

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS
OF ENGLAND AND WALES
BUSINESS LIST (ChD)

BL-2020-001343

BETWEEN:

- (1) LONDON CAPITAL & FINANCE PLC (IN ADMINISTRATION)
(2) FINBARR O'CONNELL, ADAM STEPHENS, HENRY SHINNERS, COLIN HARDMAN AND GEOFFREY ROWLEY (JOINT ADMINISTRATORS OF LONDON CAPITAL & FINANCE PLC (IN ADMINISTRATION))
(3) LONDON OIL & GAS LIMITED (IN ADMINISTRATION)
(4) FINBARR O'CONNELL, ADAM STEPHENS, COLIN HARDMAN AND LANE BEDNASH (JOINT ADMINISTRATORS OF LONDON OIL & GAS LIMITED (IN ADMINISTRATION))

Claimants

- and -

- (1) MICHAEL ANDREW THOMSON
~~(2) SIMON HUME-KENDALL~~
~~(3) ELTEN BARKER~~
(4) SPENCER GOLDING
(5) PAUL CARELESS
(6) SURGE FINANCIAL LIMITED
(7) JOHN RUSSELL-MURPHY
(8) ROBERT SEDGWICK
(9) GROSVENOR PARK INTELLIGENT INVESTMENTS LIMITED
~~(10) HELEN HUME-KENDALL~~

Defendants

Transcript of proceedings made to the court on

Day 34 - Monday, 13 May 2024

The claimants are represented by Mr Stephen Robins KC, Mr Andrew Shaw & Mr Philip Judd

Michael Andrew Thompson (D1) is represented by Miss Anumrita Dwarka-Gungabissoon

Simon Hume-Kendall (D2) & Helen Hume-Kendall (D10) settled and are no longer appearing

Elten Barker (D3) settled and is not appearing

Spencer Golding (D4) is debarred from defending the claim

Paul Careless (D5) and Surge Financial Limited (D6) are represented by Mr Ledgister & Mr Curry

Russell-Murphy (D7) and Grosvenor Park Intelligence Investments Limited (D9) appear in person

Robert Sedgwick (D8) appears in person

Monday, 13 May 2024 (10.30 am)

MR ROBINS: My Lord, I don't think there is any housekeeping, so I would like to call Dr Chudozie Okongwu, please.

Examination-in-chief by **MR ROBINS**

MR ROBINS: Would you tell the court your name, please.

A. My name is Chudozie Okungwu.

Q. And your business address?

A. 6 New Street Square, EC4A 3BF.

Q. Can we look at <D3/2> at page 1, please. Do you recognise this as your first report in these proceedings?

A. Yes, I do.

Q. Can we look at page 34, please. Is that your signature?

A. On page 30 is my signature.

Q. On the screen. It might be -- if you can read what's on the screen, it might be easier?

A. Yes, that's my signature on page 30.

Q. Do the opinions set out in this report represent your true and complete professional opinions on the matters to which they refer?

A. They do.

Q. Is there anything in the report you would like to correct or clarify?

A. Yes. In the report, one of the things I discuss are the minimum returns necessary on LCF's lending in order for it to pay the Surge fee, to pay the bondholders the interest they're owed as well as their principal, and to collect what it calls "lenders' interest", which is the premium it charges on the bond rate. I did not include what it calls the setup fee, which is a further 2 per cent fee. Had I included that, obviously the required returns would have been higher.

Q. If we look at <D3/2> at page 12, this is table 1. Is that what you are referring to?

A. That is.

Q. So, what is it you're saying about the required rate of return in the right-hand column?

A. In column 7, the numbers would be larger. They range from 18.8 to about 45.7, as opposed to 18.1 to 41.8.

Q. Can we look at <D3/3> at page 1, please. Do you recognise this as the joint statement?

A. I do.

Q. Ignoring the opinions expressed in here by Mr Grainger, do the opinions expressed by you in this joint statement represent your true and complete professional opinions on the matters to which they refer?

A. They do.

Q. If we look at <D3/4> at page 1, please, do you recognise this as your supplemental expert report in these proceedings?

A. I do.

Q. At page 24 -- sorry, I've got the wrong page number. Can we go to the final page, please, and work backwards from there. There we are. Is that your signature?

A. That is.

Q. Do the opinions set out in this report represent your true and complete professional opinions on the matters to which they refer?

A. They do.

Q. Is there anything in this report you would like to correct or clarify?

A. No, nothing.

MR ROBINS: If you stay there, my learned friends will have some questions for you.

Cross-examination by **MR LEDGISTER**

MR LEDGISTER: Dr Okungwu?

A. That's correct.

Q. You were instructed by the claimants' representatives in these proceedings and given a specific assignment; that's right, isn't it?

A. That's correct.

Q. There were a number of things that you were tasked to consider, the first being whether or not Surge's commission rates of 22.5 per cent and 25 per cent would have been agreed between reasonable parties in an arm's-length transaction, and in the context of LCF's stated return of investment to investors, what you say, in other words, the economic feasibility of Surge's commission rates. That was one of the things that you were tasked to consider. That's right, isn't it?

A. That is correct.

Q. You were also tasked to consider whether or not there was a market for the services provided by Surge. That's right also, isn't it?

A. That's correct.

Q. You were also tasked to consider Surge's commission rates of 22.5 per cent and 25 per cent and compare it with the rates ordinarily charged in that market. That's right, isn't it?

A. To see how those fees compared to the fees ordinarily charged for those services, yes.

Q. In the market?

A. Correct.

Q. I'm reading from your statement. This is not particularly controversial. When you reference that market, basically, you say, "how Surge's commission rates of 22.5 per cent and 25 per cent compare with the rates ordinarily charged in that market", which market are you referring to exactly?

A. I'm referring to the fees that are charged by the comparables that I look at for supplying some or all of the services that Surge purported to supply to LCF.

Q. In what market, is my question?

A. It depends on the particular entity that I'm looking at. If I'm looking at a third party marketing agent, I'm looking at what they would charge their client. If I'm looking at a fund manager, for example, I'm looking at what they would charge their clients, their end clients.

Q. But you were dealing with Surge and LCF; right? That's what you were being asked to consider: Surge and the commission that they were charging LCF, 22.5 per cent or 25 per cent. That's right, isn't it?

A. That is correct.

Q. In what market? The minibond market, wasn't it?

A. Oh, I see what you mean.

Q. Forgive me. It is my fault if I'm not being clear.

A. Yes, what Surge was charging LCF, who was a minibond issuer.

Q. So, in order to find comparables, would it make sense to try and identify other service providers like Surge in that market, the minibond market?

A. That's one route one could go.

Q. What did you say? That's one route?

A. That's one route one could go. Another route one could go would be to look at entities that supply similar services and see what they charge and to see how those compare to what Surge was charging and, as a matter of fact, that's the route that Mr Grainger, for example, chose to take.

Q. So, one route would be to consider other service providers in that market, the minibond market. The alternative route would be to consider service providers in completely different markets?

A. Completely different asset markets, but --

Q. What does that mean?

A. -- the issue is not the assets, as far as I can tell; the issue is the services.

Q. So, to consider assets in a highly-regulated institutional market, you say that's a fair comparison, is it, when you're looking at minibonds in an unregulated market. Let's compare the two and, wherever we end up, they are pretty much the same thing. Is that what you're telling us?

A. That's not what I'm saying and, as a matter of fact, that's not what I'm doing either. For example, one of the comparables I use is the private credit market, and that is not highly regulated.

Q. That's not highly regulated?

A. "Highly regulated", it's not regulated at all, pretty much.

Q. The private credit market, is that private equity funds like Blackstone?

A. Blackstone plays in that market, but that's not what I'm talking about. Private equity is a specific aspect of private markets, but what I'm talking about is private credit and, specifically, what I term "direct" -- well, I don't term it; what it's called, "direct lending".

MR JUSTICE MILES: So, that means the fund is just lending to borrowers?

A. That's correct. You would have --

MR JUSTICE MILES: Just on credit terms.

A. Yes, exactly, to small and medium-sized enterprises.

MR LEDGISTER: I see. We will come to that in a moment. You were also tasked to consider the report of Mr Grainger, who sits at the back of the court. You may not be able to identify him. But that's Mr Grainger. You were also asked to consider his report as well, weren't you?

A. I was.

Q. He had effectively looked at the same topics that you had looked at, and he provided his own report. Is that fair?

A. He provided his own report. I think his task was to determine whether there was a market rate for the services that Surge rendered to LCF.

Q. There was agreement on some topics, but there was significant disagreement in respect of other topics that he had given a view on in his report. Is that fair to say?

A. I think that's fair.

Q. If we can turn, please, to page 37 of your witness statement, it sets out your professional experience. It would be fair to say you have a highly impressive resume. You are clearly someone who is heavily involved and knowledgeable of macroeconomics or the marketplace, rather, of financial markets. Is that fair?

A. Thank you. Yes, I think so.

Q. It is all compliments, by the way. I'm not criticising.

A. I know.

Q. And you worked for NERA between 2008 and 2020. That's the sort of large section towards the bottom of page 3?

A. I think it is more accurate to say I worked for NERA from 1999 to 2000. I had different roles at NERA, and those are broken out on my CV. But you will see that I actually started there in 1999.

Q. But you were certainly there up until 2020; is that right?

A. Correct.

Q. You were definitely there during 2016 to 2018, it must follow?

A. I was definitely there then, yes, that's correct.

Q. Notwithstanding your various roles, we have got here 2008 to 2020, you directed projects that apply financial economics to consulting and to securities-related litigation and investigations:

"Has analysed issues of materiality, causation and damages. Has testified and consulted in cases involving the valuation of equity and fixed income securities as well as exotic derivative structures."

A lot of words. I don't understand half of it myself, but it looks pretty impressive.

A. Thank you.

Q. "Has analysed the suitability of a variety of investment strategies and products for individual as well as institutional investors. Has analysed the components of the costs of trade execution."

Also:

"Has analysed a variety of trading strategies including many that use financial derivatives. Asset classes covered include equities, rates, credit, FX and some commodities. Some of the issues examined include valuation, market abuse, insider trading and misselling."

Now, NERA -- that's National Economic Research Associates; is that right?

A. That's what it used to be called. Now it's just NERA Economic Consulting. They have made the acronym their name.

Q. What they do as a company is, they have an army of experts that they can deploy to give advice or various consulting tasks to different organisations, companies, and so on?

A. It's a consulting company that uses economics and related disciplines to supply advice to its clients.

Q. Now, your role at NERA as the managing director, how much of that exposed you to the minibond market, UK minibond market?

A. I was not exposed to the minibond market. It is a subset of what I'd call the credit markets, and you will note that I mention credit there, but I was not exposed specifically to the UK minibond market.

Q. So it would come under credit markets -- sorry, what did you say it would come under?

A. I said it would fall under -- when I say -- you read there that it says "Asset classes covered include ...". One of the items was credit. Minibonds would fall under credit.

Q. Would fall under credit. But your personal knowledge of minibonds, it would be fair to say you don't have much experience or knowledge of minibonds in your day-to-day role working in NERA?

A. That is correct. At NERA, I did not work in the minibond market -- on the minibond market, I should say.

Q. Did you have much experience with start-ups generally, start-up companies, in your role in NERA between 2016 and 2018?

A. On occasion, I've had to deal with issues relating to start-ups. There have been disputes that involve valuation of start-ups, but I think it's fair to say that the bulk of my experience was not focused on start-ups.

Q. So, from time to time, you may have dealt with the valuation of start-ups. How about their access to funding and ability to raise funding?

A. Sorry, please be more specific.

Q. No problem at all. With your involvement with start-ups in your practice at NERA between 2016 and 2018, how many start-ups did you deal with, were you involved with, who were seeking to raise capital?

A. In my capacity, I never dealt with a start-up that came to us looking to raise capital.

Q. I see.

A. I have dealt with instances in which there's a dispute that arises out of a capital raising.

Q. Okay. So, no experience of helping start-ups or advising start-ups, considering start-ups who are seeking to raise capital?

A. That's correct. I've never done that.

Q. Be it debt capital markets or otherwise?

A. Correct. That's not my role.

Q. So, you wouldn't be aware of the struggles and challenges from your own personal experience that start-ups might have faced trying to raise capital, it must follow then?

A. I have not dealt with or advised start-ups that were seeking to raise capital. I agree with that.

Q. You wouldn't be familiar, from your own personal experience, with the fees they may have been willing to pay to raise capital, it therefore must follow?

A. From my own personal experience --

Q. That's what I'm talking about, your own personal experience?

A. No, I have not.

Q. No?

A. I said no.

Q. Would you be aware, from your own personal experience, of those who were seeking to raise funds in the minibond market in 2016 to 2018? Any experience of dealing with any fundraisers?

A. No.

Q. And the challenges they may face trying to raise retail -- to raise funding from the retail markets, if I can put it that way?

A. No.

Q. No experience of the challenges they may have faced during 2016 to 2018?

A. Personal experience? No, none.

Q. Any experience of lenders, people who have raised money in minibond markets, who were lending out money between 2016 to 2018? Any personal experience that you had of lenders during that time, having raised money through minibonds and they were trying to deploy capital?

A. No.

Q. Any experience of what a lender's view of start-ups at that time between 2016 and 2018?

A. Do you mean start-ups in the minibond market?

Q. Yes, start-ups generally, what lenders, what their view of start-ups generally between 2016 to 2018, what they felt about them, what they thought about them?

A. Well, I couldn't speak to what they thought or felt. What I could speak to is that some of the matters I've worked on have involved nascent companies that needed to raise capital, not in the minibond market, and the kind of transactions that they may enter into. But, again, not in the minibond market.

Q. I understand. Any experience of retail investors who were investing in minibonds between 2016 to 2018?

A. None on my part.

Q. So, it must therefore follow that you wouldn't have a view on what investors placed reliance on when investing in minibonds, from your own personal experience? A bit clumsily put. Let me put it differently.

A. Thank you.

Q. You wouldn't know, from your own personal experience, whether or not investors valued security, the importance of security and what it meant to them before investing into a minibond?

A. Do you mean as a result of having advised an investor or just --

Q. As a result of having advised or spoken to investors. Have you any impression of what investors felt about the importance of security in their decision to invest in minibonds?

A. As a credit specialist, I have a good understanding of the importance of security to a lender.

Q. What is that? What is the importance of security to a lender?

A. Sure. Security can stand as collateral for a loan, right. So, if the loan were not to be repaid, the lender can resort to the security, liquidate it to make themselves whole, or at least in whole or in part.

Q. Sure. I suppose it would be fair to say the private credit funds or the private funds we mentioned, they would consider security to be very important before deploying capital?

A. They lend both on a secured and an unsecured basis. As you would imagine, all else being equal, a security loan is -- tends to be cheaper than an unsecured loan.

Q. Now, you received your brief from the claimants' legal representatives, I think it was in September 2023?

A. I'd have to go back and check.

Q. I don't want to take an unfair point. If I'm wrong, no doubt I'll be corrected. But at the time of receiving the instruction, I think it would be fair to say your knowledge of the minibond market from your own personal experience was thin to non-existent. Is that fair?

A. I wouldn't say it was non-existent. I had read about it but I had not participated in it nor studied it.

Q. As at 2023, what had you read about it?

A. I knew about the existence of minibonds, I knew there had been some losses by some who had invested in minibonds. But, again, this is not something I had dealt with professionally. It had been in the papers, as you know.

Q. Did you know about LCF? Did you read about LCF before 2023?

A. I think I had. It was in the papers.

Q. But your knowledge -- what was your knowledge of the marketplace for minibonds by the time that you had received your brief? I know you hadn't had any personal experience of dealing with service providers or people connected with minibonds at NERA, but what was your knowledge of the marketplace? The minibond marketplace?

A. Could you be more specific?

Q. Yes. So, did you know, for example, the impact that the LCF fallout had on the marketplace?

A. No, that was not something I'd looked into.

Q. Were you aware, for example, that there were a number of companies in the minibond marketplace that disappeared in 2020?

A. I think I was aware there were some that disappeared. I don't know if it was in 2020.

Q. Had you ever heard of Surge before you were instructed by the claimants' representatives?

A. I don't believe I had.

Q. Were you aware that Surge had been attacked in the media for the amount of fees they had charged in connection with the LCF collapse?

A. As I said, I hadn't heard of Surge, so, no, I wasn't aware of that.

Q. Were you aware that there were many individual companies who were reluctant to get involved with -- in fact, I'm going to put the question differently. Did you know that there was a microscope that was effectively being focused on LCF following the collapse of minibonds?

A. I knew that LCF had been in the papers. I don't know if I'd consider that being under a microscope, but it had been in the papers. I think it was pretty prominent in the papers.

Q. That's fair. Did you know in January 2020 what the FCA did in relation to the minibond market?

A. Before I got involved with this case, I couldn't have told you specifically.

Q. They put a stop on selling to the retail market for minibonds in January 2020. Were you aware of that?

A. I was not aware of that before I started working on this matter.

Q. But you're aware of it now?

A. Yes.

Q. Do you know who Dame Elizabeth Gloster is?

A. No.

Q. So you're not aware of her report that she prepared in late 2020?

A. As I sit here now, no.

Q. So, having received your brief, your assignment, from the claimants' legal representatives, you and your team effectively had to carry out some detective work, would it be fair to say, because you didn't have any actual knowledge of the minibond market, did you?

A. May I take that in pieces?

Q. Absolutely.

A. My brief, a large part of my brief, was merely an economic one, about the economic feasibility of the fee. In other words, was it possible for the Surge fee, in tandem with the other fees that were being charged, was it likely that would be agreed between two reasonable parties acting at arm's-length, which is an economics question.

Q. Sure.

A. It is nothing to do with minibonds specifically.

Q. Understood.

A. So I didn't need to do any investigation on that part, except to look at the characteristics of the underlying securities.

Q. Yes.

A. In responding to Mr Grainger's report, and in also looking into the kinds of services that Surge provided, I came to look into the minibond market also.

Q. That makes sense. That makes sense. So, you were trying to understand the marketplace in order to assess whether or not Surge's fee was a fair fee to be charged, presumably?

A. I was asked (a) whether there was a market for those services and, if not, what comparable services would cost, I think is a good way of summarising my instructions. So, first, I had to know what services Surge was providing to LCF and then I looked at analogues for the services elsewhere.

Q. But context was required, though, wasn't it, because to try and assess fees that may be rightly charged in 2023, that doesn't really tell us what the position would have been in 2016, does it? Would the fees charged in 2023 be the same in 2016? Things change, don't they?

A. I will take that in pieces. Yes, things change. It is not necessarily the case that fees charged in 2023 for whatever service would be the same or different than those charged in 2016. The particular types of services we are talking about, we were looking in the context of what they cost in the period of interest, which is approximately 2015 to end of 2019.

Q. So, trying to look at that period of time, 2015 to 2018, retrospectively, we are having to look retrospectively, obviously --

A. I think I said 2019.

Q. 2019, sorry. To try and get a feel for what the marketplace would have been like then. Did you try and do that?

A. To understand what comparable services were being offered for or at least what parties were charging for performing comparable services.

Q. But the issue was, many of the players had long departed by 2023, hadn't they? Many of the players who were involved in the minibond market were no longer in existence in 2023. So, who were you able to speak to to understand what fees were comparable, what fees other people were charging, over the relevant period of time?

A. Okay, to take a step back, I think both Mr Grainger and I agree that there's no exact replica of the suite of services that Surge offered to LCF. So, what I found was that, in whole, in part, actually in some cases more of those services were offered, and I looked at what those cost in that period. They tended to be far less than 25 per cent or 22.5 per cent.

Q. Sure. so there is no direct comparable to what Surge had been offering to the marketplace. Yourself and Mr Grainger agreed on that, you just said?

A. I think we did, yes. We said so in our joint expert report.

Q. There are certainly no service providers in existence now that did what Surge did back in 2015 to 2019?

A. If there are, I'm unaware of them, who did identically to what Surge was doing.

Q. Absolutely.

A. No more, no less.

Q. Your research was conducted on data that was publicly available; is that fair to say?

A. Yes, almost by definition.

Q. So, you didn't phone people up, for example, and say, "I know you were charging -- on the website or on data it says you charge 3 per cent, but how does that relate to minibonds back in 2015 to 2019, those fees"?

A. No, because, if I did that, it would be anecdotal, at best.

Q. Anecdotal but, specifically referencing the UK minibond market, you could ask some questions, couldn't you?

A. Again, what I was interested in were the services, not the minibond market per se.

Q. No.

A. So things like maintaining a website. That can be done independently of a minibond market. There's costs for that, or getting in touch with investors.

Q. So you and your team had a look at the publicly available data; yes?

A. That's correct.

Q. But not specifically in the minibond market?

A. We didn't avoid information from the minibond market, but we looked at entities that were providing similar services to those Surge was providing. Those happened to be in three markets that I identified, one of which Mr Grainger agreed with me on -- Mr Grainger identified it first and I agreed that it was comparable also.

Q. Your experience at NERA, would it be fair to say that that involved, in the main, established markets, large markets?

A. In the main, larger than the minibond market, I would say. I think that's fair. Fair to say larger than the minibond market.

Q. Where would the pendulum swing if we had to say, between regulated and unregulated markets, where is the majority of your experience?

A. I think it's a bit ambiguous, because a lot of the -- the markets I work in are over-the-counter markets for bespoke products and there tends not to be a lot of regulation there.

Q. But you have experience of dealing with sovereigns?

A. Yes, a lot.

Q. And well-known sort of power houses in the financial sector?

A. I have worked with a lot of large financial institutions that are well known, I think that's correct.

Q. As at 2023, when you received your assignment, what was your knowledge of Surge? What did you know about them?

A. As I said earlier, I hadn't heard about Surge.

Q. Okay. But once you received your brief. Sorry, once you'd received your brief from the claimants' legal representatives, what did you know, what did you understand about Surge, what type of entity were they?

A. I think attached to my instructions was a case summary which mentioned Surge. But that was the starting point of my knowledge about Surge.

Q. Did you know, for example, that they were situated on top of Barclays Bank just off Brighton High Street?

A. I did not know that.

Q. You didn't know that. How many people worked on this assignment? Yourself plus how many?

A. Five.

Q. Are you able to tell us how many hours were spent on this assignment?

A. Off the top of my head as I'm sitting here, no.

Q. How many months that you worked for?

A. Well, we started in the last quarter of 2023, I believe. I don't know the exact date. There was a long period in which I did not speak to the solicitors, I'd say a couple of months, and we are now in April, so maximum three, four months, but, again, I would hesitate to say because it was broken up. We spent a lot of time working on other projects also.

Q. But you spent some considerable time trying to conduct the assignment, trying to carry out the assignment, and to do a proper job?

A. I think that's fair.

Q. And, like you have told us, like Mr Grainger, you were unable to find a direct comparison to Surge, in terms of services that they offered?

A. That's correct. I say so in my report.

Q. Effectively, they were one of a kind, weren't they, Surge?

A. They're the only one of their kind that I was able to identify, I think is accurate.

Q. They're one of a kind. But what you were able to do was to split up their services into three segments. Is that fair?

A. I think it's fair to say that their services were split up into three areas which were identified and I have now mapped onto other service providers, yes.

Q. So marketing services, account management and technology?

A. Correct. Those are the three broad categories.

Q. So, dealing with the technology, first of all, if I can deal with it that way, what did you know about their technology?

A. Again, broadly, that they set up the database, the website for LCF. I believe they said they populated it. And they maintained it.

Q. In terms of them setting up, what do you mean by that, that they set up?

A. Well, I took that to mean, and I think everything I've read is consistent with that, that they built it, right, so they built the system, and that was the working assumption I have.

Q. Did you know that the technology behind the website they built was able to process online applications by investors?

A. I believe that's been said in some of the testimony, yes.

Q. And there was a customer dashboard as well?

A. Off the top of my head, I don't recall the customer dashboard per se.

Q. Their system was able to be integrated with other service providers. Did you know that?

A. I don't believe I knew that, off the top of my head, no.

Q. I think their system was linked to the cash custodian, for example?

A. Oh, I see what you mean. I thought you meant other customers, other customers à la LCF. Yes, I was aware of that.

Q. You're aware of that?

A. Yes.

Q. And also AML-checked providers?

A. The AML part I did not know off the top of my head. If I knew it, I've forgotten it.

Q. From the answers you are giving, can I take it you have not had a chance to try out the technology?

A. That's accurate. I have not tried out the technology, nor have I seen it first hand.

Q. Do you know how many hours would have gone into developing a platform like that?

A. I don't, no.

Q. Do you know the technical input that would have gone into a platform like that?

A. No. My -- no.

Q. It's not your area of expertise?

A. No longer. I used to do that.

Q. Do you have an ability to value, place a value on what that software, that platform, was actually worth?

A. I have not studied it, so I couldn't value it.

Q. I suppose you wouldn't have any idea how much it would cost to maintain and manage a platform such as that?

A. I think that's correct. I don't have a good idea of what that would cost.

Q. It would be fair to say, given your answers thus far, that you certainly didn't contact other technology providers to see if there was another platform similar to that which had been created by Surge, did you?

A. I didn't contact other providers, but I was aware that other providers have similar front ends that they can -- that clients can use.

Q. Like Vanguard?

A. Vanguard is an example.

Q. In the absence of finding a like-for-like comparable provider, as I think you have alluded to before, you identified various service providers who could provide the services that Surge provide, and perhaps even more?

A. Some -- in some cases, a subset; in some cases, more than a subset, more than Surge itself.

Q. Third party marketeers and placement agents could do some of the role that Surge provided?

A. That's what I said in my report, yes.

Q. Fund managers?

A. Again, yes, that's in my report.

Q. And private credit funds?

A. Again, yes, and I believe Mr Grainger used fund managers as a comparable also.

Q. If we can go to page 15, please, of your witness statement, paragraph 25. This is where you deal with the third-party marketeers and placement agents. "Third-party marketers and placement agents are 'independent representatives' ..."

I'm reading from paragraph 25:

"... who 'match the expertise of an asset manager to interested investors', with the aim of raising 'capital from target institutions plus brand building to help foster long-term relationships'."

That's what you say?

A. Yes, I believe I'm quoting from a piece of literature, yes.

Q. No problem. Where it says they "'match the expertise of an asset manager to interested investors' with the aim of raising 'capital from target institutions ...'", what types of institutions are you referencing there?

A. I think it can vary, depending upon where the asset manager wants to deploy their capital.

Q. If the asset manager is deploying in the minibond space, what types of institutions would you go to to raise capital?

A. Again, as I said, I did not study the minibond market to that level.

Q. So you can't help us on that?

A. I can't help you on that, no.

Q. You carry on:

"Their services include 'devising the sales strategy, strengthening the story and the way managers tell it, calling on investors, facilitating investor meetings and communications, populating the databases, and creating marketing materials'."

Now, these are some of the roles that Surge was carrying out. That's right, isn't it?

A. I agree with that statement. That's why I've used them as a comparable.

Q. The third-party marketeers and placement agents, can you give us an example of a company that would do these sorts of thing?

A. Not off the top of my head, I could not.

Q. What about LGBR Capital? Would that be one of them?

A. It might be. I don't know.

Q. Now, with these third-party marketeers, in their role of calling investors, would they have called the sort of 11,600 investors -- you're smiling?

A. Sorry, what's the question?

Q. You were smiling. I was just wondering why you were smiling when I asked the question?

A. I was just thinking I don't know that Surge called 11,000 investors, but I was waiting for you to finish your question.

Q. Okay. So these third-party marketeers, would they have called 11,600 investors in?

A. I don't know the answer to that question.

Q. You didn't ask them, did you, any of them?

A. No, I have not called any of them.

Q. Would they have facilitated investor meetings for 11,600 investors?

A. I don't know the answer to that question, nor do I know if Surge did that.

Q. How many of them -- again, if you don't know the answer, please just say -- how many of these third-party marketeers, that were charging between 3 to 5 per cent of the raised capital, were involved in the minibond market? Do you know the answer to that?

A. I don't know the answer to that question.

Q. And you wouldn't know how easy they may have found it to raise capital in the minibond market between 2015 and 2019?

A. That follows from my last answer. No, I don't know the answer to that question.

Q. If we can please go to page 16 of your witness statement, paragraph 26, "Fund managers", moving on to fund managers. Again, I think I know the answer to the question, but you didn't speak to any fund managers in your analysis?

A. No.

Q. At paragraph 26, it says:

"Similar to Surge, many fund managers provide account management services, conduct marketing of their funds, have websites where investors can find information about funds and check their account balances ..."

Yes?

A. That's what it says.

Q. That's what you mentioned a little while ago, in reference to other providers having platforms available where investors can check?

A. That's some of what I mentioned. I think, at the time, we were discussing the various features of the website.

Q. I mentioned Vanguard?

A. And I said that's an example.

Q. That's right. I think here you reference Vanguard as well, in the footnote, so the first line, page 13, where you reference investors being able to find out -- check their account balances, and so on. At [footnote] 37 "All funds Vanguard UK Investor". So you're referencing Vanguard at that point?

A. Correct.

Q. Now, given that Surge was situated on top of Barclays Bank off Brighton High Street, do you think it is fair to compare them to Vanguard, the US company established by Jack Bogle in 1975?

A. Again, I'm not comparing Surge to Vanguard. They're different animals. What I'm comparing are the services that Surge was providing to LCF to those provided by Vanguard and looking at the relative costs.

Q. I see. Because Vanguard, as you say, was a different animal altogether: 20,000 employees, \$8.1 billion under management; majority owned by Blackrock. Did you know any of that?

A. I don't know Vanguard was majority owned by Blackrock, actually.

Q. Neither did I, until I did my homework. Their platform, do you have any idea how much it cost them to develop their technology platform where investors can find information about funds and check their account balances?

A. I don't. Nor do I know that they developed it in-house.

Q. You don't know that?

A. I don't know that.

Q. What might they have done?

A. They may have bought it from somebody, they may be leasing it from somebody. Again, I don't know.

Q. What you do know is Surge developed their own, though, don't you?

A. I also know what Vanguard charge for theirs, for all their services.

Q. I didn't ask you that. But since we are talking about charging, how much were they being charged to prepare their technology platform?

A. I don't know the answer to that question.

Q. Do you know whether or not they were in the business of raising money for minibonds?

A. Whether Vanguard was?

Q. Yes, Vanguard.

A. I don't know for a fact. No, I don't know. But I wouldn't expect that they would be.

Q. You wouldn't have thought so. Did you say you wouldn't have expected them to be?

A. I wouldn't have expected it, but I don't know for a fact.

Q. If we can please go to <MDR00226949>, and to page 38. Here we have the funds, the bond funds, that Vanguard were operating or putting out there. It starts with "Vanguard 20+ Year Euro Treasury Index Fund". The next one, "Vanguard Euro Government Bond Index Fund". "Vanguard Euro Investment Grade Bond Index Fund". None of those sound like the sort of level of minibonds, do they?

MR JUSTICE MILES: You're on the ones on the right?

MR LEDGISTER: On the right-hand side, sorry. The stock funds are on the left; on the right-hand side is the bond fund.

Those are all heavyweight, institutional-type bonds, aren't they?

A. Those are all bonds that trade in markets that are larger than the minibond market was.

Q. Significantly larger than the minibond market. Let's take, for example, "Vanguard US Government Bond Index Fund". It doesn't compare to the LCF fund, does it?

A. I think saying significantly larger than the minibond market is fair.

Q. It would look a bit odd if you had "LCF Bond" stuck in the middle of that, wouldn't it? Wouldn't it?

A. Oh, I'm sorry. Yes, an LCF bond on its own would not fit in. For one thing, it wouldn't start with "Vanguard".

Q. Do you think that Vanguard might take 11,600 calls from potential investors wanting to put £1,000, maybe, into LCF bond?

A. I don't think Vanguard invest in LCF bonds. I think we just agreed on that.

Q. Well, we know that. But do you think that they would be prepared to take 11,600 calls of investors wanting to put money into a minibond?

A. I don't think that they operate in the minibond market. I think I said that earlier.

Q. How about private credit funds?

A. I didn't know for a fact, but I wouldn't expect they did, to be accurate.

Q. Let's turn to private credit funds. Give us an example of a private credit fund, one of the companies that you reference when you're talking about private credit funds as one of the constituent parts.

A. I mention one of the larger ones, Ares, is one of the ones I mentioned. There are others.

Q. How big are they?

A. I would imagine they have several billion under management, minimum.

Q. Nothing like Surge?

A. Nothing like LCF, in terms of assets under management.

Q. In terms of an entity that can provide services to clients such as Surge provided -- I mean, Surge doesn't even compare to them, does it, in terms of magnitude of their operation, the magnitude of the entity that you are talking about?

A. I think the comparison I make is between the combination of Surge and LCF. However, I would agree that, even combining Surge and LCF, they would be far smaller than Ares. I think it is the largest private credit fund out there. There are many much smaller ones, but that's one of the larger ones.

Q. Again, it would follow that you didn't speak to them about minibonds specifically between 2015 and 2019?

A. That is correct.

Q. Or how many start-ups they may have helped over that period of time trying to raise money?

A. I did not speak to them, period.

Q. Did you try and enquire through public available data as to whether or not they were involved in minibonds between 2015 and 2019?

A. I did not specifically look to see if Ares was involved in the minibond market. Again, I don't know for a fact, but I wouldn't expect them to be. It's too small for them.

Q. Is Carlyle a private credit -- do they operate a private credit fund?

A. Carlyle was an asset manager. Among other things they do, they have now gotten into private credit also.

Q. I think you reference them in your report somewhere, don't you?

A. I may have, yes.

Q. Another large operation, 425 billion in assets?

A. Again, they do many things. One of them is now private credit.

Q. Carlyle, in particular, their investors range from public and private pension funds. Would you agree with that?

A. I agree with that.

Q. To wealthy individuals. Do you agree with that?

A. Yes, I agree they probably have some very wealthy individuals.

Q. And families to sovereign wealth funds. Would you agree with that?

A. Family offices, do you mean?

Q. From their website. They say:

"Our investors range from public and private pension funds, to wealthy individuals and families, to sovereign wealth funds ..."

A. I see, wealthy individuals and families, I understand. Yes, I believe that.

Q. It ends "and unions and corporations". Do you believe that?

A. Yes, I believe that.

Q. Again, I know the answer to the question: you didn't speak to them about minibonds in particular between 2015 and 2019 and their ability to provide services in that environment?

A. I have not spoken to Carlyle.

Q. You reference in your report Hydrogard Legal Services. Do you remember that?

A. I remember that they were one of the companies that was mentioned as being willing to pay a fee.

Q. Did you try and get in contact with them at all?

A. No, I did not try and get in contact with them, no.

Q. Did you research them at all?

A. I think we did research them.

Q. Might I ask, why didn't you try to contact them to find out about the fee that they may or may not have been prepared to pay?

A. Sure. Because the way I work and the kind of report I produce is based on publicly available data and publicly available facts. If I called them and they told me something, it would just be an anecdote, and it wouldn't be broadly representative of anything except for what somebody happened to have told me and that's not something I do.

Q. I see. So, if it's not available publicly, then it won't find its way into your report. Is that fair to say?

A. I don't think that's entirely fair because there are a number of things that were not publicly available but that were exchanged between the parties in this matter that did find their way into my report, but I wouldn't use a phone call to a company selected at relative random to buttress one point or another in my report. I wouldn't feel comfortable doing that.

Q. There is nothing random about Hydrogard Legal Services, is there? This is one of the companies whom you were told, or you have read, were prepared to pay the fee that Surge were charging. There is nothing random about that, is there?

A. I suppose not.

Q. It didn't have to be a phone call. You could have called them up to go and have a meet, couldn't you, have a meet with them?

A. I suppose I could have done that.

Q. But you didn't?

A. I did not.

Q. Can you -- if you can't remember, it ends there, but on their website, it lists out all the names of the officers that work there. It's even got pictures of them all. Can you recall seeing their website?

A. I cannot recall that.

Q. Dolphin Capital. You reference them as well, don't you?

A. Again, they were a company that was mentioned in the case documents.

Q. Now, they filed for bankruptcy in 2020, three years prior to you being instructed on this matter. They were a German operator, I think, and they filed for bankruptcy as opposed to sort of liquidating?

A. Again, I'd have to go back and check the underlying documents. I think it had something to do with Ireland investing in Germany.

Q. That's right.

A. But I'd want to check.

Q. Okay. But the same question, really: did you try and track down their officers to find out were they prepared to pay Surge fees?

A. I obviously researched the company, since I remember the Irish connection, but, no, I did not, again, try and call them to see -- to verify that they were willing to pay a fee on the order of what Surge was charging.

Q. What about Wellesley? Did you come across Wellesley at all? Did you hear about Wellesley?

A. I don't know.

Q. Did you come across Alex Paschalis at all, either you or your team, a gentleman by the name of Alex Paschalis?

A. It does not ring a bell with me.

Q. Are you aware of Thistle, the company Thistle?

A. Thistle, yes, that was one of the companies that was mentioned also.

Q. A compliance gap analysis company. You may or may not know?

A. I did not know that.

Q. Can we have <SUR00147598-0001>. You may not have seen this. What this is, is an exchange between a gentleman, Alex Paschalis, and one of the officers of Surge, Kerry Graham. You can see the subject matter there being "Surge -- Thistle -- Loan Note". Can you see that?

A. Yes, I see the topic.

Q. At the bottom of the page, this is an email dated 18 June 2018, so certainly within that relevant period that you were considering.

A. Yes, I actually may have even seen this email.

Q. All right. Do you want to take a moment to remind yourself whether you have or not?

A. Just give me a moment to read it, please. Okay, I have read it.

Q. Do you remember seeing this before?

A. I'm not sure.

Q. What this email is basically saying is, it's Alex Paschalis saying to Kerry that he's got a prospect who are, "currently having their loan note", as he says "(quite similar to minibonds) structured with UK lawyers". It will be a 5 per cent coupon for three years, they are looking to raise 25 million: "They're allocating 25 per cent of the raise to marketing."

Do you see that?

A. I do see that.

Q. What do you make of that, allocating 25 per cent of the raise to marketing for raising £25 million?

A. In isolation, that sentence, I'm unsure what to make of it. I'm unsure what to make of it, is the short answer.

Q. What are you unsure about?

A. I'm unsure of whether they're saying they're willing to allocate a quarter of the 25 million to marketing expenses. That's what I'm unsure of.

Q. That's fair enough. If they were, what would you say to that?

A. I'd say that's a large proportion to allocate to marketing expenses.

Q. Would it surprise you?

A. Sorry, I wasn't finished.

Q. Sorry.

A. For a note that pays 5 per cent.

Q. Would it surprise you if that were the case?

A. I would investigate it.

Q. Say that again, sorry?

A. I would want to investigate it further.

Q. Why would you want to investigate it further? Is that because it would surprise you?

A. It's because I would want to understand how the math works for them to pay 5 per cent and the 25 per cent and to redeem the notes in three years.

Q. The math wouldn't work too well, would it, based on the findings that you've had?

A. Again, I'd want to -- as I said, this sentence in isolation, I wouldn't know, but if it were just a 5 per cent coupon on a three-year note, you would be assuming a very, very large return.

Q. "Assuming a very", sorry?

A. Large return.

Q. Because 5 per cent as a coupon is less than what LCF were paying, isn't it?

A. They had at least one coupon that was less than 5 per cent, but I take your point.

Q. They had one coupon, but what about the others, what about the majority? Was it less than 5 per cent or more than 5 per cent?

A. Most of them were more.

Q. If this company that Thistle are referring are prepared to pay 25 per cent of the raise to marketing, ie, 25 per cent of the 25 million, you would want to investigate that further to understand how the economics would work out on this?

A. I would.

Q. You made an assumption, didn't you, when considering the economics in this case, that the officers running the show, if I can put it that way, knew what they were doing, didn't you?

A. Sorry, in Thistle or LCF?

Q. I will break it down. In LCF, your assumption is that it wouldn't make economic sense to pay such a large fee yet charge a coupon of whatever it was, 8/9 per cent, and have a successful business. It's not possible. Is that your view?

A. It's my view that it's not possible economically unless you can consistently achieve very, very high returns.

Q. Right.

A. And that gives --

MR JUSTICE MILES: Sorry, was the question about LCF or --

MR LEDGISTER: LCF, my Lord.

MR JUSTICE MILES: I think the question was about LCF and your discussion in your report.

A. Yes, and in my opinion, if you are -- the 25 per cent Surge fee in tandem with the lenders' interest in tandem with the setup fee, the only way that that works is if LCF could consistently achieve extremely high returns on the order of those I show in I think it is table 1 of my report, at a minimum.

MR LEDGISTER: You've heard the name Andrew Thomson. You're familiar with that name, aren't you?

A. I'm familiar with it. I've never met him.

Q. You've never met him. Did you ever see a business plan from LCF?

A. If I have, I don't remember it.

Q. You didn't have an opportunity to interrogate their business model by speaking to or asking questions of any of the LCF officers, not necessarily on the telephone, but you couldn't do it by way of writing, for example, you couldn't ask questions and get a response, could you?

A. I have not communicated with anybody who is or was at LCF.

Q. But from where you sit, as an independent person assessing the business model, it doesn't seem feasible to you to pay a 25 per cent fee or a 22.5 per cent fee to Surge and conduct the business as LCF had proposed to do?

A. The only way it would work is if LCF could consistently achieve returns much greater than those that other investors, of which I'm aware, achieve.

Q. Like you said before, to be fair to you.

A. I think I've said some variant of that in the past, yes.

Q. You're aware, aren't you, that there had been others who raised minibonds who have gone out of business by paying high fees?

A. I know that there are others that have gone out of business. I think Blackmore is one I mention in my report.

Q. Because you know that Blackmore were paying a fee to Surge of 20 per cent. You're aware of that?

A. I think that the 20 per cent question is something that's a bit in dispute.

Q. In dispute, all right.

A. Yes.

Q. Are you aware that the Blackmore Bond wasn't considered to be a fraud or anything of that nature? Are you aware of that?

A. I'm aware there was an investigation and I'm aware that -- I didn't follow it -- I didn't study it in depth, but I've not heard it was a fraud, if that is the question you're asking.

Q. Are you aware of Northern Provident at all? Have you come across that name?

A. As I'm sitting here, I don't recall. I may have.

Q. What did you know of the disbursements that Surge would have racked up in providing a service as they did to LCF? When I talk about "disbursements", I'm specifically referring to search engines like Google, Bing, et cetera. Were you aware that they made payments to other companies?

A. Yes, I'm aware they made payments to other companies. I'm aware that Bing was one of those.

Q. Are you aware of the amount they paid out to those companies?

A. In aggregate, I don't have that figure. I could probably obtain it with some analysis, but as I'm sitting here, no.

Q. You were given sight of invoices, though, weren't you, that Surge or related companies would have paid to the likes of Bing?

A. I think we have the bank account.

Q. Okay.

A. So not invoices, but you could see incomings and outgoings of the bank account, which is in an Excel file.

Q. But you were aware that was millions that was being paid out to these companies?

A. Again, I haven't aggregated it, so I don't know the answer to that question. This was not the focus of my report, the amounts that were disbursed to internet advertisers.

Q. No problem. I understand. You had sight of the audited accounts of PwC and EY, didn't you?

A. I may have seen those -- for LCF?

Q. For LCF?

A. Yes, I may have seen those.

Q. Were you aware that they knew about the 25 per cent fee?

A. That's not something I know about, so ...

Q. Had you been told that PwC were aware of the fee, would that have changed your conclusion at all on whether or not you thought the fee was a proper fee to be charged for the provision of the services?

A. It would not have changed at all my view on the economic feasibility of the fee, had LCF not been able to achieve super-normal returns.

Q. Just for completeness' sake, Mr Okungwu, because I want to give you the opportunity to answer this, would it be fair to say that, following your investigation of the marketplace during the relevant period of time, 2015 to 2019, you're not able to tell us what was the typical range of fees being charged to raise money for a minibond?

A. I didn't conduct an investigation of the minibond market. What I was asked to do, as I say in my report, was to analyse the economic feasibility of the LCF business model within the context of a 25 per cent fee, and I lay that out; to look at the services that were being offered by Surge to see if there were analogues and comparables in the market to see what those cost. That's what I was asked to do. I wasn't asked to investigate the minibond market.

Q. So, the answer is, no, you don't know -- whether you were asked to investigate it or not, I'm asking you, were you were able, after conducting your assessment, to land at a number which was the number being charged by service providers to raise funds for a minibond between 2015 and 2019?

A. As that is not what I was looking for, it's not surprising at all that that is not what I found.

Q. So you can't help us on that?

A. I think you answered for me.

MR LEDGISTER: Thank you, my Lord.

MR JUSTICE MILES: Any re-examination? Sorry, I should have asked you. I thought it had been parceled up between you.

MS DWARKA: I will adopt Mr Ledgister's cross-examination, but I have some short questions.

MR JUSTICE MILES: I think we will take the shorthand writer's break. We are just going to take a five-minute break now. I'm sure you are well aware of this and it has been explained to you, but you must not discuss your evidence or the case with anyone during the break.

A. Understood.

MR JUSTICE MILES: We will come back in a few minutes.

(11.46 am)

(A short break)

(11.52 am)

Cross-examination by MS DWARKA

MS DWARKA: Mr Okungwu, you said in your first report -- let's get that up, <D3/2> at page 9, that you did not identify any companies that offer --

MR JUSTICE MILES: Hang on a sec. Let's get it up so the witness can see.

MS DWARKA: Page 9, paragraph 15, the second bullet point: "I did not identify any companies that offer the identical set of services to those which are said to have been provided by Surge."

That is the position, isn't it?

A. That is the position.

Q. And you have confirmed that in evidence. Now, in your evidence this morning, you said that you didn't look at -- you didn't speak to the various comparators that you use in your report, and I will just summarise for you. Your view is that there are firms that offer similar, if not more extensive, services such as third-party marketeers and placement agents, fund managers and private credit funds, and they charge substantially less. That's the summary of what your view is in your first report?

A. That's correct.

Q. But in your evidence, when Mr Ledgister had put it to you and looked into the different comparators, you confirmed that you didn't speak to any of them about the minibonds and you didn't look too closely into the minibonds aspect and you don't have any experience in minibonds yourself. Is that right?

A. If I can take those in turn, I agree that I've said that I did not look -- did not speak to any of them about the minibond market specifically, again, because I wasn't asked about the minibond market, I was asked about the services, and I have not looked particularly closely at the minibond market exclusively.

Q. Yes. But you're using them as comparators, aren't you?

A. I am.

Q. So, I think it has already been put to you that they were not really suitable comparators because the company you used as the gap examples are much bigger than LCF and Surge. That has already been the position and it's been put to you?

A. Sorry, I don't accept that entirely. I think Mr Ledgister picked some examples and pointed out that they were much larger, but when you read my report, you'll see that the fees I offer, the fee ranges I offer, are based on surveys, in some cases, of thousands of firms.

Q. Now, in your evidence, though, you had actually spoken about the fact that you didn't look into how the platform was built. You were using comparators, but you didn't look too closely into sort of building a platform, hosting and maintaining all of that, which is what Surge did, didn't it?

A. Sorry? I'm sorry, what's the question?

Q. One of the services provided by Surge is to actually custom-build, host and maintain the website that LCF used. That is not something that you looked into when you compared the other comparators? You just looked at the services generally, didn't you?

A. I looked at the end services offered. I did not look at the cost or the effort involved by Surge in building their front end, if that's what you are asking me.

Q. Yes. Mr Grainger, in his reply to your point, did say that the comparators are not suitable to comparing because they were unwilling or did not provide the services to issuers of minibonds. Do you recall that? It is in the joint statement, if you want to have a look, <D3/3> at page 6?

A. If I could, please.

Q. Do you want me to read it to you?

A. No, no, I'm reading it as we're speaking. Yes, I have read it.

Q. Now, in the same report, you said that you could not comment on this point, but you provided a supplemental report to deal with it. Do you recall?

A. I recall that I provided a supplemental report, yes.

Q. Essentially, in your supplemental report, which is found at <D3/4> at page 4, you say -- the first line, it starts:

"To the extent that it is the latter ..."

MR JUSTICE MILES: Oh, top of the page, paragraph 4, okay.

MS DWARKA: The first line, but at the end of the line, it starts:

"To the extent that it is the latter, I note that Mr Grainger has provided no compelling evidence in the Grainger report or the joint statement that third-party marketers, fund managers and private credit funds were unwilling to provide services to issuers of minibonds." But you don't tell us any alternative, do you?

A. May I see the beginning of that paragraph, please?

Q. Yes.

A. Okay, thank you.

Q. So, all in all, no identical set of marketers, there are issues with the comparators that you have used, so your choice may or may not be appropriate. Would you agree?

A. I think that, in terms of the services that are offered, those are a correct comparison. Whether they were offered -- I think the point Mr Grainger may have been making, because I found his response a bit ambiguous, was that some of these services would not have been provided to a minibond issuer. I don't have an opinion on that. I don't know one way or the other whether that specific assertion is correct or not.

Q. Whichever way we look at it, the comparators that you have chosen may or may not be appropriate because there are issues with the comparators?

A. I accept that they are not identical to LCF, but I don't accept that the services that they're offering are not the same ones that were being offered by Surge to LCF.

Q. Now, you also question whether LCF and Surge had established a market rate for the services provided by Surge by acting as reasonable parties at arm's-length, don't you?

A. I do. My point is that Mr Grainger makes that assumption, and then, based on that assumption, concludes that they were acting as reasonable parties at arm's-length, which is circular.

Q. Let's just have a look at what's being said. You do not believe they were acting as reasonable parties in an arm's-length transaction; is that right?

A. I believe that, unless LCF could consistently make super-normal returns, it was bound to lose money and be unable to maintain its economic viability, hence the only reason -- hence it would not willingly, as an arm's-length counterparty, enter into those -- into that agreement.

Q. So the answer is, you do not believe they are acting as reasonable parties?

A. I think I'll stand by the answer I gave you.

Q. So, in your first report, you say that Mr Grainger has not provided any evidence to support his assumption that the parties were acting as reasonable parties in an arm's-length transaction. Now, that's at <D3/2>, page 27, internal page 23, paragraph 49, if you want to have a look.

A. Yes, because he explicitly states that that's one of his assumptions.

Q. You repeat that point in the joint report at page 10 where Mr Grainger had explained that he made this assumption based on the fact that he has not -- he was not provided with any indication or any evidence to the contrary or any evidence to indicate any constraint in the negotiation between Surge and LCF. So, he chose to assume it was reasonable in the absence of any evidence to show the contrary. If you want to have a look, it is <D3/3>, page 12. That can be a way of looking at things, could it not?

A. I suppose it could be. I mean, he does say both of Surge & LCF were free to terminate the negotiations at any time prior. I don't know what he's basing that on. But if he has evidence to support that, then I suppose that's one way of looking at it.

Q. I don't think it was mentioned to you, but you may not know this, but Mr Thomson had tried to reduce the fees on a number of occasions and was looking into alternative ways. Did you know that?

A. I did not know that.

Q. So there's a possibility that he would have terminated at any point when he decided it was not suitable?

A. Again, you're discussing things of which I'm not aware.

Q. You didn't know. Unsatisfied, you respond in this joint report by saying:

"[Mr] Grainger's ... conclusions are premised on an (unsupported) assumption ..."

But, again, you don't really put an alternative of what you say should be the way to read it, do you, in there?

A. Sorry, what's the question? I'm sorry, I'm a bit confused.

Q. Mr Grainger explains on what basis he takes the assumption that this is reasonable parties in an arm's-length transaction, and he sets everything out there. You just say his conclusions are premised on this unsupported assumption in the joint report, but you don't explain what is the alternative in this report, do you? You provide a supplemental report where you decide to then give a bit of more - because you're a bit potentially unsatisfied with your explanation in the joint report?

A. Yes, because I think one of the very last points he makes in his report is that his conclusions are based upon this assumption and, as far as I can tell, he's merely restating that assumption more fulsomely.

Q. You decided to explain the point further in your supplemental report. You explain, <D3/4> at page 5, that you expect a reasonable party to assess economic viability of a transaction and, based on that view, you decided that it was economically unviable to enter into the transaction that LCF entered into with Surge, didn't you?

A. Unless they were able to consistently make super-normal returns, they were bound to lose money in that transaction, so I would not expect them to enter into it.

Q. Now, in your evidence today, you have told us that you haven't really dealt with start-ups?

A. I think I said that I -- that the bulk of my work has not been with start-ups. I think that's a more accurate description of what I said.

Q. So start-ups, and to make new business work, essentially, many companies enter into all sorts of high-interest lending facilities or high fees or less beneficial transactions to give them a better chance of success in the short run. Did you know that?

A. I do know that, but that's different than a bond offering with a set coupon. Often, in start-ups, what investors will offer is a loan that can be converted to equity, for example. But that's quite different to what we're observing here.

Q. But you were assessing reasonableness of a party in an arm's-length transaction based on economic viability of a transaction. Now, the transaction that we are talking about is a transaction that start-up companies entered into to make it work. So you, in your report, didn't analyse these types of transactions, did you?

A. I'm sorry, when we are discussing start-ups are we discussing LCF, Surge or the borrowers?

Q. Well, they were start-ups, weren't they?

A. Sorry, pardon me?

Q. LCF and Surge were start-ups, weren't they?

A. So you're saying that -- I'm sorry, I'm a little bit unsure on your question. It is not clear to me.

Q. In your analysis -- I'll say it again. You have been assessing -- you have been asked to assess the transaction as it is, LCF with Surge. That is the transaction you have been asked to assess?

A. And the bondholders are a third party there.

Q. Yes, but the transaction is the LCF and Surge transaction in respect of the fees.

Now, in order to do that, you have to look into what you are dealing with. LCF and Surge are -- Surge was a start-up company, LCF was a fairly new company. So, when you are analysing the transaction, you should have considered the idea that start-ups would enter into transactions which you may not think is economically viable but essentially are transactions that companies entered into at the very beginning of their life?

A. I don't accept that I was asked to analyse them irrespective of the fees. The fees are integral to the analysis because the fees are the cost. You can't analyse a transaction absent --

MR JUSTICE MILES: I think you may be at cross-purposes here. I think what counsel said was you were asked to analyse the relationship "in respect of the fees", not "irrespective of the fees".

A. Ah, okay, thank you. That makes more sense.

MR JUSTICE MILES: Is that right?

MS DWARKA: Yes, it is, my Lord. "In respect of the fees".

A. In respect of the fees and the rate of return that was promised to bondholders, when one considers all that, then it was not economically viable absent LCF's ability to identify situations in which it could make super-normal returns on a consistent basis.

Q. That happens all the time with start-ups. They enter into these type of transactions all the time to try to make sure that they are successful?

A. That's not a question. Or is that a question?

Q. I just put it to you. You can agree or disagree.

A. Okay.

Q. I just have one final set of questions, actually. I think you said in your evidence that you and your team spent a lot of time looking at this and working on this exercise. Is that right?

A. That's correct.

Q. You said that you have worked on publicly available data and that you had -- your team had five people who worked on this. Is that correct?

A. I think I said that, yes.

Q. I think you also said it probably took three to four months --

A. I think I qualified that by saying that there was a period of time during which I didn't speak to the lawyers and I was working on other things, but yes.

Q. Just explain this to me: your instructions -- it's found at <D3/2> at page 51 -- is actually dated 28 September 2023. If you look at your first page of your report, <D3/2> at page 1, your report is dated 29 September 2023. It looks like you spent a day?

A. I think the final set of instructions were issued to me in advance of my putting in the report.

Q. So, there was an original set of instructions which isn't part of this report and then this is a final set. That takes a day?

A. I'm sorry, I think that what happened is that I spoke to the lawyers and they explained the situation to me and together we decided on what made sense in terms of instructions as I was doing the work.

MS DWARKA: Thank you, Dr Okungwu. I have no further questions.

MR ROBINS: My Lord, I have no re-examination. Does your Lordship have any questions?

Questions from THE BENCH

MR JUSTICE MILES: I was just going to ask about the business of the super-normal returns, which means, actually, super-normal rates of interest on loans by LCF to borrowers, as I understand it. Is that right?

A. Yes, and we know in this situation that was highly unlikely because, if you think about the standard LCF example, they say, "We are going to charge 10 per cent to the borrower and pass through 8 per cent and keep 2", but, in fact, the numbers were different in reality, but there was no way, in the context of, for example, a 25 per cent sales fee, you could do that. If you take, for example, the one-year bond, the borrower only gets about 75p to start off with and within one year they have to pay back 1.10. That's a huge return. I'm unaware of any entities that can achieve that on a consistent basis.

MR JUSTICE MILES: Is there any reason to think that LCF would be able to find borrowers who would be willing to pay those kind of sums of money, based on the information you have seen?

A. Based on the information I received, no, because the margin that they added was not of a scale -- of a magnitude to even reflect the belief that that could be achieved.

MR JUSTICE MILES: Thank you very much. Any further questions arising out of that?

MR LEDGISTER: No, thank you, my Lord.

MS DWARKA: No, thank you.

MR JUSTICE MILES: Thank you very much for your evidence.

A. Thank you, my Lord.

(The witness withdrew)

MR LEDGISTER: My Lord, may we call Mr Paul Grainger, please.

Examination-in-chief by **MR LEDGISTER**

MR LEDGISTER: Would you give the court your full name, please?

A. Yes, Paul Timothy Grainger.

Q. Can we please turn up document <D3/1>, please. Do you see that document before you?

A. I do.

Q. Can we turn to page 20, please. Is this your witness statement made in connection with these proceedings?

A. It is.

Q. Is that your signature?

A. Yes, it is:

Q. Are the contents of this statement true, to your knowledge and belief?

A. To the best of my knowledge and belief, yes.

MR LEDGISTER: My Lord, may this witness statement be admitted as Mr Grainger's evidence-in-chief? My Lord, there is an additional statement, please. Can we turn to <D3/3>, which is a joint report. Can we turn to page 4. Do you recognise this as a joint report prepared by you in connection with these proceedings, along with Dr Okungwu?

A. Yes, I do.

Q. That's your signature?

A. Yes, it is.

Q. The opinions that you have stated in that document, can you confirm that they are true?

A. Yes, to the best of my knowledge and belief.

MR LEDGISTER: My Lord, may this statement be admitted in the same way?

MR JUSTICE MILES: Yes.

MR LEDGISTER: Please wait there, Mr Grainger, there will be some more questions.

Cross-examination by **MR ROBINS**

MR ROBINS: Mr Grainger, have you read Part 35 of the Civil Procedure Rules.

A: Yes, I have.

Q: Are you familiar with Part 35?

A: Yes.

Q: Do you understand that you owe a duty to help the court on matters within your expertise?

A: Yes.

Q: Would you agree that helping the court normally includes narrowing the issues between experts?

A: Yes.

Q: Do you understand that the court will ultimately decide what is and is not relevant, not you?

A: Yes.

Q: Do you agree that helping the court will normally involve expressing a view on matters within your expertise, even if you personally don't necessarily agree that it is relevant?

A: Yes.

Q: Do you understand your duty to help the court on matters within your expertise overrides any obligation to the person from whom you have received instructions?

A: Yes.

Q: Have you read the Practice Direction to Part 35?

A: Yes.

Q: Are you familiar with that?

A: Yes, I am.

Q: Do you understand your evidence should be your independent work product, uninfluenced by the pressures of litigation?

A: Yes.

Q: Do you agree that a useful test of independence is whether the expert would express the same opinion if given the same instructions by the other side?

A: Yes.

Q: Do you understand that your opinions should be unbiased?

A: Yes.

Q. Do you understand you should not provide opinions on matters outside your expertise?

A. Yes.

Q. Do you agree that you shouldn't assume the role of an advocate?

A. Yes.

Q. Do you agree that you shouldn't promote the point of view of the party instructing you?

A. Yes.

Q. Do you understand that you shouldn't be the mouthpiece for the party instructing you?

A. Yes, I do.

Q. Do you agree that your report should not be a vehicle for argument which the party instructing you seeks to advance?

A. I do.

Q. Do you understand you're required to consider all material facts?

A. Yes.

Q. Do you understand that that will include any facts which might detract from your opinion?

A. Yes.

Q. Do you understand you are required to make clear when a question or issue falls outside your expertise?

A. Sorry, can you just repeat the question?

Q. Do you understand you're required to make clear when a question or issue falls outside your expertise?

A. Yes, I do.

Q. Do you understand that you are required to make clear when you're not able to reach a definite opinion?

A. Yes.

Q. Do you understand, in particular, that, if you don't have sufficient information to reach a definite opinion, you should make clear that you don't have sufficient information?

A. Yes.

Q. Do you understand you should indicate if any opinion is provisional or qualified?

A. Yes, I do.

Q. Do you understand you should indicate where you consider that further information is required?

A. Yes.

Q. Do you understand that you should indicate if, for any other reason, you are not satisfied that an opinion can be expressed finally without qualification?

A. Yes.

Q. Turning to your experience, you're a financial services regulatory and compliance consultant; is that right?

A. Correct.

Q. You have got about 35 years' experience of regulatory and compliance consulting?

A. Yes.

Q. Is it fair to say you've got considerable experience of regulatory and compliance consulting in financial services in the UK?

A. And overseas.

Q. And overseas. Do you have experience of advising regulated financial service companies on the management of governance, risk and compliance?

A. Yes.

Q. Does your experience include advising on regulatory risks?

A. Yes.

Q. And compliance processes?

A. Yes.

Q. Have you advised firms on making applications to regulators for various forms of authorisation?

A. Yes.

Q. Do you also have experience advising on the prevention of financial crime and money laundering?

A. Yes.

Q. Have you advised on the prevention of terrorist financing and bribery and corruption?

A. Yes.

Q. I think you've got about -- well, over 30 years' experience of acting as a compliance officer and money laundering reporting officer; is that right?

A. Yes.

Q. And you're apparently the chairman of Complyport Limited; is that still the case?

A. Correct.

Q. That's a major regulatory and compliance consulting firm, is it?

A. Yes.

Q. In terms of your previous career, I think you established Grainger Consulting in about 1993; is that right?

A. That's correct.

Q. That was also a regulatory compliance consulting firm?

A. Yes.

Q. Then Grainger Consulting merged with -- was it called Compliance Consultants Limited in 1995?

A. There was a merger with a group of which Compliance Consultants was one of the trading entities, yes.

Q. And then it became Compliance.co.uk Group Limited, I think?

A. That was the group entity, yes.

Q. Then, in 2007, that group was acquired to be the financial services regulatory and compliance consulting arm of another entity?

A. Yes, a firm called RGP.

Q. What was Resources Compliance UK Limited?

A. That was the holding entity for the UK. That's a compliance -- Resources Compliance Limited was the revised name of what had previously been compliance.co.uk and Compliance Consulting Limited.

Q. You're currently the non-executive chairman of the Association of Governance, Risk and Compliance?

A. Yes.

Q. Am I right in thinking that's a professional educational body promoting best practice and improving standards for governance, risk management, compliance management and cyber security?

A. Yes, it's a member organisation, yes.

Q. You are also non-executive director of the Association of Professional Compliance Consultants?

A. Yes.

Q. I don't think you've been an employee of any company operating in the CCaaS industry; is that right?

A. Employee, no.

Q. You haven't negotiated contracts or prices for the provision of Call Centers-as-a-Service?

A. I have -- not directly as a service provider, but I have been involved in those discussions, yes. My former company, Resources, providing those services was a core part of the business.

Q. Have you worked in any role where you were responsible for the maximisation of lead generation?

A. Yes. Again, as a consultant advising clients that were involved in that kind of activity.

Q. But you haven't personally sold leads to financial advisors?

A. No.

Q. Are you an expert in the formulation and deployment of Google AdWords to generate web traffic?

A. Personally, no, but I work very closely with our in-house marketing team and they do exactly that.

Q. But the cost-effective deployment of Google AdWords is not within your personal expertise?

A. I have an understanding, but it is not an area that I personally undertake.

Q. You haven't been an employee of any web design companies?

A. No, but I have worked, again, with several web designers, both on our own web design and also involved in consulting projects.

Q. The cost of website construction and maintenance in the UK from 2015 to 2019 is not within your personal field of expertise?

A. The precise costing, no, but the scale involved, yes.

Q. Similarly, it's not within your personal expertise to comment on branding, graphic design or advertising in the UK from 2015 to 2019?

A. Well, to a degree, yes, it is, because I'm closely involved in exactly that kind of activity in my management roles within Complyport and previously within RGP.

Q. Now, you agree with Dr Okungwu that --

MR JUSTICE MILES: Is that part of your experience or your expertise? Because counsel actually asked about both. I think they may be separate questions. Because it may be that you have some personal experience, but are you an expert in them?

A. I would not call myself out as an expert in web design or in marketing, but I have considerable experience, so it's experience rather than expertise.

MR JUSTICE MILES: You have got your own experience of it?

A. Yes.

MR JUSTICE MILES: But through the businesses that you have been involved in actually running.

A. Yes, and also --

MR JUSTICE MILES: And consulting on --

A. And consulting on as well.

MR ROBINS: You agree with Dr Okungwu that, in 2015, there was no generally accepted market rate for the particular package of specific services provided by Surge to LCF. Is that right?

A. Correct, yes.

Q. I think you both agreed that there was not even a generally accepted range of prices in the market for that particular package of specific services. Is that right?

A. For the package of services offered by Surge, no.

Q. Your point, as I understand it, is there is no agreed or normal market rate for such services. Each service offering is normally a bespoke package. Is that the basic point?

A. At that point in the market, yes.

Q. Would you agree that it is possible to compare the service offering of firms who offer similar services even though they may be less comprehensive or only offer part of the service offered by other service providers?

A. No, I don't agree with that statement at all, the reason being that what Surge was offering was considerably more than many of those other service providers that offered some of what Surge offered but not all of what they offered.

Q. Can we look at <D3/1> at page 11, please. I wasn't expecting that answer because all I was doing was reading out what's in paragraph 10.4 of your report. Do you agree with that or not agree with it?

A. As a general comparison, yes. But not as a specific parallel to the service that was offered by Surge.

Q. But the general point that you're making: "... it is possible to compare the service offering of firms who offer similar services even though they may be less comprehensive ..."

A. Yes, I agree.

Q. Would you agree that some firms provide a service known as private placement of securities?

A. Yes, indeed.

Q. That involves the distribution of financial promotions to prospective investors and, where appropriate, contacting them or discussing with them the investment opportunity?

A. Yes.

Q. You mention that in paragraph 10.5 of your report, if we can just look at that. Am I right in thinking your reason for mentioning that in your report immediately after paragraph 10.4 is that you're saying that they provide similar services, even though they may be less comprehensive or only offer part of the services offered by the service providers?

A. Yes, indeed.

Q. I think you're saying, is this right, that Surge's services to LCF might have been more comprehensive, but they did include at least some of the services which were similar to the services involved in the private placement of securities?

A. Yes, correct.

Q. Based on your knowledge and expertise, do you think that a corporate financial advisor would typically charge a fee of between 1 per cent and 5 per cent for raising funds in providing the private placement of securities?

A. In my experience, yes.

Q. Is it right to say that the fee charged would normally depend on the quality of the security or bond being offered by the issuer?

A. Yes, and that in turn translates through to the difficulty of marketing.

Q. So the lower quality the bond, the higher the fee that would be charged?

A. Correct.

Q. And the better quality or more attractive investment offerings should more readily appeal to investors so they carry lower fees?

A. Generally, yes. It's based on the expected fundraise.

Q. I think fees as a percentage of funds raised tend to be higher where the volume and monetary value of the private placement is low. Is that correct?

A. Correct.

Q. So if it is a tiny raise, percentage will be larger. Is that right?

A. Correct.

Q. And, presumably, the reverse is true, where the volume and monetary value of the raise is higher, the fees will be lower?

A. Correct.

Q. Would you agree that firms which offered some services similar to Surge, such as those from the stockbroking or corporate finance sector, included Beaufort Securities?

A. Correct.

Q. I appreciate your point is they didn't offer precisely the same package of services as Surge, but they offered some similar services?

A. Yes.

Q. Can we look at <D8-0036926>, please. At the bottom of page 88, there is an email from Phil Gilbert at Beaufort Securities. If we look over on the next page, you can see it is May 2015. Second paragraph, he says he's advising that the recipient of the email would be best served creating an MTN programme rather than a bond prospectus. Then he says in the next paragraph: "We discussed Beaufort taking a role in the issuance process. Realistically, to cover the firm we would need to be dealer to the programme and arranger/lead manager ... This would involve us arranging distribution, appointing authorised distributors, and taking responsibility for the financial promotion." And then, the paragraph after that, he says: "In terms of costs, as I mentioned we would charge 125 [basis points] based on the amount raised, and an upfront fee of £25,000 ..."

Just to check I'm understanding this right, 125 basis points is 1.25 per cent, isn't it?

A. Yes.

Q. Given that you mention Beaufort Securities in paragraph 9.14 of your report and you talk of fees between 1 per cent and 5 per cent, I anticipate that you wouldn't be at all surprised by what's said in that email? It would be in line with your expectations?

A. I'm slightly surprised it's as low as 125bps. I would have expected it to be slightly higher. Then, again, there is a de minimis 25,000 in there as well. So it's what they were prepared to deal at the time.

Q. I think the point you make is, whilst Surge may have done some things which were similar to the things involved in the private placement of securities, it was also doing other things as well. Is that your proposition?

A. Yes.

Q. So you're saying that a firm dealing with private placements wouldn't provide branding or website design or design of promotional materials?

A. Ordinarily, no.

Q. So a firm like Beaufort Securities wouldn't be providing graphic design or web design services?

A. Again, ordinarily, no.

Q. Similarly, if we look at the higher end of the range that you gave of 1 to 5 per cent, <D7D9-0003539>, I don't know quite how close this is to the example that you give, but you can see someone emailing from a firm called Mirox UK and, towards the end of the email, he says:

"The current commission structure that I have in place is 5 per cent however I am keen to get investment in as soon as possible ..."

And he goes on to imply that he might go a bit higher. But, again, given what you said about the typical range of 1 per cent to 5 per cent, you wouldn't be particularly surprised to see someone talking about a 5 per cent commission payment?

A. No.

Q. Now, if it's right to say that at least part of what Surge did for LCF was similar to the private placement of securities, and that the private placement of securities typically cost between 1 per cent and 5 per cent of funds raised, then you would expect, wouldn't you, the part of Surge's services which is similar to private placement of securities to cost between 1 per cent and 5 per cent of funds raised. That would follow from what you have said, wouldn't it?

A. It would certainly be in that sort of ballpark, but, again, possibly higher, depending on exactly what was being offered.

Q. Yes. If the percentage fee would normally depend on the quality of the security or bond being offered by the issuer, then it follows, doesn't it, that, if it had been understood by everyone that LCF was a very, very safe and secure investment, you would expect the fee for the private placement element to be at the lower end of the range, perhaps closer to 1 per cent than 5 per cent?

A. Well, in a theoretical form, yes, but the problem with the minibond market is that it wasn't seen by everybody as a safe and secure investment. So, I would have expected minibonds to be at the higher end of the cost spectrum.

Q. But if it was a minibond that was constructed on the basis that there would be a very large amount of security and very low risk to investors, it would presumably be on the lower end of the spectrum?

A. Not necessarily. I mean, bear in mind that there were other minibond issuers at the time who were struggling to get some of their issues away, and it was very much, in the market at that time, a case-by-case basis in terms of how the -- particularly the promoter felt that the bond could be marketed and what the appetite in the market amongst the investors was for a minibond issue.

Q. You say, don't you, that many firms that traditionally provided private placement services focused only on transferable bonds and shares?

A. Yes, transferable bonds and shares are regulated instruments. Non-transferable bonds and shares are nonregulated, by and large.

Q. I think you say many stockbroking corporate finance advisory funds didn't cater for the minibond market?

A. Correct.

Q. But, to be clear, you are not saying, are you, that 100 per cent of the firms that traditionally provided private placement services were unwilling to deal with non-transferable bonds?

A. I can't say 100 per cent were unwilling, but certainly there was a definite swing in appetite around about 2016.

Q. So some of the firms that traditionally provided private placement services might well have been willing to deal with non-transferable bonds?

A. They may have been. My own experience at the time was that prospective bond issuers were really struggling to find people that were willing to sponsor an issue.

Q. Now, in paragraph --

MR JUSTICE MILES: Is "sponsor" a term of art there? Because "sponsor" is sometimes used in --

A. Yes, "sponsor" would be a firm willing to act in the role of a private placement agent.

MR ROBINS: Paragraph 10.12 of your report. Let's have a look at that. <D3/1> at page 12. You say: "In the case of the Blackmore Bond service agreement, the fee stated was 20 per cent of funds raised. As the service was to be delivered over 5 years, it could be said to be broadly equivalent to 4 per cent per year over 5 years."

The five years you're referring to is the term of the Blackmore Bond, isn't it?

A. Yes.

Q. Then, if we go to <D3/1> at page 6, you say in paragraph 5.11:

"The charge for services provided by Surge to Blackmore Bond Plc was 20 per cent of the funds raised ... It is not clear whether the difference in fees charged by Surge to Blackmore Bond Plc compared to LCF is due to a difference in the breadth and/or depth of services provided to the two firms." Given that it wasn't clear to you, I'm assuming you hadn't asked the party instructing you to explain whether there was any difference in the breadth and/or depth of the services provided to the two firms. Is that right?

A. That's correct.

Q. You weren't provided with the witness statement of Paul Careless?

A. Yes, I was, I think. I'm pretty sure I was.

Q. Can we look at <D3/1> at page 29. Maybe I missed it. I hadn't seen it there. This is the list of documents that was provided to you, isn't it? Can we look at -- I'm being told this predates the service of the witness statement. But at the time you were instructed, it's not one of the documents given to you?

A. Well, unless I'm thinking of a different document, but I'm pretty sure I have seen a witness statement from Paul Careless.

Q. Can we look at <D3/1> at page 35. This is part of your report itself. It is the list of documents provided "to me with my instructions" and then below that "other documents". I hadn't seen it there. Do you think you maybe inadvertently left out some documents that had been provided to you?

A. I can't see that I would have left them out, but I'm certainly -- well, I'm pretty sure I've seen some - a document stating testimony given by Paul Careless at some point.

Q. Let's look at that document. It is <C2/3> at page 4. His evidence in paragraph 24, at the bottom of the page, is:

"Surge's role in Blackmore was exactly the same as what we did for LCF ..."

Have you seen that before?

A. No, I haven't seen this document, to the best of my knowledge.

Q. But Dr Okungwu referred to this in his report, didn't he?

A. To this specific document? Not to my knowledge.

Q. Can we look at <S3/2> at page 26, please. Sorry, I've got the wrong one. I mean <D3/2> at page 26. This is Dr Okungwu's report. He said, at paragraph 46 in the second line on this page:

"Mr Careless himself in his witness statement admits that 'Surge's role in Blackmore was exactly the same as what we did for LCF' ..."

Presumably you saw that when you read the report?

A. Yes.

Q. And you saw he also referred to the Blackmore contract?

A. Yes.

Q. Did you look at the Blackmore contract?

A. Yes, I did.

Q. Can we look at <SUR00153258-0001>, please, at page 19. Have you looked at schedule 2, which sets out the services?

A. Yes.

Q. Do you agree that seems to confirm Mr Careless is correct to say that the services were the same, exactly the same, for Blackmore as they were for LCF?

A. In terms of the documents I saw, yes, but the document for LCF was unsigned.

Q. Do you at least accept that the services offered by Surge to LCF and Blackmore were very similar?

A. Yes, indeed, I do.

Q. Just assume for the moment that Mr Careless is right to say that Surge's role for Blackmore was exactly the same as it was for LCF. We saw in your report you say that 20 per cent over five years is equivalent to 4 per cent a year for each of those five years. You're essentially dividing the 20 per cent upfront commission by five years to get to the annual commission of 4 per cent, aren't you?

A. Yes.

Q. If we look at <D3/1> at page 12, we can see that in paragraph 10.13 you say:

"Similarly, in the case of LCF, the fee stated was 25 per cent of funds raised. As the service was to be delivered over two years, it could be said to be broadly equivalent to 12.5 per cent per year over two years. However, in the case of the series 4 minibond issued in 2018, the information memorandum states it is a three-year bond. In this case, the fee of 25 per cent of funds raised would equate to approximately 8.33 per cent per year if apportioned over three years." Are you aware of the various different bond series issued by LCF?

A. There were several, yes.

Q. Can we look at <MDR00166711>, please. You can see this is an email from Katie Maddock of LCF, dated 21 August 2018. She says:

"Attached is the updated table ..."

Let me show you that. It is <MDR00166712>. This shows the total bond sales in each series as at the date of that email. You can see that series 2, for example, started to be sold long before Surge had anything to do with LCF. Then series 3, "current", that's a one-year term and LCF had issued 23.8 million pounds' worth of those one-year bonds. We know Surge's commission was 25 per cent, so Surge received £5.95 million from LCF for series 3. Because that's a one-year bond, no annualisation is required, is it?

A. No.

Q. So, on the basis set out in your report at paragraph 10.13, that's 25 per cent per annum for a commission of £5.95 million in total?

A. Mmm-hmm.

Q. We can see, over this page and the next page, there are various different series with various different terms. Are you familiar with the concept of a weighted average?

A. Yes.

Q. You understand that's a method of computing an average where some data points contribute more than others?

A. Yes.

Q. You haven't calculated the weighted average annualised commission charged by Surge to LCF, have you?

A. No, I haven't.

Q. Now, we have used the figures in this table to calculate the weighted average annualised commission. We can find that at <A1/16>. This isn't up to and including LCF's collapse, it is simply as at the date of that table we were looking at. The figures in columns A, B and C come from that table. You can see that we have put the commission rate in column D. It was 22.5 for the five-year bonds. Then we have worked out the annual commissions by dividing the commission rate in column D by the term of the years in column B. But simply dividing that by the number of series in the table wouldn't be the weighted average, so we have, instead, calculated the total commissions for each series in column F and then the weights in G by dividing each row of F by the total of F and then the product of the annual commission multiplied by the weights in G gives you the product.

You add all that up together to get to the weighted average in the bottom right-hand corner of an annual equivalent of 10.9 per cent. I know you won't have had a chance to check your working, so I'm going to have to ask you questions on the assumption that the weighted average annualised commission is 10.9 per cent. Given that the equivalent figure for Blackmore was 4 per cent, and on the assumption that Mr Careless is right to say Surge's role for Blackmore was exactly the same as it was for LCF, it follows, doesn't it, that LCF was paying almost three times as much as Blackmore to Surge for exactly the same services?

A. Based upon that weighted average, yes.

Q. Would you agree that paying almost three times as much as Surge's other client for exactly the same services is not particularly commercial?

A. I'd argue the opposite. I would argue that, in business, it's very often the case that some clients pay more than others for very similar or the same services.

Q. You agree that a useful test of independence is whether the expert would express the same opinion if given the same instructions by the other side. Would you be expressing the argument that you just expressed if you had been instructed by the claimants?

A. Yes, indeed.

Q. Do you know that Surge started selling bonds for Blackmore in late June 2015?

A. I wasn't aware of the precise date, but I'm aware it was around that date, yes.

Q. Did you know that, at the outset, Surge was proposing to charge Blackmore a commission of 7.5 per cent of funds invested?

A. No, I wasn't aware of that.

Q. That would be an annualised rate of 1.5 per cent per annum for a five-year bond, wouldn't it?

A. Yes, it would, approximately.

MR JUSTICE MILES: Can I just go back to the point -- the answer you gave before about it not being particularly commercial: are you saying that from the perspective of Surge or from the perspective of LCF?

A. Both. In my experience, services are subject to price negotiation. Very often, for example, a tender process or similar. And it can be the case that very similar services are offered at different prices to different clients.

MR JUSTICE MILES: So would you expect these kind of prices to be the subject of tendering and actual negotiation?

A. Certainly to negotiation, yes, not always to tendering.

MR JUSTICE MILES: Supposing that LCF knew the fee that was being charged by Surge to Blackmore, is that something that you would expect them to take into account? Would you expect LCF to take it into account?

A. If they were aware of it, yes, certainly in their position of negotiation, I would be very mindful of any intelligence or information I had prior to going into that negotiation.

MR JUSTICE MILES: Would you expect there to be toing and froing on the negotiation of this sort of fee?

A. Normally, yes.

MR ROBINS: But if, at the outset, LCF was prepared to pay a commission to Surge which was a large multiple of the commission that Surge was prepared to accept from Blackmore, it would follow, wouldn't it, that the commission paid by LCF was extravagant and uncommercial.

A. They are fairly emotive terms to use. What I would say is that, in business negotiations, there is a price that a vendor will want to offer, and there is a price that a purchaser will be willing to pay. In many situations, agreement can't be reached. So, if agreement was reached, it was presumably because both parties found the point at which their interests were aligned and did a deal on that basis. But that's -- I look at that purely agnostically. That's the way commerce works.

Q. We will come to that part of your report in due course. But before that, would you agree that the services offered by Surge to LCF are similar in several ways to those offered by fund managers?

A. In a limited way, yes. Some of the facets are similar. But my understanding is Surge were carrying out services that in other respects would differ from that of a fund manager.

Q. If we look at <D3/1> at page 12 in paragraph 10.14 of your report, you say:

"The services offered by Surge are similar in several ways to those offered by firms that provide unregulated collective investment undertakings and alternative investment funds. Such firms are known as fund managers."

That's something you would agree with, isn't it?

A. Yes, it is.

Q. Dr Okungwu agreed with you that fund managers offer similar services, didn't he?

A. Yes.

Q. He cited the FCA's asset management market study to show that the total annual charge for fixed income funds in 2015 was 0.8 per cent of assets under management, didn't he?

A. Yes, he did.

Q. Then, in the joint memorandum, you said, "Oh, well, actually, fund managers are not a relevant comparator", didn't you?

A. The fund managers that were within the fixed income survey, yes, because they were all regulated entities.

Q. Now, assume that fund managers are a relevant comparator or a potentially relevant comparator. Presumably, you would agree that one of the services provided by fund managers is the service of actually managing the fund?

A. Managing the fund, yes.

Q. That's a fairly important part of what fund managers do, isn't it?

A. Correct.

Q. You understand Surge says it didn't manage any of the monies that were invested into LCF by members of the public?

A. That's right.

Q. Now, in terms of the other things that fund managers do, Dr Okungwu said in his report -- let's look at it. <D3/2> at page 17. In paragraph 26, after making the point about the fund managers managing the fund, four up from the bottom, he says -- sorry, we need the previous page. We are on the wrong page. Paragraph 26: "Similar to Surge, many fund managers provide account management services, conduct marketing of their funds, have websites where investors can find information about funds and check their account balances, and offer dedicated phone lines for both existing and potential clients. These phone lines are available for general enquiries including account setup as well as to address queries related to existing fund investments."

You haven't disagreed with Dr Okungwu on those points, have you?

A. I have partially agreed, partially disagreed. That statement is correct with regard to larger fund houses. It's not really applicable when we get into the area of alternative investment funds offered at the more boutique level. So, for larger fund operations, it's perfectly a valid statement. It wouldn't apply to the smaller, alternative investment funds.

Q. Your position is that Surge provided a higher level of service than typically provided by fund managers and fund administrators, is it?

A. At the comparable level, yes. A small fund -- relatively -- comparatively small fundraisers, yes.

Q. You say the services provided by Surge to LCF were proactive and interactive with the minibond investors?

A. Yes.

Q. And more focused towards relationship management?

A. Yes.

Q. Can we look at what you're relying on to make those points. <D3/1> at page 14. At paragraph 10.26, you say:

"... Surge provided bespoke marketing consultancy services and an outsourced marketing department ..." Just dealing with that, a fund manager presumably will often pay for marketing?

A. It depends. Again, if the fund manager has been asked to do so, they will do so. They will charge for it as well. Many fund managers don't offer that service, particularly for the smaller funds, the alternative investment funds. It would be highly unusual for them to offer that service.

Q. Presumably, that's because, in much smaller funds, there's just not the money available to pay for that sort of marketing?

A. Not always. Very often, it's a question that they're more bespoke investments and they're not suitable for mass distribution. In fact, in some cases, there are regulatory restrictions on the distribution of those kind of funds. So they tend to be very much more a question of personal placement typically by a sponsor or, indeed, by the investment manager of the fund rather than the administrative manager.

Q. But if the fund needs marketing, the fund manager will charge a fee for it?

A. If the fund manager is carrying out the marketing, yes, they will charge a fee.

Q. Can we look at the next one, 10.27 and 10.28. You say, effectively, that Surge would try to persuade investors to reinvest at the end of the terms of their investment. Presumably, many fund managers try to get clients to reinvest?

A. Not necessarily proactively, no. Particularly the smaller, more boutique, alternative managers. That may not be part of their brief at all. It may be purely administrative.

Q. Presumably many fund managers do try to get clients to reinvest?

A. The larger fund managers, particularly with retail funds, yes, but they can't do that proactively in that context.

MR JUSTICE MILES: Sorry, I'm just trying to understand the various roles here of the fund manager. So, lots of well-known fund managers -- there are lots of well-known fund managers, obviously, and, as regards the investor, they're offering an investment into the fund. Then there are various things that they carry out. One of them is having a website that you can go on, you can see what your investments are, and so on. Another, you say sometimes they market, sometimes they don't, but that's carried out, as far as the investor is concerned, by the fund manager -- the fund management firm, if I can call it that.

A. Correct.

MR JUSTICE MILES: And then they have to do, obviously, lots of admin as well. Typically, I think they will be receiving client money. But that's a whole different question.

But in some of the answers you have given, you have said, "Well, there's the administrative manager, effectively, and then there's the investment manager", so are you distinguishing between different --

A. Yes.

MR JUSTICE MILES: -- functions there?

A. Yes, I am.

MR JUSTICE MILES: And are they different firms or just different functions within the same firm?

A. These would generally be different functions within the same firm, but sometimes there is what's known as delegated investment management, where the firm that is actually running the fund in the administrative sense along with the governing body of the fund may have engaged an external fund manager. This doesn't tend to happen in the bigger investment groups, but it does happen a lot in the smaller-scale funds, especially the alternative funds.

MR JUSTICE MILES: Right. But if one is trying to do a like-for-like comparison here, looking at the services, as I understood the evidence, it's dealing with a case where, as it were, the fund manager is doing all of these things.

A. The example --

MR JUSTICE MILES: -- itself --

A. The examples quoted, I agree, that is the inference. Where I'm drawing a distinction, as a specialist in this field, is that, comparing an issue such as LCF with, say, Fidelity or Legal & General or one of the very large Vanguard fund houses, is an incorrect comparison. The more accurate

comparison would be with an alternative investment fund, which would be much, much smaller instead, more comparable to the issue of a minibond.

MR JUSTICE MILES: Right. In those cases, so in what you have called the boutique or alternative type of fund, is the fund, though, still providing the investment opportunity to an investor and then charging a fee for all of the services that it's providing?

A. The fund is usually charging the investor a management fee, which, again, is normally a percentage of the amount invested, taken upfront and/or taken as an annual management fee.

MR JUSTICE MILES: Yes.

A. The range of services that the administrative manager would provide typically at that scale of fund is very limited in terms of engagement with the investor. Most of those funds tend to have a very low touch point between the investor and the fund manager, apart from entry and exit or the distribution of coupon or dividends.

MR JUSTICE MILES: Mr Robins, I see the time now.

MR ROBINS: Yes. I'm happy to break now.

MR JUSTICE MILES: I think what we will do is break now until 2 o'clock. I think you understand -- I think you were in court earlier on -- you mustn't discuss your evidence or the case with anyone during the break.

A. Yes.

(1.05 pm)

(The short adjournment)

(2.00 pm)

MR ROBINS: Can you look at <D3/1> at 14, please. In paragraph 10.34 of your report at the bottom of the page, you say:

"Surge needed to screen the database of prospects to ensure they met these criteria."

You're aware that investors had to self-certify using an online form or a paper form?

A. Yes.

Q. Can we go to <SUR00130297-0001>, please. This is an application form. Bottom of page 5, we see "Investor Classification Guidelines". It explains: "The series 5 growth bonds can only be marketed to certain types of investor. The purpose of the classification guidelines on the next page is to enable you to determine whether you are a suitable investor and which classification best describes you. Tick Yes or No as appropriate to confirm or reject meeting the requirement."

Then over the page, there are various options for prospective investors to tick to say whether they are a high net worth investor, a restricted investor, a self-certified sophisticated investor. Do you understand that was just part of the application process?

A. Yes.

Q. What Surge was doing was essentially checking that the application forms had been filled out?

A. Yes.

Q. You're not suggesting by your reference to screening that Surge was doing any more than that?

A. No, but they would need to check that the certifications were correct.

Q. Assume they didn't check. You're making an assumption about what Surge did and did not do. You weren't there at the time, were you?

A. No, I wasn't there, but the whole point of the submission of a declaration, it still needs to be ascertained that that declaration has been completed.

MR JUSTICE MILES: When you say "to check that the certification was correct", you mean that someone has put a tick --

A. In the right box, yes.

MR ROBINS: You're not suggesting Surge was going away and doing any independent research into the financial circumstances of the investors?

A. No, I'm not suggesting that at all.

Q. Now, when you refer in your report to Surge's services being proactive and interactive with minibond investors and more focused towards relationship management, you're not suggesting, are you, that Surge would contact investors regularly by telephone or email to discuss the activities of LCF's lending unit or the businesses of LCF's borrowers or anything like that, are you?

A. No, I'm suggesting, instead, that if telephone calls or equivalent queries were received, then Surge would interact with the investigator.

Q. But, again, you weren't there at the time, so you're making an assumption, aren't you, about what Surge did in practice?

A. No, it's part of the service agreement.

Q. Which service agreement are you talking about?

A. The agreement for services between Surge and LCF includes investor relations.

Q. Have you seen a signed agreement?

A. Not a signed agreement, no.

Q. I think you said you've seen the witness statement of Paul Careless. Can we go to see what he says at <C2/3> at page 13. In paragraph 62.13, towards the bottom, he says:

"As we scaled, a lot more people invested online without speaking to the account managers. This was better economically for Surge, but also from a compliance point of view, as the technology ensured there was no ambiguity in the product information. Each investor would have been presented with all the documents, the key facts and the detail to be able to make their decision on investing."

Were you aware that the evidence from the party instructing you is that a lot of people invested online without speaking to account managers?

A. Yes.

Q. If we look at <D3/1> at page 15, we can see the conclusion that you reach in 10.35:

"The scope and depth of service provided is far more complex and far beyond the service provided by other service providers in the fund/capital raising market, such as, stockbrokers/placement agents, corporate finance advisors or funds."

It is right to say, isn't it, you are making a conclusion there based on an assumption that you have made as to what Surge was actually doing in practice?

A. No, I'm basing that on the fact that the tech that was provided, the website maintenance, the website consultancy and design was not what would ordinarily have been provided by many of the service providers such as stockbrokers or placement agents.

Q. But insofar as stockbrokers or placement agents had websites that needed to be designed and maintained, that's something that would come out of their own fee that they charged, isn't it?

A. I'm sorry, could you say that again?

Q. Insofar as stockbrokers or placement agents had websites that had to be designed and maintained, the cost of such design and maintenance is something that would have come out of their own fee, isn't it, one of their own overheads?

A. Their own websites, yes, but I'm not aware of any that would have offered that as a third party service.

Q. Assume Surge's services were actually, as a matter of fact, fairly limited in terms of engagement with the investor, a very low touch point with investors apart from entry and exits and distribution of coupon, you wouldn't then be able to reach the conclusion that you do in paragraph 10.35, would you?

A. I'm sorry, I don't understand the question. Could you rephrase it?

Q. Just assume that Surge's services were not particularly proactive and interactive with minibond investors, they were not particularly focused towards investment management to build or preserve a pool of investors. Assume, in fact, Surge's services were pretty limited in terms of engagement with investors and that Surge had a very low touch point with investors, apart from entry and exit and distribution of coupon.

A. Can I just be clear, you have just used the terms "assume" and then "fact", am I assuming it is a fact or assumption?

Q. Well, proceed on the assumption that it is a fact.

A. Okay.

Q. You wouldn't then be able to make the conclusion you do in 10.35, would you?

A. Yes, I would.

Q. Now, you're aware that --

MR JUSTICE MILES: What do you say is far more complex and far beyond the service? Is it the website bit?

A. Yes, the website component and the -- both the maintenance and the design input to the website and the management of an investor database is more than would normally be provided by a stockbroker or a placement agent.

MR ROBINS: When you say "database", have you seen the Excel spreadsheets with names and addresses of investors that were maintained?

A. I have not seen them, no, but I'm aware that they exist.

MR JUSTICE MILES: Is it based mainly on the -- is your evidence based mainly on the website, then, on the fact that they set up the website?

A. It's based on the fact that, ordinarily, those additional services would not be provided by placement agents or stockbrokers.

MR JUSTICE MILES: Yes, but I'm trying to work out what bit wouldn't be, and I think, so far, you've identified the website.

A. It is predominantly the area around the design of the web interfaces and the maintenance of the investor relations contact list, database, whatever you want to call it.

MR JUSTICE MILES: Thank you.

MR ROBINS: You're aware, I think, that a fund manager will charge for fund formation on a percentage of funds-invested-basis plus an annual management charge based on the value of the fund.

A. Yes, very often subject to a de minimis figure.

Q. Those charges are normally paid by deduction from the investment units attributable to each investor?

A. Yes.

Q. In your report, you provided a practical example of a fund manager who charges an initial management fee of 5 per cent of the sum invested by unit holders plus an annual management fee of 0.75 per cent of the fund value each year, didn't you?

A. Yes.

Q. Do you remember Dr Okungwu referred to the FCA's asset management market study?

A. Yes.

Q. Which he said showed that the FCA was aware of charges of up to 5 per cent per annum?

A. Yes.

Q. He put that on the agenda for the joint meeting, didn't he?

A. Yes, indeed.

Q. You declined to agree or disagree, as I understand it, on the basis that you say it's not relevant?

A. Correct.

Q. Given that the court determines what is and is not relevant, not you --

A. Well, can I just qualify? I said relevant to my instructions.

Q. Yes. Let's assume that the court is normally assisted by any narrowing of issues between investors. Can we go to <MDR00227061>? Did I say "investors"? I meant "experts". This is the document that Dr Okungwu referred to. Did you have a look at this?

A. Yes.

Q. If we go to page 76, there's a footnote right at the bottom, 156, if we can look at that, where the FCA say: "We found examples of popular funds which impose initial charges of up to 5 per cent AUM." Bearing in mind that it might be relevant and the court is probably going to be assisted by the narrowing of issues, you can't really disagree, can you, that it refers to charges of up to 5 per cent AUM?

A. Well, what's important to note is that the asset management survey was looking at the universe of retail funds. It wasn't looking at alternative investment funds.

Q. Why didn't you say that in the joint statement, instead of just declining to engage on the basis it fell outside your instructions?

A. Because, on the basis that it's clear from the narrative that the survey refers to retail funds and it's clear in the context that a minibond is not analogous to the retail fund, it's not relevant.

Q. A retail fund is a fund that, what, gets investment from retail investors?

A. Yes.

Q. And a minibond gets investment from retail investors?

A. Yes.

Q. If we look at <D3/1> at page 13, sorry, the previous page, at 10.17 of your report, you give this practical example:

"... if a fund was raised of £5 million and the investors had an investment term of five years, the fund manager may charge an initial management fee of 5 per cent of the sum invested by unit holders, plus an annual management fee of, say, 0.75 per cent ..." Then you rework that over the page, if we look at that, as a three-year term and then say, at the end of the paragraph:

"Over three years, the total charge would be ... 7.25 per cent of the amount initially invested." So, on your sort of annualised basis, that would be a charge of 2.41 per cent per annum for each of the three years?

A. Mmm-hmm, yes.

Q. And then, if we look at what you say in 10.21, you say: "However, this illustrates the difficulty of comparing fees ... The example at 10.18 above illustrates that although the headline rate of fee is apparently a 5 per cent initial fee plus a 0.75 per cent annual fee, when taken as a whole the fees combined equate to 7.25 per cent over the three-year term. Similarly, the apparently very high fee of 25 per cent upfront charged by Surge, when apportioned over the service period, equates to 8.33 per cent for each of the three years of service provision."

A speed reader who wasn't really paying attention might think that you were comparing the 7.25 per cent with the 8.33 per cent and saying, "Well, they're not that different", but, as I understand it, the

7.25 per cent for the hypothetical fund manager is the equivalent of the 25 per cent for Surge; is that right?

A. No, I was simply trying to illustrate the difficulty of comparing different charging structures.

Q. But if we did, on that basis, the 7.25 equates to the 25, doesn't it?

A. I'm sorry, can you rephrase that?

Q. Well, let's do it a different way. If we annualise it in the way you have done in your report, 2.41 per cent per annum for this hypothetical fund manager is what would compare to the weighted average of 10.9 per cent per annum that Surge charged to LCF. That would be the correct comparison, wouldn't it?

A. In terms of pure mathematical accuracy, yes, it would.

Q. Yes. It is not the 7.25 that can be in any way compared to the 8.33 that you have mentioned, is it?

A. Well, from the perspective of trying to illustrate the difficulty of comparing fees, no.

Q. In the joint memo, you say, don't you, that the reference to fund charges was not intended as a comparison of economic value of different types of charges, but as a simple illustration of the practice of taking fees for the provision or administration of financial products and services by way of upfront fees, periodic fees or a combination of both; is that right?

A. Correct.

Q. So, as I understand it, you weren't actually trying to say that an annualised equivalent of 2.41 per cent is in any way appropriate or relevant as a comparator?

A. Not as a direct comparator, no. It's the principle that fees are taken in different ways, including the ad valorem fees, upfront fees, fixed fees, and so on.

Q. So you're setting out in your report something that gives an annual equivalent of 2.41 per cent, but then saying, "Well, that's not relevant". You're not raising it to say it's in any way relevant or comparable to Surge's fee?

A. No, simply illustrating the principle.

Q. You're familiar with the concept of the net present value of a future income stream, I assume?

A. Yes, I am.

Q. Are you familiar with the time value of money?

A. Yes.

Q. You would agree that 25 per cent upfront is worth more than 8.33 per cent over a three-year term?

A. Yes.

Q. If we look at <D3/2> at 23, you can see Dr Okungwu says in paragraph 39:

"From Surge's perspectives, receiving 25 per cent of the funds raised upfront is worth more in present value terms than receiving 8.33 per cent per year due to the time value of money."

And in 40 he says that credit risk also has to be taken into account. He put those items on the agenda for the joint meeting, didn't he?

A. Yes.

Q. You refused to agree on the basis it was outside the scope of your instructions?

A. Absolutely, yes.

Q. But, given that the court will normally be assisted by anything which narrows the issues between the experts, you would agree that the points he makes there are entirely valid, wouldn't you?

A. The points he makes are valid, but they're outside the scope of my instructions.

Q. If we look at <D3/1> at 13, we were looking at this a moment ago, but you go on to say in 10.24: "When the 25 per cent fee is then apportioned over a relevant time period, say, 3 years, the fee then equates to 8.33 per cent per year, which is much closer to the fees charged for fund management services or for private placement of lower quality securities." Let's proceed on the basis that the example in paragraph 10.18 to 10.21 is, as you say in the joint memo, not a comparison of economic value of different types of charges, but a simple illustration of the practice of taking fees for the provision of administration by way of upfront fees, periodic fees or a combination of both. I think it is right to say, isn't it, that the example you are giving there in 10.18 to 10.21 doesn't actually supply any evidence about the fees actually charged for fund management services in the market in the period 2015 to 2019?

A. In which market? Minibonds or more widely?

Q. In any market. You're not putting it forward as evidence of fees actually charged. You're putting it forward, as I understand it, simply as an illustration of the possibility of taking some money upfront?

A. That's correct, yes.

Q. Or periodic fees or a combination of both?

A. Yes, it's illustrating the principle.

Q. You mention in your report that there may be an upfront fee of 5 per cent for private placement of lower-quality securities, don't you?

A. Yes.

Q. That's five times the fee of 25 per cent charged by Surge, isn't it?

A. It is, yes.

Q. So the average annualised commission charged by Surge, nearly 11 per cent, is over four times higher than the hypothetical fund manager figure that you give. But that's not relevant as evidence of market rate, according to you, and it is five times the fees charged for the private placement of lower-quality securities. That doesn't really support your conclusion in paragraph 10.24 that Surge's fee is much closer to the fees charged for fund management services or private placement of lower-quality securities, does it?

A. I disagree. Again, in the AF market, the alternative funds market, where charges can be higher, yes, it's comparable.

Q. If you were acting for the claimants, you wouldn't be saying that Surge's commission was much closer to the fees charged for fund management services for private placement of lower-quality securities, would you?

A. Yes, I would.

MR JUSTICE MILES: You haven't actually given any figures for the alternative market at all, have you?

A. I haven't, no.

MR ROBINS: But you would agree that Surge's fees of 25 per cent of investor monies do appear to be high.

A. Yes, they are high.

Q. In fact, you agree they appear very high?

A. Yes.

Q. You considered Surge's profitability, didn't you?

A. Not a full economic analysis, but I did look at the accounts, yes.

Q. You looked, I think, at the financial cost summary for Surge that was provided to you in the documents?

A. Yes.

Q. You said that total overheads were 72.4 per cent of revenues and the net profit, pre-tax profit margin of Surge was 27.6 per cent?

A. Yes.

Q. You say, of each £100 of fees earned, only £27.60 was profit?

A. Yes.

Q. If we look at the financial cost summary for Surge at <SUR00158216-0001>, what this shows, as you can see at the top, is that Surge's turnover plummeted in the year of LCF's collapse. In that year, its costs were still high, but, due to lower turnover, it made a loss. Is that a fair summary?

A. Yes.

Q. If we look at <D3/2> at page 28, at the bottom, at paragraph 52 of Dr Okungwu's report, he says: "The Grainger report states that the total overheads were 72.4 per cent of revenues and the net profit (pre-tax profit) margin of Surge was 27.6 per cent from 19 January 2015 to 30 September 2019. However, the Grainger report fails to acknowledge that from 19 January 2015 to 30 September 2018 (the periods before LCF went into administration), the net profit margin was substantially higher than 27.6 per cent, ranging from 28.2 per cent to 48 per cent. LCF went into administration in January 2019 and, in contrast, from 1 October 2018 to 30 September 2019 Surge's total costs increased to 134.3 per cent of revenues and its net profit margin dropped to minus 32.9 per cent. The substantial decrease of the net profit margin during the last period had a serious impact on the overall net profit margin for the entire 19 January 2015 to 30 September 2019 period. See table 4 below. When focusing on the period from 19 January 2015 to 30 September 2018 (the periods before LCF went into administration), the total costs were 64.8 per cent of revenues and the net

profit margin was 35.4 per cent, which is approximately 8 percentage points higher than the 27.6 per cent net profit margin of the entire period."

Did you read that?

A. Indeed, yes, I did.

Q. If we look at <D3/3> at page 14, we can see "Agenda item 8" of the meeting:

"With regards to Surge's profitabilities, agreement/disagreement that ...", et cetera. Then we can see "Declined to agree it". In the final line in the box of Mr Grainger's comments, he said:

"... falls outside the scope of my instructions." Do you think that raising a point in your report and then refusing to engage with criticism of it on the basis it falls outside the scope of instructions is or is not likely to assist the court?

A. I think it will assist the court in that I was not attempting to carry out an analysis of the profit and loss of the whole period. What I was simply illustrating was the cost involved in actually running the business was substantial.

Q. Agenda item 8 is based on a point you raised in your own report. It can't sensibly be said to fall outside the scope of your instructions, can it?

A. Well, my interpretation was that it did.

Q. Did someone tell you to say it fell outside the scope of your instructions?

A. No.

Q. If we go to <D3/2> at page 29 --

MR JUSTICE MILES: Why did you raise it in your report in the first place, if this whole subject was outside the instructions?

A. To illustrate the costs to Surge of providing services were substantial, and, as a result, it was, in my view, important to highlight that there was substantial costs, so there was very high turnover but there were also substantial costs before a profit margin could be declared.

MR JUSTICE MILES: But you think the idea of correcting it by taking 2019 out made sense?

A. I'm not understanding the question there, sorry.

MR JUSTICE MILES: The analysis which was shown to you showed that if you strip out the figures for 2019, when the performance was completely different because LCF had been closed down, for example, it gave a very different -- sorry, I'll state that again. It gave a different set of figures for net profit.

A. That's for that specific year.

MR JUSTICE MILES: No, for the period 2015 to 2018, as I understand it. The total that was just shown to you. Perhaps we had better go back to that, Mr Robins.

MR ROBINS: Here it is, my Lord.

MR JUSTICE MILES: Table 4, I think it was, showed that if you take out the 2019 figure, which is being said to be unrepresentative, and take the other figures -- in fact -- yes, it is from -- it is 2015 to the

end of 2018. What's explained in the text just above that is that the net profit is then a little over 35 per cent, as opposed to about 27 per cent.

A. Yes.

MR JUSTICE MILES: So, do you think, having seen that, that that's a material point to make?

A. It's a mathematical point, but it's not material, in the sense that there's still substantial overhead being incurred by Surge before the declaration of profit, which is the point I was trying to illustrate.

MR ROBINS: But assuming, for present purposes, the court is likely to be assisted by a narrowing of issues between the experts, you're not disagreeing with any of the calculations in table 4?

A. No, I don't disagree with them.

Q. Are you able to comment on the suggestion that Surge's true overheads were lower than the reported overheads?

A. No.

Q. Are you able to comment on the suggestion that Surge bought services from companies connected to Mr Careless?

A. No.

Q. Or the suggestion that the cost of the services was inflated by the addition of a substantial consultancy fee for Mr Careless?

A. No, I wasn't asked to look at that and wasn't provided with any evidence that would enable me to draw those conclusions.

Q. Can we look at <D3/1> at page 16, please. In 10.42 -- it must be the previous page -- right at the bottom, you say that you conclude:

"... whilst the initial fee taken by Surge appears to be high, when apportioned over the number of years for which services were intended to be provided, when the elements of the fee related to providing marketing consultancy and an outsourced marketing department are taken into account, the fee for bond issuance is very likely to be much closer and comparable to that charged by similar service providers who offered a much narrower service proposition, no marketing consultancy, no outsourced marketing department, no investor contact centre and little or no ongoing servicing and relationship management of the investors." You haven't named any similar service providers who offered, "a much narrower service proposition, no marketing consultancy, no outsourced marketing department, no investor contact centre and little or no ongoing servicing and relationship management of investors", have you?

A. No, I haven't.

Q. If we look at <D3/1> at page 16, this section of your report is headed "The rate that would have been agreed between reasonable parties in an arm's-length transaction". You agree that this involves a hypothetical?

A. Yes.

Q. We are dealing with hypothetical reasonable parties in the same positions as Surge and LCF?

A. Well, just parties that are negotiating a transaction.

Q. We are not dealing with Surge and LCF, we are dealing with hypothetical reasonable parties in the position of Surge and LCF?

A. Yes.

Q. You agree that a hypothetical reasonable party would try to make a profit?

A. Yes.

Q. A hypothetical reasonable party won't ordinarily commit itself to pay costs which will inevitably and foreseeably predict it to -- cause it to become insolvent?

A. I'm not sure I understand your question. Could you perhaps rephrase it?

Q. A hypothetical reasonable party won't commit itself to pay such a high level of costs as to inevitably and foreseeably doom itself to insolvent administration or liquidation, will they?

A. Ordinarily, no, they wouldn't.

Q. You would agree that no business, acting reasonably, would enter into an agreement which would foreseeably result in its own inevitable insolvent collapse. That's not a reasonable or rational thing for any business to do?

A. No.

Q. You are not an economist, are you?

A. No, I'm not.

Q. You don't specialise in the field of microeconomics?

A. No.

Q. So, when we read paragraphs 11.1 to 11.4 of your report, when you're talking about the law of supply and demand, is that based on something you have read somewhere, or your general knowledge or something like that?

A. It's based on my general knowledge of business and economics.

Q. But you don't hold yourself out as being a specialist in the field of microeconomics?

A. No, I don't.

Q. At 11.3, you say that transparency is a key factor in the way the law of supply and demand operates, and you explain that, to ensure prices are transparent, the financial services regulators have introduced laws and regulations making it an offence to manipulate a financial market through the abuse of price-sensitive information. That's not a point of any particular relevance to Surge, is it?

A. No, it's illustrating the principle that sometimes the scope for the agreement of a price can have constraints placed on it by regulators or, in the case of a regulated market, by the market itself.

Q. I think you say, don't you, that the market in which Surge was providing services was not a regulated market with formal market rules?

A. No, correct.

Q. You say prices in that market were not transparent?

A. Correct.

Q. So, I think the point you're making at 11.3 isn't of any real relevance to this case, is it?

A. It is illustrating the principle that the negotiations between Surge and LCF were not constrained by regulatory constraints.

Q. Let's start with a hypothetical, reasonable person in the position of LCF. At its most basic, we are dealing with an entity which borrows money from members of the public in order to lend it out to businesses?

A. Yes.

Q. It is liable to pay interest to the bondholders who have provided the funds to it, isn't it?

A. Yes.

Q. And you know the rates were 3.9 per cent per annum for the one-year bond, 6.5 per cent per annum for the two-year bond and 8 per cent for the three-year bond?

A. Yes.

Q. It lends those monies to borrowers and earns income from charging fees and interest to the borrowers. That's your understanding?

A. Correct.

Q. If we look at <11/5> at page 13, this is one of the information memoranda. It says under the heading "Income generation":

"Income is generated by charging a borrowing company lending fees of 2 per cent and making an interest 'turn' on the funds LC&F lends. As an example: for a £1 million loan, a setup fee of £20,000 would be charged and a target 10 per cent interest would be charged for the loan."

So, LCF's charging a one-off fee of 2 per cent. Then, in the example given, they explain that the 10 per cent is 2 per cent higher than the 8 per cent return that has to be paid to the bondholders. Do you see that?

A. Yes.

Q. So in this example, LCF is earning 2 per cent at the outset in fees and then 2 per cent per annum for the term of the loan. That's, you understand, the income available for LCF after the payment of interest to bondholders?

A. Yes.

Q. And it has to cover its own overheads and items of expenditure from that money?

A. Yes.

Q. You would agree a hypothetical reasonable party in the position of LCF would want to avoid making substantial losses that would result in its own insolvency, wouldn't it?

A. Not necessarily. Sometimes, in a start-up period, firms will trade at a loss to establish market share or market credibility.

Q. It wouldn't want to make substantial losses which would result in its own insolvent collapse, would it?

A. Not intentionally, no, but it does happen that firms do make that mistake.

Q. If it were to agree to pay 25 per cent of investor monies for outsourced services, it would inevitably make substantial losses and become insolvent, wouldn't it, on those figures?

A. On those figures, yes, I agree.

Q. If a reasonable hypothetical party in the position of LCF were to agree to pay 25 per cent to a third party service provider, it would then need to charge a lot more to its borrowers, wouldn't it?

A. Or reduce its costs.

Q. If it were to agree to pay 25 per cent, it would need to charge a lot more to borrowers?

A. On that basis, yes.

Q. Can we look at <D3/2> at page 12. Dr Okungwu calculated the necessary minimum annual rate of return that it would need to achieve on its loans to borrowers. As he's explained, it is a minimum rate. Can we look at <D3/3> at page 7. We can see that was agenda item 4 on the agenda for the meeting. We see you have declined to agree it and you said, at the bottom, that it falls outside the scope of your instructions. Is that your position?

A. Yes.

Q. Assume that any narrowing of issues between the experts will assist the court, is it your position that you won't assist the court or that this is outside your expertise?

A. Neither. It is something that I was not given the opportunity to look at because it was outside of the scope of instructions.

Q. Presumably, you had an opportunity to look at it before the joint meeting, didn't you?

A. No, I didn't consider it because it was outside the scope of instructions. So I read it but I didn't do any analysis on it.

Q. But you don't actively disagree with it, do you?

A. I haven't read it in sufficient depth to either agree or disagree with it.

MR JUSTICE MILES: Do you think, putting it in broad terms, the commercial consequences for each of the hypothetical parties in the negotiation might be relevant to what would be struck in an arm's-length negotiation?

A. They are relevant but I have never been involved in a negotiation, nor have I seen any clients involved in a negotiation, where they have actually analysed the client's business. The client is normally deemed, when negotiating terms for service, to be responsible for their own end of the negotiation.

MR JUSTICE MILES: Looking at it -- there are two parties to the negotiations. One of them is LCF.

A. Yes.

MR JUSTICE MILES: Did you think it might be relevant to consider what the business impact of paying a particular fee would be on LCF's business when working out what would happen in the hypothetical negotiation?

A. If I was looking at this forensically, in terms of looking after the event at both parties, yes, it's relevant, but in terms of the negotiation process, I wouldn't expect Surge to have analysed the LCF business in great detail or vice versa. Both were parties looking after their own interests.

MR JUSTICE MILES: The question you were addressing was what would -- in very broad terms, what would hypothetically reasonable parties, what fee would they come to; isn't that right.

A. Yes, I agree.

MR JUSTICE MILES: One of the parties is LCF.

A. Yes.

MR JUSTICE MILES: So, do you think it is relevant to see what impact agreeing to pay a 25 per cent fee would have had on LCF's business?

A. LCF would, I agree, be aware of that, but I can't speculate on what their motivation would have been in terms of whether they were going to loss lead or otherwise.

MR JUSTICE MILES: Do you think that -- LCF wasn't a highly capitalised business, was it? Did you know that?

A. I'm aware that it was capitalised, but whether you would call it highly capitalised or not, no, I don't believe it was highly capitalised, but I haven't done a capital analysis.

MR JUSTICE MILES: Assume that it had a pretty thin capital base, do you think that it is realistic, in this field, to talk about a company, which has attracted investment from members of the public, acting, as you put it, as a start-up or a loss leader and running at a loss? Do you think that's a sensible way of looking at this kind of business?

A. My own view, is it sensible to loss lead? It depends, again, on the motivation behind the business. Personally, I don't like loss leading, but I'm well aware of competitors that do.

MR JUSTICE MILES: Including in this kind of field or --

A. I have certainly seen start-ups that have tried to establish on very, very thin margins, yes.

MR JUSTICE MILES: Having attracted investments from members of the public?

A. Well, from investors, not necessarily members of the public.

MR JUSTICE MILES: All right, investors.

A. In most cases, they would have been high-net-worth or self-certified, sophisticated investors, but yes.

MR JUSTICE MILES: Sorry, Mr Robins, I went into a slightly different subject.

MR ROBINS: Can we go to <D3/2> at page 12, please. We see, in paragraph 20 of this report, Dr Okungwu referred, towards the end of the paragraph, to "the yield-to-maturity on the ICE BofA Sterling High Yield index", which he said ranged from approximately 5.6 per cent to 7.6 per cent in the three years from 2015 to 2019, and he set that out in the table on the next page. You read this?

A. Yes.

Q. Then, if we could go to <D3/3> at page 7, we can see agenda item 4 refers to that and, at the end of the item, it refers to the "high-yield corporate debt yields and the performance of the corporate loan market", and it is part of what you refused to comment on, on the basis it falls outside the scope of your instructions.

Assume that any narrowing of the issues between experts is likely to assist the court, you don't actively disagree with what Dr Okungwu has said about the yield-to-maturity on the ICE BofA Sterling High Yield index, do you?

A. No, that's fine as it goes.

Q. If we go back to <D3/2> at page 13, paragraph 21, Dr Okungwu refers to the performance of corporate loans. He says:

"The Cliffwater Direct Lending Index ... tracks the performance of private middle market loans, the 'largest segment of the private credit market'." He says that the table shows "the annual returns of the Cliffwater Direct Lending Index, which averaged approximately 8.5 per cent over the period from 2015 to 2019".

That's the table over on the next page. Again, you looked at this?

A. Yes.

Q. It is another of the things that you say in the joint memo that you can't agree because it falls outside the scope of instructions?

A. Scope of instructions, correct, yes.

Q. Assuming, again, any narrowing of issues between the experts is likely to assist the court, you're not saying, "Dr Okungwu has got it wrong. Here are the real figures", or anything like that?

A. No, I'm saying I didn't have the instruction to or the evidence provided to me to enable that kind of analysis to be undertaken.

Q. Let's assume we are dealing with a hypothetical reasonable person in the position of LCF raising money from the public and -- by borrowing it to lend to businesses. Let's assume it is going to have a fairly good idea of the amount of interest it can realistically charge for loans. It is not going to be willing to pay a fee of such magnitude as to necessitate the achievement of an entirely unrealistic and impossible rate of return, is it?

A. You're asking me to speculate on motive, and I can't.

Q. I'm asking you to address the question about the hypothetical reasonable person in the position of LCF?

A. A hypothetical reasonable person is going to try to make a profit, but they may have motivations that, as I said before, would cause them, temporarily or otherwise, to loss lead or to operate at a low return.

Q. The hypothetical reasonable party is not going to agree to pay a fee of such magnitude as to necessitate the achievement of an unrealistic and impossible rate of return, is it?

A. Not an impossible rate of return, no.

Q. Can we look at <D3/1> at page 16. This is paragraph 11.6 of your report, at the bottom of the page. You say:

"I have been provided with documents showing that around the time that Surge was providing services to LCF, it received enquiries for fundraising assistance from at least two parties who were aware of the services provided by Surge and of the 25 per cent fee. The enquiries received were from a firm called Hydrogard Legal Services with regard to a share issue and another from Thistle Group (on behalf of its client). I have also seen documents showing that in 2014 Dolphin Capital was willing to pay introductory fees/commission of 20 per cent on five-year corporate bonds and that in 2020 Argo Consulting was willing to pay introducers fees/commission of 20 per cent on two-year bonds and 21 per cent on three-year bonds."

To be clear, when you say "I have been provided with documents", they were provided to you by the party instructing you?

A. Yes.

Q. You haven't conducted any research yourself to identify any appropriate comparators?

A. Well, Dolphin is a former client of mine, so I had first-hand knowledge of the Dolphin setup.

Q. I wasn't asking if they were a client. You hadn't conducted any research to identify any appropriate comparators?

A. Additional research, no, but I already had some first-hand knowledge.

Q. But the contract that's referred to here is one that was provided to you by your instructing party, as I understand it?

A. Yes.

Q. So you'd essentially taken documents you had been given by the party instructing you and put them into your report?

A. No, I've also done some additional research around that.

Q. You understand you shouldn't be a mouthpiece for the party instructing you?

A. No, absolutely, which is why I did additional research to expand upon the information I was given.

MR JUSTICE MILES: Sorry, I'm a bit confused. I thought you just said that you didn't do any additional research. Have I misunderstood that?

A. No, in the sense of additional documents, no, but what I did do was, for example, look on the internet and look at other sources, trade sources and so on, particularly in the case of Dolphin. I was involved in advising Dolphin in the early days of their offer, so I remember them being a start-up operation, for example.

MR ROBINS: You haven't mentioned any documents you found on the internet or in trade sources in paragraph 11.6, have you?

A. I have referred in my report to having relied on my own knowledge and on other sources from the internet.

Q. But in terms of the only comparators that you provide in 11.6, these were given to you by the party instructing you?

A. Yes.

Q. You don't know how the party instructing you selected these comparators?

A. No.

Q. You didn't ask how the party instructing you had selected these comparators?

A. I didn't ask them, no.

Q. You didn't ask them to supply a fully comprehensive range of possible comparators, including any in the disclosed documents, so that you could select your own comparators?

A. No, I asked them what they had and that's what they provided.

Q. They essentially gave you a cherry picked selection and you put it in your report?

A. No, I wouldn't say it was cherry picked. I was given those documents, having asked, did they have any examples.

Q. You're just promoting the view of the party instructing you, aren't you?

A. No.

Q. I thought you said you understood your evidence should be your independent work product, uninfluenced by the pressures of litigation?

A. Absolutely.

Q. The first thing you referred to is an enquiry from a firm called Hydrogard Legal Services with regard to a share issue. That's <SUR00158203-0001>. Just so that you are aware, our position is that this is unlikely to be a genuine enquiry. It is more likely than not that it was generated as part of an effort to create evidence to support the argument that 25 per cent was a normal market rate. If that is right, you would agree that this doesn't carry any weight at all?

A. If it's not a true enquiry, absolutely I agree.

Q. The email says Hydrogard is looking to raise monies under the Enterprise Investment Scheme. As you say in your report, that means it wanted to find investors who would buy shares in a share issue?

A. Yes.

Q. So it wasn't trying to raise money by issuing bonds?

A. No, not in the EIS.

Q. You understand that, with shares, there is no contractual obligation to pay interest to shareholders?

A. Correct.

Q. You don't know how much Hydrogard is trying to raise?

A. No. There's insufficient detail there, other than the fact that it appears to indicate that they're prepared to accept a 25 per cent commission.

Q. You don't know if this was a risky or safe proposition for investors?

A. No, I have no further information, other than the commission rate.

Q. Do you know Hydrogard is not a money lender?

A. Not a money lender?

Q. Do you know that?

A. I -- no, I didn't know what the purpose was but if it's in the EIS scheme, they wouldn't be lending the money raised.

Q. Do you know that Hydrogard helps homeowners to make claims for compensation in respect of inappropriately installed spray foam insulation?

A. Not specifically, but I was aware that they were involved in litigation.

Q. Would you agree that the amount that a legal services company like that would be prepared to pay for services in respect of a share issue has no direct relevance to the amount that a money lender would be prepared to pay for services in respect of a bond issue?

A. Yes, I agree.

Q. Then you mention the inquiry from Thistle Group. That's <SUR00147596-0001>. It's an informal enquiry sent on behalf of an unnamed principal. You don't know the name of the principal?

A. No.

Q. You don't know if the loan note was issued?

A. No.

Q. You don't know how much, if anything, they actually paid for marketing?

A. No.

Q. You don't know what any fee for marketing actually covered?

A. No.

Q. You agree you can't really place any weight on this?

A. Only to the extent that I know Thistle and several people who work at Thistle. They are a competitor in our space and this is the type of inquiry they, like we, would sometimes come across.

Q. You have seen in the email this unnamed principal has a business in UK property, they buy sites for groups of houses. You are aware that LCF didn't buy sites for development?

A. Yes, I am aware of that.

Q. And would you agree that buying sites for development is a different business from lending monies to UK businesses?

A. I would agree it is a different business niche, yes.

Q. It might be a more profitable or less profitable business?

A. Agreed.

Q. Presumably, you don't know whether this unnamed principal's business was safer or riskier than LCF from the perspective of investors?

A. No, again, I can only judge by the content of the actual email.

Q. But you agree it has no real comparative value in the exercise you were engaged in?

A. Only in the sense that, again, it illustrates a willingness to pay reasonably high commissions.

Q. Then you referred to Dolphin Capital paying 20 per cent on five-year corporate bonds. <SUR00158275-0001> is the document. You don't know who gave this to Mr Careless or when?

A. No.

Q. Are you aware that, in May 2019, Mr Careless was asking James Hall, who was associated with Dolphin, for help in proving that 25 per cent was a standard fee for raising money for alternative finance?

A. No, I'm not aware of that.

Q. Do you agree it looks like this document is one that's been selected by the party instructing you to advance a particular argument?

A. I have no way of judging that.

Q. Do you agree you shouldn't be a mouthpiece for arguments that the party instructing you seeks to advance?

A. Absolutely I agree.

Q. In any event, 20 per cent for five years would be 4 per cent per annum on your annualised basis, wouldn't it, same as Blackmore?

A. Yes.

Q. You would agree that's significantly below the figure of almost 11 per cent on the weighted-average annualised basis that Surge charged to LCF?

A. Yes.

Q. Now, Dolphin invested monies in German property, didn't it?

A. It did.

Q. That's not the same business as LCF, is it?

A. No, it's very different.

Q. Again, it is not really going to tell you anything about what a reasonable person in LCF's position could afford to pay, or be prepared to pay, or anything like that?

A. In LCF's specific business, no, but, in general, in the sense of firms willing to pay very significant commissions or introductory fees, whatever you want to call it, it is.

Q. Then you refer to Argo Consulting, which you say is willing to pay commissions of 20 per cent and 21 per cent. Let's look at <SUR00158274-0001>. This is the document you're referring to, isn't it?

A. Yes.

Q. This is another one given to you by the party instructing you?

A. Yes.

Q. Addo Consulting is agreeing to act as an introducer for Argo Consulting selling shares in the Woodville funds. What are the Woodville funds?

A. What are they?

Q. Yes.

A. Collective investment undertakings.

Q. No, they are litigation funders, aren't they?

A. I understood they were collective investment undertakings.

Q. Let's assume, for present purposes, that Woodville is engaged in litigation funding --

MR JUSTICE MILES: Could those two things both be true?

A. Yes, they could.

MR JUSTICE MILES: So, when you say "collective investment undertaking", you mean collective investment from the point of view of the investors --

A. Yes, the investors pooling investment for the purposes of profit.

MR JUSTICE MILES: So it may be that it is a collective investment fund, the business of which is litigation funding?

A. That could be the case.

MR ROBINS: In basic terms, you understand a litigation funder is speculating on litigation?

A. Yes, in that sense, I agree.

Q. They're trying to back winning cases?

A. Yes.

Q. So they pay legal fees, and then, if the claim succeeds, they can make a lot of money?

A. Yes.

Q. So the rewards are potentially very high?

A. Potentially.

Q. And the risks are also potentially high?

A. Yes.

Q. You agree that the business of a litigation funder backing a small number of potentially lucrative cases is likely to be different in many ways from the business of a corporate lender which makes secured loans to numerous small and medium-sized enterprises?

A. Yes, in the sense that there's no coupon to be paid, other than the prospect if it is a collective investment undertaking of distributions or dividends.

Q. But you can't reason across and say, "Oh, well, if it's commercially necessary and affordable for a litigation funder to pay a commission of X, then it must necessarily follow that it's also commercially necessary and affordable for a corporate lender to pay the same commission"?

A. It doesn't follow automatically, no, but it is illustrating the principle that, in certain areas of business, people will incentivise the attraction of funds.

Q. If we go back to <D3/1> at page 16, the examples you have given in paragraph 11.6 of your report don't include any large corporate lenders which lend on a secured basis to UK businesses?

A. No.

Q. There isn't any conclusion at the end of paragraph 11.6, is there?

A. No.

Q. So it is just, "Here are some documents my client has given to me"?

A. No, not in that sense. It is illustrating the principle that certain investment opportunities will pay high introductory fees or commissions to help attract investment.

Q. But you got these documents from your client and you put them into your report. Do you think that's a permissible use of expert evidence?

A. Yes, I do because it's not purely the basis that you're suggesting that these are sort of placed by my instructing legal advisors and that's not the case.

Q. They didn't give you any other examples, did they?

A. No, they didn't.

Q. They only gave you these examples?

A. Yes.

Q. Can we look at what you say in paragraph 11.7. At the end of the third line, you say:

"It is clear from the documents provided to me that some form of negotiation of terms of service took place between Surge and LCF as I have seen at least two drafts of a service agreement that were discussed between Surge and LCF."

Now, if, as a matter of fact, those draft agreements that you have seen postdate the beginning of the payment of the 25 per cent commission, in other words, if, as a matter of fact, the 25 per cent commission had been put in place long before the preparation of those draft agreements, you would agree the draft agreements don't actually shed any light on the genesis or origin of the 25 per cent and aren't relevant?

A. If they postdate, I agree.

Q. Now, paragraph 11.13 of your report, at the bottom. You say:

"Assuming that acting as reasonable parties, both LCF and Surge entered into open discussions regarding the supply of services by Surge to LCF." Then, over the page, at the bottom of 12.6, you say: "I have concluded that in the absence of any other means of establishing a market rate, the two willing parties, acting as reasonable parties and at arm's-length, effectively established a market rate acceptable to both parties for the scope of services required."

And then over at 12.7, you say:

"In reaching my conclusions above, I have assumed that the services and fees were agreed between LCF and Surge, who were each acting as reasonable parties in an arm's-length transaction."

It is right to say, isn't it, that, instead of considering hypothetical reasonable persons in the position of LCF and Surge, you have instead assumed that LCF and Surge were both acting as reasonable persons in an arm's-length transaction and then you have said, well, if they were both acting as reasonable persons in an arm's-length transaction, the amount they agreed between them must be the amount that would have been agreed by reasonable persons in an arm's-length transaction. That's essentially the reasoning, isn't it?

A. It is. It is the same principle that either party could equally just have walked away if they found the terms unacceptable.

Q. But the reasoning is circular, isn't it, because the conclusion that the amount agreed between LCF is the amount that would have been agreed by reasonable parties depends on your assumption that they were both reasonable parties?

A. It's based on the premise that there is no evidence of coercion or restriction in the negotiation. In the absence of coercion or restriction, then there is no reason to assume that the parties weren't acting at arm's-length.

Q. If one or the other of them wasn't acting reasonably, as a matter of fact, then your assumption is wrong and the conclusion in paragraph 12.6 can't be based on that assumption?

A. It depends what you mean by "reasonable". If I am acting in free will, which is the way I would expect a reasonable person to act, then there is a basis of reasonable and arm's-length.

Q. You say that there is no evidence of coercion or restriction, negotiation. What sort of enquiry are you saying that you have conducted into the negotiation process? What documents have you examined, what people have you discussed this with?

A. The opposite, in fact, which is, I have been provided with no evidence that indicates there was any coercion or constraint.

Q. You would agree the absence of evidence is not evidence of absence?

A. Yes, I agree.

Q. Let's look at what you say in paragraph 11.9 on the previous page. You say:

"LCF was following a business model that was considered relatively new, innovative and disruptive in the lending market. LCF followed a fintech business model. It utilised website/internet and technology based service delivery to raise funds and lend funds. Its business model was predicated on charging lending fees and charging more in interest on loans it made to borrowers than the interest it was obliged to pay to its bondholders."

You're making assumptions about the facts, aren't you?

A. No, I'm basing that on the descriptions in the LCF investment memoranda.

Q. And you're assuming those descriptions were factually true, aren't you?

A. After the event, I can't comment. But in terms of what was written in the investment memoranda, that's correct.

Q. Let's assume that what was written in the investment memoranda wasn't correct. Assume that everything you say at the beginning of paragraph 11.9 is factually incorrect. Assume, instead, LCF was a Ponzi scheme from the start, it didn't carry on the business described in the information memoranda. Instead, it used monies from investors to make substantial payments to the individuals who had set it up. The borrowers didn't have any genuine money-making businesses, they didn't make any profits ever. Payments to existing investors were funded by monies from new investors. Any conclusion based on what you have said at the beginning of paragraph 11.9 would be likely to be wrong, wouldn't it?

A. If, after the event, it was proven to be a Ponzi scheme, yes. But based upon the information provided, I wouldn't -- I have been provided with no evidence that at outset it was intended to be a Ponzi scheme.

Q. But you were provided with the case memorandum, weren't you?

A. Yes.

Q. Presumably you looked at it?

A. I did.

Q. You saw that in paragraph 28 it records the claimants say the business of LCF was carried on with intent to defraud. Presumably you saw that?

A. Yes, I did.

Q. You were given the re-reamended particulars of claim, weren't you?

A. Yes.

Q. Presumably you looked at that?

A. Yes.

Q. You saw that in paragraph 21(a) the claimants allege LCF was a Ponzi scheme?

A. Yes, the key word being "allege".

Q. Yes, but if we look at <S1/10> at page 12, this is the guidance for the instruction of experts. You say in your report you're familiar with it. Paragraph 58: "Where there are material facts in dispute experts should express separate opinions on each hypothesis put forward. They should not express a view in favour of one or other disputed version of the facts unless, as a result of particular expertise and experience, they consider one set of facts as being improbable or less probable, in which case they may express that view and should give reasons for holding it."

You're not saying, are you, that as a result of your particular expertise and experience, you think the suggestion that LCF was a Ponzi scheme is somehow improbable or less probable, are you?

A. No, I'm completely agnostic on whether it was held to be a Ponzi scheme or not.

Q. You agree you haven't done what paragraph 58 of the guidance says you should do; you haven't expressed a conclusion on the assumption that LCF was conducting a Ponzi scheme with intent to defraud?

A. No, I have not concluded one way or the other.

Q. Well, assume that the claimants are right to say that LCF wasn't what you have set out at the beginning of paragraph 11.9. Assume, instead, LCF was carrying on a Ponzi scheme with intent to defraud in order to enrich its founders. Assume the people behind LCF were not motivated by the normal commercial considerations of people running honest businesses. Assume that they were prepared to pay a commission that was extravagant and uncommercial because they just wanted to get in as much money as possible so they could take it for themselves and spend it on fast cars, racehorses, expensive watches, yachts and jewellery. If we work on that assumption, you can't say, can you, well, LCF was acting as a reasonable party, the commission it was prepared to pay is, therefore, a reasonable commission?

A. If that was their motivation from outset -- and I have no indication that it was or wasn't -- then I would agree with you.

Q. Let's make another factual assumption. Assume that LCF was prepared to pay an absurd and uncommercial, extravagant commission to Surge because Mr Careless had said that he would pay 45 per cent of Surge's profits to John Russell-Murphy, who was closely involved with the LCF Ponzi scheme and its architects. If we work on that assumption, you can't say, can you, well, the parties were acting as reasonable parties at arm's-length and the commission they were prepared to pay was therefore reasonable?

A. Well, on the basis you describe, again, I would agree with you, but I have no knowledge of that part of the case.

Q. Let's assume, again, LCF was prepared to pay an absurd and uncommercial extravagant commission to Surge because Surge was paying 2 per cent of that commission to Mr Thomson, the man who ran LCF on a day-to-day basis, as some sort of kickback or bribe. If those are the facts, you can't say LCF was acting as a reasonable party and the parties are acting at arm's-length, the commission is, therefore, a reasonable one, can you?

A. Again, if that's the motivation from outset, in other words, if it was a conspiracy to commit a crime, no, I would agree with you.

Q. Similarly, if, on the facts, LCF is prepared to pay this commission because Surge is going to pay 4 per cent of it to Mr Golding, the king pin of LCF, as some sort of kickback or bribe, then, again, you can't then say, well, they are acting as reasonable parties at arm's-length, it is, therefore, a reasonable commission?

A. Again, it depends on the motivation from outset. If that was the motivation from outset, then I would agree with your contention.

MR JUSTICE MILES: What about going on? So it starts with this agreement of 25 per cent, there is no actual written agreement ever put in place, and I think it was put earlier by counsel for Mr Thomson that Mr Thomson was often trying to reduce the commission, so, in other words, on that case, there would be a sort of continuing process of settling the commission and keeping it at a certain level. If you then make the assumptions that you have just been asked to make about sums being paid to Mr Thomson or Mr Golding and that Mr Golding was somehow influential in relation to LCF, what would your answer then be about it being an arm's-length, reasonable --

A. I've been asked by counsel to make a lot of assumptions in the last number of questions. I would actually offer the thought that, if the parties were still in continuing negotiation, which is not

uncommon in commercial situations, then that might be evidence -- and I'm not trying to put a proposition forward; just simply an observation -- that might also be evidence that there was no such conspiracy from outset, but that the parties were in a process of negotiating to get better terms.

MR JUSTICE MILES: But what about the examples that were put to you that money -- it was put, and this is the question to you, that various kickbacks were being paid to, first of all, Mr Thomson and then Mr Golding. So you're being asked to assume that. What's your response to that?

A. If kickbacks were being paid, and that was known from outset, and during the continuing process of negotiation, then I would agree with counsel's contention.

MR JUSTICE MILES: You said, again, in the answer you just gave, "if that was known from the outset", and I suppose that's what I'm exploring with you. Why is it so important to your answers to keep repeating that that had to be known from the outset?

A. Well, it's the intention to effectively disburse funds raised improperly. If that is taking place, to put it in layman's terms, it's just wrong. But, on the other hand, if it's something that evolved over time, whilst it doesn't make it right, it's not the same as raising funds with the deliberate intention of paying them away improperly.

MR JUSTICE MILES: All right. I think the questions were not really directed to a general question about whether it was right or wrong, but to do with the idea that this was an arm's-length transaction between reasonable parties, and counsel was exploring that concept, I think. One of the things he was asking you about was, how is that assumption affected by a further assumption that various kickbacks were being paid, and that's what I think was being explored. But I will let Mr Robins carry on with the questioning.

MR ROBINS: My Lord, I note the time. I am happy to carry on, if there is no questions from --

MR JUSTICE MILES: How long are you going to be?

MR ROBINS: Ten minutes.

MR JUSTICE MILES: Are you expecting any significant re-examination?

MR LEDGISTER: No re-examination, my Lord, at the moment.

MR JUSTICE MILES: Let's carry on, then, Mr Robins.

MR ROBINS: Assume, in terms of Surge's expenses, assume Surge had an incentive to spend absurdly high and uncommercial sums on Google AdWords, at LCF's expense, to maximise Surge's income and profitability, and that Mr Thomson and Mr Golding, who ran LCF, had the same incentive because LCF was a Ponzi scheme and their key objective was simply to bring in as much money as possible, even if it required them to pay absurdly high and uncommercial sums on Google AdWords, in order to keep the Ponzi scheme going and continue with the fraud. If those are the facts, you can't then say the parties were acting as reasonable parties, Surge needed a high level of costs to cover its overheads and it is, therefore, a reasonable commission. The facts critically influence the conclusion that you come to, don't they?

A. Yes.

Q. If we look at <D3/1> at page 17, in paragraph 11.12, you say, towards the end of the paragraph:

"It appears that some form of discussion must have taken place between LCF and Surge with regard to services required and fees to be charged." Again, you weren't there, were you? That's another assumption?

A. Well, that statement is based on the fact that, in order to provide services, a description of the services required needs to be given, and somebody then needs to provide a description of, "Well, how much are we going to charge to provide those services?". That's all that statement is implying.

Q. But assume, in fact, no discussion took place at the outset between LCF and Surge and that, instead, there are some people running a Ponzi scheme known as Sanctuary and they are paying 20 per cent of new monies to salespeople and some of the people who became involved in Sanctuary then set up another company which became LCF and they used one of the Sanctuary salespeople to sell loan notes and they carried on paying him 20 per cent and then raised his fee to 25 per cent, and then he told Paul Careless, "Look, if Surge were to sell LCF bonds, LCF will pay 25 per cent to Surge", but there's no discussion about that between Surge and LCF. Any conclusion based on an assumption that there was a discussion would be wrong, wouldn't it?

A. It would.

Q. You said you've seen, at some point, Mr Careless's witness statement. <C2/3>, page 9. He says, in paragraph 48, that John Russell-Murphy, who was never a director or employee of Surge, originally negotiated the fee between Surge and LCF:

"I do not recall giving him any instructions ... He was already receiving 20 per cent from SAFE and we, Surge, were already receiving 20 per cent from Blackmore."

That's something that is factually in issue: "The negotiation was concluded at arm's-length by John with Andy, without me being present. John reported back to me saying he'd agreed 25 per cent for Surge to do the same job for LCF as it was doing for Blackmore. I was happy with this."

Given that he says Surge wasn't involved in negotiations, when you said it appears there must have been some form of discussion between LCF and Surge, were you saying that without having looked at the evidence filed by the party instructing you?

A. I'm saying that based on the evidence I was provided with.

Q. Sorry, what is that evidence?

A. The evidence bundle I was provided with.

Q. Which included this witness statement?

A. I'm not sure it did include this document. I think I'm thinking of another statement that was given by Careless.

Q. Can we go back to <D3/1> at 17. We were looking at what you say -- sorry, next page -- in 12.6: "... the two willing parties, acting as reasonable parties and at arm's-length, effectively established a market rate ..."

And then, at 12.7:

"In reaching my conclusions above, I have assumed that the services and fee were agreed between LCF and Surge, who were each acting as reasonable parties in an arm's-length transaction."

It is right to say, isn't it, your conclusion depends on assumptions about the facts which may or may not be correct?

A. Ultimately, yes.

Q. And you agree it is not your role to say whether those assumptions about the facts are or are not correct?

A. No, the facts are the facts.

Q. You agree that, if the assumptions are incorrect, the conclusion in paragraph 12.6 of your report is also incorrect?

A. Depending on the outcome of the facts, yes.

MR ROBINS: My Lord, I have no further questions for this witness.

MS DWARKA: No questions.

MR LEDGISTER: No re-examination, my Lord.

MR JUSTICE MILES: Your evidence is now complete. Thank you very much for coming and giving your evidence.

A. Thank you.

(The witness withdrew)

Housekeeping

MR ROBINS: My Lord, Mr Osborne is due to come here tomorrow morning. I'm afraid he is not here today. But given that we are all here, I wonder if it is sensible just to see how much cross-examination there will be, if any. Because, if the answer is none, then we may not need to come in tomorrow.

MS DWARKA: My Lord, I will be cross-examining Mr Osborne, but potentially 15 or 20 minutes.

MR JUSTICE MILES: Okay. And then it slipped my mind who the person -- the expert he was responding to.

MR ROBINS: Mr Wright.

MR JUSTICE MILES: So he is no longer giving evidence?

MR ROBINS: He was instructed solely by Mr and Mrs Hume-Kendall and, as I understand it, has not been reinstructed by anyone and isn't turning up.

MR JUSTICE MILES: So it is a slightly unusual situation, in that Mr Osborne obviously spends quite a lot of time discussing Mr Wright's evidence, obviously not in his first report, but in the later stuff. In fact, which one came first?

MR ROBINS: I think they were simultaneous.

MR JUSTICE MILES: But it is a one-sided show, as it were, as far as the experts themselves are concerned.

MR ROBINS: Yes. Obviously, your Lordship has the report but we will be making -- it is in the bundle. We will be making submissions that no weight should be given to it in the absence of the witness's cross-examination. But it is formally part of the record in the proceedings.

MR JUSTICE MILES: All right. So, it is expected to be quite a short cross-examination, as I understand it.

MS DWARKA: Yes, my Lord.

MR JUSTICE MILES: Mr Ledgister, are you going to cross-examine on it?

MR LEDGISTER: Absolutely none, my Lord.

MR JUSTICE MILES: And no chance of doing that this afternoon?

MR ROBINS: I can take instructions. Can we rise and make a phone call?

MR JUSTICE MILES: Why don't we have a break now for a few minutes. I suppose it is now getting on, though, because he would have to come to court, and so on. So I suppose it is a bit unrealistic to think that he's going to be able to come here in time.

MR ROBINS: Yes. We could at least try to find out. I don't know where his office is, but if it is very close by, it may be possible. We can rise for a few minutes to see if we can get hold of him.

MR JUSTICE MILES: Why don't we just rise then for -- I will give you ten minutes and you can then let me know what the position is:

(3.23 pm)

(A short break)

(3.35 pm)

MR ROBINS: My Lord, the short answer is, we haven't actually been able to make contact with Mr Osborne. I'm conscious your Lordship said we would need to have a discussion tomorrow about the form of written closing submissions. We are happy to have that discussion either tomorrow or this afternoon.

MR JUSTICE MILES: Let's do that tomorrow. You might just each think a little bit about any points you wish to make in relation to that. But we will do that after the evidence tomorrow, I think.

So we will adjourn now until 10.30 am tomorrow.

(3.36 pm)

(The hearing was adjourned to Tuesday, 14 May 2024 at 10.30 am)

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