

OPUS | 2

INTERNATIONAL

Claim No. HC14D02543 Peak Hotels and Resorts Limited AND
Tarek Investments Limited, Peak Hotels and Resorts Group
Limited, Sherway Group Limited AND Claim No. HC14B02717 Peak
Hotels and Resorts Limited AND Sherway Group Limited, Carl
Johan Eliasch

Day 1

July 31, 2014

Opus 2 International - Official Court Reporters

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1 Thursday, 31 July 2014
 2 (10.30 am)
 3 (Proceedings delayed)
 4 (10.40 am)
 5 HOUSEKEEPING
 6 MRS JUSTICE ROSE: Yes, Mr Hill.
 7 MR HILL: May it please my Lady, I appear with Mr Cook on
 8 behalf of the claimant, PHRL. My learned friend
 9 Mr Howard appears with Mr Caplan on behalf of Tarek
 10 Investments Limited. Mr Toledano appears with Mr Brown
 11 on behalf of Sherway Group and Mr Eliasch.
 12 I have two categories of application: an application
 13 for a speedy trial in the combined actions and
 14 an application for injunctive relief over until a return
 15 date in September to restrain the consequences of two
 16 meetings held last week which we say were unlawfully
 17 held. There are also some applications to amend, which
 18 I will leave to the end of the day, if I may.
 19 Has my Lady had an opportunity to read the skeleton
 20 arguments and any evidence?
 21 MRS JUSTICE ROSE: I have, and let me tell you what I have
 22 gleaned from my reading so far, if I may, which is that
 23 we need today to arrive at some sensible and commercial
 24 way to hold the ring between now and when this matter is
 25 resolved, because it seems to me that there is a serious

1

1 risk that what's going to happen from here on in is that
 2 Mr Doronin and Mr Djanogly are going to call meetings,
 3 Mr Amanat is going to try and exercise his right, as he
 4 sees it, to adjourn those meetings, the other side are
 5 going to say, "That's not a valid exercise of the power
 6 to request an adjournment because it's not in the best
 7 interests of the company and we are going to hold the
 8 meeting anyway" and then there will be resolutions
 9 passed and then there will be challenges to those
 10 resolutions, and that is not a good way for everyone to
 11 spend the summer.

12 So what I propose is that, and I put this forward
 13 just to start the ball rolling, as I hope to come to
 14 some kind of sensible way forward, is to set a timetable
 15 over the coming, I don't know, six months or a year, for
 16 holding board meetings with everybody having enough
 17 notice of what's going to be on the agenda, and everyone
 18 being provided with information to enable decisions to
 19 be taken.

20 The two particular areas of contention seem to me to
 21 be whether Mr Zecha -- I apologise if I mispronounce his
 22 name -- is going to stay on as CEO or whether Mr Jolivet
 23 is going to take over, whether or not a capital call is
 24 needed and if so, how much and at what price, and it
 25 must be possible for the parties to resolve those

2

1 matters.
 2 At the moment I'm not convinced that it is useful to
 3 order an expedited trial, because this is a fairly newly
 4 arisen dispute, tempers are obviously still running
 5 high, and the parties are locked into this joint
 6 venture, they must either learn to get along with each
 7 other and go back to co-operating to run these resorts,
 8 or one side is going to have to exit and they will have
 9 to decide which of them it's going to be and how much
 10 the other one is going to pay for the rest of the
 11 business. At the moment, I don't see that pitching
 12 everybody into the preparation of an expedited trial is
 13 going to assist the parties in achieving either one of
 14 those goals. A better course seems to me for the
 15 proceedings to be stayed and for there to be a mediation
 16 to see if they can either start to get along better or
 17 else that they can negotiate a way to break up this
 18 joint venture.
 19 It seems to me that, whether Mr Eliasch stays on or
 20 not, again I don't see for the moment the commercial
 21 usefulness of deciding that. If he stays on, then we
 22 are going to have the same problems; if he exits, then
 23 the claimant is going to nominate another, as he sees
 24 it, more compliant director to the board and then they
 25 will still be in a deadlock as to taking any further

3

1 decisions about the future management of the company.
 2 I understand that a hearing has fixed for September,
 3 a return date for the injunctions. I don't really see
 4 again the benefit of having such a hearing if it's just
 5 going to be overtaken by more hearings for more
 6 injunctions.

7 I would propose that, rather than spending the day
 8 hearing a debate about the rights and wrongs of this,
 9 which I can't possibly decide, whether the parties can
 10 work with my suggestion that we set a timetable for
 11 board meetings over the coming months, if necessary
 12 a timetable for the agenda to be set before each board
 13 meetings, who is going to attend the board meetings, and
 14 then, as I say, see if there can be some mediation of
 15 this dispute, either to resolve their differences so
 16 that the company can go on as it was intended to do when
 17 they joined together in this joint venture, or that some
 18 other solution to this can be found which doesn't
 19 involve huge expenditure of time and effort in legal
 20 costs and court time.

21 Now, I say that, I am obviously not nearly as
 22 familiar with the case as you all are. I may have
 23 missed some big point, in which case I invite you to
 24 tell me that. But if I haven't, those are my thoughts
 25 at the moment, Mr Hill.

4

1 MR HILL: My Lady, can I just give you a few immediate
 2 points of reaction, and then perhaps we might go away
 3 and consider your thoughts more carefully?
 4 MRS JUSTICE ROSE: Yes.
 5 MR HILL: The first is that we certainly are supportive of
 6 the idea of having a rolling series of board meetings,
 7 but obviously what is important is that we know what the
 8 business is, and those don't just become vehicles, if
 9 the existing control position is as it is, for pushing
 10 through Mr Doronin's agenda.
 11 MRS JUSTICE ROSE: Yes.
 12 MR HILL: So that's certainly something we could work with,
 13 but obviously we will have to deal with the current
 14 board meetings, which as we say are invalid, and those
 15 might have to go.
 16 Secondly, we do, I think, with respect, part company
 17 a little on the speedy trial question, and that's for
 18 this reason: as my Lady rightly says, the parties are
 19 locked in, but they are only locked in pending
 20 determination of our action, because we say if we are
 21 right, then we are entitled to buy out orders and we are
 22 certainly entitled to dismiss Mr Eliasch and the like,
 23 and entitled to buy him out.
 24 In my respectful submission, while one obviously
 25 hopes the parties might get along better, the reality

5

1 probably is that what we need is a final resolution of
 2 the actual issues in the claim, and we need it sooner
 3 rather than later, and again while one hopes that the
 4 parties might co-operate better at board level, they may
 5 not, and until we get a resolution we certainly on our
 6 side of the court are very much at risk because of their
 7 board control which we say is unlawfully obtained.
 8 So that's my immediate reaction on speedy trial.
 9 Mediation, obviously, is a very interesting idea and
 10 we will certainly explore that.
 11 I wonder if, in the light of that, it might be
 12 sensible for the parties to rise?
 13 MRS JUSTICE ROSE: Yes, I am happy with that. Yes,
 14 Mr Howard?
 15 MR HOWARD: I wonder whether that is sensible for this
 16 reason: Of course, what your Ladyship has said is
 17 interesting and helpful, but what is important that is
 18 resolved today is whether or not the claimant is
 19 entitled to the injunctions today, we say there is
 20 simply no basis for these injunctions and the
 21 resolutions are valid and the company and the directors
 22 and so on are entitled to rely on them.
 23 Now, that is an issue for today as to whether or
 24 not -- whether your Ladyship decides to grant --
 25 MRS JUSTICE ROSE: But who attended those board meetings on

6

1 the 23rd and the 25th?
 2 MR HOWARD: Mr Eliasch, Mr Doronin, and Mr Djanogly, so it
 3 was a perfectly quorate meeting.
 4 MRS JUSTICE ROSE: But there was nobody from Mr Amanat's
 5 side?
 6 MR HOWARD: Well, that was a matter of choice, nothing else.
 7 MRS JUSTICE ROSE: Wouldn't it better to have a further
 8 board meeting to consider the issues that were discussed
 9 then with some input from Mr Amanat's side in the hope
 10 that then you could move forward with a capital call
 11 and/or a change of CEO with which you were all agreed?
 12 MR HOWARD: The difficulty is -- that all sounds, in
 13 a perfect world, a good way forward. The difficulty is
 14 we said "Let's have a board meeting yesterday, and we
 15 can reconsider all of this, perfectly happy for you to
 16 put forward whatever resolutions you like" and all that
 17 happened is that that offer hasn't been taken up and the
 18 matter has been adjourned supposedly until 15 August.
 19 MRS JUSTICE ROSE: Yes, but the 30 July meeting, that was
 20 supposed to be the adjourned 23rd and 25 July meetings,
 21 isn't it? Wasn't that the date that --
 22 MR HOWARD: No, we were putting forward an offer to have
 23 another meeting on 30th.
 24 MRS JUSTICE ROSE: Right. When did you put forward that
 25 offer?

7

1 MR HOWARD: In correspondence last week in answer to this
 2 application.
 3 MRS JUSTICE ROSE: Did you provide them with information
 4 about --
 5 MR HILL: Correspondence this week.
 6 MRS JUSTICE ROSE: -- the basis of the price that's agreed
 7 for the capital call or what the capital call is going
 8 to be spent on?
 9 MR HOWARD: They had that for a long time.
 10 MR HILL: It is not likely and we have no --
 11 MR HOWARD: Please don't interrupt, because it's just not
 12 helpful. If you want to say something, say it when
 13 I have finished.
 14 The simple point is this: obviously I can go into
 15 the detail, obviously that's part of the submissions, my
 16 only concern is that we don't get a resolution today of
 17 the issue that's before you. The difficulty is things
 18 are urgent for the following reasons: we say Mr Zecha's
 19 appointment expires today, today is the 31st, and the
 20 company needs to have an interim CEO because the time
 21 for appointing a CEO, obviously that can't be done
 22 tomorrow, and so we have appointed at the board meeting
 23 an interim CEO.
 24 MRS JUSTICE ROSE: Is that Mr Sirois?
 25 MR HOWARD: Yes, who is one of the senior executives of the

8

1 company and who has been there for 20 years. Now, the
 2 company needs to know today what the position is,
 3 because it's not simply -- of course the other side want
 4 to say Mr Zecha continues. Our position is he doesn't
 5 continue, that his position actually terminates as of
 6 today, the court -- this court has essentially
 7 previously said that, and it's for the board to decide
 8 what the position is after 31 July. So it really can't
 9 be put off, because the company will just be in limbo,
 10 with arguments on both sides -- I mean, if we don't have
 11 a resolution today, there will be an argument, no doubt
 12 the claimant will say "Oh, well, Mr Zecha continues" --
 13 MR HILL: My learned friend has asked me not to interrupt,
 14 but three times my Lady has had the same submission
 15 which is entirely wrong. We are not saying Mr Zecha
 16 continues. We have put forward that Mr Jolivet, one of
 17 their candidates, is the interim CEO. My learned friend
 18 consistently in his skeleton and today ignores that
 19 point as if it doesn't exist.
 20 MR HOWARD: I am not ignoring it, and I perfectly understand
 21 their point and of course there are conditions attached,
 22 but Mr Hill is not actually understanding, and I am sure
 23 your Ladyship is, my point is simply that the position
 24 today needs to be resolved, because if Mr Hill accepts
 25 correctly that as at the end of today Mr Zecha is not

9

1 the chief executive officer, that function, that job,
 2 that position needs to be filled.
 3 MRS JUSTICE ROSE: The applications that are before me today
 4 are for interim injunctions to prevent the
 5 implementation of the resolutions that were on 23rd and
 6 25th and it's said that the Cyanamid test applies. Do
 7 you accept that that's the test that applies?
 8 MR HOWARD: Well, actually I think it's said it doesn't
 9 apply. Their primary submission is it doesn't apply.
 10 MRS JUSTICE ROSE: Oh, because it's --
 11 MR HOWARD: They say -- it's quite important that ones just
 12 sees what they are saying -- that there is an unfettered
 13 right to adjourn, and therefore they say, "Because
 14 I said I am adjourning, the board meeting can't be
 15 valid."
 16 MRS JUSTICE ROSE: Yes.
 17 MR HOWARD: We have pointed out as a matter of law that is
 18 plainly wrong, so it is subject to both proper purpose
 19 and good faith.
 20 MRS JUSTICE ROSE: Yes.
 21 MR HOWARD: Now, the question for you in relation to both
 22 the board meetings, the first question is: is there
 23 a seriously arguable case that they were entitled to
 24 adjourn?
 25 MRS JUSTICE ROSE: Yes.

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1 MR HOWARD: You have to consider the reason they are putting
 2 forward for an adjournment. We say there is not
 3 a proper reason. So the adjournments are simply invalid
 4 and the board resolutions are effective.
 5 If you come to the conclusion, well, in relation to
 6 one or both of the adjournments there is a serious issue
 7 to be tried as to whether they were for a proper purpose
 8 and in good faith, you then come to the balance of
 9 convenience.
 10 We say in relation to the balance of convenience
 11 that the balance of convenience is in fact firmly in
 12 favour of just doing nothing and allowing the
 13 resolutions to take effect, because they don't cause
 14 any -- particularly the capital call, it can't possibly
 15 cause any damage to Mr Hill's side.
 16 MRS JUSTICE ROSE: Well, they say it causes damage because
 17 it dilutes their shareholding.
 18 MR HOWARD: But it can't dilute their shareholding. Perhaps
 19 I can just explain that for one minute.
 20 It can't dilute their shareholding, because if it's
 21 an invalid resolution, if they prove that at the end of
 22 the day, if that's right --
 23 MRS JUSTICE ROSE: Yes.
 24 MR HOWARD: -- then the share issue will be invalid, so the
 25 person who is at risk is our side.

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1 MRS JUSTICE ROSE: But who is going to buy these shares?
 2 MR HOWARD: We are.
 3 MRS JUSTICE ROSE: Yes.
 4 MR HOWARD: We get the shares, but they will be invalid
 5 because they will simply have to be reversed.
 6 MRS JUSTICE ROSE: Then everyone will be in an even bigger
 7 mess that will have to be sorted out at the end of the
 8 day, won't they, Mr Howard?
 9 MR HOWARD: There are only two possibilities, with respect.
 10 One is that the resolution is valid, in which case
 11 either the other side put up their share of the money or
 12 they don't. If they don't, that's just because they
 13 have decided not to honour their obligations under the
 14 shareholders' agreement, but if it's a valid resolution,
 15 there is no reason the court should be giving
 16 injunctions to allow them not to put up the money that
 17 they should be putting.
 18 If it's an invalid resolution, simply the only
 19 person who is at risk where there is an invalid
 20 resolution would be the person on our side who puts up
 21 money, because that money has been put up, thinking you
 22 are going to get shares, and you will not be entitled to
 23 the shares. So you will have put in money to the
 24 company --
 25 MRS JUSTICE ROSE: If the resolution goes ahead and you buy

12

1 all these shares and for the time being they are treated
2 as valid, does that change the balance on the board?
3 MR HOWARD: No, nothing is changed on the board.
4 MRS JUSTICE ROSE: And how is the board then going to move
5 forward?
6 MR HOWARD: Your Ladyship is right, the board will be in the
7 same position as it is today, but the issue will have to
8 be resolved, obviously we say it's a valid resolution,
9 we will have put up money, and we are entitled to
10 shares. But if we are wrong about that, all that's
11 happened is we will have put 50 million in or 25 million
12 or whatever sum it is that we put in, the company will
13 then have had money which we thought was for shares but
14 won't be, and we are taking a risk in putting in the
15 money, it's as simple as that. We may have
16 a restitutionary right at the end of the day to get the
17 money back, but if the company has spent the money -- it
18 can't cause any loss to the other shareholder, that's
19 the simple point.
20 MRS JUSTICE ROSE: But if the company has taken the money
21 and spent it --
22 MR HOWARD: Yes.
23 MRS JUSTICE ROSE: -- then how is it going to pay you back
24 if it turns --
25 MR HOWARD: Yes, what it is going to spend the money on is

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1 things for the company's benefit, which is the Tokyo
2 hotel, for instance.
3 MRS JUSTICE ROSE: Yes.
4 MR HOWARD: So the claimant as a shareholder can't be in
5 a worse position, if the company is not in a position to
6 pay it back, the person who suffers is the
7 alternative --
8 MRS JUSTICE ROSE: But they are not just the shareholder,
9 though, are they? It's supposed to be a joint venture.
10 MR HOWARD: Well, I am not quite sure I understand when you
11 say "They are not just a shareholder".
12 MRS JUSTICE ROSE: Well, they have nominated directors to be
13 on the board, to be involved in the ongoing conduct of
14 the venture.
15 MR HOWARD: Yes, but that remains the position.
16 MRS JUSTICE ROSE: Yes, but it can't -- business isn't being
17 done at the moment, is it?
18 MR HOWARD: Well, it depends what you --
19 MRS JUSTICE ROSE: The Silverlink or whatever the operating
20 company is running the businesses, but this is not
21 a healthy situation.
22 MR HOWARD: It's only not a healthy situation because the
23 claimant says it's entitled to stop the board doing
24 anything that it doesn't like. That's actually what it
25 amounts to. The claimant is trying to exercise a right

14

1 of veto over the board, whereas that's not actually what
2 the shareholders' agreement provides, it doesn't give
3 one side -- it gives the directors the right to run the
4 company, and that's ultimately the issue.
5 MRS JUSTICE ROSE: Right. Well, I think it would be useful
6 for the parties to have a short discussion about --
7 putting on one side for the moment the question of the
8 resolutions agreed at the 23rd and 25th -- board
9 meetings over the coming months and about the
10 possibility of arranging for a mediation of the dispute,
11 and see what progress can be made then in fairly short
12 order, and also for you to have a discussion about
13 whether it's going to be Mr Zecha or Mr Jolivet going
14 forward as CEO, and if there is then a dispute I need to
15 resolve about the capital call at the 23rd and 25th July
16 meetings, then we can make progress on that. But I want
17 to get something moved forward before we launch into
18 submissions on the other matters.
19 MR HOWARD: My only concern, I just want to make it clear,
20 was that we don't lose time, and then things -- and
21 obviously if people can agree things, then I agree
22 that's the best way forward, but my concern is that if
23 the parties can't, and I fear that they may not be able
24 to, that we don't waste too much time when obviously
25 there is a lot of business that needs to be got through.

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1 MR HILL: My Lady, can I just endorse that? I am not sure
2 Mr Howard and I agree on much, but I suspect we are not
3 going to get that far -- I hope we will, but we may not,
4 just having heard him now -- and clearly, given his
5 position, I need to satisfy my Lady on the question of
6 interim injunctions, which I submit there is no
7 difficulty doing, but I want to have the time to do so.
8 MRS JUSTICE ROSE: All right. What we will do, then, is we
9 will carry on now and perhaps over the short adjournment
10 you can take on board the points that I have made and
11 see if something can come of that.
12 MR HILL: I am grateful, my Lady.
13 My Lady, in terms of the evidence, there were two
14 short witness statements that came in overnight, one was
15 on my learned friend's side from Mr Jolivet, which we
16 don't object to, and I don't know if that's found its
17 way to my Lady?
18 MRS JUSTICE ROSE: Yes.
19 MR HILL: It's very short. Secondly, one from Mr Amanat,
20 which is in response to Mr Doronin, which had been
21 served after midnight the previous night. Has that
22 found its way to my Lady? It's a third witness
23 statement.
24 MRS JUSTICE ROSE: Of Mr?
25 MR HILL: Of Mr Amanat. I can hand it up. (Handed). It

16

1 should have gone in perhaps at tab 31 in bundle red 3.
2 MRS JUSTICE ROSE: Yes.
3 APPLICATIONS FOR INJUNCTIVE RELIEF and EXPEDITED TRIAL
4 Submissions by MR HILL
5 MR HILL: I am grateful.
6 Now, what I was going to do was deal first and
7 briefly with some general points about how and why we
8 have got here and what the parties' obligations are, and
9 that's particularly important in the light of what
10 I have just heard, then deal with the injunction
11 applications, and then say some remarks about speedy
12 trial.
13 In terms of the background, as my Lady knows, this
14 arises out of the acquisition of the Aman Hotel Group at
15 the beginning of this year. As my Lady says, this is
16 a joint venture vehicle, and the hotel group is held
17 underneath the joint venture vehicle. I will refer to
18 the vehicle as "JVC" or "the company" in these
19 submissions, PHRL is the A shareholder, Tarek is the B
20 shareholder.
21 Has my Lady seen the shareholders' agreement? It is
22 at black 4, starts at page 4.
23 MRS JUSTICE ROSE: I have only got blue and white and red.
24 MR HILL: Sorry, what I mean is white with black writing.
25 I should say white.

1 Now, this agreement provides that, notwithstanding
2 the disparity in the equity levels between the
3 shareholders, each party has equal voting rights and
4 equal rights generally at board level.
5 If I could just refer -- in other words, this is
6 a deadlock company, and it was constructed as a deadlock
7 company.
8 If I could refer my Lady very briefly to some of the
9 salient provisions, first at clause 4.2 and 4.3, we
10 don't need the detail of this, but we can see at 4.2 and
11 4.3 that there are quite complex and detailed provisions
12 for the production of a resort business plan and
13 development business plan which will map out the future
14 business and spending of the company.
15 At clause 5.4, there are provisions dealing with the
16 additional capital funding that might be required for
17 the company, and the points to note here are that
18 reading 5.4(a) and (b) together, there was to be no
19 capital requirement beyond \$60 million in the first
20 year; secondly, that under clause 5.4(d) there was to be
21 a 60 day period after notification --
22 MRS JUSTICE ROSE: Where am I looking?
23 MR HILL: 5.4(d).
24 MRS JUSTICE ROSE: What page are you on in the bundle?
25 MR HILL: Yes, on page 25, 5.4, subparagraph (d).

1 "Notwithstanding clause 5.4(c), the board shall give
2 notice immediately after completion that 50 million
3 capital reserve being called amount to due date for each
4 shareholder of 60 days from completion."
5 What is envisaged is a notice requiring 60 days for
6 the shareholders to put their money in.
7 Just pausing there, when we come in due course to
8 one of the impugned resolutions, we will see that it's
9 a resolution for the shareholders to put their money in
10 within a couple of weeks, which is one of the points we
11 complain about, and one of the reasons it's unlawful.
12 The other point to know about clause 5.4 is that
13 under (e) and (f), there are provisions which allow in
14 substance the paying shareholder to step in and
15 ultimately obtain extra capital if the other partner
16 doesn't pay a capital contribution on the due date. And
17 there is a sting in the tail at little (f) 2.2 that is
18 we are talking about what is called an additional
19 capital amount, which this 50 million under 5.4(d) will
20 count as, they get a double contribution.
21 Just the final point on that area, my Lady may note
22 that clause 5.3 provides that shares shall not be
23 allotted except with the prior written agreement of each
24 shareholder. In other words, you can't have any capital
25 contribution, any share issue or cash other than with

1 the agreement of both shareholders. So this is
2 a self-contained scheme.
3 Clause 6 deals with the appointment of A and B
4 directors.
5 Clause 6.2 deals with the meetings of directors.
6 Just pausing there again, it's worth noting that
7 there is something non-standard about this arrangement,
8 in that the memorandum and articles of this company are
9 expressly subject to and subordinate to the SHA, and so
10 the provisions that one sees in meetings of directors in
11 the shareholders' agreement are the dominant ones.
12 Just for my Lady's note, that's clear from clause 12
13 of the memorandum and articles on page 82 of this
14 bundle.
15 Now, as regards the meeting of directors,
16 clause 6(f) and 6(i) need to be read together, and these
17 together require A and B representation at board level,
18 and they ensure equal voting, as I said, a deadlock
19 set-up at board level. There is also an entitlement
20 under 6.2(c) to five days' notice of meetings and agenda
21 items and information, all subject to shorter notice
22 only if both an A and B director agree. At
23 clause 6.2(g), there is a right, and we say it's
24 an important right, for each of an A and B director to
25 adjourn a meeting. That's a right that the shareholders

1 have for their appointee to adjourn a meeting, it's
 2 a commercial right.
 3 Clause 6.6 is the clause that deals with Mr Zecha,
 4 and that provides for two things. One is that he will
 5 be the initial CEO of the company for the first six
 6 months, and that doesn't mean, contrary to submissions
 7 just advanced by my learned friend, that he stands down
 8 automatically after six months; he still would have to
 9 be removed, he would continue after six months until he
 10 was removed by lawful resolution of the board. But when
 11 he does stand down --

12 MRS JUSTICE ROSE: Where is that provision?

13 MR HILL: 6.6(a), my Lady:

14 "... the initial CEO of the company for the first
 15 six months following the completion date will be
 16 Adrian Zecha and thereafter Adrian Zecha will be the
 17 chairman of the resorts business or CEO of AMBV, as
 18 determined by the board following discussions with
 19 Adrian Zecha."

20 Now, he is the CEO for the first six months, but
 21 certainly there is no automatic termination of him, it
 22 would still require a lawful resolution of the board to
 23 remove him after six months, and at that stage when he
 24 is removed, it's clear from the final words of the
 25 clause that he is then to become the Chairman of the

1 resorts business or CEO of AMBV.
 2 I think it's common ground from the previous
 3 proceedings, from the previous interlocutory
 4 proceedings, that what we are really looking at here is
 5 the CEO of AMBV.

6 MR HOWARD: Why is that?

7 MR HILL: Well, if it's not common ground, then my
 8 submission is that he should at least be CEO of AMBV,
 9 because that's a clearly identified and possible role
 10 for him as opposed to be chairman of resorts business
 11 which arguably may not be sufficiently clearly
 12 identified.

13 Now, my Lady will have picked up from the skeleton
 14 that the shareholders' agreement also provides for
 15 certain incentive arrangements for PHRL. The detail of
 16 the incentive arrangements don't matter. What matters
 17 is that they were a very important part of the
 18 consideration so far as PHRL was concerned for the deal,
 19 and for my Lady's note, they are set out at schedule 7,
 20 page 74 of the agreement.

21 So that's a whistlestop tour of the agreement.
 22 My Lady will know that as far as PHRL's participation
 23 goes, that was then subject to a separate joint venture
 24 between Mr Amanat and Mr Eliasch, and the resulting
 25 structure is set out in an organogram, I don't know if

1 my Lady ever saw that? Yes. The background to that
 2 joint venture is that relations between Mr Amanat and
 3 Mr Doronin had already deteriorated, Mr Amanat sought
 4 an ally with financial muscle and a willingness to help
 5 him stand up to Mr Doronin, and we rely, as my Lady
 6 knows from paragraphs 30 to 33 of our skeleton, on
 7 a number of assurances given to us by Mr Eliasch,
 8 including he would be an advocate for PHRL, he was not
 9 a good friend for Mr Doronin and the like.

10 MRS JUSTICE ROSE: Yes, I have seen that.

11 MR HILL: Just pausing there, obviously this is a long way
 12 away from a hearing to consider the merits --

13 MRS JUSTICE ROSE: Yes.

14 MR HILL: -- but it is worth noting that Mr Eliasch has put
 15 in evidence in these proceedings, it does accept that
 16 the degree of his friendship did come up, and his own
 17 evidence is that Mr Amanat had a strategy that was
 18 hostile to Mr Doronin, and so we submit it's quite
 19 obvious -- and will be quite obvious when we get to
 20 a trial of this -- that Mr Eliasch was indeed giving
 21 assurances of the kind that we have alleged.

22 Now, as a result of those assurances, Mr Eliasch
 23 became one of PHRL's A directors in April, and that's
 24 the fons et origo of the problems that then occurred,
 25 because it transpires that, contrary to what he had led

1 us to believe, he is in fact very good friends --
 2 extremely good friends -- with Mr Doronin, and after
 3 staying in the same house as Mr Doronin --

4 MRS JUSTICE ROSE: Yes, let's try and move forward to the
 5 validity or otherwise of the resolutions.

6 MR HILL: My Lady, yes. What I was simply going to do
 7 was -- I was nearly at the end of just summarising what
 8 we particularly objected to in the period between April
 9 and June/July. I mean, I can take it --

10 MRS JUSTICE ROSE: Well, I have read the skeleton.

11 MR HILL: If you have read the skeleton I can take it
 12 extremely quickly. My Lady knows there were three
 13 particular areas. The most striking was the
 14 \$150 million capital call at a price of \$0.01, that's
 15 1 cent per share, in the same purported resolution that
 16 ascribed a price of over \$3,000 per share for another
 17 capital call. Now, that is commercially bizarre. There
 18 has never been any explanation for it, and the only
 19 possible explanation is that it was a deliberate attempt
 20 by the two parties on the other side of the court to
 21 dilute Mr Amanat's shareholding in a quite unlawful way.
 22 That is particularly important for my Lady to keep in
 23 mind when we think about: can these parties work
 24 together, what should happen at board level, and so on,
 25 because the reality is, as is evident even from that

1 example alone, there is an unhealthy and we say unlawful
 2 alliance between Mr Eliasch -- who is supposed to be our
 3 appointee, and he is the person who is supposed to
 4 protect our deadlock arrangements and protect our rights
 5 on the board -- and Mr Doronin. And the consequence of
 6 this is that the deadlock, if you like, arrangements
 7 under the shareholders' agreement just don't work
 8 properly, because Mr Eliasch can gang up with the
 9 appointees of the B shareholders and outvote us, and he
 10 can and will and has done that, and he has done that
 11 already in ways which, in my submission, are flagrantly
 12 unlawful, as the 1 cent dilutive capital call is the
 13 most extreme example, but there are others, including
 14 his propensity to adjourn -- to call meetings at
 15 approximately one hour's notice at 8 o'clock on a Friday
 16 night.
 17 My Lady, that was, as I say, the most striking
 18 example. There is also, of course, all of the
 19 arrangements to kick out Mr Zecha, and thereafter to
 20 appoint Mr Doronin unlawfully, and thereafter to hound
 21 Mr Zecha out of his office and indeed his house, which
 22 I have referred to in the skeleton. There is also the
 23 stripping out of our incentive arrangements, which
 24 I have referred to, all of which are, in my submission,
 25 flagrantly unlawful and demonstrate the alliance.

1 Now, as my Lady knows, we had to apply to court in
 2 relation to the matters that occurred between April and
 3 June, and we have set that out in our skeleton, and we
 4 obviously secured undertakings in relation to the
 5 capital call resolutions over until September, and we
 6 obtained undertakings in relation to the Sherway
 7 enforcement action, which my Lady knows about, which is,
 8 if you like, the other side of the pincer movement,
 9 whereby Mr Eliasch is seeking to put the squeeze on
 10 Mr Amanat from the other direction, and in relation to
 11 Mr Zecha we didn't obtain undertakings, but we succeeded
 12 in front of deputy judge Catherine Newman QC, and that
 13 led to a rearguard action which I will come to.
 14 My Lady will want to know what does she get out of
 15 all of this, because we are not yet on the resolutions,
 16 and we get the following points: first, Mr Eliasch has,
 17 on any view, formed a collaboration with Mr Doronin and
 18 is prepared to use his joint control of the board to
 19 work against PHRL's interest and in favour of
 20 Mr Doronin's interests. As I say, the 150 million is
 21 the most striking example of this.

22 Just on that, it's also worth noting that we have
 23 had evidence from Mr Eliasch and two witness statements
 24 from Mr Doronin which do deal with a number of matters
 25 not directly relevant just to the interlocutory stages

1 of this, but which don't condescend to any explanation
 2 of the 150 million dilutive call.

3 Secondly, this conduct by Mr Eliasch involves,
 4 taking it at its very lowest, operating on
 5 considerations which are nothing to do with Mr Eliasch's
 6 duties to the JVC or even to the joint venture between
 7 them and again the capital call is the most obvious
 8 example which would be contrary to the interests of
 9 a JVC to have had that dilutive issue.

10 Thirdly, Mr Doronin has been executing a strategy to
 11 seize control of the JVC for himself and Mr Eliasch has
 12 been assisting in that.

13 Fourthly, they have no compunction unless and until
 14 restrained by injunction or undertakings in riding
 15 roughshod over the provisions of the SHA.

16 Fifthly, the means by which they operate this is
 17 through a control of the board.

18 Again, these are all important matters to take into
 19 account when we get on to my learned friend's somewhat
 20 lofty submissions about how meetings should not be
 21 adjourned, how the court shouldn't interfere with the
 22 business of the board, and the board should just be
 23 allowed to get on with things, because of course the
 24 board is in reality now dominated through this, we say,
 25 unlawful alliance, and that's a deeply cynical

1 submission from my learned friends, and there is no-one
 2 on this board except for the protagonists, and that's
 3 an important point.

4 Now, as regards Mr Eliasch's voting on the board, we
 5 say he should not -- and this is obviously not something
 6 that my Lady can determine today, because it's a point
 7 that's been held over firstly until September and
 8 thereafter to trial -- be voting at all and still less
 9 in a way that's adverse to PHRL's interest, that is not
 10 least because he is an outgoing director. I will come
 11 to this very shortly. We have rescinded and accepted
 12 repudiation of the arrangements between Sherway and
 13 PHRL, and we have served notice of his removal. So he
 14 shouldn't be voting at all.

15 Secondly, we do have our application for injunctive
 16 relief coming back in September, and that relief seeks
 17 to disable Mr Eliasch from voting, and that's a point
 18 for September.

19 Thirdly, in the meantime, the protection that we
 20 have in practical terms is to adjourn meetings, which
 21 Mr Eliasch and Mr Doronin are seeking to push through
 22 where they want to further their own interests and to
 23 adjourn meetings that contain any other unnecessary or
 24 unlawful or inappropriate business that doesn't need to
 25 be dealt with prior to the return date.

1 What we also say is that this is exactly what the
 2 court well understood, only a few days ago, on 18 July,
 3 when a lot of these arguments came up. The court's
 4 already given relief protecting PHRL's right to adjourn
 5 meetings, and my learned friend's opposition to this
 6 application is, as I submitted in my skeleton and in my
 7 further note from this morning, it is a re-run of points
 8 that the court has considered and not acceded to.
 9 That takes me to the hearing on 18 July. My Lady
 10 knows that that followed, if you like, a rearguard
 11 action that took place after the judgment of
 12 Catherine Newman QC. In a nutshell, the point is dealt
 13 with at paragraphs 71 to 75 of my skeleton. But there
 14 were a sequence of attempted meetings. They were called
 15 at increasingly short notice, and the content of them
 16 was to impose we submit, absurd fetters on Mr Zecha's
 17 re-appointment, so that he would not be able to function
 18 properly at all when reappointed, or so that there would
 19 be some trumped up reason to dismiss him on the basis he
 20 had not complied with this regime.
 21 The short notice was of particular concern, because
 22 what was apparent was that this camp was trying to catch
 23 us unawares, depriving us of an opportunity to adjourn
 24 any meeting, and to push through their own agenda before
 25 we could object, with Mr Eliasch exercising his A

1 director right to consent to short notice. That was the
 2 trick.
 3 As I say, the most extreme example was the 65
 4 minutes' notice at 8 o'clock on a Friday evening.
 5 That is what led to the next hearing in front of
 6 deputy judge Robert Englehart QC, and it is important
 7 that my Lady knows where the parties got to when that
 8 application was issued and when that hearing was held.
 9 The first point is that the Doronin camp had already
 10 sent out the notices convening the very meetings that we
 11 are considering and discussing today, so those notices
 12 on 23 July and 25 July had already gone out -- sorry,
 13 the notices for the meetings on the 23 and 25 July had
 14 already gone out.
 15 We then came -- I wasn't there, Mr Howard was -- the
 16 parties then came before the deputy judge. By that
 17 stage, PHRL had accepted repudiation of the Sherway
 18 arrangements, and we had issued our notice terminating
 19 Mr Eliasch. We were seeking two orders, one prohibiting
 20 Mr Eliasch as A director from consenting to short notice
 21 and the addition of items to the agenda. That's
 22 stopping the sneaky tricks, if you like. The second was
 23 preventing him from attending and voting at meetings at
 24 all, given that he was now an outgoing director.
 25 Now, in relation to our relief, certainly the second

1 part of our relief, the wider more extreme relief, one
 2 of Mr Eliasch's own points was that we shouldn't be
 3 entitled to it because we didn't need it because we had
 4 our own unilateral right to adjourn meetings, so it
 5 wasn't necessary or fair to stop him attending meetings
 6 at all, and I have referred to the extract of a skeleton
 7 at paragraph 83 of my skeleton, and it is, in my
 8 submission, somewhat startling to see the reverse
 9 position now argued today by the same party.
 10 Now, it was this argument that found favour at the
 11 time with the deputy judge, and this is apparent from
 12 bundle 3, tab 18. I am sorry, I have a wrong reference.
 13 Let me just give my Lady the right reference. I will
 14 give my Lady the right page reference. (Pause)
 15 MRS JUSTICE ROSE: Which bundle are we looking at?
 16 MR HILL: Bundle red 3, tab 18, page 42 to 43. If I could
 17 just invite my Lady to read from page 42, line 25
 18 through to page 43.
 19 Just so that my Lady understands, where we see
 20 references to relief in old 5.1 or new 4.1, that is the
 21 limited relief seeking notice and no late additions to
 22 the agenda, so we get to exercise our right to adjourn,
 23 and new 4.2, old 5.2 was our rather wider relief seeking
 24 to disable him altogether. My Lady will see how the
 25 argument ran in that passage.

1 (Pause)
 2 So the deputy judge's thinking is rather than along
 3 the lines of Mr Brindle's skeleton, which is why do we
 4 need some further relief disabling Mr Eliasch, if we get
 5 the first head of relief so that we have notice of
 6 meetings and notice of the business of the meetings,
 7 obviously because then if we think we are being pushed
 8 over, we can adjourn those meetings.
 9 Now, the third point about this hearing is that
 10 Tarek, TIL, put in evidence from Mr Doronin and made
 11 submissions in relation to the meetings that were to
 12 take place for what was then the following week, and
 13 those submissions are in the same tab, in particular at
 14 page 65 to 66. It's really from 65, line 12, through
 15 certainly all the way down through 66.
 16 MRS JUSTICE ROSE: Tab 18?
 17 MR HILL: Still in tab 18.
 18 MRS JUSTICE ROSE: What am I looking at?
 19 MR HILL: These are submissions made by Mr Howard. It
 20 starts:
 21 "But, my Lord, it is these two board meetings ...
 22 which is causal(?) or appears as a decision by
 23 Mr Brisby's clients to seek to remove or prevent
 24 Mr Eliasch from exercising rights to vote."
 25 Mr Howard then makes submissions to those

1 submissions which are renewed by Tarek before my Lady.
 2 MR HOWARD: Just while you are reading this, you may want to
 3 just pick up two references. One is in relation to the
 4 skeleton argument that Mr Hill referred you to, which
 5 I think you have in this bundle at tab 17. He referred
 6 you to paragraph 5, which is where Mr Brindle made
 7 a reference to the right unilaterally to procure the
 8 adjournment, but you need to read that together with
 9 paragraph 42, in the last sentence, where it was made
 10 clear that the right to adjourn had to be exercised in
 11 good faith. If you then read my submissions --

12 MRS JUSTICE ROSE: Well, I think you can take me to these
 13 when it's your turn, Mr Howard.

14 MR HOWARD: Okay.

15 MR HILL: What the judge decided is that, first, we did have
 16 an arguable case for our injunctive relief against
 17 Mr Eliasch, but that over until September, the return
 18 date, the position would be adequately held if we were
 19 granted the first of our heads of relief, the more
 20 limited relief, but not the second. In other words, we
 21 had received notice of meetings and agenda, and we
 22 essentially had the protection of our right to adjourn,
 23 but we were not otherwise entitled to disable
 24 Mr Eliasch.

25 Now, the judge in his judgment specifically dealt

1 with Mr Howard's arguments, saying they were strong
 2 points but in his view damage would not be caused by
 3 waiting until September. That was with these very
 4 meetings in mind, and against the prospect of us
 5 adjourning the business of these very meetings. The
 6 relevant passages in the judgment are at tab 19 of this
 7 bundle, at paragraphs 28 through to 32.

8 So having first dealt, at paragraphs 25 to 27, with
 9 serious issue to be tried, the judge decides there is
 10 a serious issue to be tried for our relief. He then
 11 deals at 28 onwards with my learned friend Mr Howard's
 12 submissions. I would just invite my Lady to read 28
 13 through to 32, and in fact 33 as well.

14 (Pause)

15 So, my Lady, the judge was saying in terms, deputy
 16 judge was saying in terms that, notwithstanding
 17 Mr Howard's points about the meeting, the meeting for
 18 next week, and about our rights to adjourn, PHRL should
 19 have the relief the judge ordered, and that was where
 20 the balance of convenience lay. The judge also gave
 21 liberty to apply, as we see at paragraph 32 and 33, but
 22 that has never been taken up. What Tarek instead did
 23 was disregard what plainly was being envisaged and
 24 simply hold these meetings and ignore our right to
 25 adjourn.

1 Can I just be clear that it was not a case of us
 2 simply adjourning the meeting on 23 and 25 July, we made
 3 clear when we adjourned those meetings that we would be
 4 providing constructive proposals for how to deal with
 5 the business of the meetings that needed to be dealt
 6 with. For my Lady's reference, that's in our letter of
 7 21 July at red 1, tab 10, pages 9 to 11. We followed
 8 that letter up with entirely constructive proposals, in
 9 my submission, that we see in the letter of 24 July,
 10 which is at red 1, tab 10, page 32 to 41. If I could
 11 just invite my Lady to take that up?

12 MRS JUSTICE ROSE: Which bundle?

13 MR HILL: Red 1, tab 10, page 32 to 41. Now, this was our
 14 letter providing the constructive proposals we had
 15 promised when we adjourned the two meetings of 23 and
 16 25 July. We set out a number, in section A of the
 17 letter, that starts at the bottom of page 33 of items
 18 from the agenda of the 21 July meeting, in particular,
 19 that we considered could simply be dealt with by written
 20 resolution, because they were so uncontroversial. We
 21 then -- just pausing there, it says:

22 "There is no question of us trying to paralyse the
 23 board or the JVC generally", which is the argument
 24 forensically mooted on the other side.

25 The next section of the letter, section B of the

1 letter, dealt with matters that we suggested should be
 2 dealt with in an adjourned meeting, and we specifically
 3 dealt at item 15 with the position of Mr Zecha.

4 Contrary to the impression that my Lady may have had
 5 from time to time from my learned friend's documents, we
 6 were not requiring Mr Zecha to remain in office,
 7 although as it happens we do think that would have been
 8 sensible, but we are prepared to compromise on that.

9 What we did was suggest one of their own proposed
 10 interim CEOs. Just so one knows why it was one of their
 11 own proposed interim CEOs, if one keeps a finger in that
 12 and goes back in the tab to page 7 to 8, you will see
 13 a letter from Herbert Smith acting for TIL, which, at
 14 page 8, they say:

15 "Our client considers that any of the following
 16 would effectively fulfil the role of interim CEO:

17 Greg Sirois, Olivier Jolivet, and Jochen
 18 Schaefer-Suren."

19 So they have put forward Mr Jolivet as a candidate
 20 for interim CEO, and we said we were amenable to this.
 21 What we also required, and my learned friend says "Well,
 22 this is conditional"; yes, it is, but not conditional in
 23 a way that could be remotely objectionable, because it
 24 has to be accompanied with Mr Zecha continuing in his
 25 role as CEO of AMBV. Now, of course, as my Lady

1 recalls, that was exactly what's provided for in
 2 clause 6.6 of the SHA. So while it conditional it could
 3 not conceivably be objectionable or properly
 4 objectionable to the other side.
 5 So again nothing, none ever this is anything to do
 6 with us wanting to paralyse the board or anything like
 7 that. We are facilitating the very arrangement that
 8 they want, which is the replacement of Mr Zecha with
 9 an interim CEO of their own choosing, and all we are
 10 doing is saying at the same time Mr Zecha has to have
 11 the role that the SHA specifically requires. When we
 12 come to balance of convenience on this injunction, this
 13 is what one is looking at. One is saying: on the one
 14 hand there is our proposal, which is exactly what they
 15 want and shouldn't be objected to, and on the other
 16 their unlawful resolution pushing through Mr Sirois, who
 17 we are not content with, and dragging their feet and
 18 pretending to ignore the SHA requirement to keep
 19 Mr Zecha in his role as CEO of Aman Resorts. There is
 20 a very large Aunt Sally erected on the other side to
 21 suggest that the completing considerations are on the
 22 one hand their resolution and on the other some kind of
 23 paralysis or gap or absence of any CEO or interim CEO.
 24 That's absolutely wrong.

25 My Lady has to ask herself: why shouldn't they
 37

1 agreed with our proposal that we put forward in that
 2 letter, and why are they opposing this part of it, given
 3 that it reflected their own suggestion? The only reason
 4 for that can be that they are in fact intent on pushing
 5 through Mr Sirois, they have had a change of mind, and
 6 they feel Mr Sirois is the most loyal to Mr Doronin.
 7 Now, that's the first of the big issues, if you
 8 like, which comes up in this letter. The other one is
 9 the capital call, and that is also dealt with in the
 10 letter under section C, which is matters which are not
 11 urgent or raise matters at issue in the High Court
 12 proceedings. We deal with that at item 21 of the
 13 letter.

14 Now, there are two points here. First, we do in
 15 fact question the urgency. In their letter of 22 July,
 16 which is at page 15 of this tab, the suggestion was made
 17 at paragraph 14 of their letter, that there was
 18 a particular urgency for the funds because of the Tokyo
 19 project, which is something that now looms very large,
 20 as my Lady will see in my learned friend Mr Howard's
 21 evidence.

22 Now, when that assertion was first made, we promptly
 23 sought information about it, and we made the point that
 24 it was a very unsatisfactory way for this information to
 25 emerge. That is at paragraph 6 of our letter, page 19,

1 just a couple of pages on in the tab, where we said:
 2 "Please send us by return all relevant documents
 3 pertaining to this issue including all documents
 4 relevant to the suggested possible consequences. It is
 5 not good enough for you to refer to these matters in
 6 summary example form in correspondence."
 7 Which, in my submission, is quite right. And there
 8 was, my Lady may not be surprised to hear, no response
 9 to that, that request. So what we did was repeat it in
 10 the 24 July letter, that we are looking at at page 39
 11 and 40.

12 MRS JUSTICE ROSE: Yes.
 13 MR HILL: At 21.2.

14 None of that information was provided, but
 15 nevertheless the same assertions came up in Mr Doronin's
 16 evidence served after midnight on Wednesday night.

17 MRS JUSTICE ROSE: And now in Mr Jolivet's evidence.

18 MR HILL: Well, up to a point in Mr Jolivet's evidence.
 19 When we come to it, I will be submitting that
 20 Mr Jolivet's evidence is actually quite neutral on the
 21 point. What we see in Mr Doronin's evidence is
 22 assertions of crashing urgency with very large financial
 23 penalties following if a fit-out isn't achieved by
 24 October. You don't get anything of that in Mr Jolivet's
 25 evidence, which is an obviously -- Mr Jolivet, they

1 wouldn't have put in a witness statement unless they had
 2 got Mr Jolivet to go as far as he was prepared to go,
 3 and where he is prepared to go is a very long way short
 4 of the dramatic statements that we see coming from
 5 Mr Doronin.

6 So the history of us trying to get actual
 7 substantiation of this stuff about the Tokyo project
 8 rather shows that when the assertions come in very late
 9 in the day, my Lady does need to take them with, in my
 10 submission, a lorry load of salt.

11 Now, the second point that we make in the letter
 12 that we are looking at is that we need pricing
 13 information. Now, my learned friend seeks to brush this
 14 aside on the basis that pricing is immaterial, but of
 15 course pricing is not immaterial, it's very important,
 16 especially if a shareholder doesn't contribute, because
 17 it determines whether there is an excessive dilution or
 18 not. The other side's position is that there can be
 19 flexibility but must be an upper limit of \$5,000 per
 20 share, but why? On what information and valuation
 21 metrics is this based? It seems to be an arbitrary
 22 assumption, and an arbitrary assumption based on the
 23 acquisition price for the company back in the January
 24 deal. That sort of back of the envelope stuff is not
 25 an appropriate way of getting to a very large capital

1 contribution with very large financial consequences.
 2 Just taking the letter as a whole, we would submit
 3 that it's all a very long way from us paralysing the
 4 proper functioning of this company, and indeed we have
 5 been bending over backwards to enable its proper
 6 functioning, especially in this very difficult period
 7 over until the return date in September.
 8 Now, just to complete the story, before I make
 9 submissions on the actual application, my Lady knows
 10 that our requests to adjourn were ignored and the
 11 proposals, the meetings were held. The resolutions at
 12 the meetings, just for my Lady's note, are at red 3,
 13 tab 10, page 28, that's the Wednesday meeting; and at
 14 bundle C2, page 524, that's the 25th, the Friday
 15 meeting.
 16 If I could just complete the picture on the
 17 correspondence, before I make my submissions, there are
 18 two relevant further letters. The first is our letter
 19 of -- sorry, TIL's letter of 28 July, which is at C2,
 20 page 529. Now, it's quite a long letter, I certainly
 21 don't propose to take my Lady through it now. Maybe
 22 my Lady will want to look at it in due course.
 23 The gist of it, we say, is that having ignored our
 24 proposals and gone ahead and unlawfully held the
 25 meetings in defiance of our right to adjourn them, my

41

1 learned friends appear to have had second thoughts, and
 2 what they were seeking by this letter to do was to
 3 invite us to reconvene the very same meetings for what
 4 would have been the 30th, this week, and what they
 5 plainly envisaged doing was rubber-stamping the
 6 resolutions that they had already voted on, obviously
 7 given they had still got dominance of the board.
 8 MRS JUSTICE ROSE: Where does the 30 July meeting come in,
 9 the proposal?
 10 MR HILL: Perhaps if I could just take you to a few
 11 paragraphs of it.
 12 MRS JUSTICE ROSE: Wait a minute, I am just looking at the
 13 28th one.
 14 MR HILL: Yes.
 15 The interim CEO point was dealt with at
 16 paragraph 16. Then the offer, in terms of 30 July, is
 17 right at the end of the letter. You will see
 18 a provision for "our client's offer".
 19 Now, I would invite my Lady to read all of those
 20 paragraphs on "our client's offer", because my learned
 21 friend was concerned at my characterisation of it in my
 22 skeleton. I don't want to --
 23 MRS JUSTICE ROSE: So from 28 onwards?
 24 MR HILL: Yes, just read from 28 onwards so there is no
 25 misunderstanding.

42

1 (Pause)
 2 MRS JUSTICE ROSE: Yes.
 3 MR HILL: Now, of course this is an offer to hold this
 4 meeting on 30 July, but one needs to see it in the
 5 context of what's said about, for instance, the interim
 6 CEO at paragraph 16 of the letter, and the capital call
 7 at paragraphs 24 through to 27.
 8 MRS JUSTICE ROSE: You say there is no point holding this if
 9 Mr Eliasch is just going to vote with Mr Doronin.
 10 MR HILL: My Lady, yes. Particularly on the interim CEO,
 11 it's deeply cynical. We have said what we are prepared
 12 to live with, which is their proposal for Mr Jolivet.
 13 They are backtracking on their own proposal and then
 14 saying "Oh, well, you can put forward whatever agenda
 15 you like at the meeting, but it's all for the board", so
 16 the reality is that we turn up at the meeting and it's
 17 Mr Sirois.
 18 MRS JUSTICE ROSE: So board decisions are by a majority of
 19 the directors, or there has to be one A and one B
 20 director?
 21 MR HILL: Because it's deadlocked, they need the support of
 22 an A director for a resolution, but they have that in
 23 Mr Eliasch, and that is the problem.
 24 MRS JUSTICE ROSE: Yes.
 25 MR HILL: So how it's supposed to work just doesn't

43

1 function. That's why --
 2 MRS JUSTICE ROSE: And these -- none of these decisions
 3 require unanimity of the board, then?
 4 MR HILL: No. It's not a question of unanimity. It would
 5 be ordinarily a question of deadlock absent agreement,
 6 but we have lost that check and balance because of the
 7 unlawful arrangement.
 8 MRS JUSTICE ROSE: What would happen if there was deadlock?
 9 MR HILL: There is a deadlock provision. I didn't show that
 10 to my Lady.
 11 MRS JUSTICE ROSE: What is that briefly? You don't need to
 12 take me to it, unless you know offhand ...
 13 MR HILL: I will have to work out the ... yes, eventually
 14 you end up in an auction process, but there are steps
 15 along the way. So the company doesn't stay in deadlock
 16 forever, you eventually get to an auction. There is
 17 also separately obligatory transfer events which we say
 18 have been triggered which also lead to a sell-out
 19 process. So it's not a company where these people are
 20 locked together forever, they have set up a situation in
 21 which they are deadlocked but with mechanisms for
 22 resolving it.
 23 So we do say it's deeply cynical to suggest that,
 24 and that's especially true of the CEO resolution,
 25 because on what we suggest, it doesn't even need

44

1 a meeting, it could simply be done by written
 2 resolution, we have suggested Jolivet, which they have
 3 previously said they were happy with, and we have
 4 suggested Zecha in his continuing role, which is just in
 5 the SHA. If these people were acting lawfully and
 6 rationally, we would simply have dealt with this by
 7 resolution now and we wouldn't be being forced into
 8 a meeting which we have to undertake not to adjourn at
 9 which they can squash us by appointing Mr Sirois and not
 10 appointing Mr Zecha.

11 Now, that's why we did respond on 29 July, and just
 12 for my Lady's note, that is in the same bundle at
 13 page 537 through to 541. So the short point is that we
 14 remaining to progress the Jolivet proposal tied with the
 15 Zecha appointment, and that ought to dispose of that
 16 aspect, and we reiterated our points about pricing of
 17 the capital call issue which has been ignored.

18 MRS JUSTICE ROSE: If the resolution, the capital call that
 19 was made, was it on the 25th rather than the 23rd
 20 meeting?

21 MR HILL: That's the 25th for the capital call, yes.

22 MRS JUSTICE ROSE: Yes. If that went ahead -- you may not
 23 be in a position to answer this, but why does it seem to
 24 be assumed that Mr Doronin would buy all those shares?

25 MR HILL: He may or may not. It puts us in a very difficult
 45

1 position. We are then given until 8 August to find all
 2 this money. It's simply unlawful. We were always
 3 entitled to 60 days and we were always entitled to know
 4 what the right price is. Being put in this very
 5 difficult situation of: do we contribute this capital
 6 call or not, do we not contribute it, allow Mr Doronin
 7 to put the money in and essentially get double the
 8 shares for the money, then taking our chances on it all
 9 being sorted out in some way at trial, which is what my
 10 learned friend suggested, is completely the wrong way to
 11 deal with this sort of commercial situation in this sort
 12 of company, especially when the capital call is on its
 13 face unlawful for two reasons: one, because it was done
 14 in breach of the adjournment request, and, two, because
 15 it required two weeks rather than 60 days.

16 Now --

17 MRS JUSTICE ROSE: Just wait one second. (Pause). Yes.

18 MR HILL: My Lady, if I could come to my submissions on the
 19 application, I apologise for the length of time it has
 20 taken to get to it, but in my submission --

21 MRS JUSTICE ROSE: Do the shorthand writers need a break?
 22 Yes. We will come back at 12 o'clock.

23 It seems to me, just going back to what I was saying
 24 this morning, that whatever happens about the
 25 resolutions from last week, there does seem to need to

1 be some kind of directions which would prevent
 2 a repetition of this calling of meetings and adjourning
 3 and non-acceptance of adjournments, and then queries
 4 over the validity of any resolutions arrived at, that if
 5 there are to be board meetings rather than just
 6 perpetual adjournments of board meetings, then there
 7 needs to be some mechanism by which something useful can
 8 be achieved at those. I realise that the question over
 9 whether Mr Eliasch should be entitled to vote was
 10 considered at the earlier hearing, and you were not
 11 given that relief.

12 MR HILL: My Lady, that's over until September, and that's
 13 in a sense why we are particularly dealing with the
 14 position of what happens between now and September.

15 MRS JUSTICE ROSE: Yes.

16 MR HILL: My bottom line, on this, in my submission, is that
 17 it's clear from our correspondence we have been putting
 18 forward a raft of proposals for the business of the
 19 company. My learned friend's clients and my clients are
 20 not apart on everything, there are obvious areas, which
 21 are the business of the company, that can and should be
 22 dealt with, and we have put forward repeated proposals
 23 for dealing with that. There are one or two very
 24 contentious areas, and what we suggest, and we have
 25 suggested this in court before, is my learned friend's

1 clients just need to stop trying to push them through
 2 until our proceedings are resolved. We know what the
 3 crucial areas are, and they need to stop pushing at
 4 them.

5 MRS JUSTICE ROSE: Do your clients accept that it would be
 6 useful, even if not essential, to sort out the capital
 7 call issue if a price can be struck before September?

8 You may say you don't need to do it, but you say you are
 9 happy to have Mr Jolivet as CEO, and I know you say he
 10 doesn't go so far as Mr Doronin, but he does seem to
 11 endorse some paragraphs in Mr Doronin's witness
 12 statement. Anyway, that's enough thinking aloud from
 13 me. We will come back in five minutes' time.

14 MR HILL: I am grateful, my Lady.

15 (12 noon)

16 (A short break)

17 (12.05 pm)

18 MRS JUSTICE ROSE: Yes, Mr Hill.

19 MR HILL: If I could just give my Lady one reference
 20 I missed. When I was referring to Herbert Smith's
 21 letter of 28 July, that was their most recent proposals,
 22 what I failed to mention was that they suggest in
 23 relation to the capital call that they have asked us
 24 what other information we need on pricing, and we have
 25 not responded. That's at paragraph 26 of the letter.

1 But that of course ignores the previous letter of
2 24 July, which is at bundle red 1, tab 10, page 40,
3 where we had told them what sort of information we
4 required. I just make that clear.
5 Now, my submissions. We do seek injunctive relief
6 over until September restraining these two unlawful
7 resolutions, being unlawful first because they were
8 obtained in breach of our request to adjourn, and as
9 regards the capital call because it doesn't allow for 60
10 days for payment.
11 If I could simultaneously with the --
12 MRS JUSTICE ROSE: Just wait one second.
13 MR HILL: Yes. (Pause)
14 MRS JUSTICE ROSE: 60 days for acceptance of, yes.
15 MR HILL: Yes.
16 MRS JUSTICE ROSE: Yes.
17 MR HILL: Under clause 5.4.
18 If I could deal simultaneously with the limbs of our
19 application and the points in opposition that are made
20 about it. Before we even get to the question of serious
21 issue to be tried, we do submit there is an overarching
22 unreality about my learned friend's opposition, because
23 their arguments don't grapple with the situation which
24 we and my Lady is actually in. This is not a normal
25 board in a normal company. This is a joint venture

1 company where the board consists only of the
2 shareholders and their appointees and where the
3 directors are supposed to represent each shareholder.
4 Now, what's happening is the board is not now
5 operating in that way, because one of the A directors'
6 appointees is doing the bidding of the B directors.
7 Now, that is the subject of the litigation, and the
8 situation is one where we have terminated the
9 appointment of that A director, as we say we are
10 entitled to do, and we have applied for relief from the
11 court to prevent him voting, and that's going over until
12 September.
13 MRS JUSTICE ROSE: Just so --
14 MR HILL: Yes.
15 MRS JUSTICE ROSE: (Pause) So it's the application for the
16 injunction to stop Mr Eliasch voting --
17 MR HILL: Yes, that's gone over to September.
18 MRS JUSTICE ROSE: So you were not granted that injunction?
19 MR HILL: No, we didn't get relief on the grounds that we
20 had all we need --
21 MRS JUSTICE ROSE: That was by Catherine Newman QC?
22 MR HILL: No, that one was Robert Englehart QC. That was
23 the one where we applied for two types of relief: one,
24 stopping him voting and then less ambitiously, just
25 making sure we have notice of meetings and no agenda

1 items.
2 MRS JUSTICE ROSE: So he adjourned it, then, until --
3 MR HILL: Yes.
4 MRS JUSTICE ROSE: Yes.
5 MR HILL: That just goes over to the return date. That was
6 just an interim interlocutory injunction, that's gone
7 over. We obviously have our -- the relief the judge did
8 grant in the meantime, and that we say ought to protect
9 us.
10 So, as I say, we are dealing with the position until
11 September, and we are also dealing with a situation
12 where, in my submission, the court's already
13 contemplated we may be adjourning these very meetings,
14 and on a balance of convenience basis, the court granted
15 our relief protecting our right to adjourn, and despite
16 Mr Howard's submissions, and the deputy judge gave
17 a liberty to apply that's never been taken up.
18 Our threshold point, if you like, is that TIL here
19 are embarking on a complete rerun of arguments that have
20 already been made and that that is vexing, especially
21 when no liberty to apply has been exercised, and where
22 certainly on a balance of convenience basis the court's
23 already determined that this position can be held over
24 until September, notwithstanding that we may be
25 adjourning meetings, and the court's decided that,

1 having heard submissions about these very meetings.
2 Now, that's, if you like, the threshold point.
3 The next question is obviously serious issue to be
4 tried, and my learned friend sets up the wrong target
5 here. My learned friend's point is that our power to
6 adjourn is fettered by obligations to exercise the power
7 in good faith and the like, and what he says is it
8 follows from that that in exercising our power to
9 adjourn we must have been acting in bad faith and,
10 further, that this is so obviously the case that there
11 isn't even a serious issue to be tried. Now, that is
12 a very ambitious submission, even leaving aside the
13 points about the last hearing.
14 On the power to adjourn itself, the starting point
15 of some of my learned friend's argument, for instance by
16 reference to the well known Byng v London Life case, it
17 all proceeds on a false premise that we are dealing here
18 with something akin to a chairman's normal power to
19 adjourn a meeting. That's not what we are dealing with
20 at all. We are dealing with a right that these
21 shareholders have under the SHA, which is part of their
22 panoply of economic rights and which takes priority over
23 the articles. That is a right which a shareholder is
24 entitled to exercise in its own economic interest, and
25 one would need very strong wording to suggest otherwise,

1 and there is nothing of that sort in this contract.
 2 So my learned friend's starting point is a wrong
 3 one, and we would suggest that, although it obviously is
 4 something that can't be resolved today, my learned
 5 friend faces a very complex and difficult argument to
 6 articulate and define any fetter on a shareholder in
 7 exercising that right to adjourn, and certainly not one
 8 that the court can reach any firm conclusion on in
 9 a hearing like today's, and even assuming that my
 10 learned friend can erect some kind of fetter on this
 11 right, such that the appointee of the A shareholder is
 12 subject to some kind of fetter involving bad faith and
 13 the like, we are just miles away from a case in which
 14 PHRL is acting in bad faith.

15 The question the court would have to ask itself is:
 16 is PHRL acting in bad faith and contrary to any putative
 17 fetter, having -- again, having regard that this is
 18 a provision for the economic benefit of the
 19 shareholders? Is it acting in bad faith in adjourning
 20 the meeting -- for instance, take the CEO meeting --
 21 when one, the board is currently dominated by
 22 Mr Doronin, and this is to be revisited in September,
 23 and we have the protection that we obtained after
 24 consideration by the court in July; two, PHRL is
 25 proposing that the board do in fact convene to transact

1 the relevant business; three, PHRL has indicated that
 2 it's prepared to support one of TIL's proposals for the
 3 interim CEO, such that the business will not only be
 4 addressed, it will actually go through to what ought to
 5 be everyone's satisfaction?

6 So the suggestion that that is an adjournment done
 7 in bad faith is, in my submission, quite absurd, and it
 8 goes further than that, because it's not a question of:
 9 do they have an arguable case about bad faith? They
 10 need to show that we can't raise a serious issue to be
 11 tried. So they need to show that necessarily this must
 12 be bad faith, and that is quite hopeless, in my
 13 submission.

14 Now, the same point applies to the other resolution
 15 with regard to the capital call. Again, even if you can
 16 erect some kind of fetter, and as I suggested that is in
 17 fact fraught with difficulty and complexity, we are
 18 miles the correct side of any line that one might erect.
 19 Again, the court would have to ask itself, again having
 20 regard to the fact that this is a contractual right that
 21 is in the SHA, whether it is in bad faith and otherwise
 22 court by the fetter to adjourn this meeting when, one,
 23 there is not the information that may be necessary to
 24 fairly price the rights issue, despite it being
 25 requested; two, the consequence of that mispricing is

1 that PHRL may be unfairly diluted; three, there is no
 2 adequate material put forward for justifying the
 3 commercial urgency of having a meeting before a proper
 4 issue pricing can be worked out; four, the resolution
 5 suggested imposes an unlawful payment date of 8 August,
 6 which is contrary to the 60 day period.

7 Now, the last point on its own is sufficient. How
 8 can it be in bad faith to adjourn a meeting when the
 9 resolution is flagrantly in breach of the SHA and
 10 requires payment in a couple of weeks? So again, we
 11 would submit this is miles away from bad faith, and even
 12 further away from putting my Lady in a position where
 13 she can determine with certainty that there is bad faith
 14 such that there is no serious issue to be tried.

15 So we would submit that there is no difficulty
 16 whatsoever in surmounting that hurdle, and that leads to
 17 balance of convenience. Again, I would make the point
 18 that the court has already considered balance of
 19 convenience once against this very background, and the
 20 decision has been that the ring should be held by
 21 protecting our power to adjourn with a liberty to apply.

22 Now, there is also the legal point my learned friend
 23 Mr Howard referred to. We do say this is a clear case
 24 of infringement of the SHA, and in cases of that kind
 25 there is authority for the proposition that any kind of

1 weighing up of the balance of convenience that might
 2 otherwise be, if you like, on an even-handed basis, may
 3 take a back seat to simply holding a party to his
 4 bargain, and not give, in the words of the authority,
 5 him a holiday away from his obligations over until
 6 trial. Now, that's the point made at paragraph 102.1 of
 7 my skeleton, by reference to Hampstead & Suburban.
 8 I don't want to spend a lot of time on this, because, in
 9 my submission, we are comfortably the right side of the
 10 line on the balance of convenience test anyway. But
 11 just so that I explain the point very briefly, this was
 12 a case where there was a restrictive covenant protecting
 13 a noise nuisance. The point was made that, while
 14 a final injunction might need one only to show a breach
 15 of the covenant, the position was different for
 16 an interim injunction because you needed to consider
 17 adequacy of damages and the like. Again I will just
 18 give my Lady the references. The submission was made at
 19 paragraphs 257B to C and the court dealt with it, and at
 20 page 259 of the judgment at letters A to E, and the
 21 point made was that in this clear case of a breach of
 22 restrictive covenant, the position was in fact no
 23 different from interim injunction than it was for
 24 a final injunction in that the respondents to the
 25 injunction should not have a holiday from their

1 obligations where there was a clear case of breach. We
 2 say it's similar here. It's quite inappropriate for my
 3 learned friends for example to ride roughshod over both
 4 the 60 day period and the adjournment period and then
 5 say "Oh, it's all right because there is not enough
 6 damage and we are going to ignore that obligation until
 7 trial".
 8 Moving on from that and assuming that we do need to
 9 address balance of convenience on a more standard basis,
 10 starting with the interim CEO resolutions, as I said
 11 before, one must remind oneself constantly what the
 12 competing alternatives actually are, and not be
 13 misdirected by the Aunt Sally about wanting to keep
 14 Mr Zecha in office forever or have gaps in the CEO or
 15 anything like that. As My Lady has seen, we have been
 16 abundantly clear about what we propose, which is
 17 Mr Jolivet together with Mr Zecha, Mr Zecha in his SHA
 18 role, and as I say, it's impossible to see what the
 19 problem is on a balance of convenience basis with what
 20 we are proposing.
 21 It's instructive to look at my learned friend's
 22 skeleton argument to see what their answer to this is,
 23 and it's at paragraphs 52 to 55 of their skeleton
 24 argument.
 25 MRS JUSTICE ROSE: Where is that?

57

1 MR HILL: Does my Lady have it -- I have it with
 2 a One Essex Court file, I don't know if it came in any
 3 other way.
 4 MRS JUSTICE ROSE: No, I have their authorities, but I don't
 5 have -- I don't think I ever received a skeleton
 6 argument. I got a short note by email.
 7 MR HOWARD: Does that mean your Ladyship hasn't seen our
 8 skeleton argument?
 9 MRS JUSTICE ROSE: I received a note by email yesterday.
 10 MR HOWARD: You should have had our skeleton argument as
 11 well, the note was subsequent. That's concerning.
 12 (Handed).
 13 MR TOLEDANO: My Lady, can I check that you received our
 14 skeleton argument as well? The skeleton argument for
 15 Mr Eliasch and Sherway? We certainly lodged a skeleton
 16 argument yesterday as well.
 17 MRS JUSTICE ROSE: No, I haven't seen that. No, I received
 18 the bundles. Was it in tabs in the bundles? No, I got
 19 this folder. (indicated)
 20 MR TOLEDANO: It was lodged as a document yesterday.
 21 Yesterday lunchtime. Could I hand up a copy?
 22 MRS JUSTICE ROSE: I received the witness statements of
 23 Mr Dunn, but those are the only loose -- and then I got
 24 the application forms, but then I got the supplemental
 25 submissions. All right, you had better hand yours up as

58

1 well, then.
 2 (Handed).
 3 MR HOWARD: My Lady, I am slightly concerned that you have
 4 not seen our skeleton. I apologise, I am not sure what
 5 has gone wrong in not ensuring that got to you. Could
 6 I respectfully suggest that the right course, in the
 7 light of that, would be -- perhaps Mr Hill, I think, is
 8 almost finished, is that right?
 9 MR HILL: Yes, I was going to suggest My Lady has the short
 10 adjournment to read that skeleton.
 11 MR HOWARD: Yes.
 12 MR HILL: Before you start, I was going to suggest.
 13 MR HOWARD: Alternatively, read it now. I am just slightly
 14 concerned -- I had not realised you had not seen our
 15 submissions, and that might actually explain part of the
 16 dialogue which we had earlier, and that does just
 17 concern me.
 18 MRS JUSTICE ROSE: No, I saw the supplemental submissions
 19 but they didn't refer to any other --
 20 MR HOWARD: No, they were just responding to some points
 21 that we consider were misrepresentations in Mr Hill's
 22 skeleton argument, but of course we had lodged --
 23 MRS JUSTICE ROSE: There was no indication in the papers
 24 that there was something particular missing.
 25 MR HOWARD: Well, obviously we were obliged to lodge a

59

1 skeleton and we certainly through One Essex Court have
 2 done so. Anyway, how it's gone wrong --
 3 MRS JUSTICE ROSE: It doesn't seem to be at the front of
 4 this bundle. Anyway, let --
 5 MR HILL: I will be about another 15 minutes, so I don't
 6 know if perhaps the solution is just to rise early,
 7 I don't know.
 8 MRS JUSTICE ROSE: All right.
 9 MR HILL: My Lady now has that skeleton?
 10 MRS JUSTICE ROSE: Yes.
 11 MR HILL: The point I was going to make is that
 12 paragraphs 52 to 55 of the skeleton set up what is, in
 13 my submission, the Aunt Sally, because they seek to talk
 14 about the balance of convenience in relation to the
 15 JVC's CEO, and they talk about matters such as: it's in
 16 TIL's submission critical that Mr Zecha does stand down,
 17 Mr Zecha has an interest in PHRL. It's all hitting
 18 entirely the wrong target, because it's pretending to
 19 ignore the fact that we have agreed to him standing down
 20 as CEO and to the appointment of their candidate. So
 21 it's suggesting that the alternative to the injunction
 22 is not our proposal but something in default of our
 23 proposal, and I am making it very clear in open court
 24 that we are prepared to agree Mr Jolivet in conjunction
 25 with Mr Zecha having his SHA role.

60

1 So there is no difficulty with that. The balance of
 2 convenience is, in my submission, entirely one way on
 3 this point, because there can't be anything wrong with
 4 what we propose because it reflects their own proposal
 5 coupled with a clear obligation under the SHA. The
 6 alternative in terms of balance of convenience terms, is
 7 us being railroaded by an unlawful resolution into
 8 having an appointee who, as CEO, who we don't want, who
 9 has shown himself to be firmly in Mr Doronin's camp for
 10 the reasons we explained in paragraph 111.4 of our
 11 skeleton, and also in Mr Amanat's most recent witness
 12 statement, and that is -- and one of the points we rely
 13 on there, as my Lady may have noted, is how Mr Sirois,
 14 together with TIL, have dealt with an attempt to
 15 refinance the Pontwelly loan. Now, that is something
 16 that goes to the interests of the company. So we have
 17 a legitimate concern that we don't want this suggested
 18 appointee, especially in circumstances where they have
 19 raised another suggested appointee who we are more than
 20 happy with. Well, I say "more than happy"; that's
 21 an exaggeration, we would have wanted Mr Zecha to stay,
 22 but we have compromised on that.

23 So we submit the balance of convenience is
 24 overwhelmingly in our favour on that point, and the same
 25 applies to the other limb of this resolution about the

1 special committee of a board to select the CEO. This is
 2 also very strange in that what's being suggested is
 3 that, in a board that only has four members, there is
 4 a special committee which consists of two of them who
 5 are all in that camp rather than our camp to select the
 6 CEO. Totally unnecessary, and it's simply divisive and
 7 wrong. The four member board are more than capable
 8 of -- and certainly not too many in number, to make
 9 a decision such as selecting the CEO, and to do so
 10 transparently, such that there is not a process that
 11 isn't entirely visible to our side.

12 My Lady, that is the CEO resolution on the balance
 13 of convenience test.

14 The next is the balance of convenience test as
 15 regards the capital call resolution, and there are three
 16 points here.

17 First, we are talking here about a capital call that
 18 is simply not permitted, because it doesn't allow
 19 60 days, as the SHA requires. That is a very
 20 substantial capital call which, in my submission, is
 21 self-evident shouldn't be sanctioned for payment within
 22 a couple of weeks, as suggested.

23 Secondly, there is an obvious risk of hardship if
 24 the pricing is not properly thought out and which may
 25 have a dilutive effect. My learned friend says, "Oh

1 well, matters can be undone at trial".
 2 MRS JUSTICE ROSE: He says it doesn't have a dilutive effect
 3 although I don't quite see that at the moment.

4 MR HILL: I think I may need to hear what he says about
 5 that. If the pricing is wrong, it's dilutive.
 6 Obviously, of course, if we take it up, it's not
 7 dilutive, and that's where my learned friend always
 8 starts from, saying the pricing doesn't matter if
 9 everyone takes it up. But especially when one is
 10 looking at a resolution for payment in a very short
 11 time, there isn't a certainty that everyone will take it
 12 up, there is no obligation to take it up, there is
 13 a mechanism for what happens if you don't take it up,
 14 and that mechanism involves Mr Doronin getting
 15 essentially double the number of shares.

16 So leaving that point aside, the pricing is crucial,
 17 because if you decide not to participate, you will be
 18 diluted if the pricing is wrong. You won't be diluted
 19 in the pricing is right, or certainly not
 20 inappropriately diluted.

21 So my learned friend says "Well, matters can all be
 22 undone at trial", but again that's not the right
 23 approach to take to a capital call requiring payment of
 24 this kind of money in such a short time.

25 Thirdly, there are all the points about the economic

1 need for the money, and my learned friend's points are,
 2 in my submission, exaggerated and, on analysis,
 3 insubstantial.

4 There are three points made in Mr Doronin's witness
 5 statement. The first is that the capital call is in
 6 some way necessary because of an accounting methodology
 7 reclassification leading to an issue with the going
 8 concern valuation. Now, that's dealt with in
 9 Mr Amanat's witness statement in reply at paragraphs 13
 10 to 14. That was the witness statement which hopefully
 11 found its way into my Lady's bundle at red 3, tab 28.

12 MRS JUSTICE ROSE: You say there is an accounting
 13 methodology problem leading to an issue where the
 14 accountants will agree to certify that the business
 15 isn't going --

16 MR HILL: My Lady, yes. It's not actually -- it is
 17 a method -- I think all sides agreed it's a methodology
 18 change problem, but ...

19 MRS JUSTICE ROSE: Yes.

20 MR HILL: The suggestion is that the JVC needs to be able to
 21 show it has this money available in order to satisfy the
 22 auditors.

23 If I could invite my Lady to look at tab 31 in
 24 bundle red 3, you will see Mr Amanat's most recent
 25 witness statement. He deals with this at paragraphs 13

1 and 14.
 2 MRS JUSTICE ROSE: Yes.
 3 (Pause)
 4 MR HILL: So, on the basis of what Mr Amanat has been given
 5 to understand from Mr Jolivet, the point is slightly
 6 more nuanced, in that what one needs is availability of
 7 funds at ultimate parent level at some level, so one
 8 doesn't have to stop at the JVC, one can go up to the
 9 shareholders. So that rather supports the suggestion
 10 you don't actually need to hold the capital call in
 11 order to get to this level of satisfaction.

12 Now, there is a witness statement from Mr Jolivet
 13 which my Lady has mentioned, and unfortunately one
 14 doesn't really get any help on it, in that he broadly
 15 endorses what's been said, but doesn't descend to the
 16 detail of what's been said to Mr Amanat, so one can't
 17 resolve that.

18 MRS JUSTICE ROSE: Well, he is pretty specific about
 19 paragraphs of Mr Doronin's witness statement that he
 20 agrees with.

21 MR HILL: Yes, but it's not addressing -- it just leaves the
 22 question unanswered of: is it sufficient to go beyond
 23 the JVC to ultimate parent level, which he has told
 24 Mr Amanat it is.

25 So, as I say, I am not suggesting my Lady can

65

1 resolve it.
 2 Secondly, the other point made by Mr Amanat, there
 3 is a certain amount of schizophrenia in Mr Doronin's
 4 argument in that, on the one hand he says the money
 5 needs to be situated in a bank account to get the
 6 auditors comfortable, but on the other, all of the money
 7 is desperately needed for ongoing expenditure and use in
 8 the running of the business, but he can't have both. If
 9 the money is going to be coming in to be expended, it is
 10 not going to be available for satisfaction of the
 11 auditors. This shows, in my submission, that this is
 12 a somewhat artificial argument.

13 The other point here is that, if there really had
 14 been any proper substance to it in terms of an urgent
 15 requirement for this money on this basis, it really
 16 would have been explained in proper detail before. It's
 17 been quite clear that we are concerned about this
 18 capital call for some time. The suggestion has been
 19 made for a very long time on the other side of the court
 20 that it's all urgent. We have asked for substantiation
 21 of that. We never received anything. What we need get
 22 is at the last minute in two witness statements this
 23 material, and that rather, in my submission, sheds some
 24 light on how much credibility one can attach to it.

25 A similar point applies to the Tokyo project. Now,

66

1 I already made the point that, to the effect that when
 2 this first came up in correspondence, we asked for the
 3 documentary substantiation, the numbers provided despite
 4 chasing, which is why it is a matter of concern to see
 5 the same points repeated without substantiation in the
 6 evidence.

7 Now, in the light of Mr Doronin's witness statement,
 8 we did ask Mr Zecha, and one can see what's said about
 9 that in paragraphs 15 to 17 of Mr Amanat's witness
 10 statement, which my Lady has, paragraph 16 specifically
 11 deals with this.

12 (Pause)

13 MRS JUSTICE ROSE: Yes.

14 MR HILL: Mr Zecha apparently doesn't subscribe to the view
 15 of the financial urgency or significant financial
 16 consequences in the very short term that Mr Doronin has
 17 put forward.

18 Then there is of course Mr Jolivet, who does also
 19 deal with the Tokyo hotel project in what I would submit
 20 are the sparsest of terms. What's quite significant is
 21 that he's plainly been shown the quite long section of
 22 Mr Doronin's witness statement that deals with the Tokyo
 23 project, and then he, in terms of what he says he
 24 accepts about it is not actually very much.

25 He says:

67

1 "Before the hotel opens, whenever that is, this
 2 money will need to be spent, including the security
 3 deposit."

4 Then he says, in a very general sense, for the
 5 reasons he explains, the Aman Resorts need to open the
 6 hotel as soon as possible and without further delay.
 7 There is no ringing endorsement of the specific
 8 financial consequences or financial urgency or timelines
 9 or deadlines that Mr Doronin had suggested.

10 So we really do suggest that one needs to take
 11 Mr Doronin's scenarios in his witness statement with
 12 a pinch of salt.

13 There is another point here, which is that even if
 14 you assume Mr Doronin is right in saying that it's very
 15 important that money comes in from the capital call to
 16 deal with a fit-out before October, which I think is his
 17 suggestion, well, what about the 60 days for the
 18 shareholders? The fit-out in October, if one pays any
 19 regard to the shareholders' agreement, is not going to
 20 be funded by this capital call.

21 Now, the third point raised by Mr Doronin relates to
 22 other improvements on health and safety grounds and the
 23 like. That's dealt with briefly by Mr Doronin and
 24 similarly briefly by Mr Amanat at paragraph 18 of his
 25 witness statement. As he says, he would expect these to

68

1 be funded out of cashflow, and if this is not the case,
2 one would expect a pretty careful and detailed
3 explanation of this, which we have never been given, and
4 which we would need to make sure we understood as
5 against the fairly rosy financials that we have for this
6 company.

7 What he also says is that, assuming there is some
8 kind of expenditure which requires some kind of
9 injection, we are talking over a period of twelve months
10 even on the other side's case, so there is no real
11 crashing urgency here either.

12 So where you end up is that, while an awful lot of
13 heat and noise is generated in Mr Doronin's witness
14 statement, and in my learned friend's skeleton dealing
15 with that material, which my Lady will see, in terms of
16 the actual substantial points that add up to anything on
17 this balance of convenience test, it is, in my
18 submission, flimsy in the extreme, and it certainly does
19 not justify enforcing on PHRL a capital call which is
20 unlawfully resolved on, arbitrarily priced, potentially
21 dilutive, and could never properly take place within
22 this kind of short timeframe for payment.

23 My Lady, that was all I was going to say on
24 injunctions. I have quite a short amount on speedy
25 trial which, given the time, I perhaps might best deal

1 with now and then perhaps rise early given the points on
2 the skeletons.

3 MRS JUSTICE ROSE: Yes.

4 MR HILL: What I was simply going to say is, in my
5 submission, there could hardly be a more paradigmatic
6 case for a speedy trial. First, court time and the
7 parties' resources are being used at an alarming rate by
8 interlocutory processes. Now, I obviously do make a lot
9 of criticism of my learned friend's clients for causing
10 all that, but there is actually a wider point, which is
11 that in contentious takeovers of this kind, they do
12 often result in multiple interlocutories, and the only
13 way to really resolve matters is just to get to a final
14 determination as soon as one can.

15 Secondly, my learned friend Mr Toledano and I both
16 share the concern that this is a very significant
17 company with lots of employees, with an important market
18 reputation. This litigation causes disruption,
19 inconvenience and no-one wants it, everyone wants it to
20 come to an end and everyone ought to want it to come to
21 an end as soon as possible.

22 Thirdly, the situation is an unsatisfactory one
23 where my learned friends, as we know, have control of
24 the board and in a de facto position --

25 MRS JUSTICE ROSE: Well, what is it that you are seeking

1 expedition of?

2 MR HILL: My Lady, at the moment the whole thing. When
3 I say the whole thing, the case is not that broad in its
4 compass. It covers quite a short timeframe, there are
5 quite a lot of allegations. It's unlikely to be more
6 than a three week trial, which is what we have proposed.

7 MRS JUSTICE ROSE: If you succeed in ousting -- I don't have
8 in my mind what is actually the relief that's sought in
9 the different claims, but if you were to succeed in
10 ousting Mr Eliasch --

11 MR HILL: In September, yes.

12 MRS JUSTICE ROSE: -- in September, well, that's only going
13 to be an interim basis, isn't it?

14 MR HILL: That would be on an interim basis. The real --

15 MRS JUSTICE ROSE: Yes. Just --

16 MR HILL: I am sorry.

17 MRS JUSTICE ROSE: You would appoint your own, as you say,
18 more obedient nominee, a nominated A director, so you
19 would have two there, and Mr Doronin and Mr Djanogly
20 would be on the other side. Then if the situation does
21 not improve and the company is in deadlock, then, as you
22 said earlier, there are provisions within the
23 shareholders' agreement which would work their way
24 through.

25 MR HILL: That's so, but what there also is, is under the

1 litigation a series of buy-out relief essentially
2 requested under the mechanisms in the shareholders'
3 agreement. We say we are entitled to obviously
4 rescission and repudiation of the shareholder
5 arrangements, and then we are seeking essentially
6 a buy-out under the shareholders' agreement because we
7 say there has been an obligatory transfer event.

8 So that is why we are essentially in a sort of
9 contested takeover situation on an ongoing basis.

10 MRS JUSTICE ROSE: What I am just exploring is that if one
11 had a speedy and final resolution of the Sherway, the
12 dispute between you and Sherway as to whether Mr Eliasch
13 was actually in repudiatory breach and you accepted that
14 repudiatory breach, if that were established one way or
15 another finally fairly quickly, might that be a quicker
16 way to make a significant step towards resolving the
17 whole litigation?

18 MR HILL: My Lady, it's certainly a very interesting
19 suggestion which I would like to think about. It may
20 be -- and it may be all parties might think this -- one
21 possible problem with it is that the underlying issues
22 overlap so much, in that one of the reasons we are
23 accepting repudiation and rescinding are to do with his
24 conduct.

25 MRS JUSTICE ROSE: Yes.

1 MR HILL: So the allegations that will be tried, I am not
 2 sure one can disinter them. That may not matter because
 3 you can just get final orders in one which are binding.
 4 MRS JUSTICE ROSE: Well, what I'm not clear about is what
 5 else there is in all the claims, which is in addition to
 6 that particular issue, and whether there is a way of --
 7 whether it would at all speed things up and shorten the
 8 issue that needs to be explored by pulling that issue
 9 out, or whether that is unlikely to be helpful. I don't
 10 know enough about the case, but yes.
 11 MR HILL: Can I think about that further as well?
 12 MRS JUSTICE ROSE: Yes.
 13 MR HILL: That does in fact tie in with the submission I was
 14 about to make, which really comes from something my
 15 learned friend Mr Toledano suggested, which is: his
 16 suggestion is: well, let's see where we are in September
 17 and decide whether to order a speedy trial then. That,
 18 in my submission, is not satisfactory. But what it does
 19 prompt the suggestion of is: order a speedy trial now,
 20 but of course make express provision, if you like, to
 21 revisit in September, because by that stage the
 22 pleadings will be in, the court can reassess in
 23 September, but the difference between the two proposals
 24 is --
 25 MRS JUSTICE ROSE: What concerns me is that the court that

73

1 has to deal with this in September, is that court in
 2 fact facing a situation where it is in essence giving
 3 final relief in an interlocutory matter? I mean, if
 4 Mr Eliasch is not prevented from voting, then there is
 5 still the issue of what happens at further board
 6 meetings, if they are announced to --
 7 MR HILL: My Lady is absolutely right, that's really why --
 8 I will certainly think about what my Lady suggests.
 9 Absent something like that, that is why, while September
 10 is important for us, the reality is we need a final
 11 resolution, and that was why I was really suggesting:
 12 let's get to a speedy trial as soon as possible, but
 13 I will certainly think about whether one can hive off
 14 bits of it which will be sufficient.
 15 MRS JUSTICE ROSE: Yes, all right.
 16 MR HILL: I think I have really made all the important
 17 points I was going to make. The only other point I was
 18 going to make is that my Lady should perhaps be
 19 healthily sceptical of opposition to the speedy trial
 20 idea from my learned friend's camp, because of course
 21 they are in this position of de facto control, and it
 22 will obviously suit their book not to have a final
 23 resolution far more than it suits us. We desperately
 24 want a final resolution.
 25 The only other point on is that in terms of

74

1 prematurity, the courts can and do make speedy trial
 2 orders at this stage in proceedings. I refer to the
 3 Commercial Court Guide. As I say, I will have a further
 4 think about my Lady's suggestion. Unless I can be of
 5 further assistance.
 6 MRS JUSTICE ROSE: So, Mr Howard?
 7 Submissions by MR HOWARD
 8 MR HOWARD: My Lady, I think there is something I could
 9 usefully do before we adjourn to read the skeletons.
 10 I am concerned about two points which I want to show you
 11 are completely misleading in what you have been told.
 12 The first is a short point, it just actually goes to
 13 what information has been provided to the other side
 14 relating to why the company needs money.
 15 If you would take the red bundle 2, if you would
 16 turn to page 187, you will see there is a letter from
 17 Mr Sirois, as group executive director, explaining the
 18 position about the Tokyo project. This is something in
 19 respect of which Mr Hill grandly says "We know nothing,
 20 take with a pinch of salt", I think he said a lorry load
 21 of salt "what Mr Doronin said". What Mr Doronin has
 22 said is based on this letter. So this is a letter from
 23 the people who are involved in running this company,
 24 explaining why in relation to the Tokyo project this
 25 company vitally needs money and he explains why the

75

1 company will suffer enormous loss if it is not able to
 2 get the funds which it desperately needs in order to
 3 continue with that.
 4 I don't propose to read it out, but I would ask you
 5 to read that letter. I will come back to the
 6 significance of it, obviously, in due course, but one
 7 does need to be very careful with people coming along
 8 saying "We don't have any understanding" or one line in
 9 a witness statement from Mr Amanat served this morning
 10 saying that Mr Zecha says they don't need the money for
 11 Tokyo. Well, that's just extraordinary in the light of
 12 what those who were actually involved in running this
 13 company here say.
 14 MRS JUSTICE ROSE: Well, who is dealing with the Tokyo
 15 project? I mean, what professional advisers are dealing
 16 with it?
 17 MR HOWARD: Mr Zecha of course wasn't -- because of the
 18 dispute about his resigning, he was not actually
 19 involved in the company for a period of two months until
 20 Ms Newman's order, so he was not dealing with it, but as
 21 far as I understand it, Mr Sirois and of course the
 22 group finance -- the finance director, Mr Jolivet, are
 23 the people dealing with it. It's part of their
 24 executive --
 25 MRS JUSTICE ROSE: There must be some lawyers or bankers who

76

1 are dealing with this.
 2 MR HOWARD: Of course, there must be, I can take
 3 instructions.
 4 MRS JUSTICE ROSE: Yes. Have they written to Peak
 5 explaining why the money is needed?
 6 MR HOWARD: Well, I mean, the executives have.
 7 MRS JUSTICE ROSE: Yes, I know, but it appears to me that
 8 Mr Hill's clients might be more convinced if they heard
 9 this from somebody who might be described as independent
 10 of the existing management.
 11 MR HOWARD: Well, this individually -- you have to remember
 12 they are saying Mr Jolivet, who has endorsed this, they
 13 are saying they are perfectly happy for him to be the
 14 interim chief executive, so they don't say he is not
 15 independent. In fact, it's entirely scurrilous, the
 16 allegations that are made against Mr Sirois. The point
 17 in showing you this is it's being suggested, "Well, it's
 18 all just come out of the thin air and we didn't know
 19 about it until a day or so ago". It's simply not true.
 20 Certainly they had this letter. If they didn't have
 21 it on 7 July, they had it on the 18th.
 22 Now, anyway, I will come back to that. The other
 23 point which is important, again, just that you should
 24 understand: if you could take bundle 3, sight seems to
 25 have been lost of actually what was going on in front of

1 Mr Englehart.
 2 MRS JUSTICE ROSE: Is this red 3?
 3 MR HOWARD: Red 3, yes. The issue before Mr Englehart which
 4 Mr Hill has ignored, there were two applications for
 5 injunctions. There was his side's application for
 6 an injunction, and there was Sherway's application for
 7 an injunction against his clients, which succeeded.
 8 Now, Mr Hill -- I wanted to show you firstly the
 9 order that was made, which you will find at tab 21.
 10 MRS JUSTICE ROSE: So before Mr Englehart, the claimants --
 11 MR HOWARD: Perhaps if we go back a stage --
 12 MRS JUSTICE ROSE: -- were seeking -- wait a minute -- an
 13 injunction stopping Mr Eliasch from consenting to short
 14 notice of board meetings and/or to the addition of items
 15 to the agenda.
 16 The second --
 17 MR HOWARD: No, stop there, that was what they initially
 18 sought.
 19 MRS JUSTICE ROSE: Right.
 20 MR HOWARD: So when Miss Newman handed down her judgment on
 21 the Monday, that's what they were seeking. By the
 22 Thursday of that week, that morphed into an application
 23 to prevent him voting at all without their approval.
 24 MR HILL: And the alternative relief of giving us notice and
 25 not adding things to the agenda. That was still there.

1 MR HOWARD: What Mr Hill says is not entirely accurate. The
 2 initial relief was not to add things to the agenda.
 3 MRS JUSTICE ROSE: Yes.
 4 MR HOWARD: That was then, as it was put before the judge on
 5 that occasion, superseded by what became their
 6 application to prevent him voting, on doing anything
 7 without their approval.
 8 MRS JUSTICE ROSE: Yes.
 9 MR HOWARD: But Sherway in turn sought an injunction against
 10 them, because what they then did --
 11 MRS JUSTICE ROSE: That was on the basis that they had
 12 accepted his repudiatory breach of the Sherway --
 13 MR HOWARD: The whole context of being misrepresented of
 14 what was happening in front of Mr Englehart, which
 15 troubles me that that is being done, what was going on
 16 in front of Mr Englehart was that Sherway were saying
 17 two things: one was that they should be enjoined from
 18 claiming, serving any notice seeking to remove him, but
 19 the second was --
 20 MRS JUSTICE ROSE: Wait a minute. (Pause) Yes.
 21 MR HOWARD: -- from adjourning the meetings on the grounds
 22 that Tarek had not procured his removal, pursuant to the
 23 notice that they had served. Because what happened just
 24 prior to the hearing is that Mr Hill's clients wrote to
 25 Tarek and to the JVC saying "We have terminated

1 Eliasch's appointment as a director, and so you must
 2 remove him as a director, the company must do that, and
 3 if you don't, we will adjourn the meetings".
 4 So that was the issue before the court, that they
 5 were seeking to adjourn the meetings on the grounds that
 6 they had removed Eliasch. So they wanted an injunction
 7 to stop Eliasch voting and Sherway wanted an injunction
 8 to stop them relying on that notice and adjourning the
 9 meetings on that ground.
 10 That was the issue before the court, and what the
 11 court ordered in relation to the injunctions is at -- in
 12 this bundle, the claimant's application was refused, at
 13 tab 20, save that -- tab 20, paragraph 5 -- the order
 14 that had been made on the Monday about short notice and
 15 amending matters on the board -- on the agenda was
 16 continued. I don't even think that was controversial at
 17 the hearing.
 18 Then if you go to tab 21, and if you look at the
 19 recitals in tab 21, if you look at the sixth one,
 20 I think, or the seventh maybe:
 21 "Upon the first defendant having stated its
 22 intention to adjourn the board meetings [of course the
 23 defendant here is Peak, because this is a different
 24 action] if Tarek does not consent to procure the removal
 25 of Eliasch as a director."

1 So that was what they were threatening. At
2 paragraph 5, you see that there was an injunction until
3 the return date that they should be restrained from
4 issuing or relying on any notice from the PHRL notice
5 seeking to remove the second claimant, and from
6 adjourning the meetings on the ground that Tarek has not
7 procured the removal.

8 Now, that is actually, in relation to the
9 submissions that are being made today, extremely
10 important, because Mr Hill --

11 MRS JUSTICE ROSE: Wait a minute. So Peak was restrained
12 from adjourning the meeting on the grounds that Tarek
13 had not removed Mr Eliasch as a director?

14 MR HOWARD: Yes.

15 MRS JUSTICE ROSE: Yes.

16 MR HOWARD: Now, what in fact we are being told, through
17 Mr Hill, is that their concern is that if a board
18 meeting was held on 23 or 25 July, Mr Eliasch would vote
19 against them. So if one stands back for a moment and
20 thinks what has happened and what is being presented by
21 these people to the court, they threaten they are going
22 to adjourn if Tarek does not remove Eliasch as
23 a director. The court refuses -- the court then
24 injuncts them from seeking to adjourn on the grounds
25 that he's not been removed. So the whole premise of the

1 court's order was that Mr Eliasch was entitled to act as
2 a director. But what they are trying to do now,
3 notwithstanding that court order, and we actually
4 suggest what is being -- has been done here is quite
5 possibly a contempt, because what they have done is
6 adjourn for the purpose of preventing a board meeting at
7 which Mr Eliasch will vote. In other words, they have
8 failed in the injunction they were seeking to stop him
9 voting, they have themselves been injuncted by the
10 court, and yet what they then go and do is adjourn --
11 serve a notice to adjourn, whose purpose was to prevent
12 Eliasch voting.

13 There is more I want to say about the hearing in
14 front of Mr Englehart, but I see the time. I wanted you
15 at least to see that the situation was not quite as has
16 been presented.

17 MRS JUSTICE ROSE: Right. We will come back at 2 o'clock.

18 Thank you.

19 (1.03 pm)

20 (The short adjournment)

21 (2.00 pm)

22 MRS JUSTICE ROSE: Yes, Mr Howard.

23 MR HOWARD: My Lady, if I can just firstly summarise our
24 position, which we say is simple and straightforward:
25 firstly, the board of the JVC is the body entrusted

1 under the shareholders' agreement and the articles of
2 association to take decisions concerning the joint
3 venture. Secondly, an injunction was sought before
4 Mr Englehart relating to Mr Eliasch, and that was
5 refused but an injunction was granted to prevent them
6 trying to stop him attending board meetings and
7 adjourning board meetings on the pretext that they had
8 terminated his arrangement.

9 Now, in our submission, to seek to adjourn board
10 meetings to prevent Mr Eliasch voting, we would say is
11 in fact contrary to that order, but it's certainly
12 contrary to the spirit of the order.

13 Thirdly, valid meetings were called for 23 and
14 25 July, there is no suggestion that the notices and the
15 time period were not valid.

16 Fourthly, the right to adjourn must be exercised --
17 and there are two points Mr Hill fails in his argument
18 to recognise -- for a proper purpose and good faith.
19 Those are both legal requirements.

20 Fifthly, the purported adjournments, in our
21 submission, were neither proper, a proper purpose nor in
22 good faith, and the reason for that is they were
23 designed simply to prevent the functioning of the board
24 because the claimant fears it will not get its own way.
25 So we suggest --

1 MRS JUSTICE ROSE: So you say that it is for a proper
2 purpose and in good faith.

3 MR HOWARD: Yes, it has to be both for a proper purpose and
4 in good faith. For instance, if, just take a simple
5 point, if what you are saying is "I am going to adjourn
6 this board meeting", it's not the shareholder who
7 adjourns it. Mr Hill kept saying it's a shareholder
8 right, it is not, it's a director's right. The
9 directors are not, as he seems to suggest, stooges of
10 the shareholders. Leaving that on one side, you can't,
11 it is not proper to adjourn a board meeting because, for
12 instance, you don't believe at the board meeting you
13 will get your own way. It's as simple as that.

14 If we take the position regarding the interim CEOs,
15 if one actually asks oneself: why did they adjourn the
16 board meeting that was scheduled for the 23rd? They are
17 not saying "We didn't have information", they are not
18 saying "We had too short a time". What it actually
19 amounts to is that they feared that if there was a board
20 meeting, they wouldn't be able to get their own way.
21 So, yes, they subsequently make a proposal and they are
22 prepared to have a board meeting to consider their
23 proposal and their proposal only, but that's not
24 a proper purpose, that's not a proper way to adjourn
25 a board meeting. You are not entitled to say "I am not

1 going to have a board meeting because I don't like the
2 fact that I can't be confident of where the votes will
3 go".
4 I will come back to all of that. We say when you
5 properly analyse this case, in relation to the limited
6 issue that is actually before you, there isn't
7 a seriously arguable case, but in any event there is no
8 risk of damage caused by these resolutions to the
9 claimant, and in any event, the balance of convenience
10 firmly is against the grant of injunctions.
11 Finally, we also say there is a concern about the
12 undertaking in damages, particularly if this company is
13 deprived of the money it needs, because we are not
14 satisfied that the claimant would be good on its
15 undertaking in damages.
16 Now, with that introduction, can I just take you
17 back to the contractual rights? Could I ask you to take
18 the shareholders' agreement for this purpose? We looked
19 at some provisions but not all of the relevant ones.
20 You have that at file 4 of the blue bundles, and it's at
21 page 4.
22 MRS JUSTICE ROSE: I think that's a white bundle.
23 MR HOWARD: Yes. The bundles, I am afraid, are the most
24 un-user friendly.
25 MRS JUSTICE ROSE: Is it white or blue?

1 MR CAPLAN: It has white paper, it is blue.
2 MRS JUSTICE ROSE: Well, no, all my bundles are black,
3 that's the confusion, it's only the pieces of paper that
4 are either red or blue.
5 MR HOWARD: File 4 white, page 4. It should be the
6 shareholders' agreement. I don't actually have that
7 bundle, I am working from a different copy.
8 What we looked at this morning is clause 6, which
9 deals with the directors and management. I don't think
10 I need -- I think you have seen the relevant provisions.
11 Of course the one that's centrally in dispute is 6.2(g),
12 which is that, as you can see, it's "A meeting of
13 directors shall be adjourned at the written request of
14 an A or B director", so it's not the shareholder's
15 right, it's the A or B director's right.
16 I will come back to that. 6.6 is important in
17 relation to Mr Zecha. Now, I don't know whether
18 your Ladyship has picked up, Mr Zecha is of course a man
19 who has a long history with Aman Resorts, but he is
20 a man who is now aged 81. So you have to get that in
21 context. These people came in to take over a company
22 which was ailing, and what they were trying to do is to
23 revive the brand and get the thing going. What you see
24 at 6.6(a), it's in that context where, firstly, in the
25 first sentence, it provides that "the day-to-day

1 activities, policies and operations of the JVC are
2 carried out by a CEO", and then:
3 "The appointment and removal will be made by the
4 board, and is a board reserved matter. Notwithstanding
5 the foregoing, the initial chief executive of the
6 company for the first six months following completion
7 date will be Adrian Zecha."
8 So it's perfectly clear what the parties intend is
9 that he is there as CEO, this 81-year old man, for six
10 months, and thereafter -- and this is quite important in
11 relation to what Mr Hill is saying and in relation to
12 what we are prepared to accept -- it says:
13 "Thereafter Adrian Zecha will be chairman of the
14 resorts business or CEO" of this other company AMBV, and
15 he is not currently the CEO of AMBV, as Mr Hill was
16 suggesting:
17 "... as determined by the board following
18 discussions with Adrian Zecha."
19 So what the board has to do is consider, both
20 amongst the directors and with Zecha, which of these
21 functions, which of these offices he should occupy, what
22 his role will be in having those functions, whether he
23 actually has to do anything or what the scope of it will
24 be, what his salary will be and so on. These are all
25 matters that the board has to decide.

1 The way in which this is all supposed to operate is,
2 if you go back to clause 4.5(c), it's the good faith
3 obligation, because what you see is that each
4 shareholder is required to procure that the directors
5 appointed by it shall act in good faith in discharging
6 their duties as directors of the JVC, and the other
7 companies are subsidiaries.
8 What is self-evident about that, again not very
9 surprising, Hornbook law, what you expect the directors
10 to do is to act in good faith in discharging their
11 duties. In other words, they are not to be mere
12 stooges, they are to act in good faith in discharging
13 their duties as directors.
14 MRS JUSTICE ROSE: Yes, but they are nominated by the A and
15 B shareholders to represent their interests in the JV,
16 would you accept?
17 MR HOWARD: Well, as a matter of law, I think that --
18 MRS JUSTICE ROSE: No, they were independent directors, of
19 course, that have ordinary -- well, they have directors'
20 duties to all the shareholders, not just their nominator
21 shareholder.
22 MR HOWARD: That's the whole point of 4.5(c).
23 MRS JUSTICE ROSE: Yes, but there are A and B shareholders
24 and A and B directors, and the shareholders' agreement
25 requires that at least one of each has to agree to

1 everything.
 2 MR HOWARD: That's right.
 3 MRS JUSTICE ROSE: Yes.
 4 MR HOWARD: That's right, but in exercising their function
 5 as director --
 6 MRS JUSTICE ROSE: Yes.
 7 MR HOWARD: -- what they are required to do is to act in
 8 the interests of the JVC.
 9 MRS JUSTICE ROSE: Yes.
 10 MR HOWARD: They are not -- it would be a breach of their
 11 duty if all they said I am going to do is to accept
 12 instructions from the person --
 13 MRS JUSTICE ROSE: Yes, but also one has to bear in mind
 14 that the companies which are the shareholders, who is
 15 the shareholder of Tarek?
 16 MR HOWARD: Who is the shareholder?
 17 MRS JUSTICE ROSE: Yes, who owns --
 18 MR HOWARD: Mr Doronin.
 19 MRS JUSTICE ROSE: Is he a director of Tarek as well?
 20 MR HOWARD: I assume so, I don't know. No, he is not.
 21 MRS JUSTICE ROSE: Shaking heads, all right. But you have
 22 this on: well, just, you know, one has to look at the
 23 realities.
 24 MR HOWARD: Yes. Your Ladyship, as it happens, none of this
 25 matters for today. The real point is the basis on which

1 you can exercise your powers.
 2 MRS JUSTICE ROSE: Yes.
 3 MR HOWARD: And there is no question that there is
 4 an obligation to procure, the directors -- so if the
 5 director is going to adjourn the board meeting, he has
 6 to do it in good faith, and the shareholder has to
 7 procure that. That is clear beyond any argument.
 8 What is also clear beyond any argument is, if you
 9 turn to the articles of association -- I'll be given the
 10 page reference -- I want Article 9.5, page 101, do you
 11 have that?
 12 MRS JUSTICE ROSE: Yes.
 13 MR HOWARD: "Each director shall exercise his powers for
 14 a proper purpose and shall not act or agree to the
 15 company acting in a manner that contravenes the memo,
 16 the articles or the shareholders' agreement. Each
 17 director exercising his power shall act honestly and in
 18 good faith and in what the director believes are in the
 19 interests of the company."
 20 I think Mr Hill was trying to say the shareholders'
 21 agreement somehow trumps the articles. That may be
 22 right, but there is nothing in this which is
 23 inconsistent with the shareholders' agreement. It's
 24 actually -- and here it's defining what is the position
 25 at common law anyway, that powers have to be exercised

1 for a proper purpose.
 2 Now, just going back into the shareholders'
 3 agreement, the other provision --
 4 MR HILL: Could you look at 9.4 while you are there, of
 5 those articles?
 6 MR HOWARD: Mr Hill wants us to look at 9.4:
 7 "If the company is carrying out a joint venture
 8 between shareholders, a director may, when exercising
 9 powers, act in a manner which he believes in the best
 10 interests of the holding company, although it may not be
 11 in the best interests of the company."
 12 I am not sure how that assists, but anyway.
 13 If you go back to the shareholders' agreement, the
 14 other -- there are three other provisions which you
 15 should be aware of. 14.3, which is on page 36 of the
 16 bundle, again, it's an important provision, because what
 17 you can see is:
 18 "In no circumstances shall either shareholder create
 19 an artificial deadlock. An artificial deadlock is
 20 a management deadlock caused by either shareholder or
 21 its respective representatives failing to attend a duly
 22 convened general meeting or board meeting which is
 23 necessary to enable the JVC to carry on business
 24 properly and efficiently", and so on.
 25 So what you are not allowed to do is create

1 a deadlock by not turning up via your director.
 2 Similarly one would say you can't create a deadlock by
 3 adjourning, which is designed to prevent the company or
 4 the board properly exercising its functions.
 5 Then 23.1, which is a general obligation to do
 6 everything:
 7 "Exercise all voting rights and other powers in
 8 relation to the JVC to procure that the provisions of
 9 this agreement are properly and promptly observed and
 10 given full force and effect according to the spirit and
 11 intention of the agreement."
 12 Now, the other aspect that I would like to draw your
 13 attention to, particularly in the light of the
 14 submission that was made on a number of occasions by
 15 Mr Hill, is 5.4(d), which is relating to the additional
 16 funding. It is common ground that, when this agreement
 17 was completed, which was in January of this year, the
 18 shares that the parties subscribed for were on the basis
 19 of \$5,000 per share. That's just a fact, that's what it
 20 would have done.
 21 Now, what the parties also contemplated, or indeed
 22 required, was that \$50 million would be put into this
 23 company by the shareholders it's very important to see
 24 actually what it says, contrary to the submissions that
 25 have been made.

1 If you look at (d) --
 2 MRS JUSTICE ROSE: Sorry, which clause now?
 3 MR HOWARD: 5.4(d), the first sentence -- do you see the two
 4 sentences? Sorry. It's on page 21 of the document
 5 itself.
 6 MRS JUSTICE ROSE: Yes.
 7 MR HOWARD: "The board shall give notice immediately after
 8 completion ..."
 9 So this was to happen immediately, in other words
 10 the day they completed.
 11 " ... that 50 million of capital reserve is being
 12 called and [the board was obliged to do this] the due
 13 date for each shareholder is 60 days from completion."
 14 That is the date this agreement was completed, not,
 15 as Mr Hill has repeatedly said, from the date of the
 16 notice.
 17 "The shareholders agree they shall instruct their
 18 nominated directors to comply with this clause."
 19 So all the shareholders were under an obligation to
 20 instruct their directors to comply, which is, in other
 21 words, to immediately demand 50 million. What you can
 22 see -- in fact, everybody has been in breach of contract
 23 in that that didn't happen, but on 11 April this year it
 24 was agreed in a resolution which is not controversial
 25 that the 50 million would be called.

1 Now, in relation to just what is before you, what
 2 you will see in this clause is it doesn't say what the
 3 price would be of the shares. The reason for that is
 4 actually obvious, because this was required to be done
 5 immediately the price of the shares would obviously be
 6 the price that everybody has just subscribed, which is
 7 \$5,000. There was, for this purpose, no need to conduct
 8 any inquiry into the needs of the company or into
 9 valuation, because the parties knew what the value was
 10 that they had put on the shares.
 11 As it happens, no-one is suggesting, subject to
 12 a point that's been floated in the skeleton argument of
 13 Mr Hill served yesterday, the value of this company has
 14 gone up in the last six months, not least because one
 15 knows that the budget of the company -- there are
 16 documents before you -- show that the budget hasn't been
 17 met and that occupancy rates at the hotel rooms are
 18 down, plus there is this dispute going on. So just so
 19 you understand it, the \$5,000 that we say the shares
 20 should be priced at, or as the maximum price, we say
 21 that's because you couldn't possibly say the shares were
 22 worth more than \$5,000, and putting a price at \$5,000,
 23 they are probably worth a lot less, can't possibly harm
 24 anybody because if, let's say -- I am not looking at
 25 injunctions at the moment, just looking at what the

1 effect is of a cash call where they don't put in the
 2 money, and their side would be 17 million, if they don't
 3 put in their 17 million, and there is a mechanism where
 4 Mr -- where my side can put in the money in their place
 5 and get more shares, if the higher the price, the less
 6 shares they get. So the less, in other words, dilution
 7 that takes place. That was their complaint about the
 8 150 million, they said that's too low because you had
 9 a price of 1 cent a share. Of course the higher you put
 10 it, the less they could conceivably be diluted.

11 Just before we leave the shareholders' agreement,
 12 the other thing to understand is clause 7 of the
 13 shareholders' agreement. Now, what -- you can just see
 14 you don't need to worry about the detail -- clause 7
 15 provided that there were certain reserved matters which
 16 essentially had to be dealt with by the board, and by
 17 the shareholders.

18 7.2 provides that:

19 "The shareholders shall give their approval to any
 20 of the shareholder reserve matters."

21 In other words, there is a scheme whereby certain
 22 matters are dealt with which require the board and
 23 certain matters require the approval of shareholders.

24 But what is happening here is that the claimants are
 25 seeking to exercise a shareholder veto over matters

1 which are not reserved matters, matters which are in
 2 fact for the board.

3 Turning to the question of the right to adjourn for
 4 a moment, what is said by the claimant is that they have
 5 an unfettered right to adjourn or the point should
 6 properly be put that their nominated director,
 7 Carpentaria, has an unfettered right to adjourn. They
 8 have said that both through Mr Hill in his skeleton
 9 argument and orally, and through their prior counsel,
 10 Mr Brisby, and in their evidence.

11 I am not sure how much time your Ladyship needs to
 12 dwell on this, because Mr Hill hasn't really made any
 13 submissions in answer to what we have put forward. We
 14 have summarised in our skeleton the law on this.

15 MRS JUSTICE ROSE: Well, my current thought is that Mr Hill
 16 also addressed me on the basis that it is fettered, or
 17 at least it's arguable that the power has to be
 18 exercised for a proper purpose and in good faith, as you
 19 say, and he has addressed me as to why I am not in
 20 a position to say that it wasn't so exercised.

21 MR HOWARD: In fact, he only addressed you on the good faith
 22 point, he didn't address you on proper purpose. At the
 23 moment I'm not on the facts, I am just on the law.
 24 I have set out the legal authorities and indeed the
 25 references to the articles and the shareholders'

1 agreement here which lead to the submission that we make
2 at paragraph 36 of the skeleton, which we say shouldn't
3 be controversial.

4 "The power to adjourn must be exercised in good
5 faith and for a proper purpose. Adjourning a board
6 meeting for the purpose of preventing business being
7 transacted, for example because of fears you might lose
8 a vote, is not a proper exercise, and a purported
9 exercise of the power to adjourn otherwise in good faith
10 and for a proper purpose is ineffective."

11 Now, unless your Ladyship needs any help with the
12 law, and we have set it all out, I haven't heard any
13 contrary submission, I am not going to deal with that.

14 What I am going to turn to next, though, is --
15 because Mr Hill makes a submission concerning what
16 transpired before Mr Englehart, suggesting that somehow
17 we are having an inappropriate re-run of that, and --
18 what he seems to be trying to say is that Mr Englehart
19 decided that his client or the directors on his side had
20 an unfettered right to adjourn, and for us to be arguing
21 now to the contrary is somehow vexatious. What he is
22 saying is in fact completely and utterly false, it is
23 not something that he should be saying, and for that
24 reason I need to show you the transcript. I've told you
25 what the applications were before Mr Englehart, and if

1 you look at tab 17 at paragraph 42 -- sorry, volume 3,
2 red or pink volume 3 --
3 MRS JUSTICE ROSE: Your skeleton argument?
4 MR HOWARD: It's the skeleton argument, and what Mr Hill
5 referred you to was paragraph 5 on page 2, and you will
6 see at paragraph 5(b), in the third sentence, it was
7 said:

8 "In any event, the restraint is not warranted on the
9 evidence or required by PHRL, as it has a right
10 unilaterally to procure the adjournment of board
11 meetings and has frequently exercised those rights."

12 So the submission appears to be being made based on
13 that sentence that somehow it was common ground before
14 the judge, and the judge was proceeding on the basis
15 that there was an absolute unfettered right.

16 Of course you have to turn on in the document to
17 paragraph 42, where the summary is actually explained,
18 and in the last sentence, "what's being considered there
19 in the balance of convenience", and "fetter
20 prospectively a director in the exercise of his duties",
21 and the last sentence says:

22 "This is particularly the case where the Carpentaria
23 can unilaterally adjourn any board meeting called
24 pursuant to 6.2(g), although clearly this right has to
25 be exercised in good faith."

1 Now, what is very important to understand is that at
2 the time of the hearing before Mr Englehart they had not
3 served notice to adjourn the meetings, and if you go to
4 tab 18 you will see -- I think you were referred to
5 page 43, where the deputy judge at line 5 referred to
6 "the power to seek an adjournment" when he was
7 discussing things with Mr Brisby. But he came back to
8 it at page 62, and this is the context in which matters
9 were being dealt with. The only question that was
10 before the judge were the two applications that
11 Mr Hill's side and Mr Brindle's side took. What
12 Mr Brindle said at line 24 on page 62:

13 "At some stage we would very much like to know
14 whether the claimant [it's page 62, line 24] is going to
15 seek to adjourn these meetings. They probably will not
16 tell us."

17 I explained, at the foot of the page, the various
18 meetings that were going on.

19 MRS JUSTICE ROSE: Mr Brindle was acting for who?

20 MR HOWARD: Mr Brindle was Sherway. You have to remember,
21 Sherway -- we weren't actually parties to this action.

22 MRS JUSTICE ROSE: Yes, I understand.

23 MR HOWARD: Indeed, Mr Brisby made a point that we shouldn't
24 actually have been there.

25 At line 42, the deputy judge, the district judge,

1 asked whether a notice of adjournment had been served.
2 At 63, I said "No".

3 The judge says "Nothing?", and I say:

4 "Well, we certainly say none should be" I think it
5 probably should read "if the parties are acting
6 bona fide".

7 Mr Brisby then said:

8 "I don't know what the position will be for any of
9 that, but I am quite sure, based on what I know --
10 I have no instructions -- that any meeting that includes
11 a resolution on the business seeking to appoint
12 Mr Doronin as acting or temporary CEO will be
13 adjourned."

14 Then the judge said:

15 "Very well, no formal notice of adjournment has yet
16 been sent. That's what we want to know."

17 If you then turn on, Mr Hill, I think, asked you to
18 look at my submissions at page 65, line 12 to page 66.
19 In order to understand what I was doing there and what
20 my submission in fact was, you need to turn to page 69,
21 which actually makes the position completely clear at
22 line 11. You can see, if you read from line 11, it
23 said:

24 "What concerns my client is that so far as possible
25 ensuring that these board meetings go ahead. If one

1 asks in relation to the relief [and this is important]
 2 particularly the relief that Mr Brindle is seeking,
 3 where does the balance of convenience lie, the balance
 4 of convenience only lies in allowing this board to
 5 function and to allow Bridle's client, Eliasch, to vote.
 6 The board meetings, in our submission, should go ahead
 7 unless there is some bona fide reason to adjourn and
 8 none has been put forward at the moment."

9 Because at that stage they had not sought to adjourn
 10 them.

11 "The only threatened reason [and this was entirely
 12 right] was because of a failure to remove Eliasch.
 13 My Lord, I stress there is no bona fide reason, because
 14 if we take the one that's scheduled for next week, we
 15 say any attempt to adjourn, whether on the basis of
 16 Eliasch or any other grounds, would be improper."

17 We make a similar point about the chief executive
 18 officer, and we make the point that all they are trying
 19 to do is say that they want to prevent Eliasch voting,
 20 you can see that at line 36.

21 Then, at the top of page 70:

22 "In relation to what your Lordship is asked to do,
 23 in my submission, your Lordship should reject the threat
 24 that is sought to be imposed on Mr Eliasch, and should
 25 you grant the relief that is sought by Mr Brindle."

101

1 That is the point. Mr Brindle's application was
 2 granted, and that is, when you read Mr Englehart's
 3 judgment, what he concluded was the right thing to do,
 4 which was to restrain them seeking to adjourn board
 5 meetings on the grounds of having served notice to
 6 remove Eliasch.

7 The idea that what happened, as Mr Hill says, was
 8 that Mr Englehart was preserving for his side a right
 9 willy-nilly to adjourn is simply nonsense. That was not
 10 the point the judge had to consider, because there was
 11 no application to adjourn the board meetings, except
 12 they were threatening to do it if we didn't remove
 13 Eliasch. In fact, the whole premise of what
 14 Mr Englehart was ordering in the order I showed you at
 15 tab 21, he refused their application to prevent Eliasch
 16 voting, and granted Sherway's application that the board
 17 meeting shouldn't be adjourned on the ground that he
 18 hadn't been removed.

19 So what they are then trying to do, and they are
 20 saying -- they don't run away from saying this to you --
 21 "we don't want Eliasch to vote" notwithstanding the fact
 22 the courts refused one injunction and granted another.
 23 In my submission, what they did by adjourning the
 24 meeting was in breach of this order, and certainly in
 25 breach of the spirit of it, because the whole purpose of

102

1 that injunction was not to rely on the fact that they
 2 don't like Eliasch voting as a basis for an adjournment.

3 What Mr Englehart was certainly not saying was that
 4 they should be entitled to simply adjourn matters.
 5 Putting the matter at the most favourable to the
 6 claimants, and I don't accept this is right, but putting
 7 it at the most favourable, he simply has left over that
 8 question, and that's the question that you have to
 9 decide today.

10 Now, if we then turn to the two board meetings, one
 11 has obviously the 23 July, where on 15 July a board
 12 meeting was convened, and the purpose of that was to
 13 consider what to do from 1 August in the light of the
 14 fact that Mr Zecha's tenure was due to expire on
 15 31 July.

16 Now, in fact, we say that the matter has already
 17 been considered, as to what is the effect of that, in
 18 Miss Newman's judgment, which you have in A4, at 29.
 19 Sorry, I may have given you the wrong reference. Sorry,
 20 it's red 1, tab 6. Sorry, I have given you the wrong
 21 reference. Yes, it is tab 6, it's in the middle of the
 22 exhibit. Paragraph 39, page 17.

23 Important point to note:

24 "[She] had held, as was a fact, Zecha hasn't been
 25 acting as the CEO for over two months. Be that as it

103

1 may, the terms of the SHA are perfectly clear and mean
 2 that unless both Peak and Tarek agree, which is
 3 extremely unlikely, that he should continue as CEO
 4 beyond 31 July, he must then step down from that role
 5 and assume a different role. The parties could agree
 6 any role for him, but absent agreement, Peak are
 7 entitled to require that provided he be willing, he
 8 should become chairman of the resorts business or CEO of
 9 AMBV."

10 She goes on to say that the former role is difficult
 11 to define with the clarity needed for injunctive relief.

12 "In the absence of agreement, he will become CEO of
 13 AMBV. It is irrelevant whether he was or wasn't CEO of
 14 AMBV before. The parties have agreed that he should
 15 have that role in default of an alternative agreed role
 16 and they are therefore impliedly bound to work out for
 17 themselves how to put it into effect. I am assuming
 18 that such will present little difficulty."

19 Now, the point is, what she is more or less
 20 correctly summarising is the board has to work out what
 21 Mr Zecha's role is, they have obviously got to speak to
 22 Mr Zecha, you can't just say "Well, Zecha will do this",
 23 but you have also to decide what the scope is.

24 Just so your Ladyship understands where we stand on
 25 this, particularly in relation to trying to find a way

104

1 forward: Mr Hill presents it that we have some
 2 attachment to Mr Sirois. We don't. We think he is
 3 a good chap to do the job. We don't have any objection
 4 to Mr Jolivet doing the job. What of course should have
 5 happened is Mr Hill's client should have come along to
 6 the board meeting and simply said why they preferred
 7 Jolivet to Sirois. Be that as it may, we could live
 8 with a situation where we all agreed to a resolution to
 9 appoint as CEO Mr Jolivet. So to some extent, that
 10 would progress things.

11 But in relation to the position of Mr Zecha, if we
 12 go back to the shareholders' agreement for a moment, so
 13 we can see what that provides, you had it a moment ago.

14 MRS JUSTICE ROSE: Red 3, I think.

15 MR HOWARD: No, I don't think it is. White 4.

16 Entirely consistent with what we have said all
 17 along, what we would agree is by a written resolution
 18 that Mr Zecha should cease to be CEO and Mr Jolivet
 19 would be appointed as interim CEO. We could do that
 20 today, and we would urge that that should be done.

21 As to the position of Mr Zecha, that should be
 22 considered by the board, to consider which of these
 23 roles he should have and to discuss the matter with him.
 24 Because those are matters that simply can't be dealt
 25 with, it's not simply a matter of saying --

105

1 MRS JUSTICE ROSE: What did the resolutions on 23 July --

2 MR HOWARD: Doesn't deal with it. That hasn't been dealt
 3 with.

4 MRS JUSTICE ROSE: So do I have power to decide what's going
 5 to happen to Mr Zecha?

6 MR HOWARD: Well, you don't. This has only arisen because
 7 what Mr Hill says, I am happy to have Mr Jolivet, but he
 8 wants to attach a condition to that.

9 MRS JUSTICE ROSE: I see.

10 MR HOWARD: His condition is Zecha must be, he says, the
 11 chief executive officer of AMBV. We say quite simply if
 12 it's Jolivet they prefer, we don't mind. But insofar as
 13 Mr Zecha's role, we are happy to discuss in accordance
 14 with clause 6.6(a) and seek to resolve that at the board
 15 meeting -- they have scheduled a board meeting for
 16 15 August, they have adjourned their adjourned board
 17 meeting, if they want at that board meeting to discuss
 18 Mr Zecha's role -- I think it may even be on the agenda,
 19 but if it isn't -- we are more than happy to discuss
 20 that and seek to agree what his future role should be.

21 MRS JUSTICE ROSE: But what is in default of agreement, do
 22 you accept that he is CEO of AMBV?

23 MR HOWARD: No, because in default of agreement -- if one
 24 imagines the board, let's assume you were not in the --
 25 in the current situation that you just got to today, you

106

1 had the board meeting and the board, let's say, simply
 2 can't agree, you have one side that says "We want him to
 3 be chairman of the resorts business" and one side says
 4 "He is to be chief executive officer of AMBV", you would
 5 have a deadlock.

6 Hopefully you can agree something. You may not be
 7 able to agree with Zecha. Zecha may say he wants
 8 \$10 million a year. The directors on one side might
 9 say, "That's ridiculous, I'm not prepared to pay him
 10 \$10 million a year", I don't know. The problem is all
 11 of these are matters that have to be dealt with at the
 12 board level, and it's said on the other side that they
 13 want to be constructive, and sort things out. We agree,
 14 everybody should seek, in relation to something like
 15 this, to attend board meetings -- there is absolutely no
 16 reason to adjourn -- and seek to discuss these things in
 17 a sensible way. Not through solicitors' correspondence,
 18 but the directors are to discuss these things and seek
 19 to decide what role for this business they think is
 20 sensible for Mr Zecha, bearing in mind his age, the fact
 21 the company --

22 MRS JUSTICE ROSE: Has anyone asked Mr Zecha what he wants
 23 to do?

24 MR HILL: Mr Zecha, we know, wants to take up the role.
 25 I am very happy, if my learned friend wants to make his

107

1 resolution that he is appointed to chairman of -- CEO of
 2 AMBV provided he is happy to do so, we are happy for
 3 that condition to be in, there is no problem with that.

4 MR HOWARD: No.

5 MR HILL: As opposed to leaving it to the board to be
 6 steamrolled by their attenders.

7 MR HOWARD: The problem with all of this is, and one needs
 8 to be careful, obviously the devil is in the detail in
 9 anything, and what the board, a board acting properly,
 10 has to discuss amongst themselves and with Mr Zecha what
 11 his function is in this role as chairman.

12 Now, as things stand, we believe we can agree a role
 13 for him as chairman of the resorts business, but it's
 14 a matter that needs to be properly discussed and not
 15 Mr Hill trying to, by trickery, say, "Ah, let's have in
 16 an undertaking he is there", and so somehow there is no
 17 room to discuss things, it has to be discussed with
 18 Mr Zecha. It's not just a question that Mr Zecha wants
 19 the job. The question is: what is the job and what are
 20 the terms and conditions?

21 This court really can't, in my respectful
 22 submission, try and get involved in trying to work out
 23 what the directors should or shouldn't do about
 24 Mr Zecha.

25 MRS JUSTICE ROSE: No.

108

1 MR HOWARD: I hope that in relation to the current issue our
2 acceptance that Mr Jolivet can perform the interim role
3 largely, if not entirely, takes the heat away.
4 Now, the capital call -- I mean, I will obviously
5 come back to some more submissions about this in
6 a moment, but just looking at the facts -- was made on
7 17 July. Again, we have set out the background to it.
8 MRS JUSTICE ROSE: Where is that resolution?
9 MR HOWARD: The resolution is in C2, which is red 2, at
10 tab 12.
11 MRS JUSTICE ROSE: C2 is not red.
12 MR HOWARD: Sorry. Are you asking for the resolution?
13 MRS JUSTICE ROSE: Do you mean C2 or red 2?
14 MR HOWARD: Sorry, it's correspondence 2. Sorry, I am being
15 misled. It's the exhibit to Mr Doronin at tab 12, which
16 is in the second red bundle, and the resolution is at
17 242. I was actually seeking to show you the notice
18 convening it. Did you want the resolution or the
19 notice?
20 MRS JUSTICE ROSE: Yes.
21 MR HOWARD: The resolution is at 242.
22 Can you note that under 3.1 the documents included
23 the written resolution dated 11 April? Now, the
24 important background we have already looked at, which
25 is: first, they were all supposed to put in 50 million

109

1 within 60 days of completion, in other words this
2 50 million should have been in this company by some time
3 in early March. The directors and the shareholders were
4 all in breach of the agreement. The 11 April resolution
5 is in the same bundle, just for your note, at tab 12,
6 page 40. So this was a written resolution.
7 If you look at page 41, capital contribution:
8 "The shareholders shall make the capital
9 contribution of \$50 million in accordance with the terms
10 of the shareholders' agreement."
11 So there is no dispute about that, but if you look
12 at page 43 you will see that that was signed, that page
13 bears the signature of Mr Amanat on behalf of
14 Carpentaria, which is the corporate director.
15 So in relation to any argument that's made about:
16 does the company need the money?, or urgency, that's all
17 complete nonsense, it's all water under the bridge. The
18 shareholders' agreement provided the money was to go in.
19 In April, later than they should have done, three months
20 late, they passed a resolution that the 50 million was
21 to come in.
22 So all the arguments that are actually made about
23 whether the company, how pressing is the need for it, is
24 actually by-the-by. It's actually all wrong, the
25 company does need it. But the point doesn't really

110

1 arise.
2 Now, what happened in relation to these two board
3 meetings is --
4 MRS JUSTICE ROSE: So, so far there has been no actual
5 capital call subscribed as per the shareholders'
6 agreement?
7 MR HOWARD: That's right. The company is 50 million short
8 of what it was agreed in January it needed. That's the
9 inescapable fact. I think your Ladyship is keen on
10 understanding the commercial context. Of course the
11 commercial context to this is --
12 MRS JUSTICE ROSE: Just wait a minute. (Pause). Yes, I am
13 sorry.
14 MR HOWARD: The commercial context, I think you have read
15 Mr Doronin's statement, and you will have seen in there
16 that Mr Doronin is a very substantial investor in this
17 company, both because he has paid for two-thirds of the
18 shares, plus he has provided, via one of his corporate
19 vehicles, a very large loan, I think \$168 million. So
20 he has invested something north of, I think,
21 \$250 million. Now, on the other side, Mr Amanat's
22 vehicle has -- Mr Doronin says he has not put in any
23 money at all in reality, because he has just borrowed
24 money. But leaving that on one side, what he has put in
25 is a much smaller amount.

111

1 So if one actually stands back for a moment, and you
2 need to work out what is actually going on in relation
3 to this aspect of the case, why on their side do they
4 not want to put in this 50 million? Well, we are very
5 concerned that the reality is that the company is
6 starved of money, and of course the person who is then
7 most at risk is Mr Doronin.
8 Your Ladyship is right, obviously in the background
9 to all of this, if the parties can't get on, is people
10 on one side or the other hope to buy the other out.
11 They say they have served a notice on us, and so on, but
12 it's completely naive to think that ultimately the
13 parties haven't got to try and resolve things. Of
14 course if the company is starved of cash, if it can't
15 make the investments in Tokyo, the person who suffers
16 the most is the person who has put the most money in,
17 and by an enormous amount, that is Mr Doronin.
18 What happened in relation to the matters is, there
19 was an attempt -- so we have the board meetings for 23
20 and 25 July, they then, on the 18th, come before the
21 court trying to get an injunction to stop Eliasch
22 voting, that way they can be confident they will get
23 a deadlock. They fail in that, so their next tack is to
24 seek to adjourn.
25 Now, I don't know whether you have had a chance to

112

1 look at the correspondence between the solicitors, but
 2 one can -- we will look in a moment, I am not going to
 3 go to that correspondence now, because I am not sure
 4 that's particularly helpful. What we suggest is clear,
 5 both from the correspondence but from the submissions
 6 they have made to the court, is that they will not allow
 7 any board meeting to go ahead, whenever it is, unless
 8 matters are circumscribed so that the only points that
 9 the directors can vote on at the board meetings are
 10 matters that the claimant has pre-approved in advance.
 11 In other words, if there is a resolution they don't
 12 like, then they say they are going to adjourn.

13 So if we take Mr Zecha's position, and the position
 14 of the CEO, their position is "I adjourned because what
 15 I want to have is a board meeting not where we consider
 16 the three individuals, but that we only consider
 17 Mr Jolivet plus Mr Zecha has to be appointed", as
 18 Mr Hill says, conditional, Mr Zecha must be appointed to
 19 the role they say. "In other words, we are happy to
 20 have a board meeting to do that we will do it by written
 21 resolution. But if you put forward a board meeting to
 22 consider, for instance, Jolivet or Sirois, no, we won't
 23 have that because you might vote in favour of Sirois and
 24 so might Mr Eliasch and we don't like it".

25 Now, in our submission, that is the simple point
 113

1 that comes out of this. So that what they are trying to
 2 do is to prevent the board operating, and to prevent in
 3 fact the order this court has made operating.

4 Now, if we turn specifically to Mr Zecha's position,
 5 or the interim CEO --

6 MRS JUSTICE ROSE: I thought we had resolved about Mr Zecha,
 7 that it was going to be Mr Jolivet and then there was
 8 a debate about whether there was anything further that
 9 I could do in relation to Mr Zecha or whether that would
 10 have to be discussed at a forthcoming board meeting.

11 MR HOWARD: The issue I'm addressing at the moment, if we
 12 just see how it fits into the framework of what
 13 your Ladyship has to decide, Mr Hill applies for
 14 an injunction to restrain our relying on the board
 15 meetings.

16 Now, my answer to that is a number of things: first,
 17 he doesn't have a proper case for an injunction, because
 18 he didn't seek to adjourn the meetings on any proper
 19 basis.

20 My second is balance of convenience, and in relation
 21 to balance of convenience, in light of the fact I am
 22 prepared to resolve anyway that Jolivet should be
 23 appointed, he doesn't need an injunction, and if he
 24 doesn't accept that, well, then that's up to him, or up
 25 to his clients.

1 If I can just take the first point, why they don't
 2 actually have a proper legal basis for this is -- and
 3 I can do it very quickly -- if you look at Mr Hill's
 4 submissions, it tells you why it was they were seeking
 5 to adjourn. One has to ask, against what he says, is
 6 that a proper purpose? Is that a proper exercise of the
 7 power by the directors? When you look at what he says
 8 in his own skeleton argument, he answers the point.

9 If you go to paragraph 105, where he sets out his
 10 reasons, at 105.1, on page 40 of 58, and of course
 11 a very long skeleton, most of which has nothing
 12 whatsoever to do with this hearing --

13 MRS JUSTICE ROSE: Sorry, where are you?

14 MR HOWARD: Paragraph 105, it's only here that we
 15 actually -- the issue before you only starts to be
 16 addressed at paragraph 99. At paragraph 105, he's
 17 explaining what his case is. So if we take 105.1, he
 18 explains why -- this is "Why did they adjourn?" Because
 19 he is setting out his reasons for the adjournment.

20 So let's look at the first one:
 21 "PHRL was concerned about the frequent changes in
 22 management to the JVC."

23 Just stopping there for a moment, that's not
 24 a proper basis to adjourn. You could turn up and vote
 25 and say "I don't think we should have these people as
 115

1 interim CEO". That's what you do at the board meeting.
 2 But that's not a proper reason to prevent the board from
 3 considering. What that's saying is "I am concerned that
 4 I'll lose the vote".

5 Then again, if you look at 107.1, which is where he
 6 comes back to this, he says:

7 "Their aim is not to avoid the removal of Zecha, nor
 8 to avoid the capital call."

9 Then goes on to say:
 10 "Their real concern is that the appointment of
 11 an interim CEO would be disruptive."

12 Again, that's the issue you make at the board
 13 meeting, you don't try and prevent the board considering
 14 it. 111.2 --

15 MRS JUSTICE ROSE: Just wait a moment. (Pause) Has there
 16 been an occasion at any of these board meetings when
 17 Mr Eliasch has voted with Carpentaria and against
 18 Mr Djanogly and Mr Doronin?

19 MR HOWARD: Well, I don't know, because there have been
 20 hardly any board meetings because they have adjourned
 21 a whole series of them.

22 MRS JUSTICE ROSE: There has only been one board meeting?

23 MR HOWARD: There has been one board meeting because they
 24 keep adjourning.

25 MR HILL: What there has been, of course, my Lady, is
 116

1 a series of attempts by Mr Eliasch to consent to short
2 notice in line with the wishes of Doronin. So in broad
3 answer to my Lady's question, of course not because he
4 has sided with them consistently.

5 MR HOWARD: That sort of assertion is -- well, it's just
6 an assertion. Their case is that Mr Eliasch has voted
7 improperly; Mr Eliasch's position, as I understand it,
8 would be, "No, I have acted in what I perceived to be
9 the best interests of me and of the JVC". Because you
10 have to remember, a point that Mr Hill and his clients
11 conveniently ignore, Mr Eliasch has funded them to the
12 extent of \$50 million. That is why Mr Eliasch has
13 a seat on this board. Not because Mr Hill's client
14 thinks that he is a jolly nice chap and would be useful
15 to have as their nominee. He has his own interest. He
16 has put in a ton of money. That's what he explained in
17 his witness statement.

18 So the idea that just because the way he votes may
19 be, as Mr Hill's clients perceives it, inimical to their
20 interests, it doesn't follow that he is acting
21 improperly if that's what he perceives to be in the
22 interests of the JVC and/or in his interest.

23 Anyway, be that as it may, the point is -- and you
24 can see in 107.1, we are looking at "why did you
25 adjourn?" When they adjourned, they say, because they

117

1 didn't want there to be interim CEOs, although they then
2 say in the course of this paragraph:

3 "Subsequently [because this is subsequent to the
4 board meeting] they are prepared to accept one of the
5 proposed interim CEOs provided that Zecha is appointed
6 CEO of AMBV, as provided by clause 6.6(a) of the JVC."

7 "The simple answer to all of this is this was not
8 a reason not to attend the board meeting. That's what
9 they have to justify, why the board meeting was
10 adjourned. Their only justification, and Mr Hill
11 doesn't shrink from this, is because the we are
12 concerned that Eliasch will vote against us and in
13 favour of the Doronin camp, but you have already lost
14 your injunction application on that, and you have
15 actually been enjoined from adjourning on that basis.

16 You can then see at 111.2 their next reason appears
17 to be that --

18 MRS JUSTICE ROSE: Just wait one second. (Pause).

19 MR HOWARD: Actually these are points they make under
20 balance of convenience, so I won't go to those. Their
21 only reason for adjourning the meeting for the 23rd,
22 it's simply because the only reason they have put
23 forward here is what they say in 107.1, that it would be
24 disruptive. That's not a proper reason to adjourn, and
25 in oral submissions, the only reason they have put

118

1 forward is they don't like the fact or don't want to
2 risk the fact that Eliasch would vote against them.

3 In our submission, there is no even attempt to show
4 that this is proper use of a power. Mr Hill stands his
5 ground on saying "I have an unfettered right, I can do
6 it because it's a Wednesday, and I feel like it". Well,
7 that isn't --

8 MRS JUSTICE ROSE: I don't think he is only saying it's
9 unfettered, I think he is also saying that it is
10 a proper purpose to stop Mr Eliasch voting with
11 Mr Doronin when, whatever Mr Eliasch says, Mr Amanat's
12 view is that Mr Eliasch should be listening to him.

13 MR HOWARD: Yes, but in our submission, particularly in the
14 light of -- well, before you get to the order of
15 Mr Englehart, that is not a proper exercise of the
16 power, because it's simply you have sought to -- well,
17 the directors are entitled to vote at the board meeting,
18 and what you are not entitled to do is to prevent them
19 voting, because you actually have to procure they act in
20 good faith -- I have shown you the clause -- in the
21 exercise of their functions as directors.

22 So the only proper purpose for adjourning a board
23 meeting is, obviously you can say "That's not convenient
24 for me, I can't make it on next Friday, I'm somewhere
25 else" or whatever it is, or "I am in hospital", one can

119

1 say that would be a proper basis, "Can we please do it
2 on the Monday", or if you could legitimately say "There
3 is some reason we can't deal with this business on that
4 day". That's what you have to do, not say "I don't like
5 what the result might be".

6 Then the next point is: the court has already
7 considered this position in terms of what they wanted to
8 do was to prevent Eliasch voting, and the court not only
9 refused to give that injunction, but it enjoined
10 them -- that's the important thing that was ignored --
11 from purporting to adjourn on the grounds that Eliasch
12 ought to be removed. So the whole premise is that you
13 can't stop Eliasch voting.

14 Now, in relation to the balance of convenience, they
15 seem to accept now that it's right for Mr Zecha to stand
16 down, and they say they would be perfectly happy with
17 Mr Jolivet, and we are not going to resist, or we are
18 prepared to accede to that by written resolution
19 recording those two things. So in the light of that, in
20 our submission, there is simply absolutely no need for
21 any injunctive relief before you get to anything else,
22 because --

23 MR HILL: I apologise for rising. Can I clarify from my
24 learned friend what is he suggesting happens to the
25 existing resolutions that appoint Mr Sirois?

120

1 MR HOWARD: One can simply have a written resolution today,
 2 it would have to be today, that --
 3 MRS JUSTICE ROSE: There seem to be enough people in court
 4 that we might be able to spare two people to go out now
 5 and prepare that.
 6 MR HOWARD: Yes, it would be a written -- I won't dictate
 7 it -- resolution according that in place of, rather than
 8 Mr Sirois, Mr Jolivet would be appointed as interim CEO.
 9 MRS JUSTICE ROSE: Well, I will not be at all offended if
 10 somebody goes out now and sorts that out.
 11 MR HOWARD: It's already being done by those behind me.
 12 I don't know really in the light of that whether
 13 it's useful to carry on talking about Mr Zecha.
 14 MRS JUSTICE ROSE: No.
 15 MR HOWARD: There are obviously a lot of other points that
 16 I would make, but that matter falls away. I don't know
 17 whether Mr Hill wants to indicate --
 18 MR HILL: I think my learned friend probably ought to make
 19 them, because --
 20 MRS JUSTICE ROSE: Go on to your other points, and let's see
 21 where we get to with the draft resolution when it
 22 arrives.
 23 MR HOWARD: Let's turn, then, to the 25 July meeting. In
 24 our submission, there was no legitimate basis to adjourn
 25 the 25 July meeting, and in any event the balance of

1 2 1

1 convenience clearly lies in favour of allowing -- of not
 2 injuncting the resolution.
 3 MRS JUSTICE ROSE: What about this point about the
 4 subcommittee?
 5 MR HOWARD: The subcommittee was on the agenda and
 6 a resolution was passed to appoint a subcommittee
 7 which -- the other side didn't turn up, so it's not very
 8 surprising that the subcommittee consists of people that
 9 did turn up. They say "We would like to be part of that
 10 subcommittee". We don't have any difficulty with that
 11 at all. If they want to say it should be Mr Amanat on
 12 the subcommittee as opposed to --
 13 MRS JUSTICE ROSE: Well, it's going to be the man from
 14 Carpentaria, isn't it?
 15 MR HOWARD: Yes, the man from Carpentaria. The whole point
 16 is, the reason you have a subcommittee is --
 17 MRS JUSTICE ROSE: All right, but this resolution may need
 18 to --
 19 MR HOWARD: No need to deal with that. If I can just say,
 20 the company has headhunters who have been looking for
 21 a chief executive for some time, three individuals have
 22 been identified, obviously what one doesn't want to have
 23 to do, particularly in this company with all this going
 24 on, is convene board meetings in order to consider what
 25 everybody thinks of the potential candidates that are

1 2 2

1 being put forward. It's a perfectly normal thing to
 2 have a subcommittee to deal with it. If the other side
 3 are not content with the representation on it, then no
 4 doubt we can put one of their individuals on, it's not
 5 a matter of -- it shouldn't be a matter of moment. The
 6 parties, it must be in their mutual interest to appoint
 7 a CEO and as soon as can be reasonably done.
 8 I am sure your Ladyship understands that the chief
 9 executive officer of this sort of company is obviously
 10 an important role, not only in terms of managing what is
 11 a very large business, but also being identified as
 12 somebody who is capable of running the business and
 13 dealing with your partners, because a lot of the hotels
 14 are run by effectively partners or franchises and so on.
 15 Now, if we go back to the capital call, and why is
 16 there any legitimate basis for adjourning this, and in
 17 any event should you injunct the resolutions, the
 18 important background to start is that the money should
 19 have been put in a long time ago and, what's more, the
 20 company resolved unanimously, including the other side,
 21 on 11 April it should be done. So all these questions
 22 about: does this company actually need the money?, are
 23 really not questions that your Ladyship should be
 24 worried about or enquiring into, because it's decided by
 25 the agreement and by the earlier resolution.

1 2 3

1 In any event, the company does need this money, and
 2 the -- if I can just show you a couple of things that
 3 you have not seen. If you could take red file 2, and
 4 put in context some of the points that are made about
 5 the need for the money, if you turn to page 192, item 9
 6 on the agenda, you will see that this was a board
 7 meeting that was to be held on 11 July, where
 8 consideration was to be given to the due date for
 9 payment and price per share for the capital call. Why
 10 didn't that take place on 11 July? Because the other
 11 side adjourned it.
 12 You also see at paragraph 3 there was discussion of
 13 alternative roles for Adrian Zecha after 31 July.
 14 Again, didn't take place, because they adjourned it.
 15 Item 8 is the report that was to be given on issues
 16 raised by the auditors of Silverlink.
 17 "Olivier Jolivet is to attend this section of the
 18 meeting to provide a report on issues raised by the
 19 auditors."
 20 Why didn't that take place? Because they adjourned
 21 the meeting. So saying "Oh, we don't know about the
 22 matters which you have spoken about", this is the
 23 Silverlink audit problem and Silverlink as a going
 24 concern, but there are two reasons you don't know about
 25 it: (a), because you adjourn board meetings to discuss

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1 these things and get a report and (b) because you seem
 2 to not be willing to even speak to people like
 3 Olivier Jolivet, the chief financial officer. Frankly,
 4 in relation to all of this, one would have thought that
 5 they -- Mr Zecha is clearly in their camp and he has
 6 been the chief executive officer for the last three
 7 weeks, one would have thought in relation to what the
 8 financial needs of the company are, that they would be
 9 speaking to him and to Mr Jolivet and to Mr Sirois, who
 10 are -- they are the executives in charge. We are not
 11 the executives, we are in the same position as them to
 12 say "What exactly is going on? What exactly can you
 13 tell us is required?" Not simply adjourning meetings
 14 and then saying "Ah, can't have a meeting because the
 15 meeting was to give a report and I haven't had the
 16 report". It simply doesn't make any sense.
 17 That meeting was adjourned first to the 21st, this
 18 one, then to the 30th, now to the 15th. That's actually
 19 what's happened here. If you look at this, one has to
 20 wonder why it is they have been unwilling to attend
 21 a board meeting to discuss the matters that are set out
 22 there.

23 In relation to Tokyo, I showed you the letter from
 24 Mr Sirois, so the suggestion that they don't know
 25 anything about what Tokyo required is somewhat
 125

1 surprising, and what is very odd is you have seen the
 2 letter from Mr Sirois, but one has to say "What is the
 3 response they make to that?" So they received that
 4 letter on 7 July, they have not at any stage said
 5 anything about it, until the evidence that was put in
 6 this morning at bundle 3, tab 31, from Mr Amanat. You
 7 will remember you were shown -- it starts at
 8 paragraph 15 of tab 31, and it's a very odd statement.
 9 Paragraph 15, it's tab 31 in bundle 3, he says that:

10 "Doronin suggests the position is urgent, very
 11 urgent, and funds are needed. It contradicts the
 12 position and information previously provided."

13 He then refers to a board meeting on 26 June, and
 14 sets out some meeting where they were told about some
 15 negotiations. The meeting didn't take place, I think.
 16 Oh, this is the Silverlink board, sorry. You can see
 17 what he sets out. What he doesn't refer to is
 18 Mr Sirois' letter of 7 July, which is -- Mr Sirois'
 19 letter is exactly summarised and set out by Mr Doronin.
 20 Then the oddity is he says:

21 "I spoke to Zecha today and he told me that no cash
 22 funds are likely to be required imminently in respect of
 23 the Tokyo project."

24 Now, what do they mean by that? What does Mr Zecha
 25 mean? Why isn't Mr Zecha able to tell us what money is
 126

1 required and when it's required? Does he mean by
 2 imminently, well, you don't need it this afternoon?
 3 Maybe he is right, he means you don't need it this
 4 afternoon. But do they need it in September and
 5 October? Do they accept, Mr Zecha knows all about the
 6 Tokyo project, he was involved in setting the thing up
 7 in the first place.

8 Frankly this is slightly ludicrous. This is a hotel
 9 project, a major project, I don't know whether you have
 10 seen this, in Tokyo. The idea is this is going to be
 11 a prestige hotel, the first Aman hotel in a city centre,
 12 I think it overlooks the Imperial Palace or somewhere or
 13 other which is supposed to be particularly desirable.
 14 They have to pay money to the landlord and spend a lot
 15 of money on staff in order to get this up and running,
 16 they had initially intended it to be 1 September, that's
 17 gone by and the aim now is 1 October, but without money
 18 it can't happen.

19 This is the quality of the evidence that's put
 20 before you: to say that this is not required is frankly
 21 laughable. What one would expect from the other side if
 22 they were serious about this is Mr Zecha to be
 23 explaining actually what is required and why this money
 24 is not required. The reason it's put in that way is, in
 25 my submission, because they know full well the money is
 127

1 required.
 2 So what you are left with, in truth, is the
 3 question -- they don't have a proper case to say it's
 4 not urgent, they don't have a proper case to say that
 5 they adjourned, they don't have a proper case to say
 6 that the money is being -- which I think is one of
 7 Mr Hill's big points, he says on its face the resolution
 8 is invalid because it requires the money within,
 9 I think, two weeks or something like that, and he says
 10 it has to be 60 days.

11 Well, you already have my submission that that's
 12 just plainly wrong. You had 60 days from completion,
 13 but there having been a default on all sides doesn't
 14 mean you get 60 more days, you are just in default and
 15 the notice now having been served, it could have been
 16 served for some much shorter period. You could have
 17 actually said "Everybody should have put in the money by
 18 31st or 1 March", whatever 60 days would have been, "and
 19 we would like interest in the meantime and you are in
 20 default". They have not done that, so they have
 21 actually given everybody more time.

22 Also you have to remember that the idea that somehow
 23 this has come out of the blue, which is a subtext, that
 24 is also not true, because they knew from the
 25 shareholders' agreement they had 60 days, they knew from
 128

1 11 April that this was to be done, and it's been on the
 2 agenda for some time. So there is really no proper
 3 basis for complaining about this.
 4 The final point they make is: ah, well, it's all
 5 very complicated, what about the price? The point that
 6 Mr Hill makes is: well, it's true -- let's see whether
 7 he does make this. Everybody is in fact obliged to put
 8 in the 50 million, it's not a question of a discretion.
 9 So what he is actually saying, "Well, what happens if we
 10 don't?" What he is contemplating, he doesn't say "We
 11 are not going to do it" but he is contemplating
 12 a default on their side, because it's a breach of
 13 contract not to put in the 50 million, or on their case,
 14 17 million.
 15 What they are then saying is "I want an injunction
 16 because I say I may breach this or I may not want to put
 17 the money in, and to protect myself" -- well, let's just
 18 think what they are trying to get protection from. If
 19 they are in breach of contract, obviously they are not
 20 entitled to any protection.
 21 What they seem to be saying is they haven't had
 22 a proper opportunity to consider the price and so -- and
 23 that matters to them --
 24 MRS JUSTICE ROSE: Where do you say the -- show me where the
 25 obligation to take up the capital call comes from. Is

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1 that in the ...
 2 MR HOWARD: Yes, I will show you. It's in the agreement.
 3 (Pause). If you look at 5.4(a), in the --
 4 MRS JUSTICE ROSE: You will have to remind me, I am afraid,
 5 where the agreement is. I have got it, actually.
 6 MR HOWARD: Sorry. Do you have 5.4(a)? Perhaps I shouldn't
 7 have taken it so quickly before. Do you see 5.4(a):
 8 "The shareholders wish to fund a capital reserve to
 9 address capital expenditure and working capital
 10 requirements. The amount of the capital reserve will be
 11 specified in the initial resorts business plan and may
 12 eventually exceed 60 million. Each shareholder agrees
 13 with the other to make available to the JVC its
 14 respective proportion of the amount of any capital
 15 reserve as determined under clause 5.4(c) below in
 16 consideration of the pro rata issuance to it of further
 17 shares in the JVC in accordance with this agreement and
 18 the memorandum and articles."
 19 When you go to (d), that is additional to 5.4(c).
 20 What 5.4(c), simply determining an amount of the -- of
 21 an additional capital amount in certain circumstances.
 22 MR HILL: Could you read (e) as well?
 23 MR HOWARD: Yes. (d) then is the amount of 50 million.
 24 Mr Hill is interested in (e), which is what happens
 25 if you fail to pay the additional capital amount or its

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1 further capital amount on the due date, the other
 2 shareholder may serve notice. So that's if you are in
 3 breach, but I think your Ladyship was asking me: is
 4 there an obligation? Yes, there is an obligation to
 5 provide the 50 million, but then there are provisions
 6 that deal with what happens if somebody fails to abide
 7 by their obligations.
 8 The point is, in fact it doesn't really matter
 9 whether or not it is an obligation, in relation to what
 10 you are having to decide, we say it is an obligation
 11 that they provide the 50 million, but it doesn't matter,
 12 the issue that Mr Hill is on about, he says the
 13 resolution is invalid because it didn't give them 60
 14 days from the date of the notice --
 15 MRS JUSTICE ROSE: No, I take that point, you say it's only
 16 60 days from completion.
 17 MR HOWARD: Yes. Therefore --
 18 MRS JUSTICE ROSE: The question is that it doesn't specify
 19 the price, and the price is presumably expected to be
 20 determined by the board?
 21 MR HOWARD: If I can take you back to what I said earlier
 22 this afternoon, there are two potential things that have
 23 to be done. Either what the parties contemplated was
 24 that the price would just be the price at the date of
 25 the -- the same price as you issued shares at just now.

1 31

1 In our submission, that's actually what the parties must
 2 have intended, because this was all supposed to have
 3 taken place on completion. So if one says: well, what's
 4 the price? The price is the price that we have already
 5 agreed in issuing the shares in the first place.
 6 But if that's wrong, then it's for the board to
 7 determine the price. But in fact, in relation to -- if
 8 one asks oneself in relation to the initial capital
 9 reserve that was being put up: did the parties intend
 10 there to be some sort of valuation? The answer is, in
 11 our submission, obviously not, because it would be
 12 bizarre. You have already valued the company for the
 13 purposes of the acquisition, they bought it from the
 14 Indian company, but you then to say: right, we are going
 15 to provide some different valuation for the purposes of
 16 the capital reserve.
 17 So that's our first point. The second point is: in
 18 any event, the price for these shares can't actually be
 19 more than the price of \$5,000 because, the value of the
 20 shares, price, whatever you want to call it, because
 21 no-one is suggesting that this company has gone up in
 22 value in the last six months. In fact, the only time
 23 one sees any suggestion of that is floated in Mr Hill's
 24 skeleton argument. But never at any stage has somebody
 25 said it's going to be higher. Their concern has always

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1 been that we would set the price too low, and they say
 2 "You are dirty dogs because you know we won't put up the
 3 money", I don't know why they think we know that, but
 4 that must be the inference, "and so you are going to try
 5 and dilute us by lowering the price". But we have
 6 responded to that by saying we are prepared to agree any
 7 price subject to a ceiling, and the purpose of the
 8 ceiling was we can't see any basis for putting the price
 9 higher than the price in January. It's as simple as
 10 that. You don't need some very complicated valuation
 11 exercise, bearing in mind that if the agreement operates
 12 in accordance with what's supposed to happen, nobody
 13 should be prejudiced because the money that's put in,
 14 whatever value you put on the shares, you get
 15 a corresponding number of shares or in the proportion
 16 that you already hold the shares.

17 So we suggest that the basis for adjourning this
 18 meeting was not proper. It's in any event been agreed,
 19 both in the shareholders' agreement and on 11 April, the
 20 company should have the money. The company needs the
 21 money, and that's set out both in Mr Doronin's statement
 22 -- I think I was going to show you -- yes, I have shown
 23 you the going concern point, I have shown you the point
 24 about Tokyo, and I have also explained that if they
 25 really had any concerns about what the money was going

133

1 to be used for and its needs, one would have thought
 2 Mr Zecha would be exploring the matter with the chief
 3 financial officer, and there is just a paucity of
 4 evidence on their side about that.

5 Now, the balance of convenience here, if one gets to
 6 that stage, the first thing is: if your Ladyship
 7 injuncts the reliance on the resolutions, the position
 8 is that this company will be starved of the money that
 9 you are being told it needs. It's not simply by our
 10 side, you are being told that by two important
 11 executives, Mr Sirois and Mr Jolivet. Mr Jolivet
 12 entirely endorses what is in Mr Doronin's statement.
 13 Mr Jolivet after today, it would appear, is going to be
 14 the chief executive officer.

15 So in my submission it would be quite a thing for
 16 the court to say: we are going to put this company in a
 17 position where it is deprived of funds, the joint
 18 venture company, where it says through the independent
 19 financial officer that it needs it.

20 Moreover, there is no potential damage at all to the
 21 other side, and the damage that's being put forward is
 22 completely illusory. It's for this reason: the other
 23 side say that the resolution is improper. If the
 24 resolution is improper, and they are right about that,
 25 and they stand by their ground, they have to take their

134

1 risk on it. I think Mr Hill at one stage said "Well, we
 2 shouldn't have to take the risk". But that's their
 3 decision, that's the commercial judgment and the legal
 4 judgment. If they say it's invalid, then they won't put
 5 in their money. But if they are right about that and we
 6 put in money, we won't get shares, it they won't be
 7 diluted, because it's all pursuant to invalid acts.
 8 I am perfectly happy to accept, and say so completely
 9 openly, that if the court ultimately says that was
 10 invalid, any shares that were issued will have to be
 11 cancelled. So it's simply my clients are taking the
 12 risk, the risk of course that Mr Hill says his clients
 13 aren't prepared to take, which is to decide whether you
 14 have the confidence in your convictions. We are
 15 confident that these resolutions are valid, and so my
 16 client is prepared to put in the money.

17 I said this this morning, and I don't shrink from
 18 making the point again, it's very difficult to
 19 understand what is the damage to the other side, and
 20 what they are actually saying is "the damage to me",
 21 this is actually what Mr Hill's submissions amount to,
 22 "is that I may decide not to put in money because I take
 23 the position on Mr Hill's advice, and his solicitor's
 24 advice, that this is invalid, and they turn out to be
 25 wrong", and what they want to be protected from is that

135

1 their advice and their judgment about that is wrong, and
 2 that's not the proper basis for an injunction. That's
 3 not holding the ring. That's them saying "I want to
 4 have the best of all worlds here, I want to say that
 5 this is an invalid resolution so that I don't have to
 6 worry about whether I put in the money or not". That's
 7 not what the court is here for, it's not here to protect
 8 them against their -- what the consequences of their
 9 argument being wrong are. They are only entitled to
 10 an injunction if they say "Well, if I turn out to be
 11 right, will I suffer damage at the end of the day which
 12 can't be compensated?" That's what you have to
 13 consider. If they are right, this is an invalid
 14 resolution, do they suffer some damage by reason of our
 15 relying on it? The answer is no, because they say it's
 16 invalid, they won't put in the money; we put in the
 17 money, well, that's our risk and our loss, not theirs.
 18 They can only benefit, they certainly can't lose.
 19 No-one has explained why they lose because my client,
 20 what would turn out to be a foolish judgment, puts in
 21 50 million believing he is going to get more shares and
 22 he doesn't.

23 So in relation to this aspect of the case, we say it
 24 actually comes down to something relatively simple,
 25 there is no proper basis for seeking to injunct what

136

1 they say is just an invalid piece of paper and we say is
 2 valid.
 3 So that's all I wanted to say on the capital call.
 4 In our submission, there is just no proper basis for
 5 injuncting the resolutions passed on 25 July.
 6 Now, I don't know perhaps if we go back to the
 7 position of Mr Zecha, in the light of Mr Hill's --
 8 MRS JUSTICE ROSE: Well, I am just debating how we are going
 9 to divide up the rest of the afternoon. Are you going
 10 to address me on expedition?
 11 MR HOWARD: Yes, very briefly.
 12 MRS JUSTICE ROSE: Where are we on the amending the
 13 particulars of claim? Is that supposed to be dealt
 14 with?
 15 MR HILL: I don't know if there is any opposition, I don't
 16 know if it's just a housekeeping matter.
 17 MR HOWARD: I don't think that's going to be controversial
 18 really.
 19 MRS JUSTICE ROSE: Right.
 20 MR TOLEDANO: My Lady, we have about 15 minutes' worth of
 21 submissions to make as well on the injunctions, maybe
 22 a little more.
 23 MRS JUSTICE ROSE: What's the nature of your submissions?
 24 MR TOLEDANO: Well, there are just one or two points I want
 25 to emphasise and that I want to bring to your attention

137

1 from the perspective of Mr Eliasch. Obviously I am not
 2 going to repeat things that have already been said, or
 3 I will do my best not to. We certainly also have
 4 submissions to make in relation to expedition and in
 5 relation to directions.
 6 MRS JUSTICE ROSE: Well, this matter has to be resolved
 7 somehow by the end of today.
 8 MR HOWARD: Yes. Essentially, subject to understand -- I am
 9 not sure I understand what the other side's position is
 10 on the interim CEO, but I can summarise our position.
 11 We say there was no proper case for an adjournment, and
 12 so that's the end of it, their injunction, the board
 13 meeting went ahead properly. If we were wrong about
 14 that and you get to balance of convenience, in any event
 15 we are prepared to undertake to sign a resolution to
 16 appoint Mr Jolivet instead of Mr Sirois, since they
 17 object to Mr Sirois. So that should be the end of it.
 18 Insofar as Mr Zecha's position is concerned, that's
 19 on the agenda, as in fact you saw on the board meeting,
 20 that they have adjourned now I think three times.
 21 MRS JUSTICE ROSE: To 15 August.
 22 MR HOWARD: So the position of Mr Zecha must and should be
 23 considered at that board meeting, it's as simple as
 24 that.
 25 MRS JUSTICE ROSE: Right.

138

1 MR HOWARD: I would also say in relation to balance of
 2 convenience just generally that you would have to be
 3 satisfied that appointing -- in the light of what I have
 4 said -- Mr Jolivet somehow caused them irreparable
 5 damage and therefore there was a need for an injunction,
 6 I am not even sure what the injunction is that they are
 7 any longer seeking, so perhaps we need to hear from
 8 Mr Hill, because we say in the light of that it really
 9 just falls away.
 10 Shall I quickly deal with expedition?
 11 MRS JUSTICE ROSE: Yes.
 12 MR HOWARD: Mr Hill says fairly that you can at any stage
 13 order expedition, so the fact that we have not got
 14 defences yet doesn't necessarily mean you can't have
 15 expedition. But -- and this is a big but -- in order to
 16 order expedition you have really to be satisfied that
 17 the court properly understands what the real issues are
 18 and are going to be.
 19 Now, this case has been dealt with, what one can see
 20 is it's been in gestation, to put it in a neutral way,
 21 for some time, in that a rather complicated points of
 22 claim were being drafted, and were only served -- the
 23 proceedings were only commenced some time in July.
 24 June 20. But where we have got to is the claimant has
 25 chosen to have a number of interlocutory battles. Now,

139

1 Mr Hill has suggested it as if they have been entirely
 2 successful. That's not actually right.
 3 MRS JUSTICE ROSE: Let's just focus on what you say about
 4 expedition.
 5 MR HOWARD: Sorry, I don't want to get -- you are right to
 6 stop me getting drawn back into the prior history. My
 7 point is a much more simple one, which is: this is
 8 actually quite a complicated litigation and it's going
 9 to require us to serve our pleadings and the same for
 10 Sherway and Eliasch, that's going to be done actually
 11 quite soon. I think there are dates for service of the
 12 defence, I think, in early September. The parties are
 13 then coming back to court on 15 September. In our
 14 submission, we will then in all probability be saying
 15 that it is not suitable to be rushed on in the way the
 16 claimants are saying, but that's all something that
 17 should be debated once the lie of the land is much
 18 clearer, once you can see the defences and really what
 19 the issues are and how complicated it is.
 20 Your Ladyship has probably already understood that
 21 there are very serious allegations on both sides, but on
 22 the claimant's side they are accusing essentially
 23 Mr Doronin and Mr Eliasch of fraud, and that is
 24 something that needs to be properly dealt with in the
 25 defence and given a proper opportunity to deal with.

140

1 Now, the issue that your Ladyship is right to say:
 2 well, how do we deal with the conduct of affairs in the
 3 meantime? In our submission, your Ladyship is right to
 4 be concerned that the parties keep rushing back to court
 5 and they shouldn't be doing that, but the way in which
 6 one should ensure that is by saying the board meeting
 7 that is scheduled for 15 August, which they have
 8 adjourned to, should not be adjourned and must go ahead,
 9 and if need be another board meeting should take place
 10 before we come back to --
 11 MRS JUSTICE ROSE: But what's going to happen at that board
 12 meeting?
 13 MR HOWARD: I think the answer is one needs to see. The
 14 problem is, if you keep adjourning board meetings --
 15 MRS JUSTICE ROSE: There is no point not adjourning it if
 16 they are going to ... suppose that there is a board
 17 meeting and on some of the things they agree and on some
 18 contentious matters, Mr Eliasch, Mr Djanogly and
 19 Mr Doronin vote in one way and the man from Carpentaria
 20 votes another way, is that then the resolution passed as
 21 far as you are concerned?
 22 MR HOWARD: We say that is how this JVC operates. But in
 23 a way, we are jumping too far ahead, in that --
 24 MRS JUSTICE ROSE: I don't know whether we are, but go on.
 25 MR HOWARD: What I am saying is: what is said on the other

1 41

1 side is "there are lots of things that we can agree".
 2 It may well be that once --
 3 MRS JUSTICE ROSE: Would it be a good idea then to say that
 4 there can be board meetings taking place but no
 5 resolution is regarded as being passed unless the man
 6 from Carpentaria agrees with it; no?
 7 MR HOWARD: No, that's rewriting the JVC, the SHA.
 8 MRS JUSTICE ROSE: Yes, but their case is that it has in
 9 effect been fundamentally rewritten. I know you say
 10 it's not, but that's the point that's got to be
 11 resolved.
 12 MR HOWARD: Well, in our submission, that would be
 13 fundamentally wrong. That's not even an issue, as it
 14 were, for the court today, the issue for the court today
 15 is the two injunctions that are sought, I am not going
 16 back over that. Perhaps I didn't explain myself
 17 properly as to what I was saying. What one needs to see
 18 is, if board meetings take place, the extent to which
 19 the business that's before the board can actually be
 20 dealt with in a co-operative way.
 21 Now, it may well be that if -- what has not happened
 22 is any board meetings.
 23 MRS JUSTICE ROSE: Yes.
 24 MR HOWARD: The parties have got into a dispute, to put it
 25 neutrally, about Mr Zecha. Let's say that is resolved

1 42

1 today.
 2 MRS JUSTICE ROSE: Yes.
 3 MR HOWARD: Let's say the capital call is resolved today.
 4 We say it's perfectly clear the monies should be
 5 provided. In relation to a lot of other matters which
 6 one would expect to come before the board, a lot of them
 7 shouldn't really be controversial. These matters
 8 shouldn't have been. But what one would hope is -- but
 9 that's what I am saying, you have to suck it and see.
 10 They are going to have a board meeting on 15 August and
 11 let's see where they get to, and then the court can
 12 actually -- in other words, if the court says "I expect
 13 you to have that board meeting, and let's actually see
 14 what happens, you have this agenda, let's see the extent
 15 to which matters are capable of being dealt with", that
 16 will tell the court the extent to which matters can be
 17 dealt with and the extent to which you really need to
 18 have an early trial and the extent to which that is
 19 feasible.
 20 At the moment, if one actually looks at what has
 21 happened, again your Ladyship does need to be quite
 22 careful and be clear about the way in which the claimant
 23 is behaving. When they came before Mr Englehart, they
 24 at that stage said he should order a speedy trial.
 25 Mr Englehart held that over to the middle of September.

1 43

1 They then, having failed in their injunction, sought to
 2 adjourn the board meetings. We said the board meetings
 3 are going ahead. Their response was (a) to make the
 4 applications for an injunction and (b) to come before
 5 the court today saying "I want a speedy trial".
 6 Now, that, in my submission, certainly the
 7 application for a speedy trial, was not something that
 8 they should have been making today as a matter of
 9 urgency, that is a matter the court has already said:
 10 deal with at the return date in September. They have
 11 pushed for an early return date so the matter is
 12 floating from 15 September, and in my submission that is
 13 the right moment for the court to take stock. By then
 14 hopefully we will have had further board meetings. We
 15 will have the interim CEO in place. We will know what
 16 the progress is in relation to the appointment of the
 17 new full-time CEO. The court will be in a much better
 18 position to see actually what is happening with this
 19 company. The sensible thing is obviously for the
 20 company's day-to-day activities to be conducted
 21 properly, and that's really what the executives would be
 22 doing. If that happens and you have a new independent
 23 CEO, one would hope the company then actually, it's
 24 armed with its \$50 million, it's going forward, and this
 25 shareholder dispute can then be resolved in the

1 44

1 background, either through negotiation or through the
 2 court, and the court can see at that stage when and how
 3 it should be tried.
 4 In our submission, Mr Hill's suggestion, for
 5 instance, that: well, you should order an expedited
 6 trial and we can revisit that in September, in my
 7 submission, it's really the wrong way round, and indeed
 8 it's recognising that when we come back in September,
 9 when we are going to have two days, the court will have
 10 more opportunity to understand what is involved. At the
 11 moment, it's simply not clear what is involved. I very
 12 much doubt that -- if everything that's in issue at the
 13 moment, I very much doubt that this is a three-week
 14 trial, to me it is very much longer. One simply can't
 15 tell, we need to put in our defence, they have put in
 16 a very long pleading, and you know, there is a lot in
 17 issue. To say, as Mr Hill does rather glibly, well it's
 18 all over a relatively short timeframe, there is an awful
 19 lot that is said to have happened in that timeframe and
 20 as one knows, you can have litigation over matters which
 21 take place over a weekend which can last weeks on end,
 22 and there is no reason at all to think that this will be
 23 dealt with shortly, and there is likely to be a fair
 24 amount of documentary evidence and evidence from all
 25 over the place.

1 45

1 MRS JUSTICE ROSE: All right.
 2 MR HOWARD: Your Ladyship's suggestion that Carpentaria
 3 effectively or its representative individuals should
 4 have a veto, that's essentially the relief which has
 5 been refused already, and in our submission, obviously
 6 that's part of the relief that they want to seek in
 7 September, effectively, by seeking to remove Mr Eliasch,
 8 and one simply shouldn't pre-empt that. Insofar as
 9 your Ladyship is concerned, I think, well, are there
 10 matters in August which could be prejudicial? I don't
 11 think it's being suggested by the other side that any of
 12 the matters that are on the agenda for 15 August, they
 13 have adjourned to then, are matters they are not
 14 prepared to deal with. They are the sort of matters,
 15 when you look at it -- take Mr Zecha's role. The whole
 16 discussion about what he should be doing, what the scope
 17 is, what you are prepared to pay him, those are the
 18 sorts of matters that ought to be capable of a sensible
 19 discussion. At the moment that has not happened. All
 20 that is happening is the claimant saying he must be
 21 chief executive officer of AMBV, full stop, and we say
 22 that that's just not a sensible way for the court to
 23 deal with it.

24 MRS JUSTICE ROSE: All right. Thank you very much. Yes,
 25 Mr Toledano. I realise that Mr Eliasch disputes a lot

1 46

1 of what has been said against him, but we really don't
 2 have time this afternoon to go into that, so I hope you
 3 will keep your submissions focused on what I really need
 4 to hear.

5 MR TOLEDANO: I am going to, your Ladyship, very much so,
 6 and really I am going to be as short as I can and I do
 7 understand entirely what your Ladyship has said, and of
 8 course the time.

9 Can I say this: Sherway and Mr Eliasch gratefully
 10 adopt the submissions of Mr Howard.

11 MRS JUSTICE ROSE: Wait a minute. The shorthand writers
 12 need a break, so we will have a short break, thank you.
 13 Five minutes.

14 (3.50 pm)

15 (A short break)

16 (3.55 pm)

17 MR HOWARD: Just before my learned friend continues, can
 18 I say we have put in front of you a draft resolution
 19 which deals with the interim CEO position.

20 Submissions by MR TOLEDANO

21 MR TOLEDANO: We, Sherway and Mr Eliasch, gratefully adopt
 22 the submissions of Mr Howard in relation to the
 23 applications for injunctions. In our submission, the
 24 proposed injunctions do run counter to the expression
 25 provisions of the shareholders' agreement that you have

1 47

1 seen, and they are in effect an attempt by the claimants
 2 to prevent the board running the business the period of
 3 this dispute, and there are just a few additional points
 4 that I want to emphasise, and I will keep this as short
 5 as I can.

6 First of all, can I refer your Ladyship to our
 7 skeleton argument at paragraph 37, please, because we
 8 make a point there which, in our submission, is
 9 important in relation to the balance of convenience
 10 which concerns holding the ring and preserving the
 11 status quo. What we say is that, in doing so, the court
 12 should give effect to the express provisions of the
 13 shareholders' agreement insofar as the court is able to
 14 do, because otherwise the risk is that the court would
 15 be subverting the contract.

16 Now, that approach to holding the ring and
 17 preserving the status quo is precisely the approach that
 18 the learned deputy judges who have looked at this so far
 19 have taken. So in the case of Miss Newman QC she
 20 required Mr Zecha to be reinstated until 31 July because
 21 that's what the contract provided for, but she was quite
 22 clear that the CEO position was a matter for the board
 23 thereafter. Similarly, Mr Englehart QC prevented the
 24 removal of Mr Eliasch because he had a contractual right
 25 to be a director under the terms of his arrangement with

1 48

1 PHRL. You haven't seen his arrangement, the terms of
2 it, but he has a contractual right to be a director, and
3 that was -- and this is an important point -- part of
4 the quid pro quo for the very substantial investment
5 that he made of \$50 million which was paid by him to
6 PHRL, and your Ladyship can see from Mr Englehart's
7 judgment a concern on his part to give effect to that
8 contractual provision in relation to the position of
9 Mr Eliasch.
10 Now, holding the ring must, in my submission,
11 include giving effect to matters that the parties have
12 already agreed in their contracts prior to the dispute,
13 because those matters are part and parcel of the status
14 quo ante. The capital call for \$50 million was not only
15 agreed, as you have seen, in the shareholders'
16 agreement, it was also voted on by all directors on
17 11 April and approved. If the injunction sought is now
18 granted, it would unravel what was previously agreed and
19 implemented by the board, and actually alter the
20 position of the parties rather than preserving their
21 position, and that is, we say, a real concern for the
22 court.

23 Now, there is, in my submission, a sense on the part
24 of the claimants of cherry-picking, in that they rely on
25 the contract where it suits them to do so, so for

149

1 example in relation to the need to give Mr Zecha a role
2 post 31 July, but they choose to ignore the contract
3 when it doesn't suit them, for example in relation to
4 the capital call or matters of that kind.
5 Now, that's the first point I wanted to make, and
6 that's in relation, as I say, to the balance of
7 convenience.
8 The second point that I wanted to emphasise, and
9 I can be very short, because my learned friend Mr Howard
10 has already made this good, but it is important for
11 your Ladyship to be quite clear about what Mr Englehart
12 did and did not order on 18 July, because there
13 certainly was a discrepancy between the way it was
14 presented by Mr Hill on behalf of the claimants and the
15 true position. The true effect of the learned judge's
16 order was to allow Mr Eliasch to continue to vote as
17 a director, because he had the contractual right to be
18 a director that I have already referred to, and should
19 not be prevented from exercising his fiduciary duties.
20 The only restriction imposed by the learned deputy
21 related to calling meetings on short notice and adding
22 items to the agenda, and neither of those is even
23 alleged in relation to the meetings on 23 and 25 July.

24 What is more, as your Ladyship has seen, on our
25 application, the learned deputy judge did impose

150

1 a fetter on PHRL's right to adjourn, namely that it
2 could not do so based on the failure to remove
3 Mr Eliasch as a director. What follows from that, we
4 submit, is that it cannot seek, the claimant cannot seek
5 to adjourn meetings or to ask its directors to do so
6 simply because they think it's likely that the vote will
7 go against them based on the current constitution of the
8 board, yet that is, in my submission, precisely what the
9 claimants are seeking to do by the injunction that they
10 ask the court to grant.

11 The third point that we make of emphasis relates to
12 the voting of Mr Eliasch and his position in all of
13 this. As your Ladyship has already said to me, that's
14 not essentially a matter for today, and I accept that,
15 of course, but your Ladyship has heard quite a lot of
16 submissions about his role and his involvement and what
17 he's up to from the claimants, and I just want to
18 address that very quickly, or at least put the other
19 side of the story so that you have seen it and I can do
20 that very quickly.

21 I just want to show you three short paragraphs of
22 his witness statement, so that your Ladyship has the
23 complete picture. It's bundle 3 of the 18 July bundles.
24 I'm afraid I can't tell you what colour they are,
25 because mine are all white. It's the ones for 18 July

151

1 and it's bundle 3, tab 1. I think they are blue.
2 This is the first witness statement of Mr Eliasch.
3 If your Ladyship would be kind enough to have a look at
4 paragraph 20, and if your Ladyship looks at the last
5 five lines of paragraph 20, and there are only two other
6 paragraphs I want to show you, he makes it clear here in
7 the last five lines of paragraph 20 at page 7 that his
8 present position in respect of the claimant's
9 application has nothing to do with Mr Doronin or any
10 friendship with him. He has taken the position he has
11 simply because he believes it's in the best interests of
12 the JVC and the Aman hotel business to do so.

13 Then if your Ladyship looks at paragraph 25, in
14 line 4 he strenuously denies the allegations against him
15 and he makes the point that he is an experienced
16 director of businessmen, he has acted in accordance with
17 his obligations and rights as a director in the best
18 interests of the JVC:

19 "I was not appointed [he says] as a nominee of the
20 claimant company. No obligation is imposed on me to act
21 in accordance with the directions of the claimant
22 company. Had this been the position, I would not have
23 proceeded with the transaction. It is very important to
24 me that I have a direct and active role in the
25 management of the business at board level, given the

152

1 state of the business, my experience and the need to
 2 protect [and this is an important point] Sherway's
 3 investment as I have said of \$50 million."
 4 Finally in paragraph 32, in the middle of that
 5 paragraph, he makes the point that he wanted a board
 6 seat:
 7 "It entailed complete freedom to act as a director
 8 in the best interests of the JVC and the Aman hotel
 9 business, with whose interests my interests were
 10 aligned. I would not and did not agree that my position
 11 as a director would in any way be fettered and I would
 12 not have made the investment that I did on that basis."
 13 Just for completeness, I should also say that in
 14 relation specifically to the meeting of 23 July, there
 15 is a detailed letter in the evidence before the court
 16 from Mr Eliasch at bundle 1 of today's bundles -- which
 17 I think are the white bundles -- at tab 10, page 22.
 18 Sorry, they are the red ones. Red 1, tab 10, page 22.
 19 This is specifically dealing with Mr Eliasch's reasons
 20 for saying that the meeting of 23 July should proceed,
 21 and he says that it is vital to have a CEO -- this is
 22 the third paragraph -- after 31 July, and he explains in
 23 a number of additional reasons why that is so and why it
 24 should not be Mr Zecha, and he actually ends the letter,
 25 in my submission, rightly by saying that it would be

153

1 a breach of the duties of the directors if the meeting
 2 didn't go ahead and if they didn't make resolutions in
 3 relation to these very important matters in respect of
 4 the running of the business.
 5 Now, that's the position of Mr Eliasch. Can I add
 6 this, then, and this is a point that's not yet been
 7 developed and is an important one, and this is the
 8 fourth point I want to make: if your Ladyship is minded
 9 to grant any further injunctions today -- and we
 10 strenuously urge your Ladyship not to do so -- then
 11 your Ladyship of course would require
 12 a cross-undertaking in damages because that is the price
 13 that has to be paid, but the problem that has arisen and
 14 that has been debated quite comprehensively in the
 15 correspondence between the parties is that no
 16 fortification of the cross-undertaking has been offered
 17 by the claimants and no security for the
 18 cross-undertaking and the bottom line is that the
 19 financial position of the claimant does not provide
 20 adequate support for the cross-undertaking that they are
 21 proffering, and that is a very important point and it is
 22 in itself a reason why there should not be any
 23 injunction granted by the court today.
 24 Now, I do need to make this good, if your Ladyship
 25 is minded to grant any injunctive relief and it is not a

154

1 point that's been developed, but to do so, and I'll take
 2 it as quickly as I can, I do need to hand up to
 3 your Ladyship a short clip of correspondence that has
 4 passed between the solicitors and that deals
 5 specifically with the cross-undertaking and
 6 fortification (Handed).
 7 You will see at page 1, which is a letter from my
 8 solicitors on 24 July, we raised this point about the
 9 inadequacy of the position in relation to the
 10 cross-undertaking, and you will see that there was
 11 a response back on page 2 from Candey's for the claimant,
 12 basically saying that the relevant fortification, if you
 13 like, or the relevant security for the
 14 cross-undertaking, was the fact that the claimant had
 15 a substantial shareholding in the JVC. So that's what
 16 they rely on as providing the basis for the
 17 cross-undertaking, or for the financial security in
 18 relation to the cross-undertaking, so that they say
 19 their principal asset is the substantial 35.21 per cent
 20 shareholding in the JVC. They say that obviously the
 21 JVC is the sole shareholder of the Aman Resorts, and
 22 that that business was valued at approximately
 23 \$358 million just six months ago.
 24 Then my solicitors wrote back and said: well, that's
 25 actually inadequate because, when you take into account

155

1 the debts that are owed by the Aman business -- and you
 2 see this in paragraph 1 of the letter at page 3 of the
 3 bundle -- you can see that actually the shareholding of
 4 35.21 per cent has an equity value of no more than
 5 62 million, and on that basis, when you then take into
 6 account other debts and liabilities identified in 2.1,
 7 2.2 and 2.3 over the page, you get to the position where
 8 actually the liabilities of the claimant amount to at
 9 least \$105 million, and therefore the liabilities vastly
 10 exceed the assets by some \$42 million.
 11 Now, that, if that is right or even close to right,
 12 then a cross-undertaking being proffered by the claimant
 13 with no security and no fortification would plainly be,
 14 in my submission, inadequate.
 15 The three debts that are referred to, as you can
 16 see, the three debts of the claimant company, are
 17 a 35 million loan by a company called Beijing Tourism
 18 Group. Then there is also a 20 million loan by the
 19 parent to a Mr George Robinson, and a liability to
 20 Sherway of \$50 million. Those are the three.
 21 Then Candey's come back at the following page,
 22 page 5, and they deal with all of those three matters,
 23 but they don't challenge the fact that those debts are
 24 owed. So they make various points in relation, for
 25 example, to the loan from the Beijing Tourism Group.

156

1 But they don't suggest that that debt was not entered
 2 into and is not owed, and plainly it is. What they say
 3 in relation to that one is they say some
 4 misunderstandings have arisen, and that's paragraph 2
 5 where they deal with the BTG point. Now, that's simply
 6 not good enough. It's not good enough to say, "Well, we
 7 accept that liability but some misunderstandings have
 8 arisen in relation to it". Similarly they take other
 9 points of a similar kind, but again inadequate in
 10 relation to the other liabilities.

11 They also say, "Well, we don't accept the starting
 12 point of 62 million as the equity value of our
 13 shareholding in the Aman group". But again they don't
 14 have any proper basis for challenging that, and our
 15 calculation of the equity value is simply based on the
 16 valuation that was the valuation used at the time of the
 17 acquisition, which after all was only January of this
 18 year.

19 Therefore, Berwin Leighton Paisner wrote again on
 20 30 July, that's at page 7, taking all of these points,
 21 and again saying "It's not good enough".

22 The tenor of this letter is essentially saying "What
 23 you can't do is have your cake and eat it. If you want
 24 to apply for injunctions, you have to give a
 25 cross-undertaking and it has to be properly secured and

157

1 fortified. If you don't want to reveal full financial
 2 information about the position that the claimant is in",
 3 and that's one of the things they say they don't want to
 4 give any more information, "If you don't want to do so,
 5 you must offer some other kind of security, you must put
 6 up a guarantee, you must put up some funds into court,
 7 or whatever." What you can't do is have your cake and
 8 eat it and say, "We are not going to give you
 9 transparent information about our financial position
 10 because we are in a dispute with you, but we are also
 11 not going to put up any other security, but we are also
 12 going to apply for an injunction and offer a cross
 13 undertaking", which in my submission would be a wholly
 14 inadequate cross-undertaking when you bear in mind that
 15 the loss to us, potential loss to us, if the 50 million
 16 capital call is injuncted, that resolution is injuncted,
 17 and if there is real detriment to the business, which we
 18 say there would be, based on the evidence before the
 19 court, or might be, then the potential loss to us is
 20 very serious indeed, because we have made a \$50 million
 21 investment into this business, and therefore we are, in
 22 my respectful submission, quite right to be entirely
 23 concerned about the position of the cross-undertaking.

24 Now, then essentially the correspondence continued.
 25 We gave the claimants until 8 o'clock last night to come

158

1 up with a proper substantive proposal, and we warned
 2 them about that twice, and said if they didn't do so, we
 3 would be bringing the matter to the attention of the
 4 court today, as we had always said we would do.

5 Essentially what we got back, not before 8 o'clock
 6 last night, but at 11.20 last night, was the email that
 7 your Ladyship sees at page 11, which basically said: get
 8 lost, we are not going to give you any more comfort, you
 9 have got plenty of comfort as it is, and that is simply
 10 not right.

11 MR HILL: Perhaps my Lady could read it. It doesn't say
 12 that at all.

13 MR TOLEDANO: That is incorrect that there is sufficient
 14 comfort. There isn't sufficient comfort. First of all,
 15 the point that they make in the first paragraph of the
 16 email is they don't want to give us any more information
 17 because of the dispute between the parties. Well,
 18 I have already addressed that. Then they say we are
 19 double-counting the \$50 million which we are plainly not
 20 doing. They themselves accept that we invested the
 21 50 million, they accept that they have rescinded the
 22 contract between us, that's their case now, and on that
 23 basis they accept they have to pay back the 50 million,
 24 because that's what --

25 MRS JUSTICE ROSE: So your initial 50 million was part of
 159

1 Peak's investment in the JV?

2 MR TOLEDANO: We think funding them, absolutely. Well, that
 3 was the proposal, that was the plan. It went in in
 4 April. The chronology is that we provided our funds to
 5 PHRL in April, and they were going to use those funds or
 6 part of those funds to make the PHRL investment into the
 7 Aman group.

8 MR HILL: Just so my learned friend is addressing the right
 9 point, it's double-counting because we have said there
 10 is 50 million held separately, and we have given
 11 evidence about that and that's why it's double-counting.

12 MR TOLEDANO: That's the point, and that's the point I am
 13 coming to. They have made a separate point, leaving
 14 aside our 50 million, which they accept they have to pay
 15 back because they have rescinded the agreement and
 16 therefore there has to be restitutio in integrum and
 17 they accept that and they have to pay that back. They
 18 say there is a separate 50 million cash reserve or cash
 19 position that they can pray in aid, and they say they
 20 have given evidence about this, and the simple point is
 21 that they haven't. There is no satisfactory financial
 22 evidence to support any such 50 million. That's
 23 absolutely key, and if there was a pot of 50 million
 24 that was properly evidenced and properly secured, then
 25 obviously the position might be different. But we have

160

1 not seen that evidence, and no proper security is being
 2 given.
 3 My learned friend Mr Howard is rightly pointing out
 4 to me as well that of course it's a cross-undertaking
 5 that has to support not just my client's position but
 6 also the position of his clients, so that even if they
 7 were somehow able to point to some security, they have
 8 to actually provide enough security for the
 9 cross-undertaking to be able to support not only the
 10 position of my client and the losses that my client
 11 might suffer, but the losses that Mr Howard's client
 12 might suffer as well, and therefore we submit that there
 13 is simply no basis here for an injunction for that
 14 reason.

15 Now, can I just say -- that's all I wanted to say
 16 about the injunctions.

17 (Pause)
 18 My Lady, that's all I wanted to say about
 19 injunctions. Can I just address, very briefly if I may,
 20 the expedition question? I think as your Ladyship has
 21 seen, what we have is a hugely complex procedural
 22 situation at the moment where there are actually four
 23 sets of proceedings now. There are three sets of
 24 proceedings that have been issued by the claimants, and
 25 a separate set of proceedings called the Sherway

161

1 proceedings that have been issued by my clients. At the
 2 moment, the procedural position is complicated yet
 3 further by the fact that in relation to my client's
 4 proceedings, the Sherway proceedings, we had understood
 5 from what Mr Brisby said at the last hearing that there
 6 was no issue in relation to service of those proceedings
 7 on, not just the claimant, PHRL, but also on Mr Amanat
 8 and the holdings company. That's what we had understood
 9 the position to be. But we now understand the position
 10 to be that there has been some rowing back on that, on
 11 the part of PHRL, so that it would seem to be the
 12 case -- although we find this very hard to believe,
 13 bearing in mind that everyone thinks they are heading
 14 towards one composite trial here -- that procedurally we
 15 need to apply for permission to serve our proceedings on
 16 Mr Amanat and the holdings company out of the
 17 jurisdiction, because at the moment the position being
 18 taken by PHRL is that Candey's does not have instructions
 19 to accept service on behalf of those parties.

20 Now, the reason why I say we find that very hard to
 21 understand procedurally is because my learned friend is
 22 actually seeking an order for expedition in my
 23 proceedings, in the Sherway proceedings, that proceeds
 24 on the basis that those proceedings have been served and
 25 that the next step will be further pleadings and that

162

1 there will be an expedited trial of them, et cetera. So
 2 what we don't understand at all at the moment is how it
 3 can be the case, bearing in mind the position they are
 4 adopting with expedition, how it can be the case that
 5 they are not accepting service on all those parties,
 6 through substituted service on Candey's. But there is
 7 that procedural complexity that needs to be resolved,
 8 and what your Ladyship can see, in circumstances where
 9 there are four sets of proceedings at the moment, three
 10 different I think particulars of claim, because there is
 11 no particulars of claim yet in the Sherway action,
 12 because all that's happened so far is that there has
 13 been the interim injunction application before
 14 Mr Englehart, we are a very, very long way at the moment
 15 from being in a position to know what the shape of this
 16 is. Our feeling at the moment, like Mr Howard's, is
 17 that we are looking at a much longer trial than three
 18 weeks. Your Ladyship has seen that there are
 19 allegations against my client of conspiracy, of
 20 fraudulent misrepresentation, very serious allegations
 21 indeed, with very large sums of money being claimed as
 22 a result of them, and we are, in my respectful
 23 submission, entitled to be able to plead out a case
 24 against those properly, with proper and sufficient time,
 25 and to take instructions to do so, and we shouldn't be

163

1 steamrolled now into some kind of expedited process
 2 that we simply cannot manage, and it's being I think
 3 even suggested on the other side that we should be
 4 producing substantive defences and counterclaims and
 5 pleadings within the next week or two when plainly
 6 that's not possible because people are going to be on
 7 holiday, and we don't think that would be right and we
 8 do urge the court therefore to come back to this point
 9 when it needs to do so but not to decide this now, and
 10 there is one other point I would add, which is again
 11 another procedural complexity, which is at the moment my
 12 learned friend Mr Hill's proposal in relation to how
 13 this all gets taken forward, the four sets of
 14 proceedings, is that the Sherway proceedings continue as
 15 their own action to be heard with the others, whereas
 16 once again we had understood from actual debate in court
 17 last time round that that wasn't going to be the
 18 procedural mechanism to be adopted, that in order to
 19 streamline things we would stay our action and that we
 20 would actually make the same allegations by way of
 21 defence and counterclaim so that, instead of there being
 22 three actions, there would only need to be two actions,
 23 which obviously make a whole lot more sense.

24 As I say, we are at a very early stage, I don't want
 25 to labour this, but it is terribly important.

164

1 Can I just deal with one other point and then I can
 2 finish, which is that your Ladyship did make a point to
 3 Mr Hill about whether or not it might be possible to
 4 hive something off in relation to the allegations
 5 against Mr Eliasch, and we have considered that in the
 6 short time that there has been available to us, but we
 7 simply don't think that's possible because the
 8 allegations against Mr Eliasch and Sherway are
 9 inexorably interlinked with all of the allegations in
 10 these proceedings, because the very same matters that
 11 are said to be the basis for the fraud against him and
 12 the basis for the rescission of the agreements with him
 13 are then relied on by the claimants in their action
 14 against Tarek and Sherway as the reason why they say
 15 that there have been improper voting by Tarek and why
 16 there has been a conspiracy by Tarek and all the rest of
 17 it.
 18 So you can't separate them out, and indeed
 19 your Ladyship might be assisted by Mr Englehart's
 20 judgment at paragraph 31 where he --
 21 MRS JUSTICE ROSE: Well, I think I am not going to --
 22 MR TOLEDANO: He actually makes that point, anyway, he
 23 actually says that the different applications in the
 24 different actions are intertwined and that it would be
 25 artificial to separate them. So I just make that point

165

1 in order to respond to your Ladyship's comment about
 2 whether or not something might be able to be hived off.
 3 Unless I can assist your Ladyship, those are our
 4 submissions.
 5 MRS JUSTICE ROSE: No, thank you.
 6 Reply submissions by MR HILL
 7 MR HILL: If I could just deal with the points made by
 8 Mr Howard first, or some of them. First in relation to
 9 Mr Englehart, we of course accept there are applications
 10 going both ways. I have set out the position very
 11 clearly at paragraph 83 of my skeleton, and I was very
 12 surprised to hear my learned friend lead up before lunch
 13 to a submission that I had in some way misled the court
 14 by saying in fact there was an injunction order against
 15 my client. That was exactly what we said at
 16 paragraph 83 of the skeleton where we explained what
 17 relief had been given.
 18 What my learned friend didn't do, perhaps
 19 unsurprisingly, is take my Lady to the judgment, because
 20 what is quite clear is that, while the judge gave
 21 injunction orders both ways, he was, in our case, giving
 22 us relief notwithstanding the submissions made by my
 23 learned friend Mr Howard with regard to the meetings.
 24 What the judge is clearly deciding is that we are
 25 entitled to our relief, notwithstanding those

166

1 submissions, and you can't read the judgment in any
 2 other way. To the extent necessary, I would invite
 3 my Lady to look again at paragraphs 28 to 33 of the
 4 judgment. You cannot reach any other conclusion than
 5 that the judge is saying notwithstanding those
 6 submissions about the meeting and the power to adjourn,
 7 nevertheless he is going to grant PHRL that relief.
 8 The next point I want to deal with relates to the
 9 scope of the power, clause 6.6, and my learned friend's
 10 reliance on clause 4.5. My learned friend puts his case
 11 much too high. These directors are there to protect the
 12 interests of their appointors, as my Lady observed in
 13 debate with Mr Howard.
 14 So when, for instance, they vote, as they are doing
 15 at clause 6.2(i), they are voting and considering the
 16 interests of their appointors, that's what they are
 17 doing. Likewise when they exercise their right to
 18 adjourn, they are entitled to consider the interests of
 19 their appointors, and that is one of the reasons it's
 20 all there in the SHA, and isn't simply, for instance,
 21 a provision of the articles.
 22 Now, this is nothing to do with clause 4.5, which is
 23 dealing with the director's general discharging of his
 24 duties in office as a director. This is something a bit
 25 different. This is a director exercising one of the

167

1 powers that's in the SHA, because it is an economic
 2 right that a shareholder has, and which its appointor
 3 director can exercise.
 4 My Lady is also right to say that, while I certainly
 5 do take a stand on the clause, I also make the point
 6 that even if you assume some kind of fetters, we are
 7 a very, very long way away from those fetters applying.
 8 My Lady, the next point relates to clause 5.4(d) and
 9 the 60 day period. Now, there is an absurdity, in my
 10 submission, in the other side's argument. What the
 11 clause says is that the board shall give notice
 12 immediately after completion that the 50 million of the
 13 capital reserve is being called and that the due date
 14 for each shareholder is 60 days from completion.
 15 Now, on my learned friend's argument, that would
 16 mean that on Day 59 the board could put out a notice
 17 saying the capital is due tomorrow, or on Day 60 it
 18 could put out a notice saying it's due now, Day 61, put
 19 out a notice saying it's due yesterday. That's
 20 obviously not the right way to read the clause. What
 21 the clause is envisaging and in fact providing is that
 22 the notice is put out immediately, in other words on
 23 that day, then you have 60 days to put the money in.
 24 The only sensible way to read the clause is that it is
 25 a 60 day notice provision. The reason it says 60 days

168

1 from completion is because it also provides that the
2 notice be provided "immediately", and that's in the
3 clause.

4 So the only sensible commercial reading of this
5 clause is that there is 60 days notice, otherwise one
6 might ask oneself: what is the point of having any
7 notice? My learned friend's submission reduces the
8 notice period to an irrelevance because what he is
9 saying is it is just due 60 days from completion
10 regardless.

11 My learned friend's submission also doesn't cope
12 with: given that we are where we are, and there wasn't
13 a notice immediately on this agreement being entered
14 into, what is it that entitles his side to simply no
15 doubt put in this arbitrary two week period, which
16 doesn't tie into anything in any of these agreements.

17 My Lady, the next issue I want to deal with was
18 pricing.

19 MRS JUSTICE ROSE: Just wait a second.

20 MR HILL: Yes. (Pause)

21 MRS JUSTICE ROSE: Yes.

22 MR HILL: First, Mr Howard suggested that no-one could
23 possibly suggest the value might have gone up. Well,
24 why not? The value may or may not have gone up. It
25 needs at least to have been considered, and having

169

1 regard to the current finances, the economy and the
2 current economic climate.

3 My learned friend then says: well, under the clause,
4 no-one could have envisaged a valuation for this initial
5 capital call. But we have to remember that we are now
6 looking at a period some time on. This is a capital
7 call that's being made now, and it needs to be priced.
8 You certainly can't make assumptions of the sort that
9 this board has currently done.

10 The next point relates to Mr Jolivet and the new
11 proposals that came for the first time in my learned
12 friend's argument today. We do wonder why this was not
13 suggested before. But dealing with what's suggested
14 now, as I understand it, the proposal is that Jolivet is
15 the interim CEO, as we suggested, however the current
16 resolution that Mr Zecha is removed, it's suggested that
17 simply stands, but without the other half of the removal
18 of Mr Zecha, which is his appointment under clause 6.6
19 as CEO of AMBV or chairman of the resorts business: my
20 learned friend then says, well, he is happy to discuss
21 all of that, but in my submission that is a somewhat
22 cynical position to take, in circumstances where this
23 camp have already tried unceremoniously to remove
24 Mr Zecha once and to hound him out of his office and
25 indeed his home. So to suggest that a board that's

170

1 entirely controlled by the Doronin and Eliasch side, it
2 should be left to them to discuss what role Mr Zecha
3 should have in circumstances where the SHA makes it
4 clear that on his discharge from office he is to have
5 this appointment is, in my submission, quite wrong.

6 MRS JUSTICE ROSE: What do you propose, then?

7 MR HILL: There has to be a package. It's very simple, my
8 Lady, we have come seeking an injunction, what I would
9 propose is -- obviously if my learned friend wants to
10 adjust his proposed resolution to deal with Mr Zecha,
11 that might solve the problem. Assuming he doesn't, then
12 my Lady should grant the injunction. She should grant
13 the injunction on the basis I expressly confirm that we
14 remain prepared to enter into a resolution similar to
15 this, which appoints Mr Jolivet, which now appears to be
16 common ground, but which reflects clause 6.6 of the SHA
17 such that, upon Mr Zecha leaving as CEO, he is appointed
18 in his new role. That's the position we made clear from
19 the outset. It really shouldn't be objectionable. What
20 we are not prepared to see is a situation where we are
21 encouraged to vote positively on one half of it, which
22 is the removal of Mr Zecha, but then leave the other
23 half, after the parties have all left this courtroom,
24 for some future board meeting where we know that the
25 inevitable will happen and we will not see Mr Zecha

171

1 appointed to any role or certainly any role of any
2 substance whatsoever.

3 So my learned friend says, well, the parties can
4 discuss what the role is of Mr Zecha. We say to that:
5 well, fine. Again, the way to deal with it is this
6 meeting should just go, whether by way of undertaking or
7 injunction, we are more than happy to have the
8 discussions, the resolutions, which again can be written
9 resolutions, can be entered into, perhaps within a day
10 or so. They should include the resolution my learned
11 friend has already drafted appointing Jolivet, they can
12 provide for Mr Zecha's removal, but only on the basis we
13 have reached agreement for some accompanying provision
14 dealing with his appointment exactly in accordance with
15 the SHA, and that is the only way we are going to get to
16 a position where Mr Zecha isn't on the one hand hoofed
17 out and on the other not re-installed, and it's quite
18 obvious that that's the tactic that is going on on the
19 other side.

20 My learned friend talks about the balance of
21 convenience in that regard and he says it's moved.
22 Well, it may have shifted a little in that it's not now
23 suggested it's going to be Mr Sirois, it's now suggested
24 it's going to be Mr Jolivet, but he still hasn't dealt
25 with the whole picture, which is that on the one hand,

172

1 if my Lady grants the injunction, there can be no
 2 possible harm, because it will be Mr Jolivet together
 3 with Mr Zecha in his role as provided under the SHA, but
 4 on the other there is no certainty whatsoever and indeed
 5 a very significant risk that we are never going to see
 6 Mr Zecha take up the role that the SHA provides for.
 7 Can I then deal with just a small point on the
 8 subcommittee? That has also featured in my learned
 9 friend's proposed written resolution. We really don't
 10 see why it isn't simply left as something that's dealt
 11 with by the board. What's now proposed is
 12 a subcommittee of three as opposed to just the board.
 13 We do rather wonder what this is all for, and it seems
 14 to us its only possible purpose is to in some way get
 15 away with rights and obligations that may happen at
 16 board level. It's just unnecessary and inappropriate in
 17 a company of this kind with a board of this size.
 18 Coming to the capital call, my learned friend says
 19 it's not fair for us to complain about not knowing about
 20 the financial requirements when we have not turned up at
 21 board meetings. That of course is a false point,
 22 because the shareholders' agreement provides that
 23 anything that would have been and is to be discussed at
 24 board meetings needs to be circulated five days in
 25 advance, so if there was any report which told us the

173

1 magic solutions and gave us all the information, we
 2 would in fact have received it, and it's not a question
 3 of whether we turned up at meetings or adjourned them or
 4 not.
 5 MRS JUSTICE ROSE: I think I have heard enough submissions
 6 on those particular aspects. I am not giving any
 7 indication by that but just move on to the
 8 cross-undertaking and damages, please.
 9 MR HILL: Yes. My Lady, on the cross-undertaking in
 10 damages, as my Lady will see, this, as one can see from
 11 the correspondence clip, is something that has come up
 12 extremely recently. There is, in my submission, quite
 13 clear double-counting, or has been in the
 14 correspondence, double-counting of the 50 million
 15 figure, which is rather important, because on the one
 16 hand they --
 17 MRS JUSTICE ROSE: Well, does Mr Amanat have some assets,
 18 unencumbered property, that he can put up to support the
 19 cross-undertaking, or give a guarantee?
 20 MR HILL: My Lady, I am hoping that the submissions I make
 21 about the 50 million will resolve the problem. As
 22 I understand it, we want to have cleared out the double
 23 counting point, then the complaint which I then
 24 understood from my learned friend is there is not
 25 sufficient evidence of the 50 million. Well, we can

174

1 remedy that. To the extent my Lady thinks it's
 2 necessary, we will provide better evidence of the
 3 existence of this 50 million, and that --
 4 MRS JUSTICE ROSE: Well --
 5 MR HILL: It's been a moving feast, and a very recent
 6 development, this criticism of our cross-undertaking.
 7 We have dealt with it in correspondence. As
 8 I understand it, the big point now is: what's the
 9 evidence of the 50 million? We will provide better
 10 evidence of the 50 million and obviously there is
 11 a liberty to apply if the evidence we provide is not
 12 adequate.
 13 MRS JUSTICE ROSE: But the money is supposed to -- is the
 14 50 million going to be adequate as a cross-undertaking
 15 for Mr Howard's clients?
 16 MR HILL: The 50 million, it's all part of my learned
 17 friend's arithmetic. His arithmetic arriving at what he
 18 saw to be a net liability position involved removing
 19 a 50 million liability but not taking into account the
 20 other side of the ledger, which was 50 million available
 21 cash. So that's what we are addressing, we can provide
 22 better evidence of that 50 million available cash.
 23 Certainly the way this has come about, we would hope
 24 that's sufficient. If it's not, there is a liberty to
 25 apply. If that's still not sufficient, it may be my

175

1 learned friends can make some further application. It's
 2 certainly not right to be bounced in by this kind of
 3 correspondence and this kind of process into a situation
 4 where essentially the injunctions are challenged on the
 5 basis of a cross-undertaking on this type of process.
 6 MR HOWARD: Actually this point about the cross-undertaking
 7 has been around for the last couple of weeks and you are
 8 wrong to say it has been bounced --
 9 MRS JUSTICE ROSE: Were cross-undertakings given in the
 10 previous --
 11 MR HILL: Everyone has given cross-undertakings for all
 12 injunctions they have got.
 13 MRS JUSTICE ROSE: Was there any question over the support
 14 for those cross-undertakings at the previous hearing?
 15 MR HILL: I was not there. (Pause). Yes, I understand
 16 there was some initial correspondence which then
 17 appeared to fizzle out and has just come back again in
 18 the correspondence my Lady has seen.
 19 MR TOLEDANO: Sorry, it is not fair to say it has just come
 20 back. It's 24 July and it's been heavily debated in
 21 correspondence, also it's not right to say that the
 22 50 million would answer everything, and I didn't suggest
 23 at all in my submissions that it would. On the
 24 contrary, even if the 50 million could be shown, it
 25 would still show that the company has a liability and

176

1 assets position that is, rather than 42 million in the
2 red, it's just about balanced is all it would show and
3 it's not good enough. What they need to do, as any
4 commercial party does that wants an injunction from the
5 court where substantial damage may be suffered by the
6 other parties, is to put forward a guarantee or some
7 proper fortification, but not to come to the court with
8 this inadequate financial information and in
9 circumstances where all that they have supported the
10 50 million with is one sentence in a letter or in
11 a witness statement, it's simply not good enough.

12 MR HILL: My Lady, I have said we will improve the position
13 on the 50 million. If my Lady thinks we ought to put in
14 more, then obviously we will have to take instructions
15 and seek to do that.

16 My learned friend also makes assumptions, for
17 example, discounting a figure of 38 million on the basis
18 of a liability that --

19 MRS JUSTICE ROSE: But is this 50 million that you are
20 talking about something separate from your interest in
21 these joint ventures?

22 MR HILL: My Lady, yes, because what we rely on is the value
23 of our shareholding, and what the arithmetical process
24 my learned friend's clients have done is to say you have
25 to take into account certain liabilities. One of the

177

1 liabilities was the 50 million which, if we are right on
2 our case on rescission and the like, we will obviously
3 have to return to my learned friend's clients. Our
4 point is that it's not right to take that into account
5 without looking at a additional sum that's available.
6 So we say that that 50 million nets off. We also don't
7 accept that it's right to make a deduction of
8 38 million.

9 MRS JUSTICE ROSE: All right, I will have to --

10 MR HILL: But obviously, my Lady, we will have to take
11 instructions if my Lady considers the position isn't
12 good enough, but certainly on the figures as rightly
13 looked at, we are not in the red remotely, there is
14 a figure of several millions, many millions, in the
15 black on the right arithmetic, and it's then a question
16 of whether that's really good enough for your Ladyship,
17 again having regard to the injunctive relief that we are
18 talking about.

19 Can I just, before moving to expedition, see if
20 there are any other points? (Pause)

21 My Lady, yes. Just on balance of convenience on the
22 capital call, we do say that it has to be right that
23 where there is a capital call, capital call where it
24 hasn't been properly priced, that we cannot be obliged
25 to have to make a decision as to whether to put the

178

1 money in in two weeks and on the footing that we want to
2 put the money in, to have to find that money within
3 a two week period. My learned friend's submissions
4 rather assumed that we won't necessarily put the money
5 in, but we may want to put the money in, and we may face
6 all the difficulties that my Lady can imagine trying to
7 find that money in a two-week period when, as I say, the
8 shareholders' agreement does provide for a 60 day
9 period, and that is a form of difficulty that simply
10 hasn't been addressed.

11 It's not, as my learned friend suggests, a case
12 where the alternative is the company is just starved of
13 money. The alternative is a resolution going forward
14 that gives 60 days' notice, as the shareholders'
15 agreement provides, and is arrived at by proper pricing,
16 as is fair and commercially sensible. So it's not
17 a case of starving the company of money at all, it's
18 a question of getting there by a fair and proper process
19 that doesn't prejudice us.

20 Can I just deal with expedition? My learned friend
21 says, well, in terms of conduct in the meantime it
22 should all happen through the board, and my Lady makes
23 the absolutely correct point that if there was to be any
24 fair way of holding the ring in the meantime, that would
25 require an effective Carpentaria vote at board level,

179

1 which is not being suggested. That does, in my
2 submission, make a speedy trial particularly important.
3 In terms of my Lady's original suggestion of can we just
4 have the Eliasch and Sherway proceedings? We would be
5 happen with that.

6 My learned friend Mr Toledano is right, however, to
7 say that a very large swathe of the allegations in the
8 other proceedings are repeated in the Eliasch and
9 Sherway proceedings, so although I think it would
10 achieve some saving and certainly wouldn't lead to
11 duplication because findings in one would be binding in
12 the other, assume that is those allegations were tried
13 between all the parties at that time, it would still be
14 a fairly significant action, but in my submission that
15 is the right way to do it.

16 Just on the service out point raised at the very
17 end, that ought to be a non-point. All that's happened
18 is that it's not right to suggest that service was
19 accepted at the last hearing and so there has been
20 a quibble about the point of order. That doesn't mean
21 that people will necessarily be contesting service. In
22 the case of Mr Amanat, we do need to understand exactly
23 what the case is said to be before we accept service.
24 In the case of PHRL that of course is the holding
25 company, which is simply a JV company, but actually the

180

1 two parties ought to discuss how it is to act in these
2 proceedings, because it should be taking a neutral role.
3 So that's simply a question of really discussion between
4 the parties.
5 My Lady, there are one or two miscellaneous
6 applications to serve out and so on in relation to the
7 new action. I don't know --
8 MRS JUSTICE ROSE: Well, I think you have missed your chance
9 with those. If we had been able to shortcircuit today's
10 proceedings, then we might have been able to get on to
11 other things, but we have not been able to do that.
12 MR HILL: So be it, my Lady. Equally in terms of amendments
13 to pleadings, then I hope those will be non-contentious.
14 MRS JUSTICE ROSE: All right. I am going to just think what
15 the best way to deal with this is. I think what would
16 be best is actually I will rise and not everyone needs
17 to stay, if you don't all need to stay. I am afraid the
18 court staff will have to stay. I will come back as
19 close to 5.30 as I can make it. Thank you.
20 (4.50 pm)
21 (A short break)
22 (5.30 pm)
23 RULING
24 MRS JUSTICE ROSE: There are five interim applications
25 before me, all brought by the claimant in these various

181

1 proceedings, Peak Hotels. The proceedings have become
2 rather complex procedurally, so what follows is a very
3 broad description of the dispute.
4 The proceedings arise out of the acquisition earlier
5 this year by a group of investors of a number of resorts
6 and hotels around the world called the Aman Resorts.
7 The cost of the business acquired was about
8 \$358 million, and they were acquired by a joint venture
9 company formed for this purpose.
10 The operating company of the Aman Resorts is
11 a company called Silverlink, and the moving spirits
12 behind the joint venture were Mr Amanat, who is the
13 shareholder of the claimant company; Mr Zecha, who was
14 the long time owner and developer of the Aman Resorts;
15 Mr Doronin; and Mr Eliasch.
16 The claimants allege in their proceedings that
17 Mr Doronin and Mr Eliasch are in effect trying to force
18 the claimants and other companies connected with
19 Mr Amanat and Mr Zecha out of the venture by seeking to
20 dilute the claimants' shareholding and thereby gaining
21 ultimate control of the Aman Resorts.
22 Peak says broadly that the joint venture is supposed
23 to work on the basis that Mr Amanat's and the claimants'
24 interests as shareholder A are represented on the board
25 of the joint venture by two A directors, and the

182

1 interests of the defendant Tarek Investments Limited,
2 which is a vehicle of Mr Doronin, they are the B
3 shareholders, and they are represented by the B
4 directors on the board, which are currently Mr Doronin
5 and Mr Djanogly.
6 Peak has already sought injunctive relief from the
7 court on a number of occasions. Injunctions were
8 granted by Catherine Newman QC, sitting as a deputy
9 High Court judge, on 14 July 2014, and there was later
10 relief given both by her and by Robert Englehart QC,
11 also sitting as a deputy, on 18 July.
12 The shareholders' agreement is dated 31 January 2014
13 and contains a number of provisions which are important
14 for understanding this dispute between the parties.
15 Clause 6 of the agreement deals with the A and B
16 directors being appointed by the A and B shareholders,
17 and provides that the directors must act in good faith
18 for the benefit of the company. In that regard,
19 Mr Howard QC, appearing today for Tarek Investments
20 Limited, pointed me to the articles of association of
21 the company which provide in clause 9.5 that the
22 directors must exercise their power for a proper
23 purpose, although significantly clause 9.4 provides that
24 the director may act in the best interests of the
25 holding company, even though that may not be in the best

183

1 interests of the company.
2 Clause 6.2(c) of the shareholders' agreement
3 provides that at least five business days' notice of
4 a board meeting must be given to all directors
5 accompanied by an agenda. A shorter period of notice
6 can be given if both an A director and a B director
7 agree in writing, and similarly, matters not on the
8 agenda circulated for the meeting cannot be raised at
9 the board meeting unless an A and B director agree
10 in writing. The quorum at the meeting is at least one A
11 and one B director.
12 Significantly, clause 6.2(i) provides that any A or
13 B director can request the adjournment of a board
14 meeting to another time or date, and no business can be
15 conducted at a meeting after such a request has been
16 made. Notwithstanding the inequality in the
17 shareholdings of the parties, they therefore have equal
18 representation at the board level, so that it is
19 potentially a deadlocked company.
20 Clause 5.4(a) and (b) of the shareholders' agreement
21 deal with additional capital, and say that there is to
22 be no capital call of more than \$60 million. It also
23 makes provision for what is to happen if one of the
24 partners does not pay in, if there is a capital call.
25 I will need to come back to that later.

184

1 Clause 6.6(a) provides that Mr Zecha, who is now
 2 an elderly gentleman, is the initial CEO of the joint
 3 venture for the first six months. There is a dispute
 4 between the parties as to the effect of this. Peak say
 5 there is no automatic termination of Mr Zecha's role
 6 after six months, and that it still requires
 7 a resolution of the board to remove him after that time;
 8 but Tarek say that he does have to stand down after six
 9 months unless re-appointed. This matter was dealt with
 10 in the earlier judgment of Catherine Newman QC, but it
 11 has been rather overtaken by events, in that Peak,
 12 having previously wanted Mr Zecha to stay on as CEO,
 13 have now proposed a different CEO, but the clause
 14 provides that after Mr Zecha stops being the CEO, he
 15 will be the chairman of the resorts business or the CEO
 16 of another company called AMBV, as decided in
 17 discussions between him and the board.

18 Clause 14.3 of the agreement provides that there
 19 shall not be an artificial deadlock created by failing
 20 to attend meetings, and Mr Howard relies on that clause
 21 as saying that they also cannot create a deadlock by
 22 constantly adjourning meetings.

23 Clause 23.1 provides that voting rights must be
 24 exercised properly and promptly.

25 As regards additional funding, it is common ground
 185

1 that the subscription originally was on the basis of the
 2 price of \$5,000 a share, and it's also agreed that they
 3 would put in \$50 million from the shareholders.

4 Clause 5.4(d) provides that immediately after
 5 completion of the shareholders' agreement, there must be
 6 notice of a capital call-up of \$50 million, which must
 7 be complied with within 60 days, and the shareholders
 8 agree that they shall instruct their nominated directors
 9 to comply with this course.

10 According to the claimants, in February 2014, that's
 11 shortly after the shareholders' agreement was entered
 12 into, Mr Amanat was introduced to Mr Eliasch. By this
 13 time there were already tensions arising between
 14 Mr Amanat and Mr Doronin. Mr Eliasch, it is said, told
 15 Mr Amanat that if he was appointed to the board he would
 16 support Peak's rights under the joint venture, and it is
 17 alleged that Mr Eliasch in fact concealed from Mr Amanat
 18 that he, Mr Eliasch, was a good friend of Mr Doronin.

19 Relations between Mr Amanat and Mr Doronin rapidly
 20 became acrimonious. In April 2014, a company called
 21 Sherway Group Limited, which is the vehicle of
 22 Mr Eliasch, entered into an agreement with the claimant,
 23 Peak, under which Sherway would obtain an indirect
 24 interest in the joint venture in return for a loan
 25 facility of \$50 million to Peak.

186

1 Mr Eliasch then became an A director in the joint
 2 venture, nominated to that post by Peak, and Peak's
 3 basic claim is that Mr Eliasch was supposed, under these
 4 agreements, to co-operate with Peak in exercising his
 5 votes as one of the two A directors and generally act in
 6 a way designed to safeguard Peak's investors, because
 7 the A directors are supposed to consider the interests
 8 of the A shareholders when exercising their directorial
 9 role.

10 Mr Eliasch, I should say, strongly denies that this
 11 was the nature of their relationship. He says that he
 12 has invested a very substantial amount of Sherway's
 13 money into the venture, and that he is entitled to
 14 exercise his voting rights as director as he sees fit,
 15 and not necessarily in agreement with Mr Amanat and
 16 Peak. His evidence is that the present stance that he
 17 has taken in the course of the conduct so far of the
 18 joint venture is nothing to do with his friendship with
 19 Mr Doronin, but acting in the best interests of the
 20 joint venture. He denies that he was appointed to act
 21 as a nominee and says he has no obligation to act in the
 22 interests of Peak, but he acts to protect the interests
 23 of the joint venture, and to protect Sherway's
 24 investment.

25 The first action between these parties was started
 187

1 on 24 June 2014, brought by Peak against Tarek and
 2 Sherway Group. There was an injunction hearing on
 3 1 July, at which Tarek and Sherway offered undertakings
 4 on the issue of the capital calls and an enforcement
 5 notice served in relation to the Sherway arrangements
 6 until a return date fixed for September 2014, and there
 7 is a hearing fixed in that month to deal with those
 8 claims for injunctive relief.

9 At the hearing before Catherine Newman QC, the only
 10 live issue was therefore the issue of Mr Zecha's
 11 continued role as CEO of the joint venture. After the
 12 hearing, she reserved her judgment, and she circulated
 13 her draft judgment on 9 July in which she made clear
 14 that Mr Zecha would be reinstated to the post until
 15 31 July. She handed down judgment on 14 July, and she
 16 said that on the basis of the shareholders' agreement it
 17 was clear that Mr Zecha should not continue in post
 18 beyond 31 July unless both parties agreed, and she noted
 19 that they were unlikely to do so.

20 There was then a series of events in which there was
 21 short notice purportedly given for a number of board
 22 meetings and for additional matters to be added to the
 23 agendas of board meetings, and Mr Eliasch signed his
 24 consent in his capacity as an A director to the short
 25 notice being given and to the addition of items to the

188

1 agenda, even though that was not how Peak wished matters
2 to proceed. In response to those actions, Carpentaria,
3 which is the other A director nominated by Peak,
4 notified various requests for the adjournment of
5 meetings.

6 A second action was started on 13 July, brought by
7 Peak against Sherway Group and Mr Eliasch, and that
8 action sought declarations that Peak was entitled to
9 rescind the shareholders' agreement on the basis of
10 Mr Eliasch's alleged misrepresentations, and also
11 declarations that it was entitled to accept Sherway's
12 repudiatory breaches of those arrangements. That also
13 sought injunctions, amongst other things, to stop
14 Mr Eliasch from consenting to the calling of meetings at
15 short notice or to the addition of items not on the
16 original circulated agenda.

17 On 14 July, Catherine Newman QC handed down her
18 judgment as to Mr Zecha's continued role in the post
19 which had been the subject of the application in the
20 first action. Applications for injunctions in the
21 second action that were also returnable on that day were
22 dealt with by injunctions, holding the ring until
23 a further hearing due on Friday 18 July.

24 By emails dated 15 and 17 July, Mr Djanogly, who is
25 one of Tarek's nominated directors, circulated notices

189

1 for two further board meetings to be held on Wednesday
2 23 and Friday 25 July. The agenda for those meetings
3 included a further discussion of the position of
4 Mr Zecha and the appointment of an interim CEO after
5 31 July, and the agenda for the 25 July meeting
6 concerned a \$50 million capital call-up.

7 There was a hearing before Mr Robert Englehart QC on
8 18 July in which both sides had applications for
9 injunctive relief. The claimants were initially seeking
10 injunctions to stop Mr Eliasch from consenting to short
11 notice of board meetings, but in fact matters progressed
12 on the day on the basis that they were seeking to
13 prevent Mr Eliasch voting without their approval. This
14 was on the basis that Peak had accepted his repudiatory
15 breach of the Sherway arrangements and withdrawn his
16 authority. At the same hearing, Sherway applied for
17 an injunction first stopping Peak from serving notice
18 seeking to remove Mr Eliasch from the board, and
19 secondly seeking to prevent Peak from adjourning the
20 proposed meetings on the ground that Tarek had not
21 procured that Mr Eliasch should not attend the meetings.

22 The parties before me today differ as to what they
23 say the import was of Mr Englehart's decisions. What
24 the court ordered was that the claimants' application
25 was refused except that the injunction for the benefit

190

1 of Peak to stop Mr Eliasch agreeing to short notice of
2 board meetings and to additions to agendas was continued
3 in force, and the recital to the order recorded that
4 Peak had threatened to adjourn the proposed meetings on
5 23 and 25 July if Mr Eliasch was not removed as
6 a director, and an injunction was granted in favour of
7 Sherway and Tarek, restraining Peak from adjourning the
8 meetings on the grounds that Tarek had not removed
9 Mr Eliasch as a director.

10 Mr Hill QC, appearing for the claimants today, says
11 that the effect of the hearing and the decision of the
12 deputy judge was that, because Peak had power to procure
13 the adjournment of the board meetings and had previously
14 been effective in exercising that right, a continuation
15 of the injunction stopping Mr Eliasch from agreeing to
16 short notice was really all the relief that was needed,
17 and he says that that was the basis on which the judge
18 also restrained Peak from relying on the steps that it
19 had purported to take to remove Mr Eliasch from the
20 joint venture's board?

21 The idea was, Peak submits, that Mr Eliasch be
22 permitted to continue to attend and vote at board
23 meetings, but that also Peak should be able to continue
24 to exercise its power to adjourn meetings because there
25 could be no short notice agreed to by Mr Eliasch.

191

1 Peak say that at the hearing before Mr Englehart,
2 the status of the meetings proposed for 21, 23 and
3 25 July were discussed, and it was clear that the judge
4 was not planning to interfere with Peak's broad right to
5 request adjournments of those if it saw fit.

6 In his judgment, as was pointed out to me,
7 Mr Englehart said that there could be no damage by
8 postponing the business of the following week's planned
9 meetings, because there was only a short time to go
10 until the September hearing and there would be no
11 serious damage to the business of the company in the
12 intervening period.

13 Mr Howard says that's not a true characterisation of
14 what the judge decided. His decision in refusing to
15 grant relief to stop Mr Eliasch voting at the meeting,
16 and instead restraining Peak from adjourning the meeting
17 on the grounds that Tarek had refused to remove
18 Mr Eliasch, they say that the judge was envisaging that
19 the meetings would go ahead and that Mr Eliasch would be
20 able to vote. To seek now, they say, to adjourn the
21 meetings or to declare the resolutions of those meetings
22 invalid on the basis that Mr Eliasch should not have
23 been allowed to vote is contrary, they say, at least to
24 the spirit if not to the letter of Mr Englehart's order.

25 Having considered the judgment of Mr Englehart and

192

1 the passages in the transcript to which my attention was
 2 drawn, it is not clear to me that the judge, in granting
 3 the injunction presenting Peak from seeking to adjourn
 4 the meeting for one particular reason was, in effect,
 5 saying that Peak had generally lost the power to request
 6 the adjournment of meetings. At that time, although the
 7 notice calling the meetings had been served, there had
 8 been no request for adjournment yet and no reasons put
 9 forward why the meetings should be adjourned; there was
 10 only the belief that the reason threatened for
 11 a proposed request for adjournment was that Tarek had
 12 not removed Mr Eliasch from the board.

13 Reading the relevant passages, particularly in
 14 paragraphs 28 to the end of the judgment, I accept
 15 Mr Hill's submission that it does appear that
 16 Mr Englehart assumed that there could be an adjournment
 17 of the meetings so that there would be no capital call
 18 and no change in the position of the CEO until the
 19 return date in September, and that is why he referred to
 20 there being no particular urgency about the money for
 21 the capital call.

22 It also seems to me that the reason why Peak
 23 ultimately requested an adjournment of the 23 and
 24 25 July meetings was not because Tarek had refused to
 25 remove Mr Eliasch as a director because they objected,

193

1 but because they objected to the substantive issues that
 2 were on the agenda. So although it's true that the
 3 court enjoined them from adjourning the meetings on the
 4 grounds that Tarek had not procured the removal of
 5 Mr Eliasch, I do not read that as meaning that they
 6 could not request the adjournment of any other meetings
 7 at which they feared that Mr Eliasch would vote on
 8 issues which they believed to be in favour of Mr Doronin
 9 and at Mr Amanat's expense.

10 So I do not agree that Peak's conduct here is
 11 anything approaching a breach of the earlier
 12 injunctions.

13 What happened after the hearing on 18 July is that
 14 problems continued. Mr Djanogly circulated a new item
 15 for the meeting on 23 July late on Sunday evening of
 16 20 July. On 21 July, Carpentaria, who are the other
 17 director nominated to the board by Peak, wrote to
 18 Herbert Smith Freehills, acting for the defendants,
 19 requesting an adjournment of the three board meetings
 20 scheduled for 21, 23 and 25 July, and it was proposed
 21 that they be consolidated into a single meeting.

22 Herbert Smith Freehills wrote back on 22 July
 23 alleging that the request for adjournment was being
 24 exercised in bad faith, and was therefore invalid. They
 25 were prepared to agree that, as long as the meeting was

194

1 not postponed further than 30 July, the other meetings
 2 could be delayed until that date.

3 Candey LLP, who act for Peak Hotels, replied on
 4 23 July denying that there was any bad faith or that
 5 there was any fetter on their absolute right to request
 6 an adjournment, and in reply, Herbert Smith Freehills
 7 reiterated its assertion that the purported adjournment
 8 request was invalid and stated that the meetings would
 9 go ahead.

10 The meetings did go ahead on 23 and 25 July, without
 11 of course the attendance from anyone from Carpentaria,
 12 and several resolutions were purportedly passed, and
 13 it's those resolutions which are the subject of the
 14 injunctive relief claimed today, as Peak seek to
 15 restrain the implementation of the resolutions that were
 16 passed at those two contested meetings.

17 So turning to the injunctive relief sought, the main
 18 injunctive relief, as I said, is to restrain the joint
 19 venture from giving effect to any of the resolutions
 20 said to have been passed on 23 and 25 July, and there
 21 are ancillary injunctions sought against Tarek and
 22 Sherway to make sure that their directors comply with
 23 this.

24 As regards the resolutions passed on 23 July, these
 25 were, first, the removal of Mr Zecha as CEO on

195

1 1 August 2014; second, his replacement by Mr Greg Sirois
 2 as interim CEO; and, third, the establishment of
 3 a special committee of the board to oversee and
 4 negotiate the terms of employment which committee was to
 5 consist of Mr Djanogly and Mr Eliasch.

6 At the meeting of 25 July, there was a resolution
 7 for a capital call for \$50 million to provide working
 8 capital and capital expenditure requirements at the
 9 price of not more than \$5,000 per share.

10 The first question is: is there a serious issue to
 11 be tried as to the validity of these resolutions passed
 12 at these two meetings on 23 and 25 July? And that
 13 means: is there a serious issue as to whether the
 14 request for an adjournment by Carpentaria on behalf of
 15 Peak is arguably valid, in which case no business should
 16 have been done at those meetings, according to the
 17 shareholders' agreement.

18 Peak argues that the matter is straightforward,
 19 clause 6.2(g) of the shareholders' agreement provides
 20 that any A or B director can request the adjournment of
 21 a board meeting to another time or date. Mr Hill says
 22 this is not the normal board of a normal company, but
 23 a joint venture where the directors are supposed to act,
 24 so far as is consistent with their general duties, in
 25 accordance with the wishes of the shareholders.

196

1 Carpentaria clearly wrote requesting an adjournment and
2 set out the reasons in its letter of 21 July for doing
3 so.

4 Is the power of the directors to request
5 an adjournment subject to a proviso that it can only be
6 exercised for a proper purpose and in good faith?
7 Mr Howard says it is subject to that proviso, and he has
8 set out in his skeleton argument various authorities
9 that he says support the idea that there are those two
10 fetters on that power.

11 I do not regard it as at all clear cut that there
12 must be some fetter on the exercise of the power, for
13 the reasons that Mr Hill says, that the power is part of
14 a structure in which A directors and B directors are
15 both supposed to be in agreement, at least one of each,
16 as regards what happens and the right to an adjournment
17 is part and parcel of the structure of arrangements
18 which balance the powers of the two shareholders in this
19 joint venture.

20 I will go on to consider whether, if there is such
21 a fetter, there is an arguable case that there was
22 a proper purpose here, or is it arguable that the power
23 was exercised in good faith?

24 Tarek says the only real purpose behind the exercise
25 of this request to adjourn is that Peak is concerned

197

1 that the way Mr Eliasch has voted in the past shows that
2 he is likely to side with Mr Doronin and Mr Djanogly in
3 any contentious vote, and not with Carpentaria.
4 Mr Howard submits that this cannot be a proper purpose
5 for exercising the power to adjourn.

6 In my judgment, Mr Howard's submissions ignore the
7 reality both of the structure of this company and how
8 the shareholders' agreement indicates it's supposed to
9 operate, and also the history of Mr Eliasch's conduct in
10 relation to the earlier board meetings and the short
11 notice requests and amendments to the agendas, in which
12 he has, for whatever reason, generally sided with
13 Mr Doronin and not with the representative from
14 Carpentaria.

15 The question is, therefore, whether if it's true
16 that the only reason for requesting an adjournment is
17 for the purpose of stopping Mr Eliasch voting with the
18 Doronin camp on matters which Mr Amanat considers are
19 inimical to his interests, if the question is whether
20 that is a proper purpose, then I consider it's certainly
21 arguable that it is a proper purpose, and I do not
22 consider that the court has previously decided this
23 against Peak on the basis that it rejected the idea that
24 Tarek is currently obliged to remove Mr Eliasch as
25 a director.

198

1 I therefore consider that there is a triable issue
2 as to whether the meetings on 23 and 25 July were
3 validly convened and whether the resolutions passed at
4 those meetings were validly passed, and should be
5 implemented.

6 So I turn then to the question of whether the
7 resolutions should stand and be implemented, or whether
8 an injunction should be granted to restrain that.

9 As regards the resolutions at the 23 July meeting,
10 Peak submit that there is no urgent need to consider the
11 position of the CEO; Mr Zecha is able to act and has the
12 qualities necessary to do so. However, things moved on
13 during the course of today's proceedings in that Peak
14 have offered, as an alternative, that
15 Mr Olivier Jolivet, who is currently involved in this
16 joint venture scheme, should take over as CEO on
17 an interim basis, and I am told that there are
18 headhunters currently seeking a full-time CEO for this
19 business.

20 Mr Howard described Tarek's position on this, which
21 is that they do not have any objection to Mr Jolivet and
22 could live with a resolution to appoint him as the CEO,
23 but in relation to Mr Zecha they say that he should
24 cease to be a CEO, and his future can be discussed at
25 a meeting which is due to be held on 15 August. If the

199

1 board cannot agree either amongst themselves or with
2 Mr Zecha as to what his function should be, then we will
3 have to take matters forward from there.

4 So on the basis of that, I consider it is
5 appropriate to grant injunctive relief. The injunctive
6 relief should be that the resolution that Mr Zecha
7 stands down as of today still stands. The resolution
8 that Mr Sirois is appointed should not be implemented,
9 but instead there should be a resolution appointing
10 Mr Jolivet as interim CEO. I do not consider that
11 I have enough information to make any further provision
12 as to Mr Zecha's position, because there is no real
13 proposal on the table as to what Mr Zecha's future role
14 should be other than the rather vague position referred
15 to in the clause of the shareholders' agreement that he
16 should either be involved in the resorts business or
17 the chairman of the other company, and I accept what
18 Mr Howard says, that there is a discussion to be had
19 with Mr Zecha about what the nature of his
20 responsibilities would be in either of those roles and
21 what his remuneration and other terms and conditions of
22 employment should be, and those are not matters which
23 I can deal with in these proceedings or which can be
24 taken for granted by making some kind of order in
25 relation to his future involvement in the company.

200

1 I agree with Mr Hill's submissions that the
2 subcommittee proposed looks like a recipe for further
3 dissention and controversy, and if there are discussions
4 to be had about the future CEO and about Mr Zecha's
5 position, then they should be had by the whole board and
6 not by a subcommittee whose members represent only one
7 of the contending interests on this board.

8 As regards the resolutions at the 25 July meeting,
9 these concern, as I have said, the capital call for
10 \$50 million. Mr Howard says that there can be no
11 argument but that this resolution should stand, the
12 \$50 million is only the capital call that was envisaged
13 in the shareholders' agreement and which was voted on by
14 the board at a meeting on 11 April 2014, and so he says
15 there can be no real argument but that the capital call
16 should go ahead.

17 He accepts of course that the price of the capital
18 call is not settled in the shareholders' agreement, but
19 this, he says, is because the shareholders' agreement
20 envisaged that the capital call would occur immediately
21 after the conclusion of the shareholders' agreement, and
22 so it was expected that it would be at the same price as
23 the price to which they had subscribed for the original
24 shares.

25 He says that the evidence shows that the price of
201

1 the shares cannot be more than that, because if the
2 value of the company has changed at all in the interim,
3 it has declined and the price would be lower, so there
4 can be no problem about having a price of \$5,000,
5 because that protects any concerns that Peak has about
6 the potential dilution of their shareholding.

7 I do not accept that those submissions are right.
8 It is true that the parties envisaged that the capital
9 call would be immediately after the shareholders'
10 agreement, but that is not what happened, and the
11 capital call is only now being made, with a price
12 attached to it, and of course the price is a very
13 important aspect of the capital call. There is
14 a dispute over how much notice needs to be given for the
15 call. Again, the shareholders' agreement clause
16 provides for 60 days after completion of the
17 shareholders' agreement, again on the supposition that
18 the call would occur immediately after the shareholders'
19 agreement was concluded, and the parties disagree as to
20 what, if any, notice period there should be for the
21 capital call given now.

22 Tarek has purported in the resolution to give two
23 weeks' notice, and Peak say they are entitled to
24 60 days, as envisaged in the agreement, and that in any
25 event, two weeks' notice is far too short a period for
202

1 them to consider properly what response they wish to
2 make to the capital call at the price of \$5,000 a share.

3 Peak also say that they do not accept that the price
4 should be the same as the price at subscription, given
5 that a lot has happened in the company, and they don't
6 accept that \$5,000 is the maximum proper price for the
7 shares.

8 So I do not accept that it is a straightforward
9 matter to say that Tarek are entitled to the capital
10 call on the basis of the provisions of the shareholders'
11 agreement.

12 Tarek say that there is a great urgency about the
13 need for money to come in to the company at this point,
14 and they put forward a number of reasons supporting
15 that.

16 First, there is apparently an accounting methodology
17 problem leading to an issue with whether the accountant
18 auditors will agree to certify that the business of
19 Silverlink, the operating company, is a going concern.
20 The suggestion is that they need to show that this money
21 is available in order to satisfy the auditors.
22 Mr Amanat has dealt with this in one of his witness
23 statements, and he says his understanding is that it
24 would be enough to satisfy the auditors to show that the
25 parent companies have assets of \$50 million, without the
203

1 need for a capital call. Mr Jolivet, who has given
2 a short witness statement shortly before this hearing,
3 does not address this particular point, although
4 generally he does support the evidence given by
5 Mr Doronin.

6 Tarek submits that this point has been on the agenda
7 of adjourned meetings in the past, and the reason why
8 it's not been discussed to the satisfaction of Peak is
9 that those meetings have been adjourned by Carpentaria
10 exercising its rights to adjourn the meetings. But it
11 seems to me that if there really was a serious problem
12 with convincing the auditors of the viability of
13 Silverlink as a going concern, that this could be dealt
14 with in some other way than this contentious capital
15 call.

16 It is also argued that the need for money is for the
17 investment in a hotel to be acquired in Tokyo. Again,
18 Mr Hill complains that his clients have not been
19 provided with information to back this up. Mr Amanat
20 reports in his witness statement at that Mr Zecha, who
21 is in charge for the moment of the operating company,
22 says there is no immediate need for cash funds, although
23 I agree there is an ambiguity about precisely what he
24 means by that. Mr Jolivet, in his recent witness
25 statement, deals with the Tokyo hotel and he agrees that
204

1 money will need to be spent, and that it needs to be
 2 opened as soon as possible, but it's not clear that he
 3 entirely endorses everything that Mr Doronin has said in
 4 his witness statement. Mr Howard points to a letter
 5 from Mr Sirois dated 7 July 2014 to those acting on
 6 behalf of Peak, explaining why the company will suffer
 7 enormous loss, and so he says that it's not true that
 8 this point has come out of the blue, and there is
 9 nothing rebutting Mr Sirois' letter.

10 Taking into account all the evidence that I have
 11 seen, I am not convinced that there is really any
 12 urgency that requires this capital call passed at
 13 a meeting, the validity of which was always going to be
 14 under challenge, to be implemented.

15 I agree with Mr Hill that the balance of convenience
 16 lies firmly in favour of this capital call not being
 17 implemented in its current form. If it goes ahead, at
 18 the price into which Peak has had no input, then Peak is
 19 put to the position of having to decide whether to
 20 subscribe or not. If it decides not to, then it risks
 21 being found to be in breach of the shareholders'
 22 agreement, and there is also the provision in the
 23 shareholders' agreement that if a partner does not take
 24 up the capital call, then the other partner gets double
 25 the number of shares. If they decide that they should

205

1 take up their proportion of shares, which I am told
 2 would be to the value of over \$17 million, then they are
 3 required to put substantially more money into the
 4 company, about which there is so much current acrimony.
 5 There is a risk that the money will be spent away, and
 6 indeed that's, I gather, the intention, and I can see
 7 that there will be very serious problems in unwinding
 8 these arrangements later if it is found that the meeting
 9 and the resolutions were invalid and the capital call
 10 resolution was invalid and the shares were not properly
 11 issued. I do not accept Mr Howard's submission that his
 12 clients are the only ones who would be damaged by the
 13 difficulties that will arise if that is the situation,
 14 and I do not consider that this is all at their risk.

15 There is a clear disadvantage to the claimant in
 16 having to choose whether to subscribe a large amount of
 17 money for a share issue that they regard as invalid and
 18 which is set at a price that they do not regard as
 19 having been properly throughout through. It will be far
 20 better, in my judgment, for any proposals for a capital
 21 call to be considered after the September hearing, and
 22 I will therefore grant an injunction preventing the
 23 implementation of the capital call resolution made at
 24 the meeting of 25 July.

25 One additional point that was made was put forward

206

1 particularly by Mr Toledano QC, appearing today for the
 2 Sherway Group and Mr Eliasch, which is to challenge the
 3 support and fortification of the cross-undertaking in
 4 damages. He handed up a clip of correspondence,
 5 starting with letters on 24 July, in which Mr Eliasch's
 6 solicitors raised this problem. There has been a debate
 7 then between the parties through correspondence as to
 8 the value of Peak's shareholding in the joint venture
 9 and as to the debts of the company and hence the overall
 10 liabilities rather than assets of the claimant company.

11 It seems to me that there is a question mark over
 12 whether the cross-undertaking is adequately supported,
 13 not only in relation to Mr Toledano's clients, but also
 14 in relation to Mr Howard's clients, and the injunctions
 15 that I grant will be on the basis that further evidence
 16 has to be provided by Peak to show that there is
 17 a substantial backing for the cross-undertaking that
 18 they need to give in support of the injunctions which
 19 I would otherwise order.

20 Mr Hill offered to provide better evidence of the
 21 £50 million cash being available which was discussed in
 22 the correspondence, and the parties need to discuss
 23 whether £50 million is sufficient for the
 24 cross-undertaking and what more needs to be provided,
 25 and I will therefore give liberty to apply in case there

207

1 are problems in putting that together.

2 The second main form of relief that was being sought
 3 today was an order for expedition of the trials of this
 4 matter, of these various proceedings. Mr Hill says this
 5 is a paradigm case for a speedy trial: in contentious
 6 joint ventures of this kind, there needs to be final
 7 determination as soon as possible. This is a very
 8 significant company by value, it has a lot of employees,
 9 a lot of partners in the various resorts who depend on
 10 it, and everybody wants to know what's going to happen
 11 to the company as soon as possible.

12 On this point, I agree with Mr Howard and
 13 Mr Toledano's submissions that it is far too early to be
 14 considering directions for an expedited hearing. This
 15 whole dispute only dates back to the beginning of this
 16 year, and proceedings have only recently been commenced.

17 Mr Toledano pointed out to various very preliminary
 18 procedural skirmishes that may take place as regards
 19 service out of the jurisdiction on Mr Amanat and on the
 20 holdings company, and questions as to which of the four
 21 sets of proceedings should go ahead and which should be
 22 stayed.

23 I did float the idea of whether there was some value
 24 in trying to pull out from the morass of issues an issue
 25 about the nature of the role of Mr Eliasch and the

208

1 relationship of Mr Eliasch and Sherway to Peak Hotels,
2 but I am told that it is not at all a simple matter.

3 I also expressed my view first thing this morning,
4 and I reiterate that view, that it is unhelpful to pitch
5 the parties immediately into preparing for an expedited
6 trial when all sides should realise that this matter
7 might benefit from a mediation before litigation gets
8 too much further underway.

9 This is a joint venture company in which it was
10 envisaged that the parties would be able to co-operate
11 and take the development of this substantial business
12 forward. It seems that they are not able to co-operate,
13 and a mediation may well help them, either to resolve
14 their differences and move forward together in
15 a different manner from the manner in which matters have
16 been conducted so far, and if they cannot do that, then
17 clearly there will have to be an arrangement whereby one
18 of them exits the scheme, and the other one pays them
19 some amount to be worked out, but it seems to me that
20 that is a more hopeful avenue to pursue, and that avenue
21 would not be assisted by an order now that there be
22 an expedited trial, and I will not make that order.

23 That, I think, is as much as I am able to achieve
24 today.

209

1 Further discussion re ruling and costs
2 MR HILL: I am grateful, my Lady, and also obviously
3 grateful to my Lady for sitting so late.
4 Just on our obligation obviously to put in further
5 evidence on our cross-undertaking.
6 MRS JUSTICE ROSE: Yes.
7 MR HILL: Could I make clear that in terms of the
8 50 million, my submission is that the 50 million is
9 available, but obviously the way the debate ran, at the
10 moment that was offset against a 50 million Sherway
11 liability. I wasn't saying there was a clear net
12 positive balance on my learned friend's arithmetic, it's
13 sort of net balance sheet of 50 million.
14 MRS JUSTICE ROSE: Well, there is work to be done if --
15 MR HILL: Yes, exactly, I was going to say it may be
16 academic because what I take on board and accept is we
17 need to put in better evidence of our ability to what we
18 can put up to show for cross-undertaking.
19 MRS JUSTICE ROSE: I am not interested in whether it is
20 50 million or whether it is a flat in Belgravia or
21 whatever.
22 MR HILL: Exactly, I understand -- I just didn't want my
23 Lady to be --
24 MR JUSTICE ROSE: Or whatever else is sometimes rustled up
25 in these circumstances to stand for security.

210

1 MR HILL: Could we perhaps discuss the process for this?

2 MRS JUSTICE ROSE: Yes. Sorry, did you want to say
3 something?

4 MR HOWARD: I was going to say we need a proper timetable
5 and a short timetable, because I will come back to the
6 question of the injunction in relation to the capital
7 call, but we say that's going to cause actual loss very
8 quickly, there is no fortification at the moment at all
9 in fact, because I think there has been some confusion
10 created in everybody's mind about this 50 million.

11 MRS JUSTICE ROSE: Yes. As I say, I am not hanging
12 anybody's hat on the 50 million.

13 MR HOWARD: No, but the situation is very simple, the only
14 asset that they are saying they have is the shareholding
15 in the JVC, but against that they have very large
16 liabilities which include a 50 million liability to
17 Sherway, and of course Mr Hill wants to say "Well, we
18 can offset that because ultimately we say we are
19 entitled to do that", but of course that rather assumes
20 they succeed in their claim that there has been
21 a repudiation.

22 MRS JUSTICE ROSE: It seems to me that it's not right that
23 the security that is put up for the cross-undertaking is
24 the very shares in the joint venture company which is
25 the subject of the dispute. Is there no possibility of

211

1 some other external assets being put up?

2 MR HILL: That's exactly what we will explore.

3 MR JUSTICE ROSE: Yes.

4 MR HILL: It seems to me that what we need to do is put in
5 either a witness statement improving our description of
6 our asset position, or if we are not able to do that, in
7 fact, as my learned friend Mr Toledano suggested,
8 showing some other source of backing for
9 cross-undertaking.

10 MRS JUSTICE ROSE: Yes.

11 MR HILL: So we need to do that. Yes, we need to do it in
12 short order. Can I just take instructions on what is
13 a realistic timetable?

14 MRS JUSTICE ROSE: Yes.

15 (Pause)

16 MR HILL: My Lady, close of business Monday?

17 MRS JUSTICE ROSE: Yes. Is that acceptable, Mr Howard?

18 (Pause)

19 MR HOWARD: We can live with Monday, but -- and this is the
20 big but -- what has to be provided is either proper
21 information from which one can see precisely what are
22 the assets which are being said are sufficient to meet
23 the liability, or if they are not prepared in other
24 words to be completely transparent as to what their
25 financial position is, then they have to put up a real

212

1 guarantee of some sort.
 2 MRS JUSTICE ROSE: Yes.
 3 MR HOWARD: I want to make it clear, it's going to have to
 4 be for a large sum of money, because the net effect of
 5 what they are claiming to do by this injunction is to
 6 prevent this company proceeding, we say, with this Tokyo
 7 investment. That's the evidence before you. That is
 8 going to cause a very large loss potentially to this
 9 company.
 10 MRS JUSTICE ROSE: Yes.
 11 MR HILL: My Lady, in terms of how much it's got to be for,
 12 just as we are going to put in what we suggest is
 13 suitable evidence or whatever substantiating it, if my
 14 learned friend is going to say that's not enough because
 15 of the potential exposure, that's maybe a submission he
 16 has to make and it may be that obviously given where we
 17 are in the vacation, my Lady wants to end up resolving
 18 it with witness statements and written submissions on
 19 paper, if we get there, and I hope we won't get there,
 20 but it may be something that can be dealt with then.
 21 MRS JUSTICE ROSE: The more sensible course, is there going
 22 to be this meeting on 15 August?
 23 MR HILL: Yes. Well, I need to take stock of what's left.
 24 MRS JUSTICE ROSE: Right. What would --
 25 MR HILL: I think there are some things left for August,

213

1 I think, yes.
 2 MRS JUSTICE ROSE: All right. Well, you know, there is the
 3 possibility that the parties could agree -- a valid
 4 resolution could be passed to raise some money for the
 5 company which would resolve the problem, if there is the
 6 problem, about the Tokyo hotel. If there is that
 7 problem, then it seems to me in everybody's interests
 8 that that is resolved and the parties should try and
 9 resolve it in a way which means that your
 10 cross-undertaking is unlikely in any event to be called
 11 upon.
 12 MR HILL: Yes.
 13 MRS JUSTICE ROSE: Right.
 14 MR HILL: My Lady, then there is the question of costs.
 15 MRS JUSTICE ROSE: Yes.
 16 MR HILL: We have, we would say, substantially succeeded on
 17 the injunction applications. My learned friends could
 18 and should, we submit, have offered undertakings, and we
 19 simply seek our costs.
 20 MRS JUSTICE ROSE: Yes.
 21 MR HOWARD: Well, I would suggest it's entirely wrong, the
 22 idea of giving any award for costs at this stage.
 23 Everything is in fact, as I understand it, still being
 24 held over until September.
 25 MRS JUSTICE ROSE: Yes.

214

1 MR HOWARD: And really all of these costs orders will have
 2 to be visited at that stage. So, in my submission, the
 3 right thing to do is simply to reserve the costs for the
 4 moment.
 5 Can I just go back? I am slightly concerned that
 6 the evidence that Mr Hill's clients are going to
 7 provide, we just have to be very clear (a) that that has
 8 to be provided by --
 9 MRS JUSTICE ROSE: Do you have a figure for how much you say
 10 you want to see supported by the cross-undertaking in
 11 damages?
 12 MR HOWARD: Let me just ... (Pause). I would suggest that
 13 they ought to be able to show that they have free and
 14 clear assets of at least 50 million, and if they do not
 15 have that, then they have to put up a bank guarantee or
 16 something similar to that amount.
 17 MRS JUSTICE ROSE: Yes. Is that satisfactory?
 18 MR HILL: My Lady, no. On the evidence, there is -- the
 19 idea that the losses my learned friend is referring to
 20 are going to be 50 million are themselves -- the
 21 evidence doesn't substantiate that at all.
 22 MRS JUSTICE ROSE: But I thought that you were saying that
 23 you did have 50 million in cash?
 24 MR HILL: My Lady, yes, but this is the arithmetical point
 25 that my learned friend Mr Toledano is referring to.

215

1 Mr Howard is right, we rely on our shareholding, we have
 2 relied on our shareholding. I get the point, my Lady.
 3 We have relied on our shareholding. We have separately
 4 an amount of 50 million available, which is separate
 5 from our shareholding. We do have that.
 6 MRS JUSTICE ROSE: Good.
 7 MR HILL: So we have the shareholding, we have 50 million,
 8 but we also have, even on our case, a liability to my
 9 learned friend Mr Toledano's client of 50 million. The
 10 debate about the 50 million was about whether he was
 11 right to deduct 50 million when looking at the value of
 12 our shareholding.
 13 I have never accepted, and certainly wouldn't
 14 accept, that the potential exposure as a result of these
 15 injunctions could be anything like 50 million. That
 16 doesn't come close to being established on my learned
 17 friend's evidence, and I would say that we will
 18 obviously go away and by Monday put up what we suggest
 19 is as much as we can, and which is appropriate. I don't
 20 know that it won't be as much as 50 million, I can't say
 21 it won't be, but if it isn't, I am certainly not
 22 accepting that it ought to be 50 million or that
 23 Mr Howard has put in evidence that could possibly
 24 justify that.
 25 MRS JUSTICE ROSE: I am not in a position to say whether

216

1 50 million is likely to be more or less than the
2 ultimate cross-undertaking in damages. You must put in
3 your evidence as to what you have. I suggest you make
4 it as much as possible.
5 MR HILL: I understand, my Lady.
6 MRS JUSTICE ROSE: And if there is a clear concern on the
7 part of the other parties that that cross-undertaking is
8 insufficient, then they will have to come back to court
9 and get that dealt with.
10 MR HOWARD: As I understand it, he has to put in his
11 evidence by Monday, there then will be liberty to apply
12 and presumably that will be certified fit for vacation
13 business.
14 MRS JUSTICE ROSE: Yes.
15 MR HOWARD: I don't know, is your Ladyship sitting during
16 August?
17 MRS JUSTICE ROSE: No.
18 MR HOWARD: Then somebody else will have the pleasure of
19 dealing with that.
20 The other question is permission to appeal in
21 relation to the injunction relating to the capital call.
22 Essentially you have reached various views on the
23 construction, as I understand it, of the shareholders'
24 agreement and also as to the basis on which adjournments
25 can be sought, and again those are questions of law. So

217

1 Court of Appeal, I am afraid, and that goes for you,
2 Mr Toledano, as well.
3 Right. At 25 to 7 on the last day of term, the
4 court is rising. Thank you very much, everybody, have
5 a good break, if you are going to have a break at all.
6 I leave all these papers here, I think, as some other
7 lucky person will have to deal with it if it comes back.
8 (6.40 pm)
9 (The court adjourned)

1 we would submit that we should be entitled to go to the
2 Court of Appeal to deal with these points. We say this
3 matter is urgent and it's obviously very important, so
4 we ask you for permission.
5 MRS JUSTICE ROSE: Well, I -- yes?
6 MR TOLEDANO: I would say we also ask for permission to
7 appeal as well and on the question of costs we support
8 Mr Howard that these should be reserved and it's also
9 not right to say that the claimants have in any event
10 won on all points, which is what Mr Hill was suggesting,
11 because certainly in relation to the 23 July meeting,
12 but we, in any event, say it should be reserved to
13 September.
14 MRS JUSTICE ROSE: I am going to reserve the costs, not
15 least because it's not clear what's going to happen on
16 the cross-undertaking of damages and whether then we
17 will ultimately hold the injunction. On permission, to
18 appeal, as far as the points of law are concerned,
19 I dealt with the matter in your favour in a way,
20 Mr Howard, in dealing with it on the basis that there
21 was a proviso that the power to request an adjournment
22 should only be exercised for proper purpose, and in good
23 faith, and the rest of the decision was a matter of my
24 discretion applying the usual test, and therefore if you
25 want permission to appeal, you will have to go to the

218

1 INDEX
2 PAGE
3 HOUSEKEEPING1
4 APPLICATIONS FOR INJUNCTIVE RELIEF17
5 and EXPEDITED TRIAL
6 Submissions by MR HILL17
7 Submissions by MR HOWARD75
8 Submissions by MR TOLEDANO147
9 Reply submissions by MR HILL166
10 RULING181
11 Further discussion re ruling and210
12 costs

219

220

July 31, 2014

A	90:17 91:9 119:19 152:20 153:7 181:1 183:17,24 187:5,20 187:21 195:3 196:23 199:11 acted (2) 117:8 152:16 acting (16) 36:13 45:5 52:9 53:14,16,19 90:15 99:19 100:5 100:12 103:25 108:9 117:20 187:19 194:18 205:5 action (17) 5:20 26:7 26:13 29:11 80:24 99:21 163:11 164:15,19 165:13 180:14 181:7 187:25 189:6,8,20 189:21 actions (5) 1:13 164:22,22 165:24 189:2 active (1) 152:24 activities (2) 87:1 144:20 acts (2) 135:7 187:22 actual (7) 6:2 40:6 41:9 69:16 111:4 164:16 211:7 add (4) 69:16 79:2 154:5 164:10 added (1) 188:22 adding (2) 78:25 150:21 addition (5) 30:21 73:5 78:14 188:25 189:15 additional (13) 18:16 19:18 92:15 130:19 130:21,25 148:3 153:23 178:5 184:21 185:25 188:22 206:25 additions (2) 31:21 191:2 address (7) 57:9 96:22 130:9 137:10 151:18 161:19 204:3 addressed (7) 54:4 96:16,19,21 115:16 159:18 179:10 addressing (4) 65:21 114:11 160:8 175:21 adequacy (1) 56:17 adequate (4) 55:2 154:20 175:12,14 adequately (2) 33:18 207:12 adjourn (86) 2:4 10:13 10:24 20:25 21:1 25:14 28:20,23 29:4,23 31:4,22 32:8 33:10,22 34:18,25 41:10,25 45:8 49:8 51:15 52:6,9,14,19 53:7 54:22 55:8,21 75:9 80:3,5,22 81:22,24 82:6,10,11 83:9,16 84:5,11,15,24 90:5 96:3,5,7 97:4,9,20 98:23 99:3,15 101:7,9,15 102:4,9 102:11 103:4 107:16 112:24 113:12 114:18 115:5,18,24 117:25	118:24 120:11 121:24 124:25 144:2 151:1,5 167:6,18 191:4,24 192:20 193:3 197:25 198:5 204:10 adjourned (30) 7:18 7:20 27:21 35:3,15 36:2 51:2 86:13 100:13 102:17 106:16,16 113:14 116:20 117:25 118:10 124:11,14 124:20 125:17 128:5 138:20 141:8 141:8 146:13 174:3 193:9 204:7,9 219:9 adjourning (29) 10:14 34:5 35:2 47:2 51:13,25 53:19 79:21 80:8 81:6,12 83:7 92:3 97:5 102:23 116:24 118:15,21 119:22 123:16 125:13 133:17 141:14,15 185:22 190:19 191:7 192:16 194:3 adjournment (36) 2:6 11:2 16:9 33:8 46:14 54:6 57:4 59:10 82:20 98:10 99:6 100:1,15 103:2 115:19 138:11 184:13 189:4 191:13 193:6 193:8,11,16,23 194:6,19,23 195:6 195:7 196:14,20 197:1,5,16 198:16 218:21 adjournments (7) 11:3 11:6 47:3,6 83:20 192:5 217:24 adjourns (1) 84:7 adjust (1) 171:10 adopt (2) 147:10,21 adopted (1) 164:18 adopting (1) 163:4 Adrian (7) 21:16,16,19 87:7,13,18 124:13 advance (2) 113:10 173:25 advanced (1) 21:7 adverse (1) 28:9 advice (3) 135:23,24 136:1 advisers (1) 76:15 advocate (1) 23:8 affairs (1) 141:2 afraid (5) 85:23 130:4 151:24 181:17 219:1 afternoon (5) 127:2,4 131:22 137:9 147:2 age (1) 107:20 aged (1) 86:20 agenda (31) 2:17 4:12 5:10 20:20 29:24 30:21 31:22 33:21 35:18 43:14 50:25 78:15,25 79:2 80:15 106:18 122:5 124:6 129:2 138:19 143:14 146:12 150:22 184:5,8 189:1,16 190:2,5 194:2 204:6	agendas (3) 188:23 191:2 198:11 ago (5) 29:2 77:19 105:13 123:19 155:23 agree (34) 15:21,21 16:2 20:22 60:24 64:14 88:25 90:14 93:17 104:2,5 105:17 106:20 107:2,6,7,13 108:12 133:6 141:17 142:1 153:10 184:7,9 186:8 194:10,25 200:1 201:1 203:18 204:23 205:15 208:12 214:3 agreed (19) 7:11 8:6 15:8 38:1 60:19 64:17 93:24 104:14 104:15 105:8 111:8 132:5 133:18 149:12,15,18 186:2 188:18 191:25 agreeing (2) 191:1,15 agreement (86) 12:14 15:2 17:21 18:1 19:23 20:1,11 22:14,20,21 25:7 44:5 68:19 71:23 72:3,6 83:1 85:18 86:6 88:24 90:16 90:21,23 91:3,13 92:9,11,16 93:14 95:11,13 97:1 104:6,12 105:12 106:21,23 110:4,10 110:18 111:6 123:25 128:25 130:2,5,17 133:11 133:19 147:25 148:13 149:16 160:15 169:13 172:13 173:22 179:8,15 183:12,15 184:2,20 185:18 186:5,11,22 187:15 188:16 189:9 196:17,19 197:15 198:8 200:15 201:13,18,19,21 202:10,15,17,19,24 203:11 205:22,23 217:24 agreements (3) 165:12 169:16 187:4 agrees (4) 65:20 130:12 142:6 204:25 ah (3) 108:15 125:14 129:4 ahead (17) 12:25 41:24 45:22 100:25 101:6 113:7 138:13 141:8,23 144:3 154:2 192:19 195:9 195:10 201:16 205:17 208:21 aid (1) 160:19 ailing (1) 86:22 aim (2) 116:7 127:17 air (1) 77:18 akin (1) 52:18 alarming (1) 70:7 aligned (1) 153:10 allegations (13) 71:5 73:1 77:16 140:21 152:14 163:19,20	164:20 165:4,8,9 180:7,12 allege (1) 182:16 alleged (4) 23:21 150:23 186:17 189:10 alleging (1) 194:23 alliance (3) 25:2,25 27:25 allotted (1) 19:23 allow (8) 12:16 19:13 46:6 49:9 62:18 101:5 113:6 150:16 allowed (3) 27:23 91:25 192:23 allowing (3) 11:12 101:4 122:1 ally (1) 23:4 aloud (1) 48:12 alter (1) 149:19 alternative (9) 14:7 60:21 61:6 78:24 104:15 124:13 179:12,13 199:14 Alternatively (1) 59:13 alternatives (1) 57:12 altogether (1) 31:24 Aman (15) 17:14 37:19 68:5 86:19 127:11 152:12 153:8 155:21 156:1 157:13 160:7 182:6 182:10,14,21 Amanat (33) 2:3 16:19 16:25 22:24 23:2,3 23:17 26:10 65:4 65:16,24 66:2 68:24 76:9 110:13 122:11 126:6 162:7 162:16 174:17 180:22 182:12,19 186:12,14,15,17,19 187:15 198:18 203:22 204:19 208:19 Amanat's (11) 7:4,9 24:21 61:11 64:9 64:24 67:9 111:21 119:11 182:23 194:9 ambiguity (1) 204:23 ambitious (1) 52:12 ambitiously (1) 50:24 AMBV (18) 21:17 22:1 22:5,8 36:25 87:14 87:15 104:9,13,14 106:11,22 107:4 108:2 118:6 146:21 170:19 185:16 amenable (1) 36:20 amend (1) 1:17 amending (2) 80:15 137:12 amendments (2) 181:12 198:11 amount (21) 19:3,19 66:3 69:24 111:25 112:17 130:10,14 130:20,21,23,25 131:1 135:21 145:24 156:8 187:12 206:16 209:19 215:16 216:4 amounts (2) 14:25 84:19 analyse (1) 85:5 analysis (1) 64:2 ancillary (1) 195:21 and/or (3) 7:11 78:14	117:22 announced (1) 74:6 answer (11) 8:1 45:23 57:22 96:13 114:16 117:3 118:7 132:10 136:15 141:13 176:22 answers (1) 115:8 ante (1) 149:14 anybody (1) 94:24 anybody's (1) 211:12 anyway (11) 2:8 48:12 56:10 60:2,4 77:22 90:25 91:12 114:22 117:23 165:22 apart (1) 47:20 apologise (4) 2:21 46:19 59:4 120:23 apparent (2) 29:22 31:11 apparently (2) 67:14 203:16 appeal (6) 217:20 218:2,7,18,25 219:1 appear (4) 1:7 42:1 134:13 193:15 appeared (1) 176:17 appearing (3) 183:19 191:10 207:1 appears (7) 1:9,10 32:22 77:9 98:12 118:16 171:15 application (29) 1:12 1:12,14 8:2 28:15 29:6 30:8 41:9 46:19 49:19 50:15 58:24 78:5,6,22 78:6 80:12 102:1 102:11,15,16 118:14 144:7 150:25 152:9 163:13 176:1 189:19 190:24 applications (17) 1:17 10:3 17:3,11 78:4 97:25 99:10 144:4 147:23 165:23 166:9 181:6,24 189:20 190:8 214:17 220:4 applied (3) 50:10,23 190:16 applies (6) 10:6,7 54:14 61:25 66:25 114:13 apply (14) 10:9,9 26:1 34:21 51:17,21 55:21 157:24 158:12 162:15 175:11,25 207:25 217:11 applying (2) 168:7 218:24 appoint (9) 25:20 71:17 100:11 105:9 120:25 122:6 123:6 138:16 199:22 appointed (16) 8:22 88:5 105:19 108:1 113:17,18 114:23 118:5 121:8 152:19 171:17 172:1 183:16 186:15 187:20 200:8 appointee (6) 21:1 25:3 53:11 61:8,18 61:19 appointees (3) 25:9 50:2,6	appointing (6) 8:21 45:9,10 139:3 172:11 200:9 appointment (13) 8:19 20:3 45:15 50:9 60:20 80:1 87:3 116:10 144:16 170:18 171:5 172:14 190:4 appointor (1) 168:2 appointors (3) 167:12 167:16,19 appoints (1) 171:15 approach (3) 63:23 148:16,17 approaching (1) 194:11 appropriate (3) 40:25 200:5 216:19 approval (5) 78:23 79:7 95:19,23 190:13 approved (1) 149:17 approximately (2) 25:15 155:22 April (15) 23:23 24:8 26:2 93:23 109:23 110:4,19 123:21 129:1 133:19 149:17 160:4,5 186:20 201:14 arbitrarily (1) 69:20 arbitrary (3) 40:21,22 169:15 area (1) 19:21 areas (5) 2:20 24:13 47:20,24 48:3 arguable (8) 10:23 33:16 54:9 85:7 96:17 197:21,22 198:21 arguably (2) 22:11 196:15 argued (2) 31:9 204:16 argues (1) 196:18 arguing (1) 97:20 argument (36) 9:11 31:10,25 33:4 35:23 52:15 53:5 57:22,24 58:6,8,10 58:14,14,16 59:22 66:4,12 83:17 90:7 90:8 94:12 96:9 98:3,4 110:15 115:8 132:24 136:9 148:7 168:10,15 170:12 197:8 201:11,15 arguments (7) 1:20 9:10 29:3 34:1 49:23 51:19 110:22 arisen (5) 3:4 106:6 154:13 157:4,8 arises (1) 17:14 arising (1) 186:13 arithmetic (4) 175:17 175:17 178:15 210:12 arithmetical (2) 177:23 215:24 armed (1) 144:24 arrangement (7) 20:7 37:7 44:7 83:8 148:25 149:1 209:17 arrangements (14) 22:15,16 25:4,6,19 25:23 28:12 30:18 72:5 188:5 189:12
----------	--	---	--	---	--	--

190:15 197:17 206:8	attendance (1) 195:11	53:14,16,19 54:7,9	209:7	179:22,25 182:24	107:19 108:13	18:16,19 19:3,15
arranging (1) 15:10	attended (1) 6:25	54:12,21 55:8,11	Berwin (1) 157:19	183:4 184:4,9,13	120:3 123:11,12	19:16,19,24 24:14
arrive (1) 1:23	attenders (1) 108:6	55:13 194:24 195:4	best (16) 2:6 15:22	184:18 185:7,17	130:11 142:19	24:17 25:12 26:5
arrived (2) 47:4	attending (3) 30:23	balance (42) 11:8,10	69:25 91:9,11	186:15 188:21,23	148:2 152:12,25	27:7 38:9 40:25
179:15	31:5 83:6	11:11 13:2 34:20	117:9 136:4 138:3	190:1,11,18 191:2	153:1,9 154:4	43:6 45:17,18,21
arrives (1) 121:22	attention (4) 92:13	37:12 44:6 51:14	152:11,17 153:8	191:13,20,22	155:22 156:1	46:5,12 48:6,23
arriving (1) 175:17	137:25 159:3 193:1	51:22 55:17,18	181:15,16 183:24	193:12 194:17,19	158:17,21 170:19	49:9 54:15 62:15
Article (1) 90:10	auction (2) 44:14,16	56:1,10 57:9,19	183:25 187:19	196:3,21,22 198:10	182:7 184:3,14	62:17,20 63:23
articles (12) 20:8,13	audit (1) 124:23	60:14 61:1,6,23	better (13) 3:14,16	200:1 201:5,7,14	185:15 192:8,11	64:5 65:10 66:18
52:23 83:1 90:9,16	auditors (9) 64:22	62:12,14 69:17	5:25 6:4 7:7 58:25	210:16	196:15 199:19	68:15,20 69:19
90:21 91:5 96:25	66:6,11 124:16,19	85:9 98:19 101:3,3	144:17 175:2,9,22	body (1) 82:25	200:16 203:18	93:11 109:4 110:7
130:18 167:21	203:18,21,24	114:20,21 118:20	206:20 207:20	bona (3) 100:6 101:7	209:11 212:16	110:8 111:5 116:8
183:20	204:12	120:14 121:25	210:17	101:13	217:13	123:15 124:9
articulate (1) 53:6	August (15) 7:18 46:1	134:5 138:14 139:1	beyond (6) 18:19	book (1) 74:22	businesses (1) 14:20	129:25 130:8,9,9
artificial (5) 66:12	55:5 103:13 106:16	148:9 150:6 172:20	65:22 90:7,8 104:4	borrowed (1) 111:23	businessmen (1)	130:10,14,21,25
91:19,19 165:25	138:21 141:7	178:21 197:18	188:18	bottom (3) 35:17	152:16	131:1 132:8,16
185:19	143:10 146:10,12	205:15 210:12,13	bidding (1) 50:6	47:16 154:18	buy (6) 5:21,23 12:1	137:3 143:3 149:14
ascribed (1) 24:16	196:1 199:25	balanced (1) 177:2	big (6) 4:23 38:7 128:7	bought (1) 132:13	12:25 45:24 112:10	150:4 158:16
aside (4) 40:14 52:12	213:22,25 217:16	ball (1) 2:13	139:15 175:8	bounced (2) 176:2,8	buy-out (2) 72:1,6	168:13,17 170:5,6
63:16 160:14	Aunt (3) 37:20 57:13	bank (2) 66:5 215:15	212:20	bound (1) 104:16	Byng (1) 52:16	173:18 178:22,23
asked (8) 9:13 48:23	60:13	bankers (1) 76:25	bigger (1) 12:6	brand (1) 86:23	by-the-by (1) 110:24	178:23 184:21,22
66:20 67:2 100:1	authorities (3) 58:4	bargain (1) 56:4	binding (2) 73:3	breach (22) 46:14		184:24 186:6 188:4
100:17 101:22	96:24 197:8	based (9) 40:21,22	180:11	49:8 55:9 56:14,21	C	190:6 193:17,21
107:22	authority (3) 55:25	75:22 98:12 100:9	bit (1) 167:24	57:1 72:13,14	C (2) 38:10 56:19	196:7,8,8 201:9,12
asking (2) 109:12	56:4 190:16	151:2,7 157:15	bits (1) 74:14	79:12 89:10 93:22	cake (2) 157:23 158:7	201:15,17,20 202:8
131:3	automatic (2) 21:21	158:18	bizarre (2) 24:17	102:24,25 110:4	calculation (1) 157:15	202:11,13,21 203:2
asks (3) 84:15 101:1	185:5	basic (1) 187:3	132:12	129:12,16,19 131:3	call (82) 2:2,23 7:10	203:9 204:1,14
132:8	automatically (1) 21:8	basically (2) 155:12	black (4) 17:22,24	154:1 190:15	8:7,7 11:14 15:15	205:12,16,24 206:9
aspect (5) 45:16 92:12	availability (1) 65:6	159:7	86:2 178:15	48:16 147:12,12,15	24:14,17 25:12,14	206:20,23 211:6
112:3 136:23	available (11) 64:21	basis (62) 6:20 8:6	blue (8) 17:23 85:20	breaches (1) 189:12	26:5 27:2,7 38:9	217:21
202:13	66:10 130:13 165:6	29:19 40:14 51:14	85:25 86:1,4	break (9) 3:17 46:21	43:6 45:17,18,21	Caplan (2) 1:9 86:1
aspects (1) 174:6	175:20,22 178:5	51:22 56:2 57:9,19	128:23 152:1 205:8	181:21 219:5,5	46:6,12 48:7,23	careful (4) 69:2 76:7
assertion (4) 38:22	203:21 207:21	65:4 66:15 71:13	board (217) 2:16 3:24	bridge (1) 110:17	49:9 54:15 62:15	108:8 143:22
117:5,6 195:7	210:9 216:4	71:14 72:9 79:11	4:11,12,13 5:6,14	bride's (1) 101:5	62:17,20 63:23	carefully (1) 5:3
assertions (3) 39:15	avenue (2) 209:20,20	89:25 92:18 96:16	6:4,7,25 7:8,14	Briefly (8) 17:7 18:8	64:5 65:10 66:18	Carpenteria (18) 96:7
39:22 40:8	avoid (2) 116:7,8	98:14 101:15 103:2	8:22 9:7 10:14,22	44:11 56:11 68:23	68:15,20 69:19	98:22 110:14
asset (3) 155:19	award (1) 214:22	114:19 115:2,24	11:4 13:2,3,4,6	68:24 137:11	95:1 109:4 111:5	116:17 122:14,15
211:14 212:6	aware (1) 91:15	118:15 120:1	14:13,23 15:1,8	161:19	116:8 123:15 124:9	141:19 142:6 146:2
assets (8) 156:10	awful (1) 69:12	121:24 123:16	16:10 18:4 19:1	Brindle (6) 33:6 99:12	129:25 132:20	179:25 189:2
174:17 177:1	145:18	129:3 133:8,17	20:17,19 21:10,18	99:19,20 101:2,25	137:3 143:3 149:14	194:16 195:11
203:25 207:10	A4 (1) 103:18	136:2,25 137:4	21:22 24:24 25:5	Brindley's (3) 32:3	150:4 158:16 170:5	196:14 197:1 198:3
212:1,22 215:14	B	153:12 155:16	26:18 27:17,22,22	99:11 102:1	170:7 173:18	198:14 204:9
assist (2) 3:13 166:3	b (28) 17:19 18:18	156:5 157:14	27:24 28:2,4 32:21	bring (1) 137:25	178:22,23,23	carried (1) 87:2
assistance (1) 75:5	17:19 18:18	159:23 161:13	35:23 37:6 42:7	bringing (1) 159:3	184:22,24 193:17	carry (3) 16:9 91:23
assisted (2) 165:19	20:3,17,22,24 25:9	162:24 165:11,12	43:15,18 44:3 47:5	Brisby (5) 96:10 99:7	193:21 196:7 201:9	121:13
209:21	35:25 43:19 50:6	171:13 172:12	47:6 49:25 50:1,4	99:23 100:7 162:5	201:12,15,18,20	carrying (1) 91:7
assisting (1) 27:12	86:14,15 88:15,23	176:5 177:17	53:21,25 62:1,3,7	Brisby's (1) 32:23	202:9,11,13,15,18	case (53) 4:22,23
assists (1) 91:12	88:24 125:1 144:4	182:23 186:1	70:24 74:5 78:14	broad (4) 71:3 117:2	202:21 203:2,10	10:23 12:10 33:16
association (3) 83:2	183:2,3,15,16	188:16 189:9	80:15,22 81:7	182:3 192:4	204:1,15 205:12,16	35:1 52:10,16
90:9 183:20	184:6,9,11,13,20	190:12,14 191:17	82:6,25 83:6,7,9,23	broadly (2) 65:14	205:24 206:9,21,23	53:13 54:9 55:23
assume (6) 68:14	196:20 197:14	192:22 198:23	84:6,11,12,16,19	182:22	211:7 217:21	56:12,21 57:1 69:1
89:20 104:5 106:24	back (57) 3:7 13:17,23	199:17 200:4	84:22,25 85:1 87:4	brought (3) 181:25	called (15) 19:3,18	69:10 70:6 71:3
168:6 180:12	14:6 28:16 36:12	203:10 207:15	87:4,17,19,25 90:5	188:1 189:6	29:14 83:13 93:12	73:10 85:5,7 98:22
assumed (3) 45:24	40:23,24 46:22,23	217:24 218:20	91:22 92:4 93:7,12	Brown (1) 1:10	93:25 98:23 156:17	112:3 114:17
179:4 193:16	48:13 56:3 76:5	battles (1) 139:25	95:16,22 96:2 97:5	brush (1) 40:13	161:25 168:13	115:17 117:6 128:3
assumes (1) 211:19	77:22 78:11 81:19	bear (2) 89:13 158:14	101:4,6 102:4,11	BTG (1) 157:5	182:6,11 185:16	128:4,5 129:13
assuming (5) 53:9	82:17 85:4,17	bearing (4) 107:20	102:16 103:10,11	budget (2) 94:15,16	186:20 214:10	136:23 138:11
57:8 69:7 104:17	86:16 88:2 91:2,13	133:11 162:13	104:20 105:6,22	bundle (29) 17:1	calling (4) 47:2 150:21	139:19 142:8
171:11	99:7 105:12 109:5	163:3	106:14,15,16,17,24	18:24 20:14 31:12	189:14 193:7	148:19 159:22
assumption (2) 40:22	112:1 116:6 123:15	bears (1) 110:13	107:1,1,12,15	31:15,16 33:5 34:7	calls (1) 188:4	162:12 163:3,4,23
40:22	131:21 137:6 140:6	beginning (2) 17:15	108:5,9,9 111:2	35:12 41:14 45:12	call-up (2) 186:6 190:6	166:21 167:10
assumptions (2) 170:8	140:13 141:4,10	208:15	112:19 113:7,9,15	49:2 60:4 64:11,24	camp (10) 29:22 30:9	178:2 179:11,17
177:16	142:16 145:8	behalf (8) 1:8,9,11	113:20,21 114:2,10	75:15 77:24 80:12	61:9 62:5,5 74:20	180:22,23,24
assurances (3) 23:7,21	155:11,24 156:21	110:13 150:14	114:14 116:1,2,12	85:22 86:7 91:16	118:13 125:5	196:15 197:21
23:22	159:5,23 160:15,17	162:19 196:14	116:13,16,20,22,23	109:16 110:5 126:6	170:23 198:18	207:25 208:5 216:8
attach (2) 66:24 106:8	162:10 164:8	205:6	117:13 118:4,8,9	126:9 151:23 152:1	cancelled (1) 135:11	cases (1) 55:24
attached (2) 9:21	176:17,20 181:18	behaving (1) 143:23	119:17,22 122:24	153:16 156:3	Candey (1) 195:3	cash (11) 19:25 95:1
202:12	184:25 194:22	Beijing (2) 156:17,25	124:6,25 125:21	bundles (8) 58:18,18	Candeyes (4) 155:11	112:14 126:21
attachment (1) 105:2	204:19 208:15	Belgravia (1) 210:20	126:13,16 131:20	85:20,23 86:2	156:21 162:18	160:18,18 175:21
attempt (6) 24:19	211:5 215:5 217:8	belief (1) 193:10	132:6 138:12,19,23	151:23 153:16,17	163:6	175:22 204:22
61:14 101:15	219:7	believe (4) 24:1 84:12	141:6,9,11,14,16	business (58) 3:11 5:8	candidate (2) 36:19	207:21 215:23
112:19 119:3 148:1	background (8) 17:13	108:12 162:12	142:4,18,19,22	14:16 15:25 18:12	60:20	cashflow (1) 69:1
attempted (1) 29:14	23:1 55:19 109:7	believed (1) 194:8	143:6,10,13 144:2	18:13,14 21:17	candidates (2) 9:17	catch (1) 29:22
attempts (1) 117:1	109:24 112:8	believes (3) 90:18	144:2,14 148:2,22	22:1,10 27:22	122:25	categories (1) 1:12
attend (9) 4:13 91:21	123:18 145:1	91:9 152:11	149:19 151:8	28:24 32:6 34:5	capable (4) 62:7	Catherine (7) 26:12
107:15 118:8	backing (2) 207:17	believing (1) 136:21	152:25 153:5	35:5 47:18,21 54:1	123:12 143:15	29:12 50:21 183:8
124:17 125:20	212:8	bending (1) 41:5	168:11,16 170:9,25	54:3 64:14 66:8	146:18	185:10 188:9
185:20 190:21	backtracking (1) 43:13	benefit (7) 4:4 14:1	171:24 173:11,12	87:14 91:23 97:6	capacity (1) 188:24	189:17
191:22	backwards (1) 41:5	183:18 190:25	173:16,17,21,24	100:11 104:8 107:3	capital (104) 2:23 7:10	causal (1) 32:22
	bad (14) 52:9 53:12				8:7,7 11:14 15:15	cause (5) 11:13,15

July 31, 2014

13:18 211:7 213:8 caused (4) 34:2 85:8 91:20 139:4 causes (2) 11:16 70:18 causing (1) 70:9 cease (2) 105:18 199:24 ceiling (2) 133:7,8 cent (5) 24:15 25:12 95:9 155:19 156:4 centrally (1) 86:11 centre (1) 127:11 CEO (86) 2:22 7:11 8:20,21,23 9:17 15:14 21:5,14,17 21:20 22:1,5,8 36:16,20,25 37:9 37:19,23,23 42:15 43:6,10 44:24 48:9 53:20 54:3 57:10 57:14 60:15,20 61:8 62:1,6,9,12 87:2,9,14,15 100:12 103:25 104:3,8,12,13 105:9,18,19 106:22 108:1 113:14 114:5 116:1,11 118:6 121:8 123:7 138:10 144:15,17,23 147:19 148:22 153:21 170:15,19 171:17 185:2,12,13 185:14,15 188:11 190:4 193:18 195:25 196:2 199:11,16,18,22,24 200:10 201:4 CEOs (5) 36:10,11 84:14 118:1,5 certain (7) 22:15 66:3 95:15,21,23 130:21 177:25 certainly (39) 5:5,12 5:22 6:5,10 21:21 30:25 32:15 41:20 51:22 53:7 58:15 60:1 62:8 63:19 69:18 72:18 74:8 74:13 77:20 83:11 100:4 102:24 103:3 136:18 138:3 144:6 150:13 168:4 170:8 172:1 175:23 176:2 178:12 180:10 198:20 216:13,21 218:11 certainty (3) 55:13 63:11 173:4 certified (1) 217:12 certify (2) 64:14 203:18 cetera (1) 163:1 chairman (12) 21:17 21:25 22:10 87:13 104:8 107:3 108:1 108:11,13 170:19 185:15 200:17 chairman's (1) 52:18 challenge (3) 156:23 205:14 207:2 challenged (1) 176:4 challenges (1) 2:9 challenging (1) 157:14 chance (2) 112:25 181:8 chances (1) 46:8 change (5) 7:11 13:2 38:5 64:18 193:18 changed (2) 13:3	202:2 changes (1) 115:21 chap (2) 105:3 117:14 characterisation (2) 42:21 192:13 charge (2) 125:10 204:21 chasing (1) 67:4 check (2) 44:6 58:13 cherry-picking (1) 149:24 chief (13) 10:1 77:14 87:5 101:17 106:11 107:4 122:21 123:8 125:3,6 134:2,14 146:21 choice (1) 7:6 choose (2) 150:2 206:16 choosing (1) 37:9 chosen (1) 139:25 chronology (1) 160:4 circulated (6) 173:24 184:8 188:12 189:16,25 194:14 circumscribed (1) 113:8 circumstances (8) 61:18 91:18 130:21 163:8 170:22 171:3 177:9 210:25 city (1) 127:11 claim (7) 6:2 137:13 139:22 163:10,11 187:3 211:20 claimant (3) 1:8 3:23 6:18 9:12 14:4,23 14:25 81:5 83:24 85:9,14 96:4 99:14 113:10 139:24 143:22 146:20 151:4 152:20,21 154:19 155:11,14 156:8,12,16 158:2 162:7 181:25 182:13 186:22 206:15 207:10 claimants (22) 78:10 95:24 103:6 140:16 148:1 149:24 150:14 151:9,17 154:17 158:25 161:24 165:13 182:16,18,20,23 186:10 190:9,24 191:10 218:9 claimant's (3) 80:12 140:22 152:8 claimed (2) 163:21 195:14 claiming (2) 79:18 213:5 claims (3) 71:9 73:5 188:8 clarify (1) 120:23 clarity (1) 104:11 clause (57) 18:9,15,20 19:1,12,22 20:3,5 20:12,16,23 21:3,3 21:25 37:2 49:17 86:8 88:2 93:2,18 94:2 95:12,14 106:14 118:6 119:20 130:15 167:9,10,15,22 168:5,8,11,20,21 168:24 169:3,5 170:3,18 171:16 183:15,21,23 184:2 184:12,20 185:1,13	185:18,20,23 186:4 196:19 200:15 202:15 clear (46) 15:19 20:12 21:24 33:10 35:1,3 47:17 49:4 55:23 56:21 57:1,16 60:23 61:5 66:17 73:4 87:8 90:7,8 100:21 104:1 113:4 143:4,22 145:11 148:22 150:11 152:6 166:20 171:4 171:18 174:13 188:13,17 192:3 193:2 197:11 205:2 206:15 210:7,11 213:3 215:7,14 217:6 218:15 cleared (1) 174:22 clearer (1) 140:18 clearly (10) 16:4 22:9 22:11 98:24 122:1 125:5 166:11,24 197:1 209:17 client (14) 36:15 97:19 100:24 101:5 105:5 117:13 135:16 136:19 161:10,10 161:11 163:19 166:15 216:9 clients (24) 32:23 47:19,19 48:1,5 70:9 77:8 78:7 79:24 114:25 117:10,19 135:11 135:12 161:6 162:1 175:15 177:24 178:3 204:18 206:12 207:13,14 215:6 client's (4) 42:18,20 161:5 162:3 climate (1) 170:2 clip (3) 155:3 174:11 207:4 close (4) 156:11 181:19 212:16 216:16 collaboration (1) 26:17 colour (1) 151:24 combined (1) 1:13 come (48) 2:13 11:5,8 16:11 19:7 23:16 26:13 28:10 37:12 39:19 40:8 42:8 46:18,22 48:13 70:20,20 76:5 77:18,22 82:17 85:4 86:16 105:5 109:5 110:21 112:20 128:23 141:10 143:6 144:4 145:8 156:21 158:25 164:8 171:8 174:11 175:23 176:17,19 177:7 181:18 184:25 203:13 205:8 211:5 216:16 217:8 comes (8) 38:8 68:15 73:14 114:1 116:6 129:25 136:24 219:7 comfort (4) 159:8,9,14 159:14 comfortable (1) 66:6 comfortably (1) 56:9 coming (10) 2:15 4:11	15:9 28:16 40:4 66:9 76:7 140:13 160:13 173:18 commenced (2) 139:23 208:16 comment (1) 166:1 commercial (12) 1:23 3:20 21:2 46:11 55:3 75:3 111:10 111:11,14 135:3 169:4 177:4 commercially (2) 24:17 179:16 committee (4) 62:1,4 196:3,4 common (7) 22:2,7 90:25 92:16 98:13 171:16 185:25 companies (4) 88:7 89:14 182:18 203:25 company (129) 2:7 4:1 4:16 5:16 6:21 8:20 9:1,2,9 12:24 13:12 13:17,20 14:5,20 15:4 17:18 18:6,7 18:14,17 20:8 21:5 21:14 40:23 41:4 44:15,19 46:12 47:19,21 49:25 50:1 61:16 69:6 70:17 71:21 75:14 75:23,25 76:1,13 76:19 80:2 85:12 86:21 87:6,14 90:15,19 91:7,10 91:11 92:3,23 94:8 94:13,15 107:21 110:2,16,23,25 111:7,17 112:5,14 122:20,23 123:9,20 123:22 124:1 125:8 132:12,14,21 133:20,20 134:8,16 134:18 144:19,23 152:20,22 156:16 156:17 162:8,16 173:17 176:25 179:12,17 180:25 180:25 182:9,10,11 182:13 183:18,21 183:25 184:1,19 185:16 186:20 192:11 196:22 198:7 200:17,25 202:2 203:5,13,19 204:21 205:6 206:4 207:9,10 208:8,11 208:20 209:9 211:24 213:6,9 214:5 company's (2) 14:1 144:20 compass (1) 71:4 compensated (1) 136:12 competing (1) 57:12 complain (2) 19:11 173:19 complaining (1) 129:3 complains (1) 204:18 complaint (2) 95:7 174:23 complete (6) 41:8,16 51:19 110:17 151:23 153:7 completed (3) 92:17 93:10,14 completely (8) 46:10 75:11 97:22 100:21	112:12 134:22 135:8 212:24 completeness (1) 153:13 completing (1) 37:21 completion (16) 19:2 19:4 21:15 87:6 93:8,13 110:1 128:12 131:16 132:3 168:12,14 169:1,9 186:5 202:16 complex (4) 18:11 53:5 161:21 182:2 complexity (3) 54:17 163:7 164:11 compliant (1) 3:24 complicated (6) 129:5 133:10 139:21 140:8,19 162:2 complied (2) 29:20 186:7 comply (4) 93:18,20 186:9 195:22 composite (1) 162:14 comprehensively (1) 154:14 compromise (1) 36:8 compromised (1) 61:22 compunction (1) 27:13 concealed (1) 186:17 conceivably (2) 37:3 95:10 concern (21) 8:16 15:19,22 29:21 59:17 61:17 64:8 67:4 70:16 81:17 85:11 116:10 124:24 132:25 133:23 149:7,21 201:9 203:19 204:13 217:6 concerned (19) 22:18 42:21 59:3,14 66:17 75:10 112:5 115:21 116:3 118:12 138:18 141:4,21 146:9 158:23 190:6 197:25 215:5 218:18 concerning (3) 58:11 83:2 97:15 concerns (5) 73:25 100:24 133:25 148:10 202:5 concluded (2) 102:3 202:19 conclusion (4) 11:5 53:8 167:4 201:21 condescend (1) 27:1 condition (3) 106:8,10 108:3 conditional (4) 36:22 36:22 37:2 113:18 conditions (3) 9:21 108:20 200:21 conduct (9) 14:13 27:3 72:24 94:7 141:2 179:21 187:17 194:10 198:9 conducted (3) 144:20 184:15 209:16 confidence (1) 135:14 confident (3) 85:2 112:22 135:15 confirm (1) 171:13 confusion (2) 86:3	211:9 conjunction (1) 60:24 connected (1) 182:18 consent (4) 30:1 80:24 117:1 188:24 consenting (4) 30:20 78:13 189:14 190:10 consequence (2) 25:5 54:25 consequences (6) 1:15 39:4 41:1 67:16 68:8 136:8 consider (28) 5:3 7:8 11:1 23:12 56:16 59:21 84:22 87:19 102:10 103:13 105:22 113:15,16 113:22 122:24 129:22 136:13 167:18 187:7 197:20 198:20,22 199:1,10 200:4,10 203:1 206:14 consideration (4) 22:18 53:24 124:8 130:16 considerations (2) 27:5 37:21 considered (13) 29:8 35:19 47:10 55:18 98:18 103:17 105:22 120:7 138:23 165:5 169:25 192:25 206:21 considering (5) 30:11 116:3,13 167:15 208:14 considers (3) 36:15 178:11 198:18 consist (1) 196:5 consistent (2) 105:16 196:24 consistently (2) 9:18 117:4 consists (3) 50:1 62:4 122:8 consolidated (1) 194:21 conspiracy (2) 163:19 165:16 constantly (2) 57:11 185:22 constitution (1) 151:7 constructed (1) 18:6 construction (1) 217:23 constructive (4) 35:4 35:8,14 107:13 contain (1) 28:23 contains (1) 183:13 contemplated (3) 51:13 92:21 131:23 contemplating (2) 129:10,11 contempt (1) 82:5 contending (1) 201:7 content (3) 29:15 37:17 123:3 contention (1) 2:20 contentious (6) 47:24 70:11 141:18 198:3 204:14 208:5 contested (2) 72:9 195:16 contesting (1) 180:21 context (9) 43:5 79:13 86:21,24 99:8 111:10,11,14 124:4	continuation (1) 191:14 continue (9) 9:5 21:9 76:3 104:3 150:16 164:14 188:17 191:22,23 continued (6) 80:16 158:24 188:11 189:18 191:2 194:14 continues (4) 9:4,12 9:16 147:17 continuing (2) 36:24 45:4 contract (9) 53:1 93:22 129:13,19 148:15,21 149:25 150:2 159:22 contracts (1) 149:12 contractual (6) 54:20 85:17 148:24 149:2 149:8 150:17 contradicts (1) 126:11 contrary (13) 21:6 23:25 27:8 36:4 53:16 55:6 83:11 83:12 92:24 97:13 97:21 176:24 192:23 contravenes (1) 90:15 contribute (3) 40:16 46:5,6 contribution (6) 19:16 19:20,25 41:1 110:7,9 control (8) 5:9 6:7 26:18 27:11,17 70:23 74:21 182:21 controlled (1) 171:1 controversial (5) 80:16 93:24 97:3 137:17 143:7 controversy (1) 201:3 convene (2) 53:25 122:24 convened (3) 91:22 103:12 199:3 convenience (37) 11:9 11:10,11 34:20 37:12 51:14,22 55:17,19 56:1,10 57:9,19 60:14 61:2 61:6,23 62:13,14 69:17 85:9 98:19 101:3,4 114:20,21 118:20 120:14 122:1 134:5 138:14 139:2 148:9 150:7 172:21 178:21 205:15 convenient (1) 119:23 conveniently (1) 117:11 convening (2) 30:10 109:18 convictions (1) 135:14 convinced (3) 3:2 77:8 205:11 convincing (1) 204:12 Cook (1) 1:7 cope (1) 169:11 copy (2) 58:21 86:7 corporate (2) 110:14 111:18 correct (2) 54:18 179:23 correctly (2) 9:25 104:20 correspondence (24) 8:1,5 39:6 41:17
---	--	--	---	---	--	--

47:17 67:2 107:17 109:14 113:1,3,5 154:15 155:3 158:24 174:11,14 175:7 176:3,16,18 176:21 207:4,7,22	covers (1) 71:4 co-operate (4) 6:4 187:4 209:10,12 co-operating (1) 3:7 co-operative (1) 142:20 crashing (2) 39:22 69:11 create (4) 91:18,25 92:2 185:21 created (2) 185:19 211:10 credibility (1) 66:24 critical (1) 60:16 criticism (2) 70:9 175:6 cross (1) 158:12 cross-undertaking (35) 154:12,16,18,20 155:5,10,14,17,18 156:12 157:25 158:14,23 161:4,9 174:8,9,19 175:6 175:14 176:5,6 207:3,12,17,24 210:5,18 211:23 212:9 214:10 215:10 217:2,7 218:16 cross-undertakings (3) 176:9,11,14 crucial (2) 48:3 63:16 current (10) 5:13 96:15 106:25 109:1 151:7 170:1,2,15 205:17 206:4 currently (7) 53:21 87:15 170:9 183:4 198:24 199:15,18 cut (1) 197:11 Cyanamid (1) 10:6 cynical (4) 27:25 43:11 44:23 170:22 C2 (5) 41:14,19 109:9 109:11,13	120:4 136:11 168:9 168:16,17,18,23,25 172:9 179:8 189:21 190:12 219:3 days (31) 19:4,5 20:20 29:2 46:3,15 49:10 49:14 62:19 68:17 93:13 110:1 128:10 128:12,14,18,25 131:14,16 145:9 168:14,23,25 169:5 169:9 173:24 179:14 184:3 186:7 202:16,24 day-to-day (2) 86:25 144:20 de (2) 70:24 74:21 deadlines (1) 68:9 deadlock (20) 3:25 18:6,6 20:18 25:4,6 44:5,8,9,15 71:21 91:19,19,20 92:1,2 107:5 112:23 185:19,21 deadlocked (3) 43:21 44:21 184:19 deal (42) 5:13 17:6,10 22:18 26:24 35:4 38:12 40:24 46:11 49:18 67:19 68:16 69:25 74:1 97:13 106:2 120:3 122:19 123:2 131:6 139:10 140:25 141:2 144:10 146:14,23 156:22 157:5 165:1 166:7 167:8 169:17 171:10 172:5 173:7 179:20 181:15 184:21 188:7 200:23 218:2 219:7 dealing (21) 18:15 47:13,23 51:10,11 52:17,19,20 69:14 76:14,15,20,23 77:1 123:13 153:19 167:23 170:13 172:14 217:19 218:20 deals (12) 20:3,5 21:3 34:11 64:25 67:11 67:22 86:9 147:19 155:4 183:15 204:25 dealt (40) 28:25 29:12 33:25 34:8 35:5,19 36:1,2,3 38:9 42:15 45:6 47:22 56:19 61:14 64:8 68:23 95:16,22 99:9 105:24 106:2 107:11 137:13 139:19 140:24 142:20 143:15,17 145:23 172:24 173:10 175:7 185:9 189:22 203:22 204:13 213:20 217:9 218:19 debate (7) 4:8 114:8 164:16 167:13 207:6 210:9 216:10 debated (3) 140:17 154:14 176:20 debating (1) 137:8 debt (1) 157:1 debts (6) 156:1,6,15 156:16,23 207:9 decide (17) 3:9 4:9 9:7 63:17 73:17 87:25	103:9 104:23 106:4 107:19 114:13 131:10 135:13,22 164:9 205:19,25 decided (8) 12:13 33:15 51:25 97:19 123:24 185:16 192:14 198:22 decides (3) 6:24 34:9 205:20 deciding (2) 3:21 166:24 decision (8) 32:22 55:20 62:9 135:3 178:25 191:11 192:14 218:23 decisions (6) 2:18 4:1 43:18 44:2 83:2 190:23 declarations (2) 189:8 189:11 declare (1) 192:21 declined (1) 202:3 deduct (1) 216:11 deduction (1) 178:7 deeply (3) 27:25 43:11 44:23 default (8) 60:22 104:15 106:21,23 128:13,14,20 129:12 defence (4) 140:12,25 145:15 164:21 defences (3) 139:14 140:18 164:4 defendant (3) 80:21 80:23 183:1 defendants (1) 194:18 defiance (1) 41:25 define (2) 53:6 104:11 defining (1) 90:24 degree (1) 23:16 delay (1) 68:6 delayed (2) 1:3 195:2 deliberate (1) 24:19 demand (1) 93:21 demonstrate (1) 25:25 denies (3) 152:14 187:10,20 denying (1) 195:4 depend (1) 208:9 depends (1) 14:18 deposit (1) 68:3 deprived (2) 85:13 134:17 depriving (1) 29:23 deputy (15) 26:12 30:6,16 31:11 32:2 34:15 51:16 99:5 99:25 148:18 150:20,25 183:8,11 191:12 descend (1) 65:15 described (2) 77:9 199:20 description (2) 182:3 212:5 designed (3) 83:23 92:3 187:6 desirable (1) 127:13 desperately (3) 66:7 74:23 76:2 despite (3) 51:15 54:24 67:3 detail (7) 8:15 18:10 22:15 65:16 66:16 95:14 108:8 detailed (3) 18:11 69:2 153:15 deteriorated (1) 23:3	determination (3) 5:20 70:14 208:7 determine (3) 28:6 55:13 132:7 determined (5) 21:18 51:23 87:17 130:15 131:20 determines (1) 40:17 determining (1) 130:20 detrimment (1) 158:17 developed (2) 154:7 155:1 developer (1) 182:14 development (3) 18:13 175:6 209:11 devil (1) 108:8 dialogue (1) 59:16 dictate (1) 121:6 differ (1) 190:22 difference (1) 73:23 differences (2) 4:15 209:14 different (14) 56:15 56:23 71:9 80:23 86:7 104:5 132:15 160:25 163:10 165:23,24 167:25 185:13 209:15 difficult (6) 41:6 45:25 46:5 53:5 104:10 135:18 difficulties (2) 179:6 206:13 difficultly (10) 7:12,13 8:17 16:7 54:17 55:15 61:1 104:18 122:10 179:9 dilute (5) 11:18,20 24:21 133:5 182:20 diluted (6) 55:1 63:18 63:18,20 95:10 135:7 dilutes (1) 11:17 dilution (3) 40:17 95:6 202:6 dilutive (8) 25:12 27:2 27:9 62:25 63:2,5,7 69:21 direct (1) 152:24 direction (1) 26:10 directions (4) 47:1 138:5 152:21 208:14 directly (1) 26:25 director (59) 3:24 20:22,24 28:10 30:1,20,24 43:20 43:22 50:9 71:18 75:17 76:22 80:1,2 80:25 81:13,23 82:2 86:14 89:5,19 90:5,13,17,18 91:8 92:1 96:6 98:20 110:14 148:25 149:2 150:17,18 151:3 152:16,17 153:7,11 167:24,25 168:3 183:24 184:6 184:6,9,11,13 187:1,14 188:24 189:3 191:6,9 193:25 194:17 196:20 198:25 directorial (1) 187:8 directors (54) 6:21 14:12 15:3 20:4,5 20:10,15 23:23 43:19 50:3,5,6 84:9 86:9,13 87:20 88:4	88:6,9,13,18,19,24 90:4 93:18,20 97:19 107:8,18 108:23 110:3 113:9 115:7 119:17,21 149:16 151:5 154:1 167:11 182:25 183:4,16,17,22 184:4 186:8 187:5 187:7 189:25 195:22 196:23 197:4,14,14, director's (3) 84:8 86:15 167:23 dirty (1) 133:2 disable (3) 28:17 31:24 33:23 disabling (1) 32:4 disadvantage (1) 206:15 disagree (1) 202:19 discharge (1) 171:4 discharging (4) 88:5 88:10,12 167:23 discouting (1) 177:17 discrepancy (1) 150:13 discretion (2) 129:8 218:24 discuss (16) 105:23 106:13,17,19 107:16,18 108:10 108:17 124:25 125:21 170:20 171:2 172:4 181:1 207:22 211:1 discussed (9) 7:8 108:14,17 114:10 173:23 192:3 199:24 204:8 207:21 discussing (2) 30:11 99:7 discussion (10) 15:6 15:12 124:12 146:16,19 181:3 190:3 200:18 210:1 220:11 discussions (5) 21:18 87:18 172:8 185:17 201:3 disinter (1) 73:2 dismiss (2) 5:22 29:19 disparity (1) 18:2 dispose (1) 45:15 dispute (21) 3:4 4:15 15:10,14 72:12 76:18 86:11 94:18 110:11 142:24 144:25 148:3 149:12 158:10 159:17 182:3 183:14 185:3 202:14 208:15 211:25 disputes (1) 146:25 disregard (1) 34:23 disruption (1) 70:18 disruptive (2) 116:11 118:24 dissention (1) 201:3 district (1) 99:25 divide (1) 137:9 divisive (1) 62:6 Djanogly (10) 2:2 7:2 71:19 116:18 141:18 183:5 189:24 194:14 196:5 198:2 document (3) 58:20	93:4 98:16 documentary (2) 67:3 145:24 documents (5) 36:5 39:2,3 94:16 109:22 dogs (1) 133:2 doing (17) 11:12 14:23 16:7 37:10 42:5 50:6 79:6 100:19 105:4 141:5 144:22 146:16 148:11 159:20 167:14,17 197:2 dominance (1) 42:7 dominant (1) 20:11 dominated (2) 27:24 53:21 Doronin (64) 2:2 7:2 16:20 23:3,5,9,18 24:2,3 25:5,20 26:17,24 27:10 28:21 30:9 32:10 38:6 40:5 43:9 45:24 46:6 48:10 53:22 63:14 67:16 68:9,14,21,23 71:19 75:21,21 89:18 100:12 109:15 111:16,22 112:7,17 116:18 117:2 118:13 119:11 126:10,19 140:23 141:19 152:9 171:1 182:15 182:17 183:2,4 186:14,18,19 187:19 194:8 198:2 198:13,18 204:5 205:3 Doronin's (16) 5:10 26:20 39:15,21 48:11 61:9 64:4 65:19 66:3 67:7,22 68:11 69:13 111:15 133:21 134:12 double (5) 19:20 46:7 63:15 174:22 205:24 double-counting (5) 159:19 160:9,11 174:13,14 doubt (5) 9:11 123:4 145:12,13 169:15 draft (3) 121:21 147:18 188:13 drafted (2) 139:22 172:11 dragging (1) 37:17 dramatic (1) 40:4 draw (1) 92:12 drawn (2) 140:6 193:2 due (16) 19:3,7,16 41:22 76:6 93:12 103:14 124:8 131:1 168:13,17,18,19 169:9 189:23 199:25 duly (1) 91:21 Dunn (1) 58:23 duplication (1) 180:11 duties (10) 27:6 88:6 88:11,13,20 98:20 150:19 154:1 167:24 196:24 duty (1) 89:11 dwell (1) 96:12				
					E					
						e (4) 19:13 56:20				

130:22,24	emerge (1) 38:25	157:12,15	87:5 101:17 106:11	exposure (2) 213:15	far (21) 1:22 16:3	75:12 80:21 86:25
earlier (9) 47:10 59:16	emphasis (1) 151:11	erect (3) 53:10 54:16	107:4 122:21 123:9	216:14	22:18,22 40:2	87:6 93:3 109:25
71:22 123:25	emphasise (3) 137:25	54:18	125:6 134:14	express (2) 73:20	48:10 74:23 76:21	114:16 115:1,20
131:21 182:4	148:4 150:8	erected (1) 37:20	146:21	148:12	100:24 111:4	125:17 127:7,11
185:10 194:11	employees (2) 70:17	especially (7) 40:16	executives (6) 8:25	expressed (1) 209:3	141:21,23 148:18	132:5,17 134:6
198:10	208:8	41:6 44:24 46:12	77:6 125:10,11	expression (1) 147:24	163:12 187:17	148:6 150:5 152:2
early (8) 60:6 70:1	employment (2) 196:4	51:20 61:18 63:9	134:11 144:21	expressly (2) 20:9	196:24 202:25	159:14,15 166:8,8
110:3 140:12	200:22	essence (1) 74:2	exercise (24) 2:3,5	171:13	206:19 208:13	169:22 170:11
143:18 144:11	enable (3) 2:18 41:5	essential (1) 48:6	14:25 31:22 52:6	extent (9) 105:9	209:16 218:18	185:3 187:25
164:24 208:13	91:23	essentially (17) 9:6	52:24 90:1,13 92:7	117:12 142:18	favour (11) 11:12	189:20 190:17
eat (2) 157:23 158:8	encouraged (1)	33:22 46:7 63:15	95:25 97:8,9 98:20	143:14,16,17,18	26:19 31:10 61:24	195:25 196:10
economic (6) 52:22,24	171:21	72:1,5,8 95:16	115:6 119:15,21	167:2 175:1	113:23 118:13	203:16 209:3
53:18 63:25 168:1	endorse (2) 16:1	138:8 140:22 146:4	133:11 167:17	external (1) 212:1	122:1 191:6 194:8	firstly (5) 28:7 78:8
170:2	48:11	151:14 157:22	168:3 183:22	extra (1) 19:15	205:16 218:19	82:23,25 86:24
economy (1) 170:1	endorsed (1) 77:12	158:24 159:5 176:4	187:14 191:24	extract (1) 31:6	favourable (2) 103:5,7	fit (3) 187:14 192:5
effect (20) 11:13	endorsement (1) 68:7	217:22	197:12,24	extraordinary (1)	fear (1) 15:23	217:12
62:25 63:2 67:1	endorses (3) 65:15	Essex (2) 58:2 60:1	exercised (14) 33:10	76:11	feared (2) 84:19 194:7	fits (1) 114:12
92:10 95:1 103:17	134:12 205:3	established (2) 72:14	51:21 83:16 90:25	extreme (4) 25:13	fears (2) 83:24 97:7	fit-out (3) 39:23 68:16
104:17 142:9 148:1	ends (1) 153:24	216:16	96:18,20 97:4	30:3 31:1 69:18	feasible (1) 143:19	68:18
148:12 149:7,11	enforcement (2) 26:7	establishment (1)	98:11,25 185:24	extremely (5) 24:2,12	feast (1) 175:5	five (8) 20:20 48:13
150:15 182:17	188:4	196:2	194:24 197:6,23	81:9 104:3 174:12	featured (1) 173:8	147:13 152:5,7
185:4 191:11 193:4	enforcing (1) 69:19	et (2) 23:24 163:1	218:22		February (1) 186:10	173:24 181:24
195:19 213:4	Englehart (29) 30:6	evening (2) 30:4	exercising (15) 29:25	F	feel (2) 38:6 119:6	184:3
effective (3) 11:4	50:22 78:1,3,10	194:15	32:24 52:8 53:7	f (2) 19:13,17	feeling (1) 163:16	fixed (3) 4:2 188:6,7
179:25 191:14	79:14 16 82:14	event (14) 72:7 85:7,9	89:4 90:17 91:8	face (3) 46:13 128:7	feet (1) 37:17	fizzle (1) 176:17
effectively (4) 36:16	83:4 97:16,18,25	98:8 121:25 123:17	92:4 150:19 167:25	179:5	fetter (1) 53:6,10,12	flagrantly (3) 25:11,25
123:14 146:3,7	99:2 102:8,14	124:1 132:18	187:4,8 191:14	faces (1) 53:5	53:17 54:16,22	55:9
efficiently (1) 91:24	103:3 119:15	133:18 138:14	198:5 204:10	facilitating (1) 37:7	98:19 151:1 195:5	flat (1) 210:20
effort (1) 4:19	143:23,25 148:23	202:25 214:10	exhibit (2) 103:22	facility (1) 186:25	197:12,21	flexibility (1) 40:19
either (17) 3:6,13,16	150:11 163:14	218:9,12	109:15	facing (1) 74:2	fettered (3) 52:6	flimsy (1) 69:18
4:15 12:11 69:11	166:9 183:10 190:7	events (3) 44:17	exist (1) 9:19	fact (51) 11:11 24:1	96:16 153:11	float (1) 208:23
86:4 91:18,20	192:1,7,25 193:16	185:11 188:20	existence (1) 175:3	34:13 38:4,15	fetters (4) 29:16 168:6	floated (2) 94:12
131:23 145:1 200:1	Englehart's (5) 102:2	eventually (3) 44:13	existing (3) 5:9 77:10	53:25 54:17,20	168:7 197:10	132:23
200:16,20 209:13	149:6 165:19	44:16 130:12	120:25	56:22 60:19 73:13	fide (3) 100:6 101:7	floating (1) 144:12
212:5,20	190:23 192:24	even-handed (1) 56:2	exit (1) 3:8	74:2 77:15 81:16	101:13	focus (1) 140:3
elderly (1) 185:2	enormous (3) 76:1	everybody's (2)	exits (2) 3:22 209:18	83:11 85:2 92:19	fiduciary (1) 150:19	focused (1) 147:3
Eliasch (130) 1:11 3:19	112:17 205:7	3:12 93:22 94:6	expect (6) 68:25 69:2	93:22 96:2,21	Fifthly (2) 27:16 83:20	folder (1) 58:19
5:22 7:2 22:24 23:7	enquiring (1) 123:24	107:14 122:25	88:9 127:21 143:6	97:22 100:20	figure (4) 174:15	follow (1) 117:20
23:14,20,22 25:2,8	ensure (2) 20:18 141:6	128:17,21 129:7	143:12	102:13,21 103:1,14	177:17 178:14	followed (2) 29:10
26:9,16,23 27:3,11	ensuring (2) 59:5	208:10 219:4	expected (2) 131:19	103:16,24 107:20	215:9	35:7
28:17,21 29:25	100:25	everybody's (2)	201:22	111:9 114:3,21	figures (1) 178:12	following (11) 8:18
30:19,20 32:4,24	entailed (1) 153:7	211:10 214:7	expedited (10) 3:3,12	119:1,2 129:7	file (4) 58:2 85:20 86:5	21:15,18 26:16
33:17,24 43:9,23	enter (1) 171:14	everyone's (1) 54:5	17:3 145:5 163:1	131:8 132:7,22	124:3	32:12 36:15 39:23
47:9 50:16 58:15	entered (5) 157:1	evidence (50) 1:20	164:1 208:14 209:5	138:19 139:13	filled (1) 10:2	87:6,17 156:21
71:10 72:12 74:4	169:13 172:9	16:13 23:15,17	209:22 220:5	155:14 156:23	final (14) 6:1 19:21	192:8
78:13 80:6,7,25	186:11,22	26:23 32:10 38:21	expedition (14) 71:1	162:3 166:14	21:24 56:14,24	follows (3) 52:8 151:3
81:13,18,22 82:1,7	entirely (17) 9:15 35:8	39:16,17,18,20,21	137:10 138:4	168:21 174:2	70:13 72:11 73:3	182:2
82:12 83:4,10	60:18 61:2 62:11	39:25 67:6 96:10	139:10,13,15,16	186:17 190:11	74:3,10,22,24	fons (1) 23:24
101:5,12,16,19,24	77:15 79:1 101:11	98:9 126:5 127:19	140:4 161:20	211:9 212:7 214:23	129:4 208:6	foolish (1) 136:20
102:6,13,15,21	105:16 109:3	134:4 145:24,24	162:22 163:4	facto (2) 70:24 74:21	finally (3) 72:15 85:11	foot (1) 99:17
103:2 112:21	134:12 140:1 147:7	153:15 158:18	178:19 179:20	facts (2) 96:23 109:6	153:4	footing (1) 179:1
113:24 116:17	158:22 171:1 205:3	160:11,20,22 161:1	208:3	fail (2) 112:23 130:25	finance (2) 76:22,22	force (3) 92:10 182:17
117:1,6,11,12	214:21	174:25 175:2,9,10	expended (1) 66:9	failed (3) 48:22 82:8	finances (1) 170:1	191:3
118:12 119:2,10,11	entitled (35) 5:21,22	175:11,22 187:16	expenditure (5) 4:19	144:1	financial (19) 23:4	forced (1) 45:7
119:12 120:8,11,13	5:23 6:19,22 10:23	201:25 204:4	66:7 69:8 130:9	failing (2) 91:21	39:22 41:1 67:15	foregoing (1) 87:5
138:1 140:10,23	12:22 13:9 14:23	205:10 207:15,20	196:8	185:19	67:15 68:8,8 125:3	forensically (1) 35:24
141:18 146:7,25	31:3 33:23 46:3,3	210:5,17 213:7,13	expense (1) 194:9	fails (2) 83:17 131:6	125:8 134:3,19	forever (3) 44:16,20
147:9,21 148:24	47:9 50:10 52:24	215:6,18,21 216:17	experience (1) 153:1	failure (2) 101:12	154:19 155:17	57:14
149:9 150:16 151:3	72:3 82:1 84:25	216:23 217:3,11	experienced (1)	151:2	158:1,9 160:21	form (4) 39:6 179:9
151:12 152:2	103:4 104:7 119:17	evidenced (1) 160:24	152:15	fair (7) 31:5 145:23	173:20 177:8	205:17 208:2
153:16 154:5 165:5	119:18 129:20	evident (1) 24:25	expire (1) 103:14	173:19 176:19	212:25	formal (1) 100:15
165:8 171:1 180:4	136:9 163:23	exactly (12) 29:1 37:1	expires (1) 8:19	179:16,18,24	financials (1) 69:5	formed (2) 26:17
180:8 182:15,17	166:25 167:18	37:14 125:12,12	explain (4) 11:19	fairly (7) 3:3 15:11	find (7) 46:1 78:9	182:9
186:12,14,17,18,22	187:13 189:8,11	126:19 166:15	56:11 59:15 142:16	54:24 69:5 72:15	104:25 162:12,20	former (1) 104:10
187:1,3,10 188:23	202:23 203:9	172:14 180:22	explained (8) 61:10	139:12 180:14	179:2,7	forms (1) 58:24
189:7,14 190:10,13	211:19 218:1	210:15,22 212:2	66:16 98:17 99:17	faith (38) 10:19 11:8	findings (1) 180:11	forthcoming (1)
190:18,21 191:1,5	entitlement (1) 20:19	exaggerated (1) 64:2	117:16 133:24	33:11 52:7,9 53:12	fine (1) 172:5	114:10
191:9,15,19,21,25	entitles (1) 169:14	exaggeration (1)	136:19 166:16	53:14,16,19 54:7,9	finger (1) 36:11	fortification (7)
192:15,18,19,22	entrusted (1) 82:25	61:21	explaining (6) 75:17	54:12,21 55:8,11	finish (1) 165:2	154:16 155:6,12
193:12,25 194:5,7	envelope (1) 40:24	example (13) 25:1,13	75:24 77:5 115:17	55:13 83:18,22	finished (2) 8:13 59:8	156:13 177:7 207:3
196:5 198:1,17,24	envisaged (9) 19:5	25:18 26:21 27:8	127:23 205:6	84:2,4 88:2,5,10,12	firm (1) 53:8	211:8
207:2 208:25 209:1	34:23 42:5 170:4	30:3 39:6 57:3 97:7	explains (4) 68:5	90:6,18 96:18,21	firmly (4) 11:11 61:9	fortified (1) 158:1
Eliasch's (9) 27:5 28:4	201:12,20 202:8,24	150:1,3 156:25	75:25 115:18	97:5,9 98:25	85:10 205:16	forward (39) 2:12,14
31:2 80:1 117:7	209:10	177:17	153:22	119:20 183:17	first (55) 5:5 10:22	7:10,13,16,22,24
153:19 189:10	envisaging (2) 168:21	exceed (2) 130:12	explanation (4) 24:18	194:24 195:4 197:6	17:6 18:9,19 21:5	9:16 11:2 13:5
198:9 207:5	192:18	156:10	24:19 27:1 69:3	197:23 218:23	21:14,20 26:16	15:14,17,22 24:4
email (4) 58:6,9 159:6	equal (4) 18:3,4 20:18	excessive (1) 40:17	explore (2) 6:10 212:2	fails (2) 121:16 139:9	30:9 32:5 33:15,19	36:19 38:1 43:14
159:16	184:17	executing (1) 27:10	explored (1) 73:8	false (3) 52:17 97:22	34:8 38:7,14,22	47:18,22 55:2
emails (1) 189:24	Equally (1) 181:12	executive (13) 10:1	exploring (2) 72:10	173:21	41:18 49:7 62:17	67:17 96:13 101:8
embarking (1) 51:19	equity (4) 18:2 156:4	75:17 76:24 77:14	134:2	familiar (1) 4:22	64:5 67:2 70:6	105:1 113:21

118:23 119:1 123:1 134:21 144:24 164:13 177:6 179:13 193:9 200:3 203:14 206:25 209:12,14 found (7) 4:18 16:16 16:22 31:10 64:11 205:21 206:8 four (7) 55:4 62:3,7 161:22 163:9 164:13 208:20 fourth (1) 154:8 Fourthly (2) 27:13 83:16 framework (1) 114:12 franchises (1) 123:14 frankly (3) 125:3 127:8,20 fraud (2) 140:23 165:11 fraudulent (1) 163:20 fraught (1) 54:17 free (1) 215:13 freedom (1) 153:7 Freehills (3) 194:18,22 195:6 frequent (1) 115:21 frequently (1) 98:11 Friday (6) 25:15 30:4 41:14 119:24 189:23 190:2 friend (51) 1:8 9:13,17 21:7 23:9 34:11 36:21 38:20 40:13 42:21 46:10 52:4 53:5,10 55:22 62:25 63:7,21 70:15 73:15 107:25 120:24 121:18 147:17 150:9 160:8 161:3 162:21 164:12 166:12,18 166:23 167:10 170:3,20 171:9 172:3,11,20 173:18 174:24 177:16 179:11,20 180:6 186:18 212:7 213:14 215:19,25 216:9 friendly (1) 85:24 friends (8) 24:1,2 28:1 42:1 57:3 70:23 176:1 214:17 friendship (3) 23:16 152:10 187:18 friend's (27) 16:15 27:19 29:5 36:5 47:19,25 49:22 52:5,15 53:2 57:21 64:1 69:14 70:9 74:20 167:9 168:15 169:7,11 170:12 173:9 175:17 177:24 178:3 179:3 210:12 216:17 front (8) 26:12 30:5 60:3 77:25 79:14 79:16 82:14 147:18 fulfil (1) 36:16 full (4) 92:10 127:25 146:21 158:1 full-time (2) 144:17 199:18 function (7) 10:1 29:17 44:1 89:4 101:5 108:11 200:2 functioning (3) 41:4,6 83:23	functions (4) 87:21,22 92:4 119:21 fund (1) 130:8 fundamentally (2) 142:9,13 funded (3) 68:20 69:1 117:11 funding (4) 18:16 92:16 160:2 185:25 funds (11) 38:18 65:7 76:2 126:11,22 134:17 158:6 160:4 160:5,6 204:22 further (33) 3:25 7:7 28:22 29:7 32:4 41:18 52:10 54:8 55:12 68:6 73:11 74:5 75:3,5 114:8 130:16 131:1 144:14 154:9 162:3 162:25 176:1 189:23 190:1,3 195:1 200:11 201:2 207:15 209:8 210:1 210:4 220:11 future (8) 4:1 18:13 106:20 171:24 199:24 200:13,25 201:4 <hr/> G gaining (1) 182:20 gang (1) 25:8 gap (1) 37:23 gaps (1) 57:14 gather (1) 206:6 general (6) 17:7 68:4 91:22 92:5 167:23 196:24 generally (7) 18:4 35:23 139:2 187:5 193:5 198:12 204:4 generated (1) 69:13 gentleman (1) 185:2 George (1) 156:19 gestation (1) 139:20 getting (4) 40:25 63:14 140:6 179:18 gist (1) 41:23 give (26) 5:1 15:2 19:1 31:13,14 48:19 56:4,18 93:7 95:19 120:9 125:15 131:13 148:12 149:7 150:1 157:24 158:4,8 159:8,16 168:11 174:19 202:22 207:18,25 given (39) 16:4 23:7 29:4 30:24 38:2 42:7 46:1 47:11 65:4 69:3,25 70:1 90:9 92:10 103:19 103:20 124:8,15 128:21 140:25 152:25 160:10,20 161:2 166:17 169:12 176:9,11 183:10 184:4,6 188:21,25 202:14 202:21 203:4 204:1 204:4 213:16 gives (2) 15:3 179:14 giving (9) 12:15 23:20 74:2 78:24 149:11 166:21 174:6 195:19 214:22 gleaned (1) 1:22 glibly (1) 145:17 go (49) 3:7 4:16 5:2,15	8:14 40:2,2,3 48:10 54:4 65:8,22 78:11 80:18 82:10 85:3 88:2 91:13 99:3 100:25 101:6 105:12 110:18 113:3,7 115:9 118:20 121:4,20 123:15 130:19 137:6 141:8,24 147:2 151:7 154:2 172:6 192:9,19 195:9,10 197:20 201:16 208:21 215:5 216:18 218:1 218:25 goals (1) 3:14 goes (12) 12:25 22:23 36:12 51:5 54:8 61:16 75:12 104:10 116:9 121:10 205:17 219:1 going (130) 2:1,2,3,5,7 2:17,22,23 3:8,9,10 3:13,22,23 4:5,13 8:7 12:1,22 13:4,23 13:25 15:13,13 16:3 17:6 24:6 43:9 46:23 50:11 57:6 59:9,12 60:11 64:7 64:15 66:9,10 68:19 69:23 70:4 71:12 74:17,18 77:25 79:15 81:21 84:5 85:1 86:23 89:11 90:5 91:2 94:18 97:13,14 99:14,18 106:4 112:2 113:2,12 114:7 120:17 122:13,23 124:23 125:12 127:10 129:11 132:14,25 133:4,22,23,25 134:13,16 136:21 137:8,9,17 138:2 139:18 140:8,10 141:11,16 142:15 143:10 144:3,24 145:9 147:5,6 158:8,11,12 159:8 160:5 164:6,17 165:21 166:10 167:7 172:15,18,23 172:24 173:5 175:14 179:13 181:14 203:19 204:13 205:13 208:10 210:15 211:4,7 213:3,8,12 213:14,21 215:6,20 218:14,15 219:5 good (45) 2:10 7:13 10:19 11:8 23:9 24:1,2 33:11 39:5 52:7 83:18,22 84:2 84:4 85:14 88:2,5 88:10,12 90:6,18 96:18,21 97:4,9 98:25 105:3 119:20 142:3 150:10 154:24 157:6,6,21 177:3,11 178:12,16 183:17 186:18 197:6,23 216:6 218:22 219:5 grandly (1) 75:19 grant (14) 6:24 51:8 85:10 101:25 151:10 154:9,25	167:7 171:12,12 192:15 200:5 206:22 207:15 granted (13) 33:19 50:18 51:14 83:5 102:2,16,22 149:18 154:23 183:8 191:6 199:8 200:24 granting (1) 193:2 grants (1) 173:1 grapple (1) 49:23 grateful (5) 16:12 17:5 48:14 210:2,3 gratefully (2) 147:9,21 great (1) 203:12 Greg (2) 36:17 196:1 ground (12) 22:2,7 80:9 81:6 92:16 98:13 102:17 119:5 134:25 171:16 185:25 190:20 grounds (12) 50:19 68:22 79:21 80:5 81:12,24 101:16 102:5 120:11 191:8 192:17 194:4 group (14) 1:11 17:14 17:16 75:17 76:22 156:18,25 157:13 160:7 182:5 186:21 188:2 189:7 207:2 guarantee (5) 158:6 174:19 177:6 213:1 215:15 Guide (1) 75:3 <hr/> H half (3) 170:17 171:21 171:23 Hampstead (1) 56:7 hand (10) 16:25 37:14 37:22 58:21,25 66:4 155:2 172:16 172:25 174:16 handed (8) 16:25 58:12 59:2 78:20 155:6 188:15 189:17 207:4 hanging (1) 211:11 happen (16) 2:1 24:24 44:8 93:9,23 106:5 127:18 133:12 141:11 171:25 173:15 179:22 180:5 184:23 208:10 218:15 happened (18) 7:17 13:11 79:23 81:20 102:7 105:5 111:2 112:18 125:19 142:21 143:21 145:19 146:19 163:12 180:17 194:13 202:10 203:5 happening (5) 50:4 79:14 95:24 144:18 146:20 happens (14) 36:7 46:24 47:14 63:13 74:5 89:24 94:11 120:24 129:9 130:24 131:6 143:14 144:22 197:16 happy (18) 6:13 7:15 45:3 48:9 61:20,20 77:13 106:7,13,19 107:25 108:2,2 113:19 120:16	135:8 170:20 172:7 hard (2) 162:12,20 hardship (1) 62:23 harm (2) 94:23 173:2 hat (1) 211:12 head (1) 32:5 headhunters (2) 122:20 199:18 heading (1) 162:13 heads (2) 33:19 89:21 health (1) 68:22 healthily (1) 74:19 healthy (2) 14:21,22 hear (5) 39:8 63:4 139:7 147:4 166:12 heard (8) 16:4 17:10 52:1 77:8 97:12 151:15 164:15 174:5 hearing (33) 4:2,4,8 23:12 29:9 30:5,8 32:9 47:10 52:13 53:9 79:24 80:17 82:13 99:2 115:12 162:5 176:14 180:19 188:2,7,9 188:12 189:23 190:7,16 191:11 192:1,10 194:13 204:2 206:21 208:14 hearings (1) 4:5 heat (2) 69:13 109:3 heavily (1) 176:20 held (18) 1:16,17 17:16 28:7 30:8 33:18 41:11,24 51:23 55:20 81:18 103:24 124:7 143:25 160:10 190:1 199:25 214:24 help (4) 23:4 65:14 97:11 209:13 helpful (4) 6:17 8:12 73:9 113:4 Herbert (5) 36:13 48:20 194:18,22 195:6 high (4) 3:5 38:11 167:11 183:9 higher (4) 95:5,9 132:25 133:9 Hill (184) 1:6,7 4:25 5:1,5,12 8:5,10 9:13,22,24 16:1,12 16:19,25 17:4,5,24 18:23,25 21:13 22:7 23:11,14 24:6 24:11 31:16 32:17 32:19 33:4,15 35:13 39:13,18 42:10,14,24 43:3 43:10,21,25 44:4,9 44:13 45:21,25 46:18 47:12,16 48:14,18,19 49:13 49:15,17 50:14,17 50:19,22 51:3,5 58:1 59:7,9,12 60:5 60:9,11 63:4 64:16 64:20 65:4,21 67:14 70:4 71:2,11 71:14,16,25 72:18 73:1,11,13 74:7,16 75:19 78:4,8,24 79:1 81:10,17 83:17 84:7 87:11 87:15 90:20 91:4,6 92:15 93:15 94:13	96:8,12,15 97:15 98:4 100:17 102:7 105:1 106:7 107:24 108:5,15 113:18 114:13 116:25 117:10 118:10 119:4 120:23 121:17,18 129:6 130:22,24 131:12 135:1,12 137:15 139:8,12 140:1 145:17 150:14 159:11 160:8 165:3 166:6,7 169:20,22 171:7 174:9,20 175:5,16 176:11,15 177:12,22 178:10 181:12 191:10 196:21 197:13 204:18 205:15 207:20 208:4 210:2 210:7 152,22 211:1 211:17 212:2,4,11 212:16 213:11,23 213:25 214:12,14 214:16 215:18,24 216:7 217:5 218:10 220:6,9 Hill's (19) 11:15 59:21 77:8 79:24 99:11 105:5 115:3 117:13 117:19 128:7 132:23 135:21,23 137:7 145:4 164:12 193:15 201:1 215:6 history (4) 40:6 86:19 140:6 198:9 hitting (1) 60:17 hive (2) 74:13 165:4 hived (1) 166:2 hold (7) 1:24 2:7 34:24 43:3 65:10 133:16 218:17 holding (12) 2:16 43:8 56:3 91:10 136:3 148:10,16 149:10 179:24 180:24 183:25 189:22 holdings (3) 162:8,16 208:20 holiday (3) 56:5,25 164:7 home (1) 170:25 honestly (1) 90:17 honour (1) 12:13 honored (1) 172:16 hope (11) 2:13 7:9 16:3 109:1 112:10 143:8 144:23 147:2 175:23 181:13 213:19 hopeful (1) 209:20 hopefully (3) 64:10 107:6 144:14 hopeless (1) 54:12 hopes (2) 5:25 6:3 hoping (1) 174:20 Hornbook (1) 88:9 hospital (1) 119:25 hostile (1) 23:18 hotel (15) 14:2 17:14 17:16 67:19 68:1,6 94:17 127:8,11,11 152:12 153:8 204:17,25 214:6 hotels (5) 123:13 182:1,6 195:3 209:1 hound (2) 25:20 170:24	hour's (1) 25:15 house (2) 24:3 25:21 housekeeping (3) 1:5 137:16 220:3 Howard (176) 1:9 6:14 6:15 7:2,6,12,22 8:1,9,11,25 9:20 10:8,11,17,21 11:1 11:18,24 12:2,4,8,9 13:3,6,22,25 14:4 14:10,15,18,22 15:19 16:2 22:6 30:15 32:19,25 33:2,13,14 55:3 58:7 10 59:3,11,13 59:20,25 75:6,7,8 76:17 77:2,6,11 78:3,11,17,20 79:1 79:4,9,13,21 81:14 81:16 82:22,23 84:3 85:23 86:5 88:17,22 89:2,4,7 89:10,16,18,20,24 90:3,13 91:6 93:3,7 96:21 98:4 99:20 99:23 105:15 106:2 106:6,10,23 108:4 108:7 109:1,9,12 109:14,21 111:7,14 114:11 115:14 116:19,23 117:5 118:19 119:13 121:1,6,11,15,23 122:5,15,19 130:2 130:6,23 131:17,21 137:11,17 138:8,22 139:1,12 140:5 141:13,22,25 142:7 142:12,24 143:3 146:2 147:10,17,22 150:9 161:3 166:8 166:23 167:13 169:22 176:6 183:19 185:20 192:13 197:7 198:4 199:20 200:18 201:10 205:4 208:12 211:4,13 212:17,19 213:3 214:21 215:1,12 216:1,23 217:10,15 217:18 218:8,20 220:7 Howard's (11) 34:1,11 34:17 38:20 51:16 161:11 163:16 175:15 198:6 206:11 207:14 huge (1) 4:19 hugely (1) 161:21 hurdle (1) 55:16 <hr/> I idea (14) 5:6 6:9 74:20 102:7 117:18 127:10 128:22 142:3 191:21 197:9 198:23 208:23 214:22 215:19 identified (5) 22:9,12 122:22 123:11 156:6 ignore (7) 34:24 37:18 57:6 60:19 117:11 150:2 198:6 ignored (5) 41:10,23 45:17 78:4 120:10 ignores (2) 9:18 49:1 ignoring (1) 9:20 illusory (1) 134:22
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<p>imagine (1) 179:6 imagines (1) 106:24 immaterial (2) 40:14 40:15 immediate (3) 5:1 6:8 204:22 immediately (14) 19:2 93:7,9,21 94:5 168:12,22 169:2,13 186:4 201:20 202:9 202:18 209:5 imminently (2) 126:22 127:2 Imperial (1) 127:12 implementation (3) 10:5 195:15 206:23 implemented (6) 149:19 199:5,7 200:8 205:14,17 impliedly (1) 104:16 import (1) 190:23 important (43) 5:7 6:17 10:11 17:9 20:24 22:17 24:22 27:18 28:3 30:6 40:15 68:15 70:17 74:10,16 77:23 81:10 86:16 87:10 91:16 92:23 99:1 101:1 103:23 109:24 120:10 123:10,18 134:10 148:9 149:3 150:10 152:23 153:2 154:3 154:7,21 164:25 174:15 180:2 183:13 202:13 218:3 impose (2) 29:16 150:25 imposed (3) 101:24 150:20 152:20 imposes (1) 55:5 impossible (1) 57:18 impression (1) 36:4 improper (4) 101:16 134:23,24 165:15 improperly (2) 117:7 117:21 improve (2) 71:21 177:12 improvements (1) 68:22 improving (1) 212:5 impugned (1) 19:8 inadequacy (1) 155:9 inadequate (5) 155:25 156:14 157:9 158:14 177:8 inappropriate (4) 28:24 57:2 97:17 173:16 inappropriately (1) 63:20 incentive (3) 22:15,16 25:23 include (3) 149:11 172:10 211:16 included (2) 109:22 190:3 includes (1) 100:10 including (5) 23:8 25:13 39:3 68:2 123:20 inconsistent (1) 90:23 inconvenience (1) 70:19 incorrect (1) 159:13 incidentally (1) 29:15 independently (5) 77:9</p>	<p>77:15 88:18 134:18 144:22 INDEX (1) 220:1 Indian (1) 132:14 indicate (1) 121:17 indicated (2) 54:1 58:19 indicates (1) 198:8 indication (2) 59:23 174:7 indirect (1) 186:23 individentally (1) 77:11 individuals (4) 113:16 122:21 123:4 146:3 ineffective (1) 97:10 inequality (1) 184:16 inescapable (1) 111:9 inevitable (1) 171:25 inexorably (1) 165:9 inference (1) 133:4 information (23) 2:18 8:3 20:21 38:23,24 39:14 40:13,20 48:24 49:3 54:23 75:13 84:17 126:12 158:2,4,9 159:16 174:1 177:8 200:11 204:19 212:21 infringement (1) 55:24 inimical (2) 117:19 198:19 initial (10) 21:5,14 79:2 87:5 130:11 132:8 159:25 170:4 176:16 185:2 initially (3) 78:17 127:16 190:9 injection (1) 69:9 injunct (2) 123:17 136:25 injuncted (7) 79:17 82:9 118:15 120:9 158:16,16 194:3 injuncting (2) 122:2 137:5 injunction (65) 17:10 27:14 37:12 50:16 50:18 51:6 56:14 56:16,23,24,25 60:21 78:6,7,13 79:9 80:6,7 81:2 82:8 83:3,5 102:22 103:1 112:21 114:14,17,23 118:14 120:9 129:15 136:2,10 138:12 139:5,6 144:1,4 149:17 151:9 154:23 158:12 161:13 163:13 166:14,21 171:8,12,13 172:7 173:1 177:4 188:2 190:17,25 191:6,15 193:3 199:8 206:22 211:6 213:5 214:17 217:21 218:17 injuncts (32) 4:3,6 6:19,20 10:4 12:16 16:6 69:24 78:5 80:11 85:10 94:25 137:21 142:15 147:23,24 154:9 157:24 161:16,19 176:4,12 183:7 189:13,20,22 190:10 194:12 195:21 207:14,18 216:15</p>	<p>injunctive (18) 1:14 17:3 28:15 33:16 49:5 104:11 120:21 154:25 178:17 183:6 188:8 190:9 195:14,17,18 200:5 200:5 220:4 injuncts (2) 81:24 134:7 input (2) 7:9 205:18 inquiry (1) 94:8 insofar (4) 106:12 138:18 146:8 148:13 instance (10) 14:2 43:5 52:15 53:20 84:4,12 113:22 145:5 167:14,20 instruct (3) 93:17,20 186:8 instructions (8) 77:3 89:12 100:10 162:18 163:25 177:14 178:11 212:12 instructive (1) 57:21 insubstantial (1) 64:3 insufficient (1) 217:8 integrum (1) 160:16 intend (2) 87:8 132:9 intended (3) 4:16 127:16 132:2 intent (1) 38:4 intention (3) 80:22 92:11 206:6 interest (10) 26:19 28:9 52:24 60:17 117:15,22 123:6 128:19 177:20 186:24 interested (2) 130:24 210:19 interesting (3) 6:9,17 72:18 interests (32) 2:7 26:20 27:8 28:22 61:16 88:15 89:8 90:19 91:10,11 117:9,20,22 152:11 152:18 153:8,9,9 167:12,16,18 182:24 183:1,24 184:1 187:7,19,22 187:22 198:19 201:7 214:7 interfere (2) 27:21 192:4 interim (42) 8:20,23 9:17 10:4 16:6 36:10,11,16,20 37:9,23 42:15 43:5 43:10 51:6 54:3 56:16,23 57:10 71:13,14 77:14 84:14 105:19 109:2 114:5 116:1,11 118:1,5 121:8 138:10 144:15 147:19 163:13 170:15 181:24 190:4 196:2 199:17 200:10 202:2 interlinked (1) 165:9 interlocutories (1) 70:12 interlocutory (6) 22:3 26:25 51:6 70:8 74:3 139:25 interrupt (2) 8:11 9:13 intertwined (1)</p>	<p>165:24 intervening (1) 192:12 introduced (1) 186:12 introduction (1) 85:16 invalid (23) 5:14 11:3 11:21,24 12:4,18 12:19 128:8 131:13 135:4,7,10,24 136:5,13,16 137:1 192:22 194:24 195:8 206:9,10,17 invested (3) 111:20 159:20 187:12 investment (9) 149:4 153:3,12 158:21 160:1,6 187:24 204:17 213:7 investments (4) 1:10 112:15 183:1,19 investor (1) 111:16 investors (2) 182:5 187:6 invite (8) 4:23 31:17 34:12 35:11 42:3 42:19 64:23 167:2 involve (1) 4:19 involved (11) 14:13 75:23 76:12,19 108:22 127:6 145:10,11 175:18 199:15 200:16 involvement (2) 151:16 200:25 involves (2) 27:3 63:14 involving (1) 53:12 irrelevance (1) 169:8 irrelevant (1) 104:13 irreparable (1) 139:4 issuance (1) 130:16 issue (52) 6:23 8:17 11:6,24 13:7 15:4 19:25 27:9 34:9,10 38:11 39:3 45:17 48:7 49:21 52:3,11 54:10,24 55:4,14 64:7,13 73:6,8,8 74:5 78:3 80:4,10 85:15 89:8 114:11 115:15 116:12 131:12 141:1 142:13,14 145:12 145:17 162:6 169:17 188:4,10,10 196:10,13 199:1 203:17 206:17 208:24 issued (8) 30:8,18 124:18 131:25 135:10 161:24 162:1 206:11 issues (10) 6:2 7:8 38:7 72:21 124:15 139:17 140:19 194:1,8 208:24 issuing (2) 81:4 132:5 item (5) 36:3 38:12 124:5,15 194:14 items (8) 20:21 30:21 35:17 51:1 78:14 150:22 188:25 189:15</p>	<p>joined (1) 4:17 joint (36) 3:5,18 4:17 14:9 17:16,17 22:23 23:2 26:18 27:6 49:25 83:2 91:7 134:17 177:21 182:8,12,22,25 185:2 186:16,24 187:1,18,20,23 188:11 191:20 195:18 196:23 197:19 199:16 207:8 208:6 209:9 211:24 Jolivet (51) 2:22 9:16 15:13 16:15 36:17 36:19 39:25 40:2 43:12 45:2,14 48:9 57:17 60:24 65:5 65:12 67:18 76:22 77:12 105:4,9,18 106:7,12 109:2 113:17,22 114:7,22 120:17 121:8 124:17 125:3,9 134:11,11,13 138:16 139:4 170:10,14 171:15 172:11,24 173:2 199:15,21 200:10 204:1,24 Jolivet's (4) 39:17,18 39:20,24 jolly (1) 117:14 judge (35) 26:12 30:6 30:16 31:11 33:15 33:25 34:9,15,16 34:19,20 51:7,16 79:4 98:14,14 99:5 99:10,25,25 100:3 100:14 102:10 150:15,25 166:20 166:24 167:5 183:9 191:12,17 192:3,14 192:18 193:2 judges (1) 148:18 judge's (1) 32:2 judgment (26) 29:11 33:25 34:6 56:20 78:20 102:3 103:18 135:3,4 136:1,20 149:7 165:20 166:19 167:1,4 185:10 188:12,13 188:15 189:18 192:6,25 193:14 198:6 206:20 July (95) 1:1 7:19,20 9:8 15:15 29:2,9 30:12,12,13 35:2,7 35:9,16,18 38:15 39:10 41:19 42:8 42:16 43:4 45:11 48:21 49:2 53:24 77:21 81:18 83:14 103:11,11,15 104:4 106:1 109:7 112:20 121:23,25 124:7,10 124:13 126:4,18 137:5 139:23 148:20 150:2,12,23 151:23,25 153:14 153:20,22 155:8 157:20 176:20 183:9,11 188:3,13 188:15,15,18 189:6 189:17,23,24 190:2 190:5,5,8 191:5 192:3 193:24 194:13,15,16,16,20</p>	<p>194:22 195:1,4,10 195:20,24 196:6,12 197:2 199:2,9 201:8 205:5 206:24 207:5 218:11 jumping (1) 141:23 June (4) 26:3 126:13 139:24 188:1 June/July (1) 24:9 jurisdiction (2) 162:17 208:19 JUSTICE (241) 1:6,21 5:4,11 6:13,25 7:4 7:7,19,24 8:3,6,24 10:3,10,16,20,25 11:16,23 12:1,3,6 12:25 13:4,20,23 14:3,8,12,16,19 15:5 16:8,18,24 17:2,23 18:22,24 21:12 23:10,13 24:4,10 31:15 32:16,18 33:12 35:12 39:12,17 42:8,12,23 43:2,8 43:18,24 44:2,8,11 45:18,22 46:17,21 47:15 48:5,18 49:12,14,16 50:13 50:15,18,21 51:2,4 57:25 58:4,9,17,22 59:18,23 60:3,8,10 63:2 64:12,19 65:2 65:18 67:13 70:3 70:25 71:7,12,15 71:17 72:10,25 73:4,12,25 74:15 75:6 76:14,25 77:4 77:7 78:2,10,12,19 79:3,8,11,20 81:11 81:15 82:17,22 84:1 85:22,25 86:2 88:14,18,23 89:3,6 89:9,13,17,19,21 90:2,12 93:2,6 96:15 98:3 99:19 99:22 105:14 106:1 106:4,9,21 107:22 108:25 109:8,11,13 109:20 111:4,12 114:6 115:13 116:15,22 118:18 119:8 121:3,9,14 121:20 122:3,13,17 129:24 130:4 131:15,18 137:8,12 137:19,23 138:6,21 138:25 139:11 140:3 141:11,15,24 142:3,8,23 143:2 146:1,24 147:11 159:25 165:21 166:5 169:19,21 171:6 174:5,17 175:4,13 176:9,13 177:19 178:9 181:8 181:14,24 210:6,14 210:19,24 211:2,11 211:22 212:3,10,14 212:17 213:2,10,21 213:24 214:2,13,15 214:20,25 215:9,17 215:22 216:6,25 217:6,14,17 218:5 218:14 justification (1) 118:10 justify (3) 69:19 118:9 216:24 justifying (1) 55:2</p>	<p>JV (3) 88:15 160:1 180:25 JVC (30) 17:18 27:6,9 27:11 35:23 64:20 65:8,23 79:25 82:25 87:1 88:6 89:8 91:23 92:8 115:22 117:9,22 118:6 130:13,17 141:22 142:7 152:12,18 153:8 155:15,20,21 211:15 JVC's (1) 60:15</p>
K						
<p>keen (1) 111:9 keep (8) 24:22 37:18 57:13 116:24 141:4 141:14 147:3 148:4 keeps (1) 36:11 kept (1) 84:7 key (1) 160:23 kick (1) 25:19 kind (25) 2:14 23:21 37:22 47:1 53:10 53:12 54:16 55:24 55:25 63:24 69:8,8 69:22 70:11 150:4 152:3 157:9 158:5 164:1 168:6 173:17 176:2,3 200:24 208:6 knew (3) 94:9 128:24 128:25 know (55) 2:15 5:7 9:2 16:16 19:12 22:22 22:25 26:14 44:12 46:3 48:2,9 58:2 60:6,7 70:23 73:10 75:19 77:7,18 86:17 89:20,22 99:13 100:8,9,16 107:10,24 112:25 116:19 121:12,16 124:21,24 125:24 127:9,25 133:2,3,3 137:6,15,16 141:24 142:9 144:15 145:16 163:15 171:24 181:7 208:10 214:2 216:20 217:15 knowing (1) 173:19 known (1) 52:16 knows (12) 17:13 23:6 24:12 26:1,7 29:10 30:7 36:10 41:9 94:15 127:5 145:20</p>	<p>known (1) 117:14</p>	<p>known (1) 117:14</p>	<p>known (1) 117:14</p>	<p>known (1) 117:14</p>		
L						
<p>labour (1) 164:25 Lady (120) 1:7 19 5:1 5:18 9:14 16:1,5,12 16:13,17,22 17:13 17:15,21 18:8 19:21 21:13 22:13 22:22 23:1,5 24:6 24:12,22 25:17 26:1,7,14 28:6 29:9 30:7 31:13,14,17 31:19,24 33:1 34:12,15 35:11 36:4,25 37:25 38:20 39:8 40:9 41:9,21,22 42:19 43:10 44:10 46:18 47:12 48:14,19 49:24 55:12 56:18</p>	<p>labour (1) 164:25 Lady (120) 1:7 19 5:1 5:18 9:14 16:1,5,12 16:13,17,22 17:13 17:15,21 18:8 19:21 21:13 22:13 22:22 23:1,5 24:6 24:12,22 25:17 26:1,7,14 28:6 29:9 30:7 31:13,14,17 31:19,24 33:1 34:12,15 35:11 36:4,25 37:25 38:20 39:8 40:9 41:9,21,22 42:19 43:10 44:10 46:18 47:12 48:14,19 49:24 55:12 56:18</p>	<p>labour (1) 164:25 Lady (120) 1:7 19 5:1 5:18 9:14 16:1,5,12 16:13,17,22 17:13 17:15,21 18:8 19:21 21:13 22:13 22:22 23:1,5 24:6 24:12,22 25:17 26:1,7,14 28:6 29:9 30:7 31:13,14,17 31:19,24 33:1 34:12,15 35:11 36:4,25 37:25 38:20 39:8 40:9 41:9,21,22 42:19 43:10 44:10 46:18 47:12 48:14,19 49:24 55:12 56:18</p>	<p>labour (1) 164:25 Lady (120) 1:7 19 5:1 5:18 9:14 16:1,5,12 16:13,17,22 17:13 17:15,21 18:8 19:21 21:13 22:13 22:22 23:1,5 24:6 24:12,22 25:17 26:1,7,14 28:6 29:9 30:7 31:13,14,17 31:19,24 33:1 34:12,15 35:11 36:4,25 37:25 38:20 39:8 40:9 41:9,21,22 42:19 43:10 44:10 46:18 47:12 48:14,19 49:24 55:12 56:18</p>	<p>labour (1) 164:25 Lady (120) 1:7 19 5:1 5:18 9:14 16:1,5,12 16:13,17,22 17:13 17:15,21 18:8 19:21 21:13 22:13 22:22 23:1,5 24:6 24:12,22 25:17 26:1,7,14 28:6 29:9 30:7 31:13,14,17 31:19,24 33:1 34:12,15 35:11 36:4,25 37:25 38:20 39:8 40:9 41:9,21,22 42:19 43:10 44:10 46:18 47:12 48:14,19 49:24 55:12 56:18</p>		

57:15 58:1,13 59:3 59:9 60:9 61:13 62:12 64:16,23 65:13,25 67:10 69:15,23 71:2 72:18 74:7,8,18 75:8 82:23 116:25 137:20 159:11 161:18 166:19 167:3,12 168:4,8 169:17 171:8,12 173:1 174:9,10,20 175:1 176:18 177:12,13,22 178:10,11,21 179:6 179:22 181:5,12 210:2,3,23 212:16 213:11,17 214:14 215:18,24 216:2 217:5	69:14 70:9,15,23 73:15 74:20 107:25 120:24 121:18 147:17 148:18 150:9,15,20,25 160:8 161:3 162:21 164:12 166:12,18 166:23 167:9,10 168:15 169:7,11 170:3,11,20 171:9 172:3,10,20 173:8 173:18 174:24 175:16 176:1 177:16,24 178:3 179:3,11,20 180:6 210:12 212:7 213:14 214:17 215:19,25 216:9,16 leave (4) 1:18 95:11 171:22 219:6 leaves (1) 65:21 leaving (7) 52:12 63:16 84:10 108:5 111:24 160:13 171:17 led (3) 23:25 26:13 30:5 ledger (1) 175:20 left (7) 103:7 128:2 171:2,23 173:10 213:23,25 legal (6) 4:19 55:22 83:19 96:24 115:2 135:3 legitimate (3) 61:17 121:24 123:16 legitimately (1) 120:2 Leighton (1) 157:19 length (1) 46:19 letter (47) 35:6,8,9,14 35:17,25 36:1,13 38:2,8,10,13,15,17 38:25 39:10 40:11 41:2,18,19,20 42:2 42:17 43:6 48:21 48:25 49:1 75:16 75:22,22 76:5 77:20 125:23 126:2 126:4,18,19 153:15 153:24 155:7 156:2 157:22 177:10 192:24 197:2 205:4 205:9 letters (3) 41:18 56:20 207:5 let's (19) 7:14 24:4 73:16 74:12 94:24 106:24 107:1 108:15 115:20 121:20,23 129:6,17 140:3 142:25 143:3 143:11,13,14 level (14) 6:4 18:4 20:17,19 24:24 65:7,7,11,23 107:12 152:25 173:16 179:25 184:18 levels (1) 18:2 liabilities (8) 156:6,8,9 157:10 177:25 178:1 207:10 211:16 liability (10) 156:19 157:7 175:18,19 176:25 177:18 210:11 211:16 212:23 216:8 liberty (8) 34:21 51:17 51:21 55:21 175:11	175:24 207:25 217:11 lie (2) 101:3 140:17 lies (3) 101:4 122:1 205:16 Life (1) 52:16 light (15) 6:11 17:9 59:7 66:24 67:7 76:11 92:13 103:13 114:21 119:14 120:19 121:12 137:7 139:3,8 Likewise (1) 167:17 limb (1) 61:25 limbo (1) 9:9 limbs (1) 49:18 limit (1) 40:19 limited (7) 1:10 31:21 33:20 85:5 183:1 183:20 186:21 line (17) 31:17 32:14 47:16 54:18 56:10 76:8 99:5,12,14,25 100:18,22,22 101:20 117:2 152:14 154:18 lines (3) 32:3 152:5,7 listening (1) 119:12 litigation (7) 50:7 70:18 72:1,17 140:8 145:20 209:7 little (5) 5:17 19:17 104:18 137:22 172:22 live (5) 43:12 105:7 188:10 199:22 212:19 LLP (1) 195:3 load (2) 40:10 75:20 loan (6) 61:15 111:19 156:17,18,25 186:24 locked (4) 3:5 5:19,19 44:20 lodge (1) 59:25 lodged (3) 58:15,20 59:22 lofty (1) 27:20 London (1) 52:16 long (15) 8:9 23:11 40:3 41:3,20 66:19 67:21 86:19 115:11 123:19 145:16 163:14 168:7 182:14 194:25 longer (3) 139:7 145:14 163:17 look (24) 41:22 57:21 64:23 80:18,19 89:22 91:4,6 93:1 98:1 100:18 110:7 110:11 113:1,2 115:3,7,20 116:5 125:19 130:3 146:15 152:3 167:3 looked (5) 85:18 86:8 109:24 148:18 178:13 looking (18) 18:22 22:4 31:15 32:18 37:13 39:10 40:12 42:12 63:10 94:24 94:25 109:6 117:24 122:20 163:17 170:6 178:5 216:11 looks (4) 143:20 152:4 152:13 201:2 looms (1) 38:19 loose (1) 58:23 Lord (2) 32:21 101:13	Lordship (2) 101:22,23 lorry (2) 40:10 75:20 lose (5) 15:20 97:7 116:4 136:18,19 loss (9) 13:18 76:1 136:17 158:15,15 158:19 205:7 211:7 213:8 losses (3) 161:10,11 215:19 lost (5) 44:6 77:25 118:13 159:8 193:5 lot (20) 15:25 29:3 56:8 69:12 70:8 71:5 94:23 121:15 123:13 127:14 143:5,6 145:16,19 146:25 151:15 164:23 203:5 208:8 208:9 lots (2) 70:17 142:1 low (2) 95:8 133:1 lower (1) 202:3 lowering (1) 133:5 lowest (1) 27:4 loyal (1) 38:6 lucky (1) 219:7 ludicrous (1) 127:8 lunch (1) 166:12 lunchtime (1) 58:21	129:23 141:18 143:5,7,15,16 145:20 146:10,12 146:13,14,18 149:11,13 150:4 154:3 156:22 165:10 184:7 188:22 189:1 190:11 198:18 200:3,22 209:15 maximum (2) 94:20 203:6 mean (18) 9:10 17:24 21:6 24:9 58:7 74:3 76:15 77:6 104:1 109:4,13 126:24,25 127:1 128:14 139:14 168:16 180:20 meaning (1) 194:5 means (5) 27:16 127:3 196:13 204:24 214:9 mechanism (5) 47:7 63:13,14 95:3 164:18 mechanisms (2) 44:21 72:2 mediation (6) 3:15 4:14 6:9 15:10 209:7,13 meet (1) 212:22 meeting (126) 2:8 7:3 7:8,14,19,23 8:22 10:14 20:15,25 21:1 29:24 34:17 34:17 35:2,18 36:2 41:13,15 42:8 43:4 43:15,16 45:1,8,20 52:19 53:20,20 54:22 55:3,8 81:12 81:18 82:6 84:6,11 84:12,16,20,22,25 85:1 86:12 90:5 91:22,22 97:6 98:23 100:10 102:17,24 103:12 105:6 106:15,15,17 106:17 107:1 113:7 113:15,20,21 114:10 116:1,13,22 116:23 118:4,8,9 118:21 119:17,23 121:23,25 124:7,18 124:21 125:14,15 125:17,21 126:13 126:14,15 133:18 138:13,19,23 141:6 141:9,12,17 143:10 143:13 153:14,20 154:1 167:6 171:24 172:6 184:4,8,9,10 184:14,15 190:5 192:15,16 193:4 194:15,21,25 196:6 196:21 199:9,25 201:8,14 205:13 206:8,24 213:22 218:11 meetings (139) 1:16 2:2,4,16 4:11,13,13 5:6,14 6:25 7:20 10:22 15:9,16 20:5 20:10 25:14 27:20 28:20,23 29:5,14 30:10,13 30:23 31:4,5 32:6,6 32:8,11,21 33:21 34:4,5,24 35:3,5,15 41:11,12,25 42:3	47:2,5,6 50:25 51:13,25 52:1 74:6 78:14 79:21 80:3,5 80:9,22 81:6 83:6,7 83:10,13 98:11 99:3,15,18 100:25 101:6 102:5,11 103:10 107:15 111:3 112:19 113:9 114:15,18 116:16 116:20 122:24 124:25 125:13 141:14 142:4,18,22 144:2,2,14 150:21 150:23 151:5 166:23 173:21,24 174:3 185:20,22 188:22,23 189:5,14 190:1,2,11,20,21 191:2,4,8,13,23,24 192:2,9,19,21,21 193:6,7,9,17,24 194:3,6,19 195:1,8 195:10,16 196:12 196:16 198:10 199:2,4 204:7,9,10 member (1) 62:7 members (2) 62:3 201:6 memo (1) 90:15 memorandum (3) 20:8,13 130:18 mention (1) 48:22 mentioned (1) 65:13 mere (1) 88:11 merits (1) 23:12 mess (1) 12:7 met (1) 94:17 method (1) 64:17 methodology (4) 64:6 64:13,17 203:16 metrics (1) 40:21 middle (3) 103:21 143:25 153:4 midnight (2) 16:21 39:16 miles (3) 53:13 54:18 55:11 million (112) 13:11,11 18:19 19:2,19 24:14 26:20 27:2 92:22 93:11,21,25 95:2,3,8 107:8,10 109:25 110:2,9,20 111:7,19,21 112:4 117:12 129:8,13,14 130:12,23 131:5,11 136:21 144:24 149:5,14 153:3 155:23 156:5,9,10 156:17,18,20 157:12 158:15,20 159:19,21,23,25 160:10,14,18,22,23 168:12 174:14,21 174:25 175:3,9,10 175:14,16,19,20,22 176:22,24 177:1,10 177:13,17,19 178:1 178:6,8 182:8 184:22 186:3,6,25 190:6 196:7 201:10 201:12 203:25 206:2 207:21,23 210:8,8,10,13,20 211:10,12,16 215:14,20,23 216:4 216:7,9,10,11,15 216:20 22 217:1 millions (2) 178:14,14	mind (12) 24:23 34:4 38:5 71:8 89:13 106:12 107:20 133:11 158:14 162:13 163:3 211:10 mindful (2) 154:8,25 mine (1) 151:25 minute (8) 11:19 42:12 66:22 78:12 79:20 81:11 111:12 147:11 minutes (5) 30:4 48:13 60:5 137:20 147:13 miscellaneous (1) 181:5 misdirected (1) 57:13 misleading (1) 75:11 misled (2) 109:15 166:13 mispricing (1) 54:25 mispronounce (1) 2:21 misrepresentation (1) 163:20 misrepresentations ... 59:21 189:10 misrepresented (1) 79:13 missed (3) 4:23 48:20 181:8 missing (1) 59:24 misunderstanding (1) 42:25 misunderstandings (2) 157:4,7 moment (39) 3:2,11 3:20 4:25 14:17 15:7 63:3 71:2 81:19 94:25 96:4 96:23 101:8 105:12 105:13 109:6 112:1 113:2 114:11 115:23 116:15 123:5 143:20 144:13 145:11,13 146:19 161:22 162:2,17 163:2,9 163:14,16 164:11 204:21 210:10 211:8 215:4 Monday (7) 78:21 80:14 120:2 212:16 212:19 216:18 217:11 money (89) 12:11,16 12:21,21,23 13:9 13:13,15,17,17,20 13:25 19:6,9 46:2,7 46:8 63:24 64:1,21 66:4,6,9,15 68:2,15 75:14,25 76:10 77:5 85:13 95:2,4 110:16,18 111:23 111:24 112:6,16 117:16 123:18,22 124:1,5 126:25 127:14,15,17,23,25 128:6,8,17 129:17 133:3,13,20,21,25 134:8 135:5,6,16 135:22 136:6,16,17 163:21 168:23 175:13 179:1,2,2,4 179:5,7,13,17 187:13 193:20 203:13,20 204:16 205:1 206:3,5,17 213:4 214:4
--	--	---	---	--	---	---

<p>monies (1) 143:4 month (1) 188:7 months (21) 2:15 4:11 15:9 21:6,8,9,15,20 21:23 69:9 76:19 87:6,10 94:14 103:25 110:19 132:22 155:23 185:3,6,9 mooted (1) 35:24 morass (1) 208:24 morning (7) 29:7 46:24 76:9 86:8 126:6 135:17 209:3 morphed (1) 78:22 move (5) 7:10 13:4 24:4 174:7 209:14 moved (3) 15:17 172:21 199:12 movement (1) 26:8 moving (4) 57:8 175:5 178:19 182:11 multiple (1) 70:12 muscle (1) 23:4 mutual (1) 123:6</p> <hr/> <p style="text-align: center;">N</p> <p>naive (1) 112:12 name (1) 2:22 nature (4) 137:23 187:11 200:19 208:25 nearly (2) 4:21 24:7 necessarily (5) 54:11 139:14 179:4 180:21 187:15 necessary (8) 4:11 31:5 54:23 64:6 91:23 167:2 175:2 199:12 need (91) 1:23 6:1,2 15:14 16:5 18:10 20:16 28:24 31:3 32:4 33:8 40:9,12 43:21 44:11,25 46:21,25 48:1,3,8 48:24 50:20 52:25 54:10,11 56:14 57:8 63:4 64:1 65:10 66:21 68:2,5 69:4 74:10 76:7,10 86:10 94:7 95:14 97:24 100:20 110:16,23,25 112:2 114:23 120:20 122:17,19 123:22 124:1,5 127:2,3,4 133:10 139:5,7 141:9 143:17,21 145:15 147:3,12 150:1 153:1 154:24 155:2 162:15 164:22 177:3 180:22 181:17 184:25 199:10 203:13,20 204:1,16 204:22 205:1 207:18,22 210:17 211:4 212:4,11,11 213:23 needed (9) 2:24 35:5 56:16 66:7 77:5 104:11 111:8 126:11 191:16 needs (39) 8:20 9:2,24 10:2 15:25 43:4 47:7 64:20 65:6 66:5 68:10 73:8 75:14,25 76:2 85:13 94:8 96:11</p>	<p>97:11 108:7,14 125:8 133:20 134:1 134:9,19 140:24 141:13 142:17 163:7 164:9 169:25 170:7 173:24 181:16 202:14 205:1 207:24 208:6 negotiate (2) 3:17 196:4 negotiation (1) 145:1 negotiations (1) 126:15 neither (2) 83:21 150:22 net (4) 175:18 210:11 210:13 213:4 nets (1) 178:6 neutral (3) 39:20 139:20 181:2 neutrally (1) 142:25 never (9) 24:18 34:22 51:17 66:21 69:3 69:21 132:24 173:5 216:13 nevertheless (2) 39:15 167:7 new (8) 31:20,23 144:17,22 170:10 171:18 181:7 194:14 newly (1) 3:3 Newman (9) 26:12 29:12 50:21 78:20 148:19 183:8 185:10 188:9 189:17 Newman's (2) 76:20 103:18 nice (1) 117:14 night (6) 16:21 25:16 39:16 158:25 159:6 159:6 noise (2) 56:13 69:13 nominate (1) 3:23 nominated (10) 14:12 71:18 88:14 93:18 96:6 186:8 187:2 189:3,25 194:17 nominator (1) 88:20 nominee (4) 71:18 117:15 152:19 187:21 nonsense (2) 102:9 110:17 non-acceptance (1) 47:3 non-contentious (1) 181:13 non-point (1) 180:17 non-standard (1) 20:7 noon (1) 48:15 normal (6) 49:24,25 52:18 123:1 196:22 196:22 north (1) 111:20 note (13) 18:17 19:21 20:12 22:19 29:7 41:12 45:12 58:6,9 58:11 103:23 109:22 110:5 noted (2) 61:13 188:18 notice (71) 2:17 19:2 19:5 20:20,21 25:15 28:13 29:15 29:21 30:1,4,18,20 31:21 32:5,6 33:21 50:25 78:14,24 79:18,23 80:8,14</p>	<p>81:4,4 82:11 93:7 93:16 99:3 100:1 100:15 102:5 109:17,19 112:11 117:2 128:15 131:2 131:14 150:21 168:11,16,18,19,22 168:25 169:2,5,7,8 169:13 179:14 184:3,5 186:6 188:5,21,25 189:15 190:11,17 191:1,16 191:25 193:7 198:11 202:14,20 202:23,25 notices (5) 30:10,11 30:13 83:14 189:25 notification (1) 18:21 notified (1) 189:4 noting (3) 20:6 23:14 26:22 notwithstanding (11) 18:1 19:1 34:16 51:24 82:3 87:4 102:21 166:22,25 167:5 184:16 no-one (7) 28:1 70:19 94:11 132:21 136:19 169:22 170:4 nuanced (1) 65:6 nuisance (1) 56:13 number (16) 23:7 26:24 35:16 62:8 63:15 92:14 114:16 133:15 139:25 153:23 182:5 183:7 183:13 188:21 203:14 205:25 numbers (1) 67:3 nutshell (1) 29:12</p> <hr/> <p style="text-align: center;">O</p> <p>obedient (1) 71:18 object (3) 16:16 29:25 138:17 objected (4) 24:8 37:15 193:25 194:1 objection (2) 105:3 199:21 objectionable (4) 36:23 37:3,4 171:19 obligation (15) 57:6 61:5 63:12 88:3 90:4 92:5 93:19 129:25 131:4,4,9 131:10 152:20 187:21 210:4 obligations (8) 12:13 17:8 52:6 56:5 57:1 131:7 152:17 173:15 obligatory (2) 44:17 72:7 obliged (5) 59:25 93:12 129:7 178:24 198:24 observed (2) 92:9 167:12 obtain (3) 19:15 26:11 186:23 obtained (4) 6:7 26:6 49:8 53:23 obvious (7) 23:19,19 27:7 47:20 62:23 94:4 172:18 obviously (58) 3:4 4:21 5:7,13,24 6:9 8:14,15,21 13:8</p>	<p>15:21,24 23:11 26:4 28:5 32:7 39:25 42:6 51:7 52:3,10 53:3 59:25 63:6 70:8 72:3 74:22 76:6 94:5 103:11 104:21 108:8 109:4 112:8 119:23 121:15 122:22 123:9 129:19 132:11 138:1 144:19 146:5 155:20 160:25 164:23 168:20 171:9 175:10 177:14 178:2,10 210:2,4,9 213:16 216:18 218:3 occasion (2) 79:5 116:16 occasions (2) 92:14 183:7 occupancy (1) 94:17 occupy (1) 87:21 occur (2) 201:20 202:18 occurred (2) 23:24 26:2 October (5) 39:24 68:16,18 127:5,17 odd (2) 126:1,8 odddity (1) 126:20 offended (1) 121:9 offer (9) 7:17,22,25 42:16,18,20 43:3 158:5,12 offered (5) 154:16 188:3 199:14 207:20 214:18 offhand (1) 44:12 office (6) 25:21 36:6 57:14 167:24 170:24 171:4 officer (11) 10:1 101:18 106:11 107:4 123:9 125:3 125:6 134:3,14,19 146:21 offices (1) 87:21 offset (2) 210:10 211:18 Oh (7) 9:12 10:10 43:14 57:5 62:25 124:21 126:16 Okay (1) 33:14 old (3) 31:20,23 87:9 Olivier (4) 36:17 124:17 125:3 199:15 once (6) 55:19 140:17 140:18 142:2 164:16 170:24 ones (6) 10:11 20:11 85:19 151:25 153:18 206:12 oneself (4) 57:11 84:15 132:8 169:6 ongoing (3) 14:13 66:7 72:9 onwards (3) 34:11 42:23,24 open (2) 60:23 68:5 opened (1) 205:2 openly (1) 135:9 opens (1) 68:1 operate (3) 27:16 88:1 198:9 operates (2) 133:11 141:22 operating (8) 14:19</p>	<p>27:4 50:5 114:2,3 182:10 203:19 204:21 operations (1) 87:1 opportunity (5) 1:19 29:23 129:22 140:25 145:10 opposed (4) 22:10 108:5 122:12 173:12 opposing (1) 38:2 opposition (5) 29:5 49:19,22 74:19 137:15 oral (1) 118:25 orally (1) 96:9 order (42) 3:3 15:12 64:21 65:11 73:17 73:19 76:2,20 78:9 80:13 82:1,3 83:11 83:12 100:19 102:14,24 114:3 119:14 122:24 127:15 139:13,15 139:16 143:24 145:5 150:12,16 162:22 164:18 166:1,14 180:20 191:3 192:24 200:24 203:21 207:19 208:3 209:21,22 212:12 ordered (3) 34:19 80:11 190:24 ordering (1) 102:14 orders (6) 5:21 30:19 73:3 75:2 166:21 215:1 ordinarily (1) 44:5 ordinary (1) 88:19 organogram (1) 22:25 original (3) 180:3 189:16 201:23 originally (1) 186:1 origo (1) 23:24 ought (12) 45:15 51:8 54:4 70:20 120:12 121:18 146:18 177:13 180:17 181:1 215:13 216:22 ousting (2) 71:7,10 outgoing (2) 28:10 30:24 outset (1) 171:19 outvote (1) 25:9 overall (1) 207:9 overarching (1) 49:21 overlap (1) 72:22 overlooks (1) 127:12 overnight (1) 16:14 oversee (1) 196:3 overtaken (2) 4:5 185:11 overwhelmingly (1) 61:24 owed (3) 156:1,24 157:2 owner (1) 182:14 owns (1) 89:17 o'clock (6) 25:15 30:4 46:22 82:17 158:25 159:5</p> <hr/> <p style="text-align: center;">P</p> <p>package (1) 171:7 page (60) 17:22 18:24 18:25 20:13 22:20 31:14,16,17,18 32:14 35:10,13,17</p>	<p>36:12,14 38:16,25 39:10 41:13,14,20 45:13 49:2 56:20 75:16 85:21 86:5 90:10,10 91:15 93:4 98:5 99:5,8,12 99:14,17 100:18,18 100:20 101:21 103:22 110:6,7,12 110:12 115:10 124:5 152:7 153:17 153:18 155:7,11 156:2,7,21,22 157:20 159:7 220:2 pages (2) 35:7 39:1 paid (3) 111:17 149:5 154:13 Paisner (1) 157:19 Palace (1) 127:12 panoply (1) 52:22 paper (4) 86:1,3 137:1 213:19 papers (2) 59:23 219:6 paradigm (1) 208:5 paradigmatic (1) 70:5 paragraph (43) 31:7 33:6,9 34:21 38:17 38:25 42:16 43:6 48:25 56:6 61:10 67:10 68:24 80:13 81:2 97:2 98:1,5,6 98:17 103:22 115:9 115:14,16,16 118:2 124:12 126:8,9 148:7 152:4,5,7,13 153:4,5,22 156:2 157:4 159:15 165:20 166:11,16 paragraphs (19) 23:6 29:13 34:7,8 42:11 42:20 43:7 48:11 56:19 57:23 60:12 64:9,25 65:19 67:9 151:21 152:6 167:3 193:14 paralyse (2) 35:22 37:6 paralysing (1) 41:3 paralysis (1) 37:23 parcel (2) 149:13 197:17 parent (4) 65:7,23 156:19 203:25 part (21) 5:16 8:15 22:17 31:1 38:2 52:21 59:15 76:23 122:9 146:6 149:3 149:7,13,23 159:25 160:6 162:11 175:16 197:13,17 217:7 participate (1) 63:17 participation (1) 22:22 particular (12) 2:20 24:13 29:21 32:13 35:18 38:18 59:24 73:6 174:6 193:4 193:20 204:3 particularly (18) 11:14 17:9 24:8,22 43:10 47:13 85:12 92:13 98:22 101:2 104:25 113:4 119:13 122:23 127:13 180:2 193:13 207:1 particulars (3) 137:13 163:10,11 parties (61) 2:25 3:5 3:13 4:9 5:18,25 6:4,12 15:6,23 17:8</p>	<p>24:20,23 30:7,16 70:7 72:20 87:8 92:18,21 94:9 99:21 100:5 104:5 104:14 112:9,13 123:6 131:23 132:1 132:9 140:12 141:4 142:24 149:11,20 154:15 159:17 162:19 163:5 171:23 172:3 177:6 180:13 181:1,4 183:14 184:17 185:4 187:25 188:18 190:22 202:8,19 207:7,22 209:5,10 214:3,8 217:7 partner (3) 19:15 205:23,24 partners (4) 123:13,14 184:24 208:9 party (4) 18:3 31:9 56:3 177:4 passage (1) 31:25 passages (3) 34:6 193:1,13 passed (16) 2:9 110:20 122:6 137:5 141:20 142:5 155:4 195:12,16,20,24 196:11 199:3,4 205:12 214:4 paucity (1) 134:3 Pause (21) 31:14 32:1 34:14 43:1 46:17 49:13 50:15 65:3 67:12 79:20 111:12 116:15 118:18 130:3 161:17 169:20 176:15 178:20 212:15,18 215:12 pausing (4) 19:7 20:6 23:11 35:21 pay (12) 3:10 13:23 14:6 19:16 107:9 127:14 130:25 146:17 159:23 160:14,17 184:24 paying (1) 19:14 payment (8) 49:10 55:5,10 62:21 63:10,23 69:22 124:9 pays (2) 68:18 209:18 Peak (54) 77:4 80:23 81:11 104:2,6 182:1,22 183:6 185:4,11 186:23,25 187:2,4,16,22 188:1 189:1,3,7,8 190:14,17,19 191:1 191:4,7,12,18,21 191:23 192:1,16 193:3,5,22 194:17 195:3,14 196:15,18 197:25 198:23 199:10,13 202:5,23 203:3 204:8 205:6 205:18,18 207:16 209:1 Peak's (7) 160:1 186:16 187:2,6 192:4 194:10 207:8 penalties (1) 39:23 pending (1) 5:19 people (16) 15:21 44:19 45:5 17:23 76:7,23 81:21</p>
--	--	--	--	--	--	--

86:21 112:9 115:25 121:3,4 122:8 125:2 164:6 180:21 perceived (1) 117:8 perceives (2) 117:19 117:21 perfect (1) 7:13 perfectly (10) 7:3,15 9:20 77:13 87:8 104:1 120:16 123:1 135:8 143:4 perform (1) 109:2 period (22) 18:21 24:8 41:6 55:6 57:4,4 69:9 76:19 83:15 128:16 148:2 168:9 169:8,15 170:6 179:3,7,9 184:5 192:12 202:20,25 permission (6) 162:15 217:20 218:4,6,17 218:25 permitted (2) 62:18 191:22 perpetual (1) 47:6 person (10) 11:25 12:19,20 14:6 25:3 89:12 112:6,15,16 219:7 perspective (1) 138:1 pertaining (1) 39:3 PHRL (27) 1:8 17:19 22:15,18 23:8 28:13 30:17 34:18 53:14,16,24 54:1 55:1 60:17 69:19 81:4 98:9 115:21 149:1,6 160:5,6 162:7,11,18 167:7 180:24 PHRL's (6) 22:22 23:23 26:19 28:9 29:4 151:1 pick (1) 33:3 picked (2) 22:13 86:18 picture (3) 41:16 151:23 172:25 piece (1) 137:1 pieces (1) 86:3 pincer (1) 26:8 pinch (2) 68:12 75:20 pink (1) 98:2 pitch (1) 209:4 pitching (1) 3:11 place (20) 29:11 32:12 69:21 95:4,7 121:7 124:10,14,20 126:15 127:7 132:3 132:5 141:9 142:4 142:18 144:15 145:21,25 208:18 plainly (9) 10:18 34:23 42:5 67:21 128:12 156:13 157:2 159:19 164:5 plan (4) 18:12,13 130:11 160:3 planned (1) 192:8 planning (1) 192:4 plead (1) 163:23 pleading (1) 145:16 pleadings (5) 73:22 140:9 162:25 164:5 181:13 please (6) 1:7 8:11 39:2 120:1 148:7 174:8 pleasure (1) 217:18 plenty (1) 159:9 plus (3) 94:18 111:18	113:17 pm (8) 48:17 82:19,21 147:14,16 181:20 181:22 219:8 point (135) 4:23 8:14 9:19,21,23 13:19 19:12,21 28:3,6,17 29:12 30:9 32:9 38:23 39:18,21 40:11 42:15 43:8 45:13 51:18 52:2,5 52:14 53:2 54:14 55:7,17,22 56:6,11 56:13,21 60:11 61:3,24 63:16 65:5 66:2,13,25 67:1 68:13,21 70:10 74:17,25 75:12 77:16,23 84:5 88:22 89:25 94:12 96:5,22 99:23 101:17,18 102:1,10 103:23 104:19 110:25 113:25 115:1,8 117:10,23 120:6 122:3,15 129:4,5 131:8,15 132:17,17 133:23 133:23 135:18 140:7 141:15 142:10 148:8 149:3 150:5,8 151:11 152:15 153:2,5 154:6,8,21 155:1,8 157:5,12 159:15 160:9,12,12,13,20 161:7 164:8,10 165:1,2,22,25 167:8 168:5,8 169:6 170:10 173:7 173:21 174:23 175:8 176:6 178:4 179:23 180:16,20 203:13 204:3,6 205:8 206:25 208:12 215:24 216:2 pointed (4) 10:17 183:20 192:6 208:17 pointing (1) 161:3 points (44) 5:2 16:10 17:7 18:17 19:10 26:16 29:7 31:2 34:2,17 38:14 45:16 49:19 52:13 59:20 61:12 62:16 63:25 64:1,4 67:5 69:16 70:1 74:17 75:10 83:17 113:8 118:19 121:15,20 124:4 128:7 137:24 139:21 148:3 156:24 157:9,20 166:7 178:20 205:4 218:2,10,18 policies (1) 87:1 Pontwelly (1) 61:15 position (101) 5:9 9:2 9:4,5,8,23 10:2 13:7 14:5,5,15 16:5 31:9 33:18 36:3 40:18 45:23 46:1 47:14 51:10,23 55:12 56:15,22 70:24 74:21 75:18 82:24 84:14 90:24 96:20 100:8,21 105:11,21 113:13 113:13,14 114:4	117:7 120:7 125:11 126:10,12 134:7,17 135:23 137:7 138:9 138:10,18,22 144:18 147:19 148:22 149:8,20,21 150:15 151:12 152:8,10,22 153:10 154:5,19 155:9 156:7 158:2,9,23 160:19,25 161:5,6 161:10 162:2,9,9 162:17 163:3,15 166:10 170:22 171:18 172:16 175:18 177:1,12 178:11 190:3 193:18 199:11,20 200:12,14 201:5 205:19 212:6,25 216:25 positive (1) 210:12 positively (1) 171:21 possibilities (1) 12:9 possibility (3) 15:10 211:25 214:3 possible (18) 2:25 22:9 24:19 39:4 68:6 70:21 72:21 74:12 100:24 164:6 165:3,7 173:2,14 205:2 208:7,11 217:4 possibly (7) 4:9 11:14 82:5 94:21,23 169:23 216:23 post (5) 150:2 187:2 188:14,17 189:18 postponed (1) 195:1 postponing (1) 192:8 pot (1) 160:23 potential (8) 122:25 131:22 134:20 158:15,19 202:6 213:15 216:14 potentially (3) 69:20 184:19 213:8 power (29) 2:5 52:5,6 52:8,14,18 55:21 90:17 96:17 97:4,9 99:6 106:4 115:7 119:4,16 167:6 183:22 191:12,24 193:5 197:4,10,12 197:13,22 198:5 218:21 powers (7) 90:1,13,25 91:9 92:7 168:1 197:18 practical (1) 28:20 pray (1) 160:19 precisely (4) 148:17 151:8 204:23 212:21 prefer (1) 106:12 preferred (1) 105:6 prejudice (1) 179:19 prejudiced (1) 133:13 prejudicial (1) 146:10 preliminary (1) 208:17 prematurity (1) 75:1 premise (4) 52:17 81:25 102:13 120:12 preparation (1) 3:12 prepare (1) 121:5 prepared (23) 26:18 36:8 40:2,3 43:11 54:2 60:24 84:22 87:12 107:9 114:22	118:4 120:18 133:6 135:13,16 138:15 146:14,17 171:14 171:20 194:25 212:23 preparing (1) 209:5 present (4) 104:18 152:8 187:16 190:19 presented (3) 81:20 82:16 150:14 presenting (1) 193:3 presents (1) 105:1 preserving (4) 102:8 148:10,17 149:20 pressing (1) 110:23 prestige (1) 127:11 presumably (2) 131:19 217:12 pretending (2) 37:18 60:18 pretext (1) 83:7 pretty (2) 65:18 69:2 prevent (22) 10:4 32:23 47:1 50:11 78:23 79:6 82:11 83:5,10,23 92:3 101:19 102:15 114:2,2 116:2,13 119:18 120:8 148:2 190:13 213:6 prevented (3) 74:4 148:23 150:19 preventing (4) 30:23 82:6 97:6 206:22 previous (6) 16:21 22:2,3 49:1 176:10 176:14 previously (7) 9:7 45:3 126:12 149:18 185:12 191:13 198:22 pre-approved (1) 113:10 pre-empt (1) 146:8 price (52) 2:24 8:6 24:14,16 40:23 46:4 48:7 54:24 94:3,5,6,20,22 95:5 95:9 124:9 129:5 129:22 131:19,19 131:24,24,25 132:4 132:4,4,7,18,19,20 133:1,5,7,8,9 154:12 186:2 196:9 201:17,22,23,25 202:3,4,11,12 203:2,3,4,6 205:18 206:18 priced (4) 69:20 94:20 170:7 178:24 pricing (14) 40:12,14 40:15 45:16 48:24 55:4 62:24 63:5,8 63:16,18,19 169:18 179:15 primary (1) 10:9 principal (1) 155:19 prior (6) 19:23 28:25 79:24 96:9 140:6 149:12 priority (1) 52:22 pro (2) 130:16 149:4 probability (1) 140:14 probably (6) 6:1 94:23 99:15 100:5 121:18 140:20 problem (20) 43:23 57:19 64:13,18 72:21 107:10 108:3	108:7 124:23 141:14 154:13 171:11 174:21 202:4 203:17 204:11 207:6 214:5 214:6,7 problems (5) 3:22 23:24 194:14 206:7 208:1 procedural (6) 161:21 162:2 163:7 164:11 164:18 208:18 procedurally (3) 162:14,21 182:2 proceed (2) 153:20 189:2 proceeded (1) 152:23 proceeding (2) 98:14 213:6 proceedings (38) 1:3 3:15 22:3,4 23:15 38:12 48:2 75:2 139:23 161:23,24 161:25 162:1,4,4,6 162:15,23,23,24 163:9 164:14,14 165:10 180:4,8,9 181:2,10 182:1,1,4 182:16 199:13 200:23 208:4,16,21 proceeds (2) 52:17 162:23 process (9) 44:14,19 62:10 164:1 176:3 176:5 177:23 179:18 211:1 processes (1) 70:8 procure (9) 33:7 80:24 88:4 90:4,7 92:8 98:10 119:19 191:12 procured (4) 79:22 81:7 190:21 194:4 producing (1) 164:4 production (1) 18:12 professional (1) 76:15 proffered (1) 156:12 proffering (1) 154:21 progress (5) 15:11,16 45:14 105:10 144:16 progressed (1) 190:11 prohibiting (1) 30:19 project (12) 38:19 40:7 66:25 67:19 67:23 75:18,24 76:15 126:23 127:6 127:9,9 promised (1) 35:15 prompt (1) 73:19 promptly (3) 38:22 92:9 185:24 propensity (1) 25:14 proper (64) 10:18 11:3 11:7 41:4,5 55:3 66:14,16 83:18,21 83:21 84:1,3,11,24 84:24 90:14 91:1 96:18,22 97:5,8,10 114:17,18 115:2,6 115:6,24 116:2 118:24 119:4,10,15 119:22 120:1 128:3 128:4,5 129:2,22 133:18 136:2,25 137:4 138:11 140:25 157:14 159:1 161:1 163:24 177:7 179:15,18 183:22 197:6,22	198:4,20,21 203:6 211:4 212:20 218:22 properly (26) 25:8 29:18 37:3 62:24 69:21 85:5 91:24 92:4,9 96:6 108:9 108:14 138:13 139:17 140:24 142:17 144:21 157:25 160:24,24 163:24 178:24 185:24 203:1 206:10,19 property (1) 174:18 proportion (3) 130:14 133:15 206:1 proposal (17) 37:14 38:1 42:9 43:12,13 45:14 60:22,23 61:4 84:21,23,23 159:1 160:3 164:12 170:14 200:13 proposals (12) 35:4,8 35:14 41:11,24 47:18,22 48:21 54:2 73:23 170:11 206:20 propose (8) 2:12 4:7 41:21 57:16 61:4 76:4 171:6,9 proposed (15) 36:9,11 71:6 118:5 147:24 171:10 173:9,11 185:13 190:20 191:4 192:2 193:11 194:20 201:2 proposing (2) 53:25 57:20 proposition (1) 55:25 prospect (1) 34:4 prospectively (1) 98:20 protagonists (1) 28:2 protect (9) 25:4,4 51:8 129:17 136:7 153:2 167:11 187:22,23 protected (1) 135:25 protecting (4) 29:4 51:15 55:21 56:12 protection (5) 28:19 33:22 53:23 129:18 129:20 protects (1) 202:5 prove (1) 11:21 provide (17) 8:3 124:18 131:5,11 132:15 154:19 161:8 172:12 175:2 175:9,11,21 179:8 183:21 196:7 207:20 215:7 provided (23) 2:18 37:1 39:14 67:3 75:13 95:15 104:7 108:2 110:18 111:18 118:5,6 126:12 143:5 148:21 160:4 169:2 173:3 204:19 207:16,24 212:20 215:8 provides (23) 15:2 18:1 19:22 21:4 22:14 86:25 95:18 105:13 169:1 173:6 173:22 179:15 183:1,17,23 184:3,12 185:1,14,18,23 186:4 196:19	202:16 providing (4) 35:4,14 155:16 168:21 provision (14) 21:12 42:18 44:9 53:18 73:20 91:3,16 149:8 167:21 168:25 172:13 184:23 200:11 205:22 provisions (16) 18:9 18:11,15 19:13 20:10 27:15 71:22 85:19 86:10 91:14 92:8 131:5 147:25 148:12 183:13 203:10 proviso (3) 197:5,7 218:21 pull (1) 208:24 pulling (1) 73:8 purported (6) 24:15 83:20 97:8 191:19 195:7 202:22 purportedly (2) 188:21 195:12 purporting (1) 120:11 purpose (35) 10:18 11:7 82:6,11 83:18 83:21 84:2,3,24 85:18 90:14 91:1 94:7 96:18,22 97:5 97:6,10 102:25 103:12 115:6 119:10,22 133:7 173:14 182:9 183:23 197:6,22,24 198:4,17,20,21 218:22 purposes (2) 132:13 132:15 pursuant (3) 79:22 98:24 135:7 pursue (1) 209:20 push (3) 28:21 29:24 48:1 pushed (2) 32:7 144:11 pushing (4) 5:9 37:16 38:4 48:3 put (111) 2:12 7:16,24 9:9,16 12:11,16,21 12:23 13:9,11,12 19:6,9 23:14 26:9 32:10 36:19 38:1 40:1 43:14 46:4,7 47:22 55:2 67:17 79:4 92:22 94:10 95:1,3,4,9 96:6,13 101:8 104:17 109:25 111:22,24 112:4,16 113:21 117:16 118:22,25 123:1,4,19 124:4 126:5 127:19,24 128:17 129:7,13,16 132:9 133:2,13,14 134:16,21 135:4,6 135:16,22 136:6,16 136:16 139:20 142:24 145:15,15 147:18 151:18 158:5,6,11 168:16 168:18,18,22,23 169:15 174:18 177:6,13 178:25 179:2,4,5 186:3 193:8 203:14 205:19 206:3,25 210:4,17,18 211:23
--	---	---	---	--	--	---

212:1,4,25 213:12 215:15 216:18,23 217:2,10 putative (1) 53:16 puts (4) 12:20 45:25 136:20 167:10 putting (12) 7:22 11:1 12:17 13:14 15:7 47:17 55:12 94:22 103:5,6 133:8 208:1	rates (1) 94:17 rationality (1) 45:6 reach (2) 53:8 167:4 reached (2) 172:13 217:22 reaction (2) 5:2 6:8 read (25) 1:19 20:16 24:10,11 31:17 33:8,11 34:12 42:19,24 59:10,13 75:9 76:4,5 100:5 100:22 102:2 111:14 130:22 159:11 167:1 168:20,24 194:5 reading (5) 1:22 18:18 33:2 169:4 193:13 real (11) 69:10 71:14 89:25 116:10 139:17 149:21 158:17 197:24 200:12 201:15 212:25 realise (3) 47:8 146:25 209:6 realised (1) 59:14 realistic (1) 212:13 realities (1) 89:23 reality (8) 5:25 24:25 27:24 43:16 74:10 111:23 112:5 198:7 really (40) 4:3 9:8 22:4 32:14 65:14 66:13 66:15 68:10 70:13 73:14 74:7,11,16 96:12 108:21 110:25 121:12 123:23 129:2 131:8 133:25 137:18 139:8,16 140:18 143:7,17 144:21 145:7 147:1,3,6 171:19 173:9 178:16 181:3 191:16 204:11 205:11 215:1 reappointed (1) 29:18 reargued (2) 26:13 29:10 reason (38) 5:18 6:16 18:11 23:18,19 24:21 39:7,20 41:20 54:7,12 57:2 63:3 66:17 67:20 67:21 69:24 71:4,5 82:4,15 87:10 100:9 106:11 134:15 140:8,11 143:21 148:21 150:11 151:15 154:14 158:22 166:20 171:5 172:17 174:12 quo (4) 148:11,17 149:4,14 quorate (1) 7:3 quorum (1) 184:10	64:7 recognise (1) 83:18 recognising (1) 145:8 reconsider (1) 7:15 reconvene (1) 42:3 recorded (1) 191:3 recording (1) 120:19 red (26) 17:1,23 31:16 35:7,10,13 41:12 49:2 64:11,24 75:15 78:2,3 86:4 98:2 103:20 105:14 109:9,11,13,16 124:3 153:18,18 177:2 178:13 reduces (1) 169:7 refer (8) 17:17 18:5,8 39:5 59:19 75:2 126:17 148:6 reference (11) 31:12 31:13,14 33:7 35:6 48:19 52:16 56:7 90:10 103:19,21 references (4) 31:20 33:3 56:18 96:25 referred (13) 25:22,24 31:6 33:4,5 55:23 98:5 99:4,5 150:18 156:15 193:19 200:14 referring (3) 48:20 215:19,25 refers (1) 126:13 refined (1) 61:15 reflected (1) 38:3 reflects (2) 61:4 171:16 refused (9) 80:12 83:5 102:15,22 120:9 146:5 190:25 192:17 193:24 refuses (1) 81:23 refusing (1) 192:14 regard (12) 53:17 54:15,20 68:19 166:23 170:1 172:21 178:17 183:18 197:11 206:17,18 regarded (1) 142:5 regarding (1) 84:14 regardless (1) 169:10 regards (10) 20:15 28:4 49:9 62:15 185:25 195:24 197:16 199:9 201:8 208:18 regime (1) 29:20 reinstated (2) 148:20 188:14 reiterate (1) 209:4 reiterated (2) 45:16 195:7 reject (1) 101:23 rejected (1) 198:23 related (1) 150:21 relates (5) 68:21 151:11 167:8 168:8 170:10 relating (4) 75:14 83:4 92:15 217:21 relation (76) 10:21 11:5,10 26:2,4,6,10 30:25 32:11 33:3 48:23 60:14 75:24 80:11 81:8 85:5 86:17 87:11,11 92:8 94:1 101:1,22 104:25 105:11 107:14 109:1	110:15 111:2 112:2 112:18 114:9,20 120:14 125:4,7,23 131:9 132:7,8 136:23 138:4,5 139:1 143:5 144:16 147:22 148:9 149:8 150:1,3,6,23 153:14 154:3 155:9 155:18 156:24 157:3,8,10 162:3,6 164:12 165:4 166:8 181:6 188:5 198:10 199:23 200:25 207:13,14 211:6 217:21 218:11 relations (2) 23:2 186:19 relationship (2) 187:11 209:1 relatively (2) 136:24 145:18 relevant (11) 26:25 34:6 39:2,4 41:18 54:1 85:19 86:10 155:12,13 193:13 reliance (2) 134:7 167:10 relied (3) 165:13 216:2,3 relief (56) 1:14 17:3 28:16,16 29:4 30:25 31:1,1,20,21 31:23 32:4,5 33:16 33:19,20 34:10,19 47:11 49:5 50:10 50:19,23 51:7,15 71:8 72:1 74:3 78:24 79:2 101:1,2 101:25 104:11 120:21 146:4,6 154:25 166:17,22 166:25 167:7 178:17 183:6,10 188:8 190:9 191:16 192:15 195:14,17 195:18 200:5,6 208:2 220:4 relies (1) 185:20 rely (8) 6:22 23:5 61:12 103:1 149:24 155:16 177:22 216:1 relying (5) 80:8 81:4 114:14 136:15 191:18 remain (2) 36:6 171:14 remaining (1) 45:14 remains (1) 14:15 remarks (1) 17:11 remedy (1) 175:1 remember (6) 77:11 99:20 117:10 126:7 128:22 170:5 remind (2) 57:11 130:4 remotely (2) 36:23 178:13 removal (12) 28:13 79:22 80:24 81:7 87:3 116:7 148:24 170:17 171:22 172:12 194:4 195:25 remove (18) 21:23 32:23 79:18 80:2 81:5,22 101:12 102:6,12 146:7 151:2 170:23 185:7	190:18 191:19 192:17 193:25 198:24 removed (12) 21:9,10 21:24 80:6 81:13 81:25 102:18 120:12 170:16 191:5,8 193:12 removing (1) 175:18 remuneration (1) 200:21 renewed (1) 33:1 repeat (2) 39:9 138:2 repeated (3) 47:22 67:5 180:8 repeatedly (1) 93:15 repetition (1) 47:2 replacement (2) 37:8 196:1 replied (1) 195:3 reply (4) 64:9 166:6 195:6 220:9 report (6) 124:15,18 125:1,15,16 173:25 reports (1) 204:20 represent (3) 50:3 88:15 201:6 representation (3) 20:17 123:3 184:18 representative (2) 146:3 198:13 representatives (1) 91:21 represented (2) 182:24 183:3 repudiation (5) 28:12 30:17 72:4,23 211:21 repudiatory (5) 72:13 72:14 79:12 189:12 190:14 reputation (1) 70:18 request (20) 2:6 39:9 46:14 49:8 86:13 184:13,15 192:5 193:5,8,11 194:6 194:23 195:5,8 196:14,20 197:4,25 218:21 requested (3) 54:25 72:2 193:23 requesting (3) 194:19 197:1 198:16 requests (3) 41:10 189:4 198:11 require (9) 20:17 21:22 44:3 95:22 95:23 104:7 140:9 154:11 179:25 required (20) 18:16 36:21 46:15 49:4 88:4 89:7 92:22 94:4 98:9 125:13 125:25 126:22 127:1,1,20,23,24 128:1 148:20 206:3 requirement (3) 18:19 37:18 66:15 requirements (4) 83:19 130:10 173:20 196:8 requires (8) 37:11 55:10 62:19 69:8 88:25 128:8 185:6 205:12 requiring (3) 19:5 36:6 63:23 rerun (1) 51:19 rescind (1) 189:9 rescinded (3) 28:11	159:21 160:15 rescinding (1) 72:23 rescission (3) 72:4 165:12 178:2 reserve (12) 19:3 93:11 95:20 130:8 130:10,15 132:9,16 160:18 168:13 215:3 218:14 reserved (6) 87:4 95:15 96:1 188:12 218:8,12 resigning (1) 76:18 resist (1) 120:17 resolution (88) 6:1,5 8:16 9:11 11:21 12:10,14,18,20,25 13:8 19:9 21:10,22 24:15 35:20 37:16 37:22 43:22 44:24 45:2,7,18 54:14 55:4,9 61:7,25 62:12,15 63:10 72:11 74:11,23,24 93:24 100:11 105:8 105:17 108:1 109:8 109:9,12,16,18,21 109:23 110:4,6,20 113:11,21 120:18 121:1,7,21 122:2,6 122:17 123:25 128:7 131:13 134:23,24 136:5,14 138:15 141:20 142:5 147:18 158:16 170:16 171:10,14 172:10 173:9 179:13 185:7 196:6 199:22 200:6 200:7,9 201:11 202:22 206:10,23 214:4 resolutions (40) 2:8 2:10 6:21 7:16 10:5 11:4,13 15:8 19:8 24:5 26:5,15 41:11 42:6 46:25 47:4 49:7 57:10 85:8 106:1 120:25 123:17 134:7 135:15 137:5 154:2 172:8,9 192:21 195:12,13,15,19,24 196:11 199:3,7,9 201:8 206:9 resolve (13) 2:25 4:15 15:15 65:17 66:1 70:13 106:14 112:13 114:22 174:21 209:13 214:5,9 resolved (16) 1:25 6:18 9:24 13:8 48:2 53:4 69:20 114:6 123:20 138:6 142:11,25 143:3 144:25 163:7 214:8 resolving (3) 44:22 72:16 213:17 resort (1) 18:12 resorts (22) 3:7 21:17 22:1,10 37:19 68:5 86:19 87:14 104:8 107:3 108:13 130:11 155:21 170:19 182:5,6,10 182:14,21 185:15 200:16 208:9 resources (1) 70:7 respect (6) 5:16 12:9	75:19 126:22 152:8 154:3 respectful (4) 5:24 108:21 158:22 163:22 respectfully (1) 59:6 respective (2) 91:21 130:14 respond (2) 45:11 166:1 responded (2) 48:25 133:6 respondents (1) 56:24 responding (1) 59:20 response (7) 16:20 39:8 126:3 144:3 155:11 189:2 203:1 responsibilities (1) 200:20 rest (4) 3:10 137:9 165:16 218:23 restitutio (1) 160:16 restitutionary (1) 13:16 restrain (6) 1:15 102:4 114:14 195:15,18 199:8 restrained (4) 27:14 81:3,11 191:18 restraining (3) 49:6 191:7 192:16 restraint (1) 98:8 restriction (1) 150:20 restrictive (2) 56:12 56:22 result (5) 23:22 70:12 120:5 163:22 216:14 resulting (1) 22:24 return (14) 1:14 4:3 28:25 33:17 39:2 41:7 51:5 81:3 144:10,11 178:3 186:24 188:6 193:19 returnable (1) 189:21 reveal (1) 158:1 reverse (1) 31:8 reversed (1) 12:5 revisit (2) 73:21 145:6 revisited (1) 53:22 revive (1) 86:23 rewriting (1) 142:7 rewritten (1) 142:9 re-appointed (1) 185:9 re-appointment (1) 29:17 re-installed (1) 172:17 re-run (2) 29:7 97:17 ride (1) 57:3 ridiculous (1) 107:9 riding (1) 27:14 right (128) 2:3 5:21 7:24 10:13 11:22 13:6,16 14:25 15:3 15:5 16:8 20:23,24 20:25 21:2 29:4 30:1 31:4,13,14,22 33:7,10,22 34:24 39:7 41:25 42:17 46:4 51:15 52:20 52:23 53:7,11 54:20 56:9 57:5 58:25 59:6,8 60:8 63:19,22 68:14 74:7,15 78:19 82:17 83:16 84:8,8 86:15,15 89:2,4,21 90:22 96:3,5,7
--	--	---	---	---	--	---

97:20 98:9,15,24 101:12 102:3,8 103:6 111:7 112:8 119:5 120:15 122:17 127:3 132:14 134:24 135:5 136:11,13 137:19 138:25 140:2,5 141:1,3 144:13 146:1,24 148:24 149:2 150:17 151:1 156:11,11 158:22 159:10 160:8 164:7 167:17 168:2,4,20 176:2,21 178:1,4,7 178:9,15,22 180:6 180:15,18 181:14 191:14 192:4 195:5 197:16 202:7 211:22 213:24 214:2,13 215:3 216:1,11 218:9 219:3 rightly (4) 5:18 153:25 161:3 178:12 rights (17) 4:8 18:3,4 25:4 32:24 34:18 52:22 54:24 85:17 92:7 98:11 152:17 173:15 185:23 186:16 187:14 204:10 ring (8) 1:24 55:20 136:3 148:10,16 149:10 179:24 189:22 ringing (1) 68:7 rise (4) 6:12 60:6 70:1 181:16 rising (2) 120:23 219:4 risk (18) 2:1 6:6 11:25 12:19 13:14 62:23 85:8 112:7 119:2 135:1,2,12,12 136:17 148:14 173:5 206:5,14 risks (1) 205:20 Robert (4) 30:6 50:22 183:10 190:7 Robinson (1) 156:19 role (44) 22:9 36:16 36:25 37:11,19 45:4 57:18 60:25 87:22 104:4,5,6,10 104:15,15,21 106:13,18,20 107:19,24 108:11 108:12 109:2 113:19 123:10 146:15 150:1 151:16 152:24 171:2,18 172:1,1,4 173:3,6 181:2 185:5 187:9 188:11 189:18 200:13 208:25 roles (3) 105:23 124:13 200:20 rolling (2) 2:13 5:6 room (1) 108:17 rooms (1) 94:17 ROSE (241) 1:6,21 5:4 5:11 6:13,25 7:4,7 7:19,24 8:3,6,24 10:3,10,16,20,25 11:16,23 12:1,3,6 12:25 13:4,20,23 14:3,8,12,16,19 15:5 16:8,18,24	17:2,23 18:22,24 21:12 23:10,13 24:4,10 31:15 32:16,18 33:12 35:12 39:12,17 42:8,12,23 43:2,8 43:18,24 44:2,8,11 45:18,22 46:17,21 47:15 48:5,18 49:12,14,16 50:13 50:15,18,21 51:2,4 57:25 58:4,9,17,22 59:18,23 60:3,8,10 63:2 64:12,19 65:2 65:18 67:13 70:3 70:25 71:7,12,15 71:17 72:10,25 73:4,12,25 74:15 75:6 76:14,25 77:4 77:7 78:2,10,12,19 79:3,8,11,20 81:11 81:15 82:17,22 84:1 85:22,25 86:2 88:14,18,23 89:3,6 89:9,13,17,19,21 90:2,12 93:2,6 96:15 98:3 99:19 99:22 105:14 106:1 106:4,9,21 107:23 108:25 109:8,11,13 109:20 111:4,12 114:6 115:13 116:15,22 118:18 119:8 121:3,9,14 121:20 122:3,13,17 129:24 130:4 131:15,18 137:8,12 137:19,23 138:6,21 138:25 139:11 140:3 141:11,15,24 142:3,8,23 143:2 146:1,24 147:11 159:25 165:21 166:5 169:19,21 171:6 174:5,17 175:4,13 176:9,13 177:19 178:9 181:8 181:14,24 210:6,14 210:19,24 211:2,11 211:22 212:3,10,14 212:17 213:2,10,21 213:24 214:2,13,15 214:20,25 215:9,17 215:22 216:6,25 217:6,14,17 218:5 218:14 rosy (1) 69:5 roughshod (2) 27:15 57:3 round (2) 145:7 164:17 rowing (1) 162:10 rubber-stamping (1) 42:5 ruling (4) 181:23 210:1 220:10,11 run (5) 3:7 15:3 102:20 123:14 147:24 running (9) 3:4 14:20 66:8 75:23 76:12 123:12 127:15 148:2 154:4 rushed (1) 140:15 rushing (1) 141:4 rustled (1) 210:24 s s (1) 150:15 safeguard (1) 187:6	safety (1) 68:22 salary (1) 87:24 salient (1) 18:9 Sally (3) 37:20 57:13 60:13 salt (4) 40:10 68:12 75:20,21 sanctioned (1) 62:21 satisfaction (4) 54:5 65:11 66:10 204:8 satisfactory (3) 73:18 160:21 215:17 satisfied (3) 85:14 139:3,16 satisfy (4) 16:5 64:21 203:21,24 save (1) 80:13 saving (1) 180:10 saw (5) 23:1 59:18 138:19 175:18 192:5 saying (64) 9:15 10:12 34:1,15,16 37:10 37:13 43:14 46:23 63:8 68:14 76:8,10 77:12,13 79:16,25 84:5,7,17,18 87:11 97:22,23 102:20,20 103:3 105:25 116:3 119:5,8,9 124:21 125:14 129:9,15,21 133:6 135:20 136:3 140:14,16 141:6,25 142:17 143:9 144:5 146:20 153:20,25 155:12 157:21,22 166:14 167:5 168:17,18,19 169:9 185:21 193:5 210:11 211:14 215:22 says (76) 5:18 14:23 17:15 35:21 36:21 52:7 62:25 63:2,4 63:21 66:4 67:23 67:25 68:4,25 69:7 75:19 76:10 79:1 87:12 92:24 98:21 100:3 102:7 106:7 106:10 107:2,3 111:22 113:18 115:5,7 116:6 119:11 126:9,20 128:7,9 131:12 132:3 134:18 135:9 135:12 139:12 143:12 152:19 153:21 165:23 168:11,25 170:3,20 172:3,21 173:18 179:21 182:22 187:11,21 191:10 191:17 192:13 196:21 197:7,9,13 197:24 200:18 201:10,14,19,25 203:23 204:22 205:7 208:4 scenarios (1) 68:11 sceptical (1) 74:19 Schaefer-Suren (1) 36:18 schedule (1) 22:19 scheduled (5) 84:16 101:14 106:15 141:7 194:20 scheme (4) 20:2 95:21 199:16 209:18 schizophrenia (1) 66:3 scope (4) 87:23	104:23 146:16 167:9 scurrilous (1) 77:15 seat (3) 56:3 117:13 153:6 second (20) 30:22,25 33:20 40:11 42:1 46:17 49:12 78:16 79:19 81:5 109:16 114:20 118:18 132:17 150:8 169:19 189:6,21 196:1 208:2 secondly (10) 5:16 16:19 18:20 27:3 28:15 62:23 66:2 70:15 83:3 190:19 section (6) 35:16,25 35:25 38:10 67:21 124:17 secured (3) 26:4 157:25 160:24 security (12) 68:2 154:17 155:13,17 156:13 158:5,11 161:1,7,8 210:25 211:23 see (85) 3:11,16,20 4:3,14 15:11 16:11 18:10 19:8 31:8,19 31:24 34:21 35:9 36:12 38:20 39:21 40:4 42:17 43:4 57:18,22 63:3 64:24 67:4,8 69:15 73:16 75:16 81:2 82:14,15 86:12,23 88:3 91:17 92:23 93:3,22 94:2 95:13 98:6 99:4 100:22 101:20 105:13 106:9 110:12 114:12 117:24 118:16 121:20 124:6,12 126:16 129:6 130:7 133:8 139:19 140:18 141:13 142:17 143:9,11,13,14 144:18 145:2 149:6 155:7,10 156:2,3 156:16 163:8 171:20,25 173:5,10 174:10,10 178:19 206:6 212:21 215:10 seek (20) 32:23 49:5 60:13 83:9 99:6,15 106:14,20 107:14 107:16,18 112:24 114:18 146:6 151:4 151:4 177:15 192:20 195:14 214:19 seeking (34) 26:9 28:21 30:19 31:21 31:23 42:2 70:25 72:5 78:12,21 79:18 80:5 81:5,24 82:8 95:25 100:11 101:2 102:4 109:17 115:4 136:25 139:7 146:7 151:9 162:22 171:8 182:19 190:9 190:12,18,19 193:3 199:18 seeks (2) 28:16 40:13 seen (22) 17:21 23:10 57:15 58:7,17 59:4 59:14 86:10 111:15	124:3 126:1 127:10 148:1 149:1,15 150:24 151:19 161:1,21 163:18 176:18 205:11 sees (7) 2:4 3:23 10:12 20:10 132:23 159:7 187:14 seize (1) 27:11 select (2) 62:1,5 selecting (1) 62:9 self-contained (1) 20:2 self-evident (2) 62:21 88:8 sell-out (1) 44:18 send (1) 39:2 senior (1) 8:25 sense (5) 47:13 68:4 125:16 149:23 164:23 sensible (14) 1:23 2:14 6:12,15 36:8 107:17,20 144:19 146:18,22 168:24 169:4 179:16 213:21 sent (2) 30:10 100:16 sentence (8) 33:9 86:25 93:3 98:6,13 98:18,21 177:10 sentences (1) 93:4 separate (8) 22:23 160:13,18 161:25 165:18,25 177:20 216:4 separately (3) 44:17 160:10 216:3 September (41) 1:15 4:2 26:5 28:7,16,18 33:17 34:3 41:7 47:12,14 48:7 49:6 50:12,17 51:11,24 53:22 71:11,12 73:16,21,23 74:1,9 127:4,16 140:12,13 143:25 144:10,12 145:6,8 146:7 188:6 192:10 193:19 206:21 214:24 218:13 sequence (1) 29:14 series (5) 5:6 72:1 116:21 117:1 188:20 serious (18) 1:25 11:6 34:9,10 49:20 52:3 52:11 54:10 55:14 127:22 140:21 158:20 163:20 192:11 196:10,13 204:11 206:7 seriously (2) 10:23 85:7 serve (5) 82:11 131:2 140:9 162:15 181:6 served (16) 16:21 28:13 39:16 76:9 79:23 94:13 99:3 100:1 102:5 112:11 128:15,16 139:22 162:24 188:5 193:7 service (10) 140:11 162:6,19 163:5,6 180:16,18,21,23 208:19 serving (2) 79:18 190:17 set (21) 2:14 4:10,12 22:19,25 26:3	35:16 44:20 60:12 96:24 97:12 109:7 125:21 126:19 133:1,21 161:25 166:10 197:2,8 206:18 sets (9) 52:4 115:9 126:14,17 161:23 161:23 163:9 164:13 208:21 setting (2) 115:19 127:6 settled (1) 201:18 set-up (1) 20:19 seventh (1) 80:20 SHA (23) 20:9 27:15 37:2,11,18 45:5 52:21 54:21 55:9 55:24 57:17 60:25 61:5 62:19 104:1 142:7 167:20 168:1 171:3,16 172:15 173:3,6 Shaking (1) 89:21 shape (1) 163:15 share (14) 11:24 12:11 19:25 24:15,16 40:20 70:16 92:19 95:9 124:9 186:2 196:9 203:2 206:17 shareholder (35) 13:18 14:4,8,11 17:19,20 19:4,14 19:24 40:16 50:3 52:23 53:6,11 72:4 84:6,7 88:4,21 89:15,16 90:6 91:18,20 93:13 95:9 125:130:12 131:2 144:25 155:21 168:2,14 182:13,24 shareholders (90) 12:14 15:2 17:21 18:3 19:6,9 20:1,11 20:25 22:14 25:7,9 50:2 52:21 53:19 65:6 68:18,19 71:23 72:6 83:1 84:10 85:18 86:6 88:15,20,23,24 89:14 90:16,20,23 91:2,8,13 92:23 93:17,19 95:11,13 95:17,19,23 96:25 105:12 110:3,8,10 110:18 111:5 128:25 130:8 133:19 147:25 148:13 149:15 173:22 179:8,14 183:3,12,16 184:2 184:20 186:3,5,7 186:11 187:8 188:16 189:9 196:17,19,25 197:18 198:8 200:15 201:13,18 201:19,21 202:9,15 202:17,18 203:10 205:21,23 217:23 shareholder's (1) 86:14 shareholding (19) 11:17,18,20 24:21 155:15,20 156:3 157:13 177:23 182:20 202:6 207:8 211:14 216:1,2,3,5 216:7,12	shareholdings (1) 184:17 shares (38) 12:1,4,22 12:23 13:1,10,13 19:22 45:24 46:8 63:15 92:18 94:3,5 94:10,19,21 95:5,6 111:18 130:17 131:25 132:5,18,20 133:14,15,16 135:6 135:10 136:21 201:24 202:1 203:7 205:25 206:1,10 211:24 sheets (1) 66:23 sheet (1) 210:13 Sherway (40) 1:11 26:6 28:12 30:17 58:15 72:11,12 79:9,12,16 80:7 99:20,21 140:10 147:9,21 156:20 161:25 162:4,23 163:11 164:14 165:8,14 180:4,9 186:21,23 188:2,3 188:5 189:7 190:15 190:16 191:7 195:22 207:2 209:1 210:10 211:17 Sherway's (6) 78:6 102:16 153:2 187:12,23 189:11 shifted (1) 172:22 short (51) 15:6,11 16:9,14,19 29:15 29:21 30:1,20 40:3 45:13 48:16 58:6 59:9 63:10,24 67:16 69:22,24 71:4 75:12 78:13 80:14 82:20 84:18 111:7 117:1 145:18 147:6,12,15 148:4 150:9,21 151:21 155:3 165:6 181:21 188:21,24 189:15 190:10 191:1,16,25 192:9 198:10 202:25 204:2 211:5 212:12 shortcircuit (1) 181:9 shorten (1) 73:7 shorter (3) 20:21 128:16 184:5 shorthand (2) 46:21 147:11 shortly (4) 28:11 145:23 186:11 204:2 show (24) 44:9 54:10 54:11 56:14 64:21 75:10 78:8 94:16 97:24 109:17 119:3 124:2 129:24 130:2 133:22 151:21 152:6 176:25 177:2 203:20,24 207:16 210:18 215:13 showed (2) 102:14 125:23 showing (2) 77:17 212:8 shown (7) 61:9 67:21 119:20 126:7 133:22,23 176:24 shows (4) 40:8 66:11 198:1 201:25 shrink (2) 118:11 135:17
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July 31, 2014

<p>side (60) 2:4 3:8 6:6 7:5,9 9:3 11:15,25 12:11,20 15:3,7 16:15 24:20 26:8 35:24 37:4,20 54:18 56:9 62:11 66:19 71:20 75:13 84:10 95:2,4 97:19 99:11,11 102:8 107:2,3,8,12 111:21,24 112:3,10 122:7 123:2,20 124:11 127:21 129:12 134:4,10,21 134:23 135:19 140:22 142:1 146:11 151:19 164:3 169:14 171:1 172:19 175:20 198:2</p> <p>sided (2) 117:4 198:12</p> <p>sides (6) 9:10 64:17 128:13 140:21 190:8 209:6</p> <p>side's (5) 40:18 69:10 78:5 138:9 168:10</p> <p>sight (1) 77:24</p> <p>sign (1) 138:15</p> <p>signature (1) 110:13</p> <p>signed (2) 110:12 188:23</p> <p>significance (1) 76:6</p> <p>significant (7) 67:15 67:20 70:16 72:16 173:5 180:14 208:8</p> <p>significantly (2) 183:23 184:12</p> <p>Silverlink (8) 14:19 124:16,23,23 126:16 182:11 203:19 204:13</p> <p>similar (6) 57:2 66:25 101:17 157:9 171:14 215:16</p> <p>similarly (5) 68:24 92:2 148:23 157:8 184:7</p> <p>simple (16) 8:14 13:15 13:19 82:24 84:4 84:13 113:25 118:7 133:9 136:24 138:23 140:7 160:20 171:7 209:2 211:13</p> <p>simply (57) 6:20 9:3 9:23 11:3 12:5,18 24:6 34:24 35:2,19 45:1,6 46:2 56:3 62:6,18 70:4 77:19 83:23 102:9 103:4 103:7 105:6,24,25 106:11 107:1 118:22 119:16 120:20 121:1 125:13,16 130:20 134:9 135:11 145:11,14 146:8 151:6 152:11 157:5 157:15 159:9 161:13 164:2 165:7 167:20 169:14 170:17 173:10 177:11 179:9 180:25 181:3 214:19 215:3</p> <p>simultaneously (2) 49:11,18</p> <p>single (1) 194:21</p> <p>Sirois (30) 8:24 36:17 37:16 38:5,6 43:17</p>	<p>45:9 61:13 75:17 76:21 77:16 105:2 105:7 113:22,23 120:25 121:8 125:9 125:24 126:2,18,18 134:11 138:16,17 172:23 196:1 200:8 205:5,9</p> <p>sitting (4) 183:8,11 210:3 217:15</p> <p>situated (1) 66:5</p> <p>situation (20) 14:21 14:22 44:20 46:5 46:11 49:23 50:8 51:11 70:22 71:20 72:9 74:2 82:15 105:8 106:25 161:22 171:20 176:3 206:13 211:13</p> <p>six (15) 2:15 21:5,8,9 21:15,20,23 87:6,9 94:14 132:22 155:23 185:3,6,8</p> <p>sixth (1) 80:19</p> <p>size (1) 173:17</p> <p>skeleton (45) 1:19 9:18 22:13 23:6 24:10,11 25:22 26:3 29:6,13 31:6,7 32:3 33:4 42:22 56:7 57:22,23 58:5 58:8,10,14,14,15 59:4,10,22 60:1,9 60:12 61:11 69:14 94:12 96:8,14 97:2 98:3,4 115:8,11 132:24 148:7 166:11,16 197:8</p> <p>skeletons (2) 70:2 75:9</p> <p>skirmishes (1) 208:18</p> <p>slightly (5) 59:3,13 65:5 127:8 215:5</p> <p>small (1) 173:7</p> <p>smaller (1) 111:25</p> <p>Smith (4) 36:13 194:18,22 195:6</p> <p>Smith's (1) 48:20</p> <p>sneaky (1) 30:22</p> <p>sole (1) 155:21</p> <p>solicitors (6) 107:17 113:1 155:4,8,24 207:6</p> <p>solicitor's (1) 135:23</p> <p>solution (2) 4:18 60:6</p> <p>solutions (1) 174:1</p> <p>solve (1) 171:11</p> <p>somebody (6) 77:9 121:10 123:12 131:6 132:24 217:18</p> <p>somewhat (5) 27:19 31:8 66:12 125:25 170:21</p> <p>soon (9) 68:6 70:14,21 74:12 123:7 140:11 205:2 208:7,11</p> <p>sooner (1) 6:2</p> <p>sorry (22) 17:24 30:12 31:12 41:19 71:16 103:19,20 109:12 109:14,14 111:13 115:13 126:16 130:6 140:5 153:18 176:19 211:2</p> <p>sort (15) 40:24 46:11 46:11 48:6 49:3 53:1 72:8 107:13</p>	<p>117:5 123:9 132:10 146:14 170:8 210:13 213:1</p> <p>sorted (2) 12:7 46:9</p> <p>sorts (2) 121:10 146:18</p> <p>sought (20) 23:3 38:23 71:8 78:18 79:9 83:3 101:9,24,25 119:16 142:15 144:1 149:17 183:6 189:8,13 195:17,21 208:2 217:25</p> <p>sounds (1) 7:12</p> <p>source (1) 212:8</p> <p>spare (1) 121:4</p> <p>sparsest (1) 67:20</p> <p>speak (2) 104:21 125:2</p> <p>speaking (1) 125:9</p> <p>special (3) 62:1,4 196:3</p> <p>specific (2) 65:18 68:7</p> <p>specifically (8) 33:25 36:2 37:11 67:10 114:4 153:14,19 155:5</p> <p>specified (1) 130:11</p> <p>specify (1) 131:18</p> <p>speed (1) 73:7</p> <p>speedy (17) 1:13 5:17 6:8 17:11 69:24 70:6 72:11 73:17 73:19 74:12,19 75:1 143:24 144:5 144:7 180:2 208:5</p> <p>spend (4) 2:11 13:25 56:8 127:14</p> <p>pending (2) 4:7 18:14</p> <p>spent (6) 8:8 13:17,21 68:2 205:1 206:5</p> <p>spirit (4) 83:12 92:10 102:25 192:24</p> <p>spirits (1) 182:11</p> <p>spoke (1) 126:21</p> <p>spoken (1) 124:22</p> <p>squash (1) 45:9</p> <p>squeeze (1) 26:9</p> <p>staff (2) 127:15 181:18</p> <p>stage (17) 21:23 30:17 73:21 75:2 78:11 99:13 101:9 126:4 132:24 134:6 135:1 139:12 143:24 145:2 164:24 214:22 215:2</p> <p>stages (1) 26:25</p> <p>stance (1) 187:16</p> <p>stand (12) 21:11 23:5 60:16 104:24 108:12 120:15 134:25 168:5 185:8 199:7 201:11 210:25</p> <p>standard (1) 57:9</p> <p>standing (1) 60:19</p> <p>stands (7) 21:7 81:19 112:1 119:4 170:17 200:7,7</p> <p>start (4) 2:13 3:16 59:12 123:18</p> <p>started (2) 187:25 189:6</p> <p>starting (5) 52:14 53:2 57:10 157:11 207:5</p> <p>startling (1) 31:8</p> <p>starts (6) 17:22 32:20 35:17 63:8 115:15 126:7</p>	<p>starved (4) 112:6,14 134:8 179:12</p> <p>starving (1) 179:17</p> <p>state (1) 153:1</p> <p>stated (2) 80:21 195:8</p> <p>statement (30) 16:23 40:1 48:12 61:12 64:5,9,10,25 65:12 65:19 67:7,10,22 68:11,25 69:14 76:9 111:15 117:17 126:8 133:21 134:12 151:22 152:2 177:11 204:2 204:20,25 205:4 212:5</p> <p>statements (7) 16:14 26:23 40:4 58:22 66:22 203:23 213:18</p> <p>status (4) 148:11,17 149:13 192:2</p> <p>stay (8) 2:22 44:15 61:21 164:19 181:17,17,18 185:12</p> <p>stayed (2) 3:15 208:22</p> <p>staying (1) 24:3</p> <p>stays (2) 3:19,21</p> <p>steamrollered (2) 108:6 164:1</p> <p>step (4) 19:14 72:16 104:4 162:25</p> <p>steps (2) 44:14 191:18</p> <p>sting (1) 19:17</p> <p>stock (2) 144:13 213:23</p> <p>stooges (2) 84:9 88:12</p> <p>stop (20) 14:23 31:5 48:1,3 50:16 65:8 78:17 80:7,8 82:8 83:6 112:21 119:10 120:13 140:6 146:21 189:13 190:10 191:1 192:15</p> <p>stopping (7) 30:22 50:24 78:13 115:23 190:17 191:15 198:17</p> <p>stops (1) 185:14</p> <p>story (2) 41:8 151:19</p> <p>straightforward (3) 82:24 196:18 203:8</p> <p>strange (1) 62:2</p> <p>strategy (2) 23:17 27:10</p> <p>streamline (1) 164:19</p> <p>strenuously (2) 152:14 154:10</p> <p>stress (1) 101:13</p> <p>striking (3) 24:13 25:17 26:21</p> <p>stripping (1) 25:23</p> <p>strong (2) 34:1 52:25</p> <p>strongly (1) 187:10</p> <p>struck (1) 48:7</p> <p>structure (4) 22:25 197:14,17 198:7</p> <p>stuff (2) 40:7,24</p> <p>subcommittee (12) 122:4,5,6,8,10,12 122:16 123:2 173:8 173:12 201:2,6</p> <p>subject (14) 10:18 20:9,21 22:23 50:7 53:12 94:11 133:7 138:8 189:19 195:13 197:5,7 211:25</p>	<p>submission (85) 5:24 9:14 10:9 22:8 25:11,24 28:1 31:8 35:9 39:7 40:10 46:20 47:16 51:12 52:12 54:7,13 56:9 56:18 60:13,16 61:2 62:20 64:2 66:11,23 69:18 70:5 73:13,18 83:9 83:21 92:14 97:1 97:13,15 98:12 100:20 101:6,23 102:23 108:22 113:25 119:3,13 120:20 121:24 127:25 128:11 132:1,11 134:15 137:4 140:14 141:3 142:12 144:6,12 145:4,7 146:5 147:23 148:8 149:10,23 151:8 153:25 156:14 158:13,22 163:23 166:13 168:10 169:7,11 170:21 171:5 174:12 180:2 180:14 193:15 206:11 210:8 213:15 215:2</p> <p>submissions (58) 8:15 15:18 17:4,19 21:6 27:20 32:11,13,19 32:25 33:1,11 34:12 41:9,17 46:18 49:5 51:16 52:1 58:25 59:15 59:18 75:7 81:9 92:24 96:13 100:18 109:5 113:5 115:4 118:25 135:21 137:21,23 138:4 147:3,10,20,22 151:16 166:4,6,22 167:1,6 174:5,20 176:23 179:3 198:6 201:1 202:7 208:13 213:18 220:6,7,8,9</p> <p>submit (14) 16:6 23:18 29:16 41:2 49:21 55:11,15 61:23 67:19 151:4 161:12 199:10 214:18 218:1</p> <p>submits (3) 191:21 198:4 204:6</p> <p>submitted (1) 29:6</p> <p>submitting (1) 39:19</p> <p>subordinate (1) 20:9</p> <p>subparagraph (1) 18:25</p> <p>subscribe (3) 67:14 205:20 206:16</p> <p>subscribed (4) 92:18 94:6 111:5 201:23</p> <p>subscription (2) 186:1 203:4</p> <p>subsequent (2) 58:11 118:3</p> <p>subsequently (2) 84:21 118:3</p> <p>subsidiaries (1) 88:7</p> <p>substance (3) 19:14 66:14 172:2</p> <p>substantial (10) 62:20 69:16 111:16 149:4 155:15,19 177:5 187:12 207:17 209:11</p>	<p>substantially (2) 206:3 214:16</p> <p>substantiate (1) 215:21</p> <p>substantiating (1) 213:13</p> <p>substantiation (4) 40:7 66:20 67:3,5</p> <p>substantive (3) 159:1 164:4 194:1</p> <p>substituted (1) 163:6</p> <p>subtext (1) 128:23</p> <p>Suburban (1) 56:7</p> <p>subverting (1) 148:15</p> <p>succeed (3) 71:7,9 211:20</p> <p>succeeded (3) 26:11 78:7 214:16</p> <p>successful (1) 140:2</p> <p>suck (1) 143:9</p> <p>suffer (6) 76:1 136:11 136:14 161:11,12 205:6</p> <p>suffered (1) 177:5</p> <p>suffers (2) 14:6 112:15</p> <p>sufficient (1) 55:7 65:22 74:14 159:13 159:14 163:24 174:25 175:24,25 207:23 212:22</p> <p>sufficiently (1) 22:11</p> <p>suggest (27) 36:9 37:21 44:23,25 47:24 48:22 52:25 53:3 59:6,9,12 68:10 82:4 83:25 84:9 113:4 133:17 157:1 169:23 170:25 176:22 180:18 213:12 214:21 215:12 216:18 217:3</p> <p>suggested (27) 36:1 39:4 45:2,4 46:10 47:25 54:16 55:5 61:17,19 62:2,22 68:9 73:15 77:17 140:1 146:11 164:3 169:22 170:13,13 170:15,16 172:23 103:21 109:10,15 172:23 180:1 212:7</p> <p>suggesting (9) 60:21 65:25 74:11 87:16 94:11 97:16 120:24 132:21 218:10</p> <p>suggestion (19) 4:10 38:3,16 54:6 64:20 65:9 66:18 68:17 72:19 73:16,19 75:4 83:14 125:24 132:23 145:4 146:2 180:3 203:20</p> <p>suggests (3) 74:8 126:10 179:11</p> <p>suit (2) 74:22 150:3</p> <p>suitable (2) 140:15 213:13</p> <p>suits (2) 74:23 149:25</p> <p>sum (3) 13:12 178:5 213:4</p> <p>summarise (2) 82:23 138:10</p> <p>summarised (2) 96:14 126:19</p> <p>summarising (2) 24:7 104:20</p> <p>summary (2) 39:6 98:17</p> <p>summer (1) 2:11</p> <p>sums (1) 163:21</p>	<p>Sunday (1) 194:15</p> <p>superseded (1) 79:5</p> <p>supplemental (2) 58:24 59:18</p> <p>support (14) 43:21 54:2 154:20 160:22 161:5,9 174:18 176:13 186:16 197:9 204:4 207:3 207:18 218:7</p> <p>supported (3) 177:9 207:12 215:10</p> <p>supporting (1) 203:14</p> <p>supportive (1) 5:5</p> <p>supports (1) 65:9</p> <p>suppose (1) 141:16</p> <p>supposed (19) 7:20 14:9 25:2,3 43:25 50:3 88:1 109:25 127:13 132:2 133:12 137:13 175:13 182:22 187:3,7 196:23 197:15 198:8</p> <p>supposedly (1) 7:18</p> <p>supposition (1) 202:17</p> <p>sure (15) 9:22 14:10 16:1 50:25 59:4 69:4 73:2 91:12 96:11 100:9 113:3 123:8 138:9 139:6 195:22</p> <p>surmounting (1) 55:16</p> <p>surprised (2) 39:8 166:12</p> <p>surprising (3) 88:9 122:8 126:1</p> <p>suspect (1) 16:2</p> <p>swathe (1) 180:7</p>
---	---	---	---	---	--	--

T

tab (37) 17:1 31:12,16
32:13,16,17 33:5
34:6 35:7,10,13
36:12 38:16 39:1
41:13 49:2 64:11
64:23 78:9 80:13
80:13,18,19 98:1
99:4 102:15 103:20
103:21 109:10,15
110:5 126:6,8,9
152:1 153:17,18

table (1) 200:13

tabs (1) 58:18

tack (1) 112:23

tactic (1) 172:18

tail (1) 19:17

take (77) 2:23 11:13
16:10 24:9,11
27:18 32:12 33:12
35:11 40:9 41:21
42:10 44:12 53:20
56:3 63:6,11,12,13
63:23 68:10 69:21
75:15,20 77:2,24
83:2 84:4,14 85:16
85:17 86:21 101:14
107:24 113:13
115:1,17 124:3,10
124:14,20 126:15
129:25 131:15,21
134:25 135:2,13,22
141:9 142:18
144:13 145:21
146:15 155:1,25
156:5 157:8 163:25
166:19 168:5
170:22 173:6
177:14,25 178:4,10
191:19 199:16

200:3 205:23 206:1 208:18 209:11 210:16 212:12 213:23 taken (14) 2:19 7:17 13:20 34:22 46:20 51:17 130:7 132:3 148:19 152:10 162:18 164:13 187:17 200:24 takeover (1) 72:9 takeovers (1) 70:11 takes (5) 29:9 52:22 63:9 95:7 109:3 talk (2) 60:13,15 talking (6) 19:18 62:17 69:9 121:13 177:20 178:18 talks (1) 172:20 Tarek (36) 1:9 17:19 32:10 33:1 34:22 79:22,25 80:24 81:6,12,22 89:15 89:19 104:2 165:14 165:15,16 183:1,19 185:8 188:1,3 190:20 191:7,8 192:17 193:11,24 194:4 195:21 197:24 198:24 202:22 203:9,12 204:6 Tarek's (2) 189:25 199:20 target (2) 52:4 60:18 tell (8) 1:21 4:24 99:16 125:13 126:25 143:16 145:15 151:24 tells (1) 115:4 tempers (1) 3:4 temporary (1) 100:12 tenor (1) 157:22 tensions (1) 186:13 tenure (1) 103:14 term (2) 67:16 219:3 terminated (3) 50:8 79:25 83:8 terminates (1) 9:5 terminating (1) 30:18 termination (2) 21:21 185:5 terms (27) 16:13 17:13 28:20 34:15 34:16 42:16 61:6,6 66:14 67:20,23 69:15 74:25 104:1 108:20 110:9 120:7 123:10 148:25 149:1 179:21 180:3 181:12 196:4 200:21 210:7 213:11 terribly (1) 164:25 test (7) 10:6,7 56:10 62:13,14 69:17 218:24 thank (6) 82:18 146:24 147:12 166:5 181:19 219:4 theirs (1) 136:17 thin (1) 77:18 thing (13) 71:2,3 86:23 95:12 102:3 120:10 123:1 127:6 134:6,15 144:19 209:3 215:3 things (32) 8:17 14:1 15:20,21 21:4 27:23 73:7 78:25	79:2,17 99:7 105:10 107:13,16 107:18 108:12,17 112:13 114:16 120:19 124:2 125:1 131:22 138:2 141:17 142:1 158:3 164:19 181:11 189:13 199:12 213:25 think (84) 5:16 10:8 15:5 22:2 24:23 32:7 33:5,12 36:7 58:5 59:7 63:4 64:17 68:16 72:19 72:20 73:11 74:8 74:13,16 75:4,8,20 80:16,20 85:22 86:9,10 88:17 90:20 99:4 100:4 100:17 105:2,14,15 106:18 107:19 111:9,14,19,20 112:12 115:25 119:8,9 121:18 126:15 127:12 128:6,9 129:18 131:3 133:3,22 135:1 137:17 138:20 140:11,12 141:13 145:22 146:9,11 151:6 152:1 153:17 160:2 161:20 163:10 164:2,7 165:7,21 174:5 180:9 181:8 181:14,15 209:23 211:9 213:25 214:1 219:6 thinking (3) 12:21 32:2 48:12 thinks (6) 81:20 117:14 122:25 162:13 175:1 177:13 third (7) 16:22 32:9 68:21 98:6 151:11 153:22 196:2 Thirdly (5) 27:10 28:19 63:25 70:22 83:13 thought (8) 13:13 62:24 96:15 114:6 125:4,7 134:1 215:22 thoughts (3) 4:24 5:3 42:1 threat (1) 101:23 threaten (1) 81:21 threatened (3) 101:11 191:4 193:10 threatening (2) 81:1 102:12 three (24) 9:14 24:12 54:1 55:1 62:15 64:4 71:6 91:14 110:19 113:16 122:21 125:6 138:20 151:21 156:15,16,20,22 161:23 163:9,17 164:22 173:12 194:19 three-week (1) 145:13 threshold (2) 51:18 52:2 Thursday (2) 1:1 78:22 tie (2) 73:13 169:16 tied (1) 45:14 TIL's (3) 41:19 54:2	60:16 time (50) 4:19,20 8:9 8:20 13:1 15:20,24 16:7 31:11 36:5,5 37:10 46:19 48:13 56:8 63:11,24 66:18,19 69:25 70:6 82:14 83:15 84:18 96:11 99:2 110:2 122:21 123:19 128:21 129:2 132:22 139:21,23 147:2,8 157:16 163:24 164:17 165:6 170:6 170:11 180:13 182:14 184:14 185:7 186:13 192:9 193:6 196:21 timeframe (4) 69:22 71:4 145:18,19 timelines (1) 68:8 times (2) 9:14 138:20 timetable (6) 2:14 4:10,12 211:4,5 212:13 today (48) 1:23 6:18 6:19,23 8:16,19,19 9:2,6,11,18,24,25 10:3 13:7 28:6 30:11 31:9 53:4 81:9 89:25 103:9 105:20 106:25 121:1,2 126:21 134:13 138:7 142:14,14 143:1,3 144:5,8 151:14 154:9,23 159:4 170:12 183:19 190:22 191:10 195:14 200:7 207:1 208:3 209:24 today's (4) 53:9 153:16 181:9 199:13 Tokyo (21) 14:1 38:18 40:7 66:25 67:19 67:22 75:18,24 76:11,14 112:15 125:23,25 126:23 127:6,10 133:24 204:17,25 213:6 214:6 told (14) 49:3 65:23 75:11 81:16 97:24 126:14,21 134:9,10 173:25 186:14 199:17 206:1 209:2 Toledano (24) 1:10 58:13,20 70:15 73:15 137:20,24 146:25 147:5,20,21 159:13 160:2,12 165:22 176:19 180:6 207:1 208:17 212:7 215:25 218:6 219:2 220:8 Toledano's (3) 207:13 208:13 216:9 tomorrow (2) 8:22 168:17 ton (1) 117:16 top (1) 101:21 Totally (1) 62:6 tour (1) 22:21 Tourism (2) 156:17,25 transact (1) 53:25 transacted (1) 97:7 transaction (1) 152:23 transcript (2) 97:24	193:1 transfer (2) 44:17 72:7 transparent (2) 158:9 212:24 transparently (1) 62:10 transpired (1) 97:16 transpires (1) 23:25 treated (1) 13:1 triable (1) 199:1 trial (36) 1:13 3:3,12 5:17 6:8 17:3,12 23:20 28:8 46:9 56:6 57:7 63:1,22 69:25 70:6 71:6 73:17,19 74:12,19 75:1 143:18,24 144:5,7 145:6,14 162:14 163:1,17 180:2 208:5 209:6 209:22 220:5 trials (1) 208:3 trick (1) 30:2 trickery (1) 108:15 tricks (1) 30:22 tried (13) 11:7 34:9,10 49:21 52:4,11 54:11 55:14 73:1 145:3 170:23 180:12 196:11 triggered (1) 44:18 troubles (1) 79:15 true (11) 44:24 77:19 128:24 129:6 150:15,15 192:13 194:2 198:15 202:8 205:7 trumped (1) 29:19 trumps (1) 90:21 truth (1) 128:2 try (7) 2:3 24:4 108:22 112:13 116:13 133:4 214:8 trying (21) 14:25 29:22 35:22 40:6 48:1 82:2 83:6 86:22 90:20 97:18 101:18 102:19 104:25 108:15,22 112:21 114:1 129:18 179:6 182:17 208:24 turn (20) 33:13 43:16 75:16 79:9 90:9 97:14 98:16 100:17 100:20 103:10 114:4 115:24 121:23 122:7,9 124:5 135:24 136:10,20 199:6 turned (2) 173:20 174:3 turning (3) 92:1 96:3 195:17 turns (1) 13:24 twelve (1) 69:9 twice (1) 159:2 two (62) 1:12,15 2:20 12:9 16:13 21:4 24:20 26:23 30:19 32:21 33:3 35:15 38:14 41:18 46:13 46:14,15 47:23 49:6 50:23 53:24 54:25 62:4 66:22 71:19 73:23 75:10 76:19 78:4 79:17 83:17 93:3 99:10 103:10,25 111:2 120:19 121:4	124:24 128:9 131:22 134:10 137:24 142:15 145:9 152:5 164:5 164:22 169:15 179:1,3 181:1,5 182:25 187:5 190:1 195:16 196:12 197:9,18 202:22,25 two-thirds (1) 111:17 two-week (1) 179:7 type (1) 176:5 types (1) 50:23 <hr/> U ultimate (4) 65:7,23 182:21 217:2 ultimately (7) 15:4 19:15 112:12 135:9 193:23 211:18 218:17 unanimity (2) 44:3,4 unanimously (1) 123:20 unanswered (1) 65:22 unawares (1) 29:23 unceremoniously (1) 170:23 uncontroversial (1) 35:20 underlying (1) 72:21 underneath (1) 17:17 understand (30) 4:2 9:20 14:10 65:5 76:21 77:24 94:19 95:12 99:1,22 100:19 117:7 135:19 138:8,9 145:10 147:7 162:9 162:21 163:2 170:14 174:22 175:8 176:15 180:22 210:22 214:23 217:5,10,23 understanding (5) 9:22 76:8 111:10 183:14 203:23 understands (4) 31:19 104:24 123:8 139:17 understood (7) 29:2 69:4 140:20 162:4 162:8 164:16 174:24 undertake (2) 45:8 138:15 undertaking (5) 85:12 85:15 108:16 158:13 172:6 undertakings (6) 26:4 26:6,11 27:14 188:3 214:18 underway (1) 209:8 undone (2) 63:1,22 unencumbered (1) 174:18 unfairly (1) 55:1 unfettered (7) 10:12 96:5 97:20 98:15 119:5,9 unfortunately (1) 65:13 unhealthy (1) 25:1 unhelpful (1) 209:4 unilateral (1) 31:4 unilaterally (3) 33:7 98:10,23 unlawful (15) 19:11 24:21 25:1,12,25 27:25 28:24 37:16	44:7 46:2,13 49:6,7 55:5 61:7 unlawfully (5) 1:16 6:7 25:20 41:24 69:20 unnecessary (3) 28:23 62:6 173:16 unravel (1) 149:18 unreality (1) 49:22 unsatisfactory (2) 38:24 70:22 unsurprisingly (1) 166:19 unwilling (1) 125:20 unwinding (1) 206:7 un-user (1) 85:24 upper (1) 40:19 urge (3) 105:20 154:10 164:8 urgency (12) 38:15,18 39:22 55:3 67:15 68:8 69:11 110:16 144:9 193:20 203:12 205:12 urgent (9) 8:18 38:11 66:14,20 126:10,11 128:4 199:10 218:3 use (4) 26:18 66:7 47:7 48:6 117:14 121:13 usefully (1) 75:9 usefulness (1) 3:21 usual (1) 218:24 utterly (1) 97:22 <hr/> V v (1) 52:16 vacation (2) 213:17 217:12 vague (1) 200:14 valid (13) 2:5 6:21 10:15 12:10,14 13:2,8 83:13,15 135:15 137:2 196:15 214:3 validity (4) 24:5 47:4 196:11 205:13 validly (2) 199:3,4 valuation (9) 40:20 64:8 94:9 132:10 132:15 133:10 157:16,16 170:4 value (17) 94:9,13 132:19,22 133:14 156:4 157:12,15 169:23,24 177:22 202:2 206:2 207:8 208:8,23 216:11 valued (2) 132:12 155:22 various (9) 99:17 156:24 181:25 189:4 197:8 208:4 208:9,17 217:22 vastly (1) 156:9 vehicle (6) 17:16,17 17:18 111:22 183:2 186:21 vehicles (2) 5:8 111:19 venture (35) 3:6,18 4:17 14:9,14 17:16 17:17 22:23 23:2 27:6 49:25 83:3 91:7 134:18 182:8 182:12,19,22,25 185:3 186:16,24 187:2,13,18,20,23 188:11 195:19	196:23 197:19 199:16 207:8 209:9 211:24 ventures (2) 177:21 208:6 venture's (1) 191:20 veto (3) 15:1 95:25 146:4 vexatious (1) 97:21 vexing (1) 51:20 viability (1) 204:12 vial (6) 26:17 34:2 67:14 119:12 209:3 209:4 views (1) 217:22 visible (1) 62:11 visited (1) 215:2 vital (1) 153:21 vitality (1) 75:25 volume (2) 98:1,2 vote (26) 32:24 43:9 47:9 81:18 82:7 97:8 101:5 102:21 113:9,23 115:24 116:4 118:12 119:2 119:17 141:19 150:16 151:6 167:14 171:21 179:25 191:22 192:20,23 194:7 198:3 voted (6) 42:6 116:17 117:6 149:16 198:1 201:13 votes (4) 85:2 117:18 141:20 187:5 voting (34) 18:3 20:18 28:4,8,14,17 30:23 50:11,16,24 74:4 78:23 79:6 80:7 82:9,12 83:10 92:7 101:19 102:16 103:2 112:22 119:10,19 120:8,13 151:12 165:15 167:15 185:23 187:14 190:13 192:15 198:17 <hr/> W wait (11) 42:12 46:17 49:12 78:12 79:20 81:11 111:12 116:15 118:18 147:11 169:19 waiting (1) 34:3 want (65) 8:12 9:3 15:16,19 16:7 26:14 28:22 33:2 37:8,15 41:22 42:22 56:8 61:8,17 70:20 74:24 75:10 82:13 90:10 100:16 101:19 102:21 106:17 107:2,13 109:18 112:4 113:15 118:1 119:1 122:11,22 129:15 129:16 132:20 135:25 136:3,4 137:24,25 140:5 144:5 146:6 148:4 151:17,21 152:6 154:8 157:23 158:1 158:3,4 159:16 164:24 167:8 169:17 174:22 179:1,5 210:22 211:2 213:3 215:10 218:25
---	---	---	--	---	---	---

wanted (13) 61:21
78:8 80:6,7 82:14
120:7 137:3 150:5
150:8 153:5 161:15
161:18 185:12
wanting (2) 37:6
57:13
wants (15) 70:19,19
91:6 106:8 107:7
107:22,24,25
108:18 121:17
171:9 177:4 208:10
211:17 213:17
warned (1) 159:1
warranted (1) 98:8
wasn't (9) 7:21 30:15
31:5 76:17 96:20
104:13 164:17
169:12 210:11
waste (1) 15:24
water (1) 110:17
way (73) 1:24 2:10,14
3:17 7:13 15:22
16:17,22 23:11
24:21 28:9 32:15
36:23 38:24 40:3
40:25 41:3 44:15
46:9,10 50:5 58:3
61:2 64:6,11 70:13
71:23 72:14,16
73:6 83:24 84:13
84:20,24 88:1
104:25 107:17
112:22 117:18
127:24 139:20
140:15 141:5,19,20
141:23 142:20
143:22 145:7
146:22 150:13
153:11 163:14
164:20 166:13
167:2 168:7,20,24
172:5,6,15 173:14
175:23 179:24
180:15 181:15
187:6 198:1 204:14
210:9 214:9 218:19
ways (3) 25:11 166:10
166:21
Wednesday (4) 39:16
41:13 119:6 190:1
week (13) 1:16 8:1,5
32:12 34:18 42:4
46:25 71:6 78:22
101:14 164:5
169:15 179:3
weekend (1) 145:21
weeks (12) 19:10
46:15 55:10 62:22
125:7 128:9 145:21
163:18 176:7 179:1
202:23,25
week's (1) 192:8
weighing (1) 56:1
went (3) 45:22 138:13
160:3
weren't (1) 99:21
whatsoever (4) 55:16
115:12 172:2 173:4
whistlestop (1) 22:21
white (10) 17:23,24
17:25 85:22,25
86:1,5 105:15
151:25 153:17
wholly (1) 158:13
wider (3) 31:1,23
70:10
willing (2) 104:7 125:2
willingness (1) 23:4
willy-nilly (1) 102:9

wish (2) 130:8 203:1
wished (1) 189:1
wishes (2) 117:2
196:25
withdrawn (1) 190:15
witness (32) 16:14,22
26:23 40:1 48:11
58:22 61:11 64:4,9
64:10,25 65:12,19
66:22 67:7,9,22
68:11,25 69:13
76:9 117:17 151:22
152:2 177:11
203:22 204:2,20,24
205:4 212:5 213:18
won (1) 218:10
wonder (5) 6:11,15
125:20 170:12
173:13
wording (1) 52:25
words (17) 18:5 19:24
21:24 33:20 56:4
82:7 88:11 93:9,21
95:6,21 110:1
113:11,19 143:12
168:22 212:24
work (14) 4:10 5:12
24:23 25:7 26:19
43:25 44:13 71:23
104:16,20 108:22
112:2 182:23
210:14
worked (2) 55:4
209:19
working (3) 86:7
130:9 196:7
world (2) 7:13 182:6
worlds (1) 136:4
worried (1) 123:24
worry (2) 95:14 136:6
worse (1) 14:5
worth (6) 20:6 23:14
26:22 94:22,23
137:20
wouldn't (6) 7:7 40:1
45:7 84:20 180:10
216:13
writers (2) 46:21
147:11
writing (3) 17:24
184:7,10
written (15) 19:23
35:19 45:1 77:4
86:13 105:17
109:23 110:6
113:20 120:18
121:1,6 172:8
173:9 213:18
wrong (29) 9:15 10:18
13:10 31:12 37:24
46:10 52:4 53:2
59:5 60:2,18 61:3
62:7 63:5,18
103:19,20 110:24
128:12 132:6
135:25 136:1,9
138:13 142:13
145:7 171:5 176:8
214:21
wrongs (1) 4:8
wrote (6) 79:24
155:24 157:19
194:17,22 197:1

yesterday (7) 7:14
58:9,16,20,21
94:13 168:19

Z

Zecha (105) 2:21 9:4
9:12,15,25 15:13
21:3,16,16,19
25:19,21 26:11
36:3,6,24 37:8,10
37:19 45:4,10,15
57:14,17,17 60:16
60:17,25 61:21
67:8,14 76:10,17
86:17,18 87:7,13
87:18,20 103:24
104:22,22 105:11
105:18,21 106:5,10
107:7,20,22,24
108:10,18,18,24
113:17,18 114:6,9
116:7 118:5 120:15
121:13 124:13
125:5 126:21,24,25
127:5,22 134:2
137:7 138:22
142:25 148:20
150:1 153:24
170:16,18,24 171:2
171:10,17,22,25
172:4,16 173:3,6
182:13,19 185:1,12
185:14 188:14,17
190:4 195:25
199:11,23 200:2,6
200:19 204:20
Zecha's (17) 8:18
29:16 103:14
104:21 106:13,18
113:13 114:4
138:18 146:15
172:12 185:5
188:10 189:18
200:12,13 201:4

\$

\$0.01 (1) 24:14
\$10 (2) 107:8,10
\$105 (1) 156:9
\$150 (1) 24:14
\$168 (1) 111:19
\$17 (1) 206:2
\$250 (1) 111:21
\$3,000 (1) 24:16
\$358 (2) 155:23 182:8
\$42 (1) 156:10
\$5,000 (12) 40:19
92:19 94:7,19,22
94:22 132:19 186:2
196:9 202:4 203:2
203:6
\$50 (18) 92:22 110:9
117:12 144:24
149:5,14 153:3
156:20 158:20
159:19 186:3,6,25
190:6 196:7 201:10
201:12 203:25
\$60 (2) 18:19 184:22

1

1 (20) 24:15 25:12
35:7,10,13 49:2
95:9 103:13,20
127:16,17 128:18
152:1 153:16,18
155:7 156:2 188:3
196:1 220:3
1.03 (1) 82:19

10 (7) 35:7,10,13
41:13 49:2 153:17
153:18
10.30 (1) 1:2
10.40 (1) 1:4
101 (1) 90:10
102.1 (1) 56:6
105 (3) 115:9,14,16
105.1 (2) 115:10,17
107.1 (3) 116:5 117:24
118:23
11 (14) 35:7 93:23
100:22,22 109:23
110:4 123:21 124:7
124:10 129:1
133:19 149:17
159:7 201:14
11.20 (1) 159:6
111.2 (2) 116:14
118:16
111.4 (1) 61:10
12 (8) 20:12 32:14
46:22 48:15 100:18
109:10,15 110:5
12.05 (1) 48:17
13 (3) 64:9,25 189:6
14 (6) 38:17 64:10
65:1 183:9 188:15
189:17
14.3 (2) 91:15 185:18
147 (1) 220:8
15 (19) 7:18 36:3
38:16 60:5 67:9
103:11 106:16
126:8,9 137:20
138:21 140:13
141:7 143:10
144:12 146:12
189:24 199:25
213:22
15th (1) 125:18
150 (3) 26:20 27:2
95:8
16 (3) 42:16 43:6
67:10
166 (1) 220:9
17 (11) 33:5 67:9 95:2
95:3 98:1 103:22
109:7 129:14
189:24 220:4,6
18 (15) 29:2,9 31:12
31:16 32:16,17
68:24 99:4 150:12
151:23,25 183:11
189:23 190:8
194:13
18th (2) 77:21 112:20
181 (1) 220:10
187 (1) 75:16
19 (2) 34:6 38:25
192 (1) 124:5

2

2 (9) 75:15 82:17 98:5
109:9,13,14 124:3
155:11 157:4
2.00 (1) 82:21
2.1 (1) 156:6
2.2 (2) 19:17 156:7
2.3 (1) 156:7
20 (9) 9:1 80:13,13
139:24 152:4,5,7
156:18 194:16
2014 (10) 1:1 183:9,12
186:10,20 188:1,6
196:1 201:14 205:5
21 (12) 35:7,18 38:12
78:9 80:18,19 93:4
102:15 192:2
194:16,20 197:2

21st (1) 125:17
21.2 (1) 39:13
210 (1) 220:11
22 (4) 38:15 153:17,18
194:22
23 (26) 30:12,13 35:2
35:15 81:18 83:13
103:11 106:1
112:19 150:23
153:14,20 190:2
191:5 192:2 193:23
194:15,20 195:4,10
195:20,24 196:12
199:2,9 218:11
23rd (8) 7:1,20 10:5
15:8,15 45:19
84:16 118:21
23.1 (2) 92:5 185:23
24 (10) 35:9 39:10
43:7 49:2 99:12,14
155:8 176:20 188:1
207:5
242 (2) 109:17,21
25 (31) 7:20 13:11
18:25 30:12,13
31:17 34:8 35:2,16
81:18 83:14 112:20
121:23,25 137:5
150:23 152:13
190:2,5 191:5
192:3 193:24
194:20 195:10,20
196:6,12 199:2
201:8 206:24 219:3
25th (7) 7:1 10:6 15:8
15:15 41:14 45:19
45:21
257B (1) 56:19
259 (1) 56:20
26 (2) 48:25 126:13
27 (2) 34:8 43:7
28 (11) 34:7,11,12
41:13,19 42:23,24
48:21 64:11 167:3
193:14
28th (1) 42:13
29 (2) 45:11 103:18

3

3 (18) 17:1 31:12,16
41:12 64:11,24
77:24 78:2,3 98:1,2
105:14 124:12
126:6,9 151:23
152:1 156:2
3.1 (1) 109:22
3.50 (1) 147:14
3.55 (1) 147:16
30 (7) 7:19 23:6 42:8
42:16 43:4 157:20
195:1
30th (3) 7:23 42:4
125:18
31 (18) 1:1 9:8 17:1
64:23 103:15 104:4
124:13 126:6,8,9
148:20 150:2
153:22 165:20
183:12 188:15,18
190:5
31st (2) 8:19 128:18
32 (6) 34:7,13,21
35:10,13 153:4
33 (5) 23:6 34:13,21
35:17 167:3
35 (1) 156:17
35.21 (2) 155:19 156:4
36 (3) 91:15 97:2
101:20
37 (1) 148:7

38 (2) 177:17 178:8
39 (2) 39:10 103:22

4

4 (8) 17:22,22 85:20
85:21 86:5,5
105:15 152:14
4.1 (1) 31:20
4.2 (3) 18:9,10 31:23
4.3 (2) 18:9,11
4.5 (2) 167:10,22
4.5c (2) 88:2,22
4.50 (1) 181:20
40 (4) 39:11 49:2
110:6 115:10
41 (3) 35:10,13 110:7
42 (7) 31:16,17 33:9
98:1,17 99:25
177:1
43 (4) 31:16,18 99:5
110:12

5

5 (6) 33:6 80:13 81:2
98:5 99:5 156:22
5(b) (1) 98:6
5.1 (1) 31:20
5.2 (1) 31:23
5.3 (1) 19:22
5.30 (2) 181:19,22
5.4 (4) 18:15,25 19:12
49:17
5.4(a) (5) 18:18 130:3
130:6,7 184:20
5.4(c) (4) 19:1 130:15
130:19,20
5.4(d) (7) 18:20,23
19:19 92:15 93:3
168:8 186:4
50 (67) 13:11 19:2,19
93:11,21,25 109:25
110:2,20 111:7
112:4 129:8,13
130:23 131:5,11
136:21 158:15
159:21,23,25
160:10,14,18,22,23
168:12 174:14,21
174:25 175:3,9,10
175:14,16,19,20,22
176:22,24 177:10
177:13,19 178:1,6
207:21,23 210:8,8
210:10,13,20
211:10,12,16
215:14,20,23 216:4
216:7,9,10,11,15
216:20,22 217:1
52 (2) 57:23 60:12
524 (1) 41:14
529 (1) 41:20
537 (1) 45:13
541 (1) 45:13
55 (2) 57:23 60:12
58 (1) 115:10
59 (1) 168:16

6

6 (6) 20:3 38:25 86:8
103:20,21 183:15
6(f) (1) 20:16
6(i) (1) 20:16
6.2 (1) 20:5
6.2(c) (2) 20:20 184:2
6.2(g) (4) 20:23 86:11
98:24 196:19
6.2(i) (2) 167:15
184:12
6.40 (1) 219:8

6.6 (6) 21:3 37:2 86:16
167:9 170:18
171:16
6.6(a) (5) 21:13 86:24
106:14 118:6 185:1
60 (34) 18:21 19:4,5
46:3,15 49:9,14
55:6 57:4 62:19
68:17 93:13 110:1
128:10,12,14,18,25
130:12 131:13,16
168:9,14,17,23,25
168:25 169:5,9
179:8,14 186:7
202:16,24
61 (1) 168:18
62 (5) 99:8,12,14
156:5 157:12
63 (1) 100:2
65 (4) 30:3 32:14,14
100:18
66 (3) 32:14,15 100:18
69 (1) 100:20

7

7 (11) 22:19 36:12
77:21 95:12,14
126:4,18 152:7
157:20 205:5 219:3
7.2 (1) 95:18
70 (1) 101:21
71 (1) 29:13
74 (1) 22:20
75 (2) 29:13 220:7

8

8 (9) 25:15 30:4 36:12
36:14 46:1 55:5
124:15 158:25
159:5
81 (1) 86:20
81-year (1) 87:9
82 (1) 20:13
83 (3) 31:7 166:11,16

9

9 (3) 35:7 124:5
188:13
9.4 (3) 91:4,6 183:23
9.5 (2) 90:10 183:21
99 (1) 115:16