Neutral Citation Number: [2024] EWHC 1692 (Ch)

Case No: CH-2023-000212

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS

ON APPEAL FROM THE COUNTY COURT AT CENTRAL LONDON
ORDER OF HHJ SAGGERSON DATED 28 SEPTEMBER 2023

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 2 July 2024

Before :

THE HONOURABLE MR JUSTICE TROWER

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Between :

Oliver Southgate	**Appellant**
- and -	
Adam Graham	**Respondent**

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- -

Christopher Snell (instructed by **Lexlaw Solicitors & Advocates**) for the **Appellant**
Rupert Beloff (instructed by **Ashtons Legal**) for the **Respondent**

Hearing date: 21 June 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on Tuesday 2nd July 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE TROWER

Mr Justice Trower:

1. This is an appeal against parts of an order made by HHJ Saggerson (the "Judge") on 28 September 2023. The order was made at the conclusion of the trial of a dispute as to the terms of an oral agreement under which the Appellant advanced cryptocurrency to the Respondent in the form of 144 Ethereum tokens ("ETH") sent to him in two tranches on 7 and 13 June 2018 and the consequences of its breach by the Respondent.

2. The advance was made in the context of what the Judge called the Respondent's need for £50,000 to deal with certain financial responsibilities which he had with third parties. The Appellant's case was that he agreed with the Respondent that the ETH, or an equivalent number of the ETH (there is no suggestion that it had to be the same tokens), supplemented by a further 10%, would be returned to him in due course.

3. The Respondent's case was that the substance of the agreement was for a loan of £50,000. He said that his obligation was to repay that sum to the Appellant plus a premium of 10%. As the Judge put it, the Respondent said that the ETH was merely the mechanism by which the Appellant intended to allow the Respondent access to the equivalent sterling sum of £50,000.

4. On the issue with which the trial was primarily concerned, the Judge found for the Appellant. As he explained in paragraph 45 of his judgment:

> "Accordingly I find, this was a contract for the provision of a funding option for the defendant in the form of 144 Ethereum tokens on the basis that the Ethereum tokens would be returned or re-transferred or their equivalent re-transferred to the claimant by way of repayment in due course."

5. The Judge also found that, pursuant to the terms of the oral agreement, the 144 ETH plus 10% (i.e., 158.4 ETH) were to be repaid within a reasonable time of demand made by the Appellant. Demand was made in July 2019. Having regard to the obligation to repay within a reasonable time of demand, the Judge concluded that the Respondent was under an obligation to re-transfer 144 ETH plus 10% by midday on 1 October 2019.

6. In late September 2019, the Respondent transferred £6,000 to the Appellant which was applied by the Appellant in discharge of the Respondent's obligation to return 42.71 of the ETH, leaving 115.69 ETH outstanding. The Judge's order recorded his further finding that, taking into account the £6,000 credit, the Appellant was entitled to the return of 115.69 ETH no part of which has since been returned. The Judge therefore found that the Respondent has been in continuing breach of the oral agreement to the extent of a failure to return 115.69 ETH since 1 October 2019.

7. The Judge's findings on these aspects of the dispute are not challenged by either party on this appeal. Furthermore, it was not said by either party that the oral agreement was terminated by the Appellant's acceptance of the Respondent's repudiatory breach at any time prior to the delivery by the Judge of his judgment. Likewise, the Respondent does not dispute that his obligations under the oral agreement in the form they took on 1 October 2019 remained unperformed.

8. Having determined the primary issue in the Appellant's favour, the parts of the Judge's order which are challenged by the Appellant relate to his decisions on the relief sought. This was specific performance of the Respondent's obligations under the oral agreement and damages in the alternative. The Appellant's particulars of claim made a specific averment that any damages should be assessed as at the date of judgment and gave as the best available particulars a value of £322,816.75 for the 115.69 ETH as at the date the statement of case was prepared.

9. In his defence, the Respondent joined issue with the claim to specific performance, alleging that it would cause him hardship and/or would be inequitable. He did not identify any form of inequity other than the anterior allegation of hardship. He did not plead to the Appellant's case on the appropriate assessment date for damages in lieu of specific performance, but limited himself to a bare denial that the Appellant was entitled to damages at all.

10. The Judge refused to grant specific performance of the Respondent's obligation to return the 115.69 ETH. He made an order for damages in lieu of specific performance to be assessed at a remedies hearing and directed that such hearing be listed for the first available date after 1 December 2023 with a time estimate of one day. One of the recitals to his order provided that the assessment of damages "must be based upon the value of the 115.69 Ethereum tokens as of midday, 1st October 2019", i.e., the time at which he had found that the Respondent was in breach of his obligation to return the ETH to the Appellant.

11. The grounds of appeal are that the Judge was wrong to refuse specific performance and alternatively that he was wrong to direct that the valuation date for an assessment of any damages in lieu should be 1 October 2019. Permission to appeal was granted by Meade J on 18 January 2023, who also extended until the determination of this appeal an order made by Edwin Johnson J on 20 October 2023 granting a stay of that part of the Judge's order which directed the listing of a remedies hearing.

12. The reason the Judge refused specific performance was explained in paragraphs 48 and 49 of his judgment. He pointed out that it is always a discretionary remedy to be based on all the circumstances of the case. He went on to hold that it would be an inept remedy in the present case "mainly because it would do no more than set up the Respondent to fail". He went on to explain that setting up this Respondent to fail might be regarded as nobody's fault but his. However, to set him up to fail in circumstances where it may simply not be possible for him to comply within a reasonable time with an order requiring him to purchase the outstanding ETH (which he said may now be worth as much as £350,000), backed no doubt in due course by a penal notice, would be unfair, disproportionate and unnecessary.

13. The reference to a penal notice indicates that the Judge had in mind that non-compliance with an order for specific performance might lead to contempt proceedings in due course, while a money judgment for damages would not have the same potentially punitive effect.

14. In the light of the way that the appeal has been argued, it is relevant to note that not only was hardship the only identified ground on which the Respondent pleaded that specific performance should not be granted; it was also the essence of the only ground on which the Judge refused relief. While he implied that there were other reasons (see

his use of the word "mainly"), he did not say what they were. I will revert to the point later in this judgment but, contrary to the suggestion made by Mr Rupert Beloff for the Respondent in his skeleton argument, the Judge did not spell out that specific performance of the obligation to re-transfer the ETH would be inappropriate because the Appellant could be adequately compensated in damages (whether because the ETH were not special property or otherwise).

15. The Appellant's claim for damages was pleaded in the alternative to specific performance. The Respondent did not contend that the Judge was wrong to order an assessment of damages at a remedies hearing as a matter of principle. He was right not to take that course, because this aspect of the Judge's decision was an appropriate exercise of his discretionary case management powers: having refused specific performance, he was entitled to order a remedies hearing at a later date.

16. However, it does not necessarily follow that the Judge was right to decide that the value of the ETH as at 1 October 2019 is the correct starting point for assessing the Appellant's loss. While the decision to order a remedies hearing was a case management order, it seems to me that the basis on which the assessment should be carried out gives rise to points of principle with which it may be more appropriate for this court to interfere.

17. In the concisely expressed part of his judgment in which he dealt with damages, the Judge assumed, without making a specific finding to this effect, that damages would have to be assessed by reference to the value of the ETH as at 1 October 2019, i.e., the date of breach (see paragraph 50 of his judgment). This was an assumption which was then expressed in the recital to his order which I have already mentioned. However, his judgment did not explain whether any other date had been addressed in oral submissions, nor why the Appellant's pleaded case that any assessment of damages should proceed on the basis of value as at the date of judgment was wrong.

18. The Judge criticised the Appellant for not adducing evidence at the trial on the amount of damages to which he claimed to be entitled as at the date of breach and said that he was not particularly sympathetic to what he called the Appellant's implicit submission that evidence as to damages could not be forthcoming until he knew how the court was going to approach matters on the claim for specific performance or valuation. Nonetheless, the Judge went on to order the remedies hearing because, although he was unimpressed by the absence of material in relation to valuation as at the date of breach, he considered it would be inappropriate for him simply to award nominal damages in the absence of any evidence as to value.

19. Mr Christopher Snell, then as before me instructed by the Appellant, said that the Judge's criticism as to a lack of evidence on the value of ETH as at 1 October 2019 was unfair because both parties had proceeded on the basis that, if the Appellant were to succeed on the primary issue as to the meaning of the oral agreement but be unsuccessful in his claim for specific performance, damages would have to be assessed at a later date. Mr Snell also pointed out that, by its very nature, it was likely that any assessment based on a valuation date as at the date of judgment could only be carried out at a remedies hearing after judgment had been delivered.

20. Mr Snell did not contend that the Respondent's failure to make a positive case in answer to the Appellant's averments on the appropriate valuation date meant that the

Respondent was therefore deemed to admit the allegation, but he relied on that omission as a further justification for why the Appellant had no reason to lead evidence as to the value of the ETH as at the date of breach.

21. At the hearing of this appeal, I did not have the benefit of a transcript of the parties' oral submissions at the trial, and nor were the parties' trial skeletons in the appeal bundle. However, Mr Snell informed me that the parties' respective cases on damages in lieu of specific performance were not developed orally before the Judge for the reasons I have already indicated: both parties proceeded on the basis that any relevant points could be further considered when the assessment of damages was determined at a remedies hearing in due course.

22. Mr Beloff did not appear before the Judge. He did not contend that Mr Snell was wrong about the course of the oral argument at trial, but he read out passages from the Respondent's trial skeleton. Those passages amounted to a summary but unpleaded submission that any damages should be assessed as at the date of breach. It was submitted that this was the general rule and reflected an innocent party's duty to mitigate his loss. The Respondent's trial skeleton also referred to a passage in the speech of Lord Brown of Eaton-under-Heywood in *Golden Strait Corpn v Nippon Yusen Kubishika Kaisha* [2007] 2 AC 353 ("*Golden Strait*") at [79] in which he described the breach date rule as reflecting that principle. The skeleton argument also made the submission that there were no exceptional circumstances to depart from the general rule.

23. The only discussion at the trial about the measure of damages (anyway to which my attention was drawn) was in a series of brief exchanges between counsel and the Judge after he had delivered judgment. The appropriate valuation date for assessment purposes arose, not on the substance of the issues decided by the Judge, but because it was said by the Respondent that what appeared likely to be a very significant discrepancy between the value of 115.69 ETH on 1 October 2019 and their value on the date of judgment was relevant to the Appellant's claim to costs. In the event, the costs were reserved to the remedies hearing.

24. During the course of that discussion, a number of different figures were referred to (as they were in the skeleton arguments on this appeal). The details do not matter because there is no real dispute that the discrepancy was very significant. The volatility in the value of ETH was such that, as at the time of judgment, ETH was worth approximately ten times its value as at the valuation date picked by the Judge, which itself was significantly less than the value at the time the ETH in issue were originally transferred to the Respondent.

25. This founded the Respondent's argument on the costs application that the Appellant had only been partially successful at trial because he had failed to obtain either an order for specific performance or a later valuation date for damages, both of which meant that his claim had only been established at a very much smaller figure than the amount he had hoped to achieve. In that context, Mr Snell raised with the Judge "for clarity" the following question: whether "for the purposes of that remedies hearing, is it to be taken as read that the correct date of valuation is the October date? Or are you open to contrary argument as to the date of valuation?"

26. The Judge then asked Mr Snell why it should be any other date in light of his findings, to which Mr Snell said that he had not given it any thought. The explanation for this rather terse response was that the parties were not expecting to have to deal with an assessment of damages, nobody having adduced any evidence on the point. The Judge then clarified the point he was making by saying that he had based the valuation date on two months from 19 July plus a fortnight. This reads as a reference to the grounds on which he had concluded that a reasonable time from the date of demand expired on 1 October 2019. It did not appear to be a reference to any possible argument that a date other than the date of breach was the right date on which to base an assessment of damages.

27. There was then a further exchange between Mr Snell and the Judge in which Mr Snell questioned whether the valuation date was set in stone and whether it remained open to the Appellant to argue for a different valuation date if he wished to do so, although Mr Snell was not saying that he would. During the course of that exchange, the Judge indicated to Mr Snell that, if he had any alternative submissions to make as to why he had got the date wrong, he might be prepared to listen to them, as now was the time to correct it. Mr Snell's response was: "No, that's fine, Your Honour. I just wanted some clarity as to where we were going with the remedies hearing."

28. On one view, Mr Snell should have developed a response to the Judge's invitation to put him right on the valuation date. Whatever the parties may have assumed about the course the proceedings should take if the Appellant were to win on his primary argument, but lose on specific performance, the court itself had not given any pre-trial directions for the conduct of a later remedies hearing. However, I do not think it can be said that this exchange served to exclude the Appellant's right to contend on appeal that the Judge's valuation date determination was wrong, not least because he had neither the instructions nor the evidence to do so.

29. Against this procedural background, the primary focus of the Appellant's submissions was to challenge the Judge's finding on the appropriate valuation date for the assessment of damages. He advanced his appeal against the Judge's refusal to grant specific performance as a fall-back in the event that he failed in his challenge to the Judge's valuation date. This was a reversal of the order in which the two points were advanced at the trial. However, I think that it is more logical to deal with them in the original order, not least because the claim to damages had always been advanced as an alternative to specific performance.

30. Specific performance is an equitable remedy which is not normally available in cases in which damages are adequate to compensate the claimant for the loss he has sustained. Unlike damages, it is not a remedy which is available to the claimant as of right. Where the defendant does not have what Lord Neuberger in *Cavendish Square Holdings BV v Makdessi* [2015] UKSC 67 at [30] called "a legitimate interest extending beyond pecuniary compensation for the breach", specific performance will not normally be granted. To that extent, it is often referred to as a discretionary (and sometimes an exceptional) remedy available to do justice in cases in which the legal remedies to which the claimant is entitled are inadequate.

31. The first argument made by the Appellant was that the evidence did not justify the Judge's conclusion that specific performance should be refused on the grounds of hardship. It was not said that what the Judge called "setting up the Respondent to

fail" was not capable of being a relevant discretionary factor in refusing relief, but Mr Snell submitted that there was insufficient evidence to allow the Judge to conclude on the facts that the Respondent did not have the means to raise the necessary funds to repurchase the ETH required to enable him to perform his obligations under the oral agreement.

32. I do not accept this submission. It is well established that an appeal court will not interfere with the trial court's findings of primary fact or the evaluation of those findings unless it is satisfied that the trial judge was plainly wrong (see e.g. *Staechelin v ALCBDD Holdings Ltd* [2019] EWCA Civ 817 at [29-39]). Based on the materials in the appeal bundle, including a witness statement made by the Respondent, I am satisfied that there was sufficient evidence to justify the Judge's finding on this point.

33. The second argument on the specific performance ground of appeal is more intimately interlinked with the issues which arise on the approach that the Judge took to the valuation date to be applied on an assessment of damages at the remedies hearing. In essence it was said that the effect of the Judge's decision on damages was to put the Respondent in a significantly better position than he would have been in if damages had been awarded by reference to the date of judgment. Conversely, it had the effect of making the Appellant financially poorer (to a significant extent) than he would have been if the Judge had either ordered specific performance or directed that the damages be assessed by reference to that date.

34. In short the Appellant says that damages are an inadequate remedy because the method of quantification chosen by the Judge by reference to the date of breach does not provide sufficient compensation for the loss he has sustained. It was submitted that this outweighed the point on hardship to the Respondent, a state of affairs which could and should be rectified by making an order for specific performance.

35. I do not agree with this analysis. I think that the Judge was entitled to take the view that the nature of the hardship in the present case was sufficient of itself to justify a refusal to grant specific performance. Where the dispute is all about pecuniary loss, it was relevant for the Judge to have regard to the fact that non-compliance with an order for specific performance of an essentially pecuniary obligation might give rise to contempt proceedings for non-compliance, while the same issue would not arise on a failure to pay any award of damages in lieu.

36. Furthermore, because the Judge described the remedy sought as "inept in the present case" it is quite possible that he had in mind, (although the point was not spelt out in this way in his judgment) that the oral agreement was not a contract for the sale of land or other special property such as a unique chattel or unquoted shares in a private family company. It was a contract for the re-transfer of cryptocurrency tokens. On the face of it, there was nothing special about the tokens to be re-transferred and the contract found by the Judge allowed the relevant obligation to be discharged by the re-transfer not just of the actual ETH originally transferred but also their equivalent.

37. While there is no reason to think that a contract for the return of cryptocurrency tokens might not be specifically performable in an appropriate case, it was also open to the Judge to decide that the nature of ETH is such that any loss as a result of a failure to return them was, as a matter of principle, capable of being adequately compensated in damages. This was the position in two cases which were cited by Mr

Beloff on this appeal (*B2C2 Ltd v Quoine Pte Ltd* [2019] SGHC(I) 03, a decision of Simon Thorley QC sitting in the Singapore International Commercial Court and *Wang v Darby* [2022] Bus LR 121, a decision of Stephen Houseman QC), in both of which specific performance was denied.

38. Both of these cases are consistent with the proposition that there is nothing special about a contract to transfer cryptocurrency by reason of the nature of the asset concerned. The usual rules will apply to the issue of whether it should be the subject of an order for specific performance.

39. If and to the extent that this was part of the Judge's reasoning, it seems to me that it is an added reason why it was appropriate for him to refuse specific performance. But this must be on the basis that damages are in fact proper compensation for the loss sustained by the Appellant, having regard to the computation adopted by the court. Put another way, the answer to this part of the argument is properly to be found by adopting the correct approach to assessing the damages to be awarded in lieu of specific performance, rather than by seeking to stretch the remedy of specific performance beyond its proper bounds. For these reasons, the Appellant has not persuaded me that the Judge was wrong to refuse that relief.

40. Before turning to the Judge's finding on the appropriate valuation date for the assessment of damages, I should refer to a further argument advanced by the Respondent as to why the Judge was correct to refuse specific performance. Mr Beloff submitted that the Judge was barred from granting such relief by section 23(d) of the County Courts Act 1984 ("CCA 1984"). This section gives the county court jurisdiction to hear and determine:

> "proceedings for the specific performance, or for the rectification, delivery up or cancellation, of any agreement for the sale, purchase or lease of any property, where, in the case of a sale or purchase, the purchase money, or in the case of a lease, the value of the property, does not exceed the county court limit;"

41. Mr Beloff submitted that, because the oral agreement in the present case is not an agreement for the sale, purchase or lease of any property, the Judge would have had no jurisdiction to grant specific performance even if he had been minded to do so. In effect he said that the categories of contract listed in section 23(d) were exhaustive and, if a contract did not fall within one of them, it was not specifically performable by order of the county court. This argument was not run before the Judge but, as it raises a point of jurisdiction, I think it is right that I should deal with it (albeit briefly).

42. Section 15 of CCA 1984 gives the county court jurisdiction to hear and determine any action founded on contract, while section 38 of CCA 1984 gives the county court power to make any order which could be made in the High Court if the proceedings were in the High Court. Neither of these sections excludes the power to grant specific performance of an obligation falling within section 15, even though that is a remedy which is available to enforce many different types of contract.

43. In *Bourne v. MacDonald* [1950] KB 422, the Court of Appeal was faced with an almost identical argument to the one advanced by Mr Beloff based on the wording of the equivalent three sections (40(1), 52(1) and 71) of the County Courts Act 1934 ("CCA 1934"). Sir Raymond Evershed MR rejected the argument that section 52(1)

of CCA 1934 (the equivalent of section 23(d)) provided an exhaustive code defining the jurisdiction of the county court to grant specific performance. He said it would be capricious for a county court judge only to have jurisdiction to grant specific performance in respect of the types of contract referred to in that section and concluded that, in any proceedings falling within what is now section 15 of CCA 1984, specific performance was a remedy available to the county court judge pursuant to what is now section 38.

44. In my view, the reasoning of the Court of Appeal in *Bourne v. MacDonald* is as applicable to CCA 1984 as it was to section 52(1) of CCA 1934. I am therefore satisfied that Mr Beloff is wrong on his jurisdiction point. There was no jurisdictional bar to the Judge granting specific performance of the oral agreement in this case if he had considered it appropriate to do so.

45. Turning to the issue of the correct valuation date, I think that there are two quite separate questions which arise. The first is whether the Judge was correct, on the basis of the material available to him, to make a determination of the correct valuation date at the conclusion of the trial rather than as part of the remedies hearing. If so, the second question is whether he was right to decide that the correct valuation date was 1 October 2019 or whether he should have determined that some other date, including in particular the date of judgment, would be a more appropriate starting point for assessing the Appellant's recoverable loss.

46. In the circumstances with which the Judge was faced at the end of the trial, I have reached the conclusion that he was wrong to reach a settled view on the correct valuation date for the assessment of damages. In part, this is because of the parties' expectations as to what would be decided at the hearing if the primary issue were to be resolved in favour of the Appellant, but specific performance was refused. It is also because I think that the Judge assumed that the date of breach must be the correct starting point for the assessment without hearing proper submissions on whether that was in fact the case. He also did so without making a finding that it was possible and reasonable for the Appellant to have gone into the market at or shortly after the time of breach to acquire from elsewhere the ETH which the Respondent had failed to re-deliver, and without determining whether and when the Appellant had the funds to do so.

47. This second consideration is of significance because I have reached the conclusion that the Appellant's arguments for a date other than the date of breach, and more specifically in favour of the date of judgment, are arguments which appear to have real merit. However, I do not think that I should finally determine these points now. In my view the fairer course is for the remedies hearing to deal with all of the issues which go to the assessment of the correct figure to compensate the Appellant for the loss he has sustained at the same time.

48. To that end, directions may be required as to the evidence for the remedies hearing. With the benefit of that evidence, the Judge will have a much fuller picture of all the circumstances, including in particular what did or might have happened (and what the Appellant did or might have done) between the date of breach and the date of judgment. As Lord Bingham MR said in *Reeves v Thrings & Long* [1996] PNLR 265:

> "The assessment of damages is ultimately a factual exercise, designed to compensate but not over-compensate the plaintiff for the civil wrong he has suffered. Whilst this is not an area free of legal rules, it is an area in which legal rules may have to bow to the particular facts of the case."

49. I also think it is appropriate for me to explain in outline why I have concluded that the Appellant's arguments have real merit and why the valuation date issue is factually more complex than the Judge seems to have considered it to be. In doing so, I should emphasise that I am not making a final determination on any of these points. The right time for those determinations, including their application to the facts, is at the remedies hearing. It remains open to the Judge at the remedies hearing to decide whether any of these arguments succeed on the basis of the factual findings that he makes.

50. In substance, the Appellant has two complementary arguments as to why the date of breach was not the proper valuation date. The first submission is that, although the date of breach is often thought to be the general rule when valuing loss caused by a breach of a contract, the authorities demonstrate that such a rule should not be rigidly applied. What matters is that the court should always seek to ensure that the wronged party is adequately compensated by being placed in the same position he would have been in if the contract had been performed. I agree that Mr Snell has accurately identified the general principle. If authority be needed, it can be found in the speeches of Lord Wilberforce in *Johnson v Agnew* [1980] AC 367 at 400H and Lord Scott in *Golden Strait* at [29].

51. I also agree that the general rule reflects the principles which were discussed by Lord Brown in *Golden Strait* at [79-80] in the passages from his judgment referred to in the Respondent's trial skeleton argument, and the importance of the innocent party's duty to mitigate his loss:

> "Essentially it applies whenever there is an available market for whatever has been lost and its explanation is that the injured party should ordinarily go out into that market to make a substitute contract to mitigate (and generally thereby crystallise) his loss. Market prices move, both up and down. If the injured party delays unjustifiably in re-entering the market, he does so at his own risk: future speculation is to his account."

52. It is then said (and in principle I agree) that, where it is not possible to give effect to the general compensatory principle by valuing the relevant asset at the date of breach, it may be necessary to adopt another approach. As Lord Scott said in *Golden Strait* at [32] "The assessment at the date of breach rule can usually achieve that result. But not always" and "If a money award of damages for breach of contract provides the creditor a lesser or a greater benefit than the creditor bargained for, the award fails, in either case, to provide a just result."

53. The fact that the general rule is sometimes not capable of providing the correct answer is also recognised by Lord Brown in *Golden Strait*, because he pointed out that, while its application may be straightforward to apply in contracts for the sale of goods or shares, it is sensitive to the nature of the contract and its subject matter. As to this he cited with approval a passage from the judgment of Oliver J in *Radford v. de Froberville* [1977] 1 WLR 1262 at 1285:

> "It is sometimes said that the ordinary rule is that damages for breach of contract fall to be assessed at the date of the breach. That, however, is not a universal principle and the rationale behind it appears to me to lie in the enquiry at what date could the plaintiff reasonably have been expected to mitigate the damages by seeking an alternative to performance of the contractual obligation?"

54. In the present case, it seems that the effect of a decision to assess the damages by reference to the date of breach would be likely to leave the Appellant significantly out of pocket. He would only be able to go out into the current market (or more accurately the market as at the date of judgment) and acquire with the damages to which he would on that basis be entitled, no more than a small proportion of the ETH, which, on the Judge's primary finding, the Respondent was required (but failed) to re-transfer. He would therefore not be compensated for the loss he sustained from the breach.

55. The question, therefore, is whether the Respondent is not liable (or is relieved from liability) for this particular shortfall on some principled basis, such as by application of the rules relating to remoteness of damage or the Appellant's duty to mitigate his loss. The most obvious possibility is that the Appellant might have failed to take the mitigating steps referred to in the authorities such as *Golden Strait* at some identifiable time between the date of breach and the date of judgment, but there may be others.

56. In answering that question, I think it is of central relevance that the oral agreement was not for the purchase of ETH at a price which remained unpaid. The oral agreement was for the Appellant to transfer to the Respondent a quantity of ETH in consideration for an undertaking by the Respondent to re-transfer to the Appellant that same quantity +10% on the expiry of a reasonable time from demand.

57. It is therefore open to the Appellant to argue that he had already provided full consideration in the form of the original transfer and that the nature of the oral agreement is therefore closer in its essence to a contract of loan than it is to a contract of sale. In that context, and depending on the evidence adduced at the remedies hearing, it may be more credible for the Appellant to contend that he is under no obligation, or in any event a more limited obligation, to go out into the market to make a substitute contract, where he would in effect be paying twice if he were to do so.

58. The fact sensitive nature of that possibility is reflected in a discussion of the problem by the editors of McGregor on Damages 21st edn at 9-044 to which I drew counsel's attention during the course of the hearing (now in the 22nd edn at 10-045), in which the following passage appears:

> "From this reasoning it would follow that even in contract claimants should not be restricted in their damages by reason of an assumption of replacement of the goods if they have already paid the contract price for them to the defendant."

59. I should add that there are two other situations which may bear on the right answer. The first is that some of the law in this area is derived from old cases dealing with stock lending arrangements, which were in some respects analogous to the oral agreement to transfer and re-transfer ETH in the present case. In those cases, such as

Shepherd v. Johnson (1802) 2 East 211, the answer is said to be the price at the time of the trial, a solution which has been analysed in McGregor (22nd edn at 30-014) as focusing on market value at the time of breach but then adding damages for consequential loss.

60. The second situation is the analysis of the House of Lords in *Miliangos v. Frank (Textiles) Ltd* [1976] AC 443 when considering the appropriate date for conversion into sterling of a judgment given in a foreign currency. As is well known, this decision effected a change in the law, reversing the previous position which was that judgments could only be given in sterling with any necessary conversion from a foreign currency being effected as at the date of breach, a state of affairs which was much criticised because of the growth of volatility in foreign currency rates of exchange. In that context Lord Wilberforce said (at 469A) that the date of enforcement gets nearest to securing to the creditor exactly what he bargained for.

61. It follows that the question of what the Appellant could and should have done once the breach of the oral agreement became clear to him, in circumstances in which (unlike a normal unperformed contract for the transfer or delivery of property) he had already performed his side of the bargain, is one which requires a factual enquiry. In my view, this ought to be conducted as part of the remedies hearing, which the Judge has already determined should be carried out (albeit for a more limited purpose), a course which I was told on the appeal the parties had all assumed would occur.

62. The Appellant's second main (and complementary) argument as to why the date of breach was not the proper valuation date was developed in a supplemental skeleton submitted after the Judge's judgment had become available, and very shortly before the hearing of the appeal. Mr Snell pointed out that the Judge's decision in relation to damages engaged section 50 of the Senior Courts Act 1981 (the statutory successor to section 2 of the Chancery Amendment Act 1858, commonly called Lord Cairns Act). This gives the High Court and, pursuant to section 38 of the County Courts Act 1984 the county court, the discretionary power to award damages in addition to or in substitution for specific performance whenever the court has jurisdiction to entertain an application for that relief.

63. It was said that damages awarded under section 50 can properly be characterised as a money substitute for specific performance. The damages must therefore be an equivalent to what is lost by the refusal of specific performance, a principle which was reflected in the present case by the terms of the Judge's order spelling out that the damages to be assessed were *in lieu of* specific performance. In any such case, the refusal of specific performance occurs at the date of judgment, which is the moment in time at which the court determines that what had been the Appellant's right to receipt of the relevant property (in this case the re-transfer of 115.69 ETH) was replaced by the right to a monetary figure payable by way of financial compensation.

64. In support of his argument on this point, Mr Snell cited a number of passages from *Johnson v Agnew* [1980] AC 367 at 339H-401D, where Lord Wilberforce considered the correct approach to assessing damages under section 50. The circumstances were different in the sense that the issue arose because an order for specific performance obtained against a defaulting purchaser of land had become impossible to enforce due to the intervening sale of the property by the vendor's mortgagee. To that extent there

was a straightforward reason why a contractual obligation that was clearly specifically performable at the outset no longer fulfilled the requirements for the remedy.

65. Lord Wilberforce first confirmed that there was no warrant for awarding damages under section 50 by reference to different principles from those awarded at common law, and then said that the general principle is compensatory in the sense that the innocent party is entitled to be placed so far as money can do in the same position as if the contract had been performed. He then went on to explain that, although this would normally lead to an assessment as at the date of breach, there was no absolute rule to that effect.

66. There are then two passages in Lord Wilberforce's speech in which he explained how these principles ought to be applied in a contract for sale in which specific performance is sought.

    i) The first is at p.401A/B:

    > "In cases where a breach of a contract for sale has occurred, and the innocent party reasonably continues to try to have the contract completed, it would to me appear more logical and just rather than tying him to the date of the original breach, to assess damages as at the date when (otherwise than by his default) the contract is lost."

    ii) The second is at p.401D, in which he applied this principle to the case in hand:

    > "In the present case if it is accepted, as I would accept, that the vendors acted reasonably in pursuing the remedy of specific performance, the date on which that remedy became aborted (not by the vendors' fault) should logically be fixed as the date on which damages should be assessed. Choice of this date would be in accordance both with common law principle, as indicated in the authorities I have mentioned, and with the wording of the act "in substitution for … specific performance"."

67. Of course, the present case is not one to enforce a contract for the sale of land. It is one in which the Appellant seeks the re-transfer of ETH originally transferred under a contract more akin to one of loan. Nonetheless, the principle explained by Lord Wilberforce is articulated as one of general application. If it applies, the effect of *Johnson v. Agnew* is that, where a remedy of specific performance continues to be reasonably pursued, the normal approach of the court should be to award damages by reference to a valuation date as at the date of any judgment which determines that the remedy is no longer available.

68. The test in such circumstances requires the innocent party to be acting reasonably in his pursuit of the remedy. In the present case, I was shown nothing to indicate that the Respondent argued that the Appellant had behaved unreasonably in his pursuit of the remedy of specific performance and the Judge made no finding to that effect. The reason which the Judge gave for denying the equitable relief was hardship to the Respondent, which made it unfair for specific performance to be granted against him.

69. It follows that, as the Respondent did not argue and the Judge did not find that it was unreasonable for the Appellant to have continued to pursue his claim for specific

performance through to judgment, an application of the *Johnson v Agnew* principles supports the Appellant's case that his claim for damages in lieu of specific performance should be quantified by reference to the value of the ETH as at the date of judgment.

70. However, I can also see that the question of whether it remained reasonable for the Appellant to continue to press for specific performance of the oral agreement throughout the course of the proceedings is highly fact sensitive. That question is also intimately interlinked with the issue of whether or not the Appellant took reasonable steps to mitigate his loss throughout the lengthy period after the date of breach, an issue of some complexity in light of the volatility of the value of ETH over that period. It may give rise to the question of who, in all the circumstances of the case, ought to bear the risk of that continuing volatility and the period for which they should do so.

71. In my view, determination of those issues is an exercise which only arose once the stage was reached for an assessment of damages, which itself was only required because of the Judge's findings in favour of the Appellant on the true construction of the oral agreement combined with his refusal of specific performance. The Judge has already quite properly exercised his case management discretion to direct that damages should be assessed at a remedies hearing.

72. The effect of the decision on this appeal is that the remedies hearing should also be used for all other issues relating to the measure of loss, including issues going to remoteness, mitigation and whether the Appellant's continued pursuit of specific performance throughout the period to judgment was reasonable. This will obviously expand the ambit of the remedies hearing, and doubtless increase the overall costs of these proceedings. It is self-evident that that is unfortunate, but in my view, it is an inevitable consequence of the nature of the issues which arise.

73. For these reasons the appeal will be allowed on the single issue of the Judge's determination of the valuation date for the assessment of damages. I shall set aside his decision that it be fixed as at 1 October 2019 and direct that it, together with such other issues as may arise on the measure of loss, be determined at the remedies hearing. The stay of the order for the listing of the remedies hearing will be lifted. The Appellant must restore the matter before Judge Saggerson at the earliest available opportunity so that he can give appropriate directions for the conduct of the remedies hearing having regard to the terms of this judgment. The parties are to prepare a minute of order for the court's approval. If they are unable to reach agreement I will deal with any issues which have arisen on the papers. This may include any issues which relate to costs.