IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1523/7/7/22

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Wednesday 5th June 2024

Before:

The Honourable Mrs Justice Bacon

Michael Cutting

John Davies

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Proposed Class Representative

BSV Claims Limited

And

Proposed Defendants

Bittylicious Limited & Others

A P P E A R AN C E S

Sarah Ford KC, Nicholas Bacon & William Hooper (Instructed by Velitor Law) on behalf of BSV Claims Limited

Brian Kennelly KC & Jason Pobjoy (Instructed by Allen Overy Shearman Sterling) on behalf of Binance Europe Services Limited (Sixth Defendant)

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Wednesday, 5th June 2024

(10.30 am)

MRS JUSTICE BACON: Morning, everyone. Some of you are joining us live-stream on our website, so I'll start with the usual warning. An official recording is being made and an authorised transcript will be produced, but it is strictly prohibited for anyone else to make an unauthorised recording, whether audio visual of the proceedings and breach of that provision is punishable as contempt of court.

Ms Ford, can you just give me a moment while I sort out these screens?

(Pause.)

Yes. Ms Ford, who is going first?

MS FORD: Madam Chair, subject to the Tribunal, the agreed agenda was that we would start with the Binance strike out application. There are then certain relatively limited certification issues that have been raised. Those are primarily concerned with funding and Mr Bacon, KC, is proposing to deal with those, but if the Tribunal felt able to give an indication that those matters might not come on, for example, before 2.00 pm or first thing tomorrow morning, that would enable Mr Bacon not to sit through the Binance application with which he is not concerned.

MRS JUSTICE BACON: We envisaged that we would hopefully deal with the Binance application today and could conclude the submissions on them today. If you feel at the end of the day there will be time for submissions on funding to be dealt with briefly, because I understand there is nobody here to oppose those, then we could deal with them that way. I mean, the other alternative is that perhaps -- do we need to hear on the funding issues at all, because you set out your position in writing. There's nobody here opposing that position. I am obviously grateful to Mr Bacon for turning up today to answer any questions that the Tribunal may have, but you may take the view that there is nothing that really needs to be added to what's already said in your skeleton

argument.

MS FORD: If the Tribunal are content to proceed on that basis, then we certainly are and that applies essentially to the entirety of the certification issues, subject to anything the Tribunal want to raise.

MRS JUSTICE BACON: We are content with that and are happy to release Mr Bacon on that basis.

MR BACON: Thank you.

MS FORD: In that case I will hand over to Mr Kennelly to make his application.

MRS JUSTICE BACON: Yes. I should say although I have said -- you can go, Mr Bacon -- we should conclude today, one possibility is that we may be able to give judgment on the application tomorrow. So before everyone makes arrangements to do other things tomorrow, perhaps you could bear in mind that we might use tomorrow or part of tomorrow for that purpose. It may be that that's tomorrow afternoon. It depends where we get to at the end of the day. We will give you an indication at the end of the day whether we think we will be back tomorrow for that.

Yes, Mr Kennelly.

Submission by MR KENNELLY

MR KENNELLY: This is the Sixth Defendant's application for summary judgment for (inaudible) the PCR today with what they call the foregone growth effect allegedly suffered by Sub-Class B. Sub-Class B, as the Tribunal has seen, are the members of the class who held on to BSV after the Proposed Defendants announced their intention to delist BSV and then delisted it from their exchanges. The foregone growth claim is the loss and damage suffered because, as is alleged, BSV was prevented from becoming or lost the chance of becoming a major cryptocurrency like Bitcoin. We say that the foregone growth effect is irrecoverable in law.

Stepping back, the basic principle governing the award of damages is that the claimant is entitled to be compensated for losses caused by the defendant's breach, but if the claimant could reasonably have prevented that loss and chose not to do so, the defendant is not liable for it. That is the duty to mitigate and damages are calculated on the assumption the claimant has taken reasonable steps in mitigation, whether, in fact, he has done so or not.

MRS JUSTICE BACON: Yes, and you accept this is essentially the principle on which you rely is a mitigation principle.

MR KENNELLY: Yes. So if the claimant does not mitigate when he could reasonably have done so and suffered wrong as a result, he has broken the chain of causation from the defendant's wrong as he cannot recover that loss from the defendant. The foregone growth effect as pleaded claims the Sub-Class B members could hold their BSV indefinitely (inaudible) we say, even after the events constituting the alleged infringement were widely publicised and according to the PCR, they can recover under the foregone growth effect from both defendants all of the value which they say BSV would have gained from 2019 until judgment had the infringement never occurred. We say that is untethered from the legal principles governing the date of the assessment of loss, which principles reflect the mitigation duty.

So in summary we say when the Proposed Defendants publicly announced their intention to delist BSV and then did so, the holders of BSV could reasonably have sold it and reinvested it in comparable cryptocurrency. On the PCR's own case this was a reasonable course of action at all relevant times. As a matter of law we say their loss crystallised at the point that they could reasonably have sold the BSV and re-entered the market.

When they decided to retain the BSV after that point, the chain of causation was broken and that was we say an entirely voluntary decision which was not induced by

the Proposed Defendants.

As I shall seek to show the Tribunal, none of the settled bases for crystallising loss at a later stage arise here. Taking them in turn, the events constituting infringement, the alleged public coordination and delisting, were highly publicised. On the PCR's case BSV was liquid at all material times and indeed, as the Tribunal has seen, the PCR claims for Class A, thousands of whom actually sold their BSV in response to the publicised events. Class B members were not locked in or induced by the Defendants to hold BSV in any way.

As the PCR's own evidence explains, other cryptocurrencies were comparable to BSV and were available to BSV holders and Class B members could have switched to them. So we say the decision to retain the BSV at or shortly after the delisting events was, to use the language of the case law, speculation on their own account for which the Defendants have no liability.

We accept that there is an arguable claim on the part of PCR that the Proposed Defendants are liable for the loss arising between delisting events and the point at which it was reasonable to sell the BSV and reinvest elsewhere. When precisely it was reasonable for the class members to appreciate what happened, the move to sell the BSV and reinvest, that is a matter for trial, but that applies equally to classes A and B. That precise date does not need to be determined in this application.

MS JUSTICE BACON: So when it was reasonable for them to sell is not an issue now?

MR KENNELLY: No.

MS JUSTICE BACON: But you say it was reasonable to sell.

MR KENNELLY: The way it was reasonable for them to sell the BSV and re-enter the market (inaudible) we accept that on the cases even if the breach occurred on a particular day in April 2019, even as we say where it was well publicised and there

were -- the liquid market with BSV and comparable cryptocurrencies in which to reinvest, they still needed time to do that.

MS JUSTICE BACON: If we can't determine when it was reasonable, are not the facts that both parties are going to rely on in the question of when it was reasonable material to the question of whether it was reasonable?

MR KENNELLY: The final question is whether the breach of data rule applies here at all. The foregone growth effect claim as pleaded assumes a breach date doesn't apply at all. There is no need to ask when it was reasonable to sell the BSV and reinvest in suitable alternatives. That's why they oppose our application. We say that the Tribunal can and should determine now that it is unarguable for them to maintain that the class could not have liquidated BSV on or shortly after the delisting events and can determine now that it is unarguable to maintain that there were no comparable cryptocurrencies in which to reinvest.

The position is more fundamental. They maintain that the breach date rule doesn't apply at all. My point about reasonableness is a more narrow one.

MS JUSTICE BACON: I am not sure if that's the submission. The submission is that it is a question for trial at this stage.

MR KENNELLY: And that's what we -- we say that the breach date rule -- you can determine now at the strike out standard the breach date rule does apply. The particular date upon which it was reasonable for them to re-enter the market and reinvest, that is a matter for trial. We accept there is a short period between the delisting events and that date which needs to be determined and that's not going to be determined in this application, but the foregone growth effect as pleaded -- I will take you to how it is expressed -- assumes that the breach of data rule doesn't apply at all, that the Tribunal can proceed on the basis that the Class B members hold their BSV indefinitely up to judgment and recover all the difference between the current

value of the BSV and the counterfactual value. Now that assumes the breach date rule doesn't apply.

The alternative basis for claiming in respect of future or potential growth of BSV is by way of a loss of a chance principle citing expressly Allied Maples and Perry v Raleys. The Allied Maples loss of a chance depends on the decisions or actions of an identifiable third party. No such decisions or actions by a third party are pleaded by the PCR. It is hard to see how the claimed loss in this case could depend on a lost chance. The alleged loss is simply the lost value of a damaged asset. We say the potential for growth -- potential for future growth is reflected in the price of BSV immediately before the alleged infringement, but in any event even if loss of a chance is a proper basis on which to claim the foregone growth effect, the principles of causation and mitigation still apply and they ought to have re-entered the market at or shortly after the delisting events and reinvested in a comparable cryptocurrency.

MS JUSTICE BACON: Your position is it is not that there is a choice between reasonable strategies, but that -- it is not that something was reasonable or could have been done, but something should have been done.

MR KENNELLY: Yes.

MS JUSTICE BACON: So it is a harder point than that they could have re-entered the market. You say they should have as part of their duty to mitigate.

MR KENNELLY: My Lady, yes, but the particular date they should have (inaudible).

Can I show you the Amended Collective Proceedings Claim Form. It is in bundle B.

MRS JUSTICE BACON: We are all using electronic bundles.

MR KENNELLY: tab 13, page 189.

MRS JUSTICE BACON: Yes. What we will need is the pdf and pages for the electronic bundle.

MR KENNELLY: I hope they are the same as the electronic bundle.

MRS JUSTICE BACON: So far they are.

MR KENNELLY: If they stay like that, I will be pleasantly surprised. Page 189 is the first page of the Amended Collective Proceedings Claim Form and go, please, to page 193. 193. It is paragraph 11, subparagraphs 1, 2 and 3. These are to show the Tribunal what is constituted by Sub-Class A and B. A are the class members who have held the BSV coins on 11th April. That was the first date when the delisting events began and sold, at least some of them, before 29th July 2022 and then, Sub-Class B members are those who held their BSV coins on 11th April 2019 and then continued to hold them on 29th July 2022.

If you go, please, next to page 235. There is the heading -- this is where the PCR deals with causation, loss and damage. Then over the page to page 236 you see paragraph 167. This is the part of the pleading which we seek to strike out. In relation to members of Sub-Class B and Sub-Class C Binance users -- we are focusing on Sub-Class B -- loss and damage arises because (1) absent the agreement and/or concerted practice, BSV would have become a major cryptocurrency and the value of the BSV that they hold would have been higher by virtue of that.

Then quoting Mr Noble in his accompanying report, the foregone growth effect.

MRS JUSTICE BACON: You have just slightly quickly skipped over:

"This arises in relation to both B and C" but your strike out application is only brought in relation to B. So as matters stand we are going to have to decide the point in relation to Sub-Class C.

MR KENNELLY: The problem with Class B is that there are other matters in the Sub-Class C claim which are properly matters for trial. If the Tribunal is with me on Sub-Class B, that will be highly material finding in respect of Sub-Class C also, but I can't strike out the whole claim in respect of Sub-Class C because there are other factors with which Sub-Class C is concerned to do with expropriation.

MRS JUSTICE BACON: Well, the problem is that then we are going to have to -- it seems to me the Tribunal will ultimately at trial need to decide the breach date point in relation to Sub-Class C in relation to the facts for that Sub-Class. If it is going to have to do that, as you accept, because you can't strike out C, then it's a bit odd for you to be saying that there's a good reason for dealing with B now.

MR KENNELLY: The Tribunal will have the benefit, if I am successful, the judgment in respect of Sub-Class B and that will be of assistance to you in relation to Sub-Class C. You won't have to revisit matters which have been determined (inaudible) in this application. We say in our skeleton, paragraph 67 if you accept that the breach date rule applies, the principle would apply equally to Sub-Class C's foregone growth claim, because we are debating before you, Madam, a point of principle, which would apply equally.

MS JUSTICE BACON: You are debating a point of principle which as far as I can see from the authorities is highly fact specific as to how it applies.

MR KENNELLY: That is the point put against me and I will have to persuade you based on the authorities and the evidence that it is appropriate for the Tribunal to determine now that the BSV holders should have entered the market at or shortly after the delisting events applying the relevant mitigation principles.

MRS JUSTICE BACON: So you are asking the Tribunal to find as a matter of fact in order to apply your principle that the Sub-Class B holders should have re-entered the market, but what's the factual basis for that? We don't have any evidence from them.

MR KENNELLY: We have evidence from the PCR. I will take you to that in due course, but I have to begin, if I may with, the law, because the law explains what claimants are expected to do pursuant to the duty to mitigate. I will begin with that, if I may, and then I will take you to the PCR's evidence as to the fact that they could have and could reasonably have entered the market and reinvested in comparable

cryptocurrencies.

MRS JUSTICE BACON: Well, as I said, there is a difference between could have and should have. Your principle is based on a proposition that the Sub-Class B holders should have re-entered the market, not they could have.

MR KENNELLY: The cases show us if they could reasonably have entered it, then they should have entered it pursuant to the duty to mitigate. If the market was available to them, then they should have mitigated by selling the BSV and reinvesting in crypto-currencies. Whether they did, in fact, do it or not is irrelevant. The question is what was reasonable for them to do in the circumstances. That's why I have to persuade you based on their own evidence that they could have done so.

MS JUSTICE BACON: So you are saying that on the basis of the case law a could in principle becomes a should in every case.

MR KENNELLY: If the settled bases are satisfied. I still have to take you to the facts and satisfy you that it was reasonably possible for them to liquidate the BSV and reinvest at or shortly after the delisting events. I appreciate that's a finding of fact and it may be a difficult one for me to make good, but if you are satisfied that I am right about that to the strike out standard, then you ought to find that they should have done so or be treated as if they should have done so, whether they did so, in fact, or not and the breach date rule applies.

I will begin with the primary basis for claiming foregone growth and I will deal with loss of a chance afterwards, but before I move on from the claim form, I would draw your attention to page 237 and the amounts claimed. You see what we say is the highly speculative nature of the Sub-Class B claim, because if you look at paragraph 171.

MRS JUSTICE BACON: Yes. Up to 9 billion.

MR KENNELLY: Indeed. It is Sub-Class A, the class members -- the BSV holders who sold, we say who saw the delisting events or ought to have seen them and

liquidated their holdings, to an extent they are said to have suffered loss, it is between 17 and £18 million roughly but for Sub-Class B up to 9 billion.

So with that brief introduction to the pleading, I will take you to the authorities.

I will begin with Smith New Court Securities. That's in the first authorities bundle. The authorities bundles are also called volume B. If you are looking at them electronically, I hope it is in tab 15, page 173. It is the first page. I will go straight, if I may, to page 179.

I should say, Madam, in view of the Tribunal's indication as to timing I am not going to take you to all of the authorities cited. I am not going to labour points which are well canvassed in written submissions. I intend to finish well before lunch in order that we comply with your direction.

Page 179. So I am using the bundle numbers, not the page numbers of the report.

MRS JUSTICE BACON: Yes.

MR KENNELLY: And the facts, if I may, first. In this case the defendant was induced -- the defendant induced the plaintiff to buy shares on a particular basis, a market-making basis, which involved holding them long-term and the plaintiff, as you will see, was induced not to buy the shares on a basis that would allow him to sell them quickly.

"The judge held that", the injured party, "Smith bought the Ferranti shares", at that price, "82p as a market-making risk, with a view to holding them on its books over a comparatively long period to be sold at a later date. He further held that [the victim] would not have bought at that price at all apart from the Roberts fraud."

The Roberts fraud was the inducement to purchase these shares on this basis.

If you move on, please, to the next page, skipping over the facts, what happened in that case was that unbeknownst to either the fraudulent defendant or the victim plaintiff there was a separate fraud that caused the shares to collapse in value. Prompted by

that, the victim retained the shares he had bought, but then started to sell them -- you see this from B to C on page 180 -- slowly began to sell the shares and had sold them all by April 1990. Then:

"It was not suggested ... that Smith's retention of the shares until [that period] or their subsequent sales were in any way unreasonable."

That's important, because in contrast we say, and we will show you the evidence, there was no lock in or inducement on the BSV investors to hold on to their BSV. They could reasonably have sold as soon as the delisting events took place.

Then moving on to page 184, letter H, Lord Browne-Wilkinson refers to:

"The general rule ...has been that damages are to be assessed as at the date the wrong was committed. But ... [that] is only a general rule: where it is necessary in order to adequately to compensate the plaintiff for the damage suffered by reason of a defendant's wrong, a different date ... can be selected. Thus ... the date of breach rule 'is not an absolute rule: if to follow it would give rise to injustice ...'"

Skipping down on the next page, 185, from C and following:

"In the light of these authorities the old 19th century cases can no longer be treated as laying down a strict and inflexible rule. In many cases, even in deceit, it will be appropriate to value the asset acquired as at the transaction date."

That's, of course, referred to as the transaction date because that was the date the wrong was committed. It was a misrepresentation case. In a claim under Article 101, like this one, the wrong is committed by the infringement, here the delisting events.

"Thus", continues Lord Browne-Wilkinson, "if the asset acquired is a readily marketable asset and there is no special feature (such as a continuing misrepresentation or the purchaser being locked into a business that he has acquired) the transaction date rule may well produce a fair result. The plaintiff has acquired the asset and what he does with it thereafter is entirely up to him, freed from any continuing

adverse impact of the defendant's wrongful act."

So here we say unless the BSV holders could not reasonably have known of the events in question or were locked in or induced to hold the BSV, we say they were free to sell it and reinvest.

Then Lord Browne-Wilkinson describes the advantage of this principle:

"The transaction date rule has one manifest advantage, namely that it avoids any question of causation. One of the difficulties of either valuing the asset at a later date or treating the actual receipt on realisation as being the value obtained is that difficult questions of causation are bound to arise. In the period between the transaction date and the date of valuation or resale other factors will have influenced the value or resale price of the asset. It was a desire to avoid these difficulties of causation which led to the adoption of the transaction date rule, but in cases where property has been acquired in reliance on a fraudulent misrepresentation, there are likely to be many cases where the general rule has to be departed from, and in particular where the fraud continues to influence the conduct of the plaintiff or where the result of the transaction induced by the fraud is to lock in the plaintiff into continuing to hold the asset acquired."

I will come to show that on the PCR's own evidence that's not the case here. Then there is a question:

"So long as he is not aware of the fraud no duty to mitigate can arise, but once the fraud has been discovered, if the plaintiff is not locked into the asset and the fraud has ceased to operate on his mind, the failure to take reasonable steps to sell the property may constitute a failure to mitigate his loss, requiring him to bring the value of the property into account as at the date when he discovered the fraud or shortly thereafter."

If you skip on, please, to page 187, you will see that on the facts of Smith New Court

Securities the plaintiff was, in fact, locked in. At B, about halfway down from A to B: "Smith were in a special sense locked into the shares, having bought them for a purpose and at a price which precluded them from sensibly disposing of them."

MRS JUSTICE BACON: Which page are you on?

MR KENNELLY: Page 187. I am so sorry. Top of page 187.

MRS JUSTICE BACON: Yes.

MR KENNELLY: Between A and B about halfway down. In this case the court found that the victim was locked in and couldn't have disposed of the shares when he became aware of the events constituting the fraud.

"[He] ... bought them for a purpose and at a price which precluded them from sensibly disposing of them",

and it wasn't suggested he acted unreasonably for holding on to the shares as long as they did in those circumstances.

If you go on, please, to page 191, again we see on the facts of Smith New Court how the victim was induced by the fraud to hold on to the stocks. On page 191 from F to G, this time it is Lord Steyn says:

"If Smith had not believed he was in competition with a bidder from outside the securities industry, he would have bid for the shares at a price consistent with doing a bought deal at a profit."

The bought deal was a type of deal that would have allowed him to sell the shares very quickly, but the fraud induced him not to do so. So it was a case where he was induced by the fraud. The fact he was required to hold on to them was a function of the fraudulent inducement.

This authority's principles have been restated in many cases. I will just take you to a couple, if I may.

I will go next to the Golden Victory judgment in the House of Lords. This is tab 21.

The first page is 383. Again the facts here. The facts themselves are not particularly important, but just to give them to you briefly.

MS JUSTICE BACON: This was the charterparty with the war clause.

MR KENNELLY: Indeed, madam. I am sure it is familiar to you, but just very briefly the owners chartered the ship in 1998 for seven years. There was a right to cancel the charter if war broke out. The charterers wrongly cancelled the charter in 2001 but war, in fact, did break out in 2003. The question was whether the owners were entitled to damages for the remaining four years of the charter. The question of the application of breach date rule arose.

The ship owners in this case were like the BSV holders. Faced with a wrong in the Golden Victory case in 2001 what were they required to do and how did that affect the date of the assessment of their loss?

I will ask you, please, to go to page 400. This is Lord Bingham. He dissented from the majority on other points but on these points I want to take you to he was with the majority and he states the principle on page 400. If you skip down to the last couple of sentences in paragraph 9 at F he raises the question:

"The question whether the injured party's loss is to be assessed as of the date when he suffers the loss or shortly thereafter in the light of what is then known or at a later date when the assessment happens to be made in the light of such later events as may then be known."

At paragraph 10 he states the principle upon which we rely:

"An injured party such as the owners may not generally speaking recover damages against a repudiator for loss which he could reasonably have avoided by taking reasonable commercial steps to mitigate his loss. Thus where, as here, there is an available market for the chartering of vessels, the injured party's loss will be calculated on the assumption that he has on or within a reasonable time of accepting

the repudiation taken reasonable commercial steps to obtain alternative employment of the vessel of the best consideration reasonably obtainable. That this is the ordinary rule whether, in fact, the injured party acts in that way or for whatever reason does not. The actual facts are ordinarily irrelevant. The rationale of the rule is one of simple commercial fairness."

Over the page --

MRS JUSTICE BACON: Yes, but if you carry on the point there is that the claimant should not be permitted to rely on their own unreasonable and uncommercial conduct. So we have to find that it was unreasonable on the facts for the Class B holders to retain their holdings in Bitcoin.

MR KENNELLY: Yes.

MS JUSTICE BACON: So, we have to reach a conclusion now on what is before us, that it was positively unreasonable for them to decide "We will hold on and see what the market does".

MR KENNELLY: I can see why instinctively you think if that broad reasonable assessment has to be determined now, how then can we possibly determine that short of a trial. As we will come to see in the cases, what is reasonable in these circumstances is determined according to settled legal rules and if there is an available market in our case where the BSV shares could be sold and if there are comparable cryptocurrencies in which they could have reinvested, then you can find that it was unreasonable for them not to do so.

The word reasonableness in this context, it is not a broad textured area of enquiry. It is to be determined according to settled principles.

MRS JUSTICE BACON: But there is no case that you have referred to us where the facts are remotely comparable to these. I can see that if somebody terminates a charterparty, then the owner can be said, if there is an available market and they

can go and get a new charter, then they should go off and do that, but that is a different factual enquiry to the question of if there is some market shock which lowers the value of your Bitcoin, just like any investment, is it positively unreasonable to hold on to it?

MR KENNELLY: Madam, the factual context here, although we refer to Bitcoin and cryptocurrencies, the factual context is really not novel at all. It is directly analogous to any situation where the holder of securities has been the victim of an infringement, and what they do, what they are expected to do according to the duty to mitigate is determined by the same questions we see in the cases. Was there an available market for them in which to liquidate their impaired assets? Were there suitable alternatives they could reasonably be expected to switch into?

That question of the liquidity of the market, the availability of alternatives, they are factual questions which I ask you to resolve in this application, but I ask you to resolve them according to the PCR's own evidence, because the evidence is quite clear, as I will come to, that the market was liquid and comparable alternatives were available to them at all material times.

Staying in Golden Victory, the next speech I want to take you to is Lord Brown, page 426, paragraph 79. He is addressing the breach date rule directly. At paragraph 79, page 426 he notes:

"Its most obvious manifestation is in section 51(3) of the Sale of Goods Act which really restates the common principle where there is an available market for the goods in question the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered."

But skipping ahead to page 427:

"But the rule is by no means confined to the sale of goods context and ... has been applied by analogy to a variety of other situations. ... it applies whenever" -- this is the

broad point, even if we are discussing cryptocurrencies or any other security -- "there is an available market for whatever has been lost and its explanation is that the injured party should ordinarily go into that market to make a substitute contract to mitigate (and thereby generally crystallise) his loss. Market prices move both up and down. If the injured party delays unjustifiably in re-entering the market, he does so at his own risk: future speculation is to his account."

"The rule" -- this is paragraph 80 -- "is easy to apply where, for example, goods or shares" -- and I emphasise shares -- "are traded: if it is the seller who is injured by non-acceptance, he must as soon as possible resell the goods or shares at the then available market price; if the buyer, he must similarly buy in substitute goods or shares."

Skipping down to D in the same paragraph:

"Where goods or shares are sold, the breach date rule is at its strictest."

That's because for shares like other securities, including BSV, there is normally a very liquid market. It is reasonable for the victim to enter at or shortly after the date of the breach and mitigate his or her loss.

MRS JUSTICE BACON: What's the assumption about what has happened to the shares to require mitigation, because here we are not talking about the loss of a shareholding? We are simply talking about a market shock which affects the price of that shareholding. Are you saying that in any case where there is some kind of a market shock the only reasonable thing to do is to go and sell those shares?

MR KENNELLY: Not any (inaudible). The duty to mitigate requires the victim to act when the facts constituting the breach are known to him or her. It's not necessary for the victim to know it is an unlawful act. They don't need to know there is an anti-competitive -- they don't need to know that the act is a violation of Article 101. The events need to be known or reasonably ought to be known and once they are

revealed, that is sufficient for the purposes of entering.

MRS JUSTICE BACON: That doesn't answer my question. I mean, the question is what is the nature of the event which requires the shareholder, let's say in this -- I accept shares are comparable to Bitcoin investments in principle -- but the question is what has to have happened to the shares to require that duty to mitigate to kick in, because what is being talked about here is whatever has been lost. Ex hypothesi you completely lose your shares. That wasn't the case here.

MR KENNELLY: Indeed, and it isn't the case for BSV either. What needs to be known or ought to have been known because it is a constructive knowledge test, is the events which are said to constitute the breach. So in the case of the charterparty the charterers had terminated. The owners didn't know if that was going to be found to be in breach of the charterparty or not. That question was ultimately going to be determined by the court, but they knew that the charterers had terminated.

Similarly, here the BSV holders knew that the exchanges had announced that they would they say in a coordinated way delist BSV and then they did delist BSV. So the events which they say constituted the breach were known or ought to have reasonably been known to them and that is what is supposed to have triggered their action, because that was what was harming their shares, in the same way that the charterers cancellation harmed the contract which they had, the value of the contract which the charterers had with the owners.

MS JUSTICE BACON: All right. I will try to put the question again in a different way. I am obviously not making myself clear.

The question is: is there a difference between an event which causes you effectively to lose your goods or your shares or your contract, completely lose it? Now whether or not that's legal or not and whether there's a possibility of getting damages for that later, the question is you have lost something and whether you should then replace it,

is that different to something which simply causes a shock in the market, which doesn't cause you to lose that in the case of Class B. They still held -- they still retained their holdings. In that situation why was it incumbent upon them commercially to switch out. They had not actually lost their holdings at that point. I can see if you actually lose something, then there is a question of whether you should go and replace it, but that's not this situation.

MR KENNELLY: In my submission -- forgive me for not appreciating the question -- there is no difference in principle between whether the injured party loses the asset entirely or loses a part of the value of the asset. To the extent that it is claimed to the extent the injured party goes on to say that the loss in its entirety or partly, constitutes loss and damage which -- loss and damage which the Defendants are liable for, the duty to mitigate kicks in.

So it doesn't matter, Madam, to answer your question, on the authorities whether the asset is lost entirely or whether it is damaged in part.

Now in the passage of Lord Brown's that I read to you he refers to the rule being easy to apply where goods or shares are traded. The duty to mitigate requires the victim to resell and buy in substitute goods or shares. The question then is what is meant by substitute for these purposes. What is the injured party expected to buy to mitigate the harm?

We get greater detail on that point in the Hooper judgment. Hooper is in the same bundle. It is tab 27, page 572. Page 572 is the first page. It is the sale of real property, but relevant we say. If you go to page 582, bottom half of paragraph 32, Lord Justice Lloyd refers to specific rules such as the breach date rule now under examination, which are individual examples of how the general compensatory principle is to be carried into effect, putting the innocent party in the same position he would have been in if the party in breach had performed his contractual obligations.

He refers at paragraph 33 to a judgment of Lord Justice Toulsen in Dampskibsselskabet. That is quoted over the page, page 583, and I would ask the Tribunal to see about halfway down the page after C where it begins:

"The availability of a substitute market enables a market valuation to be made of what the innocent party has lost, and a line thereby to be drawn under the transaction. Whether the innocent party thereafter, in fact, enters into a substitute contract is a separate matter. He has in effect a second choice whether to enter the market similar to the choice which first existed at the time of the original contract, but at the new prevailing rate instead of the contract rate, the difference being the basis of the normal measure of damages. The option to stay out of the market arises from the breach, but it does not follow that there is a causal nexus between the breach and a decision by the innocent party to stay out of the market" -- we rely on that for the purpose of BSV -- "so as to make the guilty party responsible for that decision and its consequences. The guilty party is not liable to the innocent party for the effect of market changes occurring after the innocent party has had a free choice whether to re-enter the market, nor is the innocent party required to give credit to the guilty party for any subsequent market movement in favour of him."

He agrees at paragraph 34 that:

"... the availability of a market is a most relevant factor in relation to the date for assessment of damages for breach of contract for the sale of land where the buyer fails or refuses to complete, but it is hardly ever the case that there is a readily and immediately available market for the sale or purchase of land."

Skipping down to the next sentence:

"That may be possible with commodities with listed shares" and so forth. "But the sale of land invariably requires time."

Again, that distinction we saw in Golden Victory, that for shares, because they

normally have a liquid market, the rule is applied at its strictest, and the injured party will be expected to liquidate and reinvest so as to mitigate.

At paragraph 38 over the page, 584:

"It seems to me that the breach date is the right date for assessment of damages only where there is an immediately available market for the sale of the relevant asset or ... the purchase of an equivalent asset."

The PCR's own case, Madam, is that there were equivalent assets in the market. They used those, in fact, to calculate their loss of the other cryptocurrencies.

The PCR, as you saw in our submission, relies on a judgment in the Commercial Court, Thai Airways. I will take you to that now, if I may. Tab 28. The first page is 586. In this case the airline could not fly certain aircraft because of the defendants' breach. So it leased other aircraft for three years and the defendants argued that a two-year lease was reasonable to address their breach, but that extra third year was not a response to the breach and it focused again on the application of the breach date rule.

I would ask you to go to page 595, paragraph 31. The basic principle again now we stated many times. I shall not read that again. You can see it, the last line is the distinction between what is properly caused by the defendant and what arises because of the claimant's own action or inaction and that's a function of the doctrine of mitigation.

But over the page at 596 we see the analysis by Mr Justice Leggatt, as he was then, in paragraph 33. About five lines down in paragraph 33:

"Thus, as I have indicated, the essential purpose of the mitigation rules is to identify in the light of what the claimant has done or not done to avoid loss resulting from the defendant's breach of contract or other legal wrong which costs and benefits accruing to the claimant are to be treated as consequences of the defendant's wrong and which

are to be treated as caused by the claimant's own action or inaction."

Skipping down to the bottom of that six -- sorry -- seven lines down:

"It is this point on which Andrew Dyson and Adam Kramer focus when they say in an illuminating recent discussion of the subject: 'Mitigation is often said to comprise three rules, but it is better expressed using just one: damages are assessed as if the claimant acted reasonably, if in fact it did not act reasonably'."

Over the page, members of the Tribunal, page 597, we see Mr Justice Leggatt's very careful analysis of what the duty to mitigate involves. He begins at the top of that page with the statement:

"Mitigation is not in truth a duty but an assumption. Damages are calculated on the assumption that the claimant has taken reasonable steps in mitigation whether it has, in fact, done so or not. Second, the test of what is reasonable is not simply one of general rationality."

MS JUSTICE BACON: Where are you reading from?

MR KENNELLY: The very top of page 587.

MRS JUSTICE BACON: Yes. All right.

MR KENNELLY: Starting at the very top of the page, three lines down.

MRS JUSTICE BACON: I have got there.

MR KENNELLY: "Mitigation" he says "is not ..."

MRS JUSTICE BACON: Yes, I have that.

MR KENNELLY: I draw your attention to the very last sentence on paragraph 34.

MRS JUSTICE BACON: Yes.

MR KENNELLY: "... the test of what is 'reasonable' ... is not simply one of general rationality but is governed by legal rules."

That is the point I sought to make to you earlier this morning:

"Various norms of reasonable conduct have become settled."

That's the point I made about reasonableness not being a general enquiry but settled according to these norms.

"Foremost of these is the expectation implicit in the market measure of damages that where there is an available market, the claimant will go into the market as soon as possible and obtain a substitute for the defendant's performance", citing the Golden Victory. "If the claimant fails to do this, the omission will accordingly be treated as a voluntary choice, the consequences of which are for the claimant's own account; and damages will be assessed as if the claimant has taken advantage of the available market."

Skipping down, Madam, to paragraph 57 --

MRS JUSTICE BACON: But that's where the defendant is not performing.

MR KENNELLY: The exact same principle applies where the defendant has committed a wrong such as a breach of Article 101. As the judge said earlier, it applies not only to breaches of contract and failures to perform, but for other wrongs which the defendant commits.

MRS JUSTICE BACON: But how do you translate that into a substitute for the defendant's performance because this is all about a situation in which the defendant simply isn't performing or you have fully lost something that you have contracted for?

MR KENNELLY: The principle, Madam, in Golden Victory is that substitute here means substitute for the defendant's performance in the particular facts of this case or substitute for goods or shares which are lost or damaged. Whatever is harmed by the defendant's wrong is the thing which attracts the duty to mitigate. It is that which needs to be substituted by the claimant, because that is what mitigates their loss. If you have a thing, an asset or a share which is damaged, rather than hang on to it and see what happens, make a commercial choice, the law requires you to act, and if there is an available market to make use of it so as to mitigate your loss. That is to sell the

impaired asset and reinvest. We will see that in the -- we see it in my submission already in Golden Victory, but the principle applies not only to a failure to perform a contract. It applies equally to torts and situations such as the one in this case. It is a basic principle of mitigation.

What is interesting about Mr Justice Leggatt's analysis is how he describes what is reasonable in this scenario is of settled norms of reasonable conduct, and foremost of these is the breach date rule. The breach date rule, as we see from Golden Victory, is where there is an available market the injured party is expected to use it so as to mitigate his or her loss. There is nothing in the case to say this is confined to a failure to perform a contract.

At paragraph 37 on the same page there is again an interesting analysis of whose perspective is material for deciding whether something is reasonable or not. It is not a subjective question focusing on the particular claimant's own commercial incentives. Paragraph 37 says:

"One result of these rules is that the claimant may have acted in a way which was reasonable from the point of view of its own business interests or personal objectives and yet not have adopted what the law regards as a reasonable response to defendant's breach of contract. That was the position, for example, in they Elena d'Amico, when the claimant's decision not to charter a substitute when the defendant wrongly terminated a time charter was found by the arbitrator to be reasonable from the point of view of the claimant's own business interests but was not in accordance with the expectation of the law that the claimant would take advantage of an available market."

That's exactly my point. The fact that the BSV holders may choose to hold on to BSV, to take a chance, that's speculation on their own account. The law requires them when they are the victim to use the available market where one exists, and I have to

persuade you that one exists. I entirely accept that.

MRS JUSTICE BACON: Yes.

MR KENNELLY: This is important, this last point, about whose perspective is material, because on the PCR skeleton that makes him in my submission in error.

If you go to the PCR skeleton, that's in the A bundle of -- I haven't got --

MRS JUSTICE BACON: It is all right. We don't need the references to the page numbers of the skeleton argument.

MR KENNELLY: It is paragraph 83.

MS JUSTICE BACON: Paragraphs will do.

MR KENNELLY: Paragraph 83 under the heading "Causation". The PCR says about halfway down that paragraph:

"If the members of Sub-Class B acted unreasonably in response to the wrong, damages are to be assessed as if they acted reasonably."

Then they say this:

"That self-evidently involves an enquiry as to what would be a reasonable response to the wrong and whether" and this is the bit that I say is wrong -- "whether what is reasonable is reasonable by reference to the members of Sub-Class B's own personal objectives or what the law deems to be reasonable as a response."

Now in my submission the court will not enquire as to whether the personal objectives of the class determine what was reasonable. We know from Thai Airways, relying on --

MS JUSTICE BACON: I don't read it as the PCR saying that the Sub-Class B's own personal objectives are the test. I think -- perhaps I have misunderstood -- I think it is accepted that the benchmark is what the law would reasonably require them to do.

MR KENNELLY: That's if that is the proper reading, then I agree with you.

MS JUSTICE BACON: Ms Ford is nodding. I think it is just the drafting.

MR KENNELLY: Then my (inaudible) is misplaced.

The point is that the question is to be determined objectively. We know from the cases that is to be determined by reference to the availability of the market for the impaired asset and a suitable alternative.

Now back to Thai Airways, page 597, paragraph 38. The learned judge goes on to say:

"The standard of 'reasonableness' is, however, applied with some tenderness towards the claimant ..."

At the bottom of that page:

"... the claimant is not expected to take steps which would involve unreasonable expense, risk or inconvenience."

I have to deal with that when I come to the facts and the burden of proof, over the page, is on me to show that there was a course of action which was reasonable to expect the claimant to adopt. You can put Thai Airways away now.

To be clear, if our application succeeds, we say that the PCR will have to replead to claim the loss and damage that was caused between the delisting events and the date upon which they should have re-entered the market, that is to sell the BSV they held and to buy comparable cryptocurrencies.

The PCR's own evidence we say shows that that is a matter of days at most, but that question is for trial.

I will turn now to the facts as pleaded by the PCR and the PCR's own evidence.

I am asked by Mr Pobjoy to show you Sharp. It is a very recent authority on these points, just to show it remains the case. That's in tab 55 of the authorities bundle, page 2173. The Supreme Court earlier this year. Go, please, to page 2195. The Supreme Court, Lord Hamlin speaking for the court, sets out the fundamental principles on compensatory principle and the principle of mitigation.

MRS JUSTICE BACON: Are you looking at paragraph 85?

MR KENNELLY: Yes. Madam, there is no need to read that again. That's restating what you have seen many times.

I would take you, if I may, to page 2198, paragraph 95. This is in my submission restating the fundamental common law principle:

"Provided there is an available market, the market price establishes the default price regardless of what the injured party actually does and even if a decision to delay in entering the market is a commercially reasonable business decision."

So reasonableness is not determined by particular personal incentives of the BSV holder. If there is an available market, the law expects him to enter it and mitigate:

"A decision to delay is the injured party's voluntary and independent commercial decision and its consequences are irrelevant to the damages payable however well or badly it works out."

Lord Hamlin goes on then to quote from the Golden Victory again in the indented passage:

"Wherever there is an available market the injured party should go into that market to make a substitute contract to mitigate and thereby crystallise his loss. If he delays, he does so at his own risk."

That principle applies equally we say to torts such as infringements of Article 101.

At paragraph 98 over the page there is a useful passage on what is a substitute. What's required is not an exact replica. We see that already from Thai Airways. A reasonable substitute is what is expected to be purchased.

I move on then to the next question of the facts. I will go first to the amended claim form and then to Mr Noble's evidence upon which the PCR relies.

MS JUSTICE BACON: Yes. At some point in the next 10 minutes we should take a break for the transcribers.

MR KENNELLY: Is that an appropriate moment?

MS JUSTICE BACON: Yes. All right. We will take a five-minute break then.

(Short break)

MRS JUSTICE BACON: Yes. You are going to the facts.

MR KENNELLY: I spoke too soon, Madam, as is always the way.

Three short points on the law before I move on addressing the questions you put to me.

First of all, when you said, Madam, is there a distinction between shares that are lost or assets lost entirely and assets that are damaged but which the holder continues to retain, the Smith New Court case itself is an example of the injured party having shares damaged by a fraud which he has held on to. The breach date rule prima facie applied in that situation but on the facts of that case the court found that the victim was locked in and therefore he fell within one of the exceptions to the breach date rule, but that case in my submission is authority for the fact that it doesn't matter if the asset is damaged as opposed to lost entirely. The same principles apply.

As to those principles the judgment of Mr Justice Leggatt, as he then was in Thai Airways, said in terms -- I read over it rather quickly -- that the principles he sets out there apply to Defendants' breach of contract or other legal wrongs. That's for your note paragraph 33 of his judgment, which I did read to you.

Again, to note the broad application of the principle. We say this in our skeleton. That passage in Thai Airways was cited by the Supreme Court in Sainsbury's and Mastercard, so in a competition context concerning a breach of Article 101.

May I show you that briefly? That's tab 35 of the authorities bundle, page 1350. The facts of this case I don't need to take you to. This case is notorious in this Tribunal. Paragraph 214 is where the Supreme Court refer to the judgment of Mr Justice Leggatt in Thai Airways and the Dyson/Kramer argument.

MR CUTTING: Can you give me that reference?

MR KENNELLY: Tab 35, page 1350, paragraph 214. The Supreme Court is dealing with general principles of mitigation. Mitigation was the central question in the Sainsbury's case. The Supreme Court quote the passage from Thai Airways that:

"Damages are assessed as if the claimant acted reasonably."

Not whether, in fact, he did. The question is to be assessed as if he acted reasonably. Over the page the Supreme Court quote the passage that I took you to from Lord Bingham's speech in the Golden Victory where the injured party, although that was a charterparty case, the Supreme Court is citing it in an Article 101 case, the wrong doers can't be held liable for loss which could reasonably have been avoided by taking reasonable commercial steps to mitigate his loss. Again the focus is on an available market:

"Where there is an available market the injured party's loss be calculated on the assumption that he has on or within a reasonable time of accepting ..."

MS JUSTICE BACON: I don't think any of this is very controversial that in an appropriate case if the wrong is a competition law wrong, then the standard principles on mitigation and avoidance of loss can be evoked. I don't think that's the issue. I think the real issue is in this type of case and given the nature of this market and what we know on the facts about the kind of market, can one say that there was a particular reasonable course of conduct, but you are going to come to that right now.

MR KENNELLY: Yes. I would ask you to look first please at the amended claim form. It is in the B bundle, tab 13, page 232. In going to the pleading and to Mr Noble's evidence I am drawing attention to the positive evidence of the PCR, which demonstrates that the class ought to have been -- ought reasonably to have been aware of the delisting events. There was an available market. There was an alternative substitute of comparable cryptocurrencies.

So here we look at the pleading on infringement and breach. This case, unlike a traditional cartel case, involves - on the PCR's own case - public announcements whereby the exchanges, it is alleged, publicly called on one another to delist BSV and it was through the public announcements that they were said to have coordinated their behaviour to the detriment of the BSV holders.

MS JUSTICE BACON: Public announcements on Twitter.

MR KENNELLY: On Twitter, Madam, yes, which as we will see in the context of this case is a medium particularly well suited to notifying the holders of BSV on the PCR's own case.

Paragraph 152:

"By its public announcement on 15th April 2019 Binance indicated its intention to delist, thereby informing other exchanges of its own future conduct. Further, by announcing its proposed course of conduct and in particular its invitation to others to 'do the right thing', Binance sought to influence the conduct on the market of its competitor exchanges and/or invite collusion…"

153. The CEO of Binance tweeted a response to a Twitter poll set up by a rival exchange. Further constituted encouragement to delist. Other exchanges public announcements of their intention to delist equally informed competing exchanges or sought to influence their conduct and these decisions were influenced by their knowledge of Binance's intentions.

Paragraph 156:

"The public announcements" and they are using the language of the PCR, "were therefore used as a means of achieving a common understanding that each participant would delist BSV and reduce uncertainty."

Then 157:

"In furtherance of that agreement or concerted practice the Proposed Defendants

decided to delist BSV and then announced their respective decisions to do so and ultimately delisted BSV."

Page 239 paragraph 175, sub (4). This is dealing with where the conduct took place. Can I draw the Tribunal's attention to the positive averment on the part of the PCR that the Proposed Defendants' English language Twitter feeds were publicly available to Twitter users around the world including in England and the collusive tweets affected users of the Proposed Defendant's websites in England from the moment they were made.

MS JUSTICE BACON: There is a difference between something being publicly available and seen by Twitter users or available to Twitter users around the world and something that the Sub-Class B holders should have seen. What if some or all of those,- - I am not saying all,- what if some of those holders simply weren't- on Twitter?

MR KENNELLY: The question, Madam, is whether the members of the Sub-Class ought reasonably to have been aware. So, there are particular circumstances --

MRS JUSTICE BACON: So that requires account to be taken of their particular circumstances. There are lots of people who aren't on Twitter.

MR KENNELLY: I mean the distinction between the particular subjective position of each Twitter user. The Tribunal is quite right. It is important to look at the characteristics of the class as a whole and ask as a whole are they likely to be aware of the delisting events, including by reference to what was publicised on Twitter.

MS JUSTICE BACON: That assumes that the class as a whole is on Twitter and following Twitter.

MR KENNELLY: The PCR's positive case before you is that this group of BSV holders are unusually technologically sophisticated. They have put that to you as part of their plan for consulting with the class members of the proposed class.

MRS JUSTICE BACON: That doesn't mean they are on a particular social media

platform.

MR KENNELLY: It does mean that they are technologically sophisticated and able to access information. It wasn't just on Twitter. The evidence before you is that the delisting events were widely publicised, not only on Twitter but on other online -- if there was evidence that these BSV holders were somehow -- a characteristic of them was they were not on the internet, I would have a difficulty, but by the PCR's own case these are sophisticated technologically and use of online platforms is uniquely suitable for communicating with them because they are more online than the average investor. I will show you where the PCR says that in their own evidence.

MRS JUSTICE BACON: All right. There is a world of difference between being sophisticated and using the internet and using particular platforms where this may have been broadcast.

MR KENNELLY: That is why I draw your attention to the particular characteristics of BSV holders, cryptocurrency investors are not, on the PCR's own case, like regular investors as a whole and the PCR makes that point positively. For this point, I am taking you only to what the PCR says themselves. They positively make the point that these Twitter feeds affected users of the Defendants' websites in England.

Of course, BSV itself was actually delisted from Binance. This is not a side show. Stepping back and asking ourselves realistically, every single detail may not have been known to each and every BSV holder, but the currency was ultimately delisted from the main exchanges. That is the very thrust of the claim. That is why they say it was so damaging, this currency was delisted from the main exchanges. It would be highly unusual if the BSV holders were not aware of that on or close to when it happened in April 2019.

That is something we do say is so strong and so obvious that you can determine it in this application.

Mr Noble's evidence --

MRS JUSTICE BACON: You say that I can make an assumption that they either would or should have been aware of that.

MR KENNELLY: Yes, because the question is whether they ought reasonably to have been aware and you can in my submission based on the evidence before you from the PCR, the contemporaneous materials, determine that they ought reasonably to have been aware on or about April 2019 of the delisting events.

MRS JUSTICE BACON: And just to be clear, you are not saying that the delisting was brought to their attention in any way other than social media and other media posts? You are not saying they were told about it directly in any way?

MR KENNELLY: No, not certainly that I am aware. Mr Noble's evidence is in the D bundle at tab 1, page 23.

MRS JUSTICE BACON: Sorry. Page?

MR KENNELLY: 23 is the -- tab 23. Forgive me.

MRS JUSTICE BACON: And the page of the pdf?

MR KENNELLY: Page 380 is the first page in this report submitted by the PCR. I'm moving on now from the question of what ought reasonably to have been known to why the BSV holders could reasonably have been expected to mitigate their loss at or shortly after the delisting events. For that, I will ask you to go to page 390 and paragraph 2.9. At 2.9, Mr Noble says -- he is now proposing to calculate the effects of the delisting, but he notes in the second sentence that:

"BSV continues to be listed on other exchanges after the delisting events."

He says:

"So public pricing data is available throughout the period."

I draw attention to the fact that it was still listed on exchanges, which meant it was bought and sold at all material times and could be bought and sold at all material times.

Further to that point, if you go to page 396 and paragraph 3.16, as the liquidity of the market for BSV, he makes the point that:

"The market capitalisation of BSV is just over $1 billion."

I rely on the last sentence in paragraph 3.16:

"The average daily volume traded in BSV is around $82 million."

So, there is, on their own evidence, a highly liquid market for the trading of BSV.

I would ask you now to go to page 426. We are looking now at the readily available alternatives to which BSV holders could have switched. Here, Mr Noble is considering the counterfactual, the price that BSV could have reached absent the infringement. For that he needs comparators. So, he asks himself: what cryptocurrencies were comparable to BSV? I rely on this to show you that there were comparable cryptocurrencies on the PCR's own case to which they could have switched.

We see at paragraph 6.25 Mr Noble saying:

"I will therefore be using other cryptocurrencies as the benchmark against which to quantify any effect on BSV prices."

Skipping down, he relies on the notion that, last part of the sentence at the bottom of the page:

"The notion that several currencies will share a common trend with BSV with the exception of the delisting event."

MS JUSTICE BACON: This is a preliminary report served for the purpose of setting out the overall methodology that is proposed. It is going to have to be tested at trial. He is not giving factual evidence at this point. He is saying 'these are the general approaches which I am going to use and which I think are going to be reasonable'. Necessarily, this is a provisional analysis. How can we use that as representing evidence of fact as to comparable, because this is all provisional and will need to be tested in due course.

MR KENNELLY: There is nothing in the report-it's not -like - I- understand, Madam, the point. It is a point that is often made in certification hearings where experts caveat their reports and say, "I may have to revisit this at trial". On the fundamental question of whether there were comparable cryptocurrencies such as Bitcoin, Mr Noble does not propose to - is not open to the possibility of changing his mind between now and trial for the very good reason that the whole case on foregone growth effects depends on showing there were comparable cryptocurrencies.

MS JUSTICE BACON: One can use it as a benchmark.

MR KENNELLY: Yes, but a benchmark because they are comparable because they are so like BSV that they can serve as a benchmark. It is their similarity to BSV that allows them to be a benchmark and that allows him to say but for the infringement, BSV would have behaved as these cryptocurrencies behaved. It is so fundamental to their claim that this is not a situation where one can say "Well, he might tweak or change his views". This is central to the PCR's case on the foregone growth effect.

MRS JUSTICE BACON: That's because some kind of a benchmark counterfactual is needed, but that doesn't mean that as a matter of fact there was a comparable which did represent an available market which the holder should have switched into because what we are doing here is constructing a counterfactual on the basis of the evidence that there is and it will be a matter at trial for the Tribunal to decide how close that is and whether that can be used as a benchmark or a comparator.

MR KENNELLY: It is their pleaded case. I will take it in stages. Their pleaded case is that these cryptocurrencies are assumed to be valid comparators. That is their pleaded case upon which the foregone growth effect depends. For the purpose of showing a reasonable substitute that is all we need. Their case depends -- they can't maintain a foregone growth effect case without saying there are reasonable valid comparators, and the only valid comparators that they advance are the other

cryptocurrencies.

Therefore, because it is fundamental to the case they advance, we say they must take the rough with the smooth. They cannot then say for the purposes of the foregone - for the purposes of the breach date rule they then deny that the cryptocurrencies were not suitable alternatives to BSV at the time of the delisting events. It is not a detail. It is central to their case on the foregone growth effect, and they pleaded as such, and these are the only comparators they advance and the only ones they can advance to make good this claim. That's why we rely on it to say well, if they are valid comparators for quantification, they are valid comparators for the purposes of an alternative point.

So, in my respectful submission, it is not a situation where the Tribunal can assume that the expert could change his mind or tweak his analysis. This is so central, so fundamental to their case that we are entitled to rely upon it and the Tribunal is entitled to rely upon it for the purposes of determining whether there was a suitable alternative at the time of the delisting events.

With that in mind, I would ask you to continue with Mr Noble's analysis. At 6.26 we see why he says they are comparable. He says:

"The benchmark is drawn from other cryptocurrencies with similar characteristics and similar historical price trends to BSV prior to the alleged conduct."

At 6.28 on page 427 he says:

"I consider ..."

He says:

"For the purpose of my initial assessment, I consider that cryptocurrencies that are related to BSV via a hard fork are a natural comparator, such as BTC or BCH."

Mr Noble does say that there are some cryptocurrencies that did very well and others that did better than BSV but not as well, and which of them it would be, whether it is one or a basket, will be a matter for trial, but the Tribunal doesn't need to wait for that.

Any of them would have been a suitable alternative according to the standards explained in the case law because they were valid comparators, and as you will see in the evidence, suitable for the investors to switch to.

For that we actually get some support in Mr Noble's second report. This is responsive evidence to the application to strike out and for summary judgment.

Can I ask the Tribunal to go, please, to Bundle F, tab 42, page 2072? He describes the nature of cryptocurrency investors. In 5.2 he says:

"Cryptocurrency investors are likely to be speculative investors willing to accept higher risk in exchange for higher reward. They potentially perceive a chance of making large gains on the basis of a relatively small stake over a potentially short period of time."

Pausing there, it is the PCR's evidence that in general the cryptocurrency investors are investing small stakes. So this is not a case such as the ones we see in the case law where an investor is so heavily into the investment that they cannot extract themselves.

MRS JUSTICE BACON: No. It is sort of £100 here or there.

MR KENNELLY: Indeed. Again, that's the PCR's evidence and that shows that a fortiori it was reasonable for them when they are aware of the delisting events or constructively aware to liquidate their investment and mitigate the damage.

Over the page, 2074, Mr Noble says at 5.7 on page 2074:

"An investor in BSV who has withdrawn their money from that cryptocurrency after the delisting events may reasonably have considered investing in alternative cryptocurrencies instead."

But then he says there may be good reasons not to do so, but I do rely on that general statement that he has made in response to our strike out application. We see then what he says in response. He says at 5.8:

“It is entirely possible that a speculative investor in cryptocurrencies will not

necessarily be following the latest developments associated with the cryptocurrency community."

We have already shown you what the PCR pleads positively about the public nature of the delisting events. I will come to what else they say about the nature of their class. When at trial, if I am successful in my strike out, the Tribunal comes to decide when it was reasonable for them to re-enter the market, there may be evidence then about other publicity that alerted the class as a whole. We say it will be a matter of days. Maybe it was weeks, but they should have, they should have re-entered the market after the delisting events. That's the point of principle.

MS JUSTICE BACON: The Tribunal is going to have to look at trial at the extent of the publicity and the extent to which that would have come to the attention of the investors. How can we without that evidence make a decision as to what the investors knew for the purposes of this application?

MR KENNELLY: The starting point is whether the breach data rule applies at all. I invite the Tribunal to find that it was reasonable for the investors to liquidate their BSV holdings and re-enter the market because there was an available market and there were alternative cryptocurrencies in which to invest, but I accept that there would be a short period of time between the delisting events and the point at which it was reasonable for them to do so which will be a matter for trial and they will recover damage between those two points, but the pleaded case is that that's not a matter for trial. They are allowed to proceed on the basis that the BSV investors held and were entitled to hold their stake up to judgment and the breach date rule doesn't apply at all.

MRS JUSTICE BACON: All right. Then let me try putting the question another way. You accept that we don't have before us the factual evidence for us to determine when the investors would have become aware of the delisting events precisely and you say

that is the reason why it would be a matter for trial as to when it was reasonable. If that's the case, how can we make a decision today at all that there was a point at which the BSV holders, Class B holders either did know about the delisting events and the announcement or should reasonably have done so? We don't have the factual evidence before us. So why can we decide one at trial but one apparently now?

MR KENNELLY: What you can decide now is that on or shortly after the delisting events on the evidence before you the class ought reasonably to have known about the delisting events. The precise date will be a matter for trial, but you are able to make the finding that I invite you to make, and on that basis and for that reason among others the breach date rule applies, and that requires me to persuade you that there is an available market and an alternative set of cryptocurrencies in which to invest, but this residual question for trial is really quite a narrow one because I do invite you to find that on or about the delisting events the class ought to have known, and again it is a question of constructive knowledge, it is an objective question, ought to have known about the delisting events.

The question of knowledge --

MR CUTTING: A thought just going through my head and it may be that I am wrong, but your arguments here place reliance on Mr Noble's two reports containing facts that you are saying for the purposes of today we should assume are good facts, but which when it comes to trial you and possibly other Defendants will be challenging large parts of Mr Noble's report. So, what is the risk for us that we make a decision today on your submissions that make in themselves assumptions about the facts in Mr Noble's report, but months later turn out to be based on parts of Mr Noble's report that you or other Defendants have successfully torpedoed?

So, for example, the question of available comparators and Mr Noble's argument that a couple of the cryptocurrencies look a lot like BSV. Those are arguments that would

tend to nudge up the claim. Not an unreasonable assumption to think that you or others would have a go at that. That would then change our view about the totality of Mr Noble's report.

Help me out here. I am just -- your whole case today rests on taking Noble as a given.

MR KENNELLY: Indeed.

MR CUTTING: Your case and others in period N will be absolutely the reverse of that.

MR KENNELLY: I can't get into our case down the road, but what I can do and I think I am entitled to and this is the answer to your question, Mr Cutting, is that we are entitled to take their case at its highest, assume what they say is correct and then show you that it is legally unsustainable as put. We are entitled to do that now because it is a strike out and we seek summary judgment. We can say if they are right about what they plead, then applying what Mr Justice Leggatt said in Thai Airways are (inaudible) approaches to what is reasonable, this should be excised and they should be repleading according to the proper legal principles.

MR CUTTING: The problem for that, isn't it, is that issues of causation are said to be or include matters of fact. So they would be points that even if not repleaded and even if aspects of Noble get challenged, we might at some later stage think 'Well, he is not all right, but it gets some of it there', and aren't those issues of fact that then lean against you because if it's a matter of fact, then there's a presumption that you roll it up into the trial.

MR KENNELLY: In every case concerning causation mitigation there are questions of fact. It does not mean they cannot be struck out. The cases refer to questions of fact often to show that where they are complex, where there are open questions of fact, it is best left to trial and they should not be struck out or summary judgment entered, but it is not the case and there is no authority to the effect that simply because questions of fact are engaged you may not strike out or seek summary judgment.

Because it is still open to you and open to any court to strike out or give summary judgment in respect of a causation mitigation issue at the initial stage, in every such case there is the possibility that at trial new facts will emerge, facts may change, but that doesn't mean you are barred from looking at the case as pleaded, assuming that everything they say is correct and then saying that is legally unsustainable taking the case at its highest. To say otherwise would be close to saying you could never strike out a case on causation or mitigation, because facts may emerge at trial that may have an impact on it.

There are cases in the authorities bundle, Alwyn, Stanford, there are examples in the past of the court striking out claims on the basis of the breach date rule. It is certainly open to you to do so, but I do need - again if there were complex contested facts on the question of available market, on the question of alternative cryptocurrencies, my position would be very different. I am relying on what the PCR says to show that that is their positive case, and they cannot on the one hand plead that there was a highly liquid market in BSV and alternative cryptocurrencies which were comparable to it and then deny the application of the breach data rule, because, as Mr Justice Leggatt shows, where there is an available market at the time of breach and a viable alternative, the breach date rule should apply. They are expected to enter the market and mitigate, and if they choose not to, that's speculation on their own account.

The reason why I say the Chairman's point about whether it is a preliminary report and Mr Noble may change his mind, that doesn't work in my respectful submission here, because if there is no -if these cryptocurrencies are not comparable their foregone growth effect claim fails. That's how fundamental it is to the claim. This is not something Mr Noble could resile from at trial. If he resiles at trial, the claim will fail. They need to say these cryptocurrencies are comparable to succeed on the foregone growth effect.

I was in Mr Noble's second report. I was looking at his page 2074. He acknowledges that BSV investors withdrawing might reasonably have considered investing in alternative cryptocurrencies. I have dealt with 5.8. Then 5.9:

"Second, to them" to the BSV holders, "the delisting activities, once they became aware of them, may not only convey news about what members of the cryptocurrency community think about BSV alone. Also, the potential to provide news about the volatility of the community as a whole. If an argument within the community can result in the delisting of one currency this might be a signal that it could happen to another currency. Therefore, an investor might reasonably take the view that the most likely direction the price of BSV from here is up once the relevant parties make up and relist."

This is the very definition we say of speculation on their own account. That's exactly what the cases contemplate when they say that after the events constituting the wrong are known, where the investor takes factors like this into consideration and decides to hold or sell, that is on his own account. He is not induced to do any of these things by the Defendants' wrong. So, it distinguishes it from Smith New Court.

As to the technological sophistication of the class, I would ask the Tribunal to go to the PCR's litigation plan. Volume D, tab 29, page 1627. So tab 29, page 1627. The litigation plan is contained there. I would ask you to go to page 1634. The heading is -this is concerned with notification to represented- persons of progress, how the PCR intends to communicate with class members.

Over the page, 1635, I would ask you to look at paragraph 30:

"Most, though not all, proposed class members are likely to be technologically sophisticated. Given this and to ensure a proportionate approach, the Proposed Class Representative's noticing and communications strategy will be largely online focused and the website will be a key component of this."

That's a point put to me by Madam Chairman a moment ago.

On 1637 the heading is there "Procedure for governance and consultation", something which they need to satisfy under the Tribunal's rules. If you go over the page you see how they intend to communicate with the class, reflecting the characteristics of the proposed class. It is all online and it includes -- there is a voice recording phone line at H but the Tribunal can see A to H for itself. Then at (i):

"Taking into account the nature of the class a campaign on Reddit, the global social news, aggregation and discussion website with aim list of targeted sub-Reddits. These are niche discussion forums on Reddit."

This on the PCR's own case is something which is specific to the particular class of cryptocurrency investors. To Madam Chairperson's point to me earlier, I have never been on Reddit. The class plainly is familiar with Reddit. That is something which the PCR themselves are taking into account in deciding how to communicate with the class. The evidence before you is that on the BSV forums on Reddit there was extensive discussion of the delisting events in April 2019. I don't need to take you to the documents, but extracts from the Reddit -- sub-Reddits are exhibited to Mr Chakrabarti's evidence. I will give you the reference. It is F/45, page 2101.

So unlike other situations, as the PCR themselves maintain, online news in particular on Reddit is something which the class, taking into account their particular characteristics, are likely to see.

So we say it is clear from the pleadings and the evidence that none of the settled bases, to quote Mr Justice Leggatt, for avoiding the breach date rule arise here. The events constituting infringement were highly publicised. The holders of BSV were or ought reasonably to have been fully aware BSV was liquid at all relevant times and Class B members were not locked in or induced to retain the BSV by the Defendants in any way, and, as we have discussed with the Tribunal now fairly extensively other cryptocurrencies were comparable with BSV and BSV holders could have switched to

them without difficulty in April 2019.

So I turn then to the PCR's response to our application on this primary point. Their first point relies on expert evidence as to what Mr Noble calls the fallacy of composition. That, to paraphrase, is if all members of Sub-Class B had sold their BSV at the time of the delisting events, the price of BSV would have fallen dramatically and that would have been worse for the group as a whole. So everyone selling their BSV at the same time was not a viable mitigation strategy. That's how it is put.

We say that misunderstands the breach date rule. The point, as you have seen clearly from the cases, is where there is an available market, the Claimants' loss is crystallised at the time of breach. It is the availability of the market that's important.

The first point in response to what the PCR says is that the perspective is that of the individual claimant. It is unreal we say to take the perspective of an imaginary, all-seeing group. The application of the breach date rule is premised on what the individual claimant could have done, and the evidence is clear that each class member at all material times had an available liquid market for BSV and an opportunity to invest.

The second point is even if the PCR is right, the fallacy composition only goes to quantum. Even if it is right to assume that the whole of the class ought reasonably to have mitigated and if they had done so, the price would have fallen to a particular level, that would go to the proper measure of their damages because we accept that they are entitled to -- if they are correct about the infringement, as a matter of law they are entitled to recover that immediate loss.

After that point about the fallacy of composition, the PCR focuses on factual questions which they say are central to determining whether it was reasonable to hold on to BSV after the delisting events.

I have canvassed many of these already with the Tribunal. I will go quickly through

the PCR skeleton to show you how they put it. Can you pick up the PCR skeleton please?

MR DAVIES: Can I just ask a clarification question about a previous point you made about quantum? Are you saying that if we strike out and then at trial the method of valuation is rather more like the sort of Sub-Class A method but for all of the class, that the post-events market valuation of BSV would not necessarily measure the value at that time, because we should in some sense take account of the fact that if everybody sold, it would be less than that?

MR KENNELLY: At trial if unsuccessful on Sub-Class B, then, to begin with, you are quite right. Sub-Class A, as Sub-Class A is currently put, is the proper starting point for assessment of loss and damage. The question then is what is the point at which their loss crystallised? In fact, Sub-Class A would be the class as a whole and their loss will not crystallise or is not likely to crystallise precisely at the moment of breach. As I say, the Tribunal will have to allow them some time -to - even pursuant to the duty to mitigate to become aware of the events, liquidate their holdings and reinvest in other cryptocurrency, and that will involve a passage of time. We say a short time. That's- a question for trial.

In that period the Tribunal is going to have to assess the loss they suffered. It will be open to them to argue that had they mitigated, had they exercised their duty to mitigate the price will have fallen in a particular way and that is material to assessing the true quantum. That's open to them to argue in the quantification exercise even consistently with the duty to mitigate.

What that reveals is that if we are successful in our application, they will have to remain in respect of Sub-Class B but also Sub-Class A, what the PCR ought to do is to have a single class and their loss and damage pleaded needs to reflect the proper legal rules summarised by Mr Justice Leggatt in Thai Airways. That is really what we seek

in this application.

Going to the skeleton argument of the PCR and going to paragraph 99, they make the point first -they- say:

"Consistent with Servier", a competition case, "the extent of the class members actual knowledge of the delisting and their coordinated nature it is highly relevant to the assessment of whether they responded reasonably to them."

That is the point put to me by Madam Chairman.

May I just take you back to Servier? It wasn't about the breach date rule, but it is relevant to the extent that the Claimants are arguing that the duty to mitigate can't arise at all unless they had knowledge, because the court in Servier rejected that as a proposition of law. It was interesting to see what they said about the role of knowledge in relation to the duty to mitigation. Servier is in B, tab 30, page 690. I would ask you to go, please, to page 706, paragraph 37.

"The relevance of knowledge.

The second main argument ..."

The claimant was seeking to argue that there could be no duty to mitigate unless they had knowledge and that was rejected by the court. The claimant argues that the duty to mitigate can only arise where a claimant has knowledge, including constructive knowledge, of the wrongdoing.

Skipping down through 37:

"... had to extend to the facts" it was argued, "constituting or disclosing the relevant breach ... If a claimant knows, or ought to have known, those facts, it is not also necessary for him to know that they constitute a legal wrong or found a cause of action."

MS JUSTICE BACON: What paragraph are you reading from?

MR KENNELLY: Paragraph 37, Madam. It is on page 706. This is a submission --

MRS JUSTICE BACON: Yes. All right. I have got it.

MR KENNELLY: - Which in our respectful submission to this extent reflects- the second part does reflect the law. Knowledge is not knowledge that there is a determined legal wrong. It is sufficient to know the facts constituting- the relevant breach of duty.

The court went on to reject the idea that knowledge was determinative. Duty to mitigate.

At paragraph 41, over the page, page 707, is the reference to the Court of Appeal in Payzu relied on by the PCR:

"... the question of what is reasonable" -- it is the indented passage -- "for a person to do in mitigation ... cannot be a question of law but must be one of fact in the circumstances."

Then paragraph 42 the court says:

"... the steps that a claimant should take in order to mitigate ... is always one of fact ... Self-evidently the claimant's knowledge ... will always be a highly material factor and in [its] absence it is difficult to see how ... mitigation could come into play. But the extent of the knowledge required may vary from case to case and cannot ... be formulated as a proposition of law."

The court refers to:

"... the inclusion" -- we say properly -- "of constructive knowledge ('ought to have known') in the formulation ... is itself an acknowledgment that the enquiry may have to go beyond the actual subjective knowledge of the claimant."

So, knowledge is relevant. I have to accept that, as I have done:

"Any further enquiry of that nature is likely to be heavily dependent on the oral evidence given at trial."

The actual subjective knowledge will depend on what emerges at trial, which is why

my submission to the Tribunal is for the purposes of constructive knowledge you have enough in the PCR's case to conclude that on or about the delisting events the class members ought to have known enough for the breach date rule to apply.

MR CUTTING: You are basing that essentially on, as far as I can see, a handful of points. One is that these were technologically sophisticated investors and the second is that the PCR proposes to communicate with them among other means through Reddit. Isn't that pushing the boundaries of what we can really rely on as giving rise to constructive knowledge for these purposes?

MR KENNELLY: In my respectful submission no, because there is a further factor, which is the one I outlined earlier, which is that the delisting events themselves were all in public and resulted in something which was on a matter of constructive knowledge obvious to BSV holders, which was that the currency was being delisted from the major exchanges. It was a very, very public proposal to delist and then actual delisting, and this is central to the PCR's case, the price of BSV was affected immediately and dramatically.

The entire premise of Sub-Class A is there was an immediate effect on the price. So the Tribunal can take account of that which is obvious, which is that unlike in an ordinary cartel case here, the matter which is said to constitute the infringement was the public campaign to delist and then the actual delisting of the currency by the major exchanges, which resulted in an immediate and dramatic collapse in the price of the currency. When you combine that with the technological sophistication of the class and the PCR's own evidence, the fact that the PCR seeks to communicate with them through specialised online fora which were full of the BSV crisis in April 2019, that is more than enough we say for you to conclude that they ought reasonably to have been aware of the events on or about April 2019.

Moving on then, if I may, to the second point that is made in the PCR's skeleton. At

paragraph 100 they say:

"Just as in Smith New Court, in which the purchaser's shares were purchased as a market-making risk with the intention of holding them over a comparatively long period, it is necessary to take into account the basis on which the BSV holders invested, and, as Mr Noble says, BSV holders typically hold small amounts as a speculative investment and are willing to hold them during periods when prices are falling."

That misses the point from Smith New Court, which is that in that case it was the defendant's actions which induced the investor to purchase shares on a basis that made them very difficult to offload when the duty to mitigate kicked in. There is no suggestion here that the Defendants induced the class to hold on to BSV at the point at which they ought to have re-entered the market in April 2019. There is no form of lock-in attributable to the Defendants of the type described in the case law.

Then at paragraph 101 the PCR says:

"The Claimants aren't obliged to risk capital in a speculative venture, nor destroy their own property."

At the bottom of paragraph 101 they say:

"In order to make the reinvestments" which they say are speculative, "Sub-Class B members must sell their holding of BSV which entails divesting themselves of their own profit and rights" which they say cannot be required.

This is difficult to understand because the whole premise of the breach date rule is that a claimant is reasonably expected to either acquire a substitute asset using their own money or to sell the damaged asset at its market price. That is obviously divesting themselves of their property rights. In calling it speculation, the PCR has run right up against their own pleaded case that their own methodology for calculating the foregone growth effect is that the other cryptocurrencies were comparable and had similar

investment potential to BSV.

At paragraph 102 the PCR says:

"The breach date rule could only be appropriate provided the Tribunal would be satisfied that both the infringement and any lingering effects thereof have ceased."

I will hear from my learned friend, but I don't understand that point to be pleaded against us in the amended claim form.

So, in conclusion then on the primary basis for foregone growth effect I do rely on what Mr Justice Leggatt said, summarising the case law in Thai Airways. What is reasonable conduct in this situation is settled. The various norms of reasonable conduct have become settled and Mr Justice Leggatt said the breach date rule is foremost of these. Where there is an available market the claimant will go to that market. If they fail to do so, the omission will accordingly be treated as a voluntary choice and damages will be assessed as if the claimant had taken advantage of the relevant market.

I will turn then, if I may, to the alternative basis for foregone growth effect, loss of a chance. Here I would ask you to go back to the amended claim form.

Tab 13, page 236. It is paragraph 168.

"Alternatively", says the PCR, "in relation to members of Sub-Class B and C, both class members have suffered the loss of a chance that BSV would become a major cryptocurrency ..."

This is the bit that troubles us:

"... consistent with the principles identified by the Court of Appeal in Allied Maples v Simmons & Simmons, recently approved in the Supreme Court in Perry v Raleys Solicitors. In the premises it will be for the Tribunal to determine the probability it would ascribe to BSV becoming a major cryptocurrency, because of the overall quality of the coin and the intrinsic value of its technology."

What those cases show you, Allied Maples and Perry, what they explain is that the loss of a chance which they describe involves situations related to a specific transactional opportunity whose value was contingent on the decisions or actions of an identified third party, and the amended claim form does not identify any specific third party upon whose action the foregone growth effect depended. PCR's claim does not arise from the loss of any specific transaction or opportunity. It doesn't depend on the actions of any identifiable third party.

So we say to the extent that they are putting their case by way of a loss of a chance, it has no reasonable prospect of success. The loss of a chance doctrine is it simply inapt for the claim they seek to make.

I will begin, if I may, with Perry and the particular passage they cite in the claim form. That is in the second volume of authorities, tab 34, page 71... -- sorry. That can't be right. Let me just see. 1280. Paragraph 20 is obviously the paragraph they cite in the amended claim form. There Lord Briggs said:

"For present purposes the courts have developed a clear and common-sense dividing line between those matters which the client must prove and those which may better be assessed upon the basis of the evaluation of a lost chance. To the extent (if at all) that the question whether the client would have been better off depends on what the client would have done" -- this being a solicitors' negligence case -- "upon what the client would have done upon receipt of competent advice, this must be proved by the claimant upon the balance of probabilities. To the extent that the supposed beneficial outcome depends on what others would have done, this depends upon the loss of a chance evaluation.

"This ... dividing line was laid down by the Court of Appeal in Allied Maples ..."

Then he describes the useful summary of Allied Maples. I will not go to Allied Maples. The summary will suffice. Skipping down a couple of lines:

"Allied Maples had made a corporate takeover of assets and businesses within the Gillow group of companies, during which it was negligently advised by the defendant solicitors in relation to seeking protection against contingent liabilities of subsidiaries ... Allied Maples would have been better off, competently advised if, but only if: it had raised the matter with Gillow and sought improved warranties and Gillow had responded by providing them."

The Court of Appeal held that Allied Maples had to prove on point (a) what it would have done on a balance of probabilities, but on (b) what the third party would have done upon the basis of loss of a chance.

We struggle to see how any of this fits in with how the PCR has put its case, but just to be clear about what loss of a chance under the Allied Maples and the Perry approach requires I would ask you to go to Wellesley Partners, tab 29 of the authorities bundle.

MS JUSTICE BACON: Page?

MR KENNELLY: That's the first page and it is page 646, please. This case concerned head-hunters who were the victims of negligent drafting by their solicitors. They claim that had the agreement with an investor been drafted non-negligently, they would have opened an office in the US, and they would have obtained a very good client, Nomura.

So page 646 Lord Justice Floyd sets out the first instance judgment from Mr Justice Nugee. Now Mr Justice Nugee was reversed in part, but these passages were upheld, and they again describe the nature of Allied Maples' loss of a chance.

At paragraph 44 he addressed loss of a chance. Skip down, please, to sub (2):

"... what the claimant has lost was only ever an opportunity to obtain something else, for example, the chance to take part in a competition or the opportunity to bring litigation. [That is] a valuable right in itself, and what the claimant proves (on the

balance of probabilities) is that he has lost that right ..."

Then the assessment of the value depends on an evaluative exercise, but that's where the claimant has lost an opportunity to obtain something else.

Skipping down to sub (3) in the indented passage:

"What Lord Justice Patten makes clear ..."

He is quoting from the Vasiliou judgment, which is cited at the top of that page at paragraph 44:

"What Lord Justice Patten makes clear ... is that this is not quite the same type of case as Allied Maples. In an Allied Maples case the claimant has not lost a valuable right, but he has lost the opportunity of gaining a benefit, albeit one" -- this is important -- "which depends on a third party acting in a particular way. In such a case the claimant does not require to prove the third party would have acted in that way, only that there was a real and substantial chance that he would. It is a question of causation, but if the claimant does establish", skipping down three lines, "that there was such a real and substantial chance, then when it comes to quantification his damages will be assessed not at 100% ... but at the appropriate percentages",

which does not depend on the balance of probabilities. It is an evaluative exercise by the court.

Over the page, page 647, sub (4):

"However, as Parabola and Vasiliou illustrate, there are other cases where the claimant does not seek to establish as a matter of causation that he has lost the opportunity of acquiring a specific benefit which is dependent on the actions of a third party; rather, he claims he has lost the opportunity to trade generally and claims the loss of profits that he would have made.

"... in [that] case the court must first decide whether the claimant would have traded successfully."

Here the learned judge is drawing a dividing line between loss of a chance and losing an opportunity to trade generally, which is not Allied Maples, Perry v Raleys loss of a chance.

If you skip down, please, to sub (6):

"On either view this is clearly a different type of exercise from that undertaken in Allied Maples. It does not require the court to find there was a real and substantial chance of a third party acting in a particular way but to reach a conclusion whether trading would have been profitable or not."

Skip on, please, to page 666. The Court of Appeal upheld Mr Justice Nugee's approach. We see that at paragraph 109 in the way they have applied the law to the facts of that case. They found that had the claimant proven on the balance of probabilities that it would have done the thing it said it would have done, and for the third party, Nomura, it established that there was a real and substantial chance that the third party would have awarded some part of the mandates to it.

It is a question really whether any form of loss of a chance has any possible role in this case at all. The PCR relies heavily, as you saw in the skeleton, on BritNed. We say that does not assist them. I would ask you to go to BritNed now. That's in tab 32, page 776.

The basic conclusion in BritNed we all know. Where an infringement is shown to have caused gist damage, there's competition in the market generally. The tribunal held that was the proper approach. In those circumstances there is no role for loss of a chance. You simply go straight to quantification.

It is interesting to note first in the headnote, page 776, very bottom of the headnote, sub (4):

"Where a claim for breach of Article 101 was made, once breach of statutory duty has been established, considering a loss of profit claim was a question of quantification,

not causation. There is no need for a claimant to establish on the balance of probabilities what it said it would have done."

For that reason, looking below that, Allied Maples was not applied. You see that at the very bottom of the headnote.

Page 787, skipping ahead, there is a high--level reference to loss of a chance. Sub (3) the President is going through the elements of the tort and the proper approach to damages.

In sub (3) he says:

"Where loss or damage is a necessary element of a cause of action, it must be borne in mind in some cases the law treats the loss of a chance of a favourable outcome as compensable damage in itself", referring to Barker v Corus.

Skipping down to (6):

"During this quantification exercise, English law moves away from the balance of probabilities."

There is a reference to loss of a chance in that context, but if you go to page 901, we see how the learned judge dealt with the loss of a chance. You see that at paragraph 427 on page 901 he says:

"When seeking to articulate what constitutes actionable harm, it is necessary to have regard to the object and scope of the statutory duty."

At sub (1) he makes the point about being -cartel- harm:

"It is the collective failure to compete that is the wrong at which the Article 101 is [directed]."

Then (2):

"In this Article 101 is different even from abuse of a dominant position under Article 102, which is directed towards the unilateral competent dominant firms which act in an abusive manner. In such a case", in an Article 102 case, "assuming the abuse had

been identified and proved, it is possible, applying the approach of Stuart-Smith LJ in Allied Maples, to ascertain what loss the abuse has caused."

Then in contrast I say sub (3):

"What the collusive misconduct of cartelists does is prevent, restrict or distort competition."

This is different.

"To require a claimant to show monetary harm in order to found a cause of action is to ignore the purpose of Article 101 and to impose too great a burden on the claimant. Rather, what the claimant must show as the 'gist' damage ..." and the consequence of that.

The loss is an evaluative exercise that does not depend on the balance of probabilities, which is why ultimately the learned judge declined to apply Allied Maples. He sets it out from page 919 to 920 that it was not applied in that context.

In any event, as I said in opening, even if loss of a chance is the proper basis to proceed, the foregone growth effect suffers from the same defect as under the primary basis, which is that it ignores the duty to mitigate, which we say arose in April 2019, because the breach date rule ought properly to be applied then.

I see the time and I had intended to finish at 1 o'clock. I have probably less than 10 minutes left. I am really in the Tribunal's hands whether I carry on or we come back.

MRS JUSTICE BACON: Why don't you finish and then we will come back after lunch and Ms Ford can make her submissions.

MR KENNELLY: I am obliged. My final point on this is to the extent that the PCR complains that they need the foregone growth effect basis to capture the future potential for growth, we can see in the cases that future potential for growth is actually priced into the price of the impaired asset immediately before the harm is caused --

MS JUSTICE BACON: Have you moved on from the loss of a chance part?

MR KENNELLY: I have moved on.

MRS JUSTICE BACON: So, what are these last points directed at?

MR KENNELLY: A final point PCR makes about foregone growth, but also the two authorities I have just shown you wrap up both the loss of chance points and the breach date rule points. It is the Alwyn case and the Salford City Council case cited in the skeletons. I will not take long. As I said, Madam, I will not take long on them. I think you have my points.

The key point I want to get across is the extent that the Tribunal are to be concerned about future potential growth being lost if the point is struck out, as I seek to do, what the cases show is that where an asset is impaired the future potential growth is actually priced into the asset at the point immediately before the harm is caused to it. So a share immediately before the harm is done to it contains within its price the market's assessment of its potential for future growth.

In the Aylwen case, that's in authorities bundle tab 16, I ask you to go to tab 16. This was a summary judgment application. So it shows that one can have summary judgment applications in the context of the breach date rule.

Go to page 208, please. Paragraphs 4 to 8 set out the facts. In summary there was a transfer of property between Mr and Mrs Alywen. Mrs Alywen was to assume responsibility for the secured loan. You see that between paragraphs 4 and 5. In the event because of the solicitor's negligence she never took responsibility for it, but that also meant she didn't have to pay any money on interest payments. The house was repossessed. It was sold and because of a shortfall she received nothing. The property was subsequently resold for a higher value and she said without the solicitor's negligence she would have kept the property and made a profit.

But the court ultimately found that by reason of the breach the claimant didn't have to

finance the loan. Had she been the owner, there still would have been a shortfall when the property was sold, and importantly at the point where she was expected to mitigate, she could have invested her own money, including the money she had saved by not paying the interest and invested it in a way that made up for her loss.

If you go, please, to paragraph 16, you see the conclusions there in the Court of Appeal. This is the defendant's submission:

"The loss is to be assessed at the date of breach. If she had been the proprietor" as she would have been had the solicitors been non-negligent, "she would have been liable for the shortfall. She could have invested her money in some other property and made the profit she said she could have made on the property. The property wasn't unique."

That's the available market point. The judge in paragraph 17, over the page, upholds that submission. The Tribunal can read that to yourselves. It is the indented passage about halfway down.

MS JUSTICE BACON: Yes.

MR KENNELLY: Thank you.

MS JUSTICE BACON: Yes.

MR KENNELLY: Then page 215, please. Paragraph 37:

"The judge was right on the evidence before him to proceed on the basis the breach date rule applied. What she lost was an asset. The asset had a value. One aspect of its value was its development potential."

Then this:

"The market value at the date the contract was entered into represented its true value."

So the development value, the future value was priced into the property when it was transferred or sought to be transferred and she had no separate claim for loss of an opportunity to develop or franchise the property."

Skipping down:

"The value would be different. What happened subsequently is immaterial. The value would be different because the market would have moved and movements in the property market are outside the loss recovered for a breach of duty by the solicitors."

Then:

"An alternative way of analysing it is to say there is nothing to suggest that this property could not be replaced. She had funds to invest. Had the situation in which the property could not be replaced because of lack of funds, the approach would be different."

But applying orthodox principles, there was an available market and it was reasonable to expect her to reinvest. This was a strike-out case where the nettle was grasped, and the breach duty rule was applied in the strike out.

Can we move on to Salford City Council, tab 19? The first page is 305. Again, very briefly you have the gist of this case in my submissions. I shall not take you through it, but the point was the property was sold -- the property was taken on by the tenants and they traded. The property as a going concern was valued at £65,000. When they mitigated, the property was worth nothing and they were not allowed to recover for future loss of profit. The going concern value had priced into it any future loss of profits. You get that from Lord Justice Mance at page 321. Paragraph 62, about two-thirds of the way down:

"The assessment of the value at the point at which the victim was expected to mitigate necessarily takes into account the business's future potential, including any risks likely to affect it."

These are orthodox applications of the breach date rule.

As I said in opening, we don't seek to strike out the whole claim. We simply seek to ensure that the claim is tethered to legal principles, which we say as pleaded it currently is not. The facts we ask you to determine on the strike out standard are not

complex, and they are set out in the PCR's own evidence. If you did strike it out, it would have the benefit of putting it on the right legal track. It would also reduce the complexity and scope of any subsequent trial, because save for the question of reasonableness in re-entering the market, which is a relatively narrow question, the alternative, if I lose, of substantiating and quantifying the foregone growth effect right through to judgment will be an enormously complex exercise.

MS JUSTICE BACON: It is not necessarily the case that that would have to be done in one and the same trial. One could have, for example, a split trial.

MR KENNELLY: Madam, that is, if I may say so, a very insightful observation, because on one view it might be said that this issue should be determined as a preliminary issue to the extent there are contested facts and not as a strike out. If you are against me on the strike-out point because of the factual points you have put to me, the issue may be better determined as a preliminary issue. That would allow the facts to be determined properly and also allow it to be resolved early. Obviously because of its complexity and its value, up to £9 billion, there may be real value in settling -- in resolving it early, because of the uncertainty. Uncertainty on quantum. Very difficult to settle a case when there is so much uncertainty as to its quantum if that has to be left to trial.

This is not to show any lack of confidence in my application, but if the Tribunal were minded to find against me, I could certainly see the sense in an indication that this matter is more suited to a preliminary issue. We think it can be resolved now, but if the Tribunal's view is that it is better determined as a preliminary issue, again we are entirely in your hands.

MRS JUSTICE BACON: Yes. All right. Thank you very much, Mr Kennelly. We will then hear from Ms Ford after the lunch adjournment. Thank you.

(1.13 pm)

(Lunch break)

(2.14 pm)

Submission by MS FORD

MRS JUSTICE BACON: Yes, Ms Ford.

MS FORD: Madam Chair, members of the Tribunal, the Tribunal will be familiar with the principles governing strike out and summary judgment and we have cited them in our skeleton argument.

There are two points in particular that we would emphasise. The first is what was said by Mr Justice Roth in Sel-Imperial Limited. This is the authorities bundle, tab 23 at page 448, the Second half of paragraph 16 of his judgment where he says:

"I would add with regard in particular to Competition Law claims or defences that where the area of law is in the course of development, the court should be cautious to assume that it is beyond argument with real prospect of success that the existing case law will not be extended or modified so as to encompass the basis of the argument advanced."

In my submission that is an observation which is true of competition law generally, but it is particularly true in the context of collective proceedings where the law and the approach to quantification of aggregate (inaudible) is very much a development. It is equally true of (inaudible) claims generally because we know that cryptocurrencies are a form of property, but it is fair to say that they are a novel form of property and the way in which the law applies to them is still being worked out.

We have seen and we have been shown various cases in the context of sale of goods, in the context of shares, context of charter parties, especially in the context of classic types of claims. We have not been shown any cases which consider how these rules apply to cryptocurrencies. In our submission this is an absolutely classic area where

there ought to be caution about any sort of application to strike out.

There is then a further relevant proposition, which is that in any area of developing jurisprudence it is not generally appropriate to strike out a claim on assumed facts and any development of law should be on the basis of actual facts found at trial.

The authority for that is the case of Begum, which is in tab 38.

MRS JUSTICE BACON: I don't think it can be said to be an area of developing jurisprudence. Mr Kennelly confirmed that he was relying on this as a basic principle about mitigation, on the basis of an established line of case law. So I am not sure one can say that that's developing law. I mean, you may have some points about the validity of the assumptions as to the facts, which we will come on to.

MS FORD: Madam, it is entirely fair that the principles of mitigation as such are not developing. Indeed, we rely on the principles of mitigation. Where the developing area of law comes in is Mr Kennelly's submission that what is reasonable has been fixed by rules of law and so is no longer a question of fact for the Tribunal. It is essentially the Tribunal is tramlined into determinations of what is reasonable that have been settled in the context of things like sales of goods or charter parties, and that's where we take issue with the proposition and that's where we say it is highly relevant that one has to consider how do such principles apply in the context of cryptocurrencies.

In our submission Binance's strike out application is essentially asking the Tribunal mechanistically to apply the breach date rule in a fixed and inflexible way without further enquiry. We say that's clearly inappropriate even on the face of the primary authority on which it is based, the Smith New Court case. Can I ask the Tribunal, please, to turn that up? It is tab 15, page 173 starting with page 39. This is the page you have already been shown which sets out the facts.

It is a case where there were two frauds concerned with shares and Mr Kennelly made

the submission this morning that shares are an example of a case where the breach date rule is applied at its strictest but, of course, this is a case where (inaudible) shares where the breach date rule was not applied and there was an exception to it.

This is also a case in my submission which illustrates the importance of the court or tribunal engaging in fact finding at trial before purporting to apply the breach date rule. The Tribunal has been shown the points at F about the particular circumstances in this case that the purchaser bought the shares as a market-making risk with a view to holding on to them over a comparatively long period to be sold at a later date.

We will see and have already seen throughout the judgment that those particular findings of fact are something that their Lordships placed considerable reliance on, and in order to make that sort of assessment one needs to engage in the -fact-finding process at trial.

Turning over to page 181, C to H, Lord Browne-Wilkinson is citing the familiar statement of Lord Blackburn in Livingstone v Rawyards Coal that the measure of damages in tort is that sum of money which would put the injured party in the same position as he would have been in but for the tortious conduct. They explain that that is always the touchstone. That is not superseded by any fixed or inflexible rules.

Then 182 from F is the beginning of a fairly lengthy consideration of Doyle v Olby (Ironmongers) Ltd, which was a case about fraudulent representation. That was a case where the claimant discovered a fraud shortly after purchasing a business, but then only sold the business three years later, and this is the first of a number of occasions where the court explains that in assessing damages, there simply is no inflexible rule.

So we see, for example, 184, A, starting:

"Second, in assessing such damages it is not an inflexible rule that the plaintiff must bring into account the value as at transaction date of the asset acquired. Though the

point is not adverted to in its judgments, the basis on which the damages were computed shows that there can be circumstances in which it is proper to require a defendant only to bring into account the actual proceeds of the asset whether he has acted reasonably in retaining it."

Obviously the question of whether or not one has acted reasonably is a fact-sensitive assessment. We see again the mention of the absence of any inflexible rule between C and D on this page, where he says quite categorically:

"The old inflexible rule is both wrong in principle and capable of producing manifest injustice."

He goes on to give two non-exhaustive examples of where the rule might be considered to cause injustice. I do emphasise that they are non-exhaustive, because certain of Mr Kennelly's submissions seem to say "Once I have ticked off some of the circumstances that have been identified in this case, I have satisfied the Tribunal that the breach date rule applies".

In my submission that doesn't follow. It is very clear from this and further passages that I will show the Tribunal that these are non-exhaustive examples of where one would not apply the relevant test.

MS JUSTICE BACON: What do you say you come under if you are saying the breach date test should not be applied in this case, because you are not saying that there is -- necessarily there is a continuing effect. That's suggested, but you don't base primary reliance on that. You are not saying there is locked in effect. So what exception do you rely on?

MS FORD: My Lady, the issues of fact that we say are relevant in this case are first of all the fallacy of composition point that Mr Noble has raised in his --

MS JUSTICE BACON: But that goes to liquidity and availability of switching out. So that's a different point.

MS FORD: My Lady, in my submission it is not a different point because it also goes to the question of whether or not one can apply a breach date rule in the context of the assessment of damages on an aggregate basis across the class as a whole, and that is in my submission an important point that one has to grapple with in the context of collective proceedings that hasn't been grappled with before and it potentially is a basis on which the breach date rule simply doesn't have any sensible application.

We also say that the class members' awareness of the delisting events feeds into the assessment and that again -- I am going to come on to develop my submissions on the legal test, but it is common ground between us that the principle that is being applied is one of mitigation. The Tribunal has already seen in the context of the test of mitigation the courts have said that knowledge of the circumstances is highly relevant and so there is a factual question as to the extent to which this class had the requisite knowledge and that then affects whether or not the breach date ought fairly to be applied in this case.

The third point we rely on is the fact-sensitive inquiry as to the motives of the cryptocurrency investors and there I apply an analogy with the facts that were found in Smith New Court itself, because there were findings there that the purchaser of shares purchased them as a market-making risk. I have shown the Tribunal that, and the intention was to hold them over a relatively long period, and that was a central element of their Lordship's reasoning as to why one should not be applying a breach date test, which assumes that they would dispose of them much earlier.

In my submission there is a fact-sensitive inquiry as to the circumstances in which investors purchased this property, this asset, and whether it is or is not reasonable for them to be expected or assumed to have disposed of it straightaway.

The final point that we do rely on -- this is again a point raised by Mr Noble -- that the Tribunal can only endorse the application of a breach date rule if it is satisfied that the

relevant breach either is not continuing or its ongoing effects are not continuing. That again in our submission is a fact-sensitive enquiry, which the Tribunal cannot engage in at this stage.

MRS JUSTICE BACON: When you get to that latter point, you will have to address the pleading point.

MS FORD: My Lady, indeed. I can give your Ladyship the short answer now, which is that we have pleaded out our positive case. Binance have not yet pleaded back to that. So we have not yet had the opportunity to plead in reply. We say these sorts of points are properly reply pleading points. So had Binance responded and said "We do not agree with the measure of loss you have applied to Sub-Class B", we say the breach date rule applies for the following reasons, one of the responses we would have made would be to say that's not appropriate because there are reasons to enquire as to whether this conduct is continuing and/or its effects are continuing and that would have been pleaded at that point.

So in my submission it is artificial to suggest that the class representative should be confined to the factual matters that have been set out in the positive case when we haven't had an opportunity to plead back to this point that Binance have now raised.

MRS JUSTICE BACON: All right. So we are looking at Smith.

MS FORD: We were just working through Smith. I was highlighting the various points at which there is emphasis on the lack of a fixed and inflexible rule and also the fact that examples of deviating from the rule are not expressed to be exhaustive.

The passages I have shown the Tribunal so far are specifically in the context of deceit, but at H on page 184 we then come to the general rule in other areas of law, and this is the passage that the Tribunal has already been shown. Again we see emphasis in this context that:

"Recent decisions have emphasised that this is only a general rule: where it is

necessary in order adequately to compensate the plaintiff for the damage suffered by reason of the defendant's wrong a different date of assessment can be selected."

It goes on to give an example in the law of contract. He also cites what Lord Justice Bingham is saying over the page at B, "While the general rule undoubtedly is to assess at the date of the breach, this rule also should not be mechanistically applied in circumstances where assessment at another date may more accurately reflect the overriding compensatory rule."

So a yet further emphasis that this should not be applied mechanistically.

We then come to his summary of the applicable position starting at C on page 185. Yet again we see the court saying there is no strict and inflexible rule:

"In many cases, even in deceit, it will be appropriate to value the assets prior as at the transition date if that truly reflects the value of what the plaintiff has obtained."

Then you see:

"Thus, if the asset acquired is a readily marketable asset and there is no special feature."

He gives again examples such as “transaction date rule may well produce a fair result”.

Then we see at E this passage that points out the advantage of applying a transaction date and that's a passage that Binance have sought to rely on in particular in their skeleton as suggesting that this is a good reason to apply the breach date rule in the present case.

In my submission when one looks at the context in which the court is making this point, it is clear it is saying that this is an advantage which arises where it might otherwise be appropriate to apply the breach date rule, but it doesn't give any independent reason to apply the breach date rule where fairness suggests that the rule should otherwise be departed from.

We can see that starting just above F. It has made the point about the benefits for the

purposes of quantification but then it says:

"In cases where property has been acquired in reliance on fraudulent misrepresentation there are likely to be many cases where the general rule has to be departed from in order to give adequate compensation for the wrong done to the plaintiff"

In particular one sees again the two examples that are relevant to that particular case. Their Lordships do there make a reference to the duty to mitigate, which you have also been shown, between G and H.

They say fairly categorically that “so long as the plaintiff is not aware of the fraud no question of duty to mitigate can arise."

Of course, at the very least there is an important factual inquiry there as to the extent of the claimant's awareness.

Turnover, please, to page 186. We can see there is then a numbered set of principles that Lord Browne-Wilkinson sets out. Once again, we see the emphasis on the general rule not being inflexibly applied. This is principle number 4:

"As a general rule, the benefits perceived by him include the market value of the property acquired as at the date of the acquisition, but such general rule is not to be inflexibly applied where to do so would prevent him obtaining full compensation for the wrong suffered."

Then the fifth principle is essentially confirmation that the examples that are being given as to the sorts of exceptions to the rule are not exhaustive, because Lord Browne-Wilkinson says:

"Although the circumstances in which the general rule should not apply cannot be comprehensively stated."

He goes on to give the two examples which have been mentioned fairly consistently throughout this judgment.

So on any view the basis on which one might depart from the breach date rule is not closed.

At 187 the passage at B the Tribunal has already been shown. This is where we see the importance of the facts that were found at trial in this particular case, because Lord Browne-Wilkinson is placing emphasis on the fact that the Judge found that the shares were acquired as a market-making risk and that's the basis on which he considered in this particular case the relevant rule shouldn't apply.

Just dealing briefly with Lord Steyn's judgment, if we go, please, to 203, we see that Lord Steyn similarly is at pains to emphasise that the transaction rule is not immutable. This is starting at A. He says:

"It is right that the normal method of calculating the loss caused by the deceit is the price paid less the real value of the subject matter of the sale. To the extent that this method is adopted, the selection of a date evaluation is necessary. And generally, the date of the transaction would be a practical and just date to adopt. But it is not always so. It is only prima facie the right date. It may be appropriate to select a later date. That follows from the fact that the valuation method is only a means of trying to give effect to the overriding compensatory rule."

He cites some authority for that.

Then he carries on:

"Moreover, and more importantly, the date of transaction rule is simply a second order rule applicable only where the valuation method is employed. If that method is inapposite, the court is entitled simply to assess the loss flowing directly from the transaction without any reference to the date of transaction or indeed any particular date. Such a course will be appropriate whenever the overriding compensatory rule requires it."

Again, it is very clear that one is not trammelled into a fixed and inflexible rule.

Worth picking up at page 204 at A. He makes clear that causation is to be categorised as an issue of fact. Then, finally, 204 E to F, we can see Lord Steyn is similarly placing emphasis on the particular facts that have been found in the circumstances of this case as to why the purchaser bought the shares.

In my submission once it is accepted that there is no rigid inflexible rule and once it is recognised that there needs to be a factual enquiry as to whether there are special features that would point to a different approach to quantification, in our submission it is highly unlikely that this is going to be a case suitable for strike out or summary judgment.

Now Binance did cite the Aylwen and Taylor Johnson case as an example case where the breach date rule was applied on an application for summary judgment and there the Court of Appeal did feel able to make a finding of fact and the Tribunal was shown it. It is the one at paragraph 238, page 215 of the bundle. They made the finding of fact that there is nothing to suggest that this property could not be replaced. The claimant had the funds to reinvest. Even then it did go on to recognise that had it been in a situation where the property couldn't be replaced due to lack of funds, the approach of the court to the loss might have been different depending on the precise facts, but the obvious point is that the fact that the Court of Appeal was able to make the requisite factual findings in that particular case self-evidently doesn't mean that it would be appropriate to proceed on a summary basis in every case. Our submission is very much that this is not a case where it would be appropriate.

Just to pick up one other point that was made by reference to the Aylwen case, it was pointed out that the Court of Appeal there felt the potential for future growth of the relevant property had been priced in.

Again, whether that is true or whether that is not true in our submission is a question of fact and it is a question which in our submission the Tribunal could not possibly

decide on the basis of the material before you today.

It is common ground between us, and I have adverted to it already that what underpins the breach date rule is essentially an enquiry about the principles of causation and mitigation, and they are essentially two sides of the same coin. The basic test is whether the claimant has acted reasonably in response to the defendant's wrong. You have been shown one of the authorities on which we rely on for that proposition, which is the Thai Airways judgment, paragraph 33, but I would like to also show the Tribunal what was said by the Supreme Court, Lord Leggatt again, in Stanford International Bank. This is authorities bundle tab 47, page 1930. The relevant paragraph is paragraph 43 of Lord Leggatt's judgment. He says there:

"The error lies in the premise that loss caused by a breach of duty is generally to be assessed as at the date of the breach. There is no such rule of law. Losses caused by breach of a contractual or common law duty routinely occur after the date of the breach and are generally to be assessed at whichever is the earlier of the date when the loss occurred and the date when damages are awarded. Sometimes, for example, in many personal injury cases, this requires the court to quantify losses which have not yet occurred but are likely to occur in the future.

The reason why in some types of case, for example cases involving loss of or damage to goods, it is often appropriate to take a valuation date at or near to the date of breach is the effect of a rule which I will call the market mitigation rule. This rule is that, where there is an available market in which an adequate substitute can be obtained for goods or services of which the defendant's breach of duty deprived the claimant, damages are to be assessed as if the claimant entered the market and obtained such a substitute at the earliest reasonable opportunity, whether or not the Claimant in fact did so.

So where, for example, a seller wrongfully fails to deliver goods, the market mitigation

rule generally means that the measure of damages is the difference between the contract price and the market price of the goods at (or shortly after) the date when the goods should have been delivered: hence the prima facie measure of damages in Sale of Goods Act. But where the market mitigation rule does not yield this result as, for example, where the claimant is not aware of the defendant's breach until sometime later or where there is no available market in which an adequate substitute for the loss performance could be obtained, the relevant loss will occur, and the damages will therefore be measured, at a different date."

So here we see reference to the concept of there being available market.

The first point to emphasise is Lord Leggatt is very clear even that it is not an absolute rule. He is using words like "generally" and he is saying the market mitigation rule doesn't necessarily apply.

Mr Kennelly made the submission that what is reasonable is determined by settled legal rules and so he is essentially suggesting that the assessment of reasonableness has been carried out in advance and it is not open to this Tribunal to depart from what is essentially a rigid and inflexible test as to what is reasonable and what is not. In my submission that is clearly not right, and it is contrary to the Smith New Court authority. He is quite right that the law has identified what is usually reasonable in familiar cases. So, for example, we have seen -- we have been shown the Victory case, which was the charterparty case. We have been shown the Sharp case, which was a sale of goods case about pulses, sale of pulses. The law has identified what is usually reasonable in familiar circumstances, but it certainly has not identified a completely inflexible rule and that was made very clear by Smith New Court case itself.

In our submission BSV as a cryptocurrency is not goods. It is not shares. It is a property right. It is an asset, but the nature of the property right is very much a developing area of law, and in our submission, it is not safe to assume that the same

principles necessarily apply in the same way as to classic cases such as sale of goods, charterparties.

MRS JUSTICE BACON: What is the distinguishing factor in principle and leaving aside your specific points about discovery of the -- discovery of the tweets and delisting and the liquidity of the market. What is your specific point on why cryptocurrency is different from, say, a shareholding?

MS FORD: My Lady, the inquiry is always a factual inquiry about what happens (inaudible). The factors that I have identified are the ones that in my submission the Tribunal needs to take a view on, a factual view in the light of the full finding of fact.

MRS JUSTICE BACON: That doesn't answer my question. You say that cryptocurrency is a different kind of property right. Now there are specific issues about whether there was an awareness of the delisting event. That has nothing to with cryptocurrency as a type of right. The submission you are making now is a different submission, which is that this is a different right by its very nature such that the principles applied to the reasonableness of switching out into another asset in cases such as charterparties or sale of goods or shareholdings don't apply. So you need to address the point at that level of generality. What is it that makes cryptocurrency different by its very nature, leaving aside the specific questions about awareness in this case.

MS FORD: The key point of distinction that we rely on in response to that question goes to the motives of the purchases of cryptocurrency, the basis on which they make their purchases. I am going to come on to show the Tribunal what Mr Noble has found about those facts, but the premise that underlies the conventional cases that the Tribunal has been shown means that it is entirely reasonable to expect where there is an available market an investor to simply go out and buy essentially a substitutable good, a fungible exchangeable, interchangeable product by way of mitigation for the

wrong that they have suffered.

In my submission it is very much an open question whether it is reasonable to expect the holder of a cryptocurrency to act in the same way.

MRS JUSTICE BACON: But why? This is an investment like anything else.

MS FORD: This is precisely the factual question is whether it is or is not an investment to be treated in that way. Mr Noble has indicated, and I will come on to show the Tribunal the relevant passages, but he has looked at publicly available information about the characteristics of cryptocurrency investors and it goes to what we say needs to be a fact specific assessment of the reasonableness of the conduct of these investors.

The Tribunal in my submission cannot simply proceed on the assumption that it is reasonable to expect these investors to act in the way they would if they had bought a consignment of pulses or signed up to a charterparty.

MS JUSTICE BACON: Right. Well, you will have to take us to the evidence on that in due course.

MS FORD: Certainly. I was dealing with the common ground that this is essentially either a question of causation or mitigation, two sides of the same coin. I do make the submission that because it is an issue of that nature, in itself it is fundamentally unsuitable for summary judgment because it entails an inquiry, a fact-sensitive inquiry as to what is the reasonable response to the wrong and that in my submission is an enquiry which can only be conducted at trial.

There is a lot of authority in the competition context generally and also in the collective proceedings context to the effect that questions of causation and mitigation are not suitable for summary determination. That was the import of some of the paragraphs that the Tribunal has already been shown in Servier. That's at tab 30 of the bundle.

MRS JUSTICE BACON: Although in that case there was a preliminary issue trial in the end.

MS FORD: My Lady, yes. Of course, the important difference between a preliminary issue trial and a strike-out is the express recognition that there needs to be fact finding before one can determine those issues, but the case that -- the first step was an attempt by the claimants to say that there wasn't even a runnable case on those points and that's the judgment that's behind tab 30.

MRS JUSTICE BACON: Yes, and that was rejected.

MS FORD: That was rejected. So the argument was -- if the Tribunal looks at 691, the argument was that there had been a relevant failure to take reasonable steps to encourage switching from the drug which was at issue to --

MRS JUSTICE BACON: I have some familiarity with the case.

MS FORD: I seem to recall it might, yes.

Madam, you may then recall that that was put in three different ways, and we can see it from paragraph 1. It was said either that's a failure to mitigate, or it was said it was contributory negligence, or it was said that it was a break in the chain of causation.

MS JUSTICE BACON: Yes, and Mr Justice Henderson decided this was all pleadable in principle.

MS FORD: He said it was pleadable and he said it was essentially a matter for trial. That's some of the passages that you have already been shown.

So, for example, page 707 --

MRS JUSTICE BACON: All right, but this doesn't establish a general proposition that questions of causation and mitigation are not in principle suitable for summary determination. It was pleadable on the particular facts.

MS FORD: Well, Madam, in some respects I certainly wouldn't go so far as to say that every single question of causation or mitigation has to go to trial. I don't need to

go that far, but he is putting it in pretty broad terms. If we look at 41, for example --

MS JUSTICE BACON: The thing is you make submissions about other cases like charterparties or sale of goods not really informing this case, but exactly the same could be said about the mitigation defence in Servier. It was a very different point.

MS FORD: Well, there is no inconsistency in my submission, because the reason I say that the cases about charterparties and sale of goods do not inform this case is because it is a fact sensitive inquiry and that is precisely the point that Mr Justice Henderson, as he then was, is making in this case as to why he can't strike them out now and why it has to go to trial.

MS JUSTICE BACON: But he doesn't as far as I remember make any broad point that in principle issues of causation and mitigation have to go to trial.

MS FORD: He does not go that far, nor, Madam, do I, but the statements are fairly strong. In paragraph 41, citing Payzu:

"It is plain that the question of what is reasonable for a person to do in mitigation of his damages cannot be a question of law but must be one of fact in the circumstances of each particular case."

Then at 42:

"In my view the decision in Payzu constitutes binding Court of Appeal authority that the question of the steps a claimant should take in order to mitigate his loss is always one of fact to be decided in the light of all the circumstances."

He goes on to say:

"Self-evidently the claimant's knowledge of the circumstances giving rise to the breach shall always be a highly material factor and in the absence of any relevant knowledge, it is difficult to see how in practice the doctrine of mitigation could come into play."

Now the point that my learned friend relied on this authority for is the next point, where he is open to the possibility that one might address knowledge on a constructive basis.

So he goes on to say:

"But the extent of the knowledge required may vary from case to case, and cannot in my judgment safely be formulated as a proposition of law. As so often, everything will depend on the full facts as found at trial. Furthermore, the inclusion of constructive knowledge ought to have known."

That is, of course, the way Binance put their case.

MS JUSTICE BACON: Yes. We have looked at this passage. The basic point is that you can't decide this without any factual enquiry but that's not what Mr Kennelly is saying. He accepts head on that you have to establish certain facts. He says you can establish those by reference to your own evidence and pleaded case. So, he is not saying one decides this in a complete factual vacuum.

MS FORD: Madam, yes. I will come on to address why we say that what is available is insufficient for the Tribunal to safely reach a view. That is consistent with the emphasis that Mr Justice Henderson was there saying:

"Any further inquiry of that nature" -- this is the last line. When he is saying "any further inquiry of that nature" what he means is an inquiry that goes beyond the actual subjective knowledge of the claimant. So an enquiry about constructive knowledge is likely to be heavily dependent on the oral evidence given at trial.

MS JUSTICE BACON: Ultimately, I am not sure there is much between you on the law when it comes down to what you say can be established from the facts or cannot be established from the facts.

MS FORD: My Lady, it may well be that that's the case, in which case I can simply rely on my skeleton argument for some of the other examples we have given as to where the Tribunal has not been prepared to strike out questions of mitigation --

MS JUSTICE BACON: Yes.

MS FORD: -- or of causation. The examples we have given are the Le Patourel case,

where there was --

MS JUSTICE BACON: Yes, but all on very different factual situations. One has to look at what facts we have got here.

MS FORD: Madam, that's absolutely right.

On that basis then, turning to the issues of fact in the present case, Binance's case is put on the basis of what are very clearly assertions of fact. So if we look, for example, at their skeleton argument, there is an assertion that BSV was a readily marketable asset for which there was an available market. That's the heading at paragraph 23. There is the factual assertion there is no special feature which locked in Sub-Class B. That's the heading at paragraph 24. Then there is an assertion that there is an available market for other assets with the same or similar investment potential. That's the heading above paragraph 26.

In our submission those are all transparently the sort of factual assertions that are unsuitable for summary judgment.

Now Binance's answer to that is to say "Ah, all those factual assertions are on the PCR's own case". That's the formulation that one sees fairly repeatedly in the skeleton, and it was also used this morning, but what in my submission Binance have done is to work through and to cherry pick selected snippets from the PCR's evidence, which is directed at other issues in the case.

The reason I say that is, of course, as I have said, Binance have not actually pleaded back to the PCR's positive case, and they have not formally pleaded any issue of causation or failure to mitigate and so we have not pleaded out our case in (inaudible). So what they have done is selected individual snippets from the existing body of evidence that the PCR has put in in support of its positive case and in our submission that is a very long way from a full and complete factual investigation of the issues that Binance has now raised on this application.

Dealing first with the fallacy of the composition point, this is the point that's explained by Mr Noble in the supplemental Oxera report. So it is Bundle F, tab 42, starting, please, at 2056. He explains what's meant by a fallacy of composition generally at 2.2:

"A fallacy that is frequently unpicked by economic reasoning is the 'fallacy of composition'. This occurs where properties that are, in fact, true for some part of a group are assumed to be true for all members of the group, but where this property cannot be true for all members."

He goes on to explain the relevance of that have in section 2(b) on the next page starting at 2.5:

"The Binance strike out application is asserted on the basis that all Proposed Class Members in Sub-class B could have mitigated their losses if they had sold immediately. This is also an example of a fallacy of composition. If all Proposed Class Members in Sub-Class B had sold their BSV, this would, holding other factors constant, have increased supply without any countervailing increase in demand. This would tend to reduce the price of the BSV. If divesting from BSV is optimal for the members of Sub-Class B, it would also be optimal for members of Sub-Class A and for holders of BSV who are not domiciled in the UK. If every BSV investor around the world who could divest had done so, the price of BSV would have fallen dramatically. Had that happened, only the sellers of BSV who moved fastest would have seen any benefit from adopting that strategy. Overall, the scale of the aggregate losses to Proposed Class Members could have increased had all of them sold or tried to sell their BSV."

He goes on at 2.7:

"While there may be mitigating actions for individuals, there are no clear mitigating actions available for the Proposed Class Members in Sub-Class B as a whole, or

indeed, for the wider group of people holding BSV around the world."

So the point he is making is that what Binance said should have happened is simply not a viable strategy for every class member.

MR DAVIES: So Mr Kennelly this morning said that that could be dealt with in quantum in that if we were to strike out, then there wouldn't be a need for Sub-Class B to sort of muddle the proxy evolution of other cryptocurrencies, but instead if one did have to take account of this effect, it would be by somehow estimating the gap between what the market value of BSV actually was and how much the Claimants could have got for it had they liquidated on the day.

MS FORD: Yes. That submission was made. That is made on the premise if we were to strike out but this in my submission is an important reason why one should not strike out. The strike-out is based on the breach date rule. The breach date rule is essentially asking what is reasonable and the course of action that Binance proposes is patently not reasonable, because if every class member pursued it they'd actually be worse off. So that is one good reason why in our submission the breach date rule clearly doesn't apply.

Now Binance's answer --

MS JUSTICE BACON: If you could just pause a minute. Thank you.

MS FORD: Binance's answer comes down to this debate between could and should, because they say that if the claimant could have sold their assets, then the breach date rule tells you that their loss has to be assumed to crystallise at that point in time and that's the end of the inquiry. So they say one doesn't need to trouble oneself with what would actually happen if the entire class did as they suggest.

Now in our submission that is wrong in law for the reasons that I have already been canvasing with the Tribunal, because the reason that the presence of an available market usually is treated as crystallising this loss is because the law has identified that

in regular circumstances it might be reasonable to expect the claimant to do that. So that is the Thai Airways case at 33 and the Stanford case that I showed the Tribunal at 43.

The factual enquiry is what the claimant should have done, and the case law has identified the common situations in which it might be considered reasonable to expect them to go out into an available market, but there is still underlying factual enquiry. It doesn't get away from the core question that this Tribunal has to grapple with, which is what is reasonable? What is the class's reasonable response to this wrong, and the answer to that enquiry in our submission is necessarily different for a large class of claimants than for a single claimant, because it might well be reasonable to expect a single claimant to mitigate their losses by selling into the market, but that strategy clearly doesn't work if everyone were to do the same thing.

Now this in my submission is also a reason why this particular application raises novel issues which are not suitable for strike out, because what we are getting into here is a question about how these established concepts of mitigation and causation apply in the context of collective proceedings when one is seeking to quantify an aggregate award of damages in respect of an entire class.

Mr Kennelly made the submission that the application of the breach date rule is premised on what the developed claimant would have done. Now that in my submission very much begs the question: can and should one be applying the same rule when one is seeking to quantify the aggregate damages of an entire claimant class?

At the very least in our submission this gets into the principles identified by Mr Justice Roth in Sel-Imperial. This is necessarily an area of developing jurisprudence and that is the reason why one should not strike out at this stage.

So that's the fallacy of composition. That's the first point we rely on.

The second point is there is a clear dispute of facts between the parties as to the extent to which the members of the class were aware of the delisting events. Mr Noble in his supplemental report has explained that there is a realistic prospect that a significant proportion of BSV holders may not have been immediately aware of the delisting events and might have remained unaware for a period of months or even years.

This is the supplemental Oxera report in Bundle F, tab 42 at page 2069. The paragraphs we rely on are essentially section 4 'potential for lack of awareness of the delisting events and their coordinated nature'. The Tribunal will see paragraph 4.3. Different holders of BSV may have become aware of the delisting events at different times. Some may have been unaware of the delisting for a few weeks or a few months. Others may have remained unaware that there had been a delisting event for many months or even years.

I note that those who became aware of the delisting events during or shortly after they happened and chose to sell their holdings are, by definition, not in Sub-Class B, and therefore, this strike out application would not apply to them.

Paragraph 4.4 deals with the fact that the delistings were announced on Twitter. Three lines up from the bottom:

"Given that the delistings were announced on Twitter (now known as X), but a substantial number of cryptocurrency holders did not use social media to research cryptocurrency (and – I assume - continued not to after their purchase)".

The Tribunal will see footnote 22, he is referring back to publicly available information that he set out at 3A.3. He said:

"It is likely that these cryptocurrency holders were unaware of the announcements. Even those who do follow the relevant accounts on Twitter may not have seen the relevant tweets if they were not checking Twitter at the relevant time."

So that was Mr Noble's assessment based on the publicly available information.

Mr Chakrabarti then responded to Mr Noble in his second statement. So, if we look, please, at Bundle F, tab 44 on page 2095, in paragraph 8 he refers to paragraph 4.4, which I have just shown the Tribunal. In paragraph 9 he says that this assertion is irrelevant.

MS JUSTICE BACON: Hang on. Let me catch up. Paragraph?

MS FORD: Starting paragraph 8 where he refers to the report that I have just shown the Tribunal. He responds in paragraph 9 and he said he has received significant -- he is referring to the announcement. He said:

"I understand the announcements to be a reference to the allegedly collusive tweets and delisting announcements."

Then he says:

"These received significant publicity outside of Twitter (now known as X), including but not limited to the following."

The Tribunal will see a list of articles: one from Yahoo Finance, Bloomberg, Financial Times, CoinDesk, Bitcoin, FLOT News, another CoinDesk, Finance Magnates, Cointelegraph and Reddit.

So, he has identified instances where these announcements were publicised. Mr Noble has then addressed that in a subsequent letter. That is in the supplemental bundle, which I hope the Tribunal has. It is a supplementary hearing bundle. It is at page 73 within that bundle.

MS JUSTICE BACON: I only have the -- oh, hang on. Yes.

MS FORD: It is a letter dated 24th May 2024 that Mr Noble sent in order to take into account the further information that he had been provided by Mr Chakrabarti.

If the tribunal goes over to page 74, you can see at the top of the page:

"Mr Chakrabarti helpfully raises the point that the delisting events received coverage in various news media."

He says:

"I have therefore revisited my conclusions in the light of this point."

"Importantly the publications he cites in his witness statement may well not have the necessary reach to ensure that there was not a substantial proportion of cryptocurrency investors who might still have been unaware of the delisting events months after they occurred. For example, three of the publications are financially orientated media; Yahoo Finance, Bloomberg, and the Financial Times. The others are cryptocurrency news websites or internet forums focused on cryptocurrencies, for example, Reddit forums."

He says:

"I have conducted my own news searches checking a variety of websites and using other services such as Google News over a date range of 10th April 2019 to 25th April 2019 and have found no mention of a delisting in a wide selection of mainstream news outlets popular in the UK. For example, none of the BBC News, ITV News, The Guardian, The Sun, The Telegraph, The Independent or the Times websites appear to have carried the numbers of the delisting."

He says:

"Mr Chakrabarti's witness statement has helpfully led me to consider another avenue through which the BSV investors may have become aware of the delisting events. This implies that a greater number of class members may have become aware of the delisting events than I had originally envisaged."

MS JUSTICE BACON: What does he mean by another avenue?

MS FORD: I think he means the news media that Mr Chakrabarti has identified, which he had not previously taken into account, but he goes on to say:

"However, I do not consider that it changes my ultimate conclusion that a significant proportion of BSV holders may not have been immediately aware of the delisting

events and could have remained so for a period of months after the delisting events given the nature of the publications in which this news was carried."

So, in my submission there is a very clear dispute of fact between the parties as to the extent to which members of Sub-Class B would have been aware of the delisting events.

MS JUSTICE BACON: I think what he says is a bit different. He now says that they could have remained unaware for a period of months after the delisting events. What he previously said was that a significant portion of those could have been unaware for months or years. Is he resiling from that?

MS FORD: There is that distinction. I do not know whether or not the intention was to draw that distinction, given that he says:

"I do not consider that it changes my ultimate conclusion."

He is essentially saying 'II have seen this. This is further information. I have taken it into account. I do not consider it changes my ultimate conclusion'.

I think it was common ground with my learned friend to confirm that he was not suggesting there had been any direct notification of the relevant class members.

So we do say that there is a relevant factual dispute as to the extent of awareness within the class of these events.

We say that the question of awareness is highly relevant. I have shown the Tribunal the authorities on that. It was in Smith New Court itself, page 185G and the Tribunal has seen Servier at paragraph 42. Binance's position is obviously that actual awareness is irrelevant because they say investors are assumed to act reasonably, but even if that were right there is still a relevant factual enquiry, which is whether or not the breach was reasonably discoverable.

That relevant factual enquiry obviously entails looking at all the means by which they could reasonably have discovered relevant events. So, we say this is a matter in which

there is a pertinent factual dispute and so it is simply not suitable for summary judgment. That's the second point.

The third point is the motives of cryptocurrency investors. The Tribunal has the point that in Smith New Court itself that was an actual finding that was very pertinent to their Lordships' reasoning. We say in the same way there is a question of fact as to the basis on which BSV holders invested and whether it is reasonable in all the circumstances to expect them to divest themselves of assets in response to the wrong in so far as they became aware of it.

MS JUSTICE BACON: Well, I think Mr Kennelly disputes that that's a relevant -- that the subjective motives are relevant on the basis of authorities such as Sharp v Viterra. It is not about whether there is a commercially reasonable business decision if there is an available market into which the wronged claimant can switch.

MS FORD: Madam, yes. That is partly -- that's a submission of law that takes us back to the very trammelled way in which Binance suggests this Tribunal has to approach the question of reasonableness, essentially that they accept that the enquiry is what is reasonable, but then they say that existing case law has already conducted that enquiry for you and that you are confined to what is reasonable in the context of existing case law such as the charter parties and the sale of goods.

MS JUSTICE BACON: No, that wasn't the point that he was making. He was making the point that it is an objective test rather than a subjective test. If that's right as a matter of principle, then it is difficult to see how the motives of the investors feed into that. Do you accept that it is an objective test of reasonableness?

MS FORD: Madam, as far as all that is being said is that the enquiry is an objective assessment of reasonableness, then yes, we accept that, but we still say that it is a factual assessment. It is not one that is confined to the very limited factors that have been identified in existing authorities on different elements of property.

The Tribunal is not confined in assessing what is objectively reasonable in response to this wrong to simply saying is there an available market? Yes. End of enquiry. We say that the factors that Mr Noble has identified about the objective characteristics of these types of investors are properly to be taken into account in that enquiry. These are the points that he has raised in his supplemental report, section 3. So this is Bundle F, tab 42, page 2068. The Tribunal will see -- I should show you the beginning of this section. There is an entire section, section 3 of his report, "Investors in cryptocurrencies and their motives" beginning at page 2059. He explains what he is doing at 3.1. He says:

"In this section, I consider what we can learn about investors in cryptocurrencies in general, and investors in BSV in particular, from publicly available data in the UK. I then consider what we might be able to do further about their motives for investing which may be relevant to the question of whether the breach date rule applies."

In my submission that's not inconsistent with an objective assessment of the question of reasonableness. Where Mr Kennelly and I differ in my submission is that he says that assessment of reasonableness has already been done and the Tribunal is simply constrained by the authorities to proceed on an assumption that it is reasonable to expect these investors to go out into the market and sell their holdings. In our submission the Tribunal is not confined to assume that that is the reasonable response, and it is entitled to assess all the objective circumstances in reaching an independent view as to what is reasonable in the circumstances of this case. That is what these points go to, and the summary is at page 2068, paragraph 3.29. It says:

"The overall picture in terms of holders of cryptocurrencies in the UK appears to be that first, they typically invest relatively small amounts of money."

In each case he is cross referring back to where he has supported these conclusions.

"They likely regard the investment as being of a high risk, high reward nature, and may

be willing to sustain (but avoid realising) losses for a period of time to see if prices recover later."

Section 3C, point 1.

"The majority hold (or plan to hold) the investments for more than a year", and "they sell these investments infrequently, with most reporting never having sold any."

Now in my submission there is a parallel with the sorts of factors that the court was taking into account in the Smith case about the circumstances in which the shares in that case were bought, and I do make the submission that if these are the characteristics of holders of cryptocurrencies and this is the basis on which they invested, then in our submission it would not be reasonable, assessing that question objectively, to expect them to divest their holdings in response to the delisting events, even assuming that they knew about it.

Now Binance's answer to this is in their skeleton, paragraph 34, and they say:

"Damages are to be assessed as if the claimant acted reasonably in reducing or eliminating any loss, even if they did not."

So, the implicit premise in paragraph 34 is that in acting in the way this class did in holding on to their investments, class members acted unreasonably. In our submission that is precisely the question of fact that the Tribunal has to determine at trial.

In determining that question of fact, the Tribunal will take into account that investment in cryptocurrencies is a new form of investment. It might well be in our submission governed by different considerations to traditional investments, and in our submission it is not appropriate certainly at the strike-out stage to seek to apply an ordinary market measure of loss or an ordinary market assessment of what is or is not reasonable to a novel form of investment. In our submission whether it is or is not appropriate to act in the way that the class members did is an assessment which can only be made on

the basis of all the evidence at trial.

Now the class representatives' position in that respect also accords with some of the authorities we have put into the bundle. In particular, there is a passage from Clerk & Lindsell. It is in authorities bundle tab 56. This is the relevant passage of Clerk & Lindsell that deals with the principles of mitigation.

The Tribunal can see the heading of "Mitigation" on page 2210, paragraph 26-09. If the tribunal goes over the page to 2211, right at the bottom of that section of text the Tribunal can see:

"The onus is on the defendant to show that the claimant failed to mitigate and much will depend on what the court regards, in the circumstances as being 'reasonable'. Judges are reluctant to impose excessive demands on claimants."

In particular the passage we rely on is then part way down the remaining paragraph where it says:

"He", presumably the claimant, "should not be expected to risk capital in a speculative venture ..."

There is there cited an authority for that, Jewelowski case:

"... nor to destroy his own property",

and citing Elliott Steam Tug Company.

In our submission Binance's case runs counter to both those propositions because what they are suggesting is that a Sub-Class B member is obliged to engage in speculation in investing in alternative cryptocurrencies.

MS JUSTICE BACON: But they were doing that by investing in cryptocurrency in the first place. That was the nature of the investment.

MS FORD: Madam, again it is a factual question whether investing in one cryptocurrency is to be assumed as being equally speculative as investing in another cryptocurrency but, of course, they have chosen to invest in one cryptocurrency and

what's being imposed upon them is an assessment of reasonableness that requires them to go and invest in a currency that they had not chosen.

In my submission it is at the very least a relevant factual question as to whether that's a reasonable thing to ask them to do. It is also said that in order to make such reinvestments Sub-Class B members are obliged to divest themselves of their holding in BSV. So that is requiring them to divest their holding in the property right that they have chosen to acquire. It is in our submission a very relevant factual enquiry whether that is or is not a reasonable requirement to impose upon them. So that's the third point. In our submission there is this relevant factual enquiry as to what is reasonable in the light of this novel form of investment.

The final point concerns the possibility of continuing infringement, because as I have already submitted, if the Tribunal were to endorse the application of the breach date rule, it would have to be satisfied that the relevant breach is not continuing either in terms of the conduct itself or its ongoing effects. This is a point that is raised again in the supplemental Oxera --

MS JUSTICE BACON: This comes back to the pleading point. You said this is a reply point. I'm not sure it is. You pleaded out the infringement which you rely on.

MS FORD: My Lady, it is absolutely right. (inaudible) in the sense that we have pleaded the cause of action and the infringement that we rely on.

MS JUSTICE BACON: Well, given --

MS FORD: It is undisputed that none of the exchanges have collusively -- have actually relisted BSV. That's an uncontested fact. Now the relevance of when the infringement actually ends is not a factor that we have specifically engaged with, because it is not a factor that became pertinent until Binance raised this issue.

MS JUSTICE BACON: No, that's not the case. You have defined what is the infringement. Let me just find it in the -- it is in your claim form.

MS FORD: That which we are claiming for is a defined infringement but, of course, we have then claimed for Sub-Class B.

MS JUSTICE BACON: Can you just take me to -- sorry.

MS FORD: The claim form is behind tab 13 starting at page 189.

MS JUSTICE BACON: Yes. Can you just remind me where you have defined the infringement? It is somewhere ...

MS FORD: (Inaudible) is the first point:

"By participating in the collusive tweets and/or delisting events the Defendants thereby engaged in anti-competitive agreements ..."

MS JUSTICE BACON: Yes. That's what I was thinking of. So, the infringement is very precisely defined as the collusive tweets, the delisting announcements and then ultimately delisting BSV. That's the infringement that's defined. You don't rely on any other infringement or any continuing infringement. You are not saying that there is any single continuous infringement. You identify specific infringement which took place between 12th April and ultimately 5th June 2019, 12th April being the first of the collusive tweets as you have defined it and 5th June being the end of what you have defined as the delisting events. There is nothing else which is said to continue beyond that. So I don't think it is a reply point. This is how you have defined the infringement.

MS FORD: It is absolutely right that that is the extent of the pleaded case on the infringement. Binance then say in circumstances where the infringement ceased on this date, your Sub-Class B claim is not viable, to which one would plead by way of reply "You, the colluding exchanges, delisted BSV. You have not relisted it. That raises two possibilities", and those are the two possibilities that Mr Noble has identified.

One is that the potential reason for the delisting -- sorry -- for not relisting is that there is ongoing coordination on the part of the Proposed Defendants not to relist. That is

one possibility. Another possibility is that even if there wasn't ongoing collusion, the lack of relisting might reflect the ongoing consequences of the original infringement. So, for example, concerns about loss of credibility in the event that the exchanges were to essentially perform a volte face and relist BSV.

MRS JUSTICE BACON: Sorry. I don't understand the latter point.

MS FORD: Perhaps I can show you what Mr Noble says about it. So this is F, tab 42.

MS JUSTICE BACON: After you have dealt with that point let's have a short break, but let's just look at this now.

MS FORD: 2076 has the infringement ended. He points out at 6.2:

"The continued lack of relisting may potentially indicate that the infringement is continuing in the form of a coordinated decision by the exchanges not to relist BSV. If this were to be the case, then this would be a further reason for why the application of breach rule would not apply."

MS JUSTICE BACON: That's an unpleaded continuing infringement.

MS FORD: But, Madam, I don't dispute that we have not suggested to date that the effect of the -- or the reason for any failure to relist is an ongoing infringement. I do say that that's a point that only arises in response to the suggestion that we can't claim on our positive case the period of the claim that we say flows from the original --

MS JUSTICE BACON: That doesn't arise from the response. It is how you define the infringement, and you define the infringement as having ceased on 5th June, but let's move on from that point for the time being. Your other explanation, inertia.

MS FORD: That's the one at 6.5:

"There may be some inertia that militates against reversing the decision to delist once it has been made. For example, if exchanges have a quasi-regulatory role and the decision to list is treated as an endorsement by retail investors, then to list, delist and then relist a cryptocurrency may reduce an exchange's credibility in the eyes of retail

investors", and he goes on to elaborate on that on the following pages 2078. He says: "The possibility of a long-lasting impact of the nature of competition between exchanges."

He says:

"It is ultimately a legal question whether the continued lack of any relisting appears to be as a result of the original infringement. Below, I set out why I consider, from an economics perspective, that the lack of any relisting may be a result of the original infringement. As such, I consider that from an economics perspective any gains foregone by BSV holders that would have resulted from a relisting event also flow directly from the original infringement."

MS JUSTICE BACON: Yes. I think we will just have to look at this. Shall we have a five-minute break then?

(Short break)

MS JUSTICE BACON: Yes, Ms Ford.

MS FORD: Madam, we were grappling with the question of whether or not the infringement could have long lasting effects and I was showing the Tribunal what Mr Noble says about that in 6B of his supplemental report at page 2078. He is making the point in 6.11:

"It is possible that there is some inertia in the decision to delist."

He says:

"As discussed above, this may be because of the quasi-regulatory position that the exchanges occupy where their listing decisions are viewed as an endorsement for the currency on a technical level."

He makes the point at 6.12:

In those circumstances, if they were to then flip-flop in their decision, then they may lose their credibility in the eyes of the investors.

He says at 6.13:

"From an economics perspective, the initial coordinated decision to delist would have effectively shifted the relevant exchanges from one equilibrium (listing BSV) to another. If the continuing decision not to relist BSV has been driven by the costs of losing credibility over the exchange altering their policy repeatedly, then the continuing lack of any relisting by any exchanges would appear, from an economics perspective, to be a direct result of the infringement."

MS JUSTICE BACON: So is he saying that there is continuing effects even if there is not further collusion?

MS FORD: He is saying it is possible. He is identifying it as a matter which would have to be investigated factually.

MRS JUSTICE BACON: Yes. All right.

MS FORD: So that in our submission is the final reason why the breach date rule potentially should not apply in the circumstances of the present case.

Before I move away from the way in which we put our primary case and deal with the loss of a chance, I would just like to come back on this question of what is meant by an available market because that's obviously the linchpin of my learned friend's argument. They say there is an available market and therefore that's the extent of the enquiry you need in terms of the reasonableness and mitigation. It really does beg a factual question what is meant by an available market in the context of cryptocurrency, because if one takes a classic case of a sale of goods type situation, which is the one that we see cited fairly frequently in the authorities by reference to the Sale of Goods Act, what's meant by an available market is that the purchaser can mitigate any loss they suffer by essentially going out and essentially finding the same thing in the market instead. So if their consignment of lentils doesn't turn up, they can go out into the market and find a consignment of lentils which is a suitable substitute

for that which they should have been provided under their contract.

So the authorities have said in those circumstances we have taken a view as to what it is reasonable for you to do in response to this wrong, but there really is, in our submission, a quite important factual enquiry as to whether and the extent to which that is a possibility in the context of a cryptocurrency investment, because it is by no means clear exactly what these investors should do. Should they cash out altogether, in which case they end up with no cryptocurrency investment and they end up with essentially a sum of money, or should they identify an alternative form of cryptocurrency and invest in that and to what extent is that then sufficiently close to that which they had before that they can be required to go and substitute it? It is an enquiry about substitutability.

MS JUSTICE BACON: You are saying it is not a commodity market and you say that not without factual enquiry can we decide whether it is analogous to a commodity market.

MS FORD: That's the submission I make. The submission that is made against me is to say "Aha, look at Mr Noble's outline of his provisional methodology. He is talking about looking at alternative cryptocurrencies by way of comparators in order to quantify your loss".

In my submission the fact that one seeks to identify a comparator for the purposes of quantifying loss is not the same as the enquiry one has to make as to whether this would be a reasonable response to a wrong for the purposes of a member of the class. It is simply not the same enquiry. At the very least this Tribunal in my submission should not be deciding that it clearly is the same enquiry and that no further enquiry need be made at this stage.

MRS JUSTICE BACON: Yes. All right. Thank you. That is helpful.

MS FORD: Madam, I am moving on to deal with the loss of a chance issue. This is,

we understand it, put against us in two ways. One way that Binance put it is to say that the breach date rule has to be assumed to apply to the loss of a chance claim as it does to the primary claim and therefore it is flawed for the same reasons, and all the submissions I have made about the breach date rule in the context of the primary claim apply equally in response to the way it is put for loss of a chance, but that we say is particularly illustrated by the Salford City Council case that Mr Kennelly took you to just before lunch. This is in authorities tab 19 at page 371. This was a breach of collateral warranty case where the local authority had breached a warranty not to grant leases to competing grocery shops and then the lessee claimed loss of profits.

The Court of Appeal felt able to reach a conclusion as to the cut-off date for valuation, but the reason in my submission was that it had the benefit of findings of fact made at the trial, and one can see that from -- if we look at page 318, the second half of paragraph 48 of the judgment, the court is saying:

"The obvious cut off point for any claim for loss of profits and the point at which damage fell to be assessed on a valuation basis was the point at which it was reasonable for the defendants fully apprised of the adverse effects of the breach of warranty to decide to cease trading and dispose of the business."

The short point that we make is the question of what is reasonable is a question of fact for trial and the points at which the defendants would have been fully apprised of the adverse effects of the wrong was equally a question of fact for trial. So we say that this is a case which illustrates the fact-sensitive nature of this enquiry. That is in our submission completely consistent with the way in which we put the case on a primary basis.

I am turning to deal with the other way in which the case is put against us on loss of a chance, which is to say that somehow loss of a chance doesn't actually extend to the present circumstances at all.

The function of a loss of a chance claim is to draw a line between those matters that a claimant must prove on the balance of probabilities and those matters which are to be assessed on the evaluation of a lost chance. Where that dividing line is to be drawn is what was explained by the Court of Appeal in the Allied Maples case. The Tribunal has not yet been shown that. It is tab 14 in the bundle starting at page 148. The familiar passage that one usually sees cited starts at page 155 H where we see the Court of Appeal saying:

"In these circumstances where the plaintiff's loss depends upon the actions of an independent third party, it is necessary to consider as a matter of law what it is necessary to establish as a matter of causation and where causation ends, and quantification of damages begins."

What the court then does is to identify three scenarios and those are the ones that are numbered 1, 2 and 3 in the judgment.

The first scenario beginning at the bottom of H is the scenario where the defendant's wrong consists of some positive act of misfeasance. In that case the question of causation the court says is one of historical fact and the court has to decide on the balance of probability whether the positive act caused the loss or not? So that's scenario 1.

Then over the page at 156 opposite D you have scenario 2. This was a scenario where the defendant's wrong consists of an omission. The court says in that case causation depends not on a question of historical fact but on a hypothetical question: what would the plaintiff have done but for the omission? It says in that scenario the plaintiff must prove on the balance of probability that he would have taken action to obtain the benefit or avoid the risk. So again balance of probability test.

The third scenario, which is then over the page, page 157, number 3, is where the plaintiff's action depends on the hypothetical action of a third party, and we see at

157B the Court of Appeal is posing the relevant question:

"Does the plaintiff have to prove on the balance of probability that the third party would have acted so as to confer the benefit or avoid the risk to the plaintiff or can the plaintiff succeed, provided he shows that he had a substantial chance rather than a speculative one. The valuation of a substantial chance being a question of quantification of damages."

Then the court says opposite C that:

"The second alternative is correct."

It goes on to cite a couple of authorities which predate Allied Maples. Chaplin v Hicks is about a beauty contest. Kitchen and Royal Air Force Association is concerned with litigation.

In our submission there is nothing in this classic taxonomy which seeks to limit it in the way that Binance has suggested to a specific transaction or opportunity which would have been contingent on decisions or actions of an identifiable third party. In our submission that's not what's going on here. What the Court of Appeal is doing is drawing a much more basic distinction between actions of the claimant, on one hand, and actions of others on the other hand.

That is the way the principle has been ascribed by the Supreme Court in Perry v Raleys Solicitors which the Tribunal has already been shown. Just to pick it up, it is tab 34.

MS JUSTICE BACON: Scenario 3 does say the loss depends on the hypothetical action of a third party.

MS FORD: It says that, but what it doesn't say is the very narrow way in which Binance seeks to formulate it, that one must seek an identifiable third party and identify a specific transaction. I am going to go on to show the Tribunal that's not the way in which this proposition is limited, but what I do want to show the Tribunal is the way in

which the Supreme Court describes it, because it is consistent with my submission that the relevant distinction is between third parties on the one hand and the claimant on the other, not that one has to then narrow it down even further and say "Right. Which specific third party? Which specific transaction?"

So that's tab 34.

MS JUSTICE BACON: You are saying that third parties can be the whole world and everything that happens that the claimant is not doing themselves.

MS FORD: I say the relevant formulation is the one that the Supreme Court identifies at paragraph 20 in this judgment. So, it is page 1280, paragraph 20. The Supreme Court is drawing a distinction between what the client would have done, so in this case the Claimant is his client, and then the final sentence of paragraph 20:

"To the extent that the supposed beneficial outcome depends upon what others would have done, this depends upon a loss of a chance evaluation."

So the relevant distinction is between the claimant themselves. They must insofar as they are trying to say they would have acted in a particular way, that is a balance of probabilities test. As far as they are trying say that something would have happened that depends on what others would have done, that's the loss of a chance test.

Paragraph 20 is entirely consistent with the submission I make that the purpose of doing this is to draw a line. So the Supreme Court says:

"For present purposes the courts have developed a clear and common-sense dividing line between those matters which the client must prove and those which may be better assessed upon the basis of the evaluation of a lost chance."

It goes on to say the passage I have identified, the client on the one hand and what others would have done. Paragraph 21:

"This sensible, fair and practical dividing line was laid down by the Court of Appeal in Allied Maples", which is what I have just shown to the Tribunal.

In my submission that is what is going on here, it is drawing a line between things that have to be proven on the balance of probabilities and things that have to be proven on the basis of loss of a chance, namely what others would have done.

There is nothing in my submission in that statement of principle which narrows things down even further, as Binance has sought to suggest.

Mr Kennelly showed you --

MS JUSTICE BACON: How really does this apply in the competitional context? You are using what others would have done as to encompass literally everything that is not the claimant themselves, because you are using that in the context of how the value of this particular type of Bitcoin would have developed. You say you can do this all as a loss of chance (inaudible).

MS FORD: My Lady, I am going to come on to show you two cases, two authorities which we say do look at change of value in the market, that sort of valuation as being a loss of a chance type analysis, so a much broader approach than saying you have to identify a specific third party.

What I started with is the high level propositions, the origins of them, and my submission is that one does not see in the language that is being used either by the Court of Appeal in the classic Allied Maples or by the Supreme Court a notion that this concept is narrowly limited to cases where you can point to a specific transaction and a specific third party.

What one sees is a different exercise going on, a different dividing line being drawn between conduct of the claimant, on the one hand, and conduct of others.

So Mr Kennelly showed you Wellesley Partners v Withers, which was the case where the judge was summarising authorities on loss of a chance. Two of the cases that were cross referred to in that passage were the Parabola case and the Vasiliou case.

I would like to briefly show the Tribunal those.

The Parabola Investments is in tab 25. What these authorities show in my submission is that if the court is able to find on the balance of probabilities that the claimant would have traded profitably, then it doesn't need to have recourse to loss of chance principles. They simply proceed to quantify the loss of profit but what they don't show in my submission is that one should, therefore, read the loss of a chance more narrowly than would otherwise be --

MS JUSTICE BACON: Sorry. Can you just take that more slowly. If it can be shown on the balance of probabilities that ...

MS FORD: That the claimant would have traded profitably, the two cases and the Wellesley one as well in so far as it is commenting on these cases are dealing with a group of authorities about future -- about trading losses essentially. So one of them is a restaurant and one of them is a fund where they were deprived of funds.

MS JUSTICE BACON: Yes.

MS FORD: The question was what have they lost? Essentially what we see from the authorities is that if the court is satisfied that they would have traded profitably they don't need to have recourse to loss of a chance principles. What they don't show in our submission is that therefore loss of a chance principles are somehow much narrower than they otherwise would be.

So, for example, Parabola Investments is tab 25, 485 -- sorry -- 484. The relevant passage is paragraphs 22 and 23 on page 493. So we can see -- there's a sort of general broad approach to quantification generally in 22:

"Some claims for consequential loss are capable of being established with precision (for example, expenses incurred prior to the date of trial). Other forms of consequential loss are not capable of similarly precise calculation because they involve the attempted measurement of things which would or might have happened (or might not have happened) but for the defendant's wrongful conduct, as distinct from things which

have happened. In such a situation the law does not require a claimant to perform the impossible, nor does it apply the balance of probability test to the measurement of loss.

"The claimant has first to establish an actionable head of loss. This may in some circumstances consist of the loss of a chance, for example, Chaplin v Hicks and Allied Maples."

What the court goes on to say is:

"... we are not concerned with that situation in the present case, because the judge found that but for Mr Bomford's fraud, on a balance of probability Tangent would have traded profitably at stage 1 and would have traded more profitably with a larger fund at stage 2."

They say:

"The next task is to quantify the loss. Where that involves a hypothetical exercise, the court does not apply the same balance of probability approach as it would to the proof of past facts. Rather, it estimates the loss by making the best attempt it can ..."

MS JUSTICE BACON: Right. So if it would have traded more profitably, the court then does the best it can, the broad axe principle.

MS FORD: Madam, yes. That's what this case is saying. What it is not saying -- as I understand it, what Binance relies on this case for is to say cases which are loosely analogous to trading loss cases, loss of a chance analysis is simply not available at all. My submission is that is not supported by this case. What this case is saying is you don't need loss of a chance when you can find on the balance of probability they would have traded profitably.

MS JUSTICE BACON: So what is the exact sequence of questions we ask ourselves in this case?

MS FORD: In my submission one would apply the test for loss of a chance.

MS JUSTICE BACON: No. To determine whether we get into loss of a chance.

MS FORD: One asks whether or not the matters for which the Claimant class is seeking to claim are matters that are dependent on their own conduct or matters which are dependent on the conduct of third parties.

MS JUSTICE BACON: No, how do you apply the test you have just articulated? You first ask whether -- in this case it is whether there is on a balance of probability a finding that the company would have traded profitably. What's the equivalent of that in this case?

MS FORD: This wouldn't be our primary case. Our primary case would be that BSV would have been a top tier cryptocurrency. If the Tribunal finds in our favour that that is right, then it proceeds to quantify the extent of the loss of the class had there been no delisting, but what I am addressing is the suggestion that it is somehow not open to me by way of alternative to say that there is a chance, a material chance that BSV would have been a top tier cryptocurrency and that material chance is something that the Tribunal can equally award damages for by way of essentially a percentage assessment of the likelihood that that would have happened.

So if I were right on my primary case, then there would be no deduction for the likelihood it would have happened. The Tribunal would be satisfied on the balance of probabilities that it would have been a major cryptocurrency and then it goes on to quantify loss with no deduction. If I don't get home on my primary case, our submission is that we are still entitled to loss of a chance. There is a substantial chance that it would have been a major cryptocurrency and the Tribunal quantify that by applying the appropriate reduction to reflect its assessment on the facts of the likelihood that that might or might not have taken place.

MRS JUSTICE BACON: Thank you.

MS FORD: So the other case that got cross-referred to in Wellesley was the Vasiliou

case. We essentially make a similar point about that. It is in tab 24. This is starting at page 473. This is another case where the Court of Appeal is saying actually you don't need to have recourse to loss of a chance analysis. It is concerned with the loss of profits that a restaurant would have made if there had not been a breach of a covenant by the Defendant. At paragraph 20 we see the court saying that:

"The general rule is that the claimant must prove that the defendant's breach caused the loss which he seeks to recover by way of damages. That must be proved on the balance of probabilities."

Then it says:

"In some cases, however, where the claimant's ability to have made the profits which it claims depends on the actions of unrelated third parties, there may be room for arguing that the court should approach the issue of causation by taking into account the chances of those events having occurred."

What we see in paragraph 21 is that it then goes on to identify essentially two types of loss of a chance case. It says:

"In a classic loss of a chance case the most that a claimant can ever say is that what he or she has lost is the opportunity to achieve success". It gives the example of Chaplin v Hicks, the beauty parade litigation, Kitchen v Royal Air Forces. Those are the two authorities that were cited in the Court of Appeal in Allied Maples. Then it says:

"The loss is by definition no more than the loss of a chance, and once it is established that the breach has deprived the claimant of that chance damage has to be assessed in percentage terms by reference to the chances of success."

Then it says:

"But there will be other loss of chance cases where the recoverability of the alleged loss depends upon the actions of a third party whose conduct is a critical link in the

chain of causation."

It gives Allied Maples as an example of that. It says:

"It is established that causal issues of that kind can be determined on the basis that there was a real and substantial chance that the relevant event would have come about."

So, on any view the Court of Appeal is there saying that there are multiple categories of loss of a chance. There is what are defined as the classic case and other cases. Insofar as Binance is seeking to suggest that the loss of a chance concept is somehow limited to the Allied Maples type case, that in our submission is not right, but what we see then is again on the facts of this case the Claimant didn't need to rely on loss of a chance, because the court was able to find as a fact on the balance of probabilities that the restaurant would have been successful and we can see that at 24. The judge found as a fact that Zorba's would have been a successful restaurant and therefore assessed its loss profits on that basis.

"His analysis of the variable factors I have outlined which formed the agreed components of that calculation involved taking into account the time needed to establish a reputation and other everyday contingencies but did not involve a more general discount of the kind described in Allied Maples to take account of the statistical possibility of failure. That was excluded by his finding that the restaurant would have been a success".

So, one way in which things go is that one finds on the balance of probabilities that the case is made out and then one doesn't make a deduction for loss of a chance contingency, but we have equally identified two cases as examples of where you can rely on loss of a chance analysis.

The first is the Salford City Council case that Binance have cited. It is tab 19 in the bundle, starting at 319. The Tribunal has already seen this for the proposition of the

breach date rule and how the Tribunal -- how the court in this case was able to apply the breach date rule, because it had made certain findings of fact, but the Court of Appeal goes on afterwards to say "Well, if I was wrong about the breach date rule applying, what's the proper analysis then?" That starts at paragraph 53 on page 319. He says:

"If I am wrong in that regard and the judge was correct to seek to award damages on the basis of the position as it would have been post-March 1988 ... I would ... accept the submission ... that, in assessing the amount of that future loss, the judge was in error for making no sufficient allowance for the uncertainties of the position when he held that the length of time for which the defendants would have run the business and the income they would have received were matters 'which I must assess by the conventional approach ...'."

What he says was, "Actually you should have applied a loss of chance analysis". You can see in the middle of paragraph 54:

"The whole thrust of the judgment of Lord Justice Stuart-Smith in the Allied Maples case is that where matters affecting the measure of loss are uncertain and, in particular, dependent on the hypothetical actions of third parties as well as the plaintiff, a balance of probability approach is inappropriate. [It] is concerned to evaluate the chance that a particular course of events would have occurred and to look at the range of possibilities, making an appropriate discount in respect of the possibility that a less favourable result might follow."

He quotes Lord Justice Stuart-Smith. Then he says:

"In my view this is such a case."

So, this is a case about assessing loss of profits and it's a case where the Court of Appeal is saying it depends on the actions of third parties as well as the claimant, and so a loss of a chance analysis is appropriate.

Then the final example we have given is Equitable Life, which is tab 58 right at the end of the bundle. I am hoping the Tribunal has the updated version of the authorities bundle because it is an authority that was added in relatively recently.

MRS JUSTICE BACON: When did this come in?

MS FORD: It was added on Tuesday.

MRS JUSTICE BACON: Let me just see. Tab?

MS FORD: It is tab 58 beginning at 2216.

MS JUSTICE BACON: Oh, right. 2...

MS FORD: 2216. Does the Tribunal have that?

MS JUSTICE BACON: Yes.

MS FORD: So this is the auditors' negligence claim. If the Tribunal looks at page 2225, there's a heading above paragraph 27 "The lost sales claims". What was essentially being claimed by Equitable Life was that had the directors been told what the true position was, had there been no negligence, they would have sold the company and they would have made -- they would have sold the company at a particular point in time, and they would have made a particular amount of money in doing so. They put that in two ways. They either said, "We would have done that" or they said alternatively they had lost the chance of doing so.

We can see paragraph 29:

"In the alternative, Equitable claims that it lost the chance of achieving such sales and that it is entitled to be compensated for the value of that lost chance."

So the Tribunal will appreciate that this is a closer analogy to a loss of a chance claim which doesn't identify any particular individual or opportunity, save that one would have sold the company, but presumably the amount they would get on selling the company depends on the response of the market.

The judge at first instance struck out the sales claims. We can see that's at 43 to 46,

so page 2230. It is essentially -- there are various legal reasons why at first instance he considered the lost sales claims were unviable, but the point about the loss of a chance is dealt with at 47. He said:

"The judge then accepted ... [the] submission [that was made] that for similar reasons the alternative claim for loss of a chance of sales was unsustainable. He added as a further reason his view of the law ... namely that if the lost sale claim failed on the balance of probability, they could not be resurrected on the basis of a loss of a chance to try and effect a sale 'which probably would not have been achieved'."

So that is the position at first instance. The Court of Appeal did not agree that the loss of a chance claim should be struck out. We can see that from 83 onwards, so page 2240, heading "Loss of Sale or Loss of a Chance of a Sale? The Correct Approach". The Court of Appeal is recording that:

"[Counsel in that case] sought to maintain the judge's conclusions on the facts ... to the effect that no case worthy of trial had been demonstrated in respect of the loss of sale or loss of chance of sale ..."

Then the relevant passage that we rely on begins "Secondly" halfway down this paragraph. The Court of Appeal says:

"Secondly, that once a situation is reached where a claim depends on the hypothetical reactions of a third party, as here the willingness of a potential buyer to buy Equitable's business at an acceptable price, the test is not what would have happened on the balance of probabilities, but whether the Claimant has lost a real or substantial as distinct from a merely speculative or fanciful chance. If the former is substantiated, it is then for the court to evaluate that chance, which can in theory range across the whole spectrum from some non-fanciful albeit rather meagre chance to something approaching certainty."

It quotes the Kitchen case and Allied Maples for that proposition.

Paragraph 85 records a submission that was made that:

"[Counsel] ... was unaware of any case in which the loss of an opportunity to sell had been the subject matter of a loss of chance claim."

The Court of Appeal disagrees with that and cites a case where it says at 86:

"... the court evaluated the chance of a sale at 66.66 per cent."

Then in 87 we can see the conclusion:

"We therefore consider, subject to the questions of law we discuss below, such as scope of duty and causation, that the judge was wrong to eliminate the loss of a chance of sale as a feasible and realistic claim."

We simply cite this as an example of a loss of a chance claim in respect of an asset that is said but for the wrong would have had a greater value, and we say by analogy certainly not appropriate in our submission to strike out that possibility, that possible alternative claim at this stage.

MS JUSTICE BACON: To what extent does that depend on issues of fact as opposed to a legal analysis, or is this purely a legal question?

MS FORD: In our submission it is not purely a legal question, because, as we have seen, the authorities treat questions of losses of chance as a question of causation and the authorities are very clear that questions of causation are fact-sensitive and are properly to be assessed at trial.

MS JUSTICE BACON: All right, but that is just sort of saying this is causation and generally there are fact-sensitive issues, but in this case what are the factual issues?

MS FORD: Well, ultimately what Binance is asking this Tribunal to do is to draw a line and say, "This type of scenario is a proper loss of chance claim, but this type of scenario is not a proper loss of chance claim", and that in my submission is not possible before the Tribunal has found the facts as to all the relevant circumstances of the class members' response to the wrong that they are facing.

MS JUSTICE BACON: What facts are relevant to the question as to whether you can rely on a loss of chance analysis specifically here?

MS FORD: It will be, for example, the expert analysis as to the likelihood that BSV would have become a major cryptocurrency, the availability of alternatives that the class either could or should have been said to have invested in. It is essentially the entire factual matrix in the context of which it is said by Binance that it should not be open to us to say there is a material chance that this asset would have become a major cryptocurrency and class should be compensated for it.

MS JUSTICE BACON: No, that's not what they are saying. They are not saying that if you apply the loss of chance analysis to the facts, where you come out is that there would be a purely speculative or fanciful chance. He says -- Mr Kennelly says the loss of chance analysis is not applicable on this case, to this kind of case. So what are the facts that inform us as to whether one even gets into a loss of chance analysis?

MS FORD: On his case?

MS JUSTICE BACON: On your case. I am asking you. What is your case?

MS FORD: Our case is that insofar as the loss suffered by the class depends on third parties -- so, for example, those third parties in this case might include those that would be prepared to invest in BSV and therefore accord a value, a market value, to it, but it might also the BSV community and those that develop the currency into a major cryptocurrency, or would have done but for the delisting. Those are the conduct of third parties that inform the loss that has been suffered. The Tribunal has to assess and quantify the chance that those factors would have led to a major cryptocurrency --

MS JUSTICE BACON: I am perhaps not making myself clear. The question is not assuming that we are applying a loss of chance analysis, what factors feed into that to get to the percentage chance? The question is: is the threshold question of whether we even look at loss of chance a question of law here or is it something that requires

fact finding at trial? So what facts feed into the threshold question of whether we even look at loss of chance, whether this is a kind of case where a loss of chance analysis is relevant? Are you actually saying that simply it is relevant and we don't need to get into further fact finding to decide whether loss of chance can be sustained as a legal principle here or not?

MS FORD: I do make the submission that it is relevant, but I also make the submission that if one is to determine that certain things are not relevant, if one were to determine that loss of chance is not available, then one needs to know what is meant by a specific third party, what is meant by a specific transaction and why those are not said to be present in the circumstances of this case, because a line must be drawn somewhere. In our submission the line is drawn where the Supreme Court has said it is drawn and where the Court of Appeal has said it is drawn, between the conduct of the claimant and the conduct of third parties.

MS JUSTICE BACON: So your case is that line has been drawn as a matter of law and therefore loss of chance applies. On your case, as I thought, there is not any further fact finding to do. In principle loss of chance applies and the question is then simply how you plug in the relevant facts to get a number at the end.

MS FORD: I do say that, but I also say if you are proceeding to consider the alternative that is put against me that actually it doesn't apply to certain circumstances, that does require fact finding, because one has to say what circumstances does it apply to, what circumstances does it not apply to, where does the line fall and to what extent are the claims of this class on one side of the line or the other side of the line?

MS JUSTICE BACON: Right. How are you doing for time, because Mr Kennelly will need time for a brief reply?

MS FORD: Subject to what I am about to be told, I have maybe about one minute left to go.

MS JUSTICE BACON: All right.

MS FORD: Mr Hooper reminds me of the point that actually the utility of this point may turn out to be relatively narrow, and the reason we say that is because our primary case is obviously that the Tribunal can find that BSV would, absent the delistings, have been a major cryptocurrency, and if we are right about that, then we are in the balance of probabilities world, and we are in an analogous position, the sort of loss of profit type claims in Parabola and Vasiliou that I have shown the Tribunal. So if we are there, we don't need to get into loss of a chance.

Equally on the basis of the analysis in BritNed that Mr Kennelly showed you before lunch the High Court in that case said that requiring a loss of a chance type analysis in Article 101 cases might place too great a burden on the claimants, and so it was said there that once one establishes the gist damage, essentially the damage to competition, from that point onwards the Tribunal moves on to an exercise in quantification. It is said loss of a chance is one possibility, is one tool that's available to the court in that scenario, but essentially it was saying we are in the exercise of quantification and taking into account risks and probabilities once one has established gist damage. If one proceeds on that basis, in our submission one clearly can establish gist damage for the Sub-Class B. So again, on that basis we don't have to tick the loss of a chance box.

So, the actual practical scenario where we end up relying on this may actually be relatively narrow, but nevertheless we do make the submission that this Tribunal should not shut us out from addressing that case at trial.

The final point that I make is that we take issue with Binance's suggestion that if Sub-Class B were to be struck out, it would substantially reduce the scope and complexity of the subsequent trial and that is for the reason that, Madam, you canvassed with Mr Kennelly briefly, that Sub-Class C is not going to be struck out, and so one still has

to go through the exercise of assessing the damage caused to Sub-Class C. That's the -- one element of Sub-Class C is Binance users who lost their BSV coins altogether. So those class members have suffered we would say a foregone growth effect in exactly the same way as Sub-Class B has, because they lost access to their coins. So, the same sorts of evidence that one needs on market dynamics, on valuation methods, on counterfactual scenarios will need to be deployed to decide Sub-Class C in any event.

MS JUSTICE BACON: That's a question that goes to whether there should be a preliminary issue and, if so, how that should be defined, but it seems to me you can't use that to deny a strike out if there is a valid strike out ground.

MS FORD: If there is a valid strike out ground, that is right. In fact, it has been used against me in the opposite way, which is to say "This is a good reason for striking out, but because it would save you time", and I respond to it on that basis and we say "No, it simply wouldn't".

We take issue with the assertion that if the breach date rule were to apply to Sub-Class B, then the same analysis applies to Sub-Class C, which is a point that's made in Binance's skeleton. The reason there is a separate Sub-Class is because the class is in a different position. They were put in a position where they were deprived of the opportunity to sell altogether, because they simply lost access to their coins. So it certainly can't be said that what they should have done, acting reasonably, is to sell at the date of the breach, because as at that point they didn't have the ability to do so. So, in our submission on any view there is a different analysis that needs to be undertaken in relation to quantification for Sub-Class C. So we say insofar as this is being raised against us as a reason for strike out, it simply doesn't work.

MS JUSTICE BACON: Yes. Thank you very much. All right. Thank you very much. Mr Kennelly, how long do you think you need?

Reply by MR KENNELLY

MR KENNELLY: Fifteen minutes, maybe twenty, at a push. I would like to finish today, if I might. (Inaudible).

I will begin, if I may, with my learned friend's opening primary point on the law, which is to stress the fact that the breach date rule is not inflexible. We, of course, accept that the rule is not inflexible, but contrary to the submission of my learned friend, what is reasonable for the purposes of the breach date rule, the exceptions to it are settled by legal rules.

In the first instance my learned friend took you to Smith New Court Securities to point out how in that case where -- because it involved the sale of shares, the breach date rule was to be applied strictly. It nevertheless was not applied in July 1989 to the victim.

Just to explain why that was, it was not just because the defendants induced the plaintiff in that case to buy shares in a particular way that made them hard to offload. If you go to the headnote, which is in tab 15, page 173, the first reason and most important one was, as you see on page 173 in the headnote, about a third of the way down the headnote, it says:

"By September 1989 it became known that a fraud had been perpetrated on the company ..."

and the victim started to offload the shares after that.

The judge went on to find -- the Court of Appeal went on to find that the breach date rule applied in July 1989. That was before the plaintiff became aware or could have become aware of the fraud. That was the primary reason why the breach date rule was not applied to him. The second reason was that he was induced by the fraud to buy the shares in a way that was -- made it difficult for him to offload.

You were taken to the Stanford case, the recent Stanford International Bank case, to emphasise the flexibility of the rule. I ask you to go back to that, because, in fact, although in it Lord Leggatt, as he has become, said there was not a breach date rule, in fact, he was relabelling it, but it still remains a rule.

If you go to the Stanford case, please, it is behind tab 47 and page 1912. You may have been struck by the statement by Lord Leggatt that there is no such thing as the breach date rule, but it all becomes clear when he goes on to explain what he says is the rule.

At the bottom of 1930 he refers -- actually paragraph 43, third line, he says:

"Losses caused by breach of a contractual or common law duty" -- so it is not just breach of duty; it extends to tort -- "routinely occur after the date of the breach and are generally to be assessed at whichever is the earlier of the date [of] loss ... and the date [of] damages ..."

He goes on at the very last line of that to refer to the market mitigation rule. That's his relabelling of the breach date rule. He refers to it as a rule. He says:

"This rule is that", over the page, "where there is an available market in which an adequate substitute can be obtained for goods or services of which the defendant's breach of duty deprived the claimant, damages are to be assessed as if the claimant entered the market and obtained such a substitute at the earliest reasonable opportunity, whether or not the claimant in fact did so."

The orthodox position from the Golden Victory. He is not referring only to goods or services. That's an example. On the previous page he refers to, about three lines from the bottom, cases involving the loss of or damage, for example, to goods. So it is not entire loss. It includes damage. It is not just goods and services. It includes shares, as in Smith New Court. The rule remains the same and it is set out by Lord Leggatt in Stanford in orthodox terms.

My learned friend did not take you back to the Thai Airways case, upon which I place so much reliance in my own submissions, because there Mr Justice Leggatt, as he then was, did provide a very useful, in my respectful submission, summary of where the law stood and stands.

To take you back to that to make it absolutely clear that what is reasonable in the context of the breach date rule is not a general open textured question of rationality, even objective rationality, but something much more constrained, and the tram lines, to use my learned friend's expression, are indeed set.

To go back to Thai Airways at tab 28, page 597, at paragraph 35 -- and forgive me for going back to this, but it is obviously central to the legal analysis that the Tribunal need to undertake -- he says that:

"In considering what is reasonable" -- this is just above paragraph 35 -- "that is not simply [a question] … of general rationality but is governed by legal rules. Various norms of reasonable conduct have become settled. Foremost of these is the expectation implicit in the market measure of damages that where there is an available market, the claimant will go into the market as soon as possible and will obtain a substitute" if one is available and so forth.

Paragraph 37, since I am in this, and it will be relevant to when I come to motives later, Mr Justice Leggatt said:

"One result of these rules is that the claimant may have acted in a way which was reasonable from the point of view of its own business interests or personal objectives and yet not have adopted what the law regards as a reasonable response to the defendants' breach of contract."

That is not to say the claimant acted in a wrong or foolish way even if it were reasonable from his own commercial perspective. That does not mean that is what the law regards as a reasonable response to the defendant's breach. That is governed

by legal rules which direct the Tribunal to the availability of a market and the availability of proper substitutes.

The PCR says, "Well, these cases all concern regular circumstances, but cryptocurrency is different", but when pressed by Madam Chairman, the PCR struggles to identify what is different about cryptocurrencies. I will show you. These are assets in the traditional sense. They make a virtue of that in their claim. They are securities in a liquid market and are to be treated as such. For that purpose the breach date rule is applied more strictly.

The Tribunal put to my learned friend, "What then is the exception to the breach date rule upon which the PCR relies?" My learned friend referred to none recognised in the case law. It is not their case that the class members were locked in the sense in the case law. It is not their case that the class members were induced by the Defendants' wrong to retain their shares.

Four reasons were given. I will take them in turn.

The first is the fallacy of composition. There are two answers to that. The first is that there is no reason why in law this point should make any difference. That was PCR's primary submission. They said, "This gives rise to a novel legal question", but no explanation was given for why that should be. It was just asserted. There is no reason why the proper approach to mitigation should be different in the context of collective proceedings. The question is: is BSV like another security, like an asset in a liquid market? The question was put to the PCR. No answer was given.

Mr Noble -- I will just give you the reference -- in his own evidence positively asserts that BSV is an asset in the traditional sense. That's tab 23, page 394, paragraph 3.9.

But the critical failure with the fallacy of composition point is the fact that it can be addressed in quantum, the point that I exchanged with Mr Davies and was put directly to the PCR. My learned friend did not disagree that this fallacy of composition one, if

a good one, could be addressed at the quantum stage. There was no disagreement on that point. The disagreement was as to whether it made a difference as to what was reasonable, but it could be addressed at the quantum stage.

The second of the four points raised by the PCR was awareness. Here reliance --

MS JUSTICE BACON: I haven't got a live transcript. My notes of her response were that because the position is on the fallacy of composition that if every class member pursued this course of action, it wouldn't yield a viable result, because it would collapse the price of the currency. She said that that meant as a matter of principle the course of action proposed is not reasonable. So it is not just a quantum point. It goes to the reasonableness.

MR KENNELLY: Indeed, Madam. That is what I was trying to paraphrase. I accept that's what my learned friend said, but in my submission that is not a sustainable submission, because the cases all make clear that where there is an available market, the mitigation rule applies even if as a result of entering that available market one obtains a worse price than the price which one paid -- which one hoped to get for the security. If in mitigation the shareholder obtains a lower price than what he would have obtained absent the infringement, that is recoverable in damages by definition. That's the essence of the point made in all the cases, that where the victim mitigates and suffers loss as a result of his mitigation, that is recoverable in damages from the defendant. So for that reason if there is an available market, it cannot be said that it is unreasonable to enter it simply because the price is lower than you would like, and that is the opposite, in fact, of what the cases say. You are required to enter even if the price is lower and you recover that then in damages from the defendant.

My primary point on the fallacy of composition is that that's not the appropriate way to look at this at all. The law teaches us -- tells us to look at whether from the perspective of each individual Claimant there was an available market.

The third of the four points upon which my learned friend relied was awareness. Here the evidence is very carefully put by Mr Noble. It is important to go to it because of the great weight which is placed on questions of awareness and the concern on the Tribunal's part on the question of awareness and whether there is enough evidence before you.

It is telling that even after the application was made and the question of awareness was squarely raised, the PCR was quite constrained in what they could say.

I go to Mr Noble's second report first in tab 42, page 2... --

MS JUSTICE BACON: Do we need to go back to it? We have seen his second report and we have seen the letter. Do you just want to make your submissions, because ultimately where we got to was him slightly rowing back and saying he accepts there may have been other sources of knowledge, but he still says a substantial number -- a proportion of members of the class wouldn't have been necessarily aware for months afterwards and, as Ms Ford said, he also said it didn't change his primary opinion. So that's where we got to.

MR KENNELLY: Indeed. The important point is that, and it is a point you put, Madam to, my learned friend, in his second report he refers to a couple of months and then in a separate paragraph he says even years. In his letter, when the point is absolutely squarely before him, Mr Noble quite properly chooses his words very carefully and he says that a significant number may not have been aware even for a couple of months after the delisting events.

A couple of months. That is our case. That's why I said right at the beginning that there may well be an issue at trial as to whether it was reasonable for them to re-enter the market after a week or eight weeks, but that's as far as it goes when one looks at the question of awareness.

Their pleaded case is that it was appropriate for the BSV holders to retain their BSV

and not be under any duty to mitigate up to the date of judgment. That's how high they put it, and my learned friend did not resile from that when her own evidence at its highest is that a significant group of the class may not have been aware for a couple of months after the delisting events. If that's their evidence, and we rely upon it, that is sufficient for my purposes.

The next point, the third of the four points, was motives. Here, with respect, the PCR is quite, quite wrong. The personal individual motives of individual class members are irrelevant in the context of the breach date rule. I took you to what Mr Justice Leggatt said in Thai Airways. He says that in terms.

Madam, you referred to Sharp v Viterra -- I will not go back to -- paragraph 95, which says, and I will quote, even if it makes sense to the individual investor, "a commercially reasonable business decision", even the investor takes a commercially reasonable business decision for him in his circumstances, that is not determinative. If there is an available market and a suitable alternative, he is still found to have acted unreasonably pursuant to the legal rules summarised in Thai Airways and in Sharp v Viterra in the Supreme Court.

My learned friend then said there are other factors other than those set out in Golden Victory, Thai Airways and Sharp v Viterra, but she failed to identify them. When pressed, she said, "Well, the class characteristics meant they had small amounts of money in play, and they may have had their own commercial reasons to retain the BSV".

Again, to the extent they are focused on individual commercial judgments or judgment calls, they are all irrelevant, according to the case law. The key point is that when one looks at the characteristics of the class, it is not said that they were locked in or constrained monetarily or any of the other exceptions to the breach date rule which we have seen repeatedly in the cases.

Reference was made to Clerk & Lindsell where it was said at a high level that the duty to mitigate does not require the victims to engage in speculative investments or destroy their own property, but that is an impossible submission for the PCR to make when they say themselves that the alternative cryptocurrencies were comparable.

Again, I will just give you the reference, but Mr Noble's second report says in terms that cryptocurrency investment is speculative. That's tab 42, page 2065 at paragraph 3.20. In investing in BSV the class members have already engaged in what their own expert says is a speculative investment and there is no greater speculation in switching to Bitcoin or the other comparable currencies to which Mr Noble refers.

On this issue, coming back to the question which Mr Cutting put to me about whether that might cut across what we say at trial, of course, even if at trial we say that BSV was a worse cryptocurrency than Bitcoin, the important point for our purposes is that in April 2019 they had the option to switch to Bitcoin, and, in fact, that's likely to be common ground, that in 2019, in April 2019, they had the option to switch to something, we would say something better. They may maintain that the thing was equal or comparable, but the important point is they could have switched to it. It is likely at trial that we will distinguish them and say that what they have could have switched to was better than what they had. That is entirely consistent with the submission I am making to the Tribunal today.

The final point which is cited by my learned friend is continuing infringement. This is not a reply point. It takes two parts, neither of which appear in the claim form. The first is that BSV has not been relisted because there is a continuing coordination between the Defendants. That is a separate further allegation of a breach of Article 101 and that ought to be in the claim form if it is going to be relied on at all. It is not sufficient that it be in an expert report.

The second part is equally unpleaded, the allegation that the exchanges have not

relisted BSV, even though they ought to, because they are maintaining their earlier wrongful decision. They are maintaining a decision which is itself a breach of Article 101. That is something which would also normally be pleaded in a claim form. It is not a mitigation point. That goes to the infringement and the effects of infringement. If it is not pleaded, it should not be relied upon today.

My learned friend then made a point about available markets. She says that cryptocurrencies are different but, when pressed, she could not distinguish them according to the criteria set out in the case law, which focuses on whether there is a liquid market for the asset, and to that extent she did not demur from what her own expert says about the extent to which BSV could be traded, bought and sold in the relevant period. According to her own expert it is commoditised. According to them it is the same features, the same nature, technology, and behaviour pre-breach of the other cryptocurrencies.

Moving on to the loss of a chance, here we struggle to understand precisely what the PCR's case is. They recorded the Allied Maples and Perry distinction between matters which the claimant must prove and matters which they must say the third party would have done, but she referred to Parabola and Vasiliou, neither of which are loss of chance cases at all.

My short point here is what the Claimants are seeking, what the PCR is seeking to maintain appears to be an allegation that their ability to trade generally with BSV was harmed, and in the Wellesley case and in AssetCo, which I will come to in a moment, the courts say that's not about loss of a chance. That's about your ability to trade generally being hindered by the infringement.

MS JUSTICE BACON: The way that Ms Ford articulated it was not that it was about the ability to trade generally. I asked her what the equivalent was, looking at the previous cases, and she said her primary submission was that BSV would have

become a top tier Bitcoin currency. It wasn't about trading generally. She said if that was not established on the balance of probability, then she would rely on loss of a chance. She is nodding.

MR KENNELLY: Then she would rely on loss of a chance?

MS JUSTICE BACON: Yes.

MR KENNELLY: I'm afraid that is extremely unclear from their claim form. When pressed, she said the third parties were -- to have even the alternative of loss of a chance she said the third parties would be potential investors and ultimately the whole cryptocurrency market. The case law makes clear that that is about general trading. Saying that the market as a whole is going to react well to your product is about the ability of that product generally to trade. That is not about the acts --

MS JUSTICE BACON: Her case as she articulated it today -- you may say that's not pleaded, but as she articulated it today, her case is that it would have become a top tier currency and it is that which she founds -- that which she uses as the basis for a loss of chance. Either that's proven on the balance of probability, or she lost a chance for it to -- her clients lost a chance for it to become a top tier currency, which would have led to their gains.

MR KENNELLY: We say that's not sustainable as a matter of law, because to be a loss of a chance claim it has to be about the opportunity to get a certain thing, like in Chaplin v Hicks, or with Allied Maples and Perry it has to be a thing which the claimant has to do and then what a third party would have done.

Putting to one side the standard of proof, Allied Maples' loss of a chance has two parts. One is what the PCR -- the class members would have done with the BSV and then what particular third parties would have done subsequently. I struggle in my respectful submission to see how their case fits into that paradigm. My learned friend was extremely vague about how that would actually work according to what loss of chance

means in the case law. It is a term of art. What they describe -- this is not to shut them out. It just appears that what they have is a case much closer to an allegation that they had a valuable asset which was impaired, and its value reflects the market's opinion of it and the ability to trade generally with it.

I will give you another reference. I shall not take you to it in the time. It is AssetCo, tab 33, page 1080 and the headnote at page 956, which very clearly -- Mr Justice Bryan makes the distinction between a loss of a chance case as properly described and what in our submission the PCR is really about. But ultimately, if I am right about the breach date rule, that will also apply to their allegation of loss of a chance, since they have the same duty to mitigate in any event.

My very final point on the appropriateness of a strike out is just to draw your attention to the very unsatisfactory position that the Defendants are in, the Proposed Defendants, in the currently framed claim. I didn't make this clear enough in opening, and I want to just take you to one document, the very last document I will show you. It is the claim form again and it is in the B bundle behind tab 13, which is really why we are before you, why we have come before you with this application.

If you look on page 192, paragraph 9, this is the pleaded value of the claim in relation to Sub-Class B, and the BTC heading refers to the outcome where their comparator cryptocurrency is the really good one and BCH is an outcome where the Tribunal settles on a less successful cryptocurrency. Depending on how that ends up, the Sub-Class B claim as currently framed has a value range of between just below £9 billion and £26 million. It is an extraordinary situation for us to find ourselves in to face a claim for one category that ranges between £26 million and £9 billion. That is why this issue cries out for early resolution in order that the parties know where they stand and in particular that the Defendants do not have this hanging over them all the way to trial.

Those are my submissions.

MS JUSTICE BACON: Thank you. Thank you. I can't tell you at this point whether I need you back tomorrow. What we will do is let you know later this evening if that's all right. Thank you very much.

(4.58 pm)

(The hearing concluded)