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IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1523/7/7/22

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Monday 28th September

Before:
The Honourable Mr Justice Mellor
Michael Cutting
John Davies
(Sitting as a Tribunal in England and Wales)

BETWEEN:

Class Representative

BSV Claims Limited

And

Defendants

Bittylicious Limited & Others

A P P E A R A N C E S

SARAH FORD K.C., WILLIAM HOOPER AND SARAH O'KEEFFE (Instructed by
Velitor Law) appeared on behalf of the Class Representative

SARAH ABRAM K.C. AND ANDREW MCINTYRE (Instructed by **Reynolds Porter
Chamberlain LLP**) appeared on behalf of the Second and Fourth Defendants

JONATHAN SCOTT (Instructed by **Hogan Lovells Cadwalader International LLP**)
appeared on behalf of the Fifth Defendant

BRIAN KENNELLY K.C. AND JASON POBJOY K.C. (Instructed by **Proskauer Rose
(London) LLP**) appeared on behalf of the Sixth Defendant

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(10.27 am)

Hearing

THE CHAIRMAN: Okay, so some people are joining us on live stream on our website so I must start with a customary 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 or visual, of the proceedings and breach of that provision is punishable as a contempt of court.

Good.

MS FORD: Sir, members of the Tribunal, I appear with Mr Hooper and Ms O'Keefe for the Class Representative. Ms Abram KC and Mr McIntyre appear for the Second and Fourth Defendants. Mr Scott appears for the Fifth Defendant and Mr Kennelly KC and Mr Pobjoy KC appear for the Sixth Defendant.

There are two matters on the agenda for this hearing. The first one is the Class Representative's application to amend, to reflect the guidance given by the Tribunal and the Court of Appeal concerning the market mitigation rule, and the second one is the Defendants' application for decertification. Subject to any views the Tribunal may have, what has been agreed is that we will split the time equally as between the Class Representative and the Defendants and I will go first and address both of those points for approximately three hours or so. The Defendants will then have a little over three hours to respond and then I will get a short reply and that should hopefully finish business by lunchtime tomorrow.

Starting with the Class Representative's amendment application, what I propose to do is first of all identify what we say is the guidance that's been given by the Tribunal in its previous judgment and the Court of Appeal. Then show the Tribunal our draft

1 | amendments and the expert evidence of Mr Noble which underpins them and then
2 | address the various objections that have been raised by the Defendants.

3 | Can we start, please, with the previous judgment of the Tribunal. The Tribunal should
4 | have a bundle of documents that's called "Other Relevant Documents", and it's tab 7,
5 | starting at page 210.

6 | **(Pause).**

7 | **THE CHAIRMAN:** Our IT has been sorted, thanks.

8 | **MS FORD:** Grateful. So what the Tribunal should have there is the judgment on
9 | Binance's strike-out application and certification and as the Tribunal is aware and as
10 | is recorded in the first paragraph, these are collective proceedings brought on behalf
11 | of the UK based holders of the cryptocurrency Bitcoin Satoshi Vision or BSV. The
12 | Defendants are each operators of cryptocurrency exchanges and the claims arise out
13 | of collusion to de-list BSV from the Defendant exchanges which took place between
14 | 12 April and 5 June 2019.

15 | Looking at paragraph 2, Binance applied to strike out the main category of loss, which
16 | was claimed for what was then called proposed sub-class B, which was the class of
17 | BSV holders who had retained their holdings in BSV up until the date of issue of the
18 | proceedings.

19 | That category of loss was termed the foregone growth effect and what was intended
20 | by that meaning, by that term, was loss arising by reason of the de-listings preventing
21 | BSV from becoming a major cryptocurrency and that was contrasted with what was
22 | termed the immediate and persistent effect, which was the loss suffered by then
23 | sub-class A and that referred to the fall in price of the coin in the immediate aftermath
24 | of the de-listing events.

25 | Looking at paragraph 3, the basis of the application to strike out was the market
26 | mitigation rule and the Tribunal will note, as is recorded in paragraph 4, subject to

1 | Binance's application, none of the Proposed Defendants opposed certification.

2 | The test for strike-out or summary judgment was summarised by the Tribunal in
3 | paragraphs 33 to 38, starting at page 221 and essentially the same principles will
4 | apply for present purposes, when the Tribunal is now considering our proposed
5 | amendments. The Tribunal will be familiar with the applicable test.

6 | We would emphasise in particular the point that's made at paragraph 38 of the
7 | judgment, that it's not generally appropriate to strike out a claim on assumed facts in
8 | an area of developing jurisprudence and decisions as to novel points of law should
9 | instead be based on findings of fact.

10 | Turning to page 223, the Tribunal's treatment of the strike-out application begins at
11 | paragraph 39 and in our submission there are five points to draw out of the Tribunal's
12 | judgment.

13 | The first is that the market mitigation rule assumes that the injured party will act
14 | reasonably in response to a wrong. And so it quantifies their recoverable loss on the
15 | basis of that reasonable response. And we can see that from the legal principles that
16 | have been set out by the Tribunal at paragraphs 39 to 42. So the classic statement of
17 | principle is that that comes from the *Golden Victory* and it's set out in the quotes in
18 | paragraph 39 and it explains that the market mitigation rule essentially applies
19 | whenever there's an available market for whatever has been lost and its explanation
20 | is the injured party should ordinarily go out into that market to make a substitute
21 | contract to mitigate and generally thereby crystallise his loss and it's said:

22 | "Market prices move both up and down. If the injured party delays unjustifiably in
23 | re-entering the market, he does so at his own risk. Future speculation is to his
24 | account."

25 | We then see the Tribunal elaborates in paragraphs 40 and 41. The market mitigation
26 | rule reflects a basic principle of mitigation and here we see the reference to

1 reasonableness:

2 "The other party must take all reasonable steps to mitigate their loss consequent upon
3 the wrong. They can't recover damages for any such loss which should reasonably
4 be avoided."

5 And it arises where there's an available market, where the claimant can, therefore,
6 readily obtain a reasonable substitute.

7 The Tribunal explains in 41:

8 "In that case the damages recoverable will generally be based on the cost to the
9 claimant of entering into the reasonably substitutable transaction and if they choose
10 not to do so, then their conduct is an independent decision on their part and does not
11 derive from the unlawful conduct of the defendants."

12 So the consequence as summarised in 42, provided there's an available market,
13 damages will be assessed by reference to the cost of the reasonable substitutable
14 transaction at the time at which it was reasonable for the claimant to enter into the
15 transaction, irrespective of whether the claimant actually does so.

16 So in a nutshell, the market mitigation rule is based on a conclusion about what is
17 a reasonable response to the wrong.

18 Second point, the Tribunal specifically acknowledged that if all BSV holders sold
19 together, that would cause the price of BSV to fall and result in greater aggregate
20 losses and it considered that those greater aggregate losses would be recoverable by
21 the class.

22 That, we say, is evident from paragraphs 51 to 56 which start at page 226.

23 Paragraph 51 is recording a point which was made by Mr Noble, who is the Class
24 Representative's expert economist, and he made the point that while divesting from
25 BSV might have been an optimal response for an individual BSV investor, if every BSV
26 investor who could divest had done so, the result would have been a dramatic fall in

1 the price of BSV and the overall scale of the aggregate losses to the sub-class B might
2 have increased.

3 If we look at paragraph 53 over the page, the Tribunal doesn't accept that argument
4 as a reason why the market mitigation rule shouldn't apply.

5 And it explains in paragraph 54:

6 "It may well be that if the entirety of sub-class B had divested their BSV holdings
7 following the de-listing events, the price of BSV would have been lower than it was in
8 fact in circumstances where some but not all BSV holders sold their coins."

9 The Tribunal says:

10 "If that were to be established, the consequence would be an increased, immediate
11 and persistent effect loss for that class."

12 That being, as I explained, the categorisation of the immediate loss caused by the
13 de-listings, as contrasted to the foregone growth effect.

14 That loss would represent, however, the entirety of the loss to that class, if those BSV
15 holders could immediately have replaced their BSV holdings with holdings in other
16 substitutable cryptocurrency.

17 And then at 56, that being the case, whatever price BSV might have fallen to, its
18 holders could have replaced their holdings with another cryptocurrency. In principle,
19 therefore, their losses should be based on the cost to those holders of doing so.

20 So in our submission the Tribunal has expressly acknowledged the possibility that
21 a hypothetical assumption of a mass sale might have caused the price of BSV to fall
22 even lower and it is saying it considered those losses to be properly recoverable.

23 Third point, the Tribunal finds as a fact that there was, at the time of the de-listing
24 events, an available market on which substitutable cryptocurrency investments could
25 have been made. That finding is recorded at paragraph 64 in the judgment and it's
26 essentially starting at the fourth line:

1 "The relevant questions are whether there was at the time of the de-listing events and
2 thereafter, an available market on which substitutable cryptocurrency investments
3 could have been made."

4 Mr Noble's evidence confirms that there was such a market.

5 The basis of this factual finding was Mr Noble's evidence, in which he had identified
6 potential comparators to BSV for the purposes of his quantum methodology.

7 I asked the Tribunal to note the limits of the finding that is being made here. In my
8 submission the Tribunal is not making any factual findings about the capacity of the
9 available market. It's not making any findings and nor, in our submission, did it have
10 any evidential basis to make any findings that the market it had identified was capable
11 of absorbing sales of any particular scale. There was no evidence or argument about
12 that particular point before the Tribunal.

13 The fourth point we derive from this judgment is that the precise date by which BSV
14 holders should have entered the market is a matter for trial. That was a submission
15 which was initially made by Binance and we can see that recorded at paragraph 73 in
16 the judgment. And it was submitted that the de-listing events were reasonably
17 discoverable by BSV holders, although as noted above, he accepted that the precise
18 time at which those events were or ought to have been discovered would be a matter
19 for evidence at trial.

20 So that was the submission that was made and that was ultimately accepted by
21 the Tribunal at paragraph 79. I'm looking in particular at the last sentence, where
22 the Tribunal says:

23 "We consider that it is reasonable to expect that at least some further relevant
24 evidence may be available at trial as to what BSV holders could be expected to have
25 known of the de-listing events and when, whether in the form of factual evidence or
26 expert evidence."

1 And of course, equally, it's reasonable to expect evidence to be available at trial about
2 other aspects of this deemed sale that was being contemplated as well, such as, for
3 example, how long it might take them to go into the market once they became aware
4 and how their sales might have been processed and details of that nature.

5 The fifth point, having made those findings about the market mitigation rule and about
6 the foregone growth effect being irrecoverable in law, the Tribunal then proceeds to
7 certify the Class Representative's claim and it did so, well aware of the impact on the
8 size of the claims. We can see that from paragraph 103.

9 The Tribunal is recording there the claim for the foregone growth effect for sub-class B
10 and the Binance holdings in sub-class C has a dramatic effect on the overall size of
11 the claim. The result is that while the majority of Class Members, 64 per cent, are
12 estimated by Mr Noble as falling into sub-class A, the vast majority of the estimated
13 value of the claim is derived from the claim for sub-class B and the Binance holdings
14 in sub-class C.

15 On Mr Noble's estimates, using Bitcoin as a relevant comparator, 99.8 per cent of the
16 claim is for sub-class B and the Binance holdings of sub-class C. If Bitcoin cash is
17 a relevant comparator, that figure reduces to 63 per cent but it's still a significant
18 majority of the claim.

19 The Tribunal will appreciate why I emphasise that particular point now, because when
20 it comes to the decertification application, the Defendants seek to suggest that the
21 success of Binance's strike-out application was somehow an unanticipated change of
22 circumstances and we say both the Defendants and the Tribunal had the
23 consequences well in mind at the time the Tribunal nevertheless proceeded to certify.

24 Turning to the Court of Appeal. Its judgment is behind tab 10 in this bundle, starting
25 at 249. It upheld the Tribunal's judgment. Pick it up, please, starting at paragraph 10
26 on page 252. What the Court of Appeal is doing here is setting out an exchange of

1 correspondence which took place between the Class Representative and the Tribunal,
2 which sought to clarify the exact scope of what had been decided by the Tribunal in
3 its judgment.

4 What the Court of Appeal goes on to say at 11 is that:

5 "On the basis of that correspondence, the representative was in no doubt that despite
6 Binance having failed to strike out the representative sub-class B claims and subject
7 to arguments about whether sub-class B holders were aware of the de-listing events,
8 it would be assumed at trial that those holders could and should have sold their
9 holdings of BSV after those events and bought another substitutable cryptocurrency."

10 We make two points about this paragraph. Firstly, the Court of Appeal, like
11 the Tribunal, was in no doubt that the impact of the ruling that had been made on the
12 value of the claim was clear. It's not some unanticipated eventuality. In their skeleton
13 at paragraph 37 the Defendants suggest that they couldn't be expected to see that the
14 Class Representative would abandon its foregone growth claim. The way it's put is
15 they would abandon it.

16 We say, as is evident from the judgments and this paragraph in particular, we haven't
17 abandoned it, it's been ruled unavailable to us as a matter of law, as a consequence
18 of the Defendants' application.

19 Secondly, the Defendants place some reliance on the remainder of this paragraph to
20 suggest that the Court of Appeal has specified sub-class B holders' losses should be
21 calculated on the basis of the actual market prices rather than a price derived from
22 a deemed sale. And I'm looking in particular at paragraph 13 of the Defendants'
23 skeleton argument.

24 In our submission, the Defendants are placing too much weight on this paragraph.
25 What we say the Court of Appeal is recording is that the foregone growth effect, which
26 had been claimed for, isn't recoverable and so they say sub-class B are only entitled

1 to the full value of BSV as a (inaudible) result of the de-listing effects, which is the
2 measure of loss that was claimed in respect of sub-class A and not the foregone
3 growth effect.

4 But what they're not doing, in my submission, in this paragraph is being in any way
5 prescriptive about how one should go about quantifying the effect of a deemed sale of
6 sub-class B's holdings.

7 The core of the Court of Appeal's reasoning then starts at page 256. Paragraph 34 is
8 another paragraph on which the Defendants place some weight and in particular, the
9 passage where the Court of Appeal says:

10 "It would be unthinkable for the holders of freely tradeable shares whose value had
11 been reduced by tortious conduct to be able to claim more than the current value of
12 those shares, to compensate them for the prospect that their value might have
13 substantially increased in the future. The same principle applies here. It's called the
14 mitigation rule, market mitigation rule."

15 Now, the Defendants say that the reference to current value in this paragraph must
16 mean the actual market price rather than a market price on a deemed sale. Again, in
17 our submission that's not right. We say that the reference to current value here is
18 simply saying that recovery is capped at the impact on the value of the shares at the
19 time of the wrong and so they're contrasting it with a claim encompassing
20 a speculative future value, which is the claim that was found to be unrecoverable as
21 a matter of law.

22 In our submission, all that's being said here is that the Class Representative can't
23 recover damages for the prospect that value might have substantially increased in
24 future. That is all the Court of Appeal is ruling out in this paragraph.

25 We can see from paragraph 35 that the Court of Appeal clearly had in mind
26 a counterfactual deemed sale. It says:

1 "Once the sub-class B holders knew of the allegedly wrongful de-listing events, they
2 had a decision to make. They were at liberty to retain their BSV holdings or to sell
3 them and crystallise their loss, just as the sub-class A holders did. If the sub-class B
4 holders retained their BSV coins, that was their right but it did not entitle them to argue
5 that their losses should be assessed by reference to the value of some other, better
6 performing cryptocurrency at some future unspecified date."

7 There, again, the Court of Appeal drawing the contrast with the foregone growth effect
8 claim:

9 "If they wanted to invest in Bitcoin or Bitcoin cash or anything else, they were always
10 at liberty to do so. Once the sub-class B holders knew of the de-listing events, their
11 investment decisions were nothing to do with the Defendants. They had a duty to
12 mitigate their losses and they cannot recover losses that they could reasonably have
13 mitigated."

14 That's a classic statement of the market mitigation rule:

15 "In relation to tradeable assets such as BSV, that meant selling them or retaining them
16 but either way, their maximum loss is calculated by reference to the value they could
17 have received for them, once they knew or ought to have known of the wrongful
18 conduct."

19 We say this is a very clear statement that the Court of Appeal is contemplating
20 a counterfactual deemed sale and it comes through particularly clearly from the final
21 sentence:

22 "The value they could have received for them, once they knew or ought to have known
23 of the wrongful conduct."

24 That's the point where they have to go into the market and make a sale.

25 Secondly, this paragraph is emphasising the immediacy of the duty to mitigate. So
26 the Court of Appeal is saying once the sub-class B holders know of the de-listing

1 events, their investment decisions were nothing to do with the Defendants and the
2 maximum value they could have received from them is once they knew or ought to
3 have known of the wrongful conduct.

4 Now, we say that's entirely consistent with the position on the authorities and
5 the Tribunal has in the bundle, for example, Lord Leggatt in Stanford International
6 Bank. For the Tribunal's reference, it's paragraph 43, which is at Authorities
7 Bundle-tab 19 at page 753 and the way he puts it is:

8 "The obligation is to enter the market and obtain a substitute at the earliest reasonable
9 opportunity."

10 Now, the reason I flag that up at this stage is because one of the Defendants'
11 objections to the amendments that we make is that they suggest that there is
12 a difference between the date of awareness on the one hand and the date when Class
13 Members might be expected to enter the market.

14 And in our submission there is no such leeway here on the judgment of the
15 Court of Appeal.

16 Paragraph 36 is an important paragraph. The Court of Appeal is here considering the
17 argument that was put by the Class Representative that if all holders of BSV were to
18 sell, then the consequence would be that the price would fall. And I would like to very
19 briefly show the Tribunal the way that was put by reference to the transcript. It's in
20 tab 15 of this bundle, page 401.

21 If the Tribunal looks at page 56 of the transcript, lines 2 to 15, a submission is being
22 made by reference to Mr Noble's second report and it's a familiar one because it's the
23 one we made before the Tribunal, as well:

24 "If all proposed class members in sub-class B had sold their BSV, this, with holding
25 other factors constant, would have increased supply without any countervailing
26 increase in demand. This would tend to reduce the price of BSV. If divesting from

1 BSV is optimum for members of sub-class B, it would also be optimum for members
2 of sub-class A. If every BSV investor around the world who could divest had done so,
3 the price of BSV would have fallen dramatically. Had that happened, only the sellers
4 of BSV who moved fastest would have seen any benefit."

5 So the point, as is recorded in this transcript, that Mr Noble was making, was that if
6 everyone was required to sell as at the date of breach, then the price of BSV would
7 plummet and it might become worthless and the submission was expressly made by
8 every BSV investor around the world who could divest.

9 That was the submission that was being made to the Court of Appeal. It was put in
10 terms of every BSV investor around the world and the Court of Appeal's answer to that
11 submission is what it says in paragraph 36. So if we can turn back to that, page 256
12 in this bundle.

13 It records a number of other arguments were addressed as to the value of BSV. For
14 example, it was suggested that if all the holders claiming had sold, the value would
15 have reduced still further. The Court of Appeal's view is:

16 "I cannot see the relevance of that argument. The loss is calculated by reference to
17 the actual value of BSV at the relevant date. If that was lower because many victims
18 had sold at the same time, so be it. It does not mean that the sub-class B holders can
19 retain their damaged holdings and claim a vast multiple of their original value."

20 In our submission this paragraph makes clear what the Court of Appeal means when
21 it refers to the actual value of BSV at the relevant date. What it is referring to, in our
22 submission, is what happens on a deemed sale.

23 Now, we know that that was the submission on behalf of the Class Representative that
24 the Court of Appeal was addressing, the submission that if all the holders claiming had
25 sold, the value would have been reduced still further.

26 And if we look at the last sentence of this paragraph, the Court of Appeal is confirming

1 that they should still be assumed to have sold their holdings despite the consequences
2 because it says:

3 "It doesn't mean that sub-class B holders can retain their damaged holdings and claim
4 a vast multiple of their original value."

5 So it's making very clear that they have to be deemed to have sold them and what it's
6 ruling out is the recovery of some hypothetical future value. And it says in response
7 to the specific submission that was made to it:

8 "If the actual value of BSV, in contrast to the hypothetical future value, ends up being
9 lower because so many victims sold at the same time, then so be it."

10 It says that doesn't mean that one disappplies the market mitigation rule.

11 Finally, paragraph 45, the Court of Appeal is clarifying what it understands to have
12 been the effect of Binance's application:

13 "It succeeded here and below in striking out sub-class B's claims for damages beyond
14 the difference in value of their BSV holdings on 11 April 2019 and a point in time
15 shortly after they were aware or ought to have been aware of the de-listing events and
16 any quantifiable consequential losses, such as trading fees."

17 In our submission again, the relevance of the Court of Appeal referring to the point in
18 time when they're aware or ought to be aware, is that's the point at which they are
19 deemed to go into the market and make a substitute transaction.

20 Note also the reference to trading fees. We know that sub-class B had not in fact
21 incurred any trading fees because they did not in fact sell but they are assumed to
22 have incurred loss because they are assumed, they are deemed to have sold their
23 holdings. So this is all premised, in our submission, on a deemed sale and the point
24 in time that they have to go into the market is shortly after they were aware or ought
25 to have been aware. So, again, there is no grace period for them to, for example,
26 coordinate with other victims or to wait so as to avoid a price crash.

1 **THE CHAIRMAN:** Do you mind if I ask you a question about the case you're now
2 putting forward.

3 **MS FORD:** Certainly.

4 **THE CHAIRMAN:** Because I understand all the arguments about what the
5 Court of Appeal decided and the one thing they weren't considering is the case you're
6 now putting forward.

7 **MS FORD:** The date -- I'm sorry, did I hear you?

8 **THE CHAIRMAN:** No, the basis --

9 **MS FORD:** The basis.

10 **THE CHAIRMAN:** -- for the claim for damages. Now, as I understand it, the
11 counterfactual price was £55; yes? And on the date of assessment -- well, your claim
12 is they can recover the full £55; right?

13 **MS FORD:** Well, the actual amount will be a matter for evidence at trial.

14 **THE CHAIRMAN:** Yes.

15 **MS FORD:** We say they can recover -- it might help if I showed the exact amendments
16 we're making but the difference between two counterfactual prices.

17 **THE CHAIRMAN:** Yes, but as I understand it, at its highest you're saying they can
18 recover the full £55 and this is on the basis where the range comes down a little bit.
19 So some members of sub-class 2 get £55 and yet they still retain their damaged
20 holdings; right?

21 **MS FORD:** Yes.

22 **THE CHAIRMAN:** How can that possibly be a sensible claim for damages, when
23 they're coming out better than anybody could have done so at the time?

24 **MS FORD:** That, in our submission, is the consequence of deeming the market
25 mitigation rule to apply to this claim for damages.

26 **THE CHAIRMAN:** What that points to is that you're taking the deeming too far

1 because it yields an absurd result.

2 **MS FORD:** In my submission that's not necessarily the case. The effect of applying
3 the market mitigation rule is to reduce what otherwise could have conceivably been
4 an even greater claim for damages. That would have been the case if BSV had still
5 remained tradeable and if its value had increased. They could have found themselves
6 even worse off. We have been told as a consequence of the application of the market
7 mitigation rule, that that even greater claim for damages is not available but it is not,
8 in our submission, an inherently wrong result that the amount that they recover has to
9 be, essentially, paid on the assumption that the market mitigation rule assumes that
10 they have gone into the market as a class, together, and purchased a replacement.
11 That was exactly the premise that was (inaudible) and accepted, in our submission.

12 **THE CHAIRMAN:** Okay, but what's wrong with the application of the market mitigation
13 rule, where you work out what the price -- you find out what the price of BSV would
14 have been at the date of assessment which I understand is £39; right?

15 **MS FORD:** In my submission, that's not what one does. One has to work out what
16 the price --

17 **THE CHAIRMAN:** Okay, but what's wrong with a claim for damages for the difference
18 between 55 and 39?

19 **MS FORD:** It's not the correct application of the market mitigation rule. The Tribunal
20 has taken a view as to how this class should respond to the loss. It says you have to
21 assume that they would go and make a substitute transaction, which has two stages.
22 They have to sell their BSV and then they have to find a substitute cryptocurrency and
23 buy it.

24 In reaching that judgment, it has essentially taken into account all the circumstances
25 of this class, it doesn't treat them as one claimant in isolation; it recognises that they're
26 a group who have each been a victim of the wrong. It was addressed on and

1 specifically had in mind what would be the consequences if that was the way in which
2 they're supposed to have acted reasonably. It knew that the consequence of that
3 reasonable conduct is that the price goes down because everybody goes into the
4 market at once.

5 **THE CHAIRMAN:** But in fact, the market didn't collapse.

6 **MS FORD:** It didn't because there wasn't the deemed hypothetical sale that the
7 market mitigation rule requires you to assume. They did not in fact sell.

8 There is an inherent artificiality in the market mitigation rule because you are
9 quantifying this class's loss on the basis of something that incontrovertibly they did not
10 do. They did not sell their holdings. They held on to them, so one has to construct
11 a counterfactual and the counterfactual, in our submission, has to take into account
12 the context and the circumstances in which a judgment has been made about what
13 was reasonable for these claimants to do, because that's the situation in which they
14 found themselves.

15 **THE CHAIRMAN:** Okay, thank you.

16 **MS FORD:** I can show the Tribunal how we have sought to reflect that in the
17 amendments that we're making. The amendments are in the Core Bundle, tab 1,
18 starting at page 3.

19 What we have sought to do is to give effect to what we understand is the guidance
20 that has been given. I'm not proposing to show every single amendment but I intend
21 to show the Tribunal the ones that essentially give the gist of what's in dispute between
22 the parties.

23 So if we start, please, at paragraph 11, what we have here is the pleading of the new
24 sub-classes and this is where you find the definition of the date of assessment.

25 **THE CHAIRMAN:** Yes.

26 **MS FORD:** And it's defined as "the date on which, acting reasonably, they should

1 have entered the relevant market or markets to obtain an alternative cryptocurrency,
2 following the de-listing event." Defined term, date of assessment.

3 For the purposes of providing an estimate of the amount claimed in damages and the
4 methodology by which that amount can be quantified, the Class Representative
5 instructed Mr Noble to assume that the date of assessment was 11 May 2019 and that
6 is one month after the relevant de-listing events.

7 The same amendment in relation to classes is then followed through at paragraph 57.

8 And then the explanation of the sub-class is at paragraph 60, so sub-classes 1 and 2
9 replace the previous sub-classes A, B and C. And the two new sub-classes reflect the
10 prima facie measure of loss applicable in a case where the claimants have a duty to
11 mitigate the losses by entering into the relevant market or markets by the date of
12 assessment, to obtain an alternative cryptocurrency.

13 So sub-class 1 comprises those proposed sub-class members who did sell their coins
14 by the date of assessment and sub-class 2 comprises those Class Members who did
15 not sell their coins by the date of assessment but whose loss will be assessed as
16 though they had done so.

17 Beginning at paragraph 105, we can see the methodology set out by which it's
18 appropriate to calculate their damages.

19 The actual amendments are over the page, subparagraphs 1, 2, 3 and 4. No objection
20 is taken to the methodology for sub-class 1 which is the one set out in subparagraph
21 1 and those are the holders who actually sold their BSV coins prior to the date of
22 assessment and the proposal there is to calculate the difference between the price for
23 which the Class Members actually sold their BSV coins prior to the date of assessment
24 and the price at which they would have sold those coins, absent the de-listing events.

25 In relation to sub-class 2, Mr Noble assumes, consistent with the guidance we have
26 been given, that all Class Members who held their coins by the date of assessment

1 entered the relevant market or markets to obtain an alternative cryptocurrency and he
2 then calculates the difference between two counterfactual prices and this is the point
3 that I was alluding to with the Tribunal.

4 The first counterfactual price is the price that BSV would have traded for on the date
5 of assessment, had the alleged infringement not happened and we understand no
6 objection is taken to that particular limb.

7 And the second is the price that BSV would have traded for on the date of assessment,
8 had all holders of BSV, at the same time, attempted to sell their coins and that is the
9 deemed sale and that is essentially the point in relation to which objection is taken.

10 Subparagraph 3 is pleading factual matters as to why that is an appropriate and
11 reasonable counterfactual to assume and we make the point that:

12 "Cryptocurrencies, including BSV, are traded globally and crypto exchanges operate
13 globally, so if it was reasonable ... all UK resident members of sub-class 2 to divest
14 their BSV holdings on the date of assessment, in response to the de-listing events,
15 then it was equally reasonable for holders of BSV who are not resident in the UK to
16 respond to the de-listing events in the same way. Accordingly, it's reasonable to
17 assume for the purposes of assessing loss and damage of sub-class 2 that all
18 remaining holders of BSV attempted to sell their coins on the date of assessment."

19 And then subparagraph 4 pleads the estimated damages which are realised on that
20 basis, between 122 million and 140 million, including interest.

21 Paragraphs 165, 166 and 166(a) which are on page 50, they then plead that the class
22 has suffered loss and damage on a consistent basis to the one that I have just shown
23 the Tribunal and the methodology by which that is proposed to be calculated is set out
24 in Mr Noble's third report, which is in Core Bundle, tab 13, starting at page 354. And
25 for the purposes of just giving the Tribunal a flavour of the approaches taken, I was
26 proposing just to look at his summary in paragraph 1 of his report, so starting at

1 page 357.

2 He records at 1.4 that his instructions are:

3 "... to produce this additional report in order to specify how he would quantify
4 aggregate damages in light of the judgments of the Tribunal and the Court of Appeal."

5 1.5, he's instructed:

6 "...to estimate damages on the basis that class members had a duty to mitigate their
7 losses by the date of assessment."

8 And that's to be assumed for the purposes of his report, as 11 May 2019.

9 As has been recognised by the Tribunal and the Court of Appeal in the relevant
10 judgments, when exactly it would have been reasonable for BSV holders to enter the
11 market is a matter of evidence at trial.

12 For present purposes, we have instructed Mr Noble to assume one month later but of
13 course, the evidence might conceivably suggest it was either earlier or later.

14 We do make the point that the burden is on the Defendants to plead and prove
15 a relevant failure to mitigate and they haven't presently put forward any positive date
16 about when they say the date of assessment should be and why.

17 So we say what we have done is to take a reasonable assumption for present
18 purposes. The assumption we have adopted is entirely consistent with what the
19 Defendants were suggesting in support of their strike-out application. So Binance, in
20 their submissions, referred to a couple of months and somewhere between a week or
21 eight weeks. The reference for the Tribunal's note is this bundle, tab 14, page 381,
22 lines 22 to 25.

23 So in circumstances where the sort of time period that was being mentioned was
24 a couple of months or a week or eight weeks, what we have done is taken a date in
25 the middle which is one month after the de-listing events.

26 There is what we say is an unevidenced complaint at footnote 34 of the Defendants'

1 skeleton which suggests that the month date that we have chosen is in some way
2 a particularly advantageous date for the Class Representative. We don't agree with
3 that criticism. We say we have simply suggested a reasonable assumption based on
4 what the Defendants themselves said.

5 Of course, if they wish to plead that some other date is more reasonable and advance
6 a reason for that, then that's a matter for them to plead and prove by way of evidence
7 at trial.

8 1.7 explains the two sub-classes, depending on whether BSV holders sold their coins
9 by the date of assessment.

10 1.8 is explaining sub-class 1 and 1.9 explains sub-class 2 and he explains that in this
11 context, if all holders of BSV globally, not just in the UK, would sell on a single day,
12 then a very large number of coins would be coming on to the market at the same time.

13 And footnote 1 makes the point in that context that if divesting from BSV on the date
14 of assessment is optimal for members of sub-class 2, he would expect it also to be
15 optimal for members of BSV who are not resident in the UK.

16 And he then sets out the basis on which he proposes to measure the damage between
17 the two counterfactual prices.

18 What we would emphasise is that his methodology is sufficiently flexible to reflect
19 whatever the position is on the evidence in due course. And so, for example, 1.10 in
20 respect of the first counterfactual price, he says:

21 "At the time I highlighted that I might update my methodology as more information
22 becomes available, particularly with respect to the time period over which I might
23 estimate the effect. It's also the case that as more information becomes available, I
24 may decide that a different time period is appropriate for estimating effect, specifically
25 on 11 May 2019, which I am now asked to do, rather than for estimating the general
26 effect over a protracted period."

1 Similarly, in relation to the second counterfactual price at 1.11, he's at this stage
2 identifying two possibilities. He says:

3 "If the market had sufficient liquidity", then he sets out in appendix (a)(i) to his report,
4 a methodology for estimating the second counterfactual price.

5 If, conversely, the volume of coins is so large that the market for BSV effectively
6 collapses, then he says BSV becomes worthless.

7 At 1.15, he makes the point that based on the assumption that he has been asked to
8 make, that all holders of BSV globally sell, he considers that BSV would most likely
9 have lost all of its value.

10 He's not, in making that assumption, assuming that every investor sold absolutely
11 simultaneously. He says:

12 "Those who sold early enough on the date of assessment may have received
13 a positive price, even if the price did eventually fall to zero. As a result, the average
14 selling price may be slightly above zero."

15 And he says he therefore:

16 "... conservatively considers that BSV may have lost 84 to 100 per cent of its value,
17 the lower bound of this range being based on observations of another rapid
18 cryptocurrency crash."

19 Again, in our submission, that is a matter for evidence in due course.

20 1.16, over the page. He makes clear that he is also considering methods he would
21 use to estimate the value of BSV if the market didn't collapse and his methodology for
22 that is in appendix A1.

23 So having shown the Tribunal the amendments we are proposing to make, I am now
24 turning to deal with the Defendants' objections.

25 The first objection is that it's said that the Court of Appeal judgment has already
26 decided these points against the Class Representative in two respects. First, it's said

1 that the Court of Appeal has already decided that there was an available market.
2 The Tribunal has my submissions that neither this Tribunal nor the Court of Appeal
3 had sufficient evidence or submissions to decide the capacity of that relevant market.
4 So in my submission they certainly cannot be taken to have considered and decided
5 that there could be no effective collapse of the market or no run on the market. That,
6 in our submission, is a matter for evidence and it wasn't argued first time round.
7 Then it is said that the Court of Appeal had suggested that sub-class 2's damages had
8 to be assessed by reference to actual market prices and the Tribunal has my
9 submissions on that point as well. We say that fairly read, the passages the
10 Defendants have drawn attention to are simply drawing a distinction between actual
11 market prices on the one hand and hypothetical future market prices, which they are
12 saying are unrecoverable. They are simply emphasising that sub-class 2 are not
13 permitted to recover the foregone growth effect because the market mitigation rule
14 applies to their claims.
15 In my submission, it is clearly not being prescriptive about what is the outcome. How
16 does one go about calculating the outcome if the market mitigation rule applies and
17 there is a deemed sale.
18 Next, it is said that we have misunderstood or misapplied the market mitigation rule
19 and that objection, as we understand it, is that instead of assuming a collective set of
20 sales by all those who were affected by the wrong in question, the correct way to
21 approach it is to separate out each individual claim and assume that a claimant acts
22 in a world isolated from all other claimants.
23 Now, in our submission, that is wrong as a matter of principle and it touches on some
24 of the issues that I was just canvassing with the Tribunal in response to the Tribunal's
25 questions.
26 The issue that the Tribunal is considering here when applying the market mitigation

1 rule is one of mitigation. How should the Class Members reasonably respond to the
2 Defendants' wrong? And that assessment of what is reasonable and whether their
3 conduct was reasonable has to be, we say, self-evidently undertaken in the context of
4 the Class Members' actual circumstances at the time of the wrong.

5 If a court or Tribunal is imposing on a claimant an expectation that they will act
6 reasonably, we say that expectation can't be divorced from the actual context and
7 circumstances that they find themselves in.

8 In this case, their actual circumstances are that they're not a single victim in isolation;
9 they are each one of many victims of the same tortious conduct.

10 Now, we say the Tribunal has expressly and rightly taken that into account but it
11 concluded that nevertheless, notwithstanding the circumstances in which they found
12 themselves, the reasonable response to the wrong was still to sell their holdings, even
13 though that meant that everyone else would be selling their holdings too.

14 Now, we know that the effect of the market mitigation rule is that Class Members are
15 deemed to have acted in a way which is reasonable, even if they in fact didn't do so.

16 In our submission, we don't at that stage of the analysis suddenly assume that now
17 the class member is a single victim in isolation. That, in our submission, will be
18 a completely unprincipled approach. You can't simply jettison, disregard the fact that
19 this is a victim who is one of many, when you're assessing the consequences of how
20 their act of mitigation is deemed to have played out.

21 If they had actually acted in a way which is reasonable in response to this loss, if they
22 had done what they are being told they should have done, then that would have meant
23 that everybody was selling. So we say that you don't assume any differently if they
24 are deemed to have acted reasonably.

25 And we say this also explains why this scenario that the Tribunal is now grappling with
26 is one which has not been addressed to date on the authorities, so far as we can tell,

1 and so far as appears from the Defendants' skeleton either.

2 The reason is that it would only really arise in the context of mass claims, where the
3 victim is one of many and sufficiently many to move the dial on what is the market
4 price when they act in mitigation.

5 But there's perhaps an even more straightforward answer to the Defendants'
6 suggestion that you just have to look at all these claimants in isolation and that is, in
7 our submission, it is directly contrary to what was said in the judgments of the Tribunal
8 and the Court of Appeal. Because as I have shown the Tribunal, in each of those
9 hearings we expressly advance the submission that if all BSV holders sold at once,
10 that would have dramatic consequences for the price of BSV and both the Tribunal
11 and the Court of Appeal accepted that it would have those consequences and said:
12 well nevertheless, the market mitigation rule applies.

13 That was judgment 54 that I showed you and Court of Appeal judgment 36.

14 In neither of those judgments did either this Tribunal or the Court of Appeal meet our
15 submission by saying: that is irrelevant because you just look at every claimant in
16 isolation. It would have been an obvious answer to the collective sale point but it was
17 simply not said.

18 It's now complained that the Class Representative is trying to claim for a loss that
19 sub-class 2 haven't actually suffered. And we say this is an odd complaint for these
20 Defendants to be making because the whole premise of Binance's strike-out was that
21 the losses suffered by this sub-class should be assessed not on the basis of what they
22 actually did, which was to retain their BSV holdings beyond the date of assessment,
23 but on the basis of something that they expressly did not do that should be deemed to
24 have done which is to go into the market and sell their holdings.

25 So we say it rings a bit hollow to claim now that that approach doesn't reflect their
26 actual loss.

1 We also say it's wrong because, in fact, their loss could have been greater and this is
2 the point that I made earlier to the Tribunal. But for the Defendants' tortious conduct,
3 the assets would have remained tradeable and might have become more valuable.
4 That's the foregone growth effect, that's what we have been told is not recoverable but
5 we do say that it's not open to the Defendants to advocate for the application of the
6 market mitigation rule in order to cut down the recoverable loss for this class but then
7 complain that it doesn't reflect their actual loss because they don't like the result of the
8 rule.

9 We also know that the Court of Appeal expressly contemplated that the claimants
10 might be compensated for losses which they didn't actually suffer because it identified
11 trading fees. They didn't incur those fees because they didn't actually sell but they're
12 assumed to have incurred them and they're compensated for them.

13 It's not in any way unorthodox for a claimant to be deemed to have suffered a greater
14 loss by reason of an act of mitigation than had they not mitigated at all and we can see
15 that from what's said in McGregor on Damages which is in the Authorities Bundle,
16 tab 57 at page 2475.

17 What the Tribunal should have here is McGregor on Damages, the passage where it
18 sets out McGregor's three rules of mitigation.

19 Paragraph 10-004 sets out the first rule:

20 "A claimant must take all reasonable steps to mitigate their loss consequent upon the
21 defendant's wrong and cannot recover damages for any such loss which they failed,
22 through unreasonable action or inaction, to avoid."

23 And then just looking down to 10-007 and in fact, the passage over the page, what we
24 can see is that they're citing Mr Justice Leggatt as he then was in Thai Airways, saying
25 that:

26 "Damages are assessed as if the claimant acted reasonably, even if in fact, it did not

1 act reasonably."

2 And there's reference to the market mitigation rule.

3 That's the first rule. Going back to 10-005, McGregor's second rule is that:

4 "Where the claimant does take reasonable steps to mitigate the loss to them
5 consequent upon the defendants' wrong, they can recover for loss incurred in so doing.

6 This is so even though the resulting damage is, in any event, greater than it would
7 have been had the mitigative steps not been taken."

8 In our submission this second rule has direct application here. In this case,
9 the Tribunal has held that the reasonable thing to do is to go out into the market and
10 sell holdings in BSV in response to the de-listing.

11 The rule says that if the class members act reasonably in that way, they can recover
12 for loss incurred in so doing. For example, a reduction in the value of their holdings,
13 even though the resulting damage is greater than it would have been, had they not
14 acted in that way. So in our submission it's an entirely orthodox consequence of the
15 rules on mitigation that one might find oneself in that circumstance.

16 The third challenge that the Defendants make to our amendments is to the assumption
17 that all global holders of BSV sold on the date of assessment.

18 I have shown the Tribunal that there is a pleaded factual evidential basis for that and
19 that was the draft paragraph 106(3) which is the one that pleaded that
20 cryptocurrencies, including BSV, are traded globally. Crypto exchanges operate
21 globally. And so what was reasonable for UK resident members would also be
22 reasonable for non-resident holders who are in the same position.

23 It's also, as the Tribunal will appreciate, supported by the observations that Mr Noble
24 made in his report at paragraph 2.9:

25 "If divesting from BSV on the date of assessment is optimal for UK resident members
26 of sub-class 2, I would expect it also to be optimal for holders of BSV who are not

1 resident in the UK."

2 And the simple point we make is that the Tribunal, having made a finding as to what
3 is the reasonable response to this wrong, namely that they should have gone into the
4 market when or shortly after they became aware of the de-listing events and attempted
5 to sell, you are then constructing that counterfactual. It would, in our submission, be
6 incoherent to assume that members of sub-class 2 act reasonably but all the other
7 holders of BSV act presumptively unreasonably.

8 We say there is no legitimate basis to draw any distinction between members of
9 sub-class 2 and other holders of BSV. They have each been a victim of this wrong in
10 exactly the same way. They simply happen to fall outside the geographical scope of
11 the class.

12 So why, we say, in constructing this hypothetical counterfactual which imposes on
13 these Class Members an assumption that they act in a way that the Tribunal has
14 determined to be reasonable, why should it be assumed that others in exactly the
15 same position would not respond reasonably?

16 To put it another way: why should it be assumed in the Defendants favour that other
17 victims do not respond in a way that the Tribunal has determined to be the normal,
18 reasonable response to the Defendants' conduct?

19 Addressing the Defendants' arguments that they make in response to this. First, they
20 say -- I'm referring here to their skeleton argument, paragraph 26 -- that what is
21 reasonable may have very little to do with what is realistic. In my submission, had they
22 made that submission before this Tribunal the first time round, when they were first
23 advocating in favour of the market mitigation rule, the Tribunal would not have upheld
24 the application for a strike-out.

25 The Tribunal was told that you have to assume these Class Members responded
26 reasonably, even if they didn't, and in my submission, the Tribunal would not have

1 found that there was a duty to mitigate if it had been candidly presented on the basis
2 that it was unrealistic.

3 Secondly, the Defendants make the point that the approach we're advocating would
4 apply equally to a claim brought by a single claimant as it does to a group claim.

5 Now, this touches on the point that we have been discussing about why, in our
6 submission, this is a relatively rare scenario. We know that the market mitigation rule
7 usually applies in claims where there's a product or service for which there's
8 an available market and for which the claimant can obtain a reasonable substitute.

9 Now, if an ordinary single claimant claims for sale of goods, for example, there would
10 not be a very large group of victims of the conduct complained of. We know that these
11 sorts of authorities apply in charterparty cases or sale of goods cases. Generally one
12 might expect the victims to be a smaller group, potentially often a single claimant and
13 those sorts of claims simply will not move the dial in terms of the available market for
14 a replacement.

15 So this claim is, in that respect, somewhat exceptional.

16 It's right that competition claims can conceivably involve wider loss and wider numbers
17 of victims, but they are usually claims for financial harm rather than damage to the
18 value of a product or service. There would normally, for example, be a claim for
19 an overcharge in a cartel case or for damage caused by abuse of a dominant position.

20 So, again, in my submission it is unsurprising that this particular scenario that
21 the Tribunal is now having to grapple with hasn't previously come up. The
22 circumstances are novel and that was the Court of Appeal's view of the case when it
23 considered permission to appeal about whether the market mitigation rule applied at
24 all, let alone how it was to apply.

25 The third point the Defendants take on this objection is to say that there's no reason
26 to assume that global BSV holders were even aware of the BSV de-listing events. To

1 | which we say, well, there's no reason to assume that global BSV holders were any
2 | less informed. Of course, should the Defendants wish to adduce evidence at trial
3 | suggesting that by reason of being less informed, global BSV holders should be
4 | presumed to respond differently, then so be it. It's open for them to do so but, again,
5 | we say that that is a question of fact for trial.

6 | The final objection that is being made is selling BSV for nothing in a mass selloff is not
7 | reasonable conduct. That was precisely the submission that we made both before this
8 | Tribunal and before the Court of Appeal as to why the market mitigation rule could not
9 | apply in the circumstances of this case and it wasn't accepted. We were told in very
10 | clear terms that if the market falls as a consequence of many victims selling at once,
11 | then so be it, the market mitigation rule still applies.

12 | So we say it is particularly surprising for the Defendants now to be saying that is not
13 | reasonable conduct or that is not a realistic model of market behaviour. That is exactly
14 | what they advocated for the first time round.

15 | They now seek to soften it and say: well clearly Class Members wouldn't all sell on the
16 | same day. But we say there are two problems with that. The first is, as I have shown
17 | the Tribunal, from the Court of Appeal paragraphs 35 and 45, there is no such grace
18 | period as a matter of law. The obligation to mitigate applies shortly after awareness.
19 | And I have also referred to what Lord Leggatt said in *Stanford International Bank*, the
20 | obligation to enter is at the earliest reasonable opportunity.

21 | So as a matter of law, you do not get to hang back until the price improves.

22 | The second objection is it's unclear how a class member would, in practice, manage
23 | to either cooperate or coordinate with fellow investors in order to avoid these
24 | consequences in the way the Defendants seem to be suggesting.

25 | They have said in their skeleton they're not advocating that the Class Members would
26 | actually coordinate with each other and we say well, rightly so because it would be

1 completely impracticable. But absent actual coordination between them, how are
2 these individual investors going to sensibly manage their respective sales in such
3 a way as to avoid the market falling, when they go out and make a substitute
4 transaction, as they have been told they're obliged to do?

5 We say essentially, again, when and the extent to which they might be expected to
6 avoid the market falling is a question of fact for trial.

7 So in summary, in our submission the amendments that we have put forward have
8 implemented the guidance that was given in the judgment of this Tribunal and the
9 Court of Appeal. They amply passed, in my submission, the arguability test for going
10 to trial and they are also arising in a novel area of law, where the guidance indicates
11 it's not appropriate to strike out absent findings of fact.

12 So we would ask the Tribunal to give us permission to amend in the terms that we
13 have proposed.

14 I am moving on, unless the Tribunal has any further questions, to deal with the
15 decertification applications.

16 **THE CHAIRMAN:** Yes, I just have one question. If we're against you on your
17 amendments, would the Class Representative like a further opportunity to put forward
18 a further claim for damage?

19 **MS FORD:** I can take instructions on that. I anticipate the answer would be yes.

20 **THE CHAIRMAN:** Because if we decide in that way, does it make sense to consider
21 the decertification application now or to wait until we see the next formulation of the
22 damage claim?

23 **MS FORD:** At the moment both sides say that it doesn't necessarily turn on the
24 amendment application. We say, obviously, the total benefit side of the ledger is
25 higher if you permit us to amend but we say we overcome the cost benefit analysis,
26 even if the amendments were not permitted. And in any event, we have a broader

1 objection to the decertification application which is that we say there has not been
2 a relevant change of circumstances. So we would say even if the Tribunal were
3 against us on that point, nevertheless there should be no decertification.

4 My understanding of the Defendants' position is that they say either way, they will
5 pursue their decertification application.

6 **THE CHAIRMAN:** Yes, but, I mean, if we're going to do a cost benefit analysis and I
7 understand the Tribunal didn't do one previously, but if we're going to do it, isn't it best
8 to do it against the backdrop of a pleading for damage that the Tribunal is actually
9 accepting can go forward to trial?

10 **MS FORD:** Well, the Tribunal has my submission that actually, you shouldn't be doing
11 a cost benefit analysis at all because the relevant threshold for decertification hasn't
12 been achieved. If we were to put aside that point, one way of doing it is to do it,
13 essentially, in the alternative, so one can look at what is the likely value in the event
14 that the application was granted and what's the likely value if it's not granted which is
15 the way I had proposed to approach it.

16 **THE CHAIRMAN:** Okay.

17 Shall I just hear from your opponents on that question, whether we -- how we should
18 deal with this decertification?

19 **MR KENNELLY:** Sir, I think we would all need to take instructions in relation to
20 whether they should be given a further opportunity to amend or -- that was the
21 question, I think?

22 **THE CHAIRMAN:** Well, okay then, two questions.

23 **MR KENNELLY:** The first is whether --

24 **THE CHAIRMAN:** One is if we're against them on their amendment application,
25 whether they should be given a further opportunity to plead, to put an alternative
26 pleading in and the second question is if we are minded to allow them another

1 opportunity, probably a final opportunity, should we consider your decertification
2 application now or wait until the formulated claim has been put forward?

3 **MR KENNELLY:** We will need to take instructions on both of those questions, sir.

4 **THE CHAIRMAN:** I will tell you what --

5 **MR KENNELLY:** And it's transcriber break, as well.

6 **THE CHAIRMAN:** Should we take the shorthand writer's break slightly early and you
7 can see where you get to.

8 **(11.38 am)**

9 **(A short break)**

10 **(11.50 am)**

11 **THE CHAIRMAN:** So where have we got to?

12 **MS ABRAM:** Sir, the Defendants would oppose permission for the class rep to have
13 another bite at the pleading amendment cherry. The context, the chronology of this is
14 that these proceedings were issued in August 2022, so over four years ago. The
15 Court of Appeal judgment came down in June 2025.

16 It then took another ten months for the CR to produce this version of the draft amended
17 pleading. It did nothing after the Supreme Court refused permission for its further
18 appeal, until the CAT itself wrote to it and said: what's going on with this claim? And
19 you can see from the pleading which my learned friend has taken you through, that
20 there is no middle ground pleaded. So there's the price collapse version of the claim
21 and there's no kind of intermediate fallback position between the current sub-class 2
22 and sub-class 1. It's not at all apparent what that middle ground could be conceptually.
23 It would certainly require a total further third reconceptualisation of the claim and we
24 say and you have seen in our documents, that if permission is refused for the pleading
25 amendment, then sub-class 2's claim falls to be assessed on the same basis, broadly,
26 as sub-class 1.

1 We have put forward a figure of £28.5 million for the total claim value, if you assess
2 sub-class 2's claim in that way.

3 We actually put forward that figure in May this year so four months ago, and the class
4 rep didn't engage with it until last week, when it said in its skeleton: we don't agree
5 with it. But again, it hasn't said what figure it proposes instead, it hasn't proposed an
6 alternative figure. It hasn't even actually said whether, if it's directionally wrong,
7 whether it's too high or too low for the implications of the claim and so we say that if
8 permission is refused for the price collapse pleading amendments, then you're left with
9 a claim which, on the Class Representative's own case, would be worth less in terms
10 of principal claim value than the raw costs that the Class Representative anticipates
11 both parties, both sides spending all the way to trial. So principal claim of, say,
12 30 million against raw costs of 44 million on the class rep's case -- sorry, 38 million,
13 I got the wrong figure -- so principal claim value of 30 million, give or take, against raw
14 costs of 38 million.

15 And we say on that basis the cost benefit analysis is as close as one could imagine to
16 a judicial no-brainer, frankly, sir, and we say we should still win on decert, even if you
17 grant permission for the pleading amends, but it's very straightforward indeed, we say,
18 in the absence of any fallback position and there's no reason not to grasp that nettle
19 in circumstances where it would be a really very straightforward one to grasp.

20 Of course, it would have been open to the class rep to say in the April pleading: look,
21 if you're not with us on price collapse, then we have another alternative basis that we
22 would like to be tried and they chose not to do that. And they have had four years to
23 think about this, sir, and that's long enough.

24 **THE CHAIRMAN:** Okay.

25 **MS FORD:** It would not surprise the Tribunal to hear that we do not accept the
26 characterisation we have done nothing since the refusal of permission by the Supreme

1 Court. We have been giving very careful and conscientious consideration to the way
2 in which this matter should be repleaded, in the light of the way in which we understood
3 we had been directed to approach matters.

4 That process has been a careful one and it's involved working together with our expert,
5 Mr Noble, so it's not a quick process. The Tribunal will also appreciate there's been
6 a fairly lengthy exchange of submissions involving -- submissions on behalf of the
7 Class Representative, replies by the Defendants and replies by us before we came to
8 the skeletons for this hearing and hence this hearing, so there has not been a period
9 of sitting around.

10 We also do not accept the suggestion that there's been no attempt to adduce a middle
11 ground. Mr Noble's report, as I showed the Tribunal, does have an annex A in it, in
12 which he indicated that there was a methodology he would take if he were seeking to
13 quantify damages on the basis that there was no market collapse. That does, of
14 course, still proceed on the basis that we had understood to be correct which is that
15 the correct approach is to assume a deemed sale.

16 And so were the Tribunal to be against me on what is the correct approach, what would
17 be of assistance to us would be a clear judgment explaining what, in fact, the Tribunal
18 considers is the correct way to proceed in these circumstances.

19 Certain of my learned friend's submissions have got into the substance of the cost
20 benefit analysis question. We certainly do not accept that it's as characterised,
21 a judicial no-brainer, but if the Tribunal were to wish to approach this matter on the
22 basis that we go away and replead, we can see the sense of then dealing with the cost
23 benefit analysis in the light of any subsequent clarification.

24 **THE CHAIRMAN:** You've heard the various indications I have given but I think it's for
25 the Defendants to decide whether they want to press their decertification application
26 today.

1 **MS ABRAM:** I hear that, sir, and I will confirm the instructions.

2 **THE CHAIRMAN:** Okay.

3 **MR KENNELLY:** Sir, you do wish to hear from me on the pleading amendments?

4 **THE CHAIRMAN:** Well, yes.

5 In view of what has been indicated, I think you can probably do it fairly succinctly.

6 **MR KENNELLY:** Absolutely. I will do so and if the Tribunal wants to move me on
7 firmly, I will not take offence.

8 Members of the Tribunal, we say the amendments are fundamentally flawed in four
9 main ways. First, the Class Representative seeks to argue that it must be assumed
10 in substance that there was no available market for BSV on the date of assessment.
11 That's why the price goes to zero and that case conflicts directly with the findings of
12 the Tribunal and the Court of Appeal, that there was an available market in which the
13 BSV holders could have sold their coins on or about the date of the breach.

14 Second flaw: the Class Representative seeks to argue that the market mitigation rule
15 requires the Tribunal to assume that every class member sold their BSV on the same
16 day. That ignores the purpose of the MMR which is to isolate the market price on the
17 day that the claimant ought to have sold, whether he did or not.

18 Third flaw, even more absurdly, the Class Representative seeks to argue that it must
19 be assumed for the damages calculation that on the day of assessment, every BSV
20 holder in the world who had not already sold in the previous month, attempted to sell
21 all of the BSV coins.

22 For the purposes of the rule, the market mitigation rule, the Tribunal assumes that all
23 Class Members in the UK had constructive knowledge of the alleged breach by
24 a particular date but there is no basis for making that assumption for BSV holders
25 outside the class, outside the UK and it also conflicts with reality because BSV holders
26 outside the UK did not sell in large numbers after the alleged breach or at any relevant

1 time.

2 Ultimately, the effect of the Class Representative's interpretation of the market
3 mitigation rule is to give sub-class 2 damage reflecting the full value of the coins,
4 despite the fact that on the day of assessment they were worth £39 each, in
5 circumstances where they continued to hold the coins which had that value.

6 That is, we say, as we said in our skeleton argument, an absurd outcome and it
7 conflicts directly with the authorities which are clear on this aspect of the market
8 mitigation rule. And I will just quote the passage from the Golden Victory. I will come
9 back to it in my submissions later, but there Lord Brown said in the House of Lords at
10 paragraph 83:

11 "The ... argument seeks to extend the effect of the market rule well beyond its proper
12 scope and to do so at the plain expense of Lord Blackburn's fundamental principle, to
13 restore the injured party to the same position he would have been in but for the breach
14 but not [and we say this is apt here] substantially to improve upon it."

15 That is the fundamental principle that guides the Tribunal's interpretation of the market
16 mitigation rule and that principle is breached very clearly by the Class Representative's
17 interpretation.

18 Turning to the first of those flaws, the plea, there's a real conflict in the Class
19 Representative's case because the Class Representative acknowledged, as they
20 must, that there was an available market for the sale of BSV on the day of assessment
21 but the plea they seek to make is that in substance, the market for BSV disappeared
22 on the day of assessment.

23 So if we just turn up the Class Representative's skeleton argument to see it, at
24 paragraph 11, the skeleton for this hearing.

25 **THE CHAIRMAN:** Yes.

26 **MR KENNELLY:** The Class Representative tells us that before the Court of Appeal,

1 they explained that if the market mitigation rule did apply, all BSV holders being
2 deemed to sell might reduce the value of BSV to nil or approaching nil.

3 And they cited Noble 2 at 2.6, about entry into the market.

4 They accepted that the market mitigation rule assumed that entry in the market was
5 selling the BSV and buying a replacement. And we see that, again, at paragraphs 13
6 and 14, the same page. The Class Representative has, accordingly, proposed
7 amendments to the claim on the basis identified by the Tribunal and Court of Appeal.

8 The market mitigation rule applies to the claims of Class Members who have not in
9 fact sold and the sub-class 2 comprises the BSV holders who held their coins on or
10 after the date of the breach.

11 But then, over the page, for sub-class 2, damage of claim by reference to the
12 difference between the value of the holdings at the point when they are deemed to
13 have sold those holdings.

14 And then the value they would have had but for the de-listing events.

15 And at paragraph 16.1, the Class Representative claims loss quantified by reference
16 to the market price to which BSV would have fallen, had all remaining holders of BSV
17 entered the relevant market to obtain an alternative cryptocurrency.

18 And that reference to entry into the relevant market, as we will see, involves selling
19 the BSV as well as buying the replacement currency.

20 And the price for BSV is said to fall because it is being sold as part of the Class
21 Members' entry into the relevant market.

22 Paragraph 20 on page 10 of the skeleton argument, about halfway down that
23 paragraph, the Class Representative says that:

24 "Its case is consistent with, indeed premised on, there being an available market on
25 the date of assessment. Mr Noble's estimates result from analysing what would have
26 happened on the available markets if BSV holders had acted reasonably in mitigation

1 of their loss."

2 And that plainly recognises that the market mitigation rule and its examination of the
3 existence of an available market contemplates a market in which the BSV is to be sold,
4 as well as the market where a replacement is to be purchased.

5 And that's made even clearer and we say that the Class Representative's case in the
6 reply to the amendment application response -- it's in the Core Bundle, tab 7,
7 page 175. We see here the Class Representative accepting that there needs to be
8 an available market in which to sell the BSV.

9 Paragraph 39, second sentence:

10 "The question about the application of the market mitigation rule is assessed by
11 reference to whether there was an available market for the asset."

12 The asset being the BSV. The Tribunal found there was because of the availability of
13 comparable crypto assets and the process of entering that market says the Class
14 Representative requires the sale or trade of BSV.

15 Now, they go on to make the point that they should take into account the result of them
16 entering the market but the important point for my purposes is the acknowledgement
17 that there must be an available market in which to sell the BSV as part of their own
18 positive case.

19 Paragraph 40, they deal with our argument and I focus on the last sentence of
20 paragraph 40:

21 "The fact that an available market for cryptocurrencies exists doesn't mean that the
22 price of a cryptocurrency cannot collapse for that market under sale side pressure."

23 So the fact that they have to accept the need for an available market in which to sell
24 the BSV isn't surprising because that's what the Tribunal said and the Court of Appeal
25 and I will come back to that, but there's a really stark inconsistency between the
26 acceptance of an available market in which to sell the BSV and the pleading, the

1 proposed pleading that I will come to.

2 And in summary, the problem with the proposed pleading is that despite the finding
3 that there was an available market in which to sell the BSV, the amendments ask
4 the Tribunal to assume that the very same market collapsed and disappeared and that
5 because of the lack of a market, the price fell to zero on the day of assessment.

6 We see that very clearly from the claim form itself. I would ask you to go back to it
7 because there's a suggestion in my learned friend's skeleton argument that the case
8 is not as extreme as we painted it in our skeleton argument. So if you look at the claim
9 form, you will see that, really, the pleaded case is the extreme case.

10 And we go back to the -- it's in the Core Bundle, tab 1, and page 34.

11 **THE CHAIRMAN:** Yes, thank you.

12 **MR KENNELLY:** This is paragraph 106, sub 2(a) and (b) and the pleaded case, as
13 we see in subparagraph 2 on page 34, is that all Class Members with valid coins enter
14 the relevant market and the difference is the price that BSV would have traded for,
15 absent the infringement. And, (b), over the page, the price that BSV would have traded
16 for, had all holders of BSV, that's global holders of BSV, at that time, on the same day,
17 attempted to sell their coins and at sub 3, skipping to the last three lines:

18 "It's reasonable to assume that all remaining holders of BSV attempted to sell their
19 coins on the day of assessment."

20 And sub 4, on that basis, Mr Noble estimates damages between 122 million and
21 140 million. And to be clear, that estimate, that plea is based on the total collapse of
22 the market. The losses of 84 to 100 per cent of the value of the coins in the course of
23 the day of assessment, with the price hitting zero during the day, that's the pleaded
24 case.

25 And just to see the extremity of the position that's taken, could we go, please,
26 to -- actually, just to make that good, page 52 of the same document, before we go to

1 Noble.

2 I'm not going to ask to you read this, members of the Tribunal, you have seen it already
3 today. 166(a), sub 4 on page 52 and paragraph 170 on page 52 and 53, makes the
4 same point.

5 **THE CHAIRMAN:** Yes.

6 **MR KENNELLY:** In (inaudible) Noble 3, same bundle, tab 13 and this is where the
7 Class Representative makes very clear through its expert that what's envisaged for
8 the pleaded claim is the disappearance of the available market.

9 At paragraph 1.11 on page 360, two possibilities are canvassed but it's the second
10 which forms the basis for the pleading. Second bullet point on paragraph 111:

11 "The volume of coins put up for sale is so large relative to the liquidity available, that
12 it's not possible to find enough willing buyers and the market for BSV effectively
13 collapses, making BSV effectively worthless, as they cannot be sold."

14 And then if you skip down, please, to 1.13, last sentence, he notes there are
15 approximately 15.2 million BSV coins on the date of assessment. That's the total
16 number of BSV coins in the world that weren't already traded in the previous month
17 and they had all come into the market on the same day.

18 And the reason why he envisages the market collapsing is because at paragraph 1.14,
19 the average daily trading volumes are between 850,000 and 4.3 million.

20 Then, please, over the page, paragraph 1.15 continues and I will read this again,
21 bearing in mind the question of the availability of a market. He says:

22 "The volume of coins coming on to the market is so large compared to the volumes
23 that have historically been traded, it would not have been possible to find enough
24 willing buyers for each coin, even with substantial discounts."

25 He considers that:

26 "BSV would most likely have lost all of its value and been worthless, as it would be

1 impossible to find a willing buyer."

2 As we will see in the case law, that is the opposite of an available market. Impossible
3 to find a willing buyer.

4 And I note that those who sold early may have received a positive price, even if it
5 eventually fell to zero. The average might be slightly above zero which brings them to
6 84 to 100 per cent of the value.

7 If you turn, please, to page 371, paragraph 5.2 -- I will take this briefly by pointing
8 simply to the relevant sentences in each paragraph. 5.2, about halfway down, he
9 envisages the demand significantly reducing, the price of BSV would fall to near zero,
10 the market would effectively collapse, due to the selloff.

11 And at page 376, at 5.16, paragraph 5.16, because the supply shock implied by
12 a global BSV selloff is much larger than the typical level of trading activity, he says:

13 "Scenario A is the more appropriate one to consider when estimating the price impact."

14 That's what's been pleaded.

15 **MR CUTTING:** Can I ask you a question?

16 **MR KENNELLY:** Yes.

17 **MR CUTTING:** I may be unduly simplifying for my purposes to understand it but you
18 seem to be saying that in a scenario in which the price collapses to zero, then you can
19 no longer describe that as a market for the purposes of the market mitigation rule. But
20 if the price had collapsed to a penny, there would still be a market for the purposes of
21 the market mitigation rule.

22 Because I think I need you to show me some pretty convincing authority that said
23 there's no market for the purposes of the market mitigation rule when there's
24 a collapse to zero because I think all they're really saying is there is a market but the
25 market price as revealed by a market would be zero.

26 **MR KENNELLY:** The case law on what is an available market for these purposes

1 was touched on in the Tribunal in the Court of Appeal in this litigation and even if you
2 can find some buyers and even if the price -- some of the product can be sold, there
3 is a (inaudible) effect that that is not an available market for these purposes.

4 If there isn't -- the market mitigation rule is premised on there being an available
5 market and --

6 **MR CUTTING:** But that might mean an operative stock exchange but there might be
7 a price collapse on a stock exchange for a penny or in theory, zero, thinking about
8 1929 for example, and it's still a market, it's just that the prices crash.

9 **MR KENNELLY:** A price crash alone, a dramatic price fall alone does not mean
10 there's not an available market on the cases and I will show you two authorities on this
11 very point.

12 **MR CUTTING:** Okay.

13 **MR KENNELLY:** But we're just discussing here not simply a price crash. This is, as
14 Mr Noble says and it's the basis for the pleading, a situation where there are no willing
15 buyers at any price. That's why the price is zero. There is an absence of a market
16 because there are no willing buyers for the BSV coins that are being offered for sale.
17 That is the antithesis of a market. So we're not in a situation where the price has fallen
18 a little bit, in fact the market mitigation rule assumes there will be a price difference.
19 This is not a price difference issue, this is a market disappearance and in
20 circumstances where both the Class Representative and the Court of Appeal plead on
21 the basis that there was an available market in which to sell the BSV, the Class
22 Representative's pleaded case is completely counter to that and that --

23 So I will come to the cases of what's meant by an available market.

24 **MR CUTTING:** Okay.

25 **MR KENNELLY:** But to deal with this expert report first and you can see what
26 Mr Noble is saying. He is saying this is a complete collapse and in fact, I can go

1 through it but just to be absolutely clear, his point about BSV is that the collapse here
2 is the disappearance of a market. It's not simply a price fall; it's the kind of shock
3 where the price -- the market itself would dry up entirely and if you go to page 383, he
4 makes an important point about liquidity because he says that -- at 6.16 again, he
5 refers to the fact that the market would collapse and then he says:

6 "If it's not possible to sell the coin ..."

7 If it's not possible to sell the coin. That's the absence of a market:

8 "... the coin becomes worthless. It's difficult to attract buyers and restore market
9 movement."

10 And then at 6.19:

11 "In traditional financial assets, downwards price spiral may have an actual end point."

12 At 6.20 he says -- because traditional financial assets are associated with a stream of
13 payments. Bonds, shares, they have other streams of payments. There's a natural
14 end point where a collapse will reach but at 6.20, he makes the point for the Class
15 Representative that there is no such stream of payments associated with
16 cryptocurrency. They lack any such natural floor in the price level that can act as
17 a break in a downwards price spiral.

18 And he explains that a downwards price spiral is happening because people no longer
19 see the value of the currency as a store of value. And that's why the market
20 disappears for BSV, where every single holder of BSV in the world tries to sell it on
21 the same day. But it's particularly extreme. The market disappears even more quickly
22 and more completely where cryptocurrencies are being sold.

23 So I will put that to one side and look at what the Court of Appeal said about the
24 availability market. That's in what's called the Other Relevant Documents Bundle at
25 tab 10, at page 250. I will start there because at paragraph 3, there's a reference
26 to -- yes, second sentence:

1 "BSV's value fluctuated but was always capable of being bought and sold."

2 Paragraph 7, over the page, 251, where the Master of the Rolls is dealing with the
3 legal principles underlying the market mitigation rule. He refers to the need to show
4 and assess damages by reference to the market price. That's referred to in
5 paragraph 7. I will come back to that.

6 Paragraph 10, on page 252, halfway down the paragraph:

7 "Following an inquiry from the Class Representative, the registrar replied that the
8 Tribunal had decided that there was, at the relevant time, an available market on which
9 the substitutable investments could have been made. Accordingly, the Tribunal
10 rejected the arguments that it would not have been reasonable to expect the
11 sub-class B holders to have divested their holdings following the de-listing events."

12 And then the critical paragraph 11. Now, before I read this paragraph, there are two
13 points that I seek to take from it.

14 The first goes to the existence of an available market into which the BSV could have
15 been sold and the second goes to the Class Members' entitlement in damages which
16 I say refutes the idea that the relevant figure is the difference between the pre-breach
17 price and a price at zero or near zero.

18 So paragraph 11:

19 "The representative was in no doubt that despite Binance having failed to strike out
20 the claim and the arguments, it will be assumed at trial that those holders [these are
21 now the class 2 holders] could and should have sold their holdings of BSV after those
22 events and bought another currency."

23 Could and should. So the Court of Appeal proceeded on the basis that they were able
24 to sell their BSV.

25 So that goes to my point about available market and then the second part:

26 "The sub-class B holders would therefore generally only be entitled to the same

1 damages as the sub-class A holders, namely the fall in the value of BSV as
2 an immediate result of the de-listing events which was £55 less £39 per BSV coin."

3 Now, the Master of the Rolls there, it's as clear as could be as to the proper approach,
4 the assessment of damages for those BSV coin holders who held their coins and had
5 coins held at the date of assessment.

6 Paragraph 13, it clearly says that those sub-class B holders who knew of the events
7 could have mitigated their loss. How? By divesting themselves of BSV. So, again, it
8 was understood and accepted that the BSV holders were able to divest themselves of
9 the BSV, to sell their BSV into an available market.

10 At paragraph 34 on page 256, third sentence:

11 "It will be unthinkable."

12 This is again the Master of the Rolls:

13 "It will be unthinkable for the holders of freely tradeable shares ..."

14 He's referring there to the BSV coins which were treated as freely tradeable shares:

15 "... whose value has been reduced by tortious conduct to be able to claim more than
16 the current value of those shares to compensate them for the prospect that their value
17 may have increased in the future."

18 Now, the very last part of that has fallen away but I rely on the fact that the case
19 proceeded and proceeds on the basis that these were freely tradeable shares, BSV
20 coin, and the assessment of damage has to be by reference to the current value of
21 those shares as at the date of assessment.

22 And paragraph 35, once what are now the sub-class 2 holders knew of the de-listing
23 events, they had a decision to make. They were at liberty to retain the holdings or sell
24 them.

25 So, again, the market mitigation rule here is being applied on the basis that they were
26 free to sell their BSV holdings and that sale would crystallise their loss and that, again,

1 assumed, as we have seen, that there was a market in which to sell.

2 Paragraph 35 continues, I'll read the last four lines:

3 "In relation to tradeable assets, such as BSV, that means selling them or retaining
4 them. They were tradeable and they could be sold and the maximum loss is calculated
5 by reference to the value they could have received for them, once they knew or ought
6 to have known of the wrongful conduct in the available market and the finding in
7 relation to the entitlement to damages by reference to current or market value."

8 Paragraph 36, here the Court of Appeal is addressing the submission that if the Class
9 Members had all sold at once, the price would fall and they said that was irrelevant to
10 the application of the market mitigation rule.

11 But if we read it from the beginning, in relation to arguments addressed as to the value
12 of BSV, it was suggested that if all holders claiming had sold, the value would have
13 reduced still further and he says:

14 "I cannot see the relevance of that argument. The loss is calculated by reference to
15 the actual value of BSV at the relevant date."

16 In our submission, that couldn't be clearer, (inaudible) calculated by reference to the
17 actual value of BSV at the relevant date, the date of assessment. And the Master of
18 the Rolls meant precisely what is said in that sentence: the actual value of the BSV at
19 the date of assessment means its actual existing value on that date. And that, as
20 I have said in the skeleton, reflects the case law that says that the market mitigation
21 rule requires the court to calculate loss by reference to the current value or the market
22 value on the date of assessment.

23 Now, you have seen in my learned friend's skeleton argument at paragraph 12.2 the
24 suggestion that you should read in the word "hypothetical" after the word "actual", so
25 it should be actual hypothetical value. But that, we say, is an oxymoron. Actual means
26 real and existing. Hypothetical means assumed and imagined. It cannot be both.

1 And the Class Representative's gloss in the skeleton argument misunderstands what
2 the market mitigation rule seeks to do. It assumes entry into the market to sell the
3 impaired good but the price that's used to calculate the loss as at that date of assumed
4 entry is the actual market price that was actually prevailing on that day.

5 And in not one of the authorities which involved ascertaining the current or market
6 price on the date of assessment, did the court consider it relevant to ask if entry by the
7 victim of the breach on that day can somehow move the market price for the purpose
8 of assessment.

9 And this is what the market mitigation rule requires and the fact that we look at the
10 actual market price is not just because that's what the Court of Appeal said but it must
11 be intuitively correct, for the very reasons that the chairman suggested to my learned
12 friend in the exchange today.

13 There was a very straightforward and principled way to apply the rule and the Class
14 Representative's attempt to expand it, as we have seen, is not just inconsistent with
15 the authorities but contrary to principle because, as I said in my opening, it has that
16 effect which Lord Brown deprecated in the *Golden Victory*, that it puts the injured party
17 not in the same position it would have been but for the breach but substantially to
18 improve upon it.

19 The (inaudible) reading of the rule my friend seeks to give is contrary to the authorities
20 but also contrary to principle.

21 Then we turn to the rest of paragraph 36. The Master of the Rolls said:

22 "If the actual value of the BSV at the relevant date was lower because many victims
23 had sold at that time, so be it."

24 So he's saying that if the actual value of the BSV was lower because many of the
25 victims had sold at the same time, so be it.

26 In view of what the Master of the Rolls has said earlier in the same judgment, it's clear

1 he was referring to the sales that BSV holders had made by the date of assessment,
2 between the date of breach and the date of assessment and the effect on the actual
3 market price caused by those actual sales that had taken place. That's the only
4 possible reading of that paragraph, consistently with paragraph 11.

5 Finally in this judgment, we see again support for the existence of an available market
6 at paragraph 7, second line:

7 "Since it was accepted that it was a freely tradeable cryptocurrency."

8 BSV was a freely tradeable cryptocurrency and that acceptance is entirely inconsistent
9 with the submission that the cryptocurrency could not be traded at all because of
10 an absence of buyers.

11 Turning to the point that Mr Cutting put to me about the meaning of an available
12 market. We refer to Benjamin's Sale of Goods because sections 50 and 51 of the Sale
13 of Goods Act reflects the common law on this issue and that's what Lord Brown said
14 in the House of Lords in Golden Victory at paragraph 79. That's referred to in the
15 skeletons. I shan't go back to it in view of the time.

16 The approach to sections 50 and 51 in the Sale of Goods Act reflects the common law
17 and so with that in mind, I would ask you to turn up Benjamin's Sale of Goods. It's in
18 the Supplemental Bundle, tab 18 and I would ask you to go, please, to page 115 and
19 paragraph 16068.

20 The meaning of available market. And I rely on the passage -- it's a third of the way
21 down. It says:

22 "The availability of buyers and sellers and their ready capacity to supply or to absorb
23 the relevant goods is the basic concept of an available market."

24 And that relies on authorities cited at footnote 581 and we will come to those.

25 Skipping a paragraph, second paragraph from the bottom:

26 "A fluctuating market price indicates the existence on available market but it should

1 not be a necessary test. There have to be sufficient traders who are in touch with
2 each other."

3 If you go, please, to the footnotes to see the authorities we rely on. That is on page 122
4 and at footnote -- footnote 581 is on the left-hand side and we see the list of authorities
5 that support the proposition that I just read. The second of those, WL Thompson Ltd
6 v Robinson, were cited in our submissions on the amendment and the Class
7 Representative said that it was obiter and could not be relied on.

8 If you go down, please, to footnote 583, you see:

9 "ABD, which was followed in Shearson Lehman Hutton, which refers to the need for
10 sufficient traders potentially in touch with each other to evidence a market in which the
11 actual or notional seller could, if he wished to, sell the goods."

12 And just to show how the definition in WL Thompson that we cited in our submissions
13 is a good one, I brought copies of that authority, the Shearson Lehman Hutton case
14 and I sent my learned friend a copy of this, this morning.

15 **(Handed).**

16 **THE CHAIRMAN:** Thanks.

17 **MR KENNELLY:** It's the judgment of Mrs Justice Webster from 1990 and the question
18 was about a contract between parties for the supply of tin and the defendants didn't
19 take the tin. The plaintiffs were stuck with the tin.

20 If you go, please, to page 444, that's where the discussion of the meaning of available
21 market begins. Page 444, left-hand column, second paragraph that begins:

22 "As to the meaning of available market ..."

23 So the court records the submissions of the parties and then on the second column
24 begins to examine the authorities, which included, on page 445, near the top of the
25 left-hand column, the WL Thompson v Robinson case that we cited in the submissions.

26 If you just track down that left-hand column you see a reference to Mr Justice Upjohn.

1 On the question of available market, he found he was bound by earlier Court of Appeal
2 authority which suggested that a market required a physical place, like a cotton market
3 in Liverpool, but he goes on to say, Mr Justice Upjohn, about just below the halfway
4 point:

5 "Had the matter been less integral, I think that I should have found an available market
6 merely means the situation in a particular trade and a particular area was such that
7 the particular goods could freely be sold [and then this] ... that there was a demand
8 sufficient to absorb readily all the goods that were thrust on it, so that if a purchaser
9 defaulted, the goods in question could be readily disposed of."

10 And then below that we see a reference to ABD, where the court cited the dictum of
11 Mr Justice Upjohn which seemed to the court there to be a very acceptable definition
12 and in accordance with the authorities. I should say although Mrs Justice Webster
13 refers to Lord Justice Sellers; he was in fact Mr Justice Sellers at the time that he made
14 that decision.

15 Over the page he notes that the Court of Appeal in charge -- sorry, the right-hand
16 column on the same page -- he notes that an aspect of the definition by
17 Mr Justice Upjohn was doubted and that was the question of whether there could be
18 an available market when the goods could only be sold at a fixed retail price but
19 subject to that concern, no doubt was cast on Mr Justice Upjohn's definition.

20 And if you go then, please, to page 447, we see the court's conclusion in the marked
21 passages in asking whether there was an available market:

22 "If the seller actually offers the goods for sale, there's an available market, if one buyer
23 on that day takes the goods at a fair price. If there's no actual offer for sale but only
24 a notional or hypothetical sale for the purposes of what is the equivalent of the
25 common law rule, the market mitigation rule, there's no available market unless on
26 that day, there are in the market sufficient traders potentially in touch with each other

1 to evidence a market in which the actual or notional seller could, if he wished, sell the
2 goods."

3 And what's the appropriate price? The answer is:

4 "Where there's no actual sale, the market price must be a fair market price for the total
5 quantity of goods, assuming them to have been sold by a seller on the relevant date."

6 And it's permissible, he says on the right-hand column, to take into account the price
7 which would be negotiated within a few days with persons who are members of the
8 market and not to be restricted simply by initial difficulties of communication. But
9 obviously, if account is taken of the price which would have been negotiated, no
10 account should be taken of price fluctuations after the date of the breach.

11 Which, for our purposes, is the date of the breach at the point of awareness.

12 So two points from this judgment and the authorities upon which it is based. First,
13 an available market means one which can readily absorb all the demand thrust upon
14 it and second, in the fiction of the assumed sale or point of breach or awareness of
15 breach were concerned with the market price at that point, not the point after the
16 victims have notionally entered the market and the consequential effects on the price.

17 To the suggestion by my learned friend, potentially in her submissions, but also
18 possibly touching on the point raised by Mr Cutting, if it's suggested that the fact that
19 a small number of BSV holders could notionally have received a price above zero at
20 the start of the day of assessment, again, on the authorities, that is not an available
21 market.

22 If we go back to Benjamin's Sale of Goods. Again, this is in the Supplemental Bundle,
23 tab 18, page 116 and paragraph 16-071. This is other relevant factors going to
24 whether there's an available market. First sentence, skipping to the end:

25 "A few sales of small quantities of the relevant goods will not constitute an available
26 market."

1 And the authority given for that is at footnote 602 and you see that at page 123.
2 Page 123, footnote 602, Kwei Tek Chao, a judgment from 1954 but, again, cited by
3 the relevant authors as a statement of the current law. I have copies of that judgment
4 too, if the Tribunal is interested and I have given a copy to my learned friend.

5 The basic point there is the fact that you may be able to make a few small sales does
6 not mean there's an available market. If that's all you can manage, if the market
7 cannot readily absorb all the goods, then there's not an available market.

8 So just to draw those strands together, on the first main flaw in the proposed amended
9 case, the fact that the representative accepts that there was an available market for
10 BSV on the pleaded date of assessment, as they must, in view of what the
11 Court of Appeal found, coin was freely tradeable and the BSV holders could have sold
12 it on the day of assessment.

13 The attempt to plead loss and damage on the basis of the market disappearing on the
14 same day is not sustainable, not least because as you saw in paragraph 20 of their
15 skeleton argument, it's premised upon the very Court of Appeal findings which refute
16 the plea. And the attempt to water down the extremity of the conflict with the
17 Court of Appeal judgment, that doesn't work, because as you saw in the claim form,
18 the case that's sought to be pleaded is that the market disappeared. There were few
19 or no buyers available to take the BSV at any price which is why it's assumed to go to
20 zero.

21 If the Class Representative is right, then contrary to what the Court of Appeal said, the
22 BSV holders could not sell their coins, they could not have entered the market to sell.
23 They were not at liberty to sell. The coins were not freely tradeable.

24 I will move on, then, if I may, to the second major flaw. I will take this much more
25 quickly. The Class Representative seeks to argue that the market mitigation rule
26 requires the Tribunal to calculate the market price on the assumption that every class

1 member sold their BSV on the same day and that ignores the purpose of the rule which
2 is to identify the market price on the day the claimant ought to have sold, whether they
3 did or not. It's a tool, as you have seen in the cases, for crystallising the loss that can
4 be causally connected to the breach. It's a notional sale and the rule assumes the
5 claimant would have got the prevailing market price; what the Master of the Rolls called
6 the actual market price prevailing on that day. That's not a notional market price
7 reflecting the outcome of mass market entry by claimants.

8 The Class Representative says in the skeleton argument: what about a class member
9 who opts out of the class? Once they opt out, they are not deemed to have sold.
10 There's no need to crystallise his loss. And we say: yes, if a class member opts out
11 and brings his own individual claim, then the same exercise is taken for him or her.
12 He or she is deemed to have entered the market and the court looks only at him or
13 her.

14 And that makes sense. A class member might opt out on the basis that they don't
15 believe the market mitigation rule should apply to him or her. They say that
16 assumption in relation to date of awareness shouldn't apply to me because of my
17 particular circumstances and he or she may seek to avoid the market mitigation rule
18 all together.

19 The second point that the Class Representative makes, paragraph 22 of the skeleton,
20 is in relation to pass-on. They say: well, the Defendants' points are inconsistent with
21 the approach to pass-on because in a damages calculation where Class Members are
22 direct or indirect purchasers, the Tribunal will take into account the pass on of any
23 overcharge by one sub-class of Class Members to the other sub-class of Class
24 Members.

25 And, again, we don't need to describe the argument to see that it's completely different.
26 Pass-on in that context is not like an assumed sale in the market mitigation rule but

1 the pass-on calculation determines what actually happened, the extent to which the
2 direct purchasers actually took into account the overcharge in setting their own prices
3 and this is the actual harm that's landed on the indirect class members.

4 Whereas the market mitigation rule involves a fiction designed to crystallise the
5 claimant's loss as if he sold when he became aware of the breach. And, again, as you
6 have seen from the cases, it's a simple tool which involves no modelling of hypothetical
7 prices.

8 To wrap up this point on the second flaw, modelling at hypothetical price based on
9 sales by the Class Members only doesn't get the claim very far because even if all the
10 Class Members sell, that would not lead to the price collapse that they need for their
11 pleaded case. And I can give you the references if you need them but the total number
12 of coins held by sub-class 2 was less than the normal global levels of trading in BSV.
13 Certainly less than the maximum daily volume in May 2019.

14 Which brings us to the third flaw, because they need, for the case that they seek to
15 plead, they need to assume that on the day of assessment every BSV holder in the
16 world who had not already sold in the previous month, attempted to sell all of their
17 BSV coins and this really has absolutely no basis in authority or principle.

18 If we look at the Class Representative's skeleton argument at paragraph 17.1, we see
19 a summary of the relevant authorities. 17.1:

20 "The market mitigation rule imposes a fiction ... the claimant entering the market as
21 part of ... appropriate and not unrealistic counterfactual. It does this because the
22 reasonable thing for the claimant to do is to enter. According to Lord Leggatt it is ...
23 response that a reasonably prudent person could be expected to take in the ordinary
24 course of business."

25 And so in asking what's reasonable for a claimant to do, in this case in collective
26 proceedings, we say that they should have entered the market and crystallised the

1 loss on the date of assessment and that depends on what the claimants, the Class
2 Members, knew at the relevant time. And we know from the judgments in this case
3 that it's a question here of constructive knowledge of the breach, when the claimants
4 had constructive knowledge for it to be reasonable for them to enter the market and
5 divest their BSV. That's what the Tribunal found at paragraph 44.

6 And because it's constructive knowledge, it can be applied to all of the Class Members
7 in the UK.

8 But none of that can be assumed for the purposes of all BSV holders globally. You
9 can't assume that they had knowledge or that it was reasonable for them, all 15 million
10 of them or approximately, to sell on the same day.

11 Of course, there's no need and there's never a need to make that kind of assumption
12 because the Tribunal is not seeking to crystallise their loss for the purpose of any
13 damages assessment in favour of them. They're simply outside the claim entirely.

14 But we see why the Class Representative has to run this argument.

15 And we see it in Noble 3. It's because their global collapse idea doesn't get off the
16 ground unless all BSV holders everywhere sell at once and that's in the Core Bundle,
17 tab 13, page 368. We see Mr Noble's estimates of the number of coins sold and
18 relevant of Sub-Classes. So table 3.1, we see that globally, coins held in April and not
19 transferred by May, there's just over 15 million global coins, 1.2 million held by UK
20 residents. So the UK resident selling isn't enough to cause the collapse they need
21 because that's consistent with daily trading volumes but the pleaded case is that you
22 must assume that every single BSV holder in the world sought to sell all their holdings
23 on the same day.

24 Nothing is pleaded about what these non-UK BSV holders knew or what was
25 reasonable for them to do. It's simply assumed that it's reasonable for Class Members
26 in the UK, by way of mitigation assumption. You must assume that all BSV holders

1 globally would have done the same thing on the same day and that, needless to say,
2 also conflicts with reality because the holders outside the UK in fact did not sell in large
3 numbers after the alleged breach or at any relevant time.

4 So we say that assumption is hopeless, it is not suitable for trial.

5 And I will take my very final point. Even if I am wrong on everything so far, we have
6 seen from the authorities in paragraph 17.1 of the skeleton argument of the Class
7 Representative that where there's an available market, the claimant is expected to
8 enter it and sell at the earliest reasonable opportunity. The assumption is that it must
9 be reasonable to do the act and the case which is sought to be pleaded is that it was
10 reasonable for every holder of BSV in the world to sell all of their coins over the course
11 of a single day, despite the fact that they would be seeing in real time the complete
12 collapse of the market. A market where there will be no buyers for the coins and that
13 they would persist in those sales, even where that meant the vast majority would sell
14 for zero. They would be giving the coins away.

15 And this Tribunal can decide at this stage that no rational holder of BSV, acting in their
16 own interest, would choose to sell into a market in which they expected to receive
17 nothing for their coins.

18 In the skeleton argument of the Class Representative there's a suggestion that initially,
19 they saw the absurdity of that position. At 16.3, they say that they agree that the
20 appropriate methodology does not require one to deem that every global BSV holder
21 sold at the exact same time on the date of assessment, only that they would have sold
22 when they could -- should reasonably have. But the problem for them is that the
23 pleading, which is proposed to you, assumes that they all would have sold on the same
24 day and that fails even the low bar for an amendment because on no view could it be
25 reasonable. And that, we say, is a further absurd plea that should not be permitted to
26 go to trial.

1 So I have tried to truncate my submissions in view of the indication (inaudible).

2 Thank you.

3 **THE CHAIRMAN:** Thank you.

4 **MS ABRAM:** I said I would come back on the question of what we say about the
5 decertification application. Is it helpful to do that now? Just conscious of the time.

6 **THE CHAIRMAN:** Yes.

7 **MS ABRAM:** So whether or not the Tribunal grants permission for the pleading
8 amends, from the Defendants' perspective we would ask the Tribunal to consider the
9 decertification application.

10 In a sense we say that's all the more important if you refuse permission for the pleading
11 amends because of the no-brainer point that I made earlier. The need to put the case
12 out of its misery sounds with all the more force in that scenario and the need to stop
13 costs being incurred on this case, frankly, on both sides; it's been going on for
14 four years, as I say.

15 But it is also important to take into account the point that Mrs Ford made in her
16 submissions earlier, namely that we say that whether or not you allow permission for
17 the pleading amends, the claim should be decertified because the costs still exceed
18 the benefits, even on the other side's best case. So if one posits a hypothetical
19 scenario, where, for example, they come up with some fallback position that doesn't
20 posit the whole world having sold their BSV on the same day and they say: well, that's
21 worth £40 million, £50 million, £70 million, we say still in that scenario, the costs of the
22 claim would exceed the benefit.

23 A fortiori of our argument that on the basis of the other side's £140 million current best
24 case, the costs exceed the benefit. So we say there's no world in which a fallback
25 case could lead to certification being appropriately maintained.

26 And so we say it is appropriate to determine the decertification application and one

1 doesn't need to see the content or whether -- the existence, even, of a potential third
2 bite of the cherry in order to make that decision. But having said that, Sirs, Members
3 of the Tribunal, we do accept that the question of how you deal with these applications,
4 whether you deal with the decertification application at the same time as the
5 amendment application, is a case management decision for the Tribunal and I can't
6 tell the Tribunal how it ought to resolve that question. So we press for it, but of course,
7 ultimately we're in the Tribunal's hands. I thought it was useful to flag that before
8 I embark on my substantive submissions.

9 **THE CHAIRMAN:** We will hear your decertification application.

10 **MS FORD:** Sir, before that, I do have some very, very brief points in reply.

11 **THE CHAIRMAN:** Of course, your reply.

12 **MS FORD:** On the question of the available market, it's said, if you accept, as we
13 have done, as we are directed to do, that there is an available market, then that
14 precludes a further factual enquiry as to what would have happened if you go into that
15 market and sell. And you were shown two authorities about what might be understood
16 by an available market.

17 In my submission, what is striking about those two authorities is that they have factual
18 findings that were simply not available to the Tribunal when it took the view that there
19 was such an available market. This matter wasn't argued and it wasn't evidenced, so
20 in our submission it cannot be right that the finding that there is an available market
21 precludes any sort of enquiry as to what happens when you go out into that market.

22 We do note from the authorities that they do appear to contemplate a certain amount
23 of hypothetical enquiry as to what might happen on a deemed sale. And just to give
24 one example, the Shearson Lehman case that we were taken through, page 447 in
25 the judgment of Mrs Justice Webster. Top of the second column -- you in fact pick it
26 up at the bottom of the first column, where it's saying:

1 "It might be unfair to the defendant purchaser to confine the price so establishing the
2 price obtained ... an actual sale they concluded on that day. It is permissible to take
3 into account the price which would be negotiated within a few days with persons who
4 are members of the market on that day."

5 So in our submission, this is contemplating a certain amount of counterfactual
6 construction. It's not simply offering you the temptingly simple way through which
7 Mr Kennelly reads from the Court of Appeal's judgment which we resist, which is
8 simply to say what is the actual market price and that's the end of the enquiry. That is
9 not supported on the authorities that he has cited.

10 Mr Cutting raised the question does it make a difference if, on these authorities,
11 an available market is not available if the price fell to zero? What about if the price fell
12 to 1p, does that mean there is available market or not? And that feeds into one of the
13 other authorities that was mentioned, where it was suggested the availability of a few
14 small sales isn't sufficient to suggest an available market but some other scenario
15 might be.

16 In our submission, both of those indicate that it's a factual question, a factual question
17 for trial, whether or not what happens if this class goes out into the market is or is not
18 sufficient for the price to collapse to zero and is or is not sufficient to give rise to this
19 issue that Mr Kennelly raises which is to suggest that we are precluded from arguing
20 the consequences because of the finding of an available market.

21 The Tribunal has the vast majority of my submissions on the supposed second and
22 third flaws and particularly on the global sale assumption. In my submission it came
23 very clearly from the Defendants' position that what is being suggested is that we
24 cannot assume a global sale because BSV holders, globally, may not have had
25 relevant knowledge.

26 In our submission, again, that is a question of fact for trial. One can't simply say now

1 | there is no basis. The proposition as to why there was no basis appeared to be
2 | because BSV holders outside the UK did not sell.

3 | We know that BSV holders within the UK, even sub-class B, also did not sell and yet
4 | they are deemed to sell under the Tribunal's counterfactual. So in our submission,
5 | that is not a suitably good reason to suggest that one doesn't assume the same for
6 | BSV holders outside the UK.

7 | As to the final submission about what is reasonable for them to do and it was said no
8 | rational holder of BSV would go out into the market in these circumstances,
9 | the Tribunal has my submission that that's exactly the point we made, about why the
10 | market mitigation rule doesn't apply in these circumstances. And that was rejected,
11 | so it's no better now, when the Defendants recycle it and make it in support of their
12 | own case.

13 | Essentially, in a nutshell, the problem that in our submission arises from the various
14 | flaws that are discerned in our case, is that they are attempting to remove the situation
15 | of the Class Members from the reality of the situation that they were in. They're
16 | attempting to completely divorce them from the situation that they faced when they are
17 | told: you should have mitigated your loss.

18 | That, in our submission, is completely unprincipled. When the Tribunal is imposing on
19 | them a judgment about why their conduct was not reasonable and why the amount of
20 | damages they can claim should be curtailed as a consequence, it is not right to divorce
21 | them from the reality of their situation.

22 | Sir, those are my submissions in reply.

23 | **THE CHAIRMAN:** Good, very good timing.

24 | Okay, we will resume again at 2 o'clock. Thank you very much.

25 | **(1.02 pm)**

26 | **(The luncheon adjournment)**

1
2 (2.00 pm)

3 **THE CHAIRMAN:** Yes, thank you.

4 **MS ABRAM:** Sir, Members of the Tribunal, there are four points to address on cost
5 benefit analysis. The legal framework, first of all, and where the change of
6 circumstances issue fits in. The anticipated costs of the proceedings through to trial,
7 the potential benefit, in the sense of the alleged claim value, depending on where that
8 lands, of course, and then the real world benefits, once one takes take-up into account.
9 In my submissions I will try and take account of the range of possibilities as to alleged
10 claim value depending on the outcome of the pleading amend and any further
11 suggested amendments.

12 So the legal framework, there are two elements. There's where the cost benefit issue
13 sits in the framework for the requirements for certification of collective claims and then
14 there's the requirements for decertification of collective proceedings that have already
15 been certified and it may just be helpful just to frame those for the Tribunal, to set out
16 what we're applying.

17 If we start with where cost benefit fits in as a criterion for certification in the first
18 instance, I will start by showing you the Tribunal rules which are the kind of ultimate
19 set of rules we're applying and if we look in the Supplementary Bundle, tab 14, page 73
20 and start with rule 77.1, you will see there that -- this is Tribunal rules. Tribunal rules
21 77.1 says:

22 "The Tribunal may make a collective proceedings order only if, (a), it considers that
23 the proposed Class Representative is a suitable person ..."

24 In summary:

25 "... and, (b), in respect of claims which are eligible for inclusion in collective
26 proceedings in accordance with rule 79."

1 And we're in B here, the bit of the matrix we're applying.

2 So if we skip to rule 79 which is on the next page, page 74, rule 79.1, you see:

3 "The Tribunal may certify claims as eligible for inclusion in collective proceedings
4 where ..."

5 And then A, B and C. A is identifiability of the class, B is common issues and C is
6 what we're looking at here, suitable to be brought in collective proceedings.

7 That then takes you to 79.2, which says:

8 "In determining whether claims are suitable to be brought in collective proceedings,
9 Tribunals shall take into account all matters it thinks fit, including ..."

10 And we're looking here at B:

11 "... the costs and the benefits of making the collective proceedings."

12 So that's where in the legal framework cost benefit analysis fits in.

13 Let me show you a case applying that in the wild. I will show you Waterside or Salmon,
14 it's variously called, which is in the Authorities Bundle, tab 32 and I will pick it up on
15 page 2016.

16 So if we start at paragraph 46. So the bottom of 2016, just to see the submission that
17 the Tribunal is dealing with. So paragraph 46, third line, you see the Tribunal's
18 recording a submission by a Ms Abram, whoever she may be:

19 "Ms Abram submits that the cost benefit analysis is not an independent threshold issue
20 and it needs to be considered in the context of the other factors listed in rule 79.2."

21 There I was making the argument: look, cost benefit isn't a freestanding part of the
22 suitability assessment; it's part of a broader overall assessment. And you see
23 the Tribunal's answer at paragraph 47 and following. So if you look, paragraph 47,
24 page 2017 and pick it up on the fifth line:

25 "We accept that there may be cases where questions of cost benefit analysis are finely
26 balanced and that falling just on the wrong side of the line doesn't necessarily mean

1 a case can't be certified. Necessarily, there's a penumbra of uncertainty."

2 Then the key sentence:

3 "Nevertheless, in those cases, where an assessment of the evidence indicates that
4 the cost benefit balance is plainly against continuation of the proceedings, it would not
5 ordinarily be appropriate to certify."

6 So it's not a freestanding part of the suitability assessments but if it's clearly against,
7 plainly against certification, it wouldn't ordinarily be appropriate to certify. It's where it
8 fits into the assessment.

9 And then you see the way in which that's applied in the case that was before
10 the Tribunal, 48 and 49. If I could ask you to read those two paragraphs.

11 **(Pause).**

12 The point that I particularly want to draw from paragraph 49 is the one that starts on
13 the penultimate line of page 2017. So you see the sentence starting:

14 "That inevitably ..."

15 So the certification exercise inevitably requires addressing the level of take-up of
16 damages awarded by individual Class Members:

17 "The failure of the PCR to address this, while at the same time advancing a cost budget
18 of over £20 million, means this case isn't currently suitable for a CPO."

19 So that's the conclusion there and just to anchor the assessment in the facts of that
20 case, I will tell you that the alleged range of claim values in Waterside is between
21 £71 million and £382 million, so that's at paragraph 29 of the judgment.

22 And in that case, costs and benefits, taking into account take-up, meant that the claim
23 wasn't suitable for certification.

24 So Waterside shows us that assessing likely take-up is an inevitable, in the Tribunal's
25 words, part of assessing the benefits of collective proceedings, because you have to
26 make sure that the real world financial benefit of the proceedings justifies the costs.

1 It doesn't require and I'm not suggesting that it requires, some kind of pound perfect
2 prediction of the level of take-up by the class but it does require, as we see from
3 Waterside, an assessment of whether distribution proposals are credible and realistic
4 and that, then, informs an assessment of likely take-up and whether the costs are
5 justified.

6 That's the matrix we apply on certification and then we need to layer on top of that
7 decertification because that's the context in which this application is made.

8 Again, I will show you the Tribunal rule, a case applying the Tribunal rule and I just
9 need to deal with an authority relied on by my learned friend.

10 So the Tribunal rule, again, it's in Supplementary Bundle, tab 14, page 76 this time.

11 And it's rule 85. So if we look at 85.1, you see that the rule is that:

12 "The Tribunal may at any time, either of its own initiative or on an application, as here,
13 make an order for the variation on revocation of the collective proceedings order."

14 And the circumstances to be taken into account are set out in 85.2:

15 "So deciding whether to vary or revoke, Tribunal should take account of all relevant
16 circumstances, including in particular, A [so what we're particularly looking at here],
17 whether the criteria for certification still apply or apply in the same way as when the
18 order was made."

19 So that's what we're looking at here, rule 79, and B is also of some subsidiary
20 relevance and I should just flag that without going into detail about it. B is:

21 "Whether the class rep continues to satisfy the criteria for authorisation."

22 So that's the personal suitability component.

23 You will have seen from the papers that there is an issue in the case regarding whether
24 Sir Robert Buckland is an appropriate Class Representative, given his defence of
25 Seamus Andrew, who is the solicitor with conduct of the claim at Velitor because
26 Mr Andrew is a person who has been found in another case to have given untrue

1 evidence to the High Court, motivated by a desire for personal profit.

2 We defer to the Tribunal on whether Sir Robert is still an appropriate class rep, despite
3 his defence of Mr Andrew. We have put all the references in our July submissions,
4 paragraph 5, which is at Core Bundle, tab 6, page 141. We're in the Tribunal's hands
5 on that question.

6 Let me show you an authority on the application of rule 85 in practice, which is
7 Rodger v Google. So that's in Authorities Bundle, tab 33, page 2030. So this is
8 Rodger v Google. It's an application to vary rather than revoke certification but you
9 saw in rule 85.1 that the principles are the same. It's a judgment of the president of
10 the Tribunal, so Mrs Justice Bacon from June this year and just to give you the
11 context, Google had applied to vary a collective proceedings order so that it would be
12 opt-in for part of the class and the president sets out the criteria for the application of
13 rule 85 at 14 and 15 of the judgment.

14 If I could just ask you to read paragraphs 14 and 15.

15 **(Pause).**

16 **THE CHAIRMAN:** Yes, thanks.

17 **MS ABRAM:** So two key touchstones come out of there. Has there been a material
18 change of circumstances and do the criteria for certification still apply or apply in the
19 same way?

20 Now, on that, we say one really could not imagine a more material change of
21 circumstances than the alterations to the class rep's case since the Court of Appeal
22 judgment in this case, because before that judgment, this claim was alleged to be
23 worth nearly £10 billion and its alleged value, if you allow in the pleading amendments,
24 accepting there's a range below that, is nearly 99 per cent lower than it previously was.

25 **THE CHAIRMAN:** But surely that point was apparent to the Tribunal when they gave
26 their judgment?

1 **MS ABRAM:** Sir, not only was it not apparent to the Tribunal, it wasn't apparent even
2 to the class rep. I can show you some evidence that until November last year, the
3 class rep was saying that this was a claim that was worth up to a billion pounds. So
4 I can show you -- I think the paragraph of the Tribunal's judgment you have in mind is
5 paragraph 103 --

6 **THE CHAIRMAN:** Yes.

7 **MS ABRAM:** -- which Mrs Ford showed you this morning. So it's helpful just to remind
8 yourself of that. That is in the Other Relevant Documents Bundle, tab 7, page 241.

9 So I think the extract that you have in mind is the second half of 103, where, four lines
10 from the bottom, the president again says:

11 "On Mr Noble's evidence ..."

12 So the CR's expert:

13 "... using Bitcoin as the relevant comparator, 99.8 per cent of the claim is for
14 sub-class B."

15 Now, all the Tribunal is doing there is recording the proportion of the value of the claim
16 represented by sub-class B. The Tribunal wasn't expressing any view about what
17 would happen to sub-class B's claim in light of the findings in the Tribunal's judgment
18 and in fact, the Tribunal left open what might happen to sub-class B's claim.

19 You can see that at paragraph 9 of the judgment, if you flick back a few pages to 234.

20 So this is the Tribunal actually declining to grant summary judgment on the foregone
21 growth bit of the claim. The Tribunal didn't give summary judgment against that bit of
22 the claim. You can see the Tribunal says at 79:

23 "The test at this stage is not whether the PCR's case has been established but whether
24 it has a realistic prospect of success."

25 And then the Tribunal makes a finding in the CR's favour:

26 "We consider that the evidence before us just about crosses a threshold of providing

1 a realistic basis for the proposition that at least some of the BSV holders may
2 reasonably have remained unaware of the de-listing events throughout the relevant
3 period."

4 So the Tribunal isn't saying sub-class B's claim has to be assessed on the same basis
5 of sub-class A. Still less is it saying all that 99.8 per cent of the claim that is quantified
6 in 1.3 goes out of the door. It says what you can't do is value the claim on the basis
7 that sub-class B get to assume that the currency over a period of years attains the
8 value of some other currency. It says: no, look, make a case about when sub-class B
9 should reasonably have become aware of the de-listing events.

10 And the Tribunal couldn't possibly have had a view about what the claim would still be
11 worth because, as I say, the CR itself was still saying that the claim could be worth
12 a very, very significant sum.

13 An example of that is in the Other Relevant Documents Bundle, so tab 24, page 893.
14 So this is a witness statement of Lord Currie, who until recently was the personification
15 of the Class Representative. So the predecessor to Sir Robert. And actually, if we
16 pick it up at the very last two words of 892, paragraph 26, Lord Currie is saying
17 in November 2025, after the CAT, after the Court of Appeal:

18 "As it stands therefore, BSV are still entitled to continue pursuing the company and
19 the other defendants in the CAT proceedings on a joint and several basis but for
20 a lower level of loss which ranges from £48 million ..."

21 Don't know where that figure comes from:

22 "... to £1 billion."

23 Actually, that £90 million principle claim value figure that we now have was totally new
24 in the claim form that was served in April this year, the draft amended claim form. And
25 we now, of course, hear today that there may be some suggestion that there's a further
26 permutation of the Class Representative's case that could produce yet another claim

1 value.

2 So it's wholly unreal for the Class Representative to suggest that the Tribunal or the
3 Defendants could have predicted the current value of the claim, when they themselves
4 were saying just a few months ago that it was worth many times more, when they
5 themselves don't seem to know how much they say it's worth today.

6 There is a second dimension to this change of circumstances argument and that's that
7 we criticise, for example, some of the assumptions that underlie the claim value. We
8 say: well, even the 90 million, assuming you let in the pleading amends, is a bit high
9 because you've assumed a very high rate of interest, you've chosen a very favourable
10 date of assessment. You can't assume you're going to win on all these things at trial.
11 Now some of those elements have always been part of the claim but, of course, there's
12 a fundamental difference between a claim that's alleged to be worth £10 million, where
13 I could say to you all day long: I think 8 per cent interest is too high and you would say
14 to me: well I'm afraid that doesn't make much difference, Ms Abram, as to whether the
15 costs of the claim justify the benefits because there's a lot of headroom here and
16 a case that's said to be worth less than £100 million on their very best case.

17 So what we've done is we've raised the points for the first time when they had practical
18 relevance to the certification assessment.

19 I should address, just before I move to the three cost benefit elements, I just want to
20 get my retaliation in first on one point that's made against me by Mrs Ford in her
21 skeleton.

22 They rely on Ennis v Apple as to the relevance of the strength of claims in the
23 certification and decertification matrix and I will take you to the case in reply if I need
24 to but just to try and deal with the points without going there.

25 First point, Ennis v Apple is not a case about cost benefit analysis. It's a claim that's
26 alleged to be worth nearly £1 billion, so unsurprisingly it is not a case where

1 the Tribunal considers costs and benefits of continuation of collective proceedings.

2 Second point, it is a case about decertification, so it's a case where the defendant

3 says: this case is no longer suitable for certification on an opt-out basis, it should

4 instead, if anything, be certified on an opt-in basis.

5 And when you look at the difference between opt-in and opt-out, there are two

6 particular factors that the law requires to be taken into account and this is what the

7 Supreme Court emphasised in *Evans v Barclay*, at the end of last year. There's the

8 practicability of opt-in proceedings and it's the strength of the claims. And it's true that

9 if one reads the *Ennis v Apple* judgment, it is shot through with references to the

10 strength of the claims but that's because it's considering a different bit of the legal test.

11 It's considering the difference between opt-in and opt-out and it says in that case: well,

12 this is an unusually strong case because in fact, it runs parallel to another claim that's

13 already succeeded before the Tribunal and therefore, the strength of the claims

14 militates in favour of continuing opt-out proceedings.

15 It's just not about the same question that we have in this case.

16 So we don't accept the strength of the claims is relevant in the same way here but just

17 since it's been brought up, we absolutely don't accept that these are strong claims.

18 They're denied by all of the Defendants in full and I will explain why.

19 In essence, this is just another piece of litigation attacking those who doubted whether

20 Craig Wright is Satoshi. And the context of that is that Craig Wright, together with his

21 associate, Calvin Ayre, who is the ultimate controller of the funder of these

22 proceedings, is a prominent backer and promoter of BSV and has been found by the

23 High Court in *Wright v McCormack* to have a very significant financial interest in BSV,

24 so they both have significant financial interests in BSV.

25 So BSV as a currency and its value, were intimately tied up with this question of

26 whether Wright was or was not Satoshi and of course, as you know better than anyone

1 else, since these proceedings were commenced, you've now found in the High Court
2 that Craig Wright's claim to be Satoshi was an extensive and repeated lie involving
3 forgery of documents, as you found on a grand scale. I'm not going to take you to your
4 own judgment, I think (inaudible) case, but those quotes I have just taken are from
5 paragraphs 2 and 5 of that judgment.

6 This case is about that same factual matrix and I can show you that very easily from
7 the claim form. So if we look in Core Bundle, tab 1, page 40, you will recollect that the
8 essence of this case is an allegation that there was collusion via Twitter between the
9 exchanges to de-list BSV and I will show you what the tweets complained of say.

10 So if we look at page 40, paragraph 119, this is the first tweet complained of. So this
11 is Changpeng Zhao of Binance tweeting:

12 "Craig Wright is not Satoshi. Any more of this, we de-list."

13 And then at paragraph 125, the same individual, Mr Zhao:

14 "Don't choose sides on technology ... the market do that. I'm against fraud, such as
15 lying to be someone. As such, it is my strong opinion that Craig Wright is fraud."

16 So the tweets that led to the de-listings focus on the association between BSV and
17 Craig Wright and whether Craig Wright was telling the truth when he claimed to be
18 Satoshi. The Defendant exchanges could not have been more justified in having those
19 suspicions about whether Craig Wright was Satoshi and therefore, we say, of BSV as
20 a currency because it was so intimately connected with Wright and his claim to be
21 Satoshi.

22 Now, true it is that I haven't applied for summary judgment of the claims against me.
23 If I did, it would be said against me: well, this is a fact heavy case, it requires
24 disclosure, it requires evidence but that does not detract from the fact that we say this
25 case should be treated with extreme caution by the Tribunal and it certainly can't be
26 accepted to be a strong claim.

1 So let me then move to the three elements of the cost benefit assessment, because
2 there's costs, there's benefit and then there's real world benefit in terms of actual
3 take-up by the class.

4 Starting with costs, I'll take you through the figures very briefly but I just want to be
5 clear before I start that the CR's submissions on this topic attack something of
6 a strawman, so they proceed as if the complaint we're making is that the costs that the
7 CR proposes to expend to trial are too high, unjustifiably high for a case of this nature
8 and that's not the point I'm making. I'm not trying to knock off a million here or a million
9 there.

10 The point I'm making is that the anticipated level of costs on all sides, particularly when
11 you bring in the contingent fees to the insurer and to the funder, outweigh the benefits
12 to the claim and the problem there is that the sums that would be returned to the
13 lawyers and to the funder would just outweigh the actual benefits to the class. That's
14 my complaint. I will summarise the figures and I will give you the references to them.

15 The CR's anticipated costs of bringing the claim are 24 million, including VAT, and
16 that's in the cost budget at Other Relevant Documents Bundle, tab 1, page 4. The CR
17 has arranged ATE cover for £14 million and that's in the litigation plan, paragraph 59,
18 which is Other Relevant Documents Bundle, tab 1, page 80.

19 Now, we don't accept that £14 million is enough to cover five defendant groups' likely
20 costs to trial but what one can say is that it reflects the minimum amount that even the
21 CR expects the Defendants to spend. So we're looking at £38 million raw cost figure
22 anticipated by the CR, before you get going with the contingent costs.

23 Then you put the returns to the funder and the ATE insurer on top of that and we
24 summarise these in our July submissions in which we applied for decertification. I
25 need to show you them because some of them are claimed to be confidential. So it's
26 Core Bundle, tab 6, page 152. And it's paragraph 27. The figures haven't been

1 | disputed by the CR, so we're assuming that they're accepted to be accurate. So 27.2
2 | I can refer to, there's nothing confidential claimed there. So these are the contingent
3 | returns to the funder and you see at the end of that paragraph that the contractual
4 | return to the funder could easily amount to more than £150 million.

5 | And then 27.1, I don't know why confidentiality is claimed over these figures but it has
6 | been so I won't try and blow through it, but you see the figures of potential returns to
7 | the ATE insurer at the end of 27.1. So without giving away those figures, you can see
8 | that including contingent sums, you're looking at potential costs of well over
9 | £200 million for these proceedings.

10 | I will come on next to the benefits of the proceedings but before I do, I just want to put
11 | in a pin on a point on Class Representative's remuneration. You will have seen in the
12 | papers that there's a dispute about whether Sir Robert, his hourly rate and daily rate
13 | are too great. Sir, while the Tribunal has been sitting today, a relevant judgment has
14 | been handed down in *Le Patourel v Apple and Amazon*. I have had the advantage of
15 | seeing that in draft because I'm for Apple in that case but no-one else in this room, as
16 | far as I know, has. It's a point of detail on Class Representative's remuneration but
17 | out of fairness to Mrs Ford, it's not right for me to make submissions on a judgment
18 | that only I have seen before this hearing. So what we would suggest if it's okay with
19 | you, is that we put in a very short note setting out what we say about the impact of
20 | *Le Patourel* and then the CR has the chance to respond.

21 | We're happy to go first. We could do that on Friday, if that works for the Tribunal.

22 | **THE CHAIRMAN:** Yes, okay.

23 | **MS ABRAM:** It's not a long point.

24 | So that's costs and CR remuneration.

25 | Let's move on to benefits. So when I'm talking about benefits now, I'm talking about
26 | potential benefits of the claim in the sense of the maximum alleged claim value. So

1 taking distribution out of the picture for now. And it might be helpful just to anchor
2 ourselves in the alleged values, whether the pleading amendment is allowed or not
3 and we have done a table summarising this on page 13 of our skeleton.

4 **THE CHAIRMAN:** Yes.

5 **MS ABRAM:** So you see that we have identified the principal sum and with interest,
6 with and without the amendments and of course, we need to bear in mind now that the
7 CR has said that there may be potential for some kind of unidentified middle way in-
8 between the two.

9 The bottom line of the table comes from the CR's own pleading, so they're the CR's
10 figures, they're undisputed. That's the top value of the claim. You heard me say earlier
11 that the top line of the table is our extrapolation of what the claim would be worth if
12 sub-class 2's claim were valued on the same basis as sub-class 1. That seemed to
13 be agreed until last week. It's now apparently not agreed but it's the best that you
14 have, frankly, because the CR hasn't put forward any other figure.

15 So where we get from this is that if the CR is allowed to make the pleading amendment
16 and if it succeeds on every single element of its case, top value of the claim is
17 £90 million.

18 Now, we say that it is extremely unlikely in practice that the CR would succeed on
19 every element of its case, even if it were granted permission for the pleading
20 amendment and, again, there's a bit of an attack on a strawman in the CR's
21 documents on this, as if we're asking you to rule on these points.

22 I'm not asking you to rule on them, of course I couldn't ask you to do that. But it is
23 appropriate to say: look, some of these assumptions are very, very optimistic from the
24 CR's perspective and they may very well be wishes that turn out not to come true. We
25 very rarely get everything on our Christmas lists, so there are a number of examples
26 of assumptions that we say are just put too high.

1 You have seen what we say about interest. I won't trouble you again about 8 per cent
2 interest. That's a simple point. Just a couple of other brief examples.

3 The claim value is highly dependent on what happens with the date of assessment.
4 So you have seen that the CR has proposed 11 May 2019 as the date of assessment
5 so that's one month after the de-listing events.

6 That is a particularly advantageous date for it because the other comparator
7 currencies that it uses were particularly valuable on 11 May and Mrs Ford says and
8 I have no reason to doubt that, that's just because they happened to choose a date
9 a month afterwards and it's a coincidence. And of course, that may very well be right
10 but still, it's still the case that if you choose a date that's -- if the Tribunal were to at
11 trial, choose a date that's even slightly different, it will have a massive impact on the
12 claim value.

13 We have given some example calculations of how much the claim value could change
14 in our skeleton, footnote 34, page 14, just to illustrate the impact of that point.

15 Similarly, I will give you another example, the claim value is wholly predicated on using
16 the growth in value -- sorry, sir. Did you want to look at that reference?

17 **THE CHAIRMAN:** I'm just having a quick look, yes.

18 **MS ABRAM:** Yes, page 14, footnote 34, bottom of the page. You see it's between
19 17 and 18 million, if you look ten days earlier.

20 **THE CHAIRMAN:** Okay.

21 **MS ABRAM:** So a big swing in terms of proportion of claim value and similarly, the
22 claim value is wholly predicated on using the growth in value of comparator currencies,
23 Bitcoin and Bitcoin cash. So if they're not appropriate comparators or if another
24 currency is an appropriate comparator, then that has the potential to hugely undermine
25 the alleged value of the claim.

26 And it is a bit of an odd presumption because the whole predicate, the whole premise

1 of the Class Representative's case is that BSV wasn't a top tier cryptocurrency,
2 whereas Bitcoin and Bitcoin Cash were top tier cryptocurrencies. So it's quite an odd
3 starting point to suggest that they should be used as the comparators, so, again, super
4 vulnerable to that assumption.

5 And the claim value is also very dependent on a class size which isn't based on
6 evidence, it's not based on counting up the number of people that held BSV but it's
7 based on an extrapolation from some survey returns -- a very small survey, about
8 2,000 people -- in which the FCA asked the sample size how many of them had ever
9 owned BSV. Not how many owned BSV at a particular moment which is likely, by
10 definition, to be a much smaller subset but how many people had ever owned BSV in
11 the past.

12 So, again, that's a super fragile basis to assess claim value on and it's very likely to
13 be wrong.

14 So for all of those reasons, we say the claim value is extremely fragile and, again,
15 quite suspicious.

16 But let's just suppose for a moment that the claim value is what the Class
17 Representative argues for on its very best case. They make all the assumptions in its
18 favour, £90 million. You allow the pleading amendments in, £90 million. The value of
19 the claim compared to the potential returns to the insurer and the funder really beg the
20 question what is this claim about, why is it being brought? Because even on the most
21 favourable possible scenario to the Class Representative, the claim isn't worth the
22 contractual return to the funder or to the ATE insurer. You have seen the figures for
23 the contractual returns and they are greater than the claim value.

24 So the natural inference from that, bearing in mind that the funder and the ATE insurer
25 only get their returns from undistributed damages from money that doesn't go to the
26 class, the natural inference must be that there's an expectation of a very large amount

1 of undistributed damages that will be available to go to the funder and to the insurer.
2 And I will come on to show you why that expectation, why that inference is more than
3 justified, because frankly, the distribution proposals in this case are chaotic.
4 But just sticking with the contractual arrangements for a moment. That expectation of
5 very large, undistributed damages is consistent with input that there's been from the
6 funder in this case. So let me give you the context.
7 Back in May, when we were in the lead-up to this hearing, the Tribunal directed the
8 funder -- directed the CR to provide some answers to queries from my
9 instructing solicitors, RPC, and that included a query as to whether the funder was still
10 committed to funding this case, given the hugely reduced claim value and if so, why,
11 given that factor. And I will show you what the funder said in response. It's in the
12 Other Relevant Documents Bundle, tab 1, page 98 and if I just ask you to read
13 paragraph 4 of that letter.

14 **(Pause)**

15 **THE CHAIRMAN:** Thank you.

16 **MS ABRAM:** So 4.1 effectively confirms that the funder expects take-up to be low
17 enough that it will get a satisfactory return. So that sets the spidey senses going but
18 4.2 is also interesting and it raises a further question mark. So in 4.2, Softwhale, the
19 funder, says it:

20 "... believes strongly that losses for those that held BSVs should be compensated by
21 the defendants, willing to support the consumers in the fight for redress."

22 Now, it's common ground that Softwhale is ultimately owned by Calvin Ayre.

23 Mr Ayre is known to have been, at least in the past, a friend and a supporter of Craig
24 Wright and that's from your COPA judgment, paragraphs 38 and 63 and he's also been
25 found to have had a very significant financial interest in BSV.

26 Now, Mr Ayre isn't a member of the class because he isn't and hasn't been a UK

1 resident, so that's not what's going on here but any companies who were owned by
2 Mr Ayre, so in the Ayre group of companies, who were UK residents and who did hold
3 BSV at the material time, will be Class Members.

4 We provided a list of UK companies known to be associated with Mr Ayre to the CR
5 and we asked whether any of them hold BSV. The answer was, effectively, none of
6 them currently hold any material amount of BSV, such as to engage the interest of
7 the Tribunal but we don't know what they held or other companies in which Mr Ayre
8 may have had an interest and may have owned in 2019 which is the relevant period.

9 And so in short, the short point is that it remains opaque whether Mr Ayre and the
10 businesses that he controls have some reason for wishing to support the claim beyond
11 Softwhale's immediate interest in maximising its return. So we can see the 4.1 point,
12 they think there's going to be undistributed damages they would quite like, thank you
13 very much. 4.2, we don't know what's going on there.

14 The central point is that really, the potential benefit to Class Members should be the
15 focus for analysis and we say that the potential benefit for Class Members, even on
16 the Class Representative's very, very best case, is insufficient to justify the costs of
17 the claim.

18 That takes me on to take-up, which is the final limb on cost benefit analysis.

19 **THE CHAIRMAN:** Can I just ask you about Craig Wright?

20 **MS ABRAM:** Yes.

21 **THE CHAIRMAN:** Because he was resident in the UK in 2019 and presumably,
22 because he was so keen on promoting BSV, he was likely to have quite a substantial
23 holding. But we don't know anything about that, do we?

24 **MS ABRAM:** We don't know anything about that. He's not a party, we don't know
25 anything about his BSV holdings. All we know is what's in that Mr Justice Chamberlain
26 judgment, Wright v McCormack, which says that he was a significant owner of BSV,

1 as was Mr Ayre. That's paraphrasing. I'm not exactly sure what the words are but it's
2 something like "significant owner."

3 **THE CHAIRMAN:** Okay.

4 **MS ABRAM:** Shall I give you -- let me give you the reference to where that judgment
5 is, so we don't have Wright v McCormack in the bundle but we have quoted the
6 relevant bit of it. It's in a document that's in the Correspondence Bundle, tab 7,
7 page 54, paragraph 7.2.

8 **THE CHAIRMAN:** Okay, thanks.

9 **MS ABRAM:** That takes us on to take-up which is the final limb of the cost benefit
10 analysis. As you know, you have seen in the papers the CR proposes two parallel
11 tracks for distribution in this case. There's a conventional claims based process and
12 there's a novel Blockchain methodology.

13 Start with the claims based process and then move to Blockchain. So on claims based
14 process, that means you fill in an online application form. You say: I would like my
15 share of any award, please. The CR doesn't say that that would yield higher take-up
16 rates in this case than in other past and ongoing cases in front of the Tribunal. There's
17 nothing special about this claims based process that's said to drive higher take-up
18 rates.

19 The highest the CR puts it at paragraph 37 of their skeleton is that it's going to learn
20 from any mistakes in prior distribution exercises. So the best guide that we have for
21 the claims based element of the process is distribution exercises so far. The ones that
22 have happened, the ones that are about to happen and actual and predicted consumer
23 take-up rates in those cases are in the range of 1 to 5 per cent. So you have seen
24 lots of references to Gutmann, which is the only completed distribution process which
25 had a take-up rate of below 1 per cent and 5 per cent is the predicted take-up rate for
26 consumers in Merricks v Mastercard and for the non-Motability consumer class in

1 RoRo, so that's the point of reference.

2 Now, even if we made all possible assumptions in the CR's favour, so even if
3 permission were granted for the pleading amends, the CR succeeded at trial on every
4 single issue, take-up in that range would yield returns to the class of no more than
5 £7 million on all of those most optimistic assumptions.

6 Quite clearly, the predicted costs of the claim would exceed the benefits based on
7 take-up, if we're having to look at that range. So you have the £38 million raw costs
8 figure for return to the class of less than a fifth of what would have been spent.

9 That doesn't make sense.

10 So why does the CR say that this case is different? What does it say saves its bacon
11 on take-up? It's the Blockchain distribution proposal that's put forward as an additional
12 parallel track for distribution and you can see what the CR says about that in its
13 skeleton argument, paragraph 40, page 18.

14 So if you look at the first and second sentences of paragraph 40, you see why the CR
15 says that the Blockchain channel will drive so much higher take-up.

16 **THE CHAIRMAN:** Yes.

17 **MS ABRAM:** Now, I'm going to go to the detail of this and explain why we say this is
18 just not credible but before I go there, it's worth making the point that even if take-up
19 were as high as the CR claims, the costs of the claim wouldn't justify the benefit. So,
20 again, let's assume we're at 140 million, so everything in the CR's favour, take-up at
21 50 per cent would apply benefit to the class of £70 million. Leaving £70 million left
22 over undistributed to the funder and to the ATE insurer, subject to the control of
23 the Tribunal.

24 So in the world that's the most optimistic possible for the CR, you have raw costs of
25 trial of 38 million, you have 70 million available, subject to the control of the Tribunal
26 for the funder and for the ATE insurer, so £110-odd million, 70 million to the class.

1 The funder and the insurer are getting one and a half times the total amount of benefit
2 to the class and that's the Class Representative's best case and that's why I say there
3 is no world in which the claim currently before the Tribunal can be said to be one in
4 which the costs are justified by the potential benefits.

5 So I say it's just not good enough, even with that 50 per cent figure. But let's dig down
6 into the 50 per cent figure and see how it's justified and what lies behind it because
7 I say that that figure is, frankly, pie in the sky. So in order to do that I need to address
8 the note from Global Ledger which is where that 50 per cent figure comes from. The
9 note is in the Other Relevant Documents Bundle at tab 1, page 99.

10 So the bottom line is that we say this is valueless as evidence as to likely take-up of
11 any award.

12 You see that it is headed "Expert information note", but it doesn't comply with the
13 requirements of part 35, which are applied by analogy in the Tribunal. You can see
14 that particularly clearly from the header on page 99. You see "Status".

15 "Status: information notes for discussion, not legal or financial."

16 It's certainly not identified as expert evidence. Indeed, that seems to be a disclaimer.

17 If I show you where those two figures that you saw in the Class Representative's
18 skeleton for notification and distribution come from. So paragraph 11 is the notification
19 figure. You see on page 101, bottom sentence of paragraph 11:

20 "Expected reach."

21 So this is notification:

22 "Approximately 75 to 85 per cent not treated as payment."

23 So that's where that comes from and then the take-up figure is at paragraph 22 of the
24 note, so page 104, bottom four lines of paragraph 22:

25 "Although it's not possible to know for certain what percentage of the class members
26 ultimately complete the journey from notification to payment, we would expect that

1 percentage to exceed 50 per cent, given, one, inherent effectiveness of Blockchain
2 notification process described at paragraph 11 above and two, the estimated amount
3 of damages available at minimum effort to each class member."

4 So two important points about this note before we get into the detail of the proposal.
5 First, there is no indication that Global Ledger sees itself as having any kind of duty to
6 the Tribunal, still less the duty of independence and objectivity that we expect from
7 experts.

8 You have seen in the skeletons that we invited the Class Representative's team to put
9 in a revised version of the note that did comply with the requirements for expert
10 evidence in part 35, including setting out or providing the instructions provided to
11 Global Ledger and they just refused. So the Tribunal can place no reliance on this
12 document as an independent source of expert opinion.

13 Second important point about Global Ledger is that it's now accepted that Global
14 Ledger has no expertise in notification, distribution or take-up of damages in class
15 actions in the UK or in any other jurisdiction. It has no claims, administration, expertise
16 at all.

17 Instead, it's said that this note is put forward from them because they're Blockchain
18 specialists.

19 Now, perhaps that means that at a technical level, they know how to send a notification
20 through the Blockchain. I don't know if that's the case but what it doesn't mean,
21 absolutely does not mean, that they know how many wallet holders will actually read
22 a notification or how many will respond to it by taking up their share of the award and
23 those are the critical issues that underlie these estimates.

24 So you can see from paragraphs 11 and 22 which I have shown you, that
25 unsurprisingly, given Global Ledger's total lack of relevant experience or expertise,
26 that there's no basis identified for either their notification figure or their take-up figure.

1 So what you don't see, for example, is Global Ledger saying: well, look, we know that
2 when you send a notification through the BSV Blockchain or through the Blockchain
3 generally, it tends to reach 75 to 85 per cent of recipients and we know that because
4 we have seen that in other situations.

5 They don't say: well in other circumstances, cryptocurrency wallet holders were
6 notified of their entitlement to get a partial refund, for example, and 50 per cent of them
7 took up that entitlement. There's no basis for either of those sets of figures in the
8 Global Ledger report, so that is why I say the 50 per cent figure is valueless. It's
9 neither based on any relevant expertise, nor does it even come from an independent
10 expert.

11 The CR has suggested that weight is given to these figures by the fact that Angeion,
12 so the claims administrator in this case, repeats them. It is true that Angeion repeats
13 them but, again, the reason that Global Ledger were apparently needed is that it's not
14 suggested, understandably, that Angeion have any experience of even sending
15 notifications through the Blockchain, still less distributing class actions in that way. No
16 class action award has ever been distributed through the Blockchain. That's common
17 ground. So that's why GL's input was needed and Angeion repeating those figures
18 adds no value to valueless estimates.

19 So that's what we say about GL in the big picture, about Global Ledger in the big
20 picture, so just helpful to summarise where we've got to so far. So we say even if we
21 make every assumption in the CR's favour, so you allow the pleading amendments,
22 they win on every issue at trial, the 50 per cent take-up figure is right, even on that
23 basis, the costs of this claim do not justify the benefits.

24 In fact, you can't attach any weight to the 50 per cent figure because it's given in this
25 note which has no value and that then leaves the CR with the online claims process,
26 the parallel process which the CR doesn't suggest would be any better in this case

1 than any other. So you might be looking at a range of recovery of 1 to 5 per cent and
2 you would need something much, much greater than that in order to justify the costs
3 of this case.

4 But in addition to all of those points, it's also apparent that the actual content of the
5 distribution proposal is itself really flawed, so on the terms of the GL note itself, it's
6 very far from being the saviour of distribution to the class. And, just to be clear, the
7 burden is on the class rep to present a coherent plan for distribution. I'll give you
8 a reference to that. It's *Brook v Google*, paragraph 50 which is *Authorities Bundle*,
9 tab 35, page 2104. We don't need to go there, just to have the legal context.

10 So one needs to ask why the CR says take-up is going to be so high through the
11 Blockchain proposal. Why is that going to help so much? And you can see that from
12 the Class Representative's skeleton argument, page 18 again.

13 Paragraph 40, page 18. Paragraph 40, four lines up from the bottom, you see the
14 penultimate sentence:

15 "Global Ledger's estimates are set out on the basis of one, the inherent effectiveness
16 of the Blockchain notification process and, two, the estimated amount of damages
17 available at minimum effort to each class member."

18 So those are the two points relied on in the Class Representative's favour. I will deal
19 with them the opposite way round. There's a lot of emphasis placed on the relatively
20 high per capita value of this claim in connection with distribution in this case.

21 We don't accept that that is at all informative as a reference point because it's a mean
22 average, so it doesn't take account of the distribution of per capita values across the
23 class.

24 Actually, a key premise of the application for certification in this case was that this
25 class is largely composed of individuals, not corporate investors with limited per capita
26 recovery, so the premise of the application of the certification is contrary to the point

1 that's now prayed in the Class Representative's own favour on distribution. So I will
2 give you the references to where they pray those points in aid. It's claim form 93.2
3 and 93.7 which is Core Bundle, tab 1, page 29 and page 30 but it's helpful just to see
4 the figures that underpin that which are in Noble 2. So that's Core Bundle, tab 11,
5 page 319.

6 Page 319, paragraph 3.9, you see Mr Noble says:

7 "In support of the application for certification, investors in crypto in the UK tend to hold
8 relatively small amounts of money in cryptocurrencies. FCA report shows that
9 39 per cent of crypto asset holders held crypto assets worth £100 or less. 60 per cent
10 held £500 or less. Only 11 per cent held assets valued at over £5,000."

11 And bear in mind too that those figures are for all crypto assets rather than per
12 currency, so they're not per BSV.

13 So the Class Representative's own case, its own evidence is that a large proportion
14 of Class Members is likely to have claims far below the mean average and so the
15 argument that they will be incentivised by the high per capita claim value to take up
16 their share of any award just doesn't run.

17 So then putting that to one side, the idea that notification through the BSV Blockchain
18 will drive higher take-up, it's important to underline that this still does involve a claims
19 process, it's not a direct distribution process. So in some of these cases we see direct
20 distribution proposals. So, for example, in *Brook v Google*, there was an idea -- so
21 that's the Google search claim -- there was an idea that there was going to be direct
22 distribution, as Mr Davies knows, direct distribution to Google's customers, who had
23 paid either via advertising agencies or direct to Google to place search ads with
24 Google. And the class members would effectively not need to do anything, they'd just
25 be able to receive the money. Similarly in *Le Patourel v Apple* and *Amazon*, for the
26 on Amazon bit of the claim, there's an idea that if there are any damages, they may

1 be capable of being repaid directly to people's Amazon accounts, so you won't even
2 need to make a claim. But that's not this case.

3 The CR does envisage that every class member, including all these individual
4 investors, are going to have to put in a claim, lodge a claim, even if distribution is going
5 to happen through the Blockchain. So the Blockchain proposal is not direct distribution
6 and I say that the starting assumption because it does involve a claim, should be that
7 take-up level will be similar to other claims processes.

8 I will pull out three particular features of the proposal to illuminate why notification
9 through the Blockchain wouldn't lead to higher take-up.

10 The first is the proposal is simply incoherent. It hasn't been thought through. We have
11 given a couple of examples of this in our skeleton. For example, we have pointed out
12 that the CR hadn't even considered how it was going to tell the difference between
13 sub-class 1 and sub-class 2, so the people that sold their BSV immediately after the
14 de-listing events more or less and those that held on to it.

15 And that is the whole premise of the way the claim value is meant to be calculated, so
16 that's one example of not thinking through how it's going to work.

17 Another example is that there was an idea floated in the Global Ledger note that
18 distribution would take place via a newly issued stable coin which would be
19 denominated in sterling.

20 Now, it's not suggested that Global Ledger has ever previously been involved in the
21 creation of a stable coin. They have put forward the proposal in three paragraphs:
22 paragraph 19 to 21, this new cryptocurrency approach. We pointed out that they were
23 hopelessly vague for this magnitude of proposal and it might be helpful to look at what
24 the CR said in response, which is in -- its August submissions, so that's Core Bundle,
25 tab 7, page 189.

26 So paragraph 89 on page 189, they note the criticism:

1 "Proposal means distribution through a new stable coin. Structure is sufficiently
2 identified at this stage. Issuance by an FCA authorised electronic money institution or
3 stable coin issuer backed one for one by high quality liquid assets. Apparently
4 selecting the institution and settling redemption ... years before any award would be
5 commercially irrational. In any event, if the Tribunal were to prefer a more
6 conventional method of payment at the distribution stage, payment in sterling remains
7 available directly or through an established payments provider."

8 So the whole merit of the Blockchain proposal was that it was said to be likely to drive
9 higher distribution rates. Then it's immediately abandoned when challenged and it's
10 not even clear whether it's still put forward by the CR or not. What is their proposal?
11 With the greatest respect, it's glib. It's not coherent or properly thought through. It's
12 the CR throwing out ideas without any attempt at rigour. It's not a sensible basis for
13 the Tribunal to conclude that take-up in this case would be tens of times higher than
14 we have seen in any other case.

15 That's the first point.

16 The second point is that the Blockchain distribution proposal depends critically and to
17 an extent that the Tribunal has previously described as hopeless, on cooperation from
18 cryptocurrency exchanges. So you will know better than I do that there are two ways
19 of holding cryptocurrency. You can hold it directly as an individual owner through
20 a non-custodial wallet in your own wallet or you can hold it through an exchange, in
21 which case it's likely to be held in a custodial wallet, which is a single wallet where the
22 exchange groups together the holdings of a number of cryptocurrency investors.

23 It's common ground there are at least 248 cryptocurrency exchanges globally. The
24 Defendants are four of them. So you have four of them here and at least 244 that
25 aren't. So for the BSV that's held through exchanges, the Global Ledger note
26 envisages that the exchanges would be involved at each stage of the distribution

1 process. Notifying the Class Members who held BSV, verifying their entitlement and
2 then actually making payments to them, would all be done by these exchanges,
3 including the 244 that aren't in this room today.

4 Now, we can think first perhaps about the payment stage because, frankly, that's
5 a deal breaker by itself. You can see what's proposed to happen there in the Global
6 Ledger note at Other Relevant Documents Bundle, tab 1, page 103. So if we look on
7 page 103 of the bundle at the flowchart, you see in the bottom box -- it's quite tricky to
8 read, isn't it, but in the bottom box you see that's redemption at par in GBP and then
9 the words say "to bank account, exchange, wallet." So bank account is relevant where
10 a class member has done the online application process, given their bank details. So
11 we're all agreed that that's not what's going to drive high take-up here, we put that to
12 one side.

13 Wallets will be for individual, non-custodial holders of BSV. The one that's relevant
14 here is the middle one, exchange, so that makes it clear that the proposal where BSV
15 was held through custodial wallets is for payment to be made to the exchange which
16 would then need to remit the payments to the Class Members.

17 Now, almost all of those exchanges are likely to be resident outside the jurisdiction.
18 Almost all of them are not parties to this case. The Tribunal will have no control over
19 them whatsoever. Unsurprisingly, in a previous case, it has described a proposal of
20 this nature as a hopeless proposition and that is a case that Mr Davies is familiar with
21 but I will show the Tribunal that judgment.

22 So it's Brook v Google. It's Authorities Bundle, tab 35 and this quote is at page 2105
23 and this was a case where I, for Google, said: well, the proposal seems to be that
24 where people bought advertising, where class members bought advertising through
25 advertising agencies, the class rep simply proposes to pay the money to the
26 advertising agencies, the media agencies and hope that it gets sent back to the class

1 members and that's just hopeless and the Tribunal agreed that that would be
2 hopeless.

3 So if you look in the fourth line of paragraph 52:

4 "Working through the media agencies does not mean simply giving those agencies
5 many millions of pounds and hoping that they pass it on which Google rightly said
6 would be a hopeless proposition."

7 But that hopeless proposition is precisely what is, in fact, proposed for custodial wallet
8 holders in this case.

9 So in itself, as Mr Justice Meade, as he then was, said in Brook v Google, that's
10 hopeless and that's a reason why the proposal for Blockchain distribution is
11 a non-starter.

12 But even if that weren't enough by itself, the Class Representative's proposals as to
13 how the exchanges should be involved in notifying and verifying the entitlement of
14 Class Members is also totally unrealistic. You can see what's involved in the Global
15 Ledger note again, so back to Other Relevant Documents Bundle, tab 1 and look at
16 page 101.

17 So you see, paragraph 11 -- that's step 2, "Notification":

18 "Notice of the proceedings is delivered by a mass on chain broadcast to each address
19 in the wallet map."

20 And you see, penultimate sentence of that paragraph:

21 "The claim website exchanges, advertising and press are used in parallel."

22 That's another way of saying where BSV was held through exchanges in these
23 custodial wallets, the notification will be given to the exchanges which will then need
24 to be passed on.

25 And then you see paragraph 12:

26 "From the link in the notice the member logs into the claims portal and submits

1 a claim."

2 So the next step is for the member, having been notified by the exchange, to submit
3 a claim. That's why I say this is also a claims based process. And then paragraph 13:
4 "... tracks the verification, A, track 1 BSV on an exchange. Identity [that's of the class
5 member] is confirmed from the exchange's KYC records, name, address, nationality,
6 with almost no action by the members. All regulated exchanges are required by
7 application regulations to maintain identity records and the records will directly link the
8 customers' exchange accounts to the BSV balance."

9 Now, there are multiple layers of problems with this proposal. Most obviously, it
10 assumes without any identified basis that the exchanges will still have these details
11 for customers in 2019, perhaps a decade later, when any distribution exercise takes
12 place, that they won't, for example, have been required to delete them by their
13 documentation preservation policies in the meantime.

14 Further assumption that exchanges will have not just the contact details but also the
15 KYC data or the AML data relied on here. Now, the Class Representative has made
16 no attempt to map out the exchanges, these 244 exchanges, and work out for each
17 relevant jurisdiction what KYC data they were obliged to obtain in 2019.

18 Even where exchanges would have been obliged to get that KYC data and they would
19 still have that KYC data, there would be a further question about whether local data
20 protection laws would enable them to use that data for this different purpose, in
21 circumstances where they're not even parties to the proceedings. And then assuming
22 you get over all those hurdles, there's a question of willingness. Why, one asks,
23 should a third party exchange which has this data which can use it for this purpose,
24 actually have any interest in doing so, in order to support a claim in another jurisdiction
25 that it has nothing to do with?

26 The CR suggests this would all be routine but that's just not fair. If one thinks about

1 what this would require, for each exchange to go through data that's potentially
2 a decade old, to work out who's in the class and who is not in the class but a reference
3 to residents' details by reference to identity details from a decade previously and
4 current residents' details, it's a very, very tall order.

5 The CR suggested at least the big exchanges would help but one asks again, why?
6 Why would they be interested in helping and also, if only the big exchanges help, how
7 much of the class are we then writing off and what impact does that have on the
8 50 per cent, the 75 to 85 per cent figures that are put forward so proudly by the CR as
9 the kind of centre of this proposal?

10 So none of this makes any sense, none of this stacks up and certainly doesn't stack
11 up with the 50 per cent figure.

12 The final dimension of the problem relates to BSV held through non-custodial wallets,
13 so you're looking there at wallets that an individual owner holds themselves. The main
14 advantage that's claimed for this proposal is that notification through the Blockchain
15 will be particularly effective for notifying Class Members but that's inconsistent with the
16 Class Representative's evidence when it was applying for the CPO about why Class
17 Members couldn't have been expected to sell their BSV straightaway after the
18 de-listing events.

19 At that time they said: look, Class Members might have been unaware of the de-listing
20 events for months or for years because lots of Class Members never or hardly ever
21 check their wallets and yet they're all going to be checking them sufficiently to receive
22 effective notification of this process and to take up their share of the award. And their
23 evidence on that is, just for reference, Core Bundle, tab 11, page 321, paragraph 314
24 of Noble 2.

25 So none of that makes sense.

26 And, again, that's even before we get to the obstacles that are classic in class action

1 cases, including, for example, whether class members might be concerned that
2 receiving a notification could be a phishing attempt. They just receive a notification
3 through their wallet, in circumstances where there's no external notification. Perhaps
4 particularly likely in the context of cryptocurrency, where people have good reason to
5 be all the more on alert.

6 And then, of course, if they receive the notification and believe in it, they would have
7 to be willing to dig out identity documents from 2019 because if they're an individual,
8 non-custodial holder, there's no exchange doing that for them, so they will have to
9 prove who they are and prove where they're resident. So all of those are impediments
10 to claims. It's just not realistic that you're going to have anything like 50 per cent
11 take-up.

12 So for all of those reasons, as I say, the idea that the Blockchain proposal is going to
13 drive higher take-up in this case is just pie in the sky, with respect. No confidence can
14 be placed in the Global Ledger report, the Blockchain proposal is deeply and obviously
15 so flawed that it can't be described as a serious plan and there's no basis on which
16 take-up could be found to be likely to be as high as 50 per cent.

17 So the CR says: well, why don't you treat this as a case management issue. If you're
18 not happy with our distribution plan, treat it as a case management issue. That's just
19 another way of saying: kick the can down the road. If you're not sure that the costs of
20 the claim justify the potential benefits of the claim, then don't worry about it today, put
21 it off for another day.

22 Now, that might well work in a case where one is satisfied that there are feasible and
23 sensible distribution plans available in principle, but the detail needs a bit of work. In
24 this case I hope that I have comprehensively dismantled the Blockchain distribution
25 proposal that is the centre of the Class Representative's contention that they will have
26 satisfactory, enough distribution to justify the costs of the claim. And so where we're

1 left, then, is that even if you're against us on everything and the Tribunal is against us
2 at trial on everything, which we say is very unlikely, and the CR walks away with
3 a £140 million pot to distribute, it's overwhelmingly likely that the main winners of the
4 proceedings are going to be the funder, the insurer, the lawyers and that the Class
5 Members will get very little. So that's why we say whatever happens to the pleading
6 amendment application, the claim should be decertified on the basis of the costs and
7 the benefits.

8 I gave an incorrect reference, thank you, to Wright v McCormack. I said it was in the
9 Correspondence Bundle. It's actually in the Supplemental Bundle. The tab and page
10 numbers were correct, so two out of three ain't bad.

11 Unless there's anything else for me, Sir.

12 **THE CHAIRMAN:** No, thank you very much.

13 **MR SCOTT:** My Lord, I have a very short point to make on behalf of the Fifth
14 Defendant, Shapeshift GmbH and it needs to come from me because we may be in
15 a slightly different position in this one narrow respect from the other Defendants who
16 are before you today. This will take about two minutes, my Lord, so I'm happy to do it
17 now or after the break, as you prefer.

18 The Class Representative's skeleton argument makes some points about the size and
19 the financial resources of the Defendants and if I can perhaps just show you those,
20 starting at paragraph 28.3 of the Class Representative's skeleton, which is at page 12
21 or page 13 of the PDF.

22 **THE CHAIRMAN:** Yes.

23 **MR SCOTT:** This is where the Class Representative draws some points out of the
24 Ennis v Apple case and you have heard my learned friend Ms Abram's submissions
25 about that judgment and I adopt all of that. But leaving those submissions and those
26 issues aside just for present purposes, one of the points that the Class Representative

1 draws from Ennis and this is over the page now, at the top of page 13 or PDF 14 in
2 the same paragraph, is that it is said that the defendant in Ennis v Apple was a very
3 substantial organisation with the resources to resist the claim on the merits. The
4 defendant was Apple, so I'm sure that's right.

5 Then if we could go forward to the last paragraph, paragraph 45 on page 20 of this
6 skeleton argument or page 21 of the PDF, this seems to be an application of that
7 principle that's said to come from Ennis and if we look at the first sentence, the Class
8 Representative says:

9 "Fundamentally, the claim relates to obvious public collusion by large cryptocurrency
10 exchanges."

11 And then the second sentence and really the second half of the second sentence says:
12 "The defendants are large commercial entities who can bear the costs of the litigation
13 they have invited."

14 And all my submission is, my Lord, and members of the Tribunal, is that in relation to
15 my client, Shapeshift GmbH, those points are factually incorrect as regards the size
16 and the operations of Shapeshift in particular and to make that good, I just need to
17 show you one letter which is in the Supplemental Bundle, tab 11, page 64.

18 This is a letter from my solicitors, Hogan Lovells, to the Class Representative's
19 solicitors. The letter is dated 25 September 2026. You will see it refers to earlier
20 correspondence from 2023 and I think the simplest thing is if I just ask you to read,
21 please, paragraphs 2 to 7 of this letter to yourselves.

22 **(Pause).**

23 **THE CHAIRMAN:** Yes, thank you.

24 **MR SCOTT:** And just for your note, you don't need to look at it if you don't want to,
25 the earlier January 2023 letter that's referred to there is at tab 2 of this same
26 Supplemental Bundle. I don't propose to take you to it. The submission is simply that

1 given the points made in that letter, Shapeshift is not in fact a very substantial
2 organisation or a large cryptocurrency exchange or a large commercial entity and
3 insofar as the Class Representative seeks to derive assistance from those points, it
4 cannot do so, at least in relation to my clients. Unless I can assist you any further.

5 **THE CHAIRMAN:** No, thank you very much.

6 Good, right, we will take the shorthand writers' break. Thank you.

7 **(3.20 pm)**

8 **(A short break)**

9 **(3.35 pm)**

10 **THE CHAIRMAN:** Yes, Ms Ford.

11 **MS FORD:** Sir, Members of the Tribunal, starting with the applicable principles on
12 decertification, you have been shown the relevant power in the Tribunal's rules,
13 rule 85. You were shown a brief section from the Ennis v Apple judgment but I would
14 like to take you to a few more passages. So could we look, please, at Authorities
15 Bundle, tab 4, page 2068.

16 **THE CHAIRMAN:** Yes.

17 **MS FORD:** And the Tribunal is here considering rule 85, starting at paragraph 56 and
18 if we go over to paragraph 57, you can see it setting out various observations about
19 the terms of that order.

20 Subparagraph 6 identifies the three matters the Tribunal is required to take into
21 account under rule 85.2 which the Tribunal has been shown and then subparagraph
22 7 emphasises the language of A and B. It says:

23 "Notably the words 'still' and 'continues to' suggest that the Tribunal should consider
24 in particular whether there has been a change in circumstances which means that the
25 criteria for certification of the claim no longer apply, will no longer apply in the same
26 way or that the Class Representative no longer satisfies the criteria for authorisation

1 ... reading the same way they are referring to or at least including the question of
2 certification on an opt-in or opt-out basis."

3 They go on at 59 to 60 to emphasise:

4 "We're concerned with the power to vary or revoke an order which the Tribunal has
5 already made. Considerations of consistency, legal certainty and finality dictate that
6 something must have occurred, some change of circumstances relevant to the
7 question of certification which justifies the Tribunal in varying or revoking the order
8 which it previously made. As we have observed, that is implicit in the language of
9 rule 85.2 which enjoins the Tribunal to consider in particular whether the criteria for
10 the certification of claims still apply or still apply in the same way as when the order
11 was made and whether the Class Representative continues to satisfy the criteria for
12 authorisation."

13 It goes on to point out:

14 "The decision to make a CPO and the decision whether to certify the proceedings on
15 an opt-out basis involve evaluative judgments. It plainly could not justify the variation
16 or revocation of CPO that the Tribunal has simply changed its mind or would now
17 balance the relative considerations differently from the Tribunal which made the CPO.

18 "Further, the Tribunal must exercise a power to vary or revoke a CPO in the light of
19 the governing principles set out in rule 4 of the Tribunal rules. It would not be
20 consistent with those governing principles for a CPO to be constantly relitigated in light
21 of developments which may be regarded as ordinary incidents of the litigation. The
22 change must be of such a character as justifies the Tribunal recognising the
23 importance of its gatekeeping responsibility in considering, varying or revoking the
24 order which it has previously made."

25 So we say those are the applicable principles the Tribunal is now considering,
26 including the emphasis on legal certainty and finality.

1 At 61, over the page, we can see that this Tribunal cites what was said in the Stasi
2 case, that:

3 "The Tribunal must strive to achieve an outcome which is fair and proportionate
4 between the parties, consistent with the overall obligation in rule 4.1, to deal with cases
5 justly and at proportionate costs."

6 And it goes on to express the view that:

7 "That is no less true when the Tribunal is considering whether to vary revoke a CPO
8 which has already been made."

9 It goes on to endorse a submission that was made to it, where it needs to take into
10 account work already done and costs incurred.

11 Just to pick up a few additional factors that come from the following paragraphs.

12 Paragraph 62, we can see, this is lines 4 and 5 in that paragraph, the Tribunal saying:

13 "The power to vary or revoke is not a substitute for a timely appeal."

14 Paragraph 65, the Tribunal is recording that the collective actions regime is designed
15 to provide access to justice in a new way for certain types of claims and certain types
16 of litigant.

17 And then 66 and 67 are setting out, essentially, the countervailing consideration that
18 the Tribunal must also take into account:

19 "The Tribunal must be alert to a potential for certification on an opt-out basis to operate
20 unfairly towards defendants by reason of the leveraging effect of unmeritorious
21 claims."

22 So that is what the Tribunal is weighing up.

23 How, in our submission, do these factors apply in the circumstances of the present
24 case? We say there has been no material change of circumstances. We say that the
25 reduction in claim value is an immediate and foreseeable consequence of the
26 strike-out application which was pursued by Binance. We say the Tribunal had well in

1 mind the significance of the foregone growth effect in terms of claim value and it
2 recorded that on the face of its judgment. The Tribunal has been shown that and it
3 nevertheless proceeded to certify.

4 All that has occurred since is that the Tribunal's decision has been upheld by the
5 Court of Appeal, which was also absolutely clear about the consequences of that
6 decision, as it had underlined in paragraph 11 which we showed the Tribunal before
7 lunch and then the Class Representative has amended to give effect to those
8 decisions.

9 So we do say that this is not a situation where the Class Representative has
10 unexpectedly chosen to abandon a claim; it is an immediate consequence of the
11 strike-out that Binance itself brought and a consequence of which the Tribunal was
12 aware when it chose to certify.

13 So our submission is that these eventualities are not something that could justify
14 the Tribunal in revisiting the order it previously made. We say that that would be the
15 sort of unfair relitigation of points which the Tribunal is warning against in Ennis.

16 As to the Tribunal's warning that the power to vary or revoke is not the substitute for
17 a timely appeal, that, we say, must apply a fortiori in circumstances where the
18 Defendants did not even oppose certification. Subject to Binance's strike-out, they did
19 not oppose certification, so it is not fair or appropriate or consistent with the principles
20 of legal certainty and finality for them to change their mind now and essentially come
21 back and have another go.

22 On the point that the collective action regime is designed to provide access to justice,
23 we say that the reality of this matter is that these claims concerning collusion by large
24 cryptocurrency exchanges simply will not get litigated if certification is revoked and we
25 say that is not an outcome which is consistent with the objectives of the collective
26 action regime.

1 We say that this is not a case where there is a risk of unfair leveraging effects of
2 an unmeritorious claim. On the contrary, we say this is a brazen example of
3 competition law infringement. This is an example of collusion which took place in
4 public over Twitter and in the time that this litigation has been running, the Defendants
5 have never articulated any hint of a substantive defence on liability.

6 That is, of course, until today, when I understood the submission to be made that this
7 collusion was justified by reference to a connection between BSV and Craig Wright.
8 That appeared to be the submission that was made.

9 Now, that is something that the Tribunal addressed in its first judgment. If we look,
10 please, in the Other Relevant Documents Bundle, tab 7 at page 214. Looking at
11 paragraph 11, the Tribunal recalls there:

12 "The identity of the pseudonymous Satoshi Nakamoto remains unknown, has been
13 the subject of considerable controversy. Since 2015 Dr Wright has claimed to be
14 Satoshi Nakamoto, a claim which was widely disputed and has now been discredited."
15 And reference to this, sir, your specific judgment.

16 The Tribunal then goes on, paragraph 12, to say:

17 "The present claims do not turn on the substance of that dispute. What is relevant is
18 that the controversy over Dr Wright's claim has led to a series of tweets and other
19 public announcements ... defendants variously objected to Dr Wright's conduct,
20 denounced him as a fraud, announced their intention to de-list BSV from their
21 exchanges and called upon other crypto exchanges to do the same."

22 We have made clear from the outset and the Tribunal duly recorded in paragraph 12
23 that these claims that are being pursued on behalf of a class of holder of BSV are not
24 seeking to litigate controversy over Dr Wright's claims.

25 As to the submission that was made today, which appeared to be suggesting that the
26 cryptocurrency exchanges were justified in colluding in order to de-list because of their

1 views about the claims that Dr Wright made, it hardly needs to be emphasised that
2 that is not a competition law defence to collusion. It's, of course, perfectly open to
3 these exchanges to take the view that they unilaterally would de-list whatever currency
4 they wished to de-list but it is not open to them to get together with their competitors
5 to agree that they were all going to de-list together and that is what this claim is about.
6 So we do say that these are strong claims. We do say that they don't give rise to the
7 sort of unfair leveraging concerns which were highlighted by, for example, the
8 Supreme Court in Evans and for all those reasons, we say that the attempt at
9 decertification doesn't pass the first hurdle and we make that submission irrespective
10 of the outcome of the Class Representative's amendment application.

11 I'm turning to deal with the submissions that were made on cost benefit. As is common
12 ground, the cost benefit analysis is just one factor that the Tribunal takes into account
13 when considering whether claims are suitable to be brought in collective proceedings
14 under rule 79.2 and we do say that all the other factors that the Tribunal considered
15 the first time round weighed in favour of certification, remain in place and are unaltered.
16 We both refer in support of our respective positions to the Tribunal's judgment in
17 Salmon which is Authorities Bundle, tab 32, page 1995.

18 The Tribunal will see from paragraph 1 in this judgment, over the page 1998, that this
19 was the Tribunal's judgment on an initial application for a CPO, so it wasn't an attempt
20 to reopen a CPO on cost benefit grounds under the applicable rules that we are
21 applying in the circumstances of these proceedings.

22 Paragraph 26 on page 2009, the Tribunal acknowledges that there may be many
23 cases where it is self-evident that an effective distribution method may be devised,
24 such that it's unnecessary at the certification stage to focus on distribution.

25 Now, it didn't consider that that was the case in the particular circumstances of
26 Salmon. It was concerned in Salmon that it might be not dissimilar to the Gutmann

1 proceedings and that it raised immediate concerns about what proportion of damages
2 might be distributed to the class.

3 Now, what was it that rang alarm bells in Salmon? I can show the Tribunal from
4 paragraph 29, middle of the paragraph, the loss per class member, in paragraph 29,
5 is estimated to range between £1.61 and £8.77, using an interest rate of base rate
6 plus 2 per cent, depending on the variables used for overcharge, pass-on and class
7 size.

8 Now, I think the Tribunal was given the aggregate damages figure in issue in Salmon
9 but I don't think it was taken to this particular figure. This is the amount per class
10 member that is supposedly going to be distributed to those who come forward to be
11 part of the distribution.

12 It hardly need be emphasised that it is extremely low.

13 If we look at paragraph 32, the Tribunal is spelling out why it had concerns in Salmon
14 about the similarity to Gutmann. It says:

15 "The approach to distribution in this case is similar to Gutmann, in that the sums of
16 money are relatively small and claiming requires members of the class to take
17 a proactive step and fill in a form."

18 And at the end of that paragraph it says:

19 "There's no evidence directed to the proposition that levels of take-up will be materially
20 different."

21 If we go to paragraph 36, we can see the Tribunal recalling there that the PCR had not
22 advanced any particular levels of take-up at all and on that basis, as the Tribunal points
23 out in 37, it is concerned that the outcome might be similar to Gutmann.

24 So that's the first point to emphasise here, the extremely low recovery per class
25 member and the absence of evidence from the PCR about take-up levels at all.

26 The second point was that the Tribunal considered the PCR's cost budget was

1 inexplicably high in the circumstances of that case.

2 Now, we can see that in paragraph 38. The reference to inexplicably high is just at
3 the beginning of the fourth line and the reason why it's taking that view is it's saying
4 there are already ASDA and Tesco proceedings on foot from supermarket claimants
5 which would necessarily seek to prove the existence of a cartel and measure the size
6 of any overcharge. And the Tribunal takes the view that their interests are likely to be
7 aligned, at least up to the issue of pass-on.

8 So if we look at 39, we can see that the Tribunal's concern is that the proposed class
9 has various options open to it to minimise its costs in those circumstances and it says
10 it shouldn't simply assume that it was obliged to bear the full burden of proving liability
11 independently at what the Tribunal described as enormous cost to the class and it's
12 saying: the options open to you ought to have been actively addressed.

13 Just picking up on the way past, paragraph 40, the Tribunal is noting there that the
14 litigation cost budget hadn't included the costs of the ATE insurance deposit premium.
15 I am flagging that up because when the Tribunal is doing the cost benefit analysis,
16 what it's factoring in on the cost side of the ledger is the premium payable for ATE, not
17 the total amount of the adverse costs cover. And you can see at 41 that the PCR
18 subsequently identified contingent ATE premia of 19.4 million recorded on the eighth
19 line. So, again, what's being factored in, in this exercise, is the premia sums, not the
20 total amount of the cost cover.

21 43, you see the reference to the fact that the PCR had expressed an intention to
22 procure an order that the funders' costs and expenses are only recoverable from any
23 undistributed damages and the Tribunal says that might be said to underscore an
24 expectation that there will be significant sums which are undistributed and that's
25 a passage that Ms Abram placed reliance on.

26 We say that is a valid concern in the circumstances of that case, where the potential

1 recovery per class member was very low and the Class Representative hadn't put in
2 any evidence about take-up levels.

3 Paragraph 46, you see the conclusion:

4 "For those reasons the Tribunal does not consider that as currently formulated, the
5 costs and benefits of the proposed collective proceedings came out in favour of
6 certifying the claim."

7 You have been shown, I think, the submission that was then made at 47, that cost
8 benefit analysis was not an independent threshold issue and it needed to be
9 considered in the context of other factors.

10 You have been shown, the Tribunal agrees, that where matters are finely balanced, it
11 doesn't necessarily mean a case can't be certified but it goes on to say, 47 and 48,
12 that was not the case in Salmon.

13 As the Tribunal will anticipate, my submission is going to be that the present case is
14 very different from the sorts of concerns raised by the Tribunal in Salmon and we say
15 that they don't arise here.

16 Starting with the anticipated cost of the proceedings, they have been set out in the
17 Class Representative's revised budget which for the Tribunal's note, is at the Other
18 Relevant Documents Bundle, tab 1, page 4.

19 The total revised costs budget is 20.1 million plus VAT. That has increased from
20 18.6 million, which was the amount that was before the Tribunal when it certified the
21 proceedings.

22 The reasons for that increase have been explained in Sir Robert Buckland's second
23 witness statement at paragraph 7. That, again, for the Tribunal's note, is at Core
24 Bundle, tab 16, page 479 and he mentions in particular the strike-out application, the
25 work undertaken to amend the collective proceedings claim form and the fact that SGL
26 entered into members' voluntary liquidation.

1 The Tribunal will have noted that in their submissions the Defendants are referring to
2 a different figure, they have been referring to a 38 million figure.

3 What they have done is added the costs budget plus the total amount of the Class
4 Representative's adverse costs coverage. Now, that's why I have been emphasising
5 the approach that was taken in Salmon because we say that's not the correct
6 approach. It's the premia payable by the Class Representative which are the relevant
7 costs of litigation, not the total amount of coverage which insurers might pay out to
8 meet adverse costs if it becomes necessary to do so.

9 So we say the undertaking the Tribunal should be focusing on for this purpose is the
10 20.1 million plus VAT figure and in our submission, those budgeted costs are entirely
11 proportionate and to be expected in litigation of this scale.

12 We say they're not subject to the same criticism that was levelled at the proposed
13 class representative in Salmon -- I'm sorry, I'm just going to check whether I have
14 understood a note which has been passed to me.

15 I think I was halfway through making a submission that the costs in this case, the
16 20.1 million figure, aren't, in our submission, vulnerable to the same criticism which
17 were made in Salmon and the reason for that is although there were opportunities to
18 coordinate with other claimants in Salmon, there are no such opportunities for the
19 Class Representative in this case. We bear the sole cost of establishing liability and
20 quantum in these proceedings.

21 It's worth noting that Sir Robert Buckland has engaged an independent cost specialist
22 to provide independent advice and assistance in reviewing costs and that's set out in
23 his second statement, paragraph 9, Core Bundle, tab 16, page 480.

24 Submissions were made as to the position on return to funders. We have made quite
25 clear that they're only payable from undistributed damages. The key point to
26 understand there is they're not expenses that are going to eat into sums that should

1 otherwise go to the class and I can show the Tribunal quickly the provisions that have
2 that effect. They are in the Other Relevant Documents Bundle behind tab 4.

3 If we start with recital C and H which are page 145. I showed the Tribunal C because
4 it says:

5 "The class representative will be in sole control of the claim and will act justly
6 and reasonably in the interests of the class members."

7 And that provision is then replicated in the express obligations of the Class
8 Representative in the context of this agreement.

9 I raise that because a concerted attempt has been made to imply that somehow that's
10 not what's going on but it is the Class Representative, the independent Class
11 Representative, who is essentially authorised by the Tribunal to pursue these
12 proceedings and the effect of the funding documents is that they are, as recorded at
13 C, in sole control of the claim and have their obligation to act justly and reasonably in
14 the interests of the class. It's important to bear in mind when there are various
15 insinuations which appear to be being made.

16 Picking up H:

17 "The class representative has agreed to apply to the CAT for the approval of certain
18 payments to the funder for undistributed damages or pursuant to a settlement."

19 So essentially the Tribunal has oversight over that practice, as well.

20 Then 4.1.15, on page 156.

21 Before we come to that, if we can just pick up 4.1.9. That is, again, the obligation to
22 act fairly and justly and in the interests of Class Members at all times and then 4.1.15:

23 "If at any time, other than from the ... damages settlement approval order there are
24 undistributed damages, the class representative can request that the court makes
25 an order that all or part of the undistributed damages may be paid to the class
26 representative in respect of the costs, fees and disbursements."

1 And then 10.1:

2 "If there are stakeholder proceeds, the funder is entitled to receive from the
3 stakeholder proceeds an amount equal to the funders' fee."

4 And then stakeholder procedures are then defined, if we go back to page 151:

5 "As with ... costs, any amount paid from undistributed damages to the class
6 representative pursuant to an order of the court in respect of the costs, fees or
7 disbursements incurred by the class representative within the meaning of CAT rule 93,
8 subparagraph 4, or any amount allocated in a collective settlement approval order to
9 the class representative's costs, fees and disbursements."

10 So payment only occurs out of undistributed damages and subject to the approval of
11 the Tribunal.

12 These terms were before the original Tribunal at the certification stage and
13 the Tribunal was satisfied at certification that the funding arrangements were robust.
14 And that's recorded at paragraph 102 of the Tribunal's judgment, which is in Other
15 Relevant Documents Bundle, tab 7, page 241. In response to that, the Defendants
16 have tried to invoke what was said by the Tribunal in Salmon, that payments from
17 undistributed damages might indicate an expectation that significant sums would
18 remain undistributed.

19 We say that that was a concern in Salmon, for the reasons that I have highlighted but
20 we say it's not a universal inference and in our skeleton we have given a recent
21 example which is the settlement application in the Rodger case. That was an example
22 of a claim that had a high anticipated uptake by Class Members because it was
23 concentrated in the hands of 24 developers. So there's every reason to think that the
24 take-up would be high but in that case, costs, fees and disbursements were expected
25 to exceed the amount put aside for them under the settlement sums by some
26 £4 million.

1 Notwithstanding that, the shortfall was to be paid from undistributed damages, so that
2 is an example of a situation where there was an expected high uptake but
3 nevertheless, provision for payment of undistributed damages. The same, we say,
4 applies in this case, for all the reasons that I'm going to come to when we address
5 distribution.

6 I pick up at this stage the questions that have been raised about the composition of
7 the class. It's important to emphasise that the Class Representative has no more
8 information about the composition of the class than anyone else does. We are not in
9 a privileged position in terms of our knowledge about who is within the class and who
10 has holdings within the class. We have nevertheless responded to enquiries that have
11 been made to us although they were made relatively late.

12 So there was a letter, which is in the Supplemental Bundle, which responds to the
13 enquiries that were directed to us concerning whether Mr Ayre has holdings within the
14 class and that is behind tab 12 of the Supplemental Bundle.

15 **THE CHAIRMAN:** Which page?

16 **MS FORD:** It starts at page 66.

17 **THE CHAIRMAN:** Thanks.

18 **MS FORD:** And we do make the provisional point at paragraph 2:

19 "Don't accept that the class representative has any power or obligation to compel the
20 third party information you seek."

21 Essentially reflecting the point I made, that this is not information that we necessarily
22 have access to.

23 What we did is we asked the funder, Softwhale Holdings Limited, whether it was able
24 to assist with the enquiries that had been made to us and so on that basis we had
25 provided the information which is indicated in yellow highlighting. We have designated
26 that as confidential.

1 **THE CHAIRMAN:** Yes, okay.

2 **MS FORD:** The Tribunal has also raised the question about Mr Wright's holdings.
3 We're in the same position, in the sense that we don't have any privileged information
4 about or privileged source of information about that situation and so no better able to
5 assist, essentially, with that enquiry.

6 **THE CHAIRMAN:** Okay.

7 **MS FORD:** As Ms Abram has indicated, there is a particular issue about the fees that
8 have been proposed to be paid to Sir Robert Buckland but we will address that as has
9 been proposed, in writing, we're content with the way forward that's been proposed in
10 relation to that.

11 So that is the position on the costs side and we say that the bottom line figure that
12 the Tribunal should be looking at is the 20.1 million figure.

13 We're then turning to the benefits side of the ledger. If our amendment application
14 were to be granted, then the relevant figures to look at are the ones set out in
15 Mr Noble's third report at table 7.3 which is in Core Bundle, tab 13 at page 393.

16 **THE CHAIRMAN:** Yes.

17 **MS FORD:** And the Tribunal will see that 7.3 has a number of variables if BSV loses
18 100 per cent of its value. That's one of the variables. If it loses 84 per cent of its value,
19 on average, per class member of the day, then there are different figures and also
20 there are different provisional comparators in terms of the counterfactual performance
21 that was relied on by Mr Noble, pending evidence as to what are the appropriate
22 comparables.

23 And the Tribunal will see that the damages across the class go from 78.78 million to
24 90.28 million before interest and 121.85 to 139.64, after interest at 8 per cent.

25 Since a point has been taken on interest, I can say that the 8 per cent interest rate
26 was what was awarded by the Tribunal in Kent v Apple, on the basis that it was a fair

1 reflection of the borrowing rate for a consumer class. And Mr Noble's evidence in his
2 first report, paragraphs 5.2 to 5.3, Core Bundle, tab 9, page 251 is that this is
3 overwhelmingly a consumer class, so we say interest at that amount can properly be
4 taken into account and it would be unrealistic not to do so.

5 The amount per class member is set out table 7.4 which starts on the same page and
6 goes over to the following page. So for sub-class 1, it's between £171.07 and £181.40
7 and for sub-class 2, based on the proposed amendments, it's between £556.05 and
8 £639.70.

9 It really is an absolutely different order of magnitude from the sort of thing that was
10 concerning the Tribunal in Salmon. Even if one were to proceed on the basis of only
11 the quantification per sub-class 1, it's simply no real comparison with the figures in
12 Salmon. It's very clear why the Tribunal was concerned that a claimant might not be
13 prepared to fill in a form for £1.81 or whatever the bottom line figure was.

14 In our submission, that concern simply does not arise on these figures.

15 A point was taken about these figures being average but given the very massive
16 difference in scale, it hardly makes any difference and of course, if there were
17 a concern --

18 **MR DAVIES:** Sorry, more disruption than I intended, just a clarifying question on the
19 total amounts. Just so that we know what we're looking at, if we were to refuse the
20 amendments, your amendments, do you agree with the figures that Ms Abram has put
21 forward for how that would affect these total numbers?

22 **MS FORD:** We don't, on the basis that we don't agree that the value of the claim on
23 that scenario is the 28.5 million figure that the Defendants have advocated.

24 **MR DAVIES:** Do you have a number?

25 **MS FORD:** I don't have a number, I'm afraid, but I can tell you why we think that one
26 is not quite right. The first is that that's been derived valuing sub-class 2 on exactly

1 the same basis as sub-class 1. Sub-class 1 takes an average of sales achieved over
2 the month immediately after the de-listings and we say that on any view, that's not the
3 right approach for calculating sub-class 2, which is assuming a sale taking place at
4 a particular point in time, the point of time of entry into the market. So on any view,
5 this average over the month prior is not going to be the right answer.

6 And we also had understood that that was potentially common ground from what was
7 said in footnote 23 of the Defendants' skeleton. I think it's page 7 of their skeleton. It
8 may be that I'm referring to the wrong ...

9 **(Pause).**

10 Footnote 23 of the Core Bundle, page 145. So this is tab 6 of the bundle and it's the
11 response to our amendment application and their application for decertification and
12 footnote 23 says:

13 "The defendants accept that in principle, sub-class B should be able to claim the
14 difference between a counterfactual value of their BSV holdings on the date of
15 assessments but for the alleged breaches rather than being limited to the value of their
16 BSV holdings on 11 April 2019, as stated by the Master of the Rolls."

17 Now, we're not completely clear about what that might mean but it does appear to be
18 conceding that on any view, one is looking at a counterfactual sale rather than simply
19 taking exactly the same approach as sub-class 1.

20 And indeed, what it's contemplating is the date of assessment is the relevant date, not
21 the approach that's taken in relation to sub-class 1. So for those reasons we had
22 understood it to be common ground at least that one doesn't take exactly the same
23 approach.

24 **THE CHAIRMAN:** But are you able to put a figure on what the claim would be without
25 the amendments? By all means send us a note.

26 **MS FORD:** I think we would have to consult with the expert and try and provide

1 the Tribunal with a view.

2 **THE CHAIRMAN:** Okay.

3 **MS FORD:** At the very least, I would say that we say it's important to take into account
4 interest. It would be artificial not to, so even if one were to proceed on the basis of the
5 28.5 million figure, then with interest it's 44.2.

6 And the Tribunal will recall we did offer an alternative methodology in Mr Noble's
7 annex A and that would calculate the claim value if BSV didn't lose the entirety of its
8 counterfactual value but it still assumes a counterfactual sale. Again, he hasn't
9 quantified that at this stage but it is to be expected it comes out higher than the
10 28.5 million figure because the sub-class 1 calculation is assuming no impact
11 whatsoever or fall of the price of BSV whereas the premise here is there will be
12 a degree of slippage falling short of market collapse.

13 **MR DAVIES:** Isn't that the same as the one in table 7.2 headed "84 per cent"?

14 **MS FORD:** I have closed 7.2.

15 **MR DAVIES:** Sorry, I'm still in Noble 3, page 392.

16 **MS FORD:** So sorry, sir, you were referring to table 7.2.

17 **MR DAVIES:** Yes, you said you didn't have the number for what the Noble alternative
18 method is but isn't it the 84 per cent, the sort of second set of columns?

19 **MS FORD:** No, so the 84 per cent comes from his point that given that members of
20 the class would not be entering the market simultaneously at exactly the same point
21 of the day, they would be entering at least over the course of the day of assessment,
22 then at least some of the early people to sell might not necessarily end up with zero.
23 It might hit zero over the course of the day and so he estimated a range, a potential
24 range which is 100 per cent at worst case but 84 per cent is the other end of the range,
25 essentially. So that's not the same as -- that's still anticipating that at some point one
26 hits, essentially, a total market collapse but it is not the same as an alternative

1 methodology all together which is put forward, which is his annex A. We can see that
2 starting at 395, which is headed "Annex A, one selloff scenario with stable demand."

3 He hasn't actually put a figure on that scenario.

4 **MR DAVIES:** Okay, I had understood that was where he got the 84 per cent, but ...

5 **MS FORD:** No, his 84 per cent is that scenario whereby he's trying to estimate the
6 consequences of not everybody going into the market at precisely the same point on
7 the same day.

8 **MR DAVIES:** Okay, thank you.

9 **MS FORD:** Various points were taken about the suggested variables that go into our
10 estimates and the fact that we can't expect to win on everything.

11 The simple point we make about that is all the various points that were taken were
12 ones that were essentially before the Tribunal the first time round and points weren't
13 taken on them. For example, comparators. The comparators that Mr Noble has
14 indicated his calculation proceeds on were ones that were set out originally and
15 nobody took issue with those at the time. Class size, that was the same last time
16 round, so although points are now being taken to say: well, we think these are
17 challenging assumptions, had they thought they were worth taking as points, they
18 really should have taken them last time round.

19 I'm moving on to deal with the estimated take-up and distribution plan. We do say that
20 on estimated take-up, there's no reason to anticipate parallels with Gutmann in the
21 circumstances of this case. The sums that will be recoverable both for class 1 and
22 class 2 are substantial and we make the simple point it's anticipated they will be
23 sufficient to incentivise a class member to participate in the distribution, so that is
24 a really marked contrast with the circumstances of Salmon and the sums that were in
25 issue there. And for that reason we do say this is the sort of case that the Tribunal
26 had in mind at paragraph 26 of Salmon, where it said "in some cases it's self-evident

1 that an effective distribution may be devised."

2 In our submission that's this case. The sums are sufficient that some people can be
3 incentivised to come forward to claim them.

4 There has been a lot of thought that's been put into distribution. The proposal, to be
5 clear, is that we have two alternative channels. We have the conventional notice and
6 distribution channel of the sort that's usually deployed in consumer class actions and
7 a bespoke means of distribution by means of the Blockchain which we say is
8 an innovative means of improving on conventional cases in the unique circumstances
9 of these proceedings.

10 Sir Robert Buckland has put in evidence concerning his expectations about distribution
11 and we can see that at paragraphs 37 to 40 of his second witness statement which is
12 in the Core Bundle, tab 16 at page 488.

13 Paragraph 37, he's addressing take-up rates. He says:

14 "Whilst I don't feel able to predict with any certainty what that eventually will be, I'm
15 confident that a very satisfactory take-up rate will be achieved, due to, one, the unique
16 nature of the distribution in this case via the BSV Blockchain. Two, the inherently tech
17 savvy nature of the class and, three, the relatively high estimated damages per head."
18 And he cross-refers to Global Ledger's estimates of (inaudible) notification on the one
19 hand, so that's the 75 to 85 per cent of the class that they expect to be able to get
20 notification to and their expectation that over 50 per cent of the class would collect
21 their damages.

22 At 38 he refers to his understanding from speaking with Angeion that providing bank
23 details can be a barrier to take-up. And he makes the point that that is something
24 which could be avoided if distribution can be achieved via the Blockchain and he goes
25 on at 39 to 40 to explain why the circumstances are very different to the position in
26 Salmon.

1 You have heard an absolute barrage of attempts to try and pick holes in our proposed
2 distribution via the Blockchain. In my submission, what it essentially amounts to is
3 a criticism that at this very early stage of the proceedings we haven't ironed out every
4 detail of what we're proposing. That is the extent of it.

5 Before I address in detail the eight points that have been maintained in the skeleton
6 and I can pick up the various elaborations on them that were made orally as well, we
7 do make three overarching points.

8 The first is that ordinarily, distribution is not the concern of the Defendants and we
9 cited in our skeleton paragraph 6.83 of the CAT guide. We cited it in our skeleton
10 argument, paragraph 39, where it says:

11 "Typically, the defendant will not be involved in the process of determining how the
12 award is to be distributed amongst the class. Accordingly, subject to submissions from
13 any members of the class, a determination by the Tribunal as to the entitlement of the
14 individual class members will not follow adversarial argument. The Tribunal will be
15 concerned to ensure the method proposed by the class representative is fair to the
16 interests of all class members."

17 So it is a process which has primarily been between the Class Representative and
18 the Tribunal and that is, of course, because it's not particularly in the Defendants'
19 interest. They don't have an interest in effective distribution of the sums that they have
20 ended up paying, by reason of their unlawful conduct to the class.

21 Secondly and relatedly, we say that it's self-evident that distribution plans can and do
22 develop with the case. They're not set in stone at the certification stage and we say
23 particularly in the circumstances of this case, where we're looking at a claim that has
24 already been certified, insofar as there are legitimate points concerning the workability
25 of distribution proposals, we say they can and should be addressed alongside
26 progressing the main claim in an orderly fashion. We say that the solution to that

1 would not be to revoke certification altogether and leave these Class Members without
2 any realistic means of vindicating their rights against these Defendants.

3 Third, for clarity, we say that there appears to have been a misunderstanding of the
4 distribution proposals we're making as solely focusing on the Blockchain proposals.

5 We have explained in our skeleton that these additional noticing and distribution
6 proposals through the Blockchain are intended to supplement, complement and
7 supplement the conventional noticing approach rather than to replace it. And we say
8 that that is obvious from what we have set out in our Notice and Administration Plan
9 which contains both conventional advertising proposals and the Blockchain proposal.

10 And just for the Tribunal's note, in terms of the thought that's gone into the
11 conventional approach, for example, paragraphs 74 and 75 at Core Bundle, tab 15,
12 page 443, have developed their analysis of Reddit, which is a website which Angeion
13 considers has high engagement from cryptocurrency communities.

14 So we have sought to focus the original, essentially the familiar means of distribution,
15 on matters which are relevant to this particular claim or unique to this particular claim,
16 as well as pursuing the Blockchain proposal.

17 In terms of the Blockchain channel, the notice and administration plan itself has been
18 prepared by Angeion and Angeion is an experienced class action notice and claims
19 administration company and it itself has significant experience in relation to crypto
20 asset actions. And it sets that out, if we can look, please, at Core Bundle, tab 15 at
21 page 457.

22 Sorry, 420, I've given you the wrong reference. Paragraph 9, they're making the point
23 about their experience generally:

24 "Experienced administration company ... more than 2,000 class action settlements.

25 It's worked with class representatives to design and implement the notice and
26 administration plan in the following proceeding."

1 And it lists them.

2 And if we look at paragraph 12:

3 "Angeion has significant experience in relation to crypto asset actions and is the ...
4 administrator for settlements involving ... and Coinbase in the US clawback action."

5 So they have experience in relation to crypto assets. They are then, in turn, taking
6 into account the input that they have received from Global Ledger. So if we look,
7 please, at 121 to 126, they're explaining that they expect:

8 "A Blockchain distribution method is expected to result in a more successful notice ...
9 take-up rates in comparison to other methods. Class representative has instructed a
10 Blockchain analytics company, Global Ledger, to provide technical assistance in the
11 formulation of a plan to notify class members of the claim directly via the BSV
12 Blockchain."

13 It goes on to provide details up to paragraph 126.

14 What they're doing is essentially relying on input from Global Ledger, the note for
15 which is in the Other Relevant Documents Bundle, tab 1 at page 99.

16 Now, a great deal has been made out of the fact this note is not in the form of an expert
17 report but I've shown the Tribunal exactly how it fits in. It is a note which has been
18 taken into account by Angeion, the claims administrator, in their preparation of a notice
19 and administration plan. There's no particular format laid down in the Tribunal's rules
20 for that sort of situation and in our submission the way in which it has been done is
21 perfectly adequate.

22 Subparagraph 3 explains:

23 "Global Ledger is a Swiss Blockchain analytics and forensic company acting as
24 Blockchain adviser to the class representative founded in 2019 and specialises in on
25 chain analysis, crypto wallet attribution and crypto asset tracing."

26 So that's the basis on which they are then feeding into the exercise that Angeion is

1 doing as the administrator.

2 What they are proposing, at paragraphs 10 to 11, is that they will first create a wallet
3 map. That's what they say is step 1, "snapshot of wallet map", and then they will
4 create a notification system which, in parallel with all the conventional means of
5 notification, so claims websites, exchanges, advertising press, all the usual means,
6 they will notify via the Blockchain and their expectation is that they can reach up to 75
7 to 85 per cent of Class Members and that's the number that's been given at the end
8 of paragraph 11.

9 Paragraph 22 which you've already been shown, they express the view that the BSV
10 Blockchain is well suited to notification, identity verification, distribution of damages
11 because every class member by definition has a wallet address recorded on the chain.
12 And they say in addition, they expect it will be possible to use a native GBP stable coin
13 for the purposes of distribution, again via the BSV Blockchain. And they indicate that
14 the whole process is going to be overseen by Angeion, who are experienced claims
15 administrators. They quite fairly say it's not possible to know for certain what
16 percentage of Class Members ultimately complete the journey from notification of
17 payment but their expectation is that it would exceed 50 per cent.

18 I'm turning to try and address, hopefully relatively rapidly, the various criticisms that
19 have been made of this process.

20 I'm addressing them in the order that they're made in the skeleton and I will try and
21 pick up anything that was elaborated upon orally.

22 The first point, skeleton, paragraph 54, is that it was complained that we had no
23 method for identifying whether a class member was in sub-class 1 or sub-class 2. We
24 have explained how we envisaged doing that in paragraph 83 of our reply.

25 In the case of non-custodial holders, we take a second snapshot on the date of
26 assessment to see who has sold and so those were -- in the previous snapshot and

1 had sold or were in sub-class 1. Those were in the previous -- sorry, yes, have sold
2 are in sub-class 1. The remainder are in sub-class 2.

3 And then we anticipate that confirmation of which exchange customers sold their coins
4 in the relevant period can potentially be obtained directly from exchanges or directly
5 from those Class Members themselves who respond to the notification because of
6 course, Class Members can quite straightforwardly provide information about whether
7 they have sold their holdings and if so, when.

8 The second point in the skeleton at paragraph 55 is the complaint that the proposals
9 depend for custodial holders on the assistance of cryptocurrency exchanges and they
10 suggest that we have failed to grapple with how we will secure the exchanges'
11 cooperation.

12 It's worth recalling that the Defendants in these proceedings do collectively amount for
13 a large proportion of the market and that's been addressed by Mr Noble's first report,
14 which is Core Bundle, tab 9 at page 231.

15 He has a section where he explains the exchanges hold a significant market position.

16 3.2.1 he says:

17 "I show that collectively, the Exchanges [which he's defined -- essentially, the
18 defendants are the exchanges as defined], they occupy a leading position."

19 3.26, points out very large trading volumes:

20 "In terms of trading volumes, Binance handled the greatest trading volume,
21 representing more than 50 per cent of the aggregated volume handled by the
22 Exchanges in a group of other established exchanges."

23 I should point out here that he's not talking about the entirety of the market. He's
24 conducted a review of the defendant exchanges and a certain number of other
25 exchanges that he considered were appropriate to include in his assessment. I'm just
26 trying to find the paragraph where he explains that.

1 Yes, so 3.25:

2 "The results of my analysis show that the Exchanges hold a significant position, along
3 with a group of established exchanges. See appendix A1 for an explanation regarding
4 my selection of the other established exchanges."

5 So then 3.27, he makes the point that based on 2022 data, the Exchanges counted
6 for around 50 per cent of all visits to the 17 established exchanges that he's
7 considered and at the time of the infringement they accounted for the majority of visits.
8 Binance had the highest number, with more than 121 million visits among the total
9 group of exchanges.

10 So that's the position in relation to the established exchanges that Mr Noble studied.

11 It's also relevant to look at the market as a whole and the extent of concentration of
12 the market as a whole and we have made the point at paragraph 81 that it is heavily
13 concentrated. So the five largest exchanges account for some 85 per cent of trading
14 activity across the major venues and the FCA's consumer research finds that
15 49 per cent of UK crypto asset customers use Binance and 12 per cent use Kraken
16 and 59 per cent use Coinbase. The relevance of this is that when the Tribunal is given
17 this figure about our proposals requiring us to liaise with 248 different exchanges, in
18 our submission, given the extent of the concentration of the market and given the scale
19 of the Defendants' part of the market, that's not realistic and we can cover a very
20 substantial amount of the market with considerably fewer exchanges.

21 Insofar as the Defendants themselves are concerned, they haven't been very clear
22 whether what they are saying is that they are not prepared to cooperate in this process,
23 despite essentially being in a leading position on the market. It would be a surprising
24 and uncooperative provision for them to adopt, to say that they're not prepared to
25 assist with distribution.

26 Insofar as there are exchanges who are not involved in the infringement, in our

1 submission there is a good reason to think that at least a significant number might well
2 be interested in being able to offer their customers, essentially, free money, insofar as
3 they're a member of the class and entitled to receive it.

4 We don't think that there's a fair comparison with the paragraph 52 of Google that was
5 cited to the Tribunal, which was, as we understand it, a suggestion that nobody was
6 pursuing that, essentially, money would be handed over to third parties. What is
7 contemplated is that the third parties are in a position to assist, to put the Class
8 Representative in contact with the relevant Class Members, who can then make their
9 claims.

10 Insofar as there might be administrative costs to the exchanges in assisting, the
11 potential is that they can be covered in the costs of the distribution and in McLaren,
12 for example, the Tribunal has recently approved an administration fee to Nectar for the
13 cost of administering distribution to class members as Nectar points.

14 Paragraph 7 of the Global Ledger note records that it expects that notifications of the
15 sort that it has in mind can be sent to hundreds of thousands of wallet addresses at
16 minimal cost. So in our submission, the suggestion that the number of exchanges and
17 the costs involved mean that these are insurmountable hurdles, is simply completely
18 unsupported.

19 The third point that's taken in the Defendants' skeleton, paragraph 56 and it was
20 repeated orally today, is that some BSV holders don't check their wallets regularly.
21 We say that that's not the disaster that it's been presented as. Notification of the
22 distribution will be a multipronged exercise, so it will include notifications through the
23 Blockchain but it will also include conventional publicity in parallel, conducted over
24 a several months' long window.

25 The Defendants have pointed to Mr Noble's evidence about how many BSV holders
26 would have checked their wallets for a particular purpose and the purpose was to

1 appreciate the de-listing events sufficiently rapidly, in order to go in the market and
2 engage in a substitute transaction. That's really quite a different proposition from
3 becoming notified of the possibility in good time to participate in the distribution.

4 The fourth point, this is Defendants' skeleton 57, is that the recipients might think
5 a notification is a phishing attempt and, again, that was repeated orally today. There's
6 been no evidence adduced to suggest that that is a genuine problem in relation to
7 notifications sent via a notification (inaudible) directly to a wallet but in any event, it's
8 the sort of challenges that are faced with any distribution and we anticipate that we will
9 be able to work with the claims administrator and with compliant exchanges or
10 cooperating exchanges to ensure that messaging is designed to look as trustworthy
11 as possible. And we anticipate that having, essentially, the imprimatur of the exchange
12 that the customer already entrusts with their financial assets in assisting in
13 communicating with them and notifying them of the possibility of participating in claims,
14 is likely to engender trust. And, again, we're drawing parallels here with methods
15 which were used in McLaren, such as trusted brands like Nectar or Macmillan.

16 The fifth point, Defendants' skeleton paragraph 58, is that Class Members might not
17 have access to proof of their identity or residence at the relevant period. To which we
18 say it's premature at this stage to be reaching a concluded view about what evidential
19 requirements might or might not be required for Class Members and it may well be
20 that as in some other distributions, a statement of truth suffices.

21 By their sixth point, skeleton paragraph 59, the Defendants seek to suggest that that
22 answer gives rise to some sort of inconsistency on our part. They say on the one hand
23 we said it remains to be determined to what extent evidence of historic residency be
24 required but on the other hand, we responded to something that they had said which
25 was a possibility of a non-UK resident giving a UK resident a private (key in order to
26 claim and we said: well, in that case, if there appeared to be a very genuine problem

1 of some kind of geographic fraud going on, well in that case one might well have to
2 look at identity and residency requirements.

3 There is, in my submission, no inconsistency there whatsoever. What it reflects is the
4 classic weighing up exercise that a Class Representative has to undertake and that
5 a Tribunal will supervise and approve, about the balance to be struck between
6 requiring identity requirements and avoiding fraud on the one hand and not
7 discouraging legitimate claims on the other hand.

8 Seventh point, Defendants' skeleton, paragraph 60, is that the Class Representative
9 is wrong to assume that crypto exchanges will be able to confirm the identity of all their
10 account holders from their know your customer records. And considerable
11 submissions were made along those lines about all the things that we haven't
12 established in relation to the 244 exchanges that the Defendants say we have to
13 contact in order to make this good. It hardly needs to be emphasised that it's a
14 massive exaggeration. The bottom line is that what we have identified is a possibility
15 that insofar as the exchanges can and are able to assist, Class Members' identities
16 can be verified by them in that way and that will improve uptake rates.

17 The final point that's taken in the skeleton, paragraph 61 and, again, developed orally,
18 was the suggestion that this Tribunal should be alarmed by the fact that we haven't
19 fixed the final details of the proposal to make a distribution via a stable coin.

20 Again, in our submission there really is not a problem here. What we are doing is
21 identifying potential alternative methods for distribution. We say a stable coin option
22 is an innovative and promising proposal to utilise the Blockchain in the circumstances
23 of this case. And it has the particular benefit, as I showed you in Sir Robert's
24 statement, of allowing Class Members to receive a distribution without having to
25 provide their bank account details. But we have never been suggesting that this is the
26 only option we're considering. We're not backing away from it; we're saying that it is

1 a suite of options that suggests that the prospects of distribution in this claim are
2 positive and they are simply not at all on a parallel with the sorts of things that raised
3 concerns for the Tribunal in Salmon.

4 Unless I can assist the Tribunal further, those are our submissions on the distribution
5 issues.

6 **THE CHAIRMAN:** Thank you very much.

7 **MS ABRAM:** I only have one point by way of reply and I will be very, very short. It
8 just goes to this change of circumstances point, the question of whether there was
9 a relevant change of circumstances. You will recollect that the point that I made was
10 that it's very difficult to see how the Defendants and the Tribunal were supposed to
11 know what the value of the claim would be, in the light of the CAT judgment and the
12 Court of Appeal judgment, when the CR was saying in November last year it's up to
13 a billion pounds and the £90 million figure was new in April this year and we didn't hear
14 any explanation of where that billion pound figure that was in Lord Currie's witness
15 statement from November last year came from. So we remain confused about how
16 we were meant to know what the claim was worth, in circumstances where the class
17 rep didn't know what the claim was going to be worth.

18 But I can show you a little bit more constructively than that. I can show you what the
19 relevant change of circumstances was very specifically that has driven the £90 million
20 figure, just to make clear why we couldn't have predicted that in advance.

21 What changed was the date of assessment, so in the old version of the claim, the
22 immediate and persistent effect (inaudible) was for the class of people that sold their
23 BSV until July 2022 and a change that we didn't know about until April this year was
24 that the date of assessment was moved forward to May 2019.

25 And that's one of the variables that really drove the change in the value of the claim.

26 Let me show you the amendment in the amended claim form and show you how that

1 fits with the CAT judgment because that will show why we couldn't have predicted the
2 way that it changed. So if you look first at the amended claim form. That is in Core
3 Bundle, tab 1 and you can trace through the amendments in paragraph 11 which is on
4 page 7 of the Core Bundle.

5 **THE CHAIRMAN:** Yes.

6 **MS ABRAM:** So if you look at 11.1, you just need to look at what it used to say and
7 what it now says. 11.1 originally proposed:

8 "Class members who held BSV coins in April 2019 and sold at least some before
9 midnight on 29 July 2022."

10 You see that was struck out. That was the old version of the case.

11 And then the new version of the case, so page 7 of the core bundle, the new version
12 of the case says:

13 "Before midnight on the date of assessment."

14 Which is proposed, you've heard today, provisionally to be 11 May 2019 and that was
15 new news to us in April this year. That was a change to the way in which the Class
16 Representative put their case and we couldn't have predicted that. That's where that
17 change of circumstances comes from.

18 And you can see exactly how that slots into the CAT judgment if you look at that in the
19 other Bundle and it's in tab -- I'm sorry, it's in the Other Relevant Documents Bundle,
20 tab 7 of the other bundle and, yes, it's page 241.

21 **MR CUTTING:** Where are we looking, sorry?

22 **MS ABRAM:** It's my fault. The Other Relevant Documents Bundle, tab 7, page 241,
23 paragraph 105. So this is the CAT giving the disposition, having set out its reasoning.
24 So if you see at paragraph 105, it's making a point in the Class Representative's favour
25 here, saying:

26 "We have concluded that we can't exclude at this stage the possibility that at least

1 some BSV holders may reasonably have remained unaware of the de-listing events
2 throughout the relevant period."

3 And so they don't strike or summarily dismiss the claim for sub-class B. So that goes
4 to the point I was making earlier that actually, they didn't strike out the foregone growth
5 claim. They don't identify what the relevant date is. Obviously, it's not for them to do
6 that. All they're saying is: we don't have the evidence in front of us to know how long
7 some of the BSV holders remained unaware for and you see at 107, in a sense this is
8 the sign-off:

9 "Even if the PCR were to be able to establish the existence of some of the BSV
10 holders, you might reasonably have been unaware of the de-listing events throughout
11 the relevant period. There's no explanation from Mr Noble or otherwise as to the
12 evidence that's expected to be available at trial as to the proportion of BSV holders
13 falling into that category and the value of their holdings, as compared to other BSV
14 holders."

15 So this is the CAT saying: look, we just don't know exactly what the evidence is going
16 to be. We don't know how long different BSV holders remained unaware for. We're
17 not putting a number on what the answers to this case should be.

18 **THE CHAIRMAN:** Your point is the relevant period extended through to July 2022.

19 **MS ABRAM:** As initially pleaded and now it's come forward to May 2019. We couldn't
20 have predicted that. That's a change of circumstance. That may well be what drove
21 the reduction in value from the billion to the 90 million. The billion in November 2025
22 that we didn't understand, to the 90 million that was new to us.

23 **MS FORD:** Sir, I'm just rising to perhaps dispel a bit of confusion on this point. The
24 22 July 2022 date is the date of issue of the collective proceedings claim form and
25 that's recorded in paragraph 11. So the class runs from 11 April 2019 to 29 July 2022,
26 so that was the original cut-off point of class 2, taking into account the foregone growth

1 effect and then of course, we were required to identify date of assessment, so we did.
2 So I'm somewhat personally confused to say that this couldn't have been anticipated
3 because, of course, the foregone growth effect was precisely what Binance sought to
4 strike out. And that would necessarily require changing the date from all the way to
5 the date of issue of the proceedings, back to the date of assessment which was what
6 Binance's submission was.

7 **THE CHAIRMAN:** Okay.

8 **MS ABRAM:** And that's fair as far as it goes and I have no reason to doubt that
9 explanation but, of course, the point I'm making is we didn't know what that date would
10 be and we didn't know what figure would be put on the claim as a result of it and neither
11 did the Class Representative because they thought it was worth a billion pounds
12 until November 2025. So that's the genesis. Whatever the reasons behind the
13 scenes, that's the genesis of the change of circumstances.

14 **MR CUTTING:** But help me out here. Isn't the Ennis v Apple case reinforcing the idea
15 that it's a change of circumstances in relation to the basis of our decision, rather than
16 whatever numbers Lord Currie's working on in between our decision and today?
17 Because if you look at our decision, we were striking out a claim, in effect, for
18 £8.9 billion and we had a residual series of numbers flowing from that and we said
19 (inaudible) and that the residual numbers that flowed from that weren't a billion; right?
20 They were just not a billion. They were much, much less and arguably comparable in
21 broad ballpark terms to the number that's now afoot.

22 So it goes back to the point that the change of circumstance, if we're talking about the
23 numbers, is the loss of the 8.9 billion and that was clearly in our contemplation in our
24 judgment.

25 **MS ABRAM:** Two points about that, Sir, and of course, I can't read what was in
26 the Tribunal's minds but what the Tribunal communicated in that judgment was that

1 you were not striking out the foregone growth claim. You were making a finding that
2 the market mitigation rule applies and you did not make any finding about what the
3 residual value of the claim would be.

4 You recorded that the value of the sub-class B bit of the claim was the great majority
5 of the claim but you expressly, in those paragraphs that I showed you, left it open to
6 the Class Representative to come back and say: well, this proportion of BSV holders
7 would have remained unaware, would reasonably have remained unaware for this
8 period of time and this is the value of their claim. You didn't make any findings about
9 what was left of the claim.

10 **MR CUTTING:** If we think about where we're going, aren't we effectively applying
11 numbers to the principles that we were enunciating in those paragraphs?

12 **MS ABRAM:** We are applying numbers to them but those numbers have only become
13 known as a result of the amended claim form, the draft amended claim form being
14 served. If one applies a thought experiment. For example, imagine that two years
15 ago, when one was before the Tribunal and making those arguments on that strike-out
16 application, imagine I popped up then to say: and look, if you're with us on
17 Mr Kennelly's arguments at that stage, then the claim isn't going to be worth a candle,
18 so let's not -- it shouldn't be certified at all, then what would have been said against
19 me is: hang on, we're not making any findings about what the claim is worth at this
20 point; we're saying that the market mitigation rule applies and we're telling the CR that
21 if there is to be a claim, it has to be subject to the application of the market mitigation
22 rule.

23 There wasn't any finding about what the residual bit of the claim would have been
24 worth, there's nothing in the judgment to suggest that there was such a finding and
25 if -- again, to just use another thought experiment, if really what had been in your minds
26 was that the value of the claim was to be reduced by 99.8 per cent which is the figure

1 that you put in 103 that's relied on against me, then you would be saying today: well
2 hang on, this amended claim isn't right either because you should have reduced it by
3 the value that we were looking at in that paragraph 103. Instead you left it open to the
4 CR to replead their case in a way that was consistent with the market mitigation rule
5 and also with the law, the rest of the law. And we say they haven't managed that and
6 that's why there's a change of circumstances that we couldn't have foreseen. And
7 I take your point about Lord Currie's witness statement but it is informative that even
8 the class rep didn't know what the implications of the judgment were, in the sense that
9 they couldn't pinpoint: well, we have lost X per cent of the value of the claim at that
10 stage, and it obviously took them a great deal of detailed work to get there. It's
11 reasonable that we, the Defendants, should be able to see what claim is now put
12 against us, before having to respond to it, otherwise we would be not just fighting with
13 one arm behind our back but also blindfolded and that wouldn't be very fair.

14 **MR CUTTING:** Thank you.

15 **MR KENNELLY:** Can I just support very, very briefly what my learned friend said,
16 since I was there.

17 **MR CUTTING:** I remember.

18 **MR KENNELLY:** Thank you, Mr Cutting. You will recall at the end of your judgment
19 there was to be a trial of a preliminary issue about the question of knowledge which
20 goes to the point that my learned friend just made, about the fact that that was the big
21 open question which would determine the value of the claim and depending on the
22 outcome of that preliminary issue, which was a major outstanding issue at that stage,
23 the legal principles would then be applied to the outcome of that knowledge issue. But
24 that, of course, then was dropped by the Class Representative and they took the
25 (inaudible) approach which was the change, very significant material change.

26 **MR CUTTING:** Thank you.

1 **MR DAVIES:** Just for clarification, maybe, from Ms Ford. I know you took us to
2 paragraph 11 of the claim form and then within that there are these changes in
3 subparagraph 1 and subparagraph 2 and I guess there is a change in subparagraph
4 1, that in a sense isn't directly -- sorry, I will wait until you're there.

5 **MS FORD:** Thank you.

6 **MR DAVIES:** In a sense isn't directly related to the foregone growth story but
7 I suppose for sub-class 1, formerly sub-class A, you're just bringing everything back
8 to the same date instead of looking at when they actually sold. But that is a change
9 that's not directly losing the foregone growth argument; it's a sort of consequential from
10 that?

11 **MS FORD:** Yes, I suppose that's fair although it's necessary because if one is saying
12 that one has to deem from a certain point that sub-class 2 entered into the market,
13 one can't allow the claims for sub-class 1 to continue, such that they could conceivably
14 both be deemed to have sold and in fact have sold and so it's a very immediate
15 consequence of, in my submission, the approach that we were directed to take which
16 is that instead of relying on the fact that they had not sold up until the point of issue
17 which was the basis of the previous claim, we had to deem that they were selling from
18 a particular point.

19 **MR DAVIES:** And then does that mean there are many fewer who are in class 1 than
20 there used to be because they have moved into class 2?

21 **MS FORD:** It certainly must be the case that the period of time is shorter. I hesitate
22 to agree that there are many fewer because it may depend on the --
23 (Overspeaking)

24 **MR DAVIES:** (Inaudible) immediate.

25 **MS FORD:** Indeed, it may depend on the distribution of people who did sell before
26 the date of issue and whether they all sold immediately or whether there was a regular

1 distribution over that period and that's not something that I think we necessarily looked
2 at, I don't think.

3 **MR DAVIES:** Okay, thank you.

4 **MR CUTTING:** Would it be possible for the purposes of, arguably, a more refined cost
5 benefit analysis, for us to understand what the value of the class B claims would be if
6 the date of assessment and valuation were, say, one week, four weeks, eight weeks
7 after 11 April?

8 **MS FORD:** I anticipate, without instructions, that that ought to be possible because of
9 course, what Mr Noble did for the purposes of quantifying his present report was to
10 take it on instructions, the one month after date, and so he ought equally to be able to
11 take other assumptions.

12 **MR CUTTING:** I think it might be useful for us to see that range, please.

13 **MS FORD:** I'm sure that can be done. Yes.

14 **THE CHAIRMAN:** How long do you think that would take? Because I expect it's not
15 as simple as the other things that we have requested from you.

16 **MS FORD:** Indeed, I think we would have to consult with Mr Noble. He would be in
17 the best position to inform us on that.

18 **THE CHAIRMAN:** Okay, good.

19 Good. Well, well done for completing everything in a day. You will not be surprised
20 to hear that we will consider our decision and deliver it in the usual way in due course,
21 but we will look forward to the documents that you have promised.

22 **MS FORD:** Yes.

23 **THE CHAIRMAN:** Thank you.

24 **(5.01 pm)**

25 **(The hearing concluded)**

Key to punctuation used in transcript

--	Double dashes are used at the end of a line to indicate that the person's speech was cut off by someone else speaking
...	Ellipsis is used at the end of a line to indicate that the person tailed off their speech and did not finish the sentence.
- xx xx xx -	A pair of single dashes is used to separate strong interruptions from the rest of the sentence e.g. An honest politician - if such a creature exists - would never agree to such a plan. These are unlike commas, which only separate off a weak interruption.
-	Single dashes are used when the strong interruption comes at the end of the sentence, e.g. There was no other way - or was there?