Tuesday, 17 November 2015
(10.30 am)
MR JUSTICE HILDYARD: Good morning.
Submissions in reply by MR DICKER
MR DICKER: My Lord, my learned friend Mr Foxton has covered most of the points which I would otherwise have covered during the course of reply in relation to questions 11 to 14.
I was proposing to limit my reply to four topics. The first concerns the good faith and rationality test, just to say a few words about what it is and to pick up the question of whether there is any distinction between the 1992 and 2002 master agreements.
The second topic concerns equity and the cost of equity, and the main focus of my reply submissions in this respect is to deal with a series of assertions by my learned friend about the cost of equity and the difficulties of measurement which we say are unsupported and incorrect.
The third is to refer to one further document, which I don't think your Lordship has been shown, which illustrates some of the issues which may arise in calculating the cost of borrowing.
The fourth is to deal with various miscellaneous points, including a couple raised by your Lordship.

MR JUSTICE HILDYARD: Including what?
MR DICKER: To deal with various miscellaneous points, including a couple of the points raised by your Lordship.
So starting with good faith and rationality, as your Lordship knows, the parties agree that the applicable test is good faith and rationality for the purposes of the default rate and, subject to a small point in relation to error, manifest or otherwise, agree on how that test should be formulated.
Part of my learned friend's submissions, as we understand them, is based on the contention that, given the scope of the discretion given to the relevant payee, your Lordship should read down the words "cost of funding" to mean "cost of borrowing, to read down "cost" to mean "price" et cetera. We say, given that, your Lordship should clearly have in mind what the good faith and rationality test involves.
As far as rationality is concerned, my Lord, I want to establish two points. The first is that the test for rationality in the 1992 agreement is the same as the Wednesbury unreasonableness test. The second point, more importantly, is that, as your Lordship will see from a recent decision of the Supreme Court, there are two parts to the Wednesbury test. One part is concerned

with outcome, in other words looking at the result: is the result within the range of reasonable results that each party might reach?
But the second part is concerned with process, the process by which that result was achieved and whether or not, to put it shortly, that was a commercially reasonable process.
My Lord, can I seek to make both of those points good as shortly as I can by reference to the decision, as I said, of the Supreme Court in a case called Braganza v BP Shipping Limited, which I hope your Lordship has in the bundle of authorities tab 4A, 145.
In the first instance I can do it by reference to the judgment of Baroness Hale which starts on page 1664 and, as your Lordship will see, with whom Lord Kerr agreed.
Just so your Lordship knows the context in which the issue arose, it concerned a death in service clause which is set out in paragraph 1:
"For the avoidance of doubt compensation for death, accidental injury or illness shall not be payable if, in the opinion of the company or its insurers, the death, accidental injury or illness resulted from, amongst other things, the officer's wilful act, default or misconduct ..."

Paragraph 2, Baroness Hale says in the last sentence:
"The issue of general principle in this appeal, therefore, is the test to be applied by the court in deciding that question."
So it is not an ISDA case but it is a contractual discretion case and her judgment addresses the test in that context.
My Lord, if your Lordship then goes on to paragraph 18, there is a general introduction to the court's approach to:
"Contractual terms in which one party to the contract is given the power to exercise a discretion, or to form an opinion as to relevant facts ..."
In the last sentence:
"Courts have therefore sought to ensure that such contractual powers are not abused. They have done so by implying a term as to the manner in which such powers may be exercised ..."
Then if your Lordship goes on to paragraph 22, this is a convenient way, I hope, of picking up the judgment of Lord Justice Rix in Socimer, which your Lordship will see he referred to on the fourth line and then quoted between, from his judgment between C and F.
If your Lordship just notes in the extract from

Lord Justice Rix's judgment, at letter D, the sentence:

"Reasonableness and unreasonableness are also concepts deployed in this context, but only in a sense analogous to Wednesbury unreasonableness, not in the sense in which that expression is used when speaking of the duty to take reasonable care, or when otherwise deploying entirely objective criteria ..."

Then between E and F:

"Lord Justice Laws in the course of argument put the matter accurately, if I may respectfully agree, when he said pursuant to the Wednesbury rationality test, the decision remains that of the decision-maker, whereas on entirely objective criteria of reasonableness the decision-maker becomes the court itself."

My Lord, then paragraph 24, over the page, there is a reference to Lord Greene's judgment in the Wednesbury case, which Baroness Hale then discusses. What Lord Greene said, and this is the quotation just above letter C:

"His test has two limbs:

'"The court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to have taken into account, or conversely, have refused to take into account or neglected to take into account

matters which they ought to have taken into account. Once that question is answered in favour of the local authority, it may still be possible to say that, although the local authority have kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it.'"

Then Baroness Hale says:

"The first limb focuses on the decision-making process -- whether the right matters have been taken into account in reaching the decision. The second focuses on its outcome -- whether, even though the right things have been taken into account, the result is so outrageous that no reasonable decision-maker could have reached it. The latter is often used as a shorthand for the Wednesbury principle, but without necessarily excluding the former."

Then 25:

"The parties in this case disagree as to whether the term to be implied into this contract includes both limbs."

And there is then a discussion of some cases. If your Lordship goes then to 28, Baroness Hale says:

"There are signs, therefore, that the contractual

implied term is drawing closer and closer to the principles applicable in judicial view. The contractual cases do not in terms discuss whether both limbs of the Wednesbury test apply."

She then refers to the Gan insurance case and then she says this at 29:

"If it is part of a rational decision-making process to exclude extraneous considerations, it is in my view also part of a rational decision-making process to take into account those considerations which are obviously relevant to the decision in question. It is of the essence of 'Wednesbury unreasonableness' review to consider the rationality of the decision-making process rather than to concentrate on the outcome. Concentrating on the outcome runs the risk the court will substitute its own decision for that of the primary decision-maker."

Then 30:

"It is clear, however, that unless the court can imply a term that the outcome be objectively reasonable -- for example a reasonable price or reasonable term -- the court will only imply a term that the decision-making process be lawful and rational in the public law sense, that the decision is made rationally (as well as in good faith) and consistently

with its contractual purpose. For my part, I would include both limbs of the Wednesbury formulation in the rationality test."

Then at 31 she says obviously it depends, however, on the terms of the contract.

Now, my Lord, that was I think agreed by the rest of their Lordships. Just showing your Lordship two, Lord Hodge at paragraph 53 on page 1677 says:

"Like Baroness Hale, with whom Lord Neuberger agrees on this matter, I think it is difficult to treat as rational the product of a process of reasoning if that process is flawed by the taking into consideration of an irrelevant matter or the failure to consider a relevant matter. While the courts have not as yet spoken with one voice, I agree that, in reviewing at least some contractual discretionary decisions, the court should address both limbs of Lord Greene MR's test in Wednesbury."

Then, just so your Lordship can see how Lord Neuberger dealt with this, it is at paragraph 103, page 1688. He says:

"Like Baroness Hale, I consider that there is considerable force in the notion that this approach is, and at any rate should be, the same as the approach which domestic courts adopt to a decision of the

executive, as described in the judicial observations."

Then there is a reference to Wednesbury:

"I do not think that there is any inconsistency of approach between Baroness Hale and Lord Hodge or myself in this connection."

Lord Neuberger disagreed on the facts. Your Lordship is not concerned with that for the purposes of this case.

My Lord, that is Braganza. Just picking up one decision that deals specifically with ISDA master agreements, it is the decision of Mr Justice Moore-Bick in the Peregrine v Robinson Department Store case which your Lordship may have seen before. It should be in the authorities bundles, bundle 4A, tab 146, so hopefully in the next tab.

MR JUSTICE HILDYARD: Yes.

MR DICKER: My Lord, it is a slightly different issue from the present one. Your Lordship can see how the issue in Peregrine arose in paragraph 34, three pages from the end of the judgment.

Peregrine concerned a situation in which one may be required to move from market quotation to loss and, as your Lordship will see:

"'Settlement amount' means:

"(b) such party's loss for each terminated

transaction for which a market quotation cannot be determined or would not, in the reasonable belief of the party making the determination, produce a commercially reasonable result."

And two points from the discussion that follows -- although it is worth reading in full. The two points firstly between letters F and G in paragraph 35, Mr Justice Moore-Bick says, between F and G:

"It is clear, however, that whether market quotation would or would not produce a commercially reasonable result is a matter of judgment and is a matter to be determined by the non-defaulting party."

In other words, it is not a purely objective test.

Then if your Lordship goes over the page, paragraph 38, just at letter G Mr Justice Moore-Bick says:

"Moreover, there is some protection for the defaulting party in the fact that the view taken by the non-defaulting party must be 'reasonable', that is, it must be based on reasonable grounds. That in turn requires that it must be one which can reasonably be held, taking into account all the factors which ought properly to be taken into account."

Pursuing this point, at paragraph 39 he says:

"Leaving aside cases where there is or may be a lack

of honest belief, when the court is asked is to decide in a case of this kind whether a person has acted in breach of contract it should in my view adopt a similar approach to that taken in the well-known case of ..."

Then there is a reference to Wednesbury.

So, my Lord, we say in relation to the 1992 master agreement, and the application of the good faith and rationality test in the context of the default rate, when one is talking about rationality, in the Wednesbury sense, one needs to bear in mind that one may be concerned not merely with whether the outcome is a reasonable outcome but also with the reasonableness of the process used by, in this case, the relevant payee to produce the determination figure.

My Lord, that is so far as 1992 and default rate is concerned. Can I just very quickly deal with 2002 master agreement. My Lord, we do say that there is not a material difference in this respect between the 1992 and the 2002 master agreements. It is true that the way in which the test operated is not spelt out in the definition of loss in the 1992 agreement. But that is and was, we say, for the reasons I have explained, how the test operated.

There is nothing in the user guide, we say, to suggest anything different. Can I just remind your

Lordship of what the user guide said in this respect. It is bundle 5, tab 6, page 235.

Your Lordship will see in the passage -- it is page 235; it is the last paragraph on that page, running over to the top of 236. The issue in relation to the 2002 master agreement, and your Lordship will see from the paragraph, starts with:

"The potential weaknesses of market quotation in the 1992 agreement that became apparent during periods of market stress in the late 1990s. The need for increased of flexibility was highlighted during market cries in 1998 and 1999 when many determining parties encountered difficulty trying to obtain quotations from reference market makers as required by the definition of market quotation in the 1992 agreement."

So to address that, market quotation as a separate method was removed, replaced by the closeout requirement which provided more flexibility. The draftsman of the user guide says:

"In addition even in instances where full quotations could be obtained, in a liquid market those quotations could be widely divergent. Balanced by the interest of increased flexibility was the need to ensure the new provision incorporated certain objectivity and transparency requirements that were felt to be lacking

particularly in the definition of loss in the 1992 agreement."

My Lord, all we say the draftsman was saying there, with his cross-reference to loss, is that the 1992 agreement did not spell out, as it were, the ingredients of the Wednesbury test; it simply it gave you the formula. What the draftsman did in the 2002 agreement, in a sense, was not very different from what Baroness Hale did in Braganza, namely to spell out what that test in practice means. In other words, you are not just focusing on the outcome, you are also focusing on whether the processes used to reach it were themselves commercially reasonable, if not necessarily the process that the court would have chosen if left to reach that decision itself.

My Lord, my learned friend referred your Lordship to a decision of Mr Justice Briggs in a Lehman case which is the only decision, I think, that anyone here is aware of dealing with this point in the context of the 2002 agreement.

Your Lordship has it in the authorities bundle, bundle 2, at tab 53.

It is the first instance decision of Mr Justice Briggs, as he then was. The relevant paragraphs are right at the end, paragraphs 81 and 82.

My Lord, my learned friend Mr Foxton referred to the heading "The remaining issues". At 81 Mr Justice Briggs says:

"The parties eventually came to a common view that the remaining issues could most sensibly be addressed by the identification of a single standard of reasonable conduct to be applied by the administrators. The choice, as I have said, lies between Wednesbury reasonableness, often called rationality, and objective reasonableness as that decision is explained in the Socimer case."

We say, whilst objective reasonableness was undoubtedly explained in the Socimer case, what Socimer applied, it should be seen, was Wednesbury unreasonableness. That, we say, is not essentially different from the test under the 2002 master agreement; nor did Mr Justice Briggs, we suggest, indicate otherwise. If your Lordship just goes to 82, after the quotation, picking it up at the third sentence, line 3, he says:

"Plainly that leaves a bracket or range of procedures and results within which the determining party may choose, even if the court carrying out the exercise itself might have come to a different conclusion."

So under the 2002 master agreement, the same distinction between procedures and results and the same requirement that the procedures and results are reasonable if not necessarily those which the court might have come to if it had been carrying out the exercise itself.

Now, it is fair to say that it is not clear how much debate there was in this case. As I said, this is dealt with very much as a last issue. The case itself, your Lordship you will see, was decided in 2012, a couple of years before the decision of the Supreme Court in Braganza.

My Lord, one general point in relation to the concept of rationality, rationality is not rationality in a vacuum. The question is not whether the relevant payee is acting rationally in the general conduct of its business. My Lord, he cannot justify a determination merely on the basis that it is rational, for example, for him to try and recover as much as he can from the defaulting party. I know my learned friend at one point suggested that that was rational, albeit hard-headed. But, my Lord, we would say that is simply not a rational determination by the relevant payee of the cost of funding. Because that is not what he is trying to do, he is not trying to determine the cost of funding, he is

trying to determine how he can best extract, on that hypothesis, as much as he can from the defaulting party.

My Lord, as your Lordship knows there is a separate requirement --

MR JUSTICE HILDYARD: Those are polarities, aren't they? But there might be something in between. Taking your test, which is plugging the gap, and taking your thesis, which is that you don't have to fund only the gap but you might want to incur a greater measure of funding as part of the process of funding the gap -- which I believe to be your thesis -- why is it irrational to go for quite a bit broader funding in order to plug the gap as an incident of it?

MR DICKER: My Lord, I was going to deal with that.

MR JUSTICE HILDYARD: I am sorry.

MR DICKER: I am happy to deal with that now.

MR JUSTICE HILDYARD: No, you take your own course, absolutely.

MR DICKER: It is one of the points I was proposing to deal with.

My Lord, on the question of good faith, again so your Lordship knows what the position is in relation to this, this is obviously not, again, the occasion to seek to define good faith. It is obviously a question that would inevitably have to be decided on the facts. But

just so your Lordship is aware, there is authority to the effect that a party is not acting in good faith if it deliberately chooses one extreme end of what is reasonable merely because that would give it a greater recovery.

MR JUSTICE HILDYARD: The court -- as Baroness Hale in a bi which we didn't read but I saw noted. The problem with these clauses, though they are a very Socimer type clause, if I can call it that, is that the decision maker is in almost all cases in a position of conflict of interest.

I dare say any reviewing agency, let us say it is the court, is alert to the possibility, when confronted with an extreme solution, that interest has won out at the expense of any sensible solution. That I can understand. Because of the conflict of interest, as I say, it would be the more sensitive.

MR DICKER: My Lord, that is absolutely right. Obviously we say this is the test which the parties agree the draftsman stipulated for and he obviously intended therefore that the parties should have to have the advantages and the disadvantages of that test such as they are. Now, that obviously does not preclude the court from deciding, particularly in any particular case, what the bounds of rationality and good faith are;

or, as the Supreme Court has done, to try and give a little flesh to those bones.

My Lord, that in our submission is the appropriate course. It is not to try and define down the relevant provision, to try and deal with concerns which your Lordship may or may not think might in some circumstances not be fairly addressed by the application of that test.

That is not the approach the Supreme Court took in Braganza, it is not the approach the court has taken in any of these cases. They have simply worked out what the good faith and rationality test required and sought to apply that to the facts of the particular case.

MR JUSTICE HILDYARD: In those cases, one of the problems that arises in this case didn't arise. Your starting point, surely, is to determine what the subject matter of the decision entrusted to the decision maker is, because obviously the clause cannot operate outside that definition.

In the Braganza case, the decision was whether there had been a suicide, as I understand it, in the honest opinion of the decision maker. So you had a tight subject matter to determine.

Here, you have a more complex issue because there is a row about what funding extends to. So the

definitional issue has much more prominence here.

MR DICKER: My Lord, the way in which we understood my learned friend to run this point was essentially: look at the good faith and rationality test and, given the scope of the discretion given to the relevant payee, essentially -- although it was not, for obvious reasons, put in quite these terms -- it would be commercially absurd to construe cost of funding as meaning funding rather than cost of borrowing. The draftsman could not sensibly have meant the relevant payee to determine cost of funding on a wide basis, he must have meant them to determine it on a narrower basis.

Now, my Lord, all I am seeking to do at the moment is to ensure that your Lordship understands what the good faith and rationality test involves. But we say, when your Lordship understands that, construing the clause as a whole, bearing in mind all the points my learned friend Mr Foxton made about use of the word funding rather than borrowing, et cetera, that is not a reason for the court construing the clause, we would say, more narrowly than it would naturally be construed.

MR JUSTICE HILDYARD: That is what I am testing with you. It may not be decisive, but it does not seem to me to be irrelevant when you have this prior question, which did not arise in Braganza for the reasons we have discussed,

in determining what the scope of the subject matter to which this decision would relate would be.

So you may think to yourself, "Goodness me, if rationality or irrationality and good faith are the only test, how broad can the concept truly have been?" That doesn't seem to me to be impermissible, does it?

MR DICKER: My Lord, not an impermissible question to ask; but we say, if asked, there is an obvious answer. Your Lordship is quite right, every case, in a sense, depends on its facts and Braganza did involve a different sort of clause.

But your Lordship saw references in Baroness Hale's judgment to a whole series of authorities, including Socimer, which dealt with other contexts, including contexts under the ISDA master agreement, including questions relating to the definition of loss.

My Lord, the approach in those cases was not: loss is an enormously broad concept, the draftsman cannot have intended the non-defaulting party to simply determine what his loss is merely on the grounds of rationality and good faith, essentially one has to read that down. We say, just as that is impermissible in the context of the definition of loss, there is no reason to take a different approach in the context of the definition of default rate.

My Lord, at the risk of repeating a point I made in opening, there is an element of, we say, incoherence in my learned friend's submissions. He accepts this test applies, so there is a good faith and rationality element. What he seeks to introduce is essentially a whole series of, in our submission, artificial construction points to narrow down the scope with, in which, that test has to be applied.

MR JUSTICE HILDYARD: That is not logically incoherent, that is the process of contractual construction which is a composite process.

MR DICKER: My Lord, it is logically incoherent, we say, in this sense. What he is trying to do, on this part of his argument, is to say: the good faith and rationality test is -- as he would describe it -- a problem, I have a solution. My solution is you construe it as borrowing rather than cost of equity or anything more broadly.

My Lord, the difficulty --

MR JUSTICE HILDYARD: I don't think that is quite what he said. I understand your forensic illustration, but I am not sure it is quite what he said.

MR DICKER: My Lord, the logic of his position, whether or not articulated in that way, is that you still end up with a concept, cost of borrowing, which may in itself be, particularly in a hypothetical situation for all the

reasons that have been discussed, difficult to provide a single obvious answer to, dependent in part on the views of the relevant payee as to how it would have funded the relevant amount by borrowing, for what period, in what way, et cetera.

So what undoubtedly my learned friend's argument does is introduce a series of, we say, arbitrary and commercially irrelevant distinctions but does not actually remove the problem which he says he is effectively seeking to address in this part of his argument. We still have exactly the same issues, potential issues, in relation to the good faith and rationality test, just within a slightly narrower focus. But we say all the points he is seeking to make on the width of that test are, to a great extent, equally capable of being applied even in the context of his narrower definitions.

My Lord, that is all I was going to say on good faith and rationality.

My second topic --

MR JUSTICE HILDYARD: Can I ask, do we know, or will we know in due course -- and I should admit that I have not reread the US stuff -- whether there is an analogous means of ultimate challenge in the United States to what we have called the Wednesbury unreasonableness test?

MR DICKER: The answer to that, your Lordship will see, hopefully this afternoon, is there is a debate between the two experts. There is one authority, the Finance One case, which deals with the matter very shortly, in the context of the default rate, and talks about bad faith, gross negligence and concepts of that sort.

My Lord, the broad answer to your Lordship is yes; but your Lordship I think needs to see the detail of that, hopefully this afternoon.

My second topic, as I said, concerns equity and the cost of equity. My Lord, I do need to start just by reminding your Lordship of one obvious point. Your Lordship does not have expert evidence in this case. We applied for permission to rely on expert evidence, it was opposed, strongly opposed, by Wentworth, Mr Justice David Richards decided it was not necessary. My Lord, we are concerned, on this side, that your Lordship does not decide this case on the basis of assertions by Wentworth for which there is no evidence and which we say, for reasons I will explain, more often than not are simply wrong.

My Lord, the starting point is my learned friend did not suggest that businesses did not fund themselves through equity; nor did he suggest that cost of equity

was an unknown concept. Indeed he accepted that in the corporate finance world cost of funding or costs of funds has a well known meaning and includes cost of equity.

What he did say, which in our submission is striking, is the following -- and I am taking this from Day 3, page 102 of the transcript, so your Lordship has the reference.

MR JUSTICE HILDYARD: Three, page 102?

MR DICKER: Three, page 102, he said this:

"They have simply, we say --

MR JUSTICE HILDYARD: Should I look that up?

MR DICKER: My Lord --

MR JUSTICE HILDYARD: Should I have it in front of me.

MR DICKER: My Lord, it may be worth it.

My Lord, it is page 102 on Day 3. It should be behind tab 6.

The passage starts at line 12 on page 102. He says:

"They have simply, we say, lifted the phrase out of its context and identified that it is a phrase which has a known meaning in other contexts, ie what is your cost of capital for business reasons, and tried to incorporate that meaning, we say by an impermissible leap, between construction and what happens in the corporate finance world."

We say there is no leap, for the obvious reason there is no chasm between the commercial world and the task of construction that needs to be leaped. You construe a document having regard to what makes sense in the commercial world.

Your Lordship, I think yesterday, referred to the fact that, when one approaches a question of construction, one has an initial instinct as to what a document term or phrase means. My Lord, that is obviously part of the construction approach; but we do say, respectfully, that it is very important that the instinct adopted, as it were approaches, matters from a right perspective.

The instinct which one seeks to apply, we say, to a commercial agreement is what the court considers the instinct of a commercial man is likely to be, not what an individual, thinking of this from a purely technical, legal, perspective, may or may not think. My Lord, repeated statements -- obviously in a question of construction, the court leans in favour of constructions which make sense to the commercial men and that is the approach you take.

We say it is important that one does not lose sight that the instinct which matters is the instinct one has as to how a commercial man would regard something,

rather than anyone else.

Next point, my Lord, we say it is obviously important that your Lordship bears in mind the very wide circumstances in which a party might have to use equity funding. My learned friend dealt with circumstances in which it may be necessary to do so as a result of regulatory capital requirements, but he did not seek to deal with various other situations. There are, as your Lordship can well imagine, numerous situations in which a party might need to resort to equity funding. For example, the constitutional position of an entity may preclude equity funding -- may preclude borrowing. A mutual fund may be precluded, for example, from issuing debt. Prudent capital structure policies for certain entities may mean they never issue debt in the ordinary course --

MR JUSTICE HILDYARD: The articles may have borrowing ratios and all sorts of things.

MR DICKER: Absolutely.

Now, my learned friend said, well, if an entity is precluded by regulatory constraints from borrowing, the solution is in its own hands; it simply sorts out its regulatory position. Presumably my learned friend would have to say the same in relation to all these other situations.

In other words, if you cannot borrow for constitutional reasons or whatever, the solution is you have to change your constitution. You can then borrow and that is not an issue -- my Lord, we do say that one only has to repeat my learned friend's submission to appreciate how difficult it is.

MR JUSTICE HILDYARD: Just while we are there, is there not a difference between a financial inability to borrow, which give rise to the question that Mr Trower wants answered, or one of the questions that Mr Trower wants answered, and some restriction, say constitutional or corporate, on borrowing? The latter, the hypothesis which you are allowed to make, cures, doesn't it? You can say: I know I couldn't borrow because there is a restriction, and therefore it is hypothetical, but if I were to borrow, this is the cost of it.

MR DICKER: My Lord, we say that is not what the hypothetical requires you to do unless that is what rationality and good faith demands.

MR JUSTICE HILDYARD: I am not tilting it -- I am not trying to answer the difficult question you are on about. I was just trying to sort of straighten out in my mind whether, in truth, the sort of restrictions that you have reminded me of are important restrictions or tilt the decision, what form of funding you should undertake,

or not.

MR DICKER: We say the way the clause plainly works is to look at the position of the relevant payee. Take him as you find him, and if, given his characteristics, the form of funding which he always uses in the past would be a rational and good faith funding to use now, that is the cost of funding which the defaulting party has to pay.

He is not entitled to say: we are in a hypothetical world, I can hypothesise anything I want. I can hypothesise away your constitutional restrictions, your constraints imposed by financial covenants, the regulator's capital requirements -- even, presumably, a situation that occurred shortly after Lehmans went under where the debt markets are frozen, where you could not borrow for the simple reason that entities were not lending.

My Lord, that is not what the definition requires. Hypothetical focuses on what the relevant payee, given all its characteristics, would rationally and reasonably have done. It does not entitle you to hypothesise away real world aspects of that individual.

Your Lordship is quite right, one is not just concerned, however, with entities that cannot borrow. One is also concerned with entities that do not borrow,

instead raise funding in other ways because it makes sense to do so.

One situation which my learned friend did not address was actually the present situation. LBIE went into administration; at that stage, as the administrators have repeatedly emphasised, there was no expectation that LBIE would be able to pay its debts in full. So the counterparties were essentially looking at a bad debt which had an immediate and necessary impact on their capital position.

I described that I think in opening as a capital shaped hole. Why on earth is the entity not entitled to respond by saying: I have a capital shaped hole, it is rational and good faith for me to seek to fill it? And I don't fill it just by borrowing more money from another party.

It is not a solution to the problem that LBIE has put me into.

My Lord, I think my learned friends Mr Trower and Mr Foxton have made the point that these are all situations which arise in this administration. Your Lordship cannot ignore situations in which entities cannot borrow, or situations in which entities would not reasonable have borrowed, on the basis that that is purely hypothetical and not an issue for today.

My Lord, in any event, as I think Mr Foxton said, we do say that competing constructions need to be tested by reference to the range of possible circumstances with which they may have to deal; and these are perfectly natural circumstances, not artificial in any way.

My Lord, my learned friend says that the definition envisaged a specific transaction. There are a couple of different points wrapped up into this, but one of which was a suggestion that the reference to a transaction is suggestive of, I think is the way he put it, debt funding rather than equity funding.

My Lord, we say again that is an assertion not supported. I mentioned I think in opening empirical material dealing with when companies and other entities raise debt and raise equity. Your Lordship is simply not in a position, we say, to assume that debt funding deals with transactions, specific amounts; equity funding does not.

My Lord, my learned friend also accepted that equity had a cost but made various assertions about how it is measured. Again, I just want to address a couple of those which we say are unsupported and incorrect.

My Lord, the first was my learned friend said the return on equity is measured not by time but by a share in the profits of the enterprise.

Now, one can understand from a legal perspective why one might seek to characterise it in that way. My Lord, we say, plainly not from a commercial perspective. My Lord, from a perspective of a company in business, the cost of equity is obviously measured by time. Indeed I am instructed that it is invariably expressed as a percentage rate per annum, both by practitioners in the market and by academics. This is because equity bears an expected cost which is directly proportional to the period over which it is outstanding. Put in commonsense terms, the investor is tying up his money for the period and he has an expectation of what rate of return he wants for the period during which his money is tied up.

My Lord, my learned friend also made a submission about WACC not being concerned with the time value of money but is only used, he said, when you consider whether or not to make an investment. Again, we say unsupported and plainly incorrect. My learned friend did not seek to deal with the two cases I showed your Lordship, decisions of Mr Justice Lewison and Mr Justice Cooke, where WACC was used to discount a future sum to arrive at a present sum which should be paid to the claimant.

You obviously would not discount a future sum by

WACC to arrive at a present equivalent sum unless WACC was concerned with the time value of money. That is precisely what that exercise is doing.

My Lord, my learned friend referred I think to one case, Masri v Consolidated Contractors Limited. I don't need you to turn it up, but what we do say is the case has no assistance in the present case. It involved a running account between a participant and a granter in respect of a participation in a concession, and the granter was funded solely by debt.

So the issue one has is the appropriate rate of interest on that running account. Not surprisingly, we say the decision was the appropriate rate of interest is by reference to the grantor's cost of debt funding. Nothing surprising in that at all.

My learned friend's next point was that estimating the cost of equity is complicated. My Lord, again, we say in some respects unsupported and in other respects incorrect. I think my learned friend Mr Foxton dealt with the ex post analysis, in other words looking at the position now and explained why there is of course no difficulty in working out the cost of equity ex post.

But it is also not true, in our submission, prospectively, and the assertion by my learned friend, again unsupported, incorrect -- just so your Lordship is

aware, my instructions are that, firstly, a Bloomberg terminal will provide for the cost of equity of every public company based on standardised metrics. Secondly, external capital markets have probably the best view of the cost at which a company can raise equity. Thirdly, many analysts publish discounted cashflow evaluations of public companies, all of which necessarily include an estimate of WACC, from which one can determine cost of equity because cost of equity is an ingredient of WACC. Fourthly, cost of equity can be estimated by looking at historical stock returns for the company and peer companies.

So it can be estimated, not merely can it be estimated prospectively but it is not opaque as my learned friend sought to suggest as far as the counterparty is concerned. The counterparty, if he is concerned about a particular claimed cost of equity, has a number of methods he can use to estimate whether or not the figure quoted is likely to be a fair and reasonable one.

My Lord --

MR JUSTICE HILDYARD: Mr Dicker, just for my own peace of mind I suppose, am I able to take account of those -- they don't come, if I can put it this way, as a great surprise to me. But bearing in mind what you told me

about the exclusion of expert evidence, I would wish to be wary about taking such matters into account if they were not permitted to be adduced before me.

MR DICKER: My Lord, that is why I made the submission in the way I did. My learned friend essentially is saying there are all these problems with the cost of equity.

MR JUSTICE HILDYARD: Yes.

MR DICKER: It is not about time value of money, you cannot measure it prospectively, it is opaque to third parties. My Lord, one of the difficulties your Lordship faces, and we face, is all of these points are properly the subject for expert evidence and there are not -- there is (Inaudible) -- directions for it.

My Lord, there are undoubtedly points we say your Lordship can take into account. For example, is WACC concerned with the time value of money? The answer is yes.

There may be, your Lordship may feel, other matters as your Lordship just mentioned; but for our purposes we say it is enough that your Lordship bears in mind you should not proceed on the basis of unsupported assertions as to the nature of cost of equity, the difficulty in measuring it, et cetera, in the absence of evidence and particularly in the light of the material that is before you, which we suggest many of the points

are wrong.

My Lord, there is one piece of material which your Lordship does have in the bundles in this respect. If your Lordship goes to core bundle, tab 4, it is Mr McKee's statement. All I was going to show your Lordship was one of the examples which he attaches to his attachment. If your Lordship goes to page 51 --

MR JUSTICE HILDYARD: Is this in the core bundle, did you say?

MR DICKER: Yes, core bundle/tab 4.

MR JUSTICE HILDYARD: Yes.

MR DICKER: He gives three examples at the end of this document. Example 1 starts on page 51. The first example concerns an entity defined at paragraph 22, "the original creditor OC1". The relevant point is simply page 54, paragraph 30 -- obviously this claim was acquired, so this is one of my clients explaining the position in relation to it. Paragraph 30:

"The WACC for OC1 as at 23 September 2008 can be calculated based on publicly available information."

So that just illustrates the point that a WACC for an entity is not some private information known only to the entity itself and something which is incapable of estimation assessment by a third party.

My Lord --

MR JUSTICE HILDYARD: I very much accept that financial and equity analysts have models and processes which enable them to analyse with some accuracy, although there would be many views differing in every case, the financial position and performance of the company and the actual costs it was incurring in raising its funds. I quite accept that.

I am not sure that that is disputed.

MR DICKER: My Lord, as we understood it, it was because one of my learned friend's submissions was that the difficulty with costs of these sort, whether it is cost of equity or overall cost of capital, is that it is opaque to a third party. So when he gets the certificate from the relevant payee, and it certifies a cost of funding based on WACC or cost of equity, he has absolutely no idea, as we understood the submission, whether that certification is a potentially reasonable one or not. He has no way of judging it.

That was the submission and that is the point I have just been seeking to address. We say it is simply wrong.

My Lord, the next point was this, my learned friend made a series of points to do with measuring, more detailed points, which in our submission really did not go to whether cost of equity was recoverable. They were

rather concerned with whether or not a particular approach to measuring the cost of equity or the cost of capital in a particular case would be rational or in good faith.

Our short answer on this point is that issues like this, as your Lordship knows, we say are irrelevant; they are for another day. But I should comment on a couple of points that he did make.

First of all he said that WACC and CAPM are based, at least in part, on historic costs; so it cannot be an accurate guide.

My Lord, just so your Lordship knows, in our submission, WACC is intended to measure what it would cost a company to raise new funds if a company funds in the same mix as it had funded all previous sums and it and CAPM only use historic costs to the extent that that is helpful estimating what the entity's cost of funding would be.

My Lord, in that respect, not surprising, the position is no different from estimating the cost of borrowing. One of the pieces of information which an entity may and may properly be entitled to take into account is what is the rate at which it has been able to borrow. Now, that may or may not, depending on the circumstances, give it an accurate indication of what

its future borrowing charges will be but it is something it is entitled to take into the mix.

Similarly, my learned friend says: well, the problem with WACC is that it represents an entity's average cost of funding, in other words the cost of funding its entire business. My Lord, there is a similar point that can be made, that may be an appropriate factor to take into account in working out what the cost of funding the relevant amount would be, in exactly the same way that taking into account your overall cost of borrowing might be a relevant factor.

My Lord, none of these points, in our submission, really bear on the question of: what did the draftsman intend the words "costs of funding" to cover? They are not reasons for excluding cost of equity or cost of capital.

My learned friend made some submissions to the nature of the claims so far submitted, I think both in LBIE's administration and in other Lehman bankruptcies. My learned friend Mr Foxton dealt with those and I don't need to repeat anything he said.

My Lord, there is one example, however, of a situation where an entity did certify on the basis of cost of capital which is in the material before your Lordship. Just so your Lordship knows, again it is in

Mr McKee's statement. It is probably sufficient if I give your Lordship the reference: it is paragraphs 38 to 40 of his statement. It is core bundle, tab 4, page 58, if your Lordship wanted to see that.

39 just says, it may be sufficient if I read it to your Lordship:

"In connection with the preparation and submission of the applicable proof of claim, OC2 calculated that its cost of funding for the purposes of the default rate definition was 10.4 per cent. Its calculation was based on --"

MR JUSTICE HILDYARD: Sorry, Mr Dicker, I thought I would catch up with you. But I have not. It is entirely my fault.

MR DICKER: I think it is my fault for suggesting your Lordship didn't need to have more than the reference and then reading out the --

MR JUSTICE HILDYARD: I am being an idiot, I am sorry.

MR DICKER: It is core bundle, tab 4.

MR JUSTICE HILDYARD: 58?

MR DICKER: It is page 58, it is paragraphs 39 and 40.

MR JUSTICE HILDYARD: Yes.

MR DICKER: 39:

"In connection with the preparation and submission of the applicable proof of claims, OC2 calculated that

its costs of funding for the purposes of the default rate was 10.4 per cent. Its calculation was based on an analysis prepared by the adviser to its principal equity funder and financial sponsor who was well positioned to determine OC2's costs of funding."

And your Lordship will see, in paragraph 40, the cost of funding was based on WACC, its overall cost of capital.

MR JUSTICE HILDYARD: It may not ultimately be a decider or even particularly influential, but you do accept that the process of trying to calculate the cost of equity funding is much more difficult than borrowing?

MR DICKER: My Lord, that was the next topic I was going to come to.

Your Lordship should not, in our submission, overstate the extent of any differences. My learned friend Mr Foxton said there may be cases in which estimating the cost of equity is actually relatively straightforward. I think he referred on more than one occasion to the Goldman Sachs preference shares with their 10 per cent coupon.

On the other hand, estimating cost of borrowing may itself be not an entirely straightforward exercise if you do it prospectively. It depends on the selection of a number of assumptions. My Lord, as I said, my third

topic was to deal with that issue.
Can I ask your Lordship to take, in this respect, bundle 2, the witness statements at tab 8.
I hope behind tab 8 your Lordship has a twelfth witness statement of Mr Lomas and then, beginning at page 325, exhibit 12 to that statement, and over the page a lengthy annex.
My Lord, I don't have time, and I don't think it is necessary, to take your Lordship through all of the detail of what is, as your Lordship will see, a relatively complicated annex. But what this document is seeking to do, as my learned friend Mr Trower I think mentioned briefly in opening, is identify various possible costs of borrowing depending on the approach taken. The reason I think Mr Trower referred your Lordship to it was these various possible approaches generate various possible rates and would produce different consequences so far as distributions to creditors are concerned.
MR JUSTICE HILDYARD: Yes.
MR DICKER: My Lord, I notice the time, I don't know whether this would be a convenient moment.
(11.43 am)
(A short adjournment)
(11.53 am)

MR DICKER: My Lord, I don't know whether your Lordship would like to take the opportunity to put some of the files away before I end up --
MR JUSTICE HILDYARD: It is a bit of a mess, isn't it?
MR DICKER: Before I end up ensuring that every single file is open in front of your Lordship.
MR JUSTICE HILDYARD: Any you would particularly like me --
MR DICKER: The only one I think I am going to be referring your Lordship to is volume 2, the witness statements.
(Pause).
My Lord, the reason for going to this document is, we say, it provides a good illustration of the fact that estimating the costs of borrowing may rely on making multiple assumptions and can lead to materially different results. It cannot be done in a one size fits all method and may be complicated.
Now, showing your Lordship how this works as quickly as I can, page 326, paragraph 1.2:
"In connection with its position paper Joint Administrators' team has produced this annex, seeks to illustrate some of the potential practical implications of adopting certain possible approaches to calculating a default rate. This annex illustrates a number of these approaches to the calculation of the cost of borrowing, each a scenario which the Joint

Administrators believe might be adopted by creditors holding claims in LBIE."
1.3:
"Scenarios were selected to: (i) demonstrate a wide range of potential certification approaches; (ii) identify some of the calculation complexities; (iii) highlight the evidential challenges a counterparty might face when seeking to certify its cost of borrowing; and (iv) in turn highlight the practical challenges the Joint Administrators might face when dealing with a certified default rate."
Then, if one goes to the scenarios, 2.1:
"This section provides an explanation of the scenarios that have been modelled of the type of costs of borrowing included within each one. Scenarios illustrate either actual or hypothetical costs of borrowing as explained below."
Your Lordship will see 2.2 deals with actual scenarios, scenarios 1 to 3. Paragraph 2.3 deals with hypothetical scenarios, namely 4, 5 and 6.
Just dealing first with 2.2:
"The actual scenarios illustrate the actual borrowing costs of the example counterparties taken from a variety of publicly available sources, using: rates on all the entities' borrowings, scenario one; rates for

its short term borrowings, scenario two; or rates for incremental long term borrowing, ie the cost at which further long term borrowing could potentially be obtained derived from the current market pricing of the entities outstanding long-term debt, scenario 3."
Then more detail about the three scenarios in paragraphs 2.1 to 2.3.
If your Lordship then goes to the hypothetical scenarios:
"Illustrate a range of possible borrowing rates available to the example counterparty at the date of administration, updated to reflect market rates during the period. Each rate is weighted according to the proportion of the relevant amount which was outstanding on any day to give an overall rate for the period. The scenarios have been selected to illustrate the potential impact from two key variables, namely type of borrowing and, two, its term, also known as the tenor or maturity. As to the type, the rate of interest may be fixed or it may float. As to the term, the length of time for which the funding is to be advanced to the borrower could be anything from very short term ..."
The particular hypothetical scenarios considered are as follows:
"Scenario 4, short term floating rate plus a credit

default swap to six months and a liquidity premium which in this case is presumed to be nil.

"Scenario 5, long term floating rate plus a five year credit default swap, and again taking into account a liquidity premium assumed to be nil."

And 2.3.3:

"Scenario 6, long term fix, known coupon plus a credit default swap, five years plus liquidity premium."

My Lord, can I just illustrate, shortly, some of the issues that may arise. If one just takes short-term funding, the first question is, if you decide on short term funding, should you assume the risk of overnight interest rates changing during the period? Which may or may not be a reasonable thing. Secondly, should you look at short-term funding you already have in place? What if you don't have short-term funding? In any event, even if you do have short-term funding, the relevant amount may be much bigger than the short-term funding that you presently have in place.

Having worked out issues like that, you then need to add a credit default swap spread. Now, in some cases that may not always be available. It appears that, given that, Mr Lomas with some of his examples has had to use a CDS spread for a peer company in a similar

sector which obviously involves a further assumption being made. Further issues may result; for example a party may think: well, I am taking out short-term borrowing but I would like to hedge against the risk of short-term rates increasing. So it enters into some form of rate swap, which also needs to be taken into account.

Now, all of these issues need to be resolved for an entity even to be able to work out its short-term cost of funding, or cost of funding by reference to short-term debt.

My Lord, if a party chooses to use long-term funding, again a similar range of issues arise. They need to decide whether to use debt which they already have in place and the yields to maturity on that date or an estimate of a long-term risk free rate plus a CDS spread.

Looking at in place yields to maturity can be complex because you have to decide what bonds to use; what instruments that you currently have, you take into account.

If your Lordship just goes to page 342 in this respect, paragraph 6.2.5, for the purposes of this annex Mr Lomas has excluded the bonds in (i) through to (viii) for these purposes. Obviously there is a judgmental

question involved in that. You may have a company which has no outstanding bonds, in which case this approach is simply not going to work. You are not going to be able to take in place yields to maturity because there is nothing in place.

Again, as with short-term debt, if the closeout amount is very large, your existing long-term debt may not actually be an accurate guide to the cost of long-term debt funding.

Further issues also arise in relation to your credit default swap. What Mr Lomas has chosen in 2.3.2 and 2.3.3, scenarios 5 and 6, is a CDS with a period of five years.

You can see that from 2.3.2 and 23.3.3.

Now, the length of that is obviously important because length matters simply because long-dated debt is more expensive than short-dated debt. So again an assumption has to be made: are you using five years for your CDS rate or should you be using a longer period?

Your Lordship will see each of the hypothetical scenarios also refers to a liquidity premium. If your Lordship goes on to paragraph 5.5.5 on page 340 --

MR JUSTICE HILDYARD: Yes.

MR DICKER: Liquidity premium is explained:

"It is related to what is known in the market as the CDS bond basis. Liquidity refers to how easy it is for a trade to be executed in the market, which itself is a function of how many willing buyers and sellers exist. Liquidity premium associated with availability of funding therefore reflects the market's appetite to lend at a point in time. It is a function of the prevailing balance of supply and demand. It is not openly quoted, nor is it easy to calculate."

MR JUSTICE HILDYARD: But, Mr Dicker, where are we sort of getting to on all this? I don't mean to be rude.

I accept that the choice of the draftsman to depart from what in England would be described as the generic model for interest by allowing (a) a hypothetical borrowing to count and (b) for that hypothetical borrowing to be the individual entity's hypothetical borrowing -- and that introduces complexity because I accept that the variety of borrowing available to the individual, especially on a hypothetical basis, is very broad and therefore the parameters within which a rational decision could be made are likewise broad.

I accept that and I should be surprised if that were disputed by Wentworth; and it is certainly not disputed, it is avowed, by the administrators.

I accept it is not a piece of cake to decide what

the hypothetical borrowing rate will be, but one wonders whether that really assists?
MR DICKER: My Lord, we say it does in this way. The way in which this issue falls to be decided, we say, is one starts with the wording of the definition and it uses the words "cost of funding". My learned friend has a whole series of reasons why the draftsman must have meant, when he used that word, "borrowing" not "funding". One of those reasons happens to be that actually, if I can put it very shortly, borrowing is simple and equity is complicated.
MR JUSTICE HILDYARD: I understand your in for a penny, in for a pound point, if I can put it that way, that is to say: having introduced the possibility of complexity why draw the line at borrowing? I understand that.
MR DICKER: My Lord, the point in our respectful submission is slightly different. One starts with funding. There seems to be, on one view at least, close to unanimity as to what the phrase "cost of funding", "cost of funds" means in a commercial world. So why can't it mean that in this default definition?
Some reason has to be found why that -- the draftsman was ill advised to use that word. Although he didn't use the word "borrowing", one can work out that in fact is really what he meant. Now, I am simply

answering all of the points my learned friend makes -- seeking to answer all of the points my learned friend makes in that respect; one of which is, as I said, he must have had borrowing in mind because borrowing is simple. He could not have had equity in mind because equity is complicated.
We say, if the distinction were as sharp as that, then there might be a point there needing to be considered. But when you actually look at it, particularly when one is dealing with hypothetical borrowing or equity raising in relation to the sort of entities, financial institutions, that tend to be parties to ISDA master agreements, that distinction simply does not exist and it therefore does not provide any justification for saying that, when the draftsman used the word funding, he didn't mean funding, he meant something different.
MR JUSTICE HILDYARD: That point is well made, if I may say so. But is it going to help me to have a bird's eye view of the full horror of the complexity of borrowing if I already accept it is a broad and difficult area?
MR DICKER: My Lord, the answer to that is no.
MR JUSTICE HILDYARD: If it were easy-peasy, you would not even need a certificate. If there were an easy solution, the process of certification, if necessary at

all, would be simply electing between easy parameters. It is not, it is difficult.
MR DICKER: My Lord, we agree. I thought showing your Lordship the exhibit to Mr Lomas' witness statement was a helpful way --
MR JUSTICE HILDYARD: It is a helpful way. But I think you are confirming to me that, having had the bird's eye view of complexity, I need not look at its detail?
MR DICKER: No, and, my Lord, we would strongly but respectfully agree with your Lordship.
One of the oddities of this, we say, is -- we have spent five days debating these points. In our submission, it is actually remarkably simple. Cost of funding means what cost of funding means, the draftsman had a very simple process involved in a good faith rational determination of that, capable of being done by any self-respecting treasury department or CFO. Essentially that is where your Lordship could and in other contexts might well stop.
If this was an issue which only arose at the end of a trial involving other -- I might call it substantive matters, this is the sort of issue one could expect to find dealt with in a judgment in a couple of paragraphs.
MR JUSTICE HILDYARD: Well, I don't know about that.
Obviously as you know, because you have heard as

I have, Mr Zacaroli does not simply look at that phrase but the context and the other phrases to which it is coupled, and they introduce possible restricters(?), or that is his argument at any rate. But just looking at the relative complexity, I accept that the techniques and ways in which you can borrow are many and various and complex accordingly.
But equity funding is a rather different order of problem because it operates in so many dimensions. Borrowing is, to some extent, one dimensional. You are seeking to get the best rate for your money on the one side and the lowest rate on the other.
With equity funding, you are taking a share in the company and that has many consequences. It affects the perception of you in the market in a fundamental way because gearing and the ratio between equity and borrowing is one of the key indicators. The more equity funding you get, relative to your borrowing, the stronger, in broad terms, is the perception of your financial position.
On the other side, ordinary shareholders, or possibly other shareholders, preferred or deferred, will be affected, either diluted or their interest may be affected by the further allotment of shares. It operates in three dimensions and it is difficult, in

a different order.
That is my perception. Now, is that wrong?
MR DICKER: My Lord, can I deal with that in two parts. The first is, we say one needs to look at this not from the perspective of a shareholder and the rights he is getting. One needs to look at this from the perspective of the company which is seeking to plug the hole; it needs to raise money and the directors, whoever, ask the treasury department: what would be the best way of raising this money? That may be debt, that may be equity. So, from the company's point of view, it really is looking at, primarily, simply the relative costs of those two approaches.
Now, plainly, there may be other knock-on effects and I will deal with those in a sentence --
MR JUSTICE HILDYARD: When you ask that, just to go back to an earlier discussion we had, does the chief financial officer, or whatever it is, take into account the prospects and ambitions of the entity or simply the need to plug the relevant amount?
MR DICKER: My Lord, that is a third question which again I was just about to deal with.
MR JUSTICE HILDYARD: Sorry.
MR DICKER: So the first point is, if you put yourself in the position of the relevant payee, his concern is

otherwise.
As far as your Lordship's point is concerned, your Lordship is absolutely right in the sense that just as increased borrowing will increase the cost of further borrowing or equity, similarly raising equity will have a knock-on effect, all other things being equal, of reducing the cost of borrowing.
The same issue arises, we say, in relation to both. The first question needs to be answered: is that consequence, one way or another, capable of forming part of the cost of funding the relevant amount?
If the answer is yes, then logically, we say, it should not matter whether the consequence is to increase your cost of borrowing on the one hand or reduce its cost of borrowing as a result of raising equity on the other.
In the two situations, the defaulting party has to accept, on the first case, an additional burden, the amount will be greater; and on the second case, it would have the benefit of the consequence being positive.
So that is that point.
Your Lordship then raised a further point, which I have framed in my own mind, at least, with the phrase "occasion and cause" which I think your Lordship used.
As your Lordship noted, this point is obviously

simply to get in some funding and his concern is how much he will have to pay, whatever form the payment takes, in response to getting in that funding.
The second point your Lordship raised is essentially the knock-on effect and that is the point raised by question 12.3 of the application. Can I just remind your Lordship of that.
If your Lordship goes to the core bundle, tab 1 --
MR JUSTICE HILDYARD: Yes, impact on the cost of the relevant payee's equity ..."
MR DICKER: 12, as your Lordship knows, is concerned only with borrowing. 12.3 asks whether such costs, including the impact on the costs to the relevant payee's equity capital attributable to such borrowing. I explained in opening, it is the obvious point, if you leverage up, that may itself have an impact on -- not just impact on raising further equity, it may in fact have an impact on additional borrowing.
My learned friend Mr Foxton said there is a separate question of construction as to whether, when one works out the cost of funding the relevant amount, one is taking into account consequential consequences. My learned friend Mr Foxton said, and we would agree, that the answer is yes, if they can properly be reflected in terms of cost of funding the relevant amount; no

equally applicable to debt as it is in relation to equity. Our submissions are, firstly, that the defaulting party needs to take the relevant payee as it finds it.
The second is that the consequences of that, how it works out in terms of a rational and good faith determination, may differ depending on the circumstances.
My Lord, can I illustrate one possibility -- and I think my learned friend, Mr Foxton, may very briefly have alluded to something like this. It is an example where a relevant payee effectively is facing, say, 10 defaulting counterparties. Assume it is owed 10 million by each of them, so it has a total exposure of 100 million which it needs to fund. It could go out and fund each of those 10 in turn. If it did so, you would expect that the cost of the first 10 million would be cheaper than the cost of the last 10 million, given the increasing leverage that the company would be undertaking as it borrowed each of the 10 million sums.
We say, in that situation, taking the relevant payee as you find it, the relevant payee needs to raise 100 million. The defaulting party is not entitled to insist that it is the cheapest 10 million. Nor, one might say, is it obvious that the relevant payee can say

that the defaulting party should bear the most expensive 10 million. If what happens in that situation is the relevant party does what one might think would be natural, goes out and raises 100 million, it would be an apportioned part of the 100 million. If it doesn't in fact go out and raise that sum but that is what it would have done, again, the result is the same.

My Lord, we accept that there may be other different circumstances. It is quite hard to grapple with the possibilities. But the example we came up with was -- and even this may not necessarily be the right one. You have a default, you choose to use the opportunity of the default at the same time to raise money for a holiday in Brazil; and the reason you do so is essentially to try and allocate some of the costs that would otherwise be incurred in the latter to the defaulting party.

My Lord, if one gets into that sort of situation, we can see there may be issues about good faith and rationality and there may be issues as to whether or not the party has truly tried rationally to determine its cost of funding. It is not that different, we say, from a situation in which, confronted with a range of options, one deliberately chooses one at one end to maximise the amount one might be able to recover. There may be other ways of dealing with it, whether in terms

of remoteness of causation or something of that sort.

My Lord, our short point is none of these things, we say, are matters which are resolved at the level of construction of the definition of default rate. They are all resolved either in terms of the test for rationality and good faith or on the facts in actually applying that test to what the relevant payee has done.

It is so much easier for the court to see, at the end of the day, and to reach a conclusion as to whether or not, on the facts, take the Greek holiday example, that really does represent the cost of funding the relevant amount to the relevant payee or essentially some additional cost.

My Lord, I hope that is some assistance in relation to that. We do echo my learned friend Mr Foxton's point that businesses do not match fund; it is simply not economic or sensible to do so. It is often perfectly rational and sensible to go out and raise funding in a large amount by whatever form one does so. We say the draftsman must have envisaged that that would happen and must have envisaged that there was a way of properly working out the appropriate portion of the costs to include in the certification.

MR JUSTICE HILDYARD: Just to be clear, and leaving aside any holiday in Brazil, if the chief financial officer,

whoever it is, says, "Look we have got 10 exposures of 10 million," on your example, "We have some difficult problems ahead, which this series of exposure has confirmed. We have a difficult regulatory environment, we have the need for financial institutions to be stronger than strong in the perception of the public. Really we need to get out and we need to borrow 500 to 1,000 million, it is going to cost but this is the right time. Otherwise we are going to have problems like this next week, again." Rational?

MR DICKER: Yes, capable of being, undoubtedly.

Can I reverse the example. To take the relevant payee as it is, as your Lordship described it, it has a series of problems it needs to deal with and it needs to raise 500 million. One approach it could take is to say, "We will deal with those, that will have a cost. Having done so, we will now deal with the relevant amount and that will be the last thing that we will deal with." At which point one would expect, all other things being equal, the cost of funding to be a greater sum.

If the circumstances of the relevant payee are such that there are a number of things that need to be done, in our submission it will often not make sense to say it ought to have done them in any particular order, whether

for or against the interests of the defaulting party. It is in a world in which it has to respond and its response must be to deal with the total package of the problems with which it is faced. And, if it does that, and if as part of that whole, a proportionate part of the whole costs reflect the cost of funding the relevant amount, we say that is capable of being both rational and good faith.

MR JUSTICE HILDYARD: Tweak it a bit. The conversation goes as we have discussed but, after having a little bit of a think, the chief financial officer says, "Look, at these sums there is no chance of us borrowing. But if you are asking for 100 million, I could get you that at a decent rate. But if you are asking 500 to a billion, the only chance is placing our shares with someone like Berkshire Hathaway or a series of them. That is going to be a lot more expensive but it is the resilient answer." Rational?

MR DICKER: Capable of being, yes.

MR JUSTICE HILDYARD: And you allocate that super cost to the relevant amount?

MR DICKER: Again, my Lord, yes, capable of being. There is a potential issue in essentially treating these as discrete parts which do not have a knock-on effect for the other.

Go back to the discussion we just had in relation to question 12.3. You raise additional funding, you borrow an additional amount. That will have a knock-on effect. If you then leave your further problems to be dealt with subsequently, you have just made those more expensive.

Why is the relevant payee forced to determine his cost of funding on that basis? Why is the defaulting party entitled effectively to insist on the order in which the relevant payee deals with his problems? Why is he entitled to insist it is dealt with in the order that is cheapest for him? How does that work if a party is faced with a number of defaulting counterparties, each of which is insisting that they are entitled to be dealt with on the cheapest basis?

My Lord, in our submission it just doesn't work.

MR JUSTICE HILDYARD: But I think that is where the two, the construction and the rationality argument which you posed at the beginning, come together because Mr Zacaroli suggested to me that the penumbra of rationality is so broad that the draftsman cannot have intended the meaning, the construction, to include such things as equity funding or borrowing well beyond the relevant amount to cover the relevant amount, as well as other things.

I think that is where they come together, you see.

MR DICKER: My Lord, that is the debate and we say the answer is the opposite.

MR JUSTICE HILDYARD: Yes.

MR DICKER: The one thing the draftsman certainly did not intend was for issues of construction -- indeed even if they are really issues of construction -- to have to be resolved. My Lord, in our submission -- and they are not really issues of construction. This is essentially giving the court the ability to decide for itself, in place of the relevant payee, how it should approach the whole question of actual funding, hypothetical funding, and introducing, in our submission, an element of sort of objective assessment. It is perfectly clear, we say, that is not what the draftsman envisaged.

MR JUSTICE HILDYARD: I agree that is the question. The question is the scope of the permissible certification, if you like. That is one way of putting it.

MR DICKER: My Lord, just bearing in mind, this point is not a point which bears on whether the definition includes borrowing or equity, because the point your Lordship has just made is a point which applies equally to debt just as much as it does to borrowing. In other words, can you can you appropriate, can you apportion, part of a larger whole in respect of the former?

MR JUSTICE HILDYARD: I accept that. I accept that.

MR DICKER: My Lord, it is worth standing back, we say, just for a moment. What underlies my learned friend's submissions is essentially a suggestion, more or less overt, that excessive claims may be capable of being made and may not be capable of being addressed by the rational and good faith requirement. In our respectful submission, one should not give too much credence for that.

Can I just deal with the first two situations. The first is the relevant payee actually goes out and obtains funding. What on earth would be the motivation for that relevant payee to raise funding on any other basis than the basis which was most appropriate for it in the circumstances of its business? If it goes out and raises funding at an excessive rate, it is not going to be able to recover it. It has no expectation of being able to recover it from the defaulting counterparty. The default counterparty, LBIE, is believed to be massively insolvent. Even if it does recover the funding from LBIE, it doesn't make a profit. It is just back to square one.

So if one focuses on actual funding, there really are strong commercial reasons why you can expect the relevant payee, in its own self-interest, to do what is sensible.

MR JUSTICE HILDYARD: I think that is a difficult argument Mr Dicker. The enterprise cost overall may be worth a candle; whereas if you were confining yourself to particular gaps, it might not be.

MR DICKER: The point in our respectful submission remains that the logic of my learned friend's position is essentially there is money you can -- there is money to be made here. Essentially, if your cost of funding is higher, you can then recover the greater sum. The short answer to that in our submission is simply it doesn't work like that when you are dealing with a defaulting counterparty, by definition. Whatever excess you pay, you are only going to get a percentage back. The most you can ever get back is enough to put you where you would have been otherwise.

The position, we say, is not materially different in a hypothetical case. If a relevant payee comes and says, "This is what I would have done", and the consequence is that it would have incurred a cost of funding much higher than it needed to, so 10 per cent rather than 0.2 per cent my learned friend identified, one response to that might be: why on earth would you have done that, given you had no expectation of being able to recover that additional cost from LBIE? If the relevant payee cannot come up with a good, sufficient,

rational and good faith explanation of why he did that, he is not going to be able to recover the additional cost of funding.

My Lord, that is all I was going to say in relation to question 11.

Question 12.3 I think I have dealt with. I wanted to make a couple of short submissions in relation to issue 13, which as your Lordship may recall is the fluctuating certificate point.

My Lord, question 13 is whether the costs should be calculated by reference to the relevant payee's circumstances on a particular date or on a fluctuating basis taking into account any changes in the relevant circumstances; and, if so, whether the benefit of hindsight applies.

My learned friend's starting point was, of course what matters is the position when you are seeking payment and that is at the end of the period; and his argument then proceeded on that basis.

My Lord, as so often, it is quite important one looks at the assumption one is being asked to adopt. It is simply not right, we say, that you look at the end of the period because that is when the party is seeking payment. He is seeking payment when the default occurs and it prepares its certification of the closeout

amount, which more often than not, as your Lordship has seen, will include a default rate charge.

So the premise is simply wrong, we are not concerned simply with a situation of -- we are not required to look at the last date, indeed far from that.

My Lord, then if one just considers the two possibilities, again firstly actual funding, so the relevant payee goes out and gets, let's assume, long-term funding. So actually obtains long-term funding at a fixed rate of interest, that is what it thinks is the rational and good faith thing to do. What, we say, is the relevance of hindsight in that situation? The relevant payee has incurred a cost of funding which is fixed over the period. The fact that the rate it has agreed to pay and has paid may no longer reflect the market rate because of fluctuations in the in the meantime may be good for it, may be bad for it; but it has nothing to do with the actual cost of funding it has incurred.

If hindsight is irrelevant, equally what is the point suggesting there is a requirement that you essentially have to certify when the defaulting party comes to you and says: well, I can now pay. It certifies at the start, it has fixed its cost of funding at the start, and that is an end of the matter.

My Lord, equally the same, we say, on a hypothetical basis. If a relevant payee says: this is how I always deal with these problems, I would have fixed for a period, this would have been a fixed rate; again, equally, what happens in the meantime is irrelevant and the need for a final certificate is equally irrelevant.

What my learned friend is essentially trying to do, motivated no doubt by the fall in interest rates which started some time after the Lehman group went under, is take the benefit of that. His means of doing it, at this stage, is to say: well, I require you to certify at the end of the period and I require you to take into account hindsight when doing so, regardless entirely of what you actually did and regardless entirely of what you would have done if you had actually gone out to fund.

My Lord, it suits his clients in this situation given the way interest rates have gone. One cannot imagine the submissions being made if interest rates had gone in the other direction.

My Lord that is all on question 11. Can I turn now and deal with question 10.

MR JUSTICE HILDYARD: You don't suggest or do you suggest that -- you certify the rate applicable, what, when you incur the gap? When you account for it? Or do you say

that all the solutions are rational and it is a matter of choice?

MR DICKER: My Lord, there are a number of ways in which the parties could deal with this; one of which, as I said, is to go out and obtain long-term funding. If that is what it did or would have done, yes, it is capable of being rational and in good faith.

Another approach it could have taken is: actually we prefer to leave ourselves exposed to interest rate movements, we would have done it on an overnight basis.

If that is the case then obviously its cost of funding in that situation -- one approach to it may be to say: let's look at the position at the end of the day because the decision you made was essentially to look at it each day. My Lord, the difficulty with that is that is not necessarily the position because, assume overnight rates had moved and continued to move, there may conceivably come a stage at which the party decides actually that is no longer a sensible strategy.

It is one of the difficulties of trying to deal with these questions as if they are capable of being answered by a simple yes or no, as opposed to, "Let's see what you say you did, or let's see what you say you would have done, and let's now assess that."

I mentioned right at the start, it is very unusual

for the court to deal with these sort of questions at a level of generality without even any specific set of facts. We do respectfully say it is an enormously brave exercise to contemplate in relation to something like the ISDA master agreement.

Plainly your Lordship needs to provide the administrators with as much guidance as your Lordship can. That is what we wish, I am sure it is what all the parties here wish. We do respectfully say there are points beyond which that is not a helpful exercise.

My Lord, question 10. My learned friend's case, as your Lordship knows, is relevant payee means whichever of the parties to the agreement is entitled to payment of a closeout sum under section 6(e).

We say the starting point is the words "relevant payee" and those words naturally extend to an assignee who is entitled to payment of a section 6(e) payment. So our starting point is it is for my learned friend to explain why those words do not have that effect.

I made a number of points going to commercial common sense in opening, just dealing with my learned friend's responses to those. First of all, it is common ground that the default rate is concerned with the cost of funding of a particular person, the relevant payee, to compensate it for loss which it has suffered.

We say there is no good reason why the draftsman would have intended that cost to continue to be measured by someone who is no longer suffering it.

Interestingly in that respect, my learned friend, when he referred to some US authorities, which your Lordship has not yet seen, dealing with an attorney's fees, said: there is nothing remotely surprising in that situation, in the assignee being able to charge for his own attorney's fees. Those are the fees which he has incurred and therefore those are the fees which he ought to be entitled to recover. We say equally true in relation to cost of funding.

The second point is, on my learned friend's case, cost of funding might have to be certified by the assignor, potentially years after it has signed the claim and for a period after it has ceased to have any interest in that claim.

My learned friend's response was: well, on our case, the assignor still needs to certify his cost of funding. But there is, in our respectful submission, an important distinction between the two situations. On our case, what the assignor needs to do is certify his cost of funding up to the date of assignment. So the assignee can effectively say, as part of what he gets on assignment, "Can I have a certification of your cost of

funding to date?"

On my learned friend's case that is not enough. The assignee needs, maybe 10 years later in a case like this, to go back to the assignor and say, "Can you please tell me what the cost of funding would have been for the entirety of the period up to today's date?"

My Lord, the third point is, on my learned friend's case, the nature of the certification exercise also becomes artificial. Your Lordship referred to the fact that it would essentially be the hypothetical on the hypothetical. We say that is right.

There is one other consequence. Part of the definition on this basis would actually become redundant. The definition refers to cost if you actually fund or were to fund. On this basis, part of that definition cannot have any role to play in this situation.

My Lord, the fourth point, and your Lordship I am sure has in mind --

MR JUSTICE HILDYARD: Because obviously there is no gap in the case of the assignor.

MR DICKER: Yes, and it is a slightly odd question to ask the assignor: what is your cost of funding the relevant amount? Answer -- well, question: Well, what is the equivalent amount? And why would I be, why might I have

been funding it -- I have no idea how I would have funded it. It was not a problem. It ceased to be a problem when the debt was assigned.

My Lord, there is also the issue I made, and I am sure your Lordship has well in mind, of where the assignor has a high cost of funding transfers to an assignee with a low cost of funding. I think my learned friend's only answer to at that was to say, quite fairly, of course it could be round the other way as well.

MR JUSTICE HILDYARD: Hmm.

MR DICKER: My Lord, my learned friend referred to the explanation in the 1992 user guide for the introduction of the right to transfer in section 7(b) and your Lordship will recall the user guide saying that the exception was added to allow for certain transactions in the marketplace in which a party transfers amounts payable to it from a defaulting party under section 6(e) as part of another financing transaction.

So the effect of this is that the defaulting party now owes its debt to another party, a perfectly common sort of situation. It is not in any way unusual or absurd in such a situation for the assignee the other assignor to be able to charge the debtor for its ongoing costs. I showed your Lordship Lonsdale --

MR JUSTICE HILDYARD: Would the assignee be entitled to enforce against the defaulting party?
MR DICKER: Entitled to default?
MR JUSTICE HILDYARD: To enforce. Does he have a contractual claim?
MR DICKER: If the section 6(e) closeout amount is assigned to it, yes, he has a right --
MR JUSTICE HILDYARD: Not only against the assignor but against the defaulting party?
MR DICKER: It mainly depends on the precise terms of the assignment but, assuming it is a legal assignment of the underlying debt, then subject to any questions about -- no. The short answer is yes, he would.

My Lord, am sure your Lordship is familiar -- one is from time to time faced with, receives, letters from banks notifying one that one's credit card or whatever has been transferred to some other lender. There is no issue in that sort of situation, no oddity in that situation, of in due course having to deal with the new lender and whatever its costs may be. We say there is nothing objectionable on commercial terms here in that respect.

So, my Lord, one asks, given the natural meaning of the words, and points I have made about commercial common sense, why should the words "relevant payee" not

have their natural meaning --
MR JUSTICE HILDYARD: I only ask it, I am sorry because the assignment you contemplate is not an assignment of the rights the assignor had but a new relationship between the assignee and the defaulting party. That is why I was wondering about it.
MR DICKER: My Lord, one goes back, in our submission, to Lord Justice Millett's approach in L/M. What the assignee gets is the rights which the assignor had against the defaulting party. The rights which the assignor had against the defaulting party were to have the closeout amount, together with the cost of funding of the relevant payee on that closeout amount.

So one comes to the point your Lordship made, which is it is a question of construction. If we are right, the assignee is acquiring precisely the rights which the assignor had against the defaulting party, it is just that right is defined in a way that entitles one to recover the cost of funding of the relevant payee.

My learned friend referred to the 1987 agreement. His point was that there was no equivalent to section 7(b) in the 1987 agreement, so the words "relevant payee" could not have had the meaning for which we contend in that agreement. He therefore says the 1987 agreement, ruling from the grave, position must

be the same in relation to the 1992 agreement.

I have already made submissions in opening on the approach to construction and Mr Foxton made some further submissions in that respect. I will not repeat them. In our respectful submission, this is a bad argument for a number of reasons.

The first point is this. The 1987 agreement provided for transfers of any interest or obligation, subject to the consent of the other party. So the first point is, of course this could occur with the consent of the other party. That is the first point.

The second point is, if your Lordship goes to the 1987 agreement -- bundle 5, tab 1.
MR JUSTICE HILDYARD: Yes.
MR DICKER: My Lord, the second point is section 7 of the 1987 agreement, tab 1, page 8, also includes a provision for transfer pursuant to consolidation or amalgamation et cetera. It is actually in slightly different terms from the equivalent provision in the 1992 and 2002 agreement.

My Lord, if one just reads it, section 7:

"Subject to section 6(b) and to any exception provided in the schedule, neither this agreement nor any interest or obligation in or under this agreement ..."

So you have two possibilities, either the agreement

or "any interest or obligation in or under this agreement."

So that is what you can transfer, either the agreement or any interest or obligation in or under it. Now, how may you do so?

"It may not be transferred without the prior written consent of the other party other than pursuant to a consolidation or amalgamation with or merger into transfer of all or substantially all of its assets to another entity."

One then has to ask, do those methods of transfer necessarily involve the transferee becoming by novation a party to the agreement? We say the answer is no. You can transfer an interest or obligation in or under this agreement, so you can transfer an interest. You can transfer it by transferring all or substantially all of your assets to another entity. Would that mean the transferee is a party? Answer: no.

So "relevant payee" does have potential meaning even under the 1987 agreement.

The third point, which may be a slightly less compelling point but worth making, is, my Lord, there may, for all I know, be a question as to whether or not consolidation, amalgamation or merger necessarily themselves result in the transferee becoming a party by

novation to the original agreement. The answer to that question may or may not bet the same, depending on whether it is taking place under English, New York law or some other legal system entirely.

So, on any basis, we say the 1987 master agreement is a very thin ground for suggesting that "relevant payee" does not have its natural meaning.

The next point my learned friend made was, well, there are four possible situations in which the default rate may apply and, thus, in which the words "relevant payee" may operate. His submission was if you look at three of those situations, "relevant payee" can only be a party to the agreement.

He then said, well, it is only in the fourth situation that "relevant payee" could mean anything other than party; at which point he submitted that you have to assume the fourth is to be treated in the same way as the first three; and, although this fourth situation envisages the possibility of another person being the relevant payee, nevertheless you have to read it as meaning party.

My Lord, in our submission, that is simply a non sequitur. Indeed, if anything, the argument is against him. The argument is against him because, if he is right, and what the draftsman had in mind was

"party", why not simply use that word?

You don't answer that by saying, "There is a fourth situation in which it could apply to someone different, but he must be taken to have meant party in that situation as well." If anything the converse is indicated. In other words it is precisely because of that fourth situation that he decided a new word was appropriate, namely "relevant payee."

My Lord, there is always a danger in using analogies but one could imagine a clause which used the word "animal" and a series of subclauses, the first nine of which identified various mammals and the tenth of which said "any other animal". You would not necessarily, depending on the context, assume what the draftsman meant when he chose the word "animal". It was nevertheless a mammal falling within the first nine subparagraphs.

My Lord, we do say it is striking that if one drills down into this argument, and one looks at the situations, if one looks at the clauses dealing with these other situations -- so in other words one looks at where the definition of default rate may have been applicable. If one then looks at these other three situations, the clauses that deal with them, those clauses use the word "party". So section 2, as my

learned friend showed you, uses the word "party". But when you come to section 6, there is no reference to "party", there is no reference to -- there is nothing which indicates who the draftsman had in mind. At that stage you were simply left with "relevant payee" in the definition of default rate.

My Lord, I notice the time. I have probably 5 or 10 minutes more, no more than that. I don't know what would be convenient.

I think the intention is that we then go straight on to US law. I have very little, which I am sure you will be glad to hear, in relation to US law and I think my learned friend is likewise.

MR JUSTICE HILDYARD: I think we will break here, which will allow you any time to make sure that you have covered all that you wish to cover and then move on to the US.

MR DICKER: I was going to say the only downside is by the time we return at 2.00, it may be --

MR JUSTICE HILDYARD: It would not be unusual if you had one or two additional clarificatory points for me.

Just before we break, I think I am still in a muddle about 7(b) because of its reading "A party may make such transfer of all or any part of its interest in any amounts payable to it from a defaulting party."

That is not a right, that is uncertain sum of money,

it may be. So I just need some clarification on that, if you could think about that too.

MR DICKER: I will.

(1.01 pm)

(The Luncheon Adjournment)

(2.00 pm)

MR DICKER: My Lord, I was dealing just before the short adjournment with my learned friend's submission that, because it can only mean "party" in three situations, it must mean "party" in the fourth.

He made an identical submission in relation to the applicable deferral rate under the 2002 agreement. The short answer is that one can make exactly the same response to that argument; in other words, if one looks at -- your Lordship has the 2002 master agreement at core bundle tab 8.

My Lord, what my learned friend says was applicable deferral rate in (c) in the 2002 agreement, refers to, for the purposes of section 9(h), 1.3(c) --

MR JUSTICE HILDYARD: Sorry.

MR DICKER: I am sorry, it is core bundle tab 8, page 192.

MR JUSTICE HILDYARD: Thank you.

MR DICKER: It is the definition of applicable deferral rate.

MR JUSTICE HILDYARD: Yes.

MR DICKER: I am looking at subparagraph (c).
MR JUSTICE HILDYARD: Yes. Yes.
MR DICKER: "For the purposes of" and then three provisions are referred to, first the section and then three clauses."
What my learned friend said was, if you look at 9(h) 1.3(c), the relevant payee can only mean party in that context and therefore effectively it must always mean party.
The short response to that is no, not necessarily. If one goes through the definitions -- which I will not do now. If your Lordship traces B(i)(3) through, your Lordship will find that there are circumstances in which that clause can refer to a payee in respect of a section 6(e) amount owed by a defaulting party, in other words a situation in which relevant payee can mean someone other than simply party.
So the point we say suffers from the same flaw as his submission that when you see a provision that refers to four clauses, in three of which it must mean party, therefore it follows the fourth must mean party as well.
My learned friend also spent a little time explaining why, in his submission, the draftsman did not use the phrase "relevant party."
He said this would not have indicated which party's

costs of funding was relevant. What he didn't identify, we say, is why the draftsman used the phrase "relevant payee" rather than simply the phrase "payee". One goes back to the point one has a section 6(e) sum owed by a non-defaulting party. That sum can only be owed to one person, if you exclude the possibility of it being owed to an assignee. So you could simply have said payee. That point is equally true of any section 6(e) sum because the closeout sum is only ever due one way. So no explanation, we say, as to why the draftsman used the word "relevant payee" rather than "payee". As we understand it my learned friend accepted that on his case the addition of the word "relevant" really adds nothing.
My Lord, that was Day 3, page 147, just so your Lordship has the reference.
What we say is when you have got "relevant payee" you necessarily have the idea there may be two payees, and that situation is precisely the situation that arises when you have got an assignee.
Now, my learned friend also referred to the words "to it" in section 7. I dealt with this in my opening submissions and there was nothing said by my learned friend that I wanted to respond to.
Your Lordship did raise a point just before the

short adjournment and I was not, I confess, sure that I fully took it on board.
If your Lordship just goes to 7(b) in the 1992 agreement -- your Lordship has that at tab 7, page 157. Just so your Lordship knows the parties' positions, it is common ground that 7(b) in the 1992 agreement permits the assignment of not merely the closeout sum but any interest accruing on the closeout sum. That was initially disputed by Wentworth, but they subsequently accepted it is covered. So, in other words, 7(b) entitles the assignee, whenever an assignee can, to pursue the debtor both for the section 6(e) sum and any default rate of interest accruing on it.
That is also true, more clearly, in relation to section 7(b) of the 2002 agreement. If your Lordship recalls, that provision added an express reference to interest. Both sides accept 7(b) in the 1992 and 2002 agreements mean the same thing.
My Lord, the final point is this and it concerns the use of the word "party" elsewhere in the master agreements. Your Lordship I think referred to section 8 at one stage. My Lord --
MR JUSTICE HILDYARD: I am so sorry, I am being so silly about 7(b):
"A party may make such a transfer of all or any part

of its interest in any amount payable to it from a defaulting party."
MR DICKER: What the parties agree is that the interest, in other words the entitlement -- whatever synonym one wants to use -- the rights in respect of the section 6(e) payment include the contractual entitlement to default rate interest. Obviously the word "interest" is being used in terms of entitlement rather than interest in the sense of a rate.
MR JUSTICE HILDYARD: It is not limited, and you are all agreed about this, to such amount as is payable by the defaulting party prior to the transfer?
MR DICKER: No. All parties are agreed that is not what it means in the 1992 agreement or in the 2002 agreement.
The easiest way perhaps of reading it, although it is obviously not what it says, but to get an idea of the sense we -- it is common ground it means "all or any part of its rights in respect of any amount payable to it from a defaulting party under section 6(e)."
MR JUSTICE HILDYARD: That is not what it says, as you rightly say.
MR DICKER: No. It is what 7(b) in the subsequent agreement says. We say it is what -- if your Lordship goes on to 7(b), the phrase "together with any amounts payable on or in respect of that interest and any other rights

associated with that interest pursuant to sections 8, 9(h) and 11."

So that is what it now is. The parties approach is essentially to say, well, that additional paragraph is effectively implicit in or embedded in the use of the word "interest" in the earlier version of 7(b).

MR JUSTICE HILDYARD: It says the words "to it" in 7(b) 2002. What is the interest? It is in an interest in the early termination amount. Whose interests and to what extent? The amount of any such payment payable to the transferor -- "to it".

MR DICKER: We say that means that the assignor can transfer its interest in any amount payable to it under section 6(e) and its interest in respect of that includes its contractual right to a default rate, which, when you look at the terms of that contractual rate, has the effect that, if it goes to an assignee, the assignee then picks up his own cost of funding.

Take an example of attorney's fees. If you had a clause worded similarly, that refers to its entitled to rights and interest in respect of various things, including attorney's fees, my Lord, equally one could have exactly the same construction. Of course when one comes to an assignee, the assignee picks up not some hypothetical un-incurred attorney's fees of the assignor

but the fees which it had incurred.

MR JUSTICE HILDYARD: So it is just a sort of tree and the fruit?

MR DICKER: Yes, my Lord, very much so, if I may adopt that way of referring to it.

The last point I had was the use of the word party, your Lordship mentioned it is used elsewhere in the agreement. What we say in relation to this is as follows. Now, it is clear that there are circumstances in which "party" as used by the draftsman elsewhere in the agreement must have an extended meaning capable of including the word assignee. What we say is that does not advance the debate here.

It is common ground that section 7(b) of the master agreements permit a transfer of the section 6(e) claim and the rest of the agreements need to be construed consistently with that. So, just as in various authorities, when you have a provision permitting assignment, you have to, when then reading the rest of the agreement, construe references to party as capable of including assignee as the sum indication of the contract."

Now, my Lord, that does not necessarily bear on this issue. The next stage is, assuming that is where matters remained, you would still have the question

raised by Lord Justice Millett in the L/M case of whether in that circumstances, just as a matter of law, the assignee was entitled to say, "I am not claiming a new head of damage, I am simply claiming damage quantified by reference to myself."

My Lord, nothing unusual in any of that. What is different here, we say, is that the draftsman didn't simply leave it there. He didn't stop by saying: there was a provision for assignment, I will assume that the court will construe party used elsewhere as capable of including assignee where it is appropriate to do so, and I will leave it on the basis that the parties can then rely on Lord Justice Millett to permit the assignee to recover by reference to its own losses.

What we say is different here is the draftsman went further. He used the relevant payee, he made the point payee means the person to whom payment is due to be made. He identified that there may be more than one and that covers the position where there is an assignment.

My Lord, connected with that, my learned friend referred to common law cases on assignment and, for the reasons I think your Lordship identified, we say they are really of limited assistance. The question is a question of construction, as your Lordship put it. The question is whether on the construction of the

agreement, it is pregnant with the ability of the assignee to recover its own costs. If it is, then the defaulting party is not bearing an additional burden which he didn't agree to bear; he is simply performing the contract in accordance with its terms. So it doesn't enable you to avoid the construction question.

We do say, again, echoing something I said right at the start of my opening submissions, there is a great danger in assuming the draftsman intended to replicate or necessarily reflect common law concepts; and this is one example. It not a substitute for construing the agreement in accordance with its terms.

My Lord, that is all I was proposing to say in relation to question 10. The administrators raised various questions in paragraph 65 of their skeleton argument. Mr Foxton dealt with those. My Lord, we are happy to adopt for ourselves the responses he gave in relation to those questions, and there is nothing further that I would wish to add.

My Lord, unless I can help your Lordship further, those are our submissions in reply.

I think I indicated before lunch we would be moving on to US law. Just two points: first, of all I think as my learned friend Mr Zacaroli reminded me he has a right to reply in relation to new authorities. Secondly,

I think Mr Foxton may be proposing, with no disrespect to your Lordship or anyone else, to absent himself before we get on to New York law.
MR JUSTICE HILDYARD: He is not joined --
MR FOXTON: We are not and we are not party to a New York law agreement. Mr Morrison will stay. But if your Lordship is otherwise content with that, we would propose to withdraw, both from the New York and the German law issues where we are not joined and we have no interest.
MR JUSTICE HILDYARD: Yes, indeed. I have one or two questions for Mr Dicker. I am extremely grateful to you, Mr Foxton, and quite understand.
The 1 per cent extra. How does that fit in to your presentation that there can be a measurement of all the relevant costs associated, for example, with an equity funding? What does the 1 per cent then represent?
MR DICKER: My Lord, this issue, like so many, is an issue which is equally capable of applying in the context of borrowing as well as equity.
MR JUSTICE HILDYARD: I am not sure it is, is it? If you have a 8 per cent interest rate, that is the cost of borrowing the money but it doesn't cover your other administration costs. Implicit, as I understand it, within the cost of funding of an equity issue, you have

included, really, the lot in your assessment.
What does the extra 1 per cent stand for?
MR DICKER: Well, my Lord, two points. First of all, in the context of borrowing, one obviously can have costs other than simply the headline interest rate which get wrapped up in the amount amortised to produce an overall rate to which 1 per cent is added.
My learned friend sought to explain the addition of that rate by reference to authorities. So it is the cost of dealing with a defaulting counterparty and that is certainly one possible explanation.
My Lord, there is no reason, in our submission, why those difficulties are either non-existent or indeed any less if you choose to raise funding by way of equity funding rather than debt funding. You still had a disruption to the normal performance of your business, your contractual rights --
MR JUSTICE HILDYARD: It is the hassle factor, is it?
MR DICKER: Yes, you are confronting with somebody who has defaulted. You are not going to say, "Thank goodness, I am going to sort this out through equity funding, I've got no administrative hassle". The reality is, as I think your Lordship just put it, it is a hassle either way.
My Lord, my learned friend's suggestion as to why

the 1 per cent is at least justified is in our respectful submission a possible one. It may not even be that, it may simply be that the draftsman thought it appropriate to reflect what is appropriate for a whole variety of reasons given the sum is owed by a defaulting party.
It may not have been intended to be, as it were, a proxy for additional administrative costs; simply a default rate.
Your Lordship I think said your Lordship had a couple of questions?
MR JUSTICE HILDYARD: Yes. I was wondering about the second.
It is the applicable deferral rate and the provision in (c) for the arithmetic mean of the rate.
MR DICKER: My Lord, that was the point I addressed a few minutes ago.
MR JUSTICE HILDYARD: Yes.
MR DICKER: Go through the mechanics of the various cross-references, you can find, through B(i)(3), whatever it is, a situation -- although it is rather involved and it would took me a while to go through. A situation, in which you can have a closeout sum owed by a defaulting party, in that context relevant payee is relevant.

It is true that the draftsman is asking you to take the arithmetic mean of two different things. But in our respectful submission it doesn't really throw much light on the fact that, on my learned friend's instruction, it is the arithmetic mean of cost of funding to one party, cost of funding to the other party by reference to, he says, borrowing, and on our case cost of funding -- the arithmetic mean based on cost of funding in each case by reference to cost of equity rather than cost of borrowing.
MR JUSTICE HILDYARD: Yes.
Hold on one sec. (Pause).
Does the entire definition prompt an insight into what the draftsman may have had in mind, given its specific reference to, in effect, interest rates?
MR DICKER: My Lord, no, for a number of reasons. Again similar points can be made, for and against, both in relation to borrowing and equity. My learned friend accepted, as far as borrowing was concerned, that the costs and ancillary costs of borrowing, at least if payable to the lender, so arrangement fees, legal expenses of the lender, et cetera, can be rolled up and amortised. As my learned friend Mr Foxton said, there is nothing in those sums suggestive of interest.
My Lord, that is the first; so in other words no

help in relation to borrowing because it can include things that are not interest.

On the second, we say cost of equity is, as I submitted to your Lordship, expressed as a percentage rate per annum. In other words if you look on the other side of the equation, the basic ingredient to the cost of equity is, certainly is expressed as -- and in our submission would be thought of by a commercial counterparty as effectively a rate.

MR JUSTICE HILDYARD: This is a completely separate question. Do you reject the view of a preference share as a participatory interest in a company connoting no obligation on the part of the company, but conferring a right participation capped at the coupon rate?

MR DICKER: My Lord, two responses. That is plainly likely to be correct as a matter of legal form. Secondly, that may also well be how the holder of the preference share himself views it.

We say neither of those things are actually the right starting point. The right starting point is to look at the position of the relevant payee. From its perspective, what it will be concerned about is essentially what it is going to have to pay to get this money in and from that perspective -- one can imagine the treasury department coming to the board and saying,

"You have got two choices. It is cost of equity, we think we can raise this at an effective rate of 10 per cent per annum; or it is cost of debt and the cost of this will be X."

MR JUSTICE HILDYARD: I think the only other one was, you showed me that textbook.

MR DICKER: Yes, (Inaudible).

MR JUSTICE HILDYARD: After it had been vetted by all and sundry. It used to be at the end but now I think it has slipped down the rankings. I had it open, 4A, 139(a) I think.

This textbook, which after all is not evidence but just is an insight, describes the remuneration of equity, which rather suggests participation than indebtedness, introduces far more complexity than the cost of debt. Companies, in the last bit, need to reward equity investors for bearing a higher level of risk than debt investors. But you say, whether described as remuneration or reward, the obligation is there, even if conditional, and is no different, even if more complexly calculated, than an indebtedness.

MR DICKER: My Lord, that is right. I think I gave an example in opening of a bonus payment. One could imagine a situation in which a third party agrees to bear the cost of making bonus payments to staff,

assuming defaults, and then has to work out what the right measure of recovery would be. No difficulty in saying, if the bonus payments are actually made, that is a cost; no difficulty in saying, even if they have not yet been made, they represent a cost.

My Lord, the reference to remuneration in there, we say that is focusing on the position on the viewpoint of the shareholder but only for the purposes of -- it is actually identifying the flip side to that. That is what the shareholder wants, it is a rate of remuneration that makes it worthwhile for it to invest by reference to whatever other opportunities may be open to it. Those are the rights it gets. But from the company's point of view, the flip side of that is it basically needs to pay the amount that the shareholder requires for it to be happy to make the investment.

My Lord, I hope that was of some help.

MR JUSTICE HILDYARD: Mr Dicker, thank you very much indeed.

Submissions in reply by MR ZACAROLI

MR JUSTICE HILDYARD: Mr Zacaroli, you are entitled on your authority.

MR ZACAROLI: My Lord yes, there were one or two additional authorities referred to.

If I can start with not an authority but a new document that was handed up in the break between last

Wednesday and this week, and that was by my learned friend Mr Foxton, the 1992 single currency agreement.

MR JUSTICE HILDYARD: Yes.

MR ZACAROLI: I believe that is in the core bundle -- it is in bundle 5, I am sorry, at 2(a).

My Lord doesn't need to look at the detail of it. Our submission is my Lord gets no assistance from it. My learned friend relied on it, on the fact that it used the same cost of funding language as the multicurrency form and that this somehow detracted from our point based on the two different 1987 forms. But there is nothing in this, my Lord, because my Lord will recall that the draftsman explained the reason for the difference in the default rate between the US dollar in the seventh form and the multicurrency 1987 form was because there was no published index existing covering all possible currencies. That was one of the reasons. There was a second reason given, repeated in the 1992 users guide, about the minor differences were there just as necessitated by the fact that one was multicurrency and the other was not.

The point goes nowhere on this form, the 1992 single currency form, or local currency form, because, although it is a single currency, it is still any currency. It is not US dollars alone, as was the 1987 interest rate

swap agreement.
If confirmation is needed for that you can find it in the users guide for the 1992 agreement.
MR JUSTICE HILDYARD: I see the heading is "Local currency, single jurisdiction"?
MR ZACAROLI: Yes. I will read the sentence in the users guide. I will give my Lord the reference. It is page 112 of bundle 5, tab 5. The heading, paragraph 1, "Selecting a form, multicurrency versus local currency master". The last four lines of the main paragraph there:
"A party may choose the local currency master when dealing with a counterparty located in the same jurisdiction of such a party in a transaction involving one currency, generally the local currency across(?) jurisdiction."
So the point remains that the draftsman was unable to identify a benchmark rate for US dollars as he had done with the 1987 form, which explains why it has the same language in terms of cost of funding as the multicurrency 1992 agreement.
That was the first point. The second new authority was the Tael One Partners decision. I believe that is to be found at 4A, 145. Although I have just put something else there, so I may be wrong. I don't think

we on our side know where it is was put in fact --
MR JUSTICE HILDYARD: That was Braganza I think.
MR ZACAROLI: My learned friends tell me it is volume 2, tab 55A.
(Pause).
My Lord, the 55A is the Court of Appeal decision, I am told, which is the relevant one because the Supreme Court was gone to mainly just to show that it upheld the decision.
Does my Lord have the Court of Appeal judgment?
MR JUSTICE HILDYARD: Yes.
MR ZACAROLI: Yes. Our broad submission on this case is that no point of general application can be derived from this decision, which is a decision clearly limited to its facts. Just to pick up the relevant passages, it was involved in the construction of clause 11. At paragraph 24 of the judgment of Lord Justice Longmore -- and the Court of Appeal judgment begins just over halfway through the document. At paragraph 24, he identifies the relevant conditions and in particular 11.3. 11.3 provided what the buyer was to pay the seller in terms of interest and fees, and that was such interest and fees accruing prior to the settlement date. Going down to paragraph 25, the other clausal condition was 11.9. That stated what interest in the fees should

be for the account of the buyer.
The conclusion of Lord Justice Longmore at paragraph 29, at least on this point, was that the words in clause 11.9(a) "shall be for the account of" did not impose any additional payment obligation.
That is not a surprising conclusion and indeed it was clearly difficult to argue that the phrase "for the account of" meant payment when the same clause had already determined to what extent accrued interest was payable and had used words "pay", "payment" and "payable". So in that context it is quite understandable why the court did not allow the phrase "for the account of" to be construed to mean the same as payment.
My Lord, that is very different from our case. In our case the word "funding" is used consistently throughout in relation to all interest rates. Of course our case is that the context in which that phrase is used, "cost of funding the relevant amount", is critical identifying what the draftsman intended by that phrase.
It would be different, perhaps, if the draftsman had used the word "borrowing" in, say, the non-default rate but the word "funding" in the default rate. Our case would be much harder if that were the case, but the word "funding" is used in all contexts when the draftsman is

attempting to identify a rate of interest.
My Lord, that deals with the two points that my learned friend Mr Foxton -- new points that he brought up.
Then my learned friend Mr Dicker cited the Braganza decision in the Supreme Court of earlier this year. That is at bundle 4A, tab 145 I think. That is where I have put it. I think I was told to put it there this morning. (Pause)
The only passage I wish to show my Lord -- my Lord was taken to this to explain the Wednesbury irrationality principle, how it is --
MR JUSTICE HILDYARD: It is the two aspects of it.
MR ZACAROLI: Yes, and I don't dispute that it has two aspects.
MR JUSTICE HILDYARD: No.
MR ZACAROLI: My Lord may well have looked at this in passing over it, but it is the judgment of Lord Sumption in the Hayes v Willoughby decision, which it is cited at paragraph 23. You will see the way if it's put there, which in our submission chimes very much with the way my Lord instinctively put the test in the course of argument earlier this week -- perhaps last week.
My Lord, I think the point that was then built on this was that, under the 2002 master agreement,

commercially reasonable procedures and commercially reasonable outcome merely reflected the two elements in the Wednesbury unreasonableness test. My Lord was taken to the judgment of Mr Justice Briggs where he, in those two paragraphs at the end of the judgment, defined in his terms what the test was.

The only point I would make -- this is repeating a point I made earlier but very quickly. Mr Justice Briggs very clearly identifies the two options under the 2002 agreement: is it Wednesbury irrationality or is it an objectively reasonable test? And he concluded it was the latter.

So that is the only authority that has considered this point. It was a decision, it was not obiter, it was necessary; and that is the decision he came to.

It is true that, under any test of reasonableness, it envisages more than one reasonable outcome but that doesn't mean that it is the Wednesbury unreasonableness test. They are different tests. One is for the court to determine what is reasonable, what is not, based upon a range of possibilities; and the other is for the party to determine itself.

My Lord, those I think are the only authorities that I need to deal with.

With my Lord's permission, just to clarify something

we were said to have accepted as common ground in terms of cost of equity. Can I be very clear what we do accept about the meaning of cost of equity. That is that we accept that businessmen will identify and understand that equity has a cost in the sense of funding the enterprise. I think it was said we accepted there was unanimity amongst the businessmen that it had a particular meaning. We don't accept that at all. There are all sorts of meanings one might ascribe to the phrase "cost of equity". All we accept is it is something that businessmen generally will recognise as having a cost in some sense. Our case, of course, is that is irrelevant to the construction of the master agreement when it is not contended and cannot be contended that there is any notorious invariable meaning, understanding, of the phrase in the market in the context of the ISDA master agreement which means that that meaning can be incorporated as a matter of construction into the clause. That is not being said, never has been said. When my learned friend sought expert evidence earlier this year, it was avowedly not put on that basis.

MR JUSTICE HILDYARD: You would accept, in broad terms, that it is what the issuer has to pay to attract a person to acquire those shares.

MR ZACAROLI: Yes, that is part of it. It is the --

MR JUSTICE HILDYARD: That will not be the entire cost.

MR ZACAROLI: No.

MR JUSTICE HILDYARD: Because there will be other factors, both plus and minus.

MR ZACAROLI: Yes, but it certainly involves that.

MR JUSTICE HILDYARD: And the measurement of those may differ as between two or more equity analysts.

MR ZACAROLI: Yes.

MR JUSTICE HILDYARD: Yes.

MR ZACAROLI: My Lord, those were, I think, my only points in rejoinder.

MR JUSTICE HILDYARD: Thank you. Thank you very much. Now we say goodbye to Mr Foxton but we cross the Atlantic, is that right?

MR FOXTON: Bon voyage, my Lord.

MR JUSTICE HILDYARD: Thank you very much for your help.

Submissions by MR DICKER

MR DICKER: My Lord, we can take the case law I think fairly shortly.

MR JUSTICE HILDYARD: Yes, I reminded myself over the short adjournment. It is a quite a narrow point in a way, isn't it? Just so you know where my rather disordered thoughts are, irrationality under New York law seems to be tinged with unconscionability. But I don't know

whether that is tingeing or not?

MR DICKER: There were three points I wanted to deal with fairly briefly.

MR JUSTICE HILDYARD: Yes.

MR DICKER: Your Lordship has the experts' reports.

MR JUSTICE HILDYARD: I must just pore over those.

MR DICKER: If I may say so, they are very clear and well reasoned. Your Lordship has also a rather helpful joint statement by the two of them. I wanted to just emphasise a few points in relation to three aspects.

MR JUSTICE HILDYARD: Yes.

MR DICKER: The first concerned the approach to construction. The second concerned the Finance One case, which I think is the only authority --

MR JUSTICE HILDYARD: It is very short.

MR DICKER: Yes, and the third concerns the position in relation to assignees. I can take these three very shortly.

As far as the first is concerned, there is no doubt a temptation for those of us here to assume that those in New York construe documents in exactly the same way as we do. My Lord, plainly that is not necessarily the case.

There are differences in the respective rules of construction, although the differences are in some

respects subtle and difficult to articulate without actually seeing how they are applied in practice. That, however, is something your Lordship will simply need to do in this case.

My Lord, just to emphasise the difference, as we understand it, in the United States, certainly in New York, one starts with what is called the four corners doctrine. In other words you look at the words of the relevant provision in the agreement as a whole and you do not have regard to extrinsic evidence unless those words are ambiguous.

My Lord, if they are ambiguous, extrinsic evidence is then admissible. As I understand it, from the experts' reports, the range of extrinsic evidence which may be admissible is potentially wide. It includes, it appears, evidence of negotiations, conceivably post-contractual contracts and things of that sort.

Whereas we construe documents in a factual matrix which has to be known or reasonably available to both parties, as I understand it, in the United States, they start with the words of the agreement. Unless they are ambiguous those words dictate the effect of the contract. If they are ambiguous, then one is entitled to look at extrinsic evidence and there may need to be essentially a trial on the facts.

My Lord that, one surmises, may be the reason why in the United States courts regularly hold provisions to be unambiguous, despite the lengthy arguments having taken place advocating one or other particular forms of construction; essentially, one might surmise, because the alternative is that every issue of construction will then turn into a trial on the underlying facts with all that that involves.

My Lord, those differences, as I say, are subtle. One suspects that the effect of them is in part capable of being discerned only through living and breathing their application in New York. There are examples given in both experts' reports. I was not proposing to take your Lordship through those, but it did seem to me appropriate at least just to emphasise that difference in the approach of construction between the two jurisdictions.

MR JUSTICE HILDYARD: Ambiguity had a slightly different meaning before we were schooled by Lord Hoffmann in ICS.

MR DICKER: And even more so, I think there is a recent slightly more recent comment by Lord Sumption to similar lines, that in fact you cannot tell whether something is ambiguous unless and until you understand the context in which it is said.

MR JUSTICE HILDYARD: Yes, pretty much no words under the

English system now are so certain of meaning as to admit no nuance; and once you allow the nuance, you may change the prima facie meaning.

MR DICKER: Yes.

Put another way, our approach proceeds on the basis that context may significantly influence how you construe words and you have to start with the word in its context.

MR JUSTICE HILDYARD: Yes.

MR DICKER: My Lord, what that does potentially indicate here, given in particular that neither party has sought to include the sort of extrinsic evidence that might be available if this were treated as ambiguous in the United States, is a particular focus on the words used. We say that is obviously important even as a matter of English rules of construction, but it is obviously particularly important under New York law. So when construing the same provisions under New York law, we say that, whatever force your Lordship gives to the words as a matter of English construction, at least that much(?) force, and potentially more, it would be appropriate to give under New York law. So that was the first point.

The second just concerned the Finance One decision. Given it is the only decision the parties appear to be

able to find on the point in either jurisdiction, it seemed to us appropriate your Lordship should see it.

MR JUSTICE HILDYARD: It is quite conclusory in its statement.

MR DICKER: If your Lordship goes to bundle 4, tab 105.

MR JUSTICE HILDYARD: Yes.

MR DICKER: My Lord, can I just start with its status. It is a decision of the US District Court of the Southern District of New York. It is a federal court, not a New York state court. Both experts are agreed it is therefore not binding as a matter of New York law but is of persuasive authority, the extent to which it is persuasive depending, no doubt, on the strength of the reasons given.

The relevant passage, and it is in a very short judgment, is over the page on page 2. Your Lordship will see at the start of paragraph 2, first column, last paragraph, a reference to the fact that under the master agreement:

"In the event of an early termination of the derivative transactions, the terminating party is required to pay the amount due together with, to the extent permitted under applicable law, interest thereon, before as well as after judgment in the termination currency at the applicable rate."

Applicable rate is then defined as the default rate and the terms of that provision are then set out at the bottom of that paragraph. Then, on the right-hand side, the column just by the first hole-punch:

"Defendant LBSF attempts to create an issue of fact by arguing that the rate certified by Mr Mongpon(?) are exaggerated. This argument, however, ignores the fact that the ISDA explicitly precludes an issue of fact contest with regard to the proper default rate with the phrases 'without proof or evidence of any actual cost' and as certified by it. Under New York law the only possible route to avoid enforcement of this clause in the contract would be to suggest bad faith, fraud, gross negligence or contravention of public policy, which LBSF does not do."

My Lord, it is very shortly expressed. The carve out uses the phrase "not merely bad faith or fraud" but also the phrase "gross negligence". Depending on how one construes that, obviously that is capable of including, one might think, at least some aspects of the Wednesbury irrationality test and may conceivably even, either -- one assumes it means something similar to the meaning it would have in English law, be capable of going beyond that.

My Lord, that is all the guidance one gets out of

the Finance One decision.

There is some discussion in the two experts' reports and there is a slight difference in view between the two of them. Judge Smith essentially says it has two parts, which as I understand it broadly reflect the good faith and rationality parts in the English test. Professor Cohen leaves open the possibility, I don't put it any higher than that, that under New York law the clause could be construed as being limited to the good faith element, not covering the rationality element. Judge Smith disagrees with that on the basis that, if the clause gives a discretion -- and he said it is inescapable. If it gives rise to two possible conclusions, both of which are reasonable, and you have to choose between them, that is a matter of discretion. If that is right, both experts agree, then the second limb essentially comes in. You are not just limited to good faith, you are limited to fair dealing, rationality, that aspect of things.

So, my Lord, that is --

MR JUSTICE HILDYARD: In this judgment, which is why I was asking, the control appears to be, or the controls appear to be, public policy, unconscionability, possibly gross negligence and certainly bad faith and fraud.

Gross negligence is a difficult one because we go up

and down whether we accept anything of that sort in England. But it may be that negligence is, as it were, there but for the grace of God; and gross negligence means it takes your breath away.

MR DICKER: My Lord, the difficulty in our respectful submission of putting too much weight on the Finance One decision is not merely it is not binding as a matter of New York law, it is only persuasive. It is also, to be fair to the judgment, the circumstances in which the issue appears to have arisen and the extent to which it needed to be dealt with. I mean the short point is, whatever LBSF was alleging, by way of exaggeration, was not sufficient to come within the exceptions.

MR JUSTICE HILDYARD: Right.

MR DICKER: And the judge didn't need to spend a long time explaining what the precise delimination(?) of those exceptions was.

The only other point I would make is this. Certainly in our respectful submission -- there may be of course circumstances in which it is inescapable that the agreements mean something different depending on whether they are governed by New York law or English law. There are just, for whatever reason, rules that have that effect. That is a conceivable situation. But, my Lord, in our respectful submission it is highly

unlikely that is something which the draftsman intended. I mentioned the desire of the draftsman to have only one authorised form, subject to two possible legal systems, on the basis that that would remove, certainly reduce, documentation risk, increase liquidity, et cetera.

So we do say, just as the Finance One decision is persuasive, so equally in our respectful submission is the approach of an English court to the same provision under the English law agreement. Your Lordship will have noted, for example from Judge Chapman's judgment, the extent to which both jurisdictions refer to judgments and consider, almost as if they were their own, the terms of those judgments in deciding on the appropriate result.

We do say if your Lordship reaches a particular view as to what good faith and rationality means in an English context, it would be surprising if it meant something substantially different in a US context.

The final point is your Lordship actually does not need to decide this issue for the simple reason that the parties have agreed on a formulation, subject only to the manifest error point. Any issues that may arise as to precisely what that formulation means in practice will no doubt have to get worked out in due course by reference to a particular set of facts.

So in our submission your Lordship does not need to include a long analysis stating definitively what the test is in each of the two master agreements. As I say, I have indicated in broad terms what we say the test amounts to as a matter of English law. In our submission there is nothing, at least in the Finance One decision, to indicate the US courts clearly take a different approach in relation to that.

MR JUSTICE HILDYARD: Is it common ground, then, as a matter -- now on this other side of the Atlantic, that irrationality is a control?

MR DICKER: More, as I understand Wentworth's expert evidence relied upon by Wentworth, I think that is their expert's view. The issue raised as to whether or not it is may be limited to good faith is in fact one raised by Professor Cohen.

MR JUSTICE HILDYARD: Right. Maybe I am misunderstanding you Mr Dicker, but can I take it that good faith and irrationality, which are agreed controls under English law, although maybe there is a dispute with respect to error, are also agreed controls under New York law as far as the parties before me are concerned?

MR DICKER: My Lord, as far as our side is contending, before your Lordship on this application, the answer is yes.

MR JUSTICE HILDYARD: Yes. You are both agreed that on the most strict construction, although influential, it has not influenced you in the case of this. You are both agreed that is not the right test as far as you are concerned under New York law?

MR DICKER: Can I --

MR JUSTICE HILDYARD: You both are concerned.

MR DICKER: Can I put it a slightly different way: we are content for your Lordship to proceed on the basis that we are submitting that, for these purposes, the US test is essentially similar to the English test I have outlined to your Lordship.

MR JUSTICE HILDYARD: Right.

MR DICKER: My Lord, the third area, just concerned the position of assignees. Dealing with this very shortly, the starting point, your Lordship can see, if you go to the joint statement -- which is bundle 4, tab 4, page 72C and it is paragraph 13.

The starting point is section 9-404(a), article 9, the New York UCC provides in relevant part that the assignee is subject to all the terms of the agreement between the assignor and the account debtor. And then, 14 onwards, summarises, if I may say I think very fairly, the difference in view between the two experts. And 14:

"In Judge Smith's view section 9-404(a) codifies the so-called 'stand in shoes' maxim of the New York law of assignments: ie when an assignment has occurred an assignee is said to 'stand in the shoes' of the assignor, such that the assigner acquires no greater rights than the assignor had at the time of the assignment. In judge Smith's opinion, the 'stand in the shoes' maxim is substantially correct and has not been materially altered ..."

Then, 15:

"Professor Cohen, however, pointing, as an example, to attorney's fees cases, notes that it is not uncommon for the dollar amount of remedial provisions to be measured by a cost to an assignee, even if that is not identical to the costs that would hypothetically have been incurred by an assignee. In Professor Cohen's opinion, the statement that an assignee 'stands in the shoes' of the assignor works as a loose aphorism, but it is not a precise statement of the legal rule."

Judge Smith agrees that a contract could provide otherwise, in other words ultimately all of this, as here, is a question of construction. What he does is refer to a number of cases. If your Lordship goes to tab 1 of the same bundle, at paragraph 26, page 11, he says:

"When an assignment has occurred, an assignee is said to 'stand in the shoes' of the assignor, such that the assignee acquires no greater rights than the assignor had at the time of the assignment."

And then he identifies various examples of that. Professor Cohen's response is: all of those cases essentially echo a similar point under English law, they are all concerned with situations in which the assignee was held not entitled to assert any greater legal right than that which had benefited the assignor.

Just so your Lordship sees where he deals with that, it is tab 2, page 39. It is essentially 54, through to 57. In 54, he says:

"When the terms of the assigned contract are applied in the context of enforcement of remedial provisions of that contract by the assignee, it is not the case that those terms will invariably generate the same measure of recovery as when applied in the context of enforcement by the assignor."

He refers to attorney's fees cases and says just above the first hole-punch:

"I have never seen that argument made, and judicial decisions involving recovery of attorney's fees in the context of collection by an assignee do not even suggest that the fee recovery would be so limited ..."

He gives two examples in paragraph 54 and says, in 55:

"The recovery of the assignee's attorney's fees, rather than the hypothetical attorney's fees of the assignor, is accepted elsewhere as well."

Again there is a reference there, and he says in 56:

"The opinions of the courts in Essex and Searles describe the California law of assignment in very similar terms to the descriptions in New York cases, including references to the aphorism of standing in the shoes of the assignor. I believe that New York courts would have decided these cases the same way."

57:

"The right to attorney's fees for enforcing one's rights and the right to post-default interest are similar in that they do not constitute elements of the defaulting party's satisfaction of its primary performance obligations under the contract but, rather, exist as remedial provisions to make the non-defaulting party whole in light of the negative consequences of the other party's default."

My Lord, it is a very similar distinction to that, we say, being drawn by Lord Justice Millett in the L/M case.

MR JUSTICE HILDYARD: It does appear as it were, with all

respect, trite that the assignor, being in possession of an asset which is flawed or subject to restriction cannot pass to the assignee more than it has.

MR DICKER: My Lord, that is right.

MR JUSTICE HILDYARD: That is just an example of the no doubt(?) principle, isn't it?

MR DICKER: One hesitates to say anything follows simply as a matter of logic but, certainly as a matter of English law, that is right. Professor Cohen would accept that that is also right as a matter of US law but one has to ask what is the nature of the right that is being transferred, how is it defined and that --

MR JUSTICE HILDYARD: It would be the same rights -- the parties can always restrict the right that they transfer and retain a right in the case of the transferor. But if the right is subject to some restrictional flaw, there is nothing the transferor can do about it, and no amount of assigning can wash it into a better thing.

MR DICKER: My Lord, and that is right. The question is, what are the limits of that principle? It is a point your Lordship made in relation to English law, does the point that the debtor cannot be in a worse position following assignment cover a situation in which the assignee simply says, "Well, I am claiming damages, it may or may not be that, because they are now being

assessed by reference to my position, I recover more than the assignee -- assignor -- might have recovered."

That distinction is reflected equally, it appears, in New York law and in a sense one has a similar discussion about the limits of it. The only point we make is that Professor Cohen gives an example we don't have comparable cases for in England, namely the attorney's fees.

Judge Smith's response to that is, well, the amount of the attorney's fees is not going to differ depending on whether one is talking about attorney fees that would have been incurred by the assignor or by the assignee. My Lord, we say not necessarily so. One can imagine a distinction between, on the one hand, an individual, and, on the other hand, a bank with the benefit of preferential panel rates and attorney's fees being different -- or vice versa, a bank choosing to instruct a magic circle (Inaudible) at perhaps substantially more cost than might otherwise have been incurred. Differences can arise.

The other point Judge Smith makes is that the other difference is that, in the context of default interest, there is the hypothetical situation as well, which doesn't arise in relation to attorney's fees. That is obviously true so far as the assignee is concerned but

we say it doesn't affect the principle. Just as my learned friend said nothing surprising in the assignee being entitled to recover its own attorney's fees, we say that just illustrates the limit of the protection of the debtor principle, and it applies equally, we say, to calculation of cost of funding as compensation for not receiving the payment that they should have received.

My Lord, I am conscious I have dealt with US law very shortly. I have said, and I mean no disrespect to the US law, the reports are very clear and the joint report very helpful. No doubt your Lordship will read each of those. All I was intending to do was emphasise, as I say, those three aspects in the hope that they may be of help to your Lordship.

My Lord, subject to your Lordship, that is all I was proposing to say in relation to US law.

MR JUSTICE HILDYARD: Thank you very much.

Submissions by MR ZACAROLI

MR ZACAROLI: My Lord, I think I can be equally brief. We don't suggest there is any principle of New York law which should lead the court to reach a different conclusion on any of the issues than it would reach under English law. We accept that works both ways. That is, if we persuade my Lord in our favour on the issues under English law, we say my Lord should reach

the same conclusion under New York law.
On the contrary, if my Lord is not persuaded under English law, I am not going to be able to persuade my Lord to find for us under New York law under some different principle.
Just dealing with the same three issues that my learned friend dealt with, so far as construction is concerned, the approach to construction, we say that the approach in New York is, for the purposes of the issues in this case, materially the same as English law. There are certain differences. First of all, the four corners rule adopted under New York law, which my learned friend has described in terms of lessor's(?) ambiguity, one cannot go beyond the four corners of the document; and, secondly, the implied covenant of good faith and fair dealing that exists in New York contracts.
How those two play out in this case is as follows. The first one, the four corners rule, we say is largely irrelevant to the matters my Lord has to determine because we don't rely upon any extraneous materials that would be inadmissible in a New York court. So far as the approach to construction is concerned --
MR JUSTICE HILDYARD: But take the users guide --
MR ZACAROLI: I will deal with that separately. It is a slight oddity because, on one reading of the four

corners rule you might say you cannot look at it but it is very clear the court in the Intel case, Judge Chapman undoubtedly looked at it and relied on it in number of places to assist in determining what the --
MR JUSTICE HILDYARD: Not on the grounds that it was referred to within the master form, simply because it appeared to be a helpful guide.
MR ZACAROLI: Yes. Yes, perhaps I will come on to --
MR JUSTICE HILDYARD: Yes, sorry.
MR ZACAROLI: -- why that does not infringe the principle under the New York law. In a sense one has the decision, that is the position.
So far as the approach to construction is concerned, a neat summary of it is indeed in Mr Cohen's expert report. That is the expert presented by the Senior Creditor Group, tab 2 of the experts' bundle, which I think is bundle 4.
MR JUSTICE HILDYARD: Yes.
MR ZACAROLI: Paragraph 26 on page 32 of the bundle, under the heading "General principles of the contract's interpretation", he says he is asked about the principles of New York law. At 27:
"The basic principle of contract interpretation is quite simple. When parties set down their agreement in a clear complete document, their writing should be

enforced according to its terms."
Then paragraph 29:
"As a general matter, as stated by the Court of Appeals in Cromwell Towers Redevelopment case, due consideration must be given to the purposes of the parties in making the contract, a fair and reasonable interpretation consistent with that purpose must guide the courts in enforcing the agreement."
And then:
"Moreover, it is also important to read the document as a whole to ensure that the excess of emphasis is not placed on particular words or phrases."
That we would say echos very much the approach of the court in England. You don't look at the words in isolation, you look at them in their context within the agreement and take into account the purposes of the agreement.
That is in fact the bedrock of our submissions under English law. I hope my Lord understands by now, we are asking my Lord to look at the words in the agreement in their context within the agreement, both for the question of what does cost of funding mean and also for what does the relevant payee mean.
So far as the users guide is concerned, the shortest point here is that the only case that the parties have

come up with where the court has considered this point at all, it has clearly relied upon the users guide and previous versions of the master agreement in construing the later versions of the master agreement. I think there are about three or four different places within Judge Chapman's decision -- I know my Lord has read it in detail now -- where that is precisely what she does.
In reality, the four corners rule, we would submit, is there to prevent the sort of wide ranging enquiry which the court would embark upon under New York principles of what is admissible once you get to the ambiguous stage from interrupting the court's streamlined process of construction. You can imagine all sorts of problems if you allow in parties' subjective intentions.
There is one case just to illustrate that point, or to illustrate the fear of the US court in going beyond the four corners, and it is a case called Graev v Graev, and I refer to it merely by way of illustration. It is bundle A4, tab 117. (Pause)
This is a case concerned with the meaning of the word "cohabitation", as used in a settlement agreement, and you will see from the holding that the Court of Appeal held that the term was ambiguous and therefore required resort to extrinsic evidence to determine the

parties' intent.
There was a dissent in the court as to whether the phrase was indeed ambiguous, and that is the point I want to focus on. If my Lord picks up page 11 of the report, or it is the last page of the report, this is actually part of the judgment of Justice Graffeo, who was dissenting under heading (iv), at the bottom of page 11, he explains why the majority's determination that the word is ambiguous creates problems:
"First, it will create a proliferation of litigation in virtually every case where these commonly used cohabitation maintenance determination provisions are sought to be enforced and courts in turn will have little helpful evidence when attempting to evaluate the issue, other than the self interested testimony of the parties themselves. Second, requiring extrinsic evidence in all these cases undermines the primary purpose for entering into written agreements to memorialise the parties' understanding of the parameters of permissible and impermissible conduct and personal relations."
Neither of those concerns applies. If the court is stepping beyond the four corners of the ISDA master agreement to look at what the draftsman of that agreement have stated in the users guide is a helpful

guide to its interpretation, and we are dealing here with a standard form contract, as I say, explained by the drafters for that standard form in whatever circumstances it may be used.
So the concern about going beyond the four corners as expressed there simply does not apply and, although not expressed by Judge Chapman, no doubt inherently or implicitly underlies why Judge Chapman was quite prepared to look at the user guide and the changes between the master agreements, as explained in the user guide to help interpretation.
The bottom line is we have an authority where that has indeed been done in New York and we say that my Lord should take no different approach when construing the document under New York law than here.
My Lord, the other aspect then was the covenant of good faith and fair dealing. Where that is relevant is because that is what Judge Smith relies upon in criticising the Finance One decision, and saying that was ignored by the judge in the Finance One decision, and when you factor that into the exercise of discretion under the default rate, it necessarily leads to the conclusion that that exercise of discretion is controlled by irrationality and good faith.
Indeed, my learned friend I think made it quite

clear this, is an agreed issue. Issue 14 was largely agreed. It is still largely agreed, other than the formulation of that error. Other than that, it is an agreed issue between us and both of us, both parties, agree that it is an issue which should be determined the same under New York law as English law.
So, to answer my Lord's question of my learned friend, it is common ground that irrationality and bad faith are the controlling mechanism under the default rate.
MR JUSTICE HILDYARD: Whichever --
MR ZACAROLI: Whichever law applies, yes.
My Lord, that leaves simply the issue of assignment. The potential area of disagreements, under areas of disagreement under New York law, are the extent of the principle itself and its relevance or -- rather the weight that would be given to it in construing an agreement like the master agreement.
It is Judge Smith's view that a New York court would give weight to the fact that under New York law there is a principle, he describes it as the maxim of 'stand in the shoes'. The existence of that principle he thinks would be of weight to a New York court in determining the meaning of "relevant payee" under the master agreement.

Professor Cohen does not say no weight would be applied to it. His view, expressed in the joint statement, is that it would not be determinative. "Dispositive" is I think the word he uses, it would not be dispositive of the matter.
We don't say it is. Whether it is English law or New York law, we say it is merely a factor which lies in the background and supports, we say, the conclusion we urge the court here to make as a matter of construing the words in their immediate context.
The main point of departure in terms of the principle itself, Professor Cohen relies upon the authorities my learned friend has indicated, namely those relating to attorney's fees. Our answer to that, Judge Smith gives the answer but in a sense it is the answer I gave this morning to my Lord, as a matter of English law, there is a fundamental difference between a right to recoup attorney's fees and a right to recoup interest calculated upon your own cost of funding. One is personalised to you, that is interest; the other is not.
When one is looking at this as a matter of construction, the personalisation of the rate of interest to the counterparty, we say is an important consideration leading to the conclusion that it is not

something which is assignable. No reason, we say, why that same conclusion should not be reached under New York law if my Lord reaches it under English law.

So my Lord, unless I can assist further, those are our submissions on New York law.

MR JUSTICE HILDYARD: In elaborating his explanation of the stand in the shoes principle, in paragraph 26 I think of his first report, he does instant -- I think all his instances are restrictions or flaws on the asset assigned.

MR ZACAROLI: That is true my Lord, that is true. There is no authority in New York, or at least we have not found a New York authority, akin to the case in which Lord Justice Millett and Lord Justice Staughton -- I forget the name of the case, or indeed the Equitas case we placed particular reliance on. There is not an equivalent case either way on that, so we cannot pray in aid such a decision which takes the point under New York law that step further. I acknowledge that.

MR JUSTICE HILDYARD: That is very helpful, thank you.

Does anyone else have a go?

MR DICKER: I don't know whether anyone else has a go?

MR JUSTICE HILDYARD: I think yours was simply a curtain raiser.

MR TROWER: My Lord, that is one way of putting it.

MR JUSTICE HILDYARD: A very good one too.

MR TROWER: That is one way of putting it. My Lord, we don't have anything to add on the New York law issue.

Submissions in reply by MR DICKER

MR DICKER: I have one very short point of reply and it just concerned the use of the user guide in the Lehman v Intel case. Your Lordship may have seen the response or the analysis of Professor Cohen on that point. It is most clearly set out in the joint statement, tab 4, paragraph 19.

Just picking it up at the second hole-punch, on page 72, F:

"Professor Cohen agrees that prior dealings between the parties to a contract may be relevant to an interpretation of that contract. He, notes, however that the predecessor version of the ISDA master agreement does not represent a prior dealing between LBIE and the parties and he is unaware of New York authority for the proposition that, when parties contract on the basis of a standard form agreement prepared by a third party, the meaning of their agreement can be determined by reference to predecessors of that third party's standard form without regard to whether the parties ever contracted with each other on the basis of that predecessor form.

"Professor Cohen further observes that while the proposed finding of the facts and conclusion of law referred to by Judge Smith do note a reference to the 1987 master agreement, in an explanation of the meaning of the 1992 master agreement in the user guide for that document, and the bankruptcy court uses that reference in its analysis of the disputed issue in the case, this appears to be a situation in which the documentation between the parties, ie the 1992 master agreement and user guide, explicitly refers to earlier forms. The 1987 materials analyses the current documents in light of differences from their predecessors."

My Lord, I am not sure that there is much between the parties. Professor Cohen's analysis, however, is that, if you have an agreement, the 1992 agreement, and the user guide to that and it effectively incorporates by reference another document, well it may be permissible to look at that document, given that it is to be treated as effectively incorporated by reference. To the extent that that is what is going on, he says that is permissible under New York law and within the scope of the four corners document. That does not give you freedom to range more widely and have regard to other aspects, for example, of the earlier agreements that may not be cross-referenced, let alone further

extrinsic material beyond that.

My Lord, so there is a slight difference I think, a potential difference, between on the one hand Judge Smith and Professor Cohen as to the basis upon which the court in the Lehman v Intel case was entitled to refer to the user guide. But, as I say, I am not sure that anything turns on it in this case.

MR JUSTICE HILDYARD: It is a jolly difficult principle to hold to completely, the four walls. Do you allow specific trade meanings for words which are otherwise unambiguous? Or if the parties have before the contract said, "Look, between us, black is white, okay", and then they used black in the contract -- it is an almost impossible thing, isn't it, to restrict yourself to the four walls in commercial reality?

MR DICKER: My Lord, I would agree it feels unnatural to English eyes. I am not sure whether or not a New York practitioner would necessarily react in the same way.

MR JUSTICE HILDYARD: We don't know what the New York approach, for example, to the example I gave of specialised meaning is or private dictionaries. We don't know. I was just musing that it is very, very difficult to exclude those without denying the parties their bargain.

MR DICKER: As your Lordship says, there is no evidence of

New York law on the point and --
MR JUSTICE HILDYARD: There is not, no.
MR DICKER: -- I am not sure I can take that point any further.
MR JUSTICE HILDYARD: No. Anyway, there appears to be as agreed between you -- but you would emphasise it more -- a reluctance to step outside what we will call the four walls of the contract without a pretty good excuse. An excuse, you say, explains the particular Chapman decision -- is the reliance on previous drafts as crying out for explanation by reference to the user guide.
MR DICKER: Yes, and it has, if I may say, this aspect -- I have complained, if complained is the right word, at my learned friend's assertions of fact about equity, cost of equity, et cetera. My Lord, we do say that those sorts of submissions on our part do have particular force in the context of New York law. There is no evidence here because it is expert evidence. Nobody has denied in New York, within the four corners rules, certainly statements of that sort it appears would not play any role at all in construing the master agreement.
My Lord, that was the only point I wished to make by way of reply and, again, unless I can assist your Lordship further --

MR JUSTICE HILDYARD: No, thank you very much.
MR DICKER: -- that all I was proposing to say.
MR JUSTICE HILDYARD: Yes.
MR DICKER: My Lord, I don't know whether my learned friend Mr Trower wants to summarise where we have got to. As I understand it, it is next German law and the timetable is Professor Mülbert on Thursday, Judge Fischer on Friday and then we have the joy of the weekend to prepare our closing submissions for Monday and Tuesday of next week.
MR JUSTICE HILDYARD: Yes. So Wednesday looks like a reading day?
MR DICKER: My Lord, it may well be useful for your Lordship to have that reading day. I don't know to what extent your Lordship has managed to get on top of the German law materials so far?
MR JUSTICE HILDYARD: It is always useful to have a reading day.
Mr Trower, do you want to --
MR TROWER: I don't think so. I think Mr Dicker has very adequately, and with his usual precision, identified where we are in the case. My Lord, it probably is quite difficult to think of a better way of using Wednesday than for your Lordship to have a bit more time to go through the German materials.

MR JUSTICE HILDYARD: My understanding is that the German witnesses are slotted in and not available until then.
MR TROWER: Yes.
MR JUSTICE HILDYARD: There is therefore no choice.
MR DICKER: I think that is right and there is not anything else that we can usefully do tomorrow. I think your Lordship may find it useful, in any event, to get to grips with the German materials before the cross-examination.
MR JUSTICE HILDYARD: Yes, indeed.
MR ZACAROLI: My Lord, the only question is whether my Lord would be assisted by a list from the parties, a reading list to assist you with the German reading. I know my learned co-silk has given thought to that. If my Lord would find that useful, we could discuss it with my learned friends and submit one this evening.
MR JUSTICE HILDYARD: That is useful for the obvious two reasons. One is so that I don't let you down by not doing the absolutely essential homework which is, well, summarised, but also sequencing -- sometimes is quite helpful to have a suggested sequence as being the easiest way in. But I will leave it to you. If you can agree something, that would be jolly helpful.
MR DICKER: My Lord, it, sounds if I may say, a very sensible idea and we will certainly discuss it with the

other side.
MR JUSTICE HILDYARD: Thank you very much. See you on Thursday.
(3.35 pm)
(The hearing adjourned until Thursday, 19 November 2015 at 10.30 am)

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