74:13,21,25 84:4 84:9 85:25 88:6 89:3 92:11,16 95:22,25 96:13 97:22 98:2,16,21 99:1,3,7,9,11 101:13,16,19 102:2 103:21,24 104:3,5,11,13,24 105:23 106:3,5 106:12 107:16 109:3,7,15,22 110:4,7 111:2,11 111:15 113:4,11 114:25 120:9,14 120:19,24 121:7 122:4,8,10,13,23 123:4 124:6,8 127:5,19 128:2</p>	<p>130:11 131:25 132:5 133:2,5,15 133:18 134:12,22 134:25 135:4,14 139:22 140:1,5 140:19 141:1,4 141:14,18 148:16 148:19 152:2,4 152:24 153:2,22 153:24 154:4 162:25 164:20 166:14,23 167:6 167:17 168:11,20 168:24 169:20 174:4,8,13 175:18 176:3,8 176:24 177:1,15 177:23 178:7,15 <b>hinted</b> 44:22 <b>historic</b> 77:6,19 79:12 88:9 <b>historically</b> 78:14 <b>history</b> 33:22 41:14 77:9 78:7 78:25 150:5 171:11,11 <b>Hoffmann</b> 105:24 <b>hold</b> 82:23 <b>holder</b> 120:19 <b>holding</b> 12:20 17:9 <b>hole</b> 25:20 <b>hole-punch</b> 84:11 <b>honest</b> 177:24 <b>Hong</b> 66:9 <b>hope</b> 90:18 96:11 124:10 135:9 <b>hopefully</b> 124:12 178:11 <b>horrendous</b> 73:22 <b>hours</b> 175:16 <b>House</b> 114:23 <b>Housekeeping</b> 175:15 179:4 <b>Hughes</b> 83:14 <b>hybrid</b> 67:2 117:11,16 118:8 118:9 <b>hyperbole</b> 116:1 <b>hypothecated</b> 66:24</p>	<p><b>hypothetical</b> 17:17 32:6 55:24,24 56:1 124:15 125:23 130:17,19 130:21 132:2,14 <b>hypothetically</b> 10:17</p> <hr/> <p><b>I</b></p> <p><b>idea</b> 175:19 <b>identified</b> 5:3 17:20 34:5 102:13 115:11 127:18 149:11 <b>identifies</b> 130:23 147:9,21 149:20 <b>identify</b> 1:19 3:4,6 22:14 37:2 39:17 40:19 59:17 60:13 73:25 77:24 78:5 86:15 91:13 108:4 118:7 145:14 <b>identifying</b> 10:23 44:23 52:14 86:10 88:23 100:17 122:2 147:16 148:4 149:21 151:23 152:17 172:16 <b>identity</b> 163:17 <b>ignores</b> 33:7 <b>illegality</b> 152:22 153:5 <b>illuminate</b> 115:2 <b>illuminated</b> 7:6,21 <b>illuminates</b> 115:16 <b>illuminating</b> 168:25,25 <b>Illustrate</b> 26:4 <b>illustrated</b> 55:23 57:8 <b>illustrates</b> 112:1 <b>illustration</b> 110:6 110:9 <b>illustrations</b> 134:14 <b>imagine</b> 26:18 <b>imagining</b> 68:14 111:12</p>
--	---	---	---	---

<b>immediate</b> 74:19	38:22 46:13	<b>indicate</b> 145:11	116:21	<b>interests</b> 79:9 82:6
<b>immediately</b> 73:3	48:16 90:6	<b>indicated</b> 54:13	<b>intend</b> 90:5 157:18	<b>internal</b> 99:5
107:24 132:6	102:24 136:12,25	<b>indicates</b> 34:11	<b>intended</b> 1:14 7:5	<b>International</b>
159:17	<b>included</b> 13:16	<b>indicating</b> 8:16	15:6 33:21 34:13	79:25 164:11
<b>immense</b> 14:8	42:7 49:8 58:11	<b>indication</b> 1:14	34:16 49:4,15	<b>interpret</b> 98:10
<b>impact</b> 31:9 69:14	59:4 71:14 104:6	11:3 40:9 157:17	73:19 91:13	158:4
137:1	137:5	<b>indications</b> 98:12	98:14 102:24	<b>interpretation</b>
<b>impaired</b> 43:19	<b>includes</b> 37:19	<b>indirect</b> 31:15,16	103:10 116:9	40:14 51:18
<b>impermissible</b>	59:7 61:3 76:18	<b>inflated</b> 19:8	123:11 145:11	96:10,17 97:2,16
102:16	93:2,14,15 94:3	<b>information</b> 46:7	150:24 157:5	150:25 157:24
<b>implication</b> 53:22	126:18,22 127:2	46:9 47:19,20,22	168:7 171:10	<b>interpreted</b> 158:4
<b>implications</b> 27:22	143:6	47:24 48:5,20	172:13	163:11
29:13	<b>including</b> 38:7	51:5 52:17,21,22	<b>interest</b> 1:20,20	<b>interpreting</b> 39:3
<b>implicit</b> 52:2 54:3	46:7 87:18	<b>informed</b> 8:4	2:2,4,6 4:13,18	<b>introduce</b> 50:2
58:14	143:11 155:1	91:14 92:9	5:22 7:19,21	140:20
<b>implicitly</b> 35:8	161:17	<b>infringe</b> 160:8	8:16,25 10:22	<b>introduced</b> 10:21
49:6 53:20	<b>inclusion</b> 38:5	<b>ingenuity</b> 12:13	12:5 15:5,8	45:5
<b>implied</b> 51:1 58:18	46:20 139:21	123:7	16:20 19:7 21:14	<b>introduces</b> 15:22
<b>impliedly</b> 3:18	<b>income</b> 161:4,6	<b>inherent</b> 2:17	21:16,17 22:15	172:11
<b>implies</b> 4:4 41:17	<b>inconsistent</b> 51:3	86:10 90:2 97:1	22:25 23:15 24:3	<b>introduction</b> 45:6
58:15	<b>inconvenient</b>	<b>inherently</b> 4:5	27:20 32:21	68:18 157:3
<b>import</b> 49:18	45:13	79:19	35:13 36:15,21	<b>intuitive</b> 29:7
53:18	<b>incorporate</b> 89:25	<b>input</b> 54:12,14	36:25 38:23	32:16
<b>importance</b> 6:2	102:16	<b>inserted</b> 130:3	39:18 44:24,24	<b>invalid</b> 67:12
116:18 155:17	<b>incorporated</b> 5:16	<b>inside</b> 121:13	47:4 55:6 60:24	<b>invariable</b> 102:7
<b>important</b> 7:23	37:14 47:6 59:9	<b>insofar</b> 11:21 19:6	61:1 62:20,21,24	<b>invariably</b> 24:3
13:3 15:24 21:23	102:9	91:12 134:10	65:1,5,8 69:3	<b>inverted</b> 122:21
45:1 56:10 57:21	<b>incorporates</b>	159:21	70:12 71:18	<b>invest</b> 72:18
75:1 85:3,17,23	37:12 76:7	<b>insolvency</b> 113:21	72:19 74:7 77:25	<b>invested</b> 39:7 61:5
154:3 155:19	132:17	114:3	78:4,6 79:21	61:10,13
156:8	<b>incorporating</b>	<b>insolvent</b> 114:3,12	80:15,22,25 81:6	<b>investing</b> 39:12
<b>importantly</b> 75:21	85:7,14	<b>instance</b> 4:12 43:5	82:4 83:9,16	75:16
<b>imported</b> 52:1	<b>increase</b> 21:17	53:16 151:19	84:8,14,16,20	<b>investment</b> 63:1
<b>imports</b> 51:2	27:18 28:14	<b>instances</b> 34:4	85:1 86:8,15	69:10 72:13
60:10 71:1	29:12 32:21	<b>instinct</b> 35:14	87:10 92:2,22	78:21 80:4,5,8,21
<b>impose</b> 160:9	33:13 70:11	<b>instinctive</b> 35:11	93:3 98:17,22,25	84:19,21 85:7,10
168:7 169:12	165:17	59:16,17	99:5 110:23,25	85:13,20,22
<b>imposition</b> 163:25	<b>increased</b> 13:7,10	<b>institution</b> 111:5	112:9,20 114:11	86:18 87:15 88:2
<b>impossible</b> 69:25	45:4 47:4 79:8	<b>instructions</b>	117:1,2,7 133:8	89:12,13,13,15
<b>inaccurate</b> 65:10	<b>increases</b> 30:17	165:11	138:10 139:4,19	89:17 122:22
<b>inadequate</b> 126:16	<b>increasing</b> 27:22	<b>instructive</b> 35:6	142:11,16 143:6	161:3,6
<b>inadmissible</b> 106:9	<b>incremental</b>	<b>instrument</b> 66:4	143:10,25 144:2	<b>investor</b> 29:2
<b>inappropriateness</b>	136:12,17	67:2 118:8,17	144:3,14 153:7	78:12
73:7 77:3 89:9	<b>incur</b> 78:22	119:8,10	153:20 154:1,5	<b>investors</b> 68:25
<b>incentive</b> 89:22	<b>incuriam</b> 65:2	<b>instruments</b>	154:10,12,15,17	72:11 77:18 88:8
173:21	<b>incurred</b> 46:2	106:18 117:12,16	154:18,21,25	88:14
<b>incentives</b> 173:18	117:10 124:19,23	117:22 121:10	155:24 156:2	<b>involve</b> 22:16 32:3
<b>include</b> 11:4 12:25	126:23 174:18	123:18,21	159:24 161:16	71:17 124:14
13:21 24:8 26:1	<b>incurring</b> 124:14	<b>Insurance</b> 97:5	172:20 173:3	<b>involved</b> 24:11
33:8,9,12 36:17	136:12	<b>Intel</b> 115:24	174:1	32:11 36:15

42:17 <b>involves</b> 19:19 24:13 75:4,8 96:18 106:14 <b>involving</b> 85:20 127:15 148:21 <b>irrational</b> 33:14 57:3,6 <b>irrationality</b> 42:12 48:4,14,21 53:23 54:6,13 56:10 57:7 <b>irrationally</b> 56:12 56:16 <b>irreducible</b> 67:5 <b>irrelevant</b> 3:10 14:24 105:17 106:19,24 117:5 117:22 126:3 164:25 <b>irrespective</b> 19:25 117:3 <b>ISDA</b> 6:15,20 11:7 12:4,5 35:1,20 73:17 86:21 88:22 102:22 107:10 110:14,18 111:22 116:8 123:14 138:1 <b>isolation</b> 149:17 <b>issue</b> 3:25 8:7 14:10 21:19 27:24,25 33:24 62:9,10 70:5 80:15 87:11 105:4 107:20 108:7 114:5,8 127:11,15 133:23 134:11,23 135:2 135:6,7,12 137:10,10 159:7 159:18 162:9 169:17,18 175:6 <b>issued</b> 78:9 119:5 <b>issues</b> 21:12 24:18 43:23 114:9 130:20 131:20 134:9,15 135:2 175:7 <b>issuing</b> 59:14	70:21 90:6 <b>iv</b> 81:11 152:12,14 <hr/> <b>J</b> <b>job</b> 174:9,10 <b>joint</b> 103:5 118:24 131:17 <b>judge</b> 4:12 8:3 43:23 50:2 52:24 54:3 84:23 86:19 103:16 114:1 115:24 116:17 160:2 164:15 176:21 <b>judgment</b> 5:23,23 12:21 44:11,12 63:13,14,15 75:20 80:13,14 81:1 82:10,12,13 82:14 83:2 85:13 160:11 162:7,8 163:5 164:13 166:1 <b>judgments</b> 24:14 32:11 79:16 <b>judicial</b> 53:5 <b>June</b> 128:22 <b>Justice</b> 1:3 4:12 5:15,20 6:5,9,12 7:7,17 8:1,13 9:9 9:14 12:10,13 16:11,14 17:11 18:12 20:22 21:5 21:19 22:4 25:18 25:23 26:4,19 28:11,18,21 29:16,25 30:3,15 30:24 31:11 39:5 39:11 40:3,21,24 41:13,19,25 43:1 43:7,11,16 44:10 44:13 45:15 48:24 49:16,22 50:11,14,22,24 51:10,22 52:7,18 52:20,24 53:4,8 53:16,18,25 54:2 54:6,10,12,18 56:18,24 59:19 60:6,11,23 63:13	65:18 66:21,23 67:5,10 68:5,6,17 68:20 74:9,13,21 74:25 79:23 82:10 84:4,9 85:25 88:6 89:3 92:11,16 95:22 95:25 96:10,13 97:4,22 98:2,16 98:21 99:1,3,7,9 99:11 101:13,16 101:19 102:2 103:6,21,24 104:3,5,11,13,13 104:24,25 105:23 106:3,5,12 107:16 109:3,7 109:15,22 110:4 110:7 111:2,11 111:15 113:4,10 113:11 114:25 115:17 120:9,14 120:19,24 121:7 122:4,8,10,13,23 123:4 124:6,8 127:5,19 128:2 130:11 131:25 132:5 133:2,5,15 133:18 134:12,22 134:25 135:4,14 139:22 140:1,5 140:19 141:1,4 141:14,18 148:16 148:19 152:2,4 152:24 153:2,22 153:24 154:4 157:24 159:5 162:25 163:5 164:13,20 165:1 165:6 166:14,14 166:15,18,23,23 167:2,4,6,13,17 168:11,20,24 169:20 174:4,8 174:13 175:18 176:3,8,24 177:1 177:15,23 178:7 178:15 <b>justifiable</b> 9:1 <b>justification</b> 49:24	<b>justifies</b> 55:3 <b>justify</b> 54:25 55:8 <hr/> <b>K</b> <b>keeping</b> 122:23 <b>key</b> 42:1 98:8 103:12,20 <b>Khoury</b> 82:17 <b>knew</b> 16:11 <b>knock</b> 28:11,12,14 <b>knocked</b> 68:10 <b>knock-on</b> 70:24 <b>know</b> 12:14 15:12 16:15 19:15 27:1 32:2 40:3,8 48:8 49:17 51:21 59:8 61:22 94:12 99:22 100:25 106:17 109:22,23 126:20 137:12 142:25 148:1 151:2 155:19 156:13 170:18 172:3 <b>knowing</b> 33:15 48:19 128:5 <b>knowledge</b> 47:25 <b>known</b> 83:23 102:7,14 105:15 105:16,16,22,25 134:5 170:17 <b>knows</b> 60:15 99:19 108:20 <b>Kong</b> 66:9 <hr/> <b>L</b> <b>L</b> 94:24 <b>labels</b> 66:7 <b>lack</b> 12:13 <b>lacking</b> 47:7 <b>Lady</b> 43:11 44:10 68:6 <b>laid</b> 65:1 177:20 <b>land</b> 158:24 <b>language</b> 1:10,11 2:15 17:5,14 18:10 34:10 35:10 37:13 46:5 47:14,15,23 49:19 51:16 52:1	130:15 <b>large</b> 15:13 31:14 35:18 38:16,24 111:25 <b>late</b> 115:5 161:5,7 <b>law</b> 4:8,9 5:4,5,7 5:14 6:16 7:6,11 7:20,22,24 8:2,4 8:24 11:15 21:24 42:20,24 61:24 62:17 66:14 115:2,4,15 157:7 157:10,13,17 158:5 168:13 169:14 178:12 <b>lawyers</b> 68:7 <b>lay</b> 51:22 <b>LBF</b> 113:9 126:5 <b>LBIE</b> 87:25 88:3 88:16 135:19 136:3,10 <b>LBSF</b> 103:7 <b>lead</b> 51:5 92:11 <b>leads</b> 173:17 <b>leap</b> 102:16 <b>learned</b> 3:13 17:3 20:19 27:2,4 29:23 30:20 37:16 42:9,23 50:19 54:24 55:17 56:5 59:3 68:1 77:7 84:23 86:19 93:1 100:14 101:4 103:16 105:7 112:24 119:11 125:17 128:12 132:10 134:3 141:9 148:6 149:23 150:9,16 155:15 164:15 170:24 173:17,19 175:14,25 <b>leave</b> 74:23 <b>leavened</b> 49:25 50:1 <b>leaving</b> 52:14 72:5 72:12 116:18 <b>left</b> 49:11 61:14 66:19 73:20
--	---	---	--	---

101:4 109:25 134:9 <b>left-hand</b> 161:11 <b>legal</b> 2:9 67:19,20 72:15 90:4 123:7 158:5 <b>legally</b> 116:7 <b>Lehman</b> 12:4 23:10 43:1,2 53:17 73:13 88:10,18 107:25 115:24 <b>Lehmans</b> 11:22 52:25 73:23 74:20 107:13,24 108:1,16,16,24 110:18,21 113:3 <b>lend</b> 14:18 19:4 31:10 48:7 56:6 129:14 131:2,2,9 131:12 173:23 <b>lender</b> 27:12 29:3 69:3,4 <b>lenders</b> 68:24 173:23 <b>lending</b> 15:11 131:8 <b>length</b> 3:25 60:15 60:19 126:21 137:3 175:23 <b>lest</b> 67:19,24 <b>letter</b> 21:20 22:1 128:21 162:18 <b>let's</b> 9:10 17:11 35:24 77:22,23 94:14 106:16 126:1 129:8 <b>level</b> 31:1 70:18 78:10 104:5 133:2 172:11 178:5 <b>levels</b> 33:18 75:23 75:25 <b>leverage</b> 13:10 27:19 29:12 30:11 32:10 <b>levied</b> 91:9 <b>Lewison's</b> 96:10 157:24 <b>liabilities</b> 161:13	<b>liability</b> 60:25 72:15 80:14 <b>lie</b> 20:4 <b>lies</b> 32:23 <b>life</b> 15:17 36:18 143:3 <b>lifted</b> 102:12 <b>light</b> 2:16 12:21 13:9 52:4 97:19 115:16 132:7,14 <b>limit</b> 105:6,17 137:7 <b>limitation</b> 46:8 116:12 <b>limitations</b> 49:13 <b>limited</b> 1:9 9:20 10:25 11:1 12:22 13:7 48:2 50:4 66:25 76:13 121:8,14 128:20 131:6,20 136:3 136:10 139:20 140:2,2,4 151:3 155:23 <b>limiting</b> 113:18 <b>limits</b> 129:17 <b>Lindley</b> 64:10 <b>line</b> 24:19 29:17,19 64:3,4 77:16 115:23 121:13 173:9 <b>lines</b> 47:3 63:6,15 63:25 70:14,16 139:10 158:12 <b>linguistic</b> 145:8 <b>linked</b> 71:23 75:22 107:4 <b>lips</b> 167:2 <b>liquidation</b> 113:20 114:8 119:24 <b>list</b> 152:13 <b>listening</b> 176:12 <b>literature</b> 11:6 <b>little</b> 11:10 12:24 15:25 31:2 76:15 178:12 <b>Lloyd's</b> 160:14 <b>load</b> 167:20 <b>loan</b> 14:11 15:18 22:2 70:7 84:16	86:16,17 <b>loans</b> 70:5 <b>logically</b> 29:10 <b>Lomas's</b> 12:1 <b>long</b> 61:25 76:2 88:21,23 178:9 <b>longer</b> 3:12 95:23 172:19 173:3,5 <b>long-term</b> 83:16 <b>look</b> 5:9,11 20:25 27:13 30:21 32:7 39:22 40:18 41:20 42:19 45:2 45:21 67:23 78:18 95:7 98:9 101:5,23 115:1 117:19 122:13 123:18 130:21 141:21 155:6 158:10 173:7 177:1,3 <b>looked</b> 39:24 50:20 53:17 142:25 163:19 <b>looking</b> 2:19 15:4 48:3 67:14 80:9 97:18 101:17 116:23 130:19 145:17,20 148:16 153:17 163:16 171:8 173:15 174:2,20 <b>looks</b> 8:11 18:16 39:13 65:13 <b>loose</b> 129:21 <b>Lord</b> 1:5,6 2:10 4:14 5:9,10,13 6:8,11,13 7:10,16 8:5 9:15 12:23 13:19 17:13,21 20:17,17 21:3,7 22:3,7 23:20 24:2 28:2 34:22 35:4 37:20 40:16 41:5 42:8 43:4 44:2,9,15 45:12 45:22 52:12 54:9 55:9 58:8 59:15 60:15,17 61:22 62:16,18 64:23	65:24 67:20 75:6 79:24 84:5 85:24 89:2 90:3,18 91:1,4 92:13,25 93:24 94:12 95:13,16 96:4,6 96:10,11 97:4,9 99:13 100:13,24 101:1,22,25 103:12 104:22 105:24 108:20 110:8,12 111:17 112:4 114:13,19 114:22 119:3 120:8 121:9,15 123:5 125:16 126:20 127:24 128:16 130:8 133:22 135:6 137:10,12 138:4 138:24 142:25 143:1 144:12 150:5 151:7,19 152:23 153:17 155:6 157:24,25 158:1,2 159:17 162:23 163:5,6 164:10,12,13,14 165:1,6 166:14 166:15,18,23 167:2,4,12 169:17,18 175:10 177:20 <b>Lords</b> 114:23 <b>Lordship</b> 27:1,3 28:3 112:19 164:18 177:7 178:2,3,4,13 <b>Lordship's</b> 3:16 28:2 175:22 <b>Lordsvale</b> 20:19 21:7 <b>Lord's</b> 8:21 35:11 35:13 62:14 134:5 <b>losing</b> 92:20 176:9 <b>loss</b> 7:12 13:18,19 13:20,21,25 17:9 20:8 22:20 24:19 24:23 25:3,4	26:16 28:7 30:20 31:7,20,20 33:4 34:25 35:5,12,15 35:15,19 36:9,11 36:17 37:3,11,19 37:25 38:7 39:3 39:14 42:2,7,14 47:8,14,15 51:25 52:15 53:1,11 54:23 63:19 90:24 91:7 92:5 92:14,18 93:5,5 93:12,13,14,15 93:15,20,22,25 94:3,10,24 95:3,7 95:7,9,19 115:9 115:25 116:11,16 116:22 126:18 137:4 161:3,6 163:18 165:22,23 <b>losses</b> 9:24 11:4,19 13:1,23 14:2 25:7,11 26:12,13 26:14 32:2 36:11 38:4 46:1 48:17 94:3 95:8 126:18 <b>Loss's</b> 37:21 <b>lost</b> 2:14 71:10 115:7 159:15 160:8 <b>lot</b> 48:22 111:3 <b>low</b> 88:10 110:22 113:7 <b>lower</b> 112:22 <b>lowest</b> 55:18 73:16 89:23 125:7 127:2 157:2 <b>lunch</b> 176:1 <b>Lyle</b> 4:11 115:17 <b>L/M</b> 164:10
<hr/>				
<b>M</b>				
<hr/>				
<b>magnified</b> 32:5 <b>main</b> 106:14 <b>maintain</b> 106:23 <b>maintaining</b> 13:9 <b>maintenance</b> 61:22 <b>majeure</b> 152:22 153:5				

<b>major</b> 102:22	115:3,11 116:9	98:14 100:6	<b>meeting</b> 72:16	<b>mix</b> 29:6 37:16
<b>making</b> 31:25 32:1	117:3 123:14	102:7,8,14,16	<b>memory</b> 111:2	<b>mixture</b> 117:15
46:23 52:7 89:8	138:1 140:14	105:18,18 106:10	<b>mention</b> 6:3	<b>mode</b> 65:10
89:12 95:1 113:2	148:8,18	106:10 116:24	<b>mentioned</b> 29:8	<b>model</b> 49:25,25
140:24 173:10	<b>matched</b> 45:8	123:20 133:25	147:4 165:19	75:2,3 77:15
<b>Males</b> 159:5	<b>matrix</b> 5:6 41:6	137:11 141:6,12	<b>mercy</b> 64:16	<b>modelling</b> 37:2,10
167:13	103:22 104:7	141:13 142:18	<b>mere</b> 106:16,17	37:12,14 49:5
<b>managed</b> 88:18	105:2,15 157:11	145:6 150:18,19	<b>merely</b> 126:9	51:1 73:9
<b>management</b>	<b>matter</b> 4:2 59:12	152:3 172:1	137:23 147:24	<b>models</b> 35:6,12
166:13	88:20 95:21	<b>meaningful</b> 85:22	168:5 171:15	36:7,10 49:4
<b>managers</b> 165:10	107:19 112:17	<b>meanings</b> 96:18,20	<b>merge</b> 138:13	73:9,11 75:1
<b>Mance</b> 97:4	114:13 117:6,18	<b>means</b> 10:11 20:23	<b>merger</b> 156:16,19	80:10 87:17
<b>manifest</b> 166:10	128:20 129:3	20:25 36:2 37:25	156:19	134:20
<b>Mann's</b> 2:9	134:20 141:2	48:12 55:15,18	<b>Metals</b> 114:24	<b>modest</b> 48:15 79:7
<b>marked</b> 101:23	161:24 178:3,10	56:1,9,14,20 57:5	<b>method</b> 7:3 22:20	<b>modified</b> 139:18
<b>marker</b> 51:22	<b>matters</b> 33:1 54:24	57:15 91:21	85:11,15 94:16	<b>Modigliani</b> 29:9
177:20	65:16 118:21	99:19,20 102:23	95:6 145:25	<b>moment</b> 29:17
<b>market</b> 3:22 4:10	158:2	106:6,7 109:11	<b>methodologies</b>	35:25 43:11
4:23 7:12 15:6	<b>maturity</b> 119:20	123:17 129:20	116:2	45:13 50:17 51:1
31:16 36:1,8	120:10,14 121:2	134:15 135:16	<b>methodology</b>	55:25 72:6 73:12
37:8 47:1,16,18	<b>McKee</b> 101:8	137:12,15,18	83:23	76:14 78:18 86:9
47:20,22 48:6,11	<b>McKee's</b> 100:24	141:10 171:1,5	<b>middle</b> 84:10	89:2 122:21
52:16,21 56:2	<b>mean</b> 8:1 10:12	172:15	130:5 161:9	124:18 127:14
75:11,15,16,17	12:13 17:2 19:23	<b>meant</b> 11:4 16:14	165:6	133:16
76:1,24,25 79:3,7	20:24 23:17 24:5	41:23 49:9 54:9	<b>mill</b> 15:1,3 73:17	<b>moments</b> 175:9
89:21 93:6,8	34:5,12,17 37:12	96:24 99:21	<b>Miller</b> 29:9	<b>Monday</b> 3:13 5:8
94:11,14,16,23	40:3 48:12 53:19	148:9 150:21	<b>Millett</b> 166:15,23	175:8,13,24
95:6,11,20 102:8	56:9 68:6 70:22	171:7	167:2	176:2,11 178:17
106:21 110:20	90:15 92:3 97:22	<b>measurable</b> 59:25	<b>Millett's</b> 164:13	<b>money</b> 2:7,9,14,17
117:21 118:18	97:23 105:9	67:16	<b>million</b> 32:20	2:18,20 3:7 4:9
132:22 136:24	109:12 117:13	<b>measure</b> 9:12	81:14 110:15	4:10 7:25 10:15
174:2	120:10 123:8,24	29:20 46:20,22	126:1,2 161:6,8	11:16 18:13,21
<b>marketplace</b>	125:24 126:2	47:10 65:11	<b>millions</b> 110:17	19:6 24:11 27:6
139:14	129:19 131:25	69:25 71:22	111:21	27:12,17 32:7
<b>markets</b> 79:14	133:6 134:13	75:10 79:18	<b>mimic</b> 62:20	37:6 58:22 60:24
<b>market-wide</b> 79:5	136:22 143:16,23	80:22 83:15 84:8	<b>mind</b> 40:5 86:13	61:4,14 64:14
<b>Masri</b> 79:24 81:3,5	144:4 145:8	87:5 88:24	96:9 122:5	69:2 71:20 75:22
81:8,13,13 83:12	150:24 152:1	<b>measured</b> 25:23	168:24	76:3 88:25 91:13
83:12,25 84:17	153:12,15 156:23	60:24 61:10,14	<b>mindset</b> 105:1	91:25 110:14,24
85:15	163:1,1 171:6	61:15 62:3,8,10	<b>minute</b> 65:25	115:7,8 117:8
<b>Masri's</b> 82:3,6,18	<b>meaning</b> 4:7 7:20	62:25 63:2 71:5	<b>minutes</b> 17:12	118:1,15 122:25
82:24 84:15,17	9:17 11:8,11,14	80:24	<b>mischaracterisa...</b>	124:15 128:14
<b>master</b> 1:13,17	11:17 12:18,25	<b>measurements</b>	128:11	131:7 146:22,24
4:25 5:4 6:16,20	16:19 17:15 35:2	134:15	<b>mischaracterises</b>	147:10 150:22
6:24 12:6 13:18	39:3,8,13,23 40:1	<b>measures</b> 51:19	127:3	160:15
16:2,21 35:20	40:20 51:16	<b>meat</b> 162:24	<b>misplaced</b> 116:1	<b>month</b> 22:25
73:18 79:22	57:10,11 58:1,9	<b>mechanics</b> 95:21	<b>missing</b> 93:12	<b>months</b> 23:11
102:9 103:4	90:24 91:2,7,14	<b>mechanism</b> 20:8	138:16	<b>morning</b> 1:3,5
107:11 110:14,18	91:15,16 92:6,8,8	48:14	<b>misunderstood</b>	90:22 91:1,21
111:22 112:9,10	97:3,12 98:3,5,10	<b>meet</b> 69:12	3:13	92:7 109:5

175:25 <b>morning's</b> 96:4 <b>move</b> 15:8 <b>moved</b> 79:14 <b>movements</b> 36:17 36:21 <b>moving</b> 21:3 <b>multicurrency</b> 1:13 10:24 <b>multiple</b> 1:12 16:2 22:16,16 32:11 <b>multiplied</b> 32:13 75:9 <b>muster</b> 5:25 <b>myriad</b> 133:13	110:12 <b>needs</b> 39:24 44:19 59:11 114:13 127:18 130:24 134:10 136:6 157:8 163:11 <b>negative</b> 59:20 69:8 <b>negligent</b> 158:23 <b>neither</b> 19:21 138:9 146:5,17 <b>net</b> 36:23 <b>netting</b> 155:18,21 <b>neutral</b> 9:9 20:2,8 124:18 <b>never</b> 5:25 18:7 82:17 86:2 100:5 121:25 123:10 142:21 <b>nevertheless</b> 66:16 98:8 143:21 173:6 176:13 <b>new</b> 47:5 78:22 139:2,21 156:13 165:13 171:10,11 <b>nexus</b> 24:21 <b>nice</b> 167:17 <b>Nobel</b> 29:9 <b>nominal</b> 61:16 174:24 <b>non</b> 106:15 <b>nonbank</b> 105:11 <b>nondelivery</b> 93:16 <b>non-addressee</b> 104:19 <b>non-certifying</b> 48:8 <b>non-default</b> 17:7 17:19 18:1,6,22 19:13 23:1,24 146:25 148:24 <b>non-defaulting</b> 6:23 18:2,6 19:3 19:6,10,14 25:14 116:2 140:8 144:16,22 146:1 146:6,12,16 147:5 149:3 <b>non-distributable</b> 66:21	<b>non-existent</b> 68:12 <b>non-life</b> 161:14 <b>non-payment</b> 92:1 93:16 95:9 115:10 125:12 126:19 159:10,12 <b>north</b> 87:21,23 <b>Northern</b> 165:18 167:8 <b>notable</b> 11:21 <b>note</b> 3:16 37:15 42:15 62:14 63:23 64:20 101:19 112:11 127:20,25 137:24 141:24 164:14 165:2 <b>noted</b> 37:15 115:24 151:7 <b>notes</b> 12:6 82:12 <b>notice</b> 23:11 45:12 <b>noting</b> 7:13 114:2 137:18 <b>notion</b> 56:24 73:14 <b>notorious</b> 102:7 <b>notwithstanding</b> 174:24 <b>November</b> 1:1 81:12 108:15 178:17 <b>nuance</b> 92:25 <b>nuanced</b> 91:5,5 <b>nuances</b> 104:15 <b>number</b> 2:3 8:10 32:20 35:21 59:14,17 75:5 78:13 87:20 92:21 115:20 129:22 130:12 135:17 148:6 159:12 <b>numbering</b> 68:19 <b>nutshell</b> 58:8	52:21 53:6,18 57:12,14,25 <b>objectively</b> 47:12 85:15 <b>objectivity</b> 45:6 47:6 50:1,1,4 <b>obligation</b> 65:14 66:11,13,16 69:6 69:20 93:16 124:14,19,24 138:10 142:11 162:13,19 165:9 <b>obligations</b> 82:3 83:4 137:25 140:14 143:11 <b>obliged</b> 58:2 165:10 <b>observe</b> 16:14 <b>observed</b> 17:12 <b>obtain</b> 58:16 68:23 <b>obtained</b> 3:19 <b>obtaining</b> 124:20 <b>obvious</b> 16:25 18:5 18:16 20:18 36:13 40:24 63:12 64:12,20 78:20 140:16 148:22 163:7 <b>obviously</b> 41:22 58:23 77:20 89:14 132:10 148:20 168:7 <b>occasion</b> 52:10 74:9,13 109:4,10 <b>occurred</b> 165:21 <b>occurrence</b> 46:25 142:9 152:22 153:4 <b>occurs</b> 16:1,19 165:25 <b>October</b> 108:15 <b>offend</b> 9:1 65:21 <b>offended</b> 54:20 <b>offer</b> 46:23 97:24 121:21 <b>offered</b> 34:3,18 124:25 131:16 <b>offset</b> 34:20 <b>offsetting</b> 24:23 <b>offside</b> 13:17	14:13 15:21 30:2 30:14 <b>Oh</b> 103:24 <b>oil</b> 81:4,7 <b>okay</b> 74:25 134:25 <b>old</b> 2:7 <b>once</b> 109:8 150:15 171:7,11 <b>ones</b> 163:19 <b>one's</b> 40:5 41:1 <b>ongoing</b> 15:6 142:7 <b>open</b> 109:25 116:19 <b>opening</b> 1:4 71:8 179:3 <b>open-ended</b> 175:4 <b>operate</b> 56:11 121:3,4 170:21 <b>operates</b> 6:20 <b>operating</b> 107:11 <b>operative</b> 147:9 <b>opinion</b> 64:8 65:2 <b>Oppenheim</b> 113:9 126:5 <b>opponents</b> 90:10 <b>opportunity</b> 13:22 26:20 28:3,7 29:17 30:1 69:1 71:10 87:18 115:7 <b>opposed</b> 11:24 20:7 24:10 57:4 73:5 80:2 85:2 87:17,19 93:6 99:13 105:6 145:13 146:23 <b>opposite</b> 89:18 <b>opted</b> 22:20 <b>options</b> 57:17 <b>oral</b> 2:12 <b>orally</b> 13:11 170:25 173:19 <b>order</b> 32:20 41:6 52:9 76:2 78:5 92:1 108:11 112:14 113:14 166:15 171:14,18 176:18 177:9,10 177:10,13 178:5
<hr/> <b>N</b> <hr/> N 179:1 <b>name</b> 65:25 145:15 <b>nature</b> 13:17 60:14 63:10 101:5 117:5 137:7 <b>near</b> 98:11 162:7 <b>neatly</b> 63:4 <b>necessarily</b> 2:23 27:20 41:17 58:15 92:19 125:24 134:4,7 170:4 <b>necessary</b> 36:7 47:19 74:2 79:17 98:18 113:14 118:23 147:15 <b>necessity</b> 64:8 <b>need</b> 3:6,17 18:7 23:8 47:5 81:17 91:19 99:9 106:25 107:9 108:7 111:24,25 113:12 114:9 127:13 128:6 132:11,13 160:1 160:5 162:22 173:14 <b>needed</b> 150:12 151:22 165:14 <b>needing</b> 114:5 <b>needn't</b> 2:9 61:24		<hr/> <b>O</b> <hr/> <b>obiter</b> 162:22 167:13 <b>object</b> 166:10 <b>objective</b> 44:5,6 45:9 51:2,6		

<b>orders</b> 165:13	<b>o'clock</b> 16:12	63:25 64:25	6:18,18 7:13	8:24 10:15 15:19
<b>ordinarily</b> 122:11		70:14,16 77:12	24:15 33:7 34:4	18:2,6,13,23,25
168:12,13	<b>P</b>	81:2 82:12,13	38:14 39:21 42:4	19:1,3,6,7,10,14
<b>ordinary</b> 9:17 62:6	<b>P</b> 146:3	83:7,8 84:5,6,11	42:5 43:20 48:16	19:18 20:1,2,6,24
133:7	<b>page</b> 3:16 17:23	84:24 85:23,23	55:5,7 58:17	22:19,21,22 23:3
<b>organise</b> 122:5	18:1,10 21:20,25	96:15 101:23	62:14 63:10	23:6,17,18,19
<b>original</b> 18:19	22:11 23:13	103:15 104:10,22	65:15 78:12,21	25:14 32:17,25
64:1 86:25 87:8	37:22 45:22 46:5	107:4 115:19	78:22 80:15 81:7	33:10 34:3,7,19
143:23 144:21	46:11,17 63:23	119:18,18 124:7	94:13 101:7	34:21 35:17 38:1
168:15 170:20	64:3,24,24 68:18	127:24 130:9	102:8 104:15	38:2 42:21,21
173:1,2,2,5,7,11	68:19 70:2,3	131:19 139:10	106:21,23 107:12	44:16 46:2,7,23
177:10	77:12 93:25	153:6 158:12,13	107:18 109:20	48:1,8,18 49:12
<b>ought</b> 166:1 175:3	94:20,21 101:25	160:12,20,24	110:16,17 113:19	54:4,9,10,16 57:3
<b>outcome</b> 88:20	104:9 115:23	161:10,19 164:23	114:4 116:6,22	57:12 58:1 71:11
<b>outer</b> 121:23	124:7 130:4,5,8	165:15,20	118:22 120:3,18	71:11,18 72:20
<b>outlawed</b> 15:21	130:10 131:21	<b>paragraphs</b> 7:9	127:15,15 128:6	72:21 87:25 95:1
<b>outlay</b> 174:25	138:6,23 139:7	12:2 22:13 44:2	129:12 135:3	97:10 105:11,13
<b>outside</b> 13:2 14:2,5	141:2 142:5,24	82:11 102:1	136:8 137:7	114:8 116:22
15:19,23 33:20	143:9,9 148:18	103:12,19,20	147:10 163:17	117:10 137:20,22
59:8 60:12 67:25	148:24,24 152:6	114:18,20,22	167:23 176:20	138:11 139:5,14
86:11,20 88:25	152:12,16,23	162:8,10,23	<b>particularly</b> 10:7	139:15 140:6,8,9
112:18 120:4,6	153:1 158:11	<b>parameters</b> 48:20	11:15 21:23	142:10,13,14,15
121:13 126:25	161:10,19,20	<b>paraphrase</b> 60:22	33:21 47:7 62:16	142:15,16 143:16
133:7	162:8 164:13,18	<b>parent</b> 111:7,8	72:1,6 79:13	144:11,17,17,22
<b>outstanding</b> 3:24	165:2,6,7,20	113:21	84:10 95:12	145:1,7,11,14,15
58:17 70:7 73:20	171:18 179:2	<b>pari</b> 119:21	106:25 109:23	145:25 146:2,2,5
73:22 76:14	<b>pages</b> 62:16 130:4	<b>part</b> 5:5 7:15 9:5	177:3,24	146:6,8,12,12,12
86:16 119:21,22	162:5	10:13 14:11,20	<b>parties</b> 5:2,16 10:2	146:12,15,16,19
<b>outweigh</b> 98:12	<b>paid</b> 2:19 9:18	14:21 15:16	13:1,14 14:5,10	147:1,5,5,6,8,23
<b>overall</b> 24:25 32:9	10:2,6 14:23	25:12 26:13	15:7 20:1,3	147:24,25,25
58:24 79:10	15:18 16:5 23:4	28:15 33:15 40:4	22:17,19 23:7	148:7,9,13,21,22
136:17 166:10	25:16 27:6 36:19	44:24 59:21	32:14 39:22	149:3,4,6,12,15
167:11	48:18 55:15	63:20 77:25 78:3	53:19 54:8 80:17	150:13,22 151:13
<b>overarching</b> 43:12	56:15,15,17	78:25 93:17 95:4	80:19 85:6 86:3	151:17 152:1,3
44:18,20 76:23	63:17,22 64:15	103:22 104:7	86:21 96:19,24	152:21 153:19,21
<b>overnight</b> 34:2,6	65:7 66:3 69:9	110:2 112:22	99:25 105:1,22	154:2,23 155:10
34:18 50:17	70:13 72:9 73:21	124:20,22 125:2	112:7 113:17	155:13,19 157:1
137:9	74:7 78:2,3	135:1 139:3,3,16	116:2 123:7	157:14 159:16
<b>overturned</b> 43:16	89:19,19 93:3,18	139:22 140:17	137:13 141:7	163:17 164:7
<b>owed</b> 22:21,22	107:14 109:21	143:19 144:1	142:19 144:21,21	169:9 170:18,20
27:5 109:20	111:20 124:17	149:13 152:19	146:20 147:4,5	171:12 173:1,2,2
110:13 126:2	143:10,22 144:14	153:20 154:1	147:10,16,20,21	173:5 174:19
140:5 146:1	147:10 161:5	156:8 157:4,10	148:4,15 149:18	175:5
150:22 153:12	<b>paper</b> 13:12	<b>participants</b>	149:21 150:2	<b>party's</b> 20:9,25
161:23,25 162:2	127:22 131:20	122:23	153:16 155:18	24:4 87:2 94:24
162:13,19 170:20	<b>paragraph</b> 7:10,15	<b>participate</b> 60:21	156:1 157:18,19	105:19 154:1
<b>owes</b> 19:6 25:15	16:8 21:13 22:3	<b>participation</b> 67:6	161:20 169:10	173:7
<b>owing</b> 117:8	22:18 32:23	68:10 84:18	<b>partly</b> 52:7	<b>pass</b> 160:14,17
140:17 144:22	43:22 44:11,14	122:5,19	<b>parts</b> 34:14	<b>passage</b> 4:14,16
146:2	46:5,17,21 47:2	<b>particular</b> 4:21	<b>party</b> 6:23 7:2	7:8 21:25 64:23



<p>96:9 103:15 157:23 162:6 164:12,14,19,21 166:16 <b>passages</b> 63:12 <b>passed</b> 5:25 <b>passes</b> 149:20 <b>passu</b> 119:22 <b>Pause</b> 7:14,16 22:3 44:3 84:8 85:24 96:13 102:1 103:20 114:24 127:21,23 130:10 153:22 162:24 <b>pay</b> 10:4,25 14:9 14:19 15:13,15 19:7,10,16 27:21 31:17 32:21 33:13 55:22,23 56:2,7,9,21,25 57:5 58:4,9 65:14 66:11 69:17,19,20 70:18 71:18 72:14 73:2 79:2 81:13,17,22 82:18 121:18 124:15 125:1,4,4 125:7 127:5,6 142:6,14,16 146:24 158:18,19 161:1 165:18 <b>payable</b> 2:5 7:1 18:22 19:13,14 19:25 22:9,15 23:1,15 34:2 38:15 62:2 64:7 71:24 72:19 77:25 92:22 95:6 119:12 121:6 137:16 139:4,15 144:2,25 145:18 145:19,24 146:15 147:13 149:10,15 149:21 153:7,20 154:2,6,12,15,18 154:21 155:2,4 157:4 159:10 170:5,16 171:6 172:2</p>	<p><b>payee</b> 2:14 13:6 47:21 56:12 57:15,16 71:10 76:4 114:3 128:8 128:15,25 129:10 136:8,14 137:11 137:12 141:20 142:18 143:15,22 144:4,20 145:6 145:10,13 147:3 147:17,20 148:1 148:3,10,22 149:25 150:3,11 150:17,18,21 151:1,15,22,25 153:13,15 156:9 168:10 169:23 170:19 171:1,5 171:16,23 <b>payees</b> 169:23 170:4,23 171:23 <b>payee's</b> 135:19,20 137:1 <b>payer</b> 18:7 <b>paying</b> 11:2 14:16 19:15 20:1,6 32:17,24 35:17 56:8 58:21 71:18 81:14,21 90:1 140:9 144:17 147:25 149:4 <b>payment</b> 2:7,17 4:17 21:15 22:24 36:20,22,24 46:22 62:24,25 64:13 65:8 66:18 67:16 76:2 81:14 94:4 115:5 116:5 118:15 123:1 137:14,21 143:7 143:20 144:13,13 145:22 150:1 152:18,21 161:7 165:4 171:2,24 173:12,13,15 <b>payments</b> 13:1,14 14:4 15:8 66:15 70:6,10,22 71:4 95:18 117:23,25 119:23 143:2</p>	<p>151:8 153:3 159:16 160:17 <b>payor</b> 47:21 170:19 <b>peering</b> 105:1 <b>penalties</b> 9:2 <b>penalty</b> 21:10,18 <b>people</b> 12:4,20 19:4 48:11 103:10 106:1 151:4 <b>percentage</b> 62:22 <b>perfect</b> 111:22 148:13 <b>perfectly</b> 60:15 107:17 145:9 168:17 <b>perform</b> 147:16 <b>performance</b> 35:17 66:18 88:9 142:11 <b>performed</b> 143:12 <b>performing</b> 100:17,18 <b>performs</b> 147:15 148:3 <b>period</b> 2:18,21,23 3:8,20,23 19:14 22:25 23:4,9,15 23:19 36:21 58:17 69:2 70:7 71:3 73:2 76:3 76:14 91:25 144:18 145:23 159:22 160:21 161:4 170:14,19 171:3,23 172:4,7 172:17,18 173:1 173:4 174:3 <b>periods</b> 2:19 19:12 22:23 23:9 24:6 74:1 <b>permission</b> 163:24 169:5 <b>permits</b> 163:9 175:11 <b>permitted</b> 61:21 153:19 170:5 <b>permitting</b> 116:1 163:12</p>	<p><b>person</b> 106:11 131:1 137:20,22 146:9,21,24 172:1 <b>personalised</b> 47:23 <b>person's</b> 53:20 <b>perspective</b> 55:14 59:6 67:15 90:4 103:19 <b>perverse</b> 89:24 173:18 <b>pessimistic</b> 109:23 <b>Peter</b> 97:5 <b>phrase</b> 8:7 10:21 11:11 12:18 16:5 16:8,18 22:6 37:23 39:4,6,22 39:24 40:8 99:15 99:17,18 100:7 102:12,13 120:15 123:14 129:22 141:20 142:23 144:8 146:15,18 156:9 <b>phrased</b> 135:15 136:2 <b>phraseology</b> 41:12 97:25 133:3 <b>phrases</b> 7:5 <b>pick</b> 45:1 71:7 83:11 93:24 94:15 100:13 135:5 138:21 140:18 160:19 164:9 <b>picked</b> 44:15 56:5 93:1 124:4 <b>picking</b> 44:9 64:3 151:7 <b>picture</b> 70:17 <b>place</b> 1:10 8:14 33:23 34:10 96:7 100:8 101:3 158:20 163:13 167:23 178:8 <b>placed</b> 111:3,7,8 167:1 <b>places</b> 75:5 115:21 142:4 148:2,7 <b>placing</b> 111:15</p>	<p><b>plain</b> 90:13,14 <b>plaintiffs</b> 63:16 <b>play</b> 11:18 25:12 47:13 110:2 129:5 <b>players</b> 36:8 <b>plays</b> 117:13 <b>please</b> 114:19,22 <b>pleasure</b> 176:13 178:13 <b>plug</b> 27:17 28:8,9 <b>plugging</b> 25:20 27:19 <b>plumped</b> 44:5 <b>plurality</b> 172:5 <b>plus</b> 74:7 93:10 94:18 131:24 171:24 <b>pm</b> 89:3,4,6 133:19,21 178:16 <b>point</b> 1:16 2:1 3:9 3:11 4:7 6:19 8:21 9:9,16,19 10:9,19,20 11:6 11:20 12:23 14:15 15:20 17:3 20:10,21 21:3,7 21:23 26:16 28:2 29:14 31:25 32:23 33:17,24 34:8,22,23 37:15 37:15,18 39:1,15 42:1,8,8,15 43:15 43:17,20,21 45:1 45:2 52:7,11,12 52:13 53:9,15 54:22 57:22,22 58:20,24 59:2,19 60:13 63:4,4,12 63:23,25 64:20 67:2,18 70:2,4 71:7 72:6 73:7 74:17 76:15,17 76:23 77:2,7,8,10 78:20,24 79:7,15 79:17 80:1,15 85:3,3 87:22 88:5 89:7,11 90:12 93:1 95:12 96:3,5,6 97:7</p>
--	--	--	--	--

98:1,9,11 100:13 100:22 102:19 103:5 104:4,13 104:21,23 105:3 105:7 106:13 109:25 110:8,9 110:13 111:10 112:1,5,6,11,17 113:2,8 114:16 115:20,22,22 116:8 118:11,13 120:2 123:8 127:4,5,6,16,17 134:6,13 135:23 135:25 137:24 138:1 140:11,15 140:16 141:8,15 141:24 142:13 143:4,5 146:20 147:7,13,19 151:14,18 153:17 155:6,15 156:11 156:22 157:7,21 157:21 158:1,3,7 160:6 162:10,24 163:2,4,15 164:17 165:1 166:19,19,20,24 167:3,6,22 168:2 168:3 169:17,24 170:24 171:15 172:8 173:16,20 175:1,2 176:12 177:16,19,21 <b>points</b> 1:7,21 35:3 35:5 39:16 50:6 52:14 54:23 58:13 103:1 112:12 113:13 135:8 151:6 157:9 169:3 172:21 <b>policies</b> 159:11 <b>poor</b> 31:1,18 <b>poring</b> 176:19 <b>posed</b> 90:10 96:22 <b>position</b> 13:12 25:19 27:3 29:22 127:22 128:13,19 129:2 130:14	131:7,20 132:13 132:15,19,21 158:7 167:9,19 <b>positions</b> 161:20 <b>positive</b> 59:20 <b>positively</b> 159:3 <b>possibilities</b> 22:14 46:10 129:9 146:11 <b>possibility</b> 23:13 53:5 109:24 145:6 <b>possible</b> 89:23 97:6 107:17 109:7 111:23 130:24 132:2 168:17 <b>possibly</b> 24:5 134:15 142:18 <b>potential</b> 84:18 105:10,12 131:17 <b>pounds</b> 111:21 <b>practicable</b> 74:4 <b>practical</b> 27:10 90:4 <b>precedence</b> 62:12 <b>precedent</b> 64:9 94:6 <b>precise</b> 3:23 24:20 29:6 <b>precisely</b> 71:17 113:6 147:3 170:11 <b>precluded</b> 129:11 130:20 <b>predicated</b> 3:10 <b>predicting</b> 77:17 <b>preface</b> 9:19 <b>prefer</b> 164:16 175:7 <b>preference</b> 62:6,8 62:15,19 64:2,16 64:17 65:19 66:2 66:5 119:5 120:10,17 121:2 <b>preferential</b> 63:18 64:7,21 <b>preferred</b> 111:13 119:19,20,22 120:4	<b>pregnant</b> 167:20 168:15 <b>prejudice</b> 106:11 <b>prejudicing</b> 158:16 <b>preliminary</b> 59:2 <b>prematurely</b> 109:4 <b>premise</b> 108:13 <b>premium</b> 62:2 75:15 160:17 <b>premiums</b> 159:10 160:18 <b>prepared</b> 31:10 60:5 78:12 <b>prescribed</b> 61:19 <b>present</b> 36:24 71:6 122:11 132:5 137:18 166:9 176:4 <b>pressed</b> 13:11 <b>presumably</b> 32:25 149:2 <b>presumption</b> 109:2 <b>pretty</b> 16:25 <b>prevailing</b> 46:3 <b>prevent</b> 123:12 158:16 <b>prevents</b> 66:15 <b>preview</b> 8:20 33:18 <b>previous</b> 72:10,11 80:13 82:10 95:18 104:9 148:24 <b>previously</b> 169:6 <b>pre-assignment</b> 159:22 <b>pre-early</b> 142:21 <b>price</b> 2:19 9:18,20 10:3,6 14:21,22 14:23 31:17 36:2 37:9 50:24 52:5 58:15 69:17,19 69:23 119:15 124:17 125:3 126:25 <b>prices</b> 69:8 70:19 <b>pricing</b> 35:6 75:3 <b>primary</b> 132:13	155:16 <b>principal</b> 51:8,10 75:2 90:3 91:11 127:12 154:15 <b>Principally</b> 75:23 <b>principals</b> 160:15 <b>principle</b> 9:2 43:12 44:16,18 44:20 53:12 157:13 158:16 159:2 160:8 167:12 169:14 <b>principles</b> 167:25 <b>prior</b> 61:18 93:17 108:13 138:11 142:9 153:1 161:14 <b>private</b> 51:4 52:22 <b>privy</b> 106:11 <b>prize</b> 29:9 <b>pro</b> 45:4,6 <b>probably</b> 14:12 30:24 87:23 107:7 110:8 164:9 <b>problem</b> 66:12 88:15 129:25 130:7,22 131:4 131:12,14 133:2 133:6,11,14 173:3 <b>problematic</b> 158:22 <b>problems</b> 103:18 109:9,9 114:4,14 <b>procedure</b> 113:21 <b>procedures</b> 43:13 44:7,17 46:12 50:9 <b>proceed</b> 83:3 <b>proceedings</b> 114:6 <b>process</b> 52:15 78:4 105:21 114:4 <b>produce</b> 2:16 44:7 95:2 159:25 <b>produced</b> 134:14 <b>product</b> 29:8 78:14 <b>professional</b> 10:1 10:3 13:15	126:23 <b>profit</b> 13:22 63:2 63:19 65:21 67:17 71:10 72:22,24 73:6 75:23,24 88:12 88:14 90:1 <b>profits</b> 61:11 62:3 62:3,13,23 63:8 65:9,12,15,16,16 65:17 66:15,21 67:6 71:19,19,24 71:25 72:8,14 88:16,17 115:8 121:6 126:18 159:15,18,23,25 160:3,8 163:18 <b>prohibition</b> 137:25 138:18 140:13 150:7 155:7,8 156:10 <b>projects</b> 82:7 <b>promise</b> 70:6 81:18 <b>promptly</b> 161:24 <b>proof</b> 171:21 <b>proper</b> 76:21 82:15 84:13 105:2 <b>properly</b> 64:15 <b>proportionate</b> 61:15 <b>propose</b> 38:16 60:17 62:17 124:9 151:21 158:2 <b>proposed</b> 132:7 <b>proposing</b> 17:10 177:14 <b>proposition</b> 6:15 16:23 20:18 77:20 86:9 107:20 108:3 156:24 157:17 159:1 163:15,23 167:11 <b>proprietor</b> 158:24 <b>protect</b> 155:10 169:9 <b>protection</b> 156:17
---	--	---	---	---

<b>prove</b> 59:11	<b>pursuant</b> 35:21	150:22 164:16,25	120:4 123:9	149:24 150:7,25
<b>proved</b> 158:22	80:17 138:12	165:24 168:16	126:15 129:1	151:15 152:6,8
<b>provide</b> 119:2	156:15 161:22	<b>questions</b> 118:24	<b>raisings</b> 163:21	152:11,15 153:8
149:14	<b>put</b> 12:3 52:3	122:1 123:9,12	<b>range</b> 112:21,22	153:10,12 154:21
<b>provided</b> 65:20	55:19,19,21,21	124:4 127:17	116:9	159:24 169:22
81:5 83:17 138:9	56:4 61:15,16	131:25 160:1	<b>ranged</b> 110:25	171:18,21
139:6 158:23	66:24 73:16	<b>quick</b> 115:18	<b>rank</b> 119:21	<b>rates</b> 4:25 11:23
168:18	74:12 82:19 91:1	<b>quickly</b> 78:3	<b>rarest</b> 170:8	11:24 16:2,3,20
<b>provides</b> 22:2	97:7 99:9,22,25	175:24	<b>rate</b> 1:11,19,23,23	18:15 22:7,16
157:10	101:1 131:19	<b>quid</b> 45:3,6	1:23 2:13,16 3:6	23:22 31:3 34:14
<b>providing</b> 21:15	149:11 154:25	<b>quite</b> 31:6 45:23	4:24 8:16,25	36:18,21 38:12
46:4 81:18,21	157:2 167:9	74:1 78:3 99:22	10:10,22 11:1,25	38:13 39:16,19
<b>provision</b> 15:2	170:24 174:10	111:3 117:17	12:5 13:24 15:12	40:1 48:6 55:6
38:20 46:20	<b>puts</b> 64:15 92:2	166:17 169:25	15:18 16:6 17:7	75:9 78:11 79:6
49:10 95:8 119:8	<b>putting</b> 49:11	<b>quo</b> 45:4,6	17:19,19,24 18:1	79:8 91:18,24
119:10 120:25	54:15 80:9	<b>quotation</b> 7:13	18:1,6,9,17,20,22	110:22,25 113:6
139:21 140:1	156:21 171:15	36:1 37:8 47:2	19:7,13,19 20:16	113:18 148:17
<b>provisions</b> 15:3,5	<b>put-up</b> 174:8	93:6,8,10 94:11	20:23,23 21:4,14	155:24 174:1
47:5 64:5 151:20		94:14,16,25 95:6	21:17 23:1,5,16	<b>rating</b> 76:1 156:21
155:12	<b>Q</b>	95:11,20 167:7	23:24,24,25 24:3	<b>ratio</b> 106:23
<b>proximate</b> 108:18	<b>qualification</b>	<b>quotations</b> 94:23	32:14,17,21 34:2	126:16 130:7,20
<b>proxy</b> 8:17 9:10	57:22	<b>quote</b> 97:14	34:2,4,6,11,18	166:24
30:22 70:12	<b>qualities</b> 117:12	114:23	35:2 36:15 37:1	<b>rational</b> 32:24
76:21 77:3 79:2	<b>query</b> 50:1	<b>quotes</b> 97:4	37:4,13 38:11	41:4 128:25
88:24	<b>question</b> 1:7 3:25	<b>R</b>	39:18 40:10	<b>rationale</b> 18:5,15
<b>punt</b> 122:14	4:13 5:8 15:10	<b>Railway</b> 165:18	44:23 48:10,20	18:19 19:9 20:5
<b>purchase</b> 76:3	27:6,16 31:8,16	167:8	49:7 51:20 55:2	<b>rationality</b> 4:3
<b>purchased</b> 72:3	33:4,5 40:4,13,14	<b>raise</b> 5:21 10:12,15	55:7 57:14 58:2	54:20 56:22,23
88:10	41:7 42:16 48:13	24:10 32:7 42:4	58:6,12 62:21	58:3,6 134:20
<b>purchaser</b> 72:5	50:15 56:11	42:5 73:15 76:11	69:3,7 70:12,25	<b>ratios</b> 129:13,19
87:14 174:17,21	59:24 60:1 63:8	76:25 106:21,25	72:23 74:8 75:8	129:20,21
174:23	65:13 66:1 68:12	107:3,6,9,23	75:17 76:21 78:4	<b>reach</b> 143:4 166:8
<b>purchasers</b> 87:2	83:7 89:16 91:1	108:4,5,7,14	78:6 79:21,21	<b>reached</b> 81:17
173:21	91:20 92:3,23	110:21 111:24	80:15,25 83:9,16	129:17
<b>purely</b> 52:22 57:25	96:22 97:3,15	114:14 118:18	84:20 85:9 86:8	<b>reaches</b> 176:11
<b>purported</b> 138:15	98:4 100:11	121:19 128:14	86:15 87:9 89:18	<b>reaching</b> 82:5
<b>purpose</b> 2:6,13,16	105:8,17 106:19	129:23 136:23	91:17 92:2,22	<b>react</b> 42:20
60:25 80:10	107:1 113:16	<b>raised</b> 5:8 27:4	98:24 99:5	<b>reaction</b> 35:11
86:14 98:24	115:16 116:19,20	48:13 54:23	102:24 112:3,8,9	129:23
131:13 139:20,25	116:21 117:11,22	111:9 123:11	113:15 114:7,10	<b>read</b> 2:15 7:10,16
142:23 151:3	117:23 118:20	127:11	117:2,14 128:20	22:3 34:9 44:2
153:10 155:6	120:3 124:13,19	<b>raises</b> 10:16 114:4	131:23 132:16	49:6 50:11 65:3
158:15 159:19	124:23 125:5,10	<b>raising</b> 9:21 10:4	133:10 137:16	84:5,6 85:24,24
164:3,5	126:3,3,13,17,22	31:3 70:21 71:12	138:5 141:23,24	101:25 114:22
<b>purposes</b> 3:6 57:9	127:9,13,19	71:15 74:19	142:12,17,24	120:24 130:8
77:24 103:3,9	128:3 129:8	76:13 91:13,25	143:14,15,24	149:19 162:23
105:2 125:14	130:24 131:19	102:25 108:10,22	144:3,3,15,16,17	164:21 171:20
137:18 139:20	132:2,12 133:12	108:23 109:10	145:1,5,16,20	172:1 176:17
141:22 142:4	134:19 135:15,22	110:24 111:19	146:25 147:18	<b>readily</b> 48:5
151:5,23 152:10	136:2,6,11,19,25		148:2,12,14,24	141:21

<b>reading</b> 52:8 90:15 105:13 149:17 176:18 177:6	137:2 143:17 150:11 155:7,16	37:5 39:20 41:13 47:16 53:5 60:18	34:1	124:13 125:11,19
<b>real</b> 68:2 71:16 73:13 85:5 121:25 174:20	<b>recall</b> 16:1 138:4	62:10 63:1 67:17 67:17 71:5 75:25	<b>reiterate</b> 90:17 116:15	126:4,8,12,14,19
<b>realistic</b> 111:23	<b>recap</b> 58:13	76:6 80:25 83:19 83:22 86:4,11	<b>reiterated</b> 70:2	128:8,15,25
<b>reality</b> 79:10 121:15 131:6	<b>receipt</b> 161:24	101:18 112:19 115:15,19 122:25	<b>rejected</b> 84:23 104:4	129:3,10 134:5
<b>really</b> 11:20 12:10 39:15,16 41:20	<b>receive</b> 69:8,11 70:10 142:15	123:1 130:16 144:4 149:18	<b>relate</b> 118:14	135:16,19,20
41:21 48:23 54:18 59:6,20	146:22 171:2	154:19,22,25 157:7 159:15	<b>related</b> 135:24 159:21	136:14,16,16,23
95:16 97:17 111:18 122:5	<b>received</b> 36:19 110:16 160:15,18	172:5	<b>relates</b> 35:15 58:21 143:2	136:23 137:1,6
145:21 174:16 175:1 177:23	160:23 161:1	<b>referenced</b> 2:8 4:11 12:5	152:17 153:3	137:11,12 140:21
178:3,10	<b>receiving</b> 20:1 147:25 150:13	<b>references</b> 49:4 76:19	<b>relating</b> 36:22	141:20,23 142:18
<b>realms</b> 49:8	151:23 159:16	<b>referencing</b> 2:4	<b>relation</b> 1:7 27:25 38:21 69:18 72:7	143:15,22 144:20
<b>reason</b> 1:9 9:23 14:1 17:1 18:8	<b>recipient</b> 163:17	<b>referred</b> 12:18 104:9 105:25	73:25 78:8 80:4	145:6,10,13,14
18:12 19:8 25:8 27:11 37:10 40:8	<b>reclaim</b> 174:19	147:17 148:6 159:3 161:2,9	138:19 142:24	146:18,20 147:1
41:2 74:10,15 76:8 84:25 85:17	<b>recognised</b> 86:6,7	<b>referring</b> 115:19	144:8 161:17	147:3,7,11,17,20
92:6 100:8 122:2 124:10 128:8	<b>recollection</b> 68:13	<b>refers</b> 11:7 21:20 43:12 139:10	<b>relationship</b> 35:5	147:22,24 148:1
129:7 132:8 140:12 147:23	<b>reconstruction</b> 162:4	161:11	<b>relative</b> 1:24 2:25 71:4 75:13	148:3,10,22
148:25 150:3,10 164:6 167:10	<b>recourse</b> 66:25 121:8,15,22	<b>reflected</b> 9:6 12:19	<b>relatively</b> 49:15 79:7 163:16	149:25 150:3,11
177:2	135:18 136:3	<b>reflection</b> 90:23	<b>relevance</b> 6:2 89:16 116:19	150:14,17,18,21
<b>reasonable</b> 18:24 43:13 44:7,8,17	<b>recover</b> 64:10 158:14 161:22	<b>reflective</b> 2:16	<b>relevant</b> 2:21 4:13 5:6 6:17 7:8 9:22	150:25 151:15,22
46:12 47:11,12 48:20 49:18 50:9	165:23,24 166:11	<b>refusal</b> 81:22	11:8 12:15,16	151:25 152:9
51:19 83:9,16 85:15 86:12 95:1	174:23	<b>regard</b> 15:25 49:19 84:14	13:5 15:12 16:4	153:13,15 154:24
95:2	<b>recoverable</b> 25:21 26:21,23,24	90:14	17:25 18:3,12	156:9 157:11
<b>reasonably</b> 38:3 50:4 74:4 105:16	28:12 31:4,7	<b>regarded</b> 80:20 84:24 103:17	20:10 24:3 25:8	159:18 162:6
161:23	62:4	<b>regardless</b> 28:25 29:6	25:9,16,16,17,20	163:21,23 164:9
<b>reasons</b> 20:16 30:14 31:21	<b>recovered</b> 166:3	<b>regulatory</b> 102:23 103:8,19 104:6	30:23 31:23 33:6	168:10 169:23,23
59:14 68:6 74:14 83:24 86:19	<b>recovery</b> 8:17,18 92:12	104:18 129:12,18	34:3 38:14 39:4	170:4 171:1,5,16
88:25 90:3 102:15 115:14	<b>red</b> 48:9,13	<b>reinforces</b> 47:13 104:22	39:11,25 43:17	171:22,24 172:5
117:18 125:2 126:21,24 130:18	<b>redeemable</b> 120:18	<b>reinsurance</b> 161:12	46:7 47:19,25	172:6,17 173:6
	<b>redemption</b> 62:2 120:15 121:1	<b>reinsured</b> 160:15 160:18	49:13 55:12	<b>relevantly</b> 82:11
	<b>redirected</b> 132:6	<b>reinsurers</b> 160:16 160:17	56:12 57:15,16	<b>reliance</b> 8:14 73:11 100:9
	<b>reduce</b> 68:7	<b>reintroduction</b>	57:16 58:2 59:12	102:20 105:15
	<b>reduction</b> 61:7,20		60:9 64:23 66:4	<b>reliant</b> 11:24
	<b>refer</b> 64:23 142:14 144:20 145:11		71:9,12,15 75:24	<b>relied</b> 11:9 13:10 15:2,4 100:25
	150:20		76:4,5,11,25 77:4	101:20 113:9
	<b>referable</b> 14:12 29:19		80:5 85:1 86:14	115:4 118:5
	<b>reference</b> 1:15 2:2 5:1 7:6,22 22:10		87:9 90:6 91:17	121:25 126:11
	23:1,16 36:1		94:6 95:13	<b>relies</b> 107:5
			100:11 107:9	<b>rely</b> 4:1 7:15 9:7 9:16 59:14 78:5
			108:4,5,6,11	84:10 86:8 87:20
			114:3 116:5	87:23 98:12 99:5
			117:7,20 118:18	118:11,14 121:17
			122:24 123:25	128:25 137:8
				160:3,7 162:6
				<b>relying</b> 14:10 24:16 31:22
				77:21 105:21
				106:9
				<b>remain</b> 28:25

143:4	176:1 177:8,13	<b>responding</b> 112:5	57:25 60:21 61:3	<b>runs</b> 71:16
<b>remainder</b> 23:4,18	<b>represent</b> 125:3	<b>response</b> 35:3	64:13 65:19 66:3	<b>run-of-the-mill</b>
<b>remained</b> 141:13	<b>represented</b>	91:11 102:20	66:8 67:22 68:10	73:24 107:10
<b>remaining</b> 43:23	113:23	103:1 106:14	80:12 98:16	
<b>remains</b> 29:6	<b>representing</b> 70:8	108:24 110:16	105:8 114:12	<b>S</b>
58:17 76:14 98:9	<b>repudiatory</b> 81:23	112:11 116:15	132:24 135:4	<b>s</b> 171:16 172:3
101:9 159:1	82:24	127:12 133:9,12	137:21,23 140:3	<b>Sachs</b> 16:7,17
<b>remedy</b> 66:13,17	<b>require</b> 68:25	172:21 175:1	141:2 144:6	32:22 73:10
115:12	124:1	<b>responsive</b> 112:1	148:20 152:4	74:22 76:16
<b>remember</b> 5:20,24	<b>required</b> 3:12 8:3	<b>rest</b> 130:14 135:19	153:24 154:5,9	86:25 102:6,21
6:1,10 13:3 72:2	15:15 24:21,22	<b>restitution</b> 161:25	154:16 156:1,2	107:5 108:23
101:1 104:5	32:18 36:10	<b>restricted</b> 66:23	156:23 165:4	110:5 111:2
111:11	47:10 55:23	<b>restriction</b> 155:12	166:15,16 167:7	113:2 114:16
<b>remembering</b>	67:22 69:12 71:1	<b>restrictions</b> 119:13	168:20 176:3	119:4 130:3
37:24 104:1	74:1 77:18 81:8	<b>rests</b> 97:10	<b>rightly</b> 171:9	177:17
<b>remembers</b> 97:23	84:21 86:4 94:4	<b>result</b> 19:20 29:12	<b>rights</b> 14:10 36:4	<b>Sal</b> 113:9 126:5
<b>remind</b> 22:7 52:8	106:22 108:4	32:2 44:8 50:5	61:2 62:11 68:7	<b>Sally</b> 3:14
103:12 143:1	117:24 120:1	51:17 95:2 107:6	68:11,11 137:25	<b>satisfaction</b> 94:5
176:18 177:4	125:19,20 142:16	161:7 162:3	140:14 154:10	<b>satisfy</b> 60:11
<b>reminded</b> 104:22	143:12 144:13	<b>resulting</b> 126:19	156:6 157:15	<b>saturation</b> 176:12
<b>reminding</b> 37:20	171:14	<b>retention</b> 159:10	159:14 161:16	<b>save</b> 81:13 122:16
<b>remit</b> 123:12	<b>requirement</b> 119:1	159:11	<b>rise</b> 26:12 66:12	133:23
160:22 161:23	119:16 121:5,18	<b>return</b> 13:8,9 61:9	155:22	<b>savour</b> 59:5
<b>remote</b> 162:12	<b>requirements</b> 47:7	61:12,25 62:13	<b>risk</b> 15:22 24:12	<b>saw</b> 163:6
<b>remoteness</b> 162:9	102:23 103:8	62:20 65:15	69:4 71:16 75:8	<b>saying</b> 9:19 16:17
<b>remove</b> 132:23	104:6,18 118:2,4	68:25 69:10,22	75:14,15,17,18	24:19 50:16
<b>render</b> 68:8	118:23 120:7	71:23 72:12,15	76:1,1 78:12	59:23 72:23
165:12	129:12,18	72:20,25 84:21	84:17 131:3,10	88:20 99:25
<b>renewal</b> 162:4	<b>requires</b> 3:18 34:5	87:16 88:13,14	156:1,25 157:6	102:10 105:23
<b>repaid</b> 3:19 70:9	72:21 117:19	89:13,20 90:2	157:19 168:14,16	112:25 120:25,25
71:2 84:1 120:1	125:18 136:14	119:14 122:15	<b>riskiness</b> 75:10,16	130:1 140:23
<b>repay</b> 58:19	138:3 172:22	160:16 161:15	101:6	147:24 178:8
<b>repayable</b> 4:5	<b>requiring</b> 66:18	<b>returns</b> 69:8,13	<b>risks</b> 29:4 75:24	<b>says</b> 3:17 22:18
<b>repeated</b> 170:25	71:18	77:18,19 80:10	155:10,21 156:5	30:9 31:4 53:25
<b>repetition</b> 178:10	<b>research</b> 12:7	88:9	164:8 167:20	83:12 85:4,21
<b>replace</b> 36:5 37:6	<b>reserve</b> 63:21	<b>reverse</b> 79:13 92:7	168:8	93:20 96:21
47:17 56:3 89:21	64:11 110:23	141:8,10 144:24	<b>rival</b> 96:18,20	115:4 139:12,22
90:1 91:4	<b>resolutions</b> 64:2	166:15 177:9	132:1	139:24 160:12
<b>replacement</b> 14:1	<b>resolved</b> 66:12	178:9	<b>Rixson</b> 103:25	164:15,23 166:19
36:3 37:9 38:21	<b>resonance</b> 168:1	<b>reversed</b> 5:24	<b>role</b> 100:17 117:13	166:24 171:19
58:16	<b>resort</b> 128:15	<b>review</b> 50:2 51:4	<b>round</b> 18:17 33:17	<b>SCG</b> 76:17 177:18
<b>replacements</b> 36:9	<b>respect</b> 27:3 37:25	53:5,22 78:19,23	74:11 75:13	<b>SCG's</b> 9:25 34:16
<b>replacing</b> 46:3	40:16 41:5 45:25	<b>revisit</b> 55:13	161:4	76:19
73:5 117:10	51:25 65:6 94:3	<b>revisited</b> 162:9	<b>rounding</b> 89:7	<b>schedule</b> 138:9
<b>replenish</b> 125:20	119:23 161:14	<b>reward</b> 69:6 84:18	<b>rule</b> 166:1,7	<b>scope</b> 49:15 105:6
<b>replenishing</b> 73:5	167:3	<b>re-direct</b> 52:10	<b>run</b> 15:1,3 73:16	105:6 123:6,20
<b>replete</b> 76:19	<b>respects</b> 165:10	<b>re-writing</b> 171:13	124:9	<b>second</b> 1:16 7:2
<b>reply</b> 16:7,17	<b>respond</b> 13:13	<b>Richards</b> 53:8	<b>running</b> 80:16,20	10:19 14:4 21:13
29:16 32:22	34:23	<b>right</b> 18:14 27:3	82:3,9,21 83:6,17	22:13,20 26:17
132:11 175:18,21	<b>responded</b> 173:19	28:4 35:14 43:15	84:2,14 85:19	27:16 37:15

46:21 52:13 55:9 61:9 64:24 71:7 75:19 77:16 84:11 93:11 94:16 95:6 96:13 101:8,19,24 119:17 130:9 136:11 139:11,13 142:23 145:23,25 153:22 157:13 158:7 165:20 166:16,24 177:18 <b>secondary</b> 61:1 <b>secondly</b> 2:1,25 13:14 24:18 39:20 58:21 84:3 125:3 162:11 172:25 <b>section</b> 7:1 22:9,15 54:22 94:8,15 137:14,17,21 138:6,8,17,22,23 139:5,8,9,12,16 139:20 140:9,15 140:16,17 142:5 142:8 143:20 144:1,9,12,14,23 144:25 145:3,17 145:18,23 147:19 149:5,6,8,14 150:8,23 151:7 151:10,12,16 152:20 153:18,19 153:25 154:6,8 154:11 156:6 157:5 164:4 170:5,16 <b>security</b> 38:20 139:19 164:24 166:12 <b>see</b> 7:23 8:12 21:9 21:12 24:2 28:21 32:7 44:20 45:20 65:24 68:16 74:9 82:8 95:14 110:12 119:9,17 134:25 138:7,16 140:11 143:8 152:12,20,25 153:5 157:25	158:3 159:17 <b>seeing</b> 86:24 99:15 <b>seek</b> 130:7 <b>seeking</b> 49:18 <b>seen</b> 13:20 45:22 46:10,15 119:6,8 144:12 167:12 <b>sees</b> 48:9 50:9 <b>seldom</b> 96:18 <b>selected</b> 8:2 40:22 <b>selection</b> 40:24 41:3 <b>selfishness</b> 174:12 <b>self-contained</b> 6:17 <b>self-evidently</b> 16:21 80:6 <b>Sempre</b> 114:24 <b>senior</b> 2:11 11:9 13:13 16:24 73:10 77:10 87:1 98:14 102:5,21 115:21 119:21 170:1 171:14,19 <b>sense</b> 12:16 28:19 37:9 40:13 49:1 54:14 56:3,9 77:20 79:9 82:25 85:22 98:23 107:22 108:1 112:2 120:11 122:15 129:2 134:1 136:18 145:8 148:13,22 152:3 <b>sensible</b> 41:7 <b>sensibly</b> 121:17 <b>sentence</b> 64:24 65:4 77:16 119:17 160:12,19 164:14 <b>separate</b> 14:7 27:16,24 29:14 30:19 43:4 50:12 50:25 51:2,3 93:21 <b>separately</b> 154:10 <b>September</b> 108:15 108:21 <b>sequitur</b> 106:15	<b>series</b> 119:22 124:3 <b>served</b> 23:11 <b>serves</b> 131:13 <b>service</b> 10:2,3 14:7 <b>services</b> 13:15 97:5 158:24 <b>set</b> 3:14 4:13 62:14 130:6 152:9 155:19 173:21 <b>sets</b> 84:6 <b>settled</b> 161:2 <b>settlement</b> 36:6 93:9 94:18,20,22 95:5 143:20 144:5 160:16 <b>seven</b> 15:4 <b>share</b> 60:22 61:10 61:15 62:8 63:2 65:9,11,19 66:5 67:6 68:13 69:23 70:18 81:6 121:2 122:8,18 <b>shareholder</b> 29:3 62:11 64:13 65:6 <b>shareholders</b> 13:8 62:12 64:16,17 66:2 68:23 69:7 69:7,11 70:9 71:23 72:10,17 72:25 <b>shares</b> 61:16 62:6 62:9,10,15,20 64:2,6 65:7 68:8 70:8,11 72:10 111:3 119:5 120:4,10,17 <b>sheet</b> 26:10 30:17 <b>shilling</b> 63:21 <b>Shire</b> 165:13 166:11 <b>shoes</b> 54:15,19 <b>short</b> 16:13 23:9 39:1 45:17 74:1 89:5,8 133:20 136:5 147:13 <b>shortfall</b> 125:12 <b>shorthand</b> 45:14 133:16 <b>shortly</b> 45:23	60:17 117:17 <b>short-term</b> 84:25 <b>shot</b> 3:15 <b>show</b> 17:1 63:7 98:13 104:22 133:9 148:8 <b>showed</b> 111:16 <b>showing</b> 149:15 <b>shown</b> 23:10 150:5 164:12,15,18,21 <b>shows</b> 82:15 <b>shy</b> 122:2 <b>side</b> 6:2 11:2 19:20 19:22 25:19 33:12 48:21 84:22 90:10 99:14 135:21,21 155:20 161:11 177:5 <b>sides</b> 91:9 <b>sign</b> 173:13 <b>significant</b> 24:12 46:19 169:25 <b>significantly</b> 121:20 <b>silence</b> 16:15 17:12 <b>similar</b> 12:6 34:13 37:8 86:19 90:9 143:2 163:16 <b>similarities</b> 121:11 <b>similarly</b> 116:13 126:22 147:18 <b>simple</b> 9:16 58:25 70:12,12 76:8 78:24 83:9 85:2 112:19 <b>simplistic</b> 108:24 <b>simply</b> 5:25 27:20 31:23 33:20 36:2 37:14 56:11 67:25 69:18 71:6 78:2 86:11,20 102:12 104:15 110:1 115:19 116:23 117:13 118:13 124:9 125:2 131:3 132:19 133:6,8 144:5 145:15	147:1 177:16 <b>single</b> 22:8 46:20 81:14 110:13 111:24 118:7 122:10 137:23 <b>situation</b> 24:1 86:3 129:16 131:22 174:11 <b>situations</b> 27:4 29:5 73:17 129:15 <b>six</b> 8:11 <b>sixth</b> 33:24 126:17 <b>skeleton</b> 2:9,12 4:11,14 16:8,18 16:23 22:10,10 23:22 32:22 55:20 56:4 57:8 60:19 62:15 76:18,19 77:11 77:11,13 101:3 103:5 107:4 110:9,15 114:17 114:19,20 115:18 115:23 116:15 118:11 124:4 127:11,25 128:17 145:12 156:22 157:23 170:25 171:19 173:18 <b>slight</b> 177:15 <b>slightly</b> 29:7 52:13 55:14 69:21 97:22 98:7,8 135:8 168:14 <b>slipped</b> 65:2 <b>slips</b> 176:14 <b>slot</b> 43:8 <b>small</b> 130:9 140:8 146:2 151:14 169:24 172:9 <b>smaller</b> 174:25 <b>Snell</b> 158:11 <b>Socimer</b> 42:22 53:19,25 54:2 <b>sole</b> 21:22 <b>solely</b> 37:4 135:18 171:8 <b>solicitors</b> 14:16 128:21
--	---	--	--	--

<b>solution</b> 133:5	44:5,6 51:2,6	<b>stuck</b> 105:14	160:22 161:1	4:23 9:22 10:4
<b>solutions</b> 132:7	52:21 53:6,10,19	<b>stupid</b> 20:22	174:1	10:12 14:12 16:5
<b>somebody</b> 31:17	57:12	<b>subject</b> 54:6 67:7	<b>substantially</b>	19:25 22:8 25:4
36:3 143:22	<b>standards</b> 47:16	75:20 79:15	48:10 87:23	25:16,16 26:6,15
<b>soon</b> 74:3	54:17	119:13,15 121:5	174:25 175:12	27:5,13,17 29:11
<b>sorry</b> 52:9 95:25	<b>standing</b> 73:12	138:8,18 168:2	<b>substantive</b> 175:19	32:7 38:14 42:4
111:11 120:9	<b>stands</b> 18:16	<b>subjective</b> 24:13	<b>subsumed</b> 10:1	42:5 60:24 61:4
122:4 128:1	<b>start</b> 65:17 89:7	32:11 75:20	<b>sub-heading</b> 55:10	61:4,12,14 73:5
142:1 152:2	138:3 141:11	79:16	58:10 130:5	76:11,25 90:1
172:18,19 176:24	142:1	<b>submission</b> 35:13	<b>sub-headings</b> 8:6	92:1 94:17
<b>sort</b> 14:19 15:8	<b>starting</b> 68:18	44:21 55:15,16	<b>sub-issue</b> 33:25	106:21 109:20
22:5 29:18 31:1	81:1 137:24	55:18 59:5,6	<b>sub-points</b> 8:10	110:14,18 111:21
31:20 50:8 82:5	140:11 160:11	84:24 90:23 92:6	<b>succeed</b> 171:15	117:8,10 118:18
92:11 106:13	<b>starts</b> 77:16 165:6	98:3 107:21	<b>success</b> 84:3	120:1 124:15
109:8,23 122:18	<b>state</b> 19:4 31:18	<b>submissions</b> 1:4	<b>successful</b> 84:19	136:23 142:20,20
129:20 168:16	75:7 108:19	2:12 3:12 20:13	<b>successive</b> 172:10	143:18 144:2,5,6
<b>sorted</b> 28:9	155:11 156:5	34:23 35:4 55:10	<b>succinctly</b> 147:21	144:21 147:10
<b>sorting</b> 129:21	<b>stated</b> 64:10	59:3 60:4 84:7	167:4	150:14 154:6,15
<b>sorts</b> 87:16 91:8	<b>statement</b> 6:5 12:2	96:4 102:20	<b>suffered</b> 34:21	171:5 172:2
117:6	53:11 100:24	124:11 134:3	161:7 165:22	174:24
<b>sought</b> 13:16 68:7	101:11,14 115:4	157:22 175:20	<b>suffering</b> 25:5	<b>summarised</b> 82:11
104:6 116:4	144:18 145:22	176:11,19 177:11	<b>suffers</b> 22:19	<b>summary</b> 161:19
<b>sound</b> 169:24	149:11,15 167:17	179:3	<b>sufficient</b> 98:12	161:21
<b>sounds</b> 16:9	<b>statements</b> 149:9	<b>submit</b> 5:5,10	<b>suggest</b> 3:9,14	<b>sums</b> 6:25 24:24
<b>source</b> 19:23 79:20	<b>States</b> 11:13	18:16 24:7 33:17	8:16 15:9 17:5	33:2 107:23
<b>sources</b> 106:19	<b>status</b> 28:13	38:18 41:10	17:13 33:3 34:8	111:20,25 166:12
<b>South</b> 81:7	<b>statute</b> 65:22	43:17 67:22	34:11 35:14	174:1
<b>speaking</b> 8:14	66:19	76:22 98:11	100:3,4,6 107:7	<b>supplemental</b> 5:23
<b>special</b> 64:1	<b>statutes</b> 66:14	112:13 113:3	110:1 111:18	151:6,18
<b>specific</b> 26:16	<b>Staughton</b> 165:1,6	125:15 128:4	116:1 127:3	<b>support</b> 16:22
38:25 66:18	166:14,18 167:4	<b>submitted</b> 12:20	129:4 130:23	49:14 136:9
100:15 114:14	<b>Staughton's</b> 163:5	83:15,19 84:13	131:4 132:16	<b>supportive</b> 169:11
125:22	<b>Steel</b> 63:5	112:12 135:11	136:4 169:10	<b>supports</b> 150:16
<b>specifically</b> 90:9	<b>stepping</b> 2:6 86:23	<b>subordinated</b>	170:8 174:11	151:14 168:6
95:15 176:16	<b>steps</b> 130:14	78:10	176:17	<b>suppose</b> 40:21
<b>specified</b> 69:7	<b>stick</b> 35:24	<b>subparagraph</b>	<b>suggested</b> 22:7	49:23 78:19
<b>spectacles</b> 5:10,12	<b>stock</b> 69:8 75:16	7:13 44:14 81:11	100:5 102:5	125:2
5:12 67:21	119:19,20,21,22	81:19,25 131:20	128:11 129:4	<b>supposed</b> 104:17
<b>speculation</b> 109:1	<b>stop</b> 27:20	138:25	131:18	<b>supposing</b> 30:25
<b>speed</b> 74:2	<b>straight</b> 24:2	<b>subparagraphs</b>	<b>suggesting</b> 30:13	<b>supposition</b> 59:21
<b>spend</b> 178:12	<b>straightforward</b>	139:1	166:25	<b>sure</b> 74:11 75:13
<b>split</b> 139:1	52:3	<b>subsequent</b> 52:10	<b>suggestion</b> 20:4	99:10 111:6
<b>spoken</b> 50:19	<b>streams</b> 36:24	<b>subsequently</b> 82:4	37:11 49:3 82:2	120:24 134:6
<b>spread</b> 8:15,19	<b>stress</b> 39:12 65:1	<b>subsidiary</b> 1:21	82:20 92:20	177:24
131:24	<b>strictly</b> 147:14	<b>substance</b> 99:23	102:11 108:2	<b>surely</b> 123:10
<b>SPV</b> 173:21	<b>strip</b> 60:3	133:22 162:6	<b>suggests</b> 10:25	<b>surplusage</b> 147:8
<b>squeezed</b> 95:22	<b>strong</b> 1:14 40:9	171:1	105:13 164:3	147:11
<b>stage</b> 101:2 106:5	157:17	<b>substantial</b> 24:11	<b>suitable</b> 45:13	<b>surprised</b> 16:11
117:8	<b>structured</b> 121:13	29:11 32:3 74:18	<b>suits</b> 169:20	<b>surprising</b> 11:15
<b>standard</b> 29:21	155:9	107:23 138:14	<b>sum</b> 2:20 4:20,21	12:17 157:3

<b>surrounding</b> 73:23	57:22 62:17 72:5	153:1 156:18	54:9 56:4 68:3	76:3 79:13 81:9
<b>surveying</b> 158:23	87:14,15 99:16	170:7,11,12,15	68:14 77:7 83:12	81:9 86:22 88:24
<b>susceptible</b> 97:3	111:13 115:17	<b>terminology</b> 66:7	97:10 104:4	91:25 92:21
<b>suspect</b> 135:9	128:12 134:2	<b>terms</b> 5:19 7:21	107:7,16 109:24	108:20 110:20
<b>suspicious</b> 133:23	138:24 146:23	8:18 64:10,17	110:14,16 112:20	112:25 114:17
<b>swallowed</b> 113:4	148:5 151:19	69:16 80:19	113:12 117:17	118:1,15 122:25
<b>swap</b> 36:15	158:19 159:8	92:23 102:19	118:13 125:17	123:1 128:16
<b>sweet</b> 122:23	164:10 167:3	112:20 119:14	128:21 135:21	129:11 137:9,9
<b>swept</b> 41:15	170:2,3 172:23	124:1,25 138:5	136:5,6 141:7	143:4 159:17
<b>syndicated</b> 14:11	<b>takes</b> 93:25 143:6	146:6	154:10 157:25	170:14,20 171:2
<b>syndicates</b> 159:8	<b>talking</b> 10:14	<b>terrible</b> 118:19	164:18 169:18	171:2 173:2,4,14
159:14,20,23	56:21 62:6	<b>terrorem</b> 21:21	170:25 171:9	175:12,13,13
160:22 161:13,17	114:11	<b>test</b> 4:3 42:24	174:4,4 175:9,25	176:7 178:12
161:18 162:1,15	<b>task</b> 48:2	43:24 45:4 48:5	176:14,22 177:1	<b>times</b> 107:11
<b>syndication</b> 15:13	<b>Tate</b> 4:11 115:17	48:21 52:20	177:7 178:1,2,7	<b>timetable</b> 175:17
<b>system</b> 158:5	<b>tax</b> 24:24,25	54:20 56:10,22	<b>thinking</b> 50:17	176:4
	<b>technical</b> 103:2	56:23 57:7,14,25	92:13	<b>title</b> 161:16
	106:13	58:3,6 132:1	<b>third</b> 4:7 10:2,15	<b>today</b> 114:8
<b>T</b> 35:21	<b>tell</b> 8:13 16:15	<b>tested</b> 6:1	11:6 13:1,14	<b>told</b> 42:18 87:21
<b>tab</b> 7:8 17:23	146:19	<b>text</b> 11:11 12:19	14:4,9 15:19	112:13 127:24
21:11 22:11	<b>telling</b> 167:6	96:16	22:13,14 42:8	175:13
37:21 43:3,6,9	<b>tells</b> 8:25	<b>textbook</b> 68:1	48:18 55:13 73:7	<b>tool</b> 86:7
44:10 45:11,22	<b>temporarily</b>	<b>textbooks</b> 134:14	75:15,19 86:2	<b>top</b> 21:13 64:24
46:17 63:6 68:4	130:19	<b>textual</b> 50:8 51:17	101:13 102:19	68:19 130:9
77:11 80:12 94:1	<b>tending</b> 8:16	52:14	124:23 136:25	153:1
101:12,18 103:14	<b>tens</b> 110:17 111:21	<b>thank</b> 178:15	144:8 145:11	<b>tort</b> 161:25
110:10 112:5	<b>term</b> 1:15 4:1	<b>thanks</b> 96:14	150:2 151:17	<b>total</b> 38:3 161:5
114:20 119:7	13:21 19:18 65:6	<b>theory</b> 20:11,11	157:1,19 169:10	174:24
124:5 130:3	79:4 123:25	100:22 102:3	175:5	<b>touch</b> 131:4
131:21 135:12	124:18 140:10	<b>thereon</b> 82:4	<b>Thirdly</b> 157:16	<b>touches</b> 125:16
138:4 139:7	145:10,13,16	<b>thesis</b> 17:4,13	<b>thought</b> 25:19	<b>trade</b> 151:4
158:11 159:4	148:25 149:1,25	<b>thing</b> 13:24 54:18	37:13,17 47:9	<b>trading</b> 65:10
164:11 176:23,25	<b>terminate</b> 83:1	69:18 71:4 88:1	50:21 95:13	<b>traditional</b> 6:21
<b>take</b> 2:10 4:15	<b>terminated</b> 35:17	106:9 122:10	104:25 135:6	<b>transact</b> 107:3
6:13 15:25 20:17	35:22 36:12 38:1	133:23 141:17	177:23	151:4
23:20 27:7,14	45:25	175:8	<b>three</b> 1:7 29:25	<b>transacting</b> 9:21
29:15 36:13	<b>termination</b> 18:9	<b>things</b> 2:22 10:1	63:6 70:14 75:4	69:17
45:13,19,23 56:3	19:12,19,20,21	30:4 33:3 38:19	75:4 83:24 115:6	<b>transaction</b> 10:8
57:23 58:5,24	20:23 22:20,23	46:4 57:21,24	157:9	10:11,12 11:2
59:7 62:11 66:10	23:14,16,25	69:5 80:6 93:9	<b>thwarted</b> 26:23	36:4 37:6 38:21
71:25 75:6 78:13	32:14,17 34:4	108:18 130:12	<b>tie</b> 81:20	45:25 47:17
79:24 80:7 90:12	36:12 38:2 46:25	152:11 175:21	<b>tied</b> 38:13	58:16 94:24
98:1 100:23	55:7 74:4 77:23	<b>think</b> 3:12 5:8 8:10	<b>time</b> 1:25 2:5,7,14	100:15,18 116:10
107:20 111:10	79:5 92:19 93:4	8:22 9:7 13:11	2:17,21,23 3:1,7	117:4,5 118:22
129:8 130:14	93:17 94:6,22	15:9 16:14,23	3:8,11 4:9 7:24	124:22 125:22,23
131:1 158:2	142:7,10,21	20:20 21:8 25:25	11:16 15:25	127:1 139:17,23
161:15 171:17	143:5,8,13 146:4	26:19 29:22 32:8	45:12 58:22,24	143:3
175:8,16	146:4,7,8,13	32:9 34:23 37:16	61:10,25 63:1,1	<b>transactions</b> 35:18
<b>taken</b> 17:21 21:7	147:6 148:12,14	49:17 50:6,14,22	67:17 69:2 71:3	35:21 36:5,12
27:24 28:5 53:7	148:17 152:18	51:15 53:4 54:8	71:4,5 75:22	38:1 46:1 117:7



118:21 139:14 169:7 <b>transcript</b> 3:16 50:20 52:8 <b>transcripts</b> 176:18 <b>transfer</b> 137:23,25 138:7,13,15,17 139:3,8,19 140:13,16 141:17 150:8,23 151:12 153:19 154:9,17 155:7 156:2,15 156:16,20,24 157:4 170:4,9 171:7 <b>transferable</b> 143:18 144:22,23 145:3 153:25 154:6,7 <b>transferee</b> 151:12 170:2 172:15 <b>transferor</b> 172:17 172:18,19 <b>transferred</b> 138:11 139:11 142:22 143:21 150:2,9 151:17 152:19 154:12 156:6 170:17 <b>transfers</b> 139:15 <b>translated</b> 1:22 <b>transparency</b> 45:7 47:6 <b>transport</b> 51:18 <b>tread</b> 8:3 <b>Treasury</b> 75:8 <b>Trevor</b> 61:23 <b>tried</b> 102:15 <b>trite</b> 2:1 56:3 <b>TROWER</b> 175:16 175:19 176:4,22 176:25 177:5 178:1 <b>true</b> 29:6 62:19 74:17 79:13 97:16 148:2 149:6,17 172:21 173:4 <b>Trust</b> 165:13 166:11	<b>Trustee</b> 60:23 <b>try</b> 27:12 57:23 <b>trying</b> 28:21 34:17 40:17 77:24 116:24 117:9 122:4 131:5 134:13 168:24 174:23 <b>Tuesday</b> 176:5 <b>turn</b> 8:8,14 61:24 83:18 90:8 110:12 113:12 114:19 117:11 124:3 137:10 <b>turned</b> 88:3,16 <b>turning</b> 9:15 17:22 21:8 63:3 83:7 129:7 <b>turns</b> 88:13 <b>two</b> 1:21 2:22 3:2 3:3 13:4 17:12 19:12 20:2 21:1 22:23 23:8 27:4 29:5,8,24 30:9 33:3 34:13 35:25 39:16 47:3 50:6 51:17 54:17 57:16 58:13,17 60:20 63:12 71:1 93:8 100:14 103:1,12 110:24 114:22 123:2 125:2 129:9,14 131:16 147:21 148:14 149:20 151:6 158:9 160:23 167:5 170:4,23 172:21 172:22 175:21 176:9 <b>twofold</b> 51:25 <b>two-minute</b> 16:15 <b>two-way</b> 6:21 <b>type</b> 118:16 <b>types</b> 46:8 68:24 110:24 116:10 117:6 <hr/> <b>U</b> <hr/> <b>ultimately</b> 8:10	<b>unable</b> 128:9 133:1 159:21 <b>unacceptable</b> 116:3 <b>unagreed</b> 156:4 <b>uncertain</b> 3:8,9 <b>uncertainty</b> 116:3 <b>unclear</b> 49:16 <b>undergo</b> 32:15 <b>underlies</b> 4:16 67:18 117:4 <b>underlying</b> 23:21 62:17 128:5 168:3 169:14 <b>undermine</b> 50:3 <b>underpin</b> 68:22 <b>underpinned</b> 35:14 <b>underpinnings</b> 59:17 <b>underpins</b> 55:6 73:9 75:3 <b>understand</b> 25:22 26:5,13,25 27:5 28:24 30:13,19 41:1,19 42:20 52:18 74:16 87:12 99:7 <b>understanding</b> 51:24 115:2 176:14 <b>understands</b> 90:19 <b>understood</b> 50:15 60:2 134:4,7 135:22 136:22 <b>undertake</b> 26:22 172:16 <b>undoubtedly</b> 10:10 13:12 71:9 168:6 <b>unencumbered</b> 81:20 135:20 <b>unenforceable</b> 21:17 <b>unfair</b> 19:5 <b>unfortunately</b> 123:11 152:7 <b>United</b> 11:13 <b>unknowable</b> 168:8 <b>unknown</b> 100:3	156:4 157:6,19 164:7,8 168:13 169:9,12 175:5 <b>unlawful</b> 100:2 <b>unmanageable</b> 157:6 164:7 <b>unnecessary</b> 147:14 <b>unpaid</b> 74:6,6 77:25 78:4 93:1 93:2,7,11,18 94:18 95:4,17 142:6,24 143:4,6 143:10,19,25 <b>unprotected</b> 168:14 <b>unreal</b> 15:9 <b>unreasonable</b> 23:12 <b>unreasonableness</b> 44:5 <b>unworkable</b> 49:10 <b>upfront</b> 15:11,13 <b>urged</b> 64:15 <b>use</b> 1:9 2:7,18 7:24 10:14 13:25 39:17 40:5 44:16 58:22 76:3 80:8 90:5 95:25 96:8 103:10 112:8 123:1 124:18 129:21 134:1 141:8 142:23 144:8 145:10 149:1 <b>useful</b> 131:13 <b>users</b> 44:19 45:2,3 45:11,21 46:16 52:4 97:20 102:22 139:7 140:23 <b>uses</b> 7:5,19 13:19 13:25 123:6,13 123:14 145:4 151:13 <b>usually</b> 3:9 <hr/> <b>V</b> <hr/> <b>v</b> 5:22 6:6,9 61:23 63:5 79:24 97:4	97:9 103:7 113:9 115:24 126:5 159:4 165:18 167:7 <b>vacuum</b> 56:11 158:4 <b>valuation</b> 7:24 69:15 <b>value</b> 2:14,17 3:7 4:9 11:16 36:24 61:16 70:8,11 75:22 88:11,24 118:15 <b>valued</b> 35:23 <b>valueless</b> 68:9 <b>variable</b> 122:15 <b>variation</b> 79:16 <b>varies</b> 69:3 <b>variety</b> 100:10 106:18,18 117:22 123:21 130:18 145:19 <b>various</b> 12:3 13:19 26:22 33:8 46:4 61:2 68:6 91:23 98:18,18 123:17 159:8 176:19 <b>versa</b> 177:19 <b>vi</b> 81:19 <b>vice</b> 177:19 <b>victim</b> 20:11 55:2 55:3,6 <b>view</b> 25:9 49:14 53:7 54:25 55:4 55:8 59:16,18 66:10 70:8 82:4 109:17 168:6 178:1 <b>viii</b> 81:25 <b>void</b> 138:15 <b>volume</b> 131:21 <b>voting</b> 68:11 <hr/> <b>W</b> <hr/> <b>WACC</b> 11:19 13:8 33:19 48:16 76:7 77:3,21 78:5,17 83:19 85:7,11,13 89:9,11 90:2 <b>wait</b> 17:11
---	---	--	--	--

<b>waive</b> 82:1,18	170:24 171:19,20	<b>witness</b> 12:1	151:22 155:17	68:2 71:8 112:19
<b>waived</b> 83:2	174:1 177:6,7	100:24 101:11,13	156:3 171:20	112:24 125:17
<b>walk</b> 72:17 103:17	<b>ways</b> 49:23 76:20	<b>witnesses</b> 63:11	<b>world</b> 59:9 73:13	163:6 164:10
<b>Walsham</b> 159:4	100:10 115:6	<b>won</b> 29:9	73:20 99:19	
160:22,25 161:22	129:22,24 130:6	<b>wondering</b> 106:5,6	102:18 121:25	<b>Z</b>
161:23 162:11,17	130:22	120:9	135:17 174:20	<b>Zacaroli</b> 1:4,5
<b>want</b> 6:6 12:24	<b>weaknesses</b> 47:1	<b>Wooder</b> 97:9	<b>worldwide</b> 11:22	5:18 6:8,11,13
14:16 64:23	<b>Weber</b> 112:12	<b>word</b> 1:20 7:19 8:7	<b>worse</b> 75:12 167:9	7:18 8:5,19 9:13
81:20 87:8,19,23	<b>Weber's</b> 110:10	8:8 40:5 41:3,7,9	167:19	9:15 12:12,15
89:14 90:21	112:4	41:15 55:11,13	<b>worth</b> 17:22 21:8	16:17 17:13
156:25 158:3	<b>Wednesbury</b> 44:4	65:1,2,5 90:14	26:11 37:20,23	18:14 21:2,6
175:22 176:16	53:11	95:25 97:25 98:4	63:3 86:23	22:5 25:22,25
177:3	<b>Wednesday</b> 1:1	98:21 99:2	113:17 114:2	26:5 29:22 30:1
<b>wanted</b> 14:22	<b>week</b> 178:14	100:16 142:13	<b>worthless</b> 26:10	30:8,16 31:6,12
<b>wants</b> 4:14 60:18	<b>weigh</b> 134:13	147:7,9,11,12	<b>wouldn't</b> 31:5 56:7	39:10,15 40:7,23
62:16 65:24 75:6	<b>weight</b> 64:18	148:12,21 149:6	65:21 125:3	41:5,16,24 42:1
110:12 157:25	167:1	151:13	131:11 133:6,9	43:8 44:14 45:19
174:18	<b>weighted</b> 28:24	<b>wording</b> 1:17	145:15 146:16	49:2,21 50:6,13
<b>warning</b> 170:13	76:7 78:13	17:20 33:22	<b>wrapped</b> 93:21	50:19,23 51:8,12
<b>wary</b> 175:3	136:13,20	37:21 42:6 44:11	<b>writers</b> 45:14	52:6,11,19,23
<b>wasn't</b> 17:20 40:10	<b>well-known</b> 2:10	90:13 99:6	133:17	53:1,7,24 54:1,5
66:12 74:7 93:3	4:16 62:18 99:25	116:24 125:18	<b>wrong</b> 17:13 30:24	54:8,11,14,21
103:23 106:11	<b>went</b> 43:5 56:2	140:19 164:2,2	31:21,23 37:14	56:20 57:1 60:5
116:25 120:14	79:2 108:14	169:22	42:23 48:12	60:7,13 65:23
129:3 164:17	125:25 128:23	<b>words</b> 2:3 18:3	87:11 91:19	66:22 67:1,9,14
165:4	<b>Wentworth</b> 12:7	19:3 28:15 37:19	100:8 101:18	68:16,18,21
<b>Waterfall</b> 135:1,1	<b>weren't</b> 49:18,23	38:9 39:2,7,8,17	114:12 128:23	74:11,16,23 75:1
<b>wave</b> 104:14	101:3 103:24	40:15,17,18,22	129:2 134:18	84:5,10 86:1
<b>wavy</b> 29:19	153:4	42:3,19 44:6,9	152:16 166:20	88:7 89:7 92:13
<b>way</b> 6:20 8:17 10:9	<b>whichever</b> 137:13	57:10 86:6 90:5	<b>wrongful</b> 159:9	92:17 95:24 96:2
11:10,20 12:12	150:21	93:14 96:7 97:2	<b>wrongly</b> 55:17	96:15 98:1,8,20
13:15 22:6 38:5	<b>whilst</b> 69:11 142:6	97:18,20 98:9,17		98:23 99:2,4,8,10
38:6 40:2,17	<b>Whitworth</b> 61:23	115:2 120:8	<b>X</b>	99:12 101:15,17
48:18,19 49:11	<b>whoever's</b> 121:1	123:6,13,21	<b>X</b> 36:5 105:18	101:21 102:3
52:3 55:19,19,21	<b>wholly</b> 38:9 41:21	132:23 134:1	179:1	103:23 104:1,4,8
57:2 59:2 62:1	42:2 49:19 88:1	141:1,3,22		104:12,20 105:3
64:20 65:7 69:24	95:19 100:25	148:13,21 153:18	<b>Y</b>	106:2,4,8,13
74:11 75:13 76:2	<b>wide</b> 75:17	154:3,14 168:9	<b>year</b> 24:25 53:9	107:20 109:6,14
79:14 88:21,23	<b>widely</b> 83:22 134:4	<b>work</b> 14:11,17	62:22,23 63:19	109:17 110:1,5,8
93:11 95:17	<b>wider</b> 108:17	15:6 23:22,24,25	65:20,20 72:10	111:6,18 113:1,6
98:21 99:24	109:17 112:2	36:19 55:4	72:14 128:22	113:12 115:1
108:22,25 109:8	125:13	105:19 117:9	<b>years</b> 15:5 36:23	120:13,17,22
110:9 116:6	<b>wide-ranging</b>	168:24 171:18	72:11 73:21,22	121:4,9 122:7,9
118:25 121:3,4	34:19	174:16	88:12 107:14	122:12,20,24
121:21 134:2	<b>willing</b> 48:7 56:6	<b>workable</b> 48:23	159:12 161:15	123:5 124:7,9
140:2 141:8	131:9,11,11	<b>worked</b> 145:15	<b>Yemen</b> 81:7	127:6,20 128:3
154:12,25 160:10	173:23	146:16 147:23	<b>yesterday</b> 1:6 21:8	130:12 132:4,8
160:16 163:21,25	<b>winding</b> 61:7,13	<b>working</b> 27:8	29:8 34:24 35:11	133:4,11,16,22
164:24 165:2	61:19	<b>works</b> 13:4 48:4	42:9 44:15 49:17	134:18,23 135:1
166:11 168:5,9	<b>wish</b> 96:3	48:14 147:3	50:15 54:23 56:5	135:5,15 139:24

140:4,7,22 141:3 141:5,15,19 148:17,20 152:3 152:5,25 153:3 153:23,25 154:5 163:3 164:21 166:22,25 167:11 167:23 168:19,23 169:2,21 174:6 174:10,14 175:20 175:24 176:6,12 177:16 179:3 <b>Zacaroli's</b> 176:10 <b>zero</b> 89:19 131:23	<b>11-13</b> 131:21 <b>11.50</b> 45:16 <b>11.55</b> 45:18 <b>116</b> 7:9,10 <b>117</b> 7:9,15 <b>12</b> 3:25 82:11,12 134:9 135:6,8,10 135:12,15 <b>12.4</b> 137:6 <b>126</b> 148:24 <b>128</b> 176:23,25 <b>129</b> 162:8,10 <b>13</b> 82:11 135:7,8 175:7 <b>130</b> 162:16 <b>131</b> 162:23 <b>132</b> 162:23 <b>136</b> 130:3 <b>139A</b> 68:4,16 <b>14</b> 134:9 135:7,8 175:7 <b>141</b> 139:7 <b>143</b> 119:7 <b>149</b> 142:5 <b>157</b> 138:23 <b>16</b> 115:23 161:10 178:17 <b>160</b> 17:23 171:18 <b>161</b> 37:22 93:25 <b>162</b> 18:1 94:20 <b>163</b> 18:10 142:24 148:18 <b>164</b> 21:20 143:9 <b>166</b> 21:25 <b>17</b> 131:21 <b>175</b> 179:4 <b>18</b> 101:23 102:1 <b>185</b> 141:2 <b>187</b> 152:16,23 <b>19</b> 83:7,8 102:1 104:11 124:7 <b>191</b> 152:12 <b>192</b> 45:22,24 152:6 <b>193</b> 46:5 <b>1987</b> 41:14 86:13 138:3 150:5,19 <b>1992</b> 16:2,6 17:22 35:1,8,24 42:10 47:8 51:14,21 53:1,12 81:3,12	81:23 82:16,25 83:5 86:13 138:6 138:21 141:6,10 141:11,12,16 142:1,3 150:23 153:18 161:14 169:5 <b>1993</b> 81:12,22 83:25 85:16	<b>3</b> <b>3</b> 7:13 22:11,11,18 77:11 94:8 114:20 115:9 124:5 <b>3-027</b> 158:12 <b>3.15</b> 133:19 <b>3.20</b> 133:21 <b>3.7</b> 113:7 <b>3.75</b> 175:16 <b>31</b> 85:20 164:13,18 <b>32</b> 85:23,24,25 <b>33</b> 86:1 161:19 <b>34.3</b> 115:19,20 <b>36</b> 110:15 <b>36A</b> 80:12 <b>361</b> 63:14,24 <b>362</b> 63:23 <b>363</b> 64:24 <b>39</b> 114:18,20	<b>57</b> 44:11,13,14
<b>0</b> <b>0.7</b> 113:7	<b>1</b> <b>1</b> 8:15,19,25 9:6,10 20:15 21:4,10,11 21:16,21 58:18 75:11,12,12 80:11 110:25 111:1 115:6 124:5 125:2 131:21,24 135:12 135:17 138:4 160:12 164:11 171:25 179:3 <b>1B</b> 135:12 <b>1's</b> 3:16 <b>1(i)</b> 81:2 <b>1.00</b> 89:4 <b>1.5</b> 81:14 <b>10</b> 56:6,7 57:4,17 57:19 72:9,12 81:6,6 87:11 112:14 134:11 135:7 137:10,10 169:18 175:6 <b>10.30</b> 1:2 178:18 <b>10.55</b> 16:10 <b>100</b> 32:20 126:2 161:13 <b>106</b> 3:16 <b>108</b> 82:13 <b>11</b> 1:1 8:7 16:12 133:23 135:9 <b>11th</b> 12:1	<b>2</b> <b>2</b> 7:8 43:3 56:7,8 57:4,17,18 68:18 77:11 101:11 103:14 110:10 111:1 112:4 115:7 124:19 159:4 <b>2(a)(iii)</b> 103:17 <b>2(e)</b> 38:15 142:5 147:19 <b>2.00</b> 89:3,6 <b>2.13</b> 96:15 <b>20</b> 104:10,11 <b>2002</b> 7:3 16:3 33:25 35:1,7 42:11 43:25 44:19 45:5,8,19 49:5 51:14,19,25 52:4 53:2,13,14 86:13 95:22 116:13 140:19,23 140:24 141:7,9 141:13,16 151:20 <b>2008</b> 108:15,21 <b>2013</b> 6:7 159:6 <b>2015</b> 1:1 178:17 <b>22</b> 165:2,6 <b>235</b> 46:17 <b>24</b> 84:5,6 103:15 164:11 <b>25</b> 103:19 131:19 <b>26</b> 84:24 103:20 130:4,4 <b>27</b> 21:11 77:12 84:25 130:4 <b>27.1</b> 16:8 <b>27.2</b> 32:23 <b>28</b> 85:3 104:22 <b>29</b> 85:12	<b>4</b> <b>4</b> 101:18 114:20 125:5 131:20 158:11 <b>4A</b> 68:4 119:6 <b>4(4)</b> 176:22,25 <b>4.40</b> 178:16 <b>40</b> 114:19,21 <b>403</b> 161:10 <b>405</b> 161:19 <b>413</b> 131:21 <b>42</b> 158:11 <b>421</b> 162:8 <b>46</b> 103:14 <b>47</b> 107:4 <b>49</b> 7:8 101:25	<b>6</b> <b>6</b> 45:11 46:17 110:10 112:5 <b>6E</b> 139:12 <b>6(b)</b> 138:8 <b>6(d)</b> 144:9,25 <b>6(d)(ii)</b> 144:12 145:17,18,23 149:5,6,8,17 <b>6(d)(i)</b> 149:12,12 149:19 <b>6(e)</b> 7:1 22:9,15 94:15 137:14,17 137:21 138:17 139:5,16 140:5,9 140:17 142:8 143:20 144:1,14 149:14 150:8 151:10,16 152:20 154:6 156:6 157:5 164:4 170:5,16 <b>6(e)(ii)(2)(a)</b> 94:8 <b>6(e)(i)(1)</b> 94:8 <b>6(e)(i)(3)</b> 94:16 <b>6.8-11</b> 112:21 <b>63-65</b> 62:16 <b>65</b> 124:7
			<b>5</b> <b>5</b> 45:11 46:16 63:6 70:2,3 81:15 101:12 138:4 139:7,7 <b>5(a)</b> 46:17 <b>5.2</b> 161:6 <b>500</b> 126:1 <b>52</b> 127:24 <b>53</b> 43:3,6,7,9 <b>55</b> 159:4 <b>55.1</b> 77:12	<b>7</b> <b>7</b> 17:23 37:21 44:14 94:1 126:22 138:6,22 138:23 139:8,20 176:20 <b>7(a)</b> 140:15 141:15 156:14 <b>7(b)</b> 140:16 141:12 144:23 145:3 150:23 153:18,19 153:25 154:8,11
			<b>8</b> <b>8</b> 45:22 87:21 138:6 151:7,12 160:20 176:20 <b>80</b> 12:2 <b>81</b> 43:22 44:2	

158:11 82 44:2 88 22:11 <hr/> 9 <hr/> 9 160:24 9(h)(i)(C) 152:16 152:20 9.8 161:8 92 12:2				
--	--	--	--	--