Neutral citation [2024] CAT [48]

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1523/7/7/22

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

26 July 2024

Before:

THE HONOURABLE MRS JUSTICE BACON
(Chair)
MICHAEL CUTTING
JOHN DAVIES

Sitting as a Tribunal in England and Wales

BETWEEN:

BSV CLAIMS LIMITED

Applicant/Proposed Class Representative

- v -

(1) BITTYLICIOUS LIMITED
(2) PAYWARD LIMITED
(3) SHAPESHIFT GLOBAL LIMITED
(4) PAYWARD, INC.
(5) SHAPESHIFT A.G.
(6) BINANCE EUROPE SERVICES LIMITED

Respondents/Proposed Defendants

Heard at Salisbury Square House on 5 June 2024

JUDGMENT (STRIKE OUT AND COLLECTIVE PROCEEDINGS CERTIFICATION)

APPEARANCES

Sarah Ford K.C, Nicholas Bacon K.C. and William Hooper (instructed by Velitor Law) appeared on behalf of the Proposed Class Representative.

Brian Kennelly K.C. and Jason Pobjoy (instructed by A&O Shearman LLP) appeared on behalf of the Sixth Proposed Defendant.

A. INTRODUCTION

1. By a Collective Proceedings Claim Form dated 29 July 2022, and amended on 6 October 2023, the Proposed Class Representative ("PCR"), BSV Claims Limited, seeks a collective proceedings order pursuant to section 47B of the Competition Act 1998 (the "CA"). The proposed claims are brought on behalf of the UK based holders of the cryptocurrency Bitcoin Satoshi Vision ("BSV"). The PCR alleges that the Proposed Defendants, who are operators of cryptocurrency exchanges, engaged in conduct contrary to Article 101 of the Treaty on the Functioning of the European Union ("TFEU") and/or the Chapter I prohibition under section 2 of the CA, by colluding to delist BSV from their exchanges between 12 April and 5 June 2019. That is said to have caused loss to the holders of BSV coins ("BSV holders"), who the PCR divides into Sub-Classes A, B and C depending on the effects of the alleged infringement on their BSV holdings. The PCR seeks certification of its claims on an opt-out basis.

2. On 16 February 2024 the Sixth Proposed Defendant, Binance Europe Services Limited ("Binance"), issued an application for strike out and/or reverse summary judgment in respect of the main category of loss claimed for Proposed Sub-Class B, which is the class of BSV holders who retained their holdings in BSV up to the date of issuing proceedings. For Sub-Class B, the most significant element of the proposed loss claim is a claim estimated at up to £9 billion for a so-called "forgone growth effect", on the basis that BSV is said, as a result of the infringement, to have been prevented from becoming a major cryptocurrency, or at least lost the chance to become a major cryptocurrency.

3. Binance's application seeks the strike out or summary dismissal of the Sub-Class B forgone growth effect claim on two bases:

   (1) The primary basis for the application is what has been referred to as the "market mitigation rule". Binance contends, in this regard, that the forgone growth effect asserted by the PCR is irrecoverable in law, on the basis that there was nothing preventing BSV holders from mitigating any future losses by selling their BSV coins after the alleged infringing events and purchasing other cryptocurrencies instead. Any loss caused

by the retention of BSV holdings thereafter was, therefore, the consequence of speculation on the account of the BSV holders, for which the Proposed Defendants should have no liability.

(2) Binance also argues that the alternative loss of a chance claim pleaded by the PCR is defective in law, since the claim for forgone growth cannot fall within the loss of a chance doctrine. That aspect of the claim should therefore be struck out or summarily dismissed in any event.

4. Subject to Binance's application, none of the Proposed Defendants oppose certification of the proposed claims in principle. Other than Binance, none of the Proposed Defendants attended the hearing or made any written representations to the court; and Binance did not pursue any point at the hearing other than its strike out/summary judgment application. Various issues were, however, raised in correspondence between the parties regarding the PCR's funding arrangements. Those issues were addressed by the PCR in its evidence and skeleton argument for the hearing, and we therefore comment on them briefly in this judgment.

5. The PCR's application for certification of its proposed claims was supported by witness statements from Lord Currie of Marylebone, Johnny Jaswal, a director of Softwhale Holdings Limited ("Softwhale", the PCR's litigation funder), and Seamus Andrew, a partner at Velitor Law with conduct of the case for the PCR, all dated 29 July 2022, together with an expert report from Robin Noble of Oxera Economics also dated 29 July 2022.

6. In response to Binance's application and funding issues raised by the Proposed Defendants, further witness statements have been provided by Lord Currie, dated 6 October and 10 November 2023, Mr Andrew, dated 6 October 2023 and 12 April 2024, and Conrad Druzeta, another director at Softwhale, dated 19 September 2023. Mr Noble has also provided a supplemental expert report dated 12 April 2024 and a letter dated 24 May 2024, both addressing Binance's application.

7. In support of its application for strike out/summary judgment, Binance relied on two witness statements of Arnondo Moy Chakrabarti, the partner at Allen & Overy LLP with conduct of the proceedings on behalf of Binance, dated 16 February 2024 and 9 May 2024.

8. At the hearing, submissions were made by Ms Ford KC for the PCR, and Mr Kennelly KC for Binance. We are grateful to all counsel for the clarity of their oral and written submissions.

B. FACTUAL BACKGROUND

9. The proposed claims concern the trading of cryptocurrencies. Cryptocurrencies operate using technology known as blockchains, which are immutable digital ledgers of transactions that are distributed among users in peer-to-peer computer networks. Cryptocurrencies are traded on cryptocurrency exchanges. The exchanges operated by the Proposed Defendants are known as Bittylicious (First Proposed Defendant), Kraken (Second and Fourth Proposed Defendants), ShapeShift (Third and Fifth Proposed Defendants) and Binance (Sixth Proposed Defendant).

10. The world's first widely known cryptocurrency was Bitcoin, which was created in 2009 by an inventor using the pseudonym Satoshi Nakamoto. Other cryptocurrencies have since become established, either independently of Bitcoin, or as a result of protocol changes in the Bitcoin blockchain which have caused splits (known as "hard forks") in that blockchain. One such fork led to the creation of Bitcoin Cash in 2017. A further fork in the Bitcoin Cash blockchain led to the creation of BSV in 2018, promoted by a group of which the most public representative and advocate is the computer scientist and businessman Dr Craig Wright.

11. The identity of the pseudonymous Satoshi Nakamoto remains unknown, and has been the subject of considerable controversy. Since 2015, Dr Wright has claimed to be Satoshi Nakamoto, a claim which was widely disputed and has now been discredited (see in particular the judgment of Mellor J in *Crypto Open Patent Alliance v Craig Steven Wright* [2024] EWHC 1198 (Ch)).

12. The present claims do not turn on the substance of that dispute. What is relevant is that the controversy over Dr Wright's claims led to a series of tweets and other public announcements between 12 and 19 April 2019, in which the Proposed Defendants (variously) objected to Dr Wright's conduct, denounced him as a fraud, announced their intention to delist BSV from their exchanges, and called upon other cryptocurrency exchanges to do the same.

13. The Proposed Defendants then announced that they would delist BSV, and subsequently did in fact delist BSV, between 15 April and June 2019. The announcements and delistings are referred to collectively by the PCR as the delisting events, and we adopt the same terminology in this judgment. The Proposed Defendants' participation in the tweets and delisting events is what is said to constitute the infringement of Article 101 TFEU and the Chapter I prohibition.

14. Thereafter, users of Binance were required to withdraw their holdings before 22 July 2019. If they failed to do so, they lost access to their BSV holdings completely. Kraken likewise disabled access to BSV held on its exchange with effect from 5 June 2019, with those holdings being converted to holdings in Bitcoin on 7 December 2019, minus a 10% conversion fee. The other exchanges did not restrict users' access to their BSV holdings.

C. THE PROPOSED COLLECTIVE PROCEEDINGS

15. The proposed collective proceedings are brought on behalf of holders of BSV coins on 11 April 2019, who were resident in the UK between 11 April 2019 and 29 July 2022, which was the date of issue of the proceedings, together with the personal authorised representatives of the estate of any individual who was in that class but subsequently died.

16. The PCR, BSV Claims Limited, is a special purpose vehicle of which the sole director is Lord Currie of Marylebone, the inaugural Chair of both Ofcom and the Competition and Markets Authority, and the former Dean of the London Business School. Lord Currie is assisted by an Advisory Board consisting of a former Lord Chancellor and Secretary of Justice, a former senior director of the

Office of Fair Trading, a former Chairman of the Competition and Markets Authority, a barrister specialising in competition law, and a cryptocurrency commentator.

17. The claim seeks an aggregate award of damages caused to the Proposed Class by reason of the infringement. The loss is described in Mr Noble's expert report of 29 July 2022. His analysis describes two main categories of loss:

    (1) The first is an "immediate and persistent effect" arising from the fall in the price of BSV in the immediate aftermath of the delisting events. Mr Noble proposes to calculate this by comparing the price of BSV before and after the delisting events, and considering counterfactual benchmark prices for BSV using various methods, including changes over the same period of the prices of other cryptocurrencies such as Bitcoin and Bitcoin Cash.

    (2) The second is the supposed "forgone growth effect", resulting from what is described as being a lost opportunity for BSV to develop into a "top tier" cryptocurrency. Mr Noble proposes to calculate this on the basis of a counterfactual which assumes that but for the delisting events BSV would, or could potentially, have achieved a similar price over time to the prices of currencies such as Bitcoin or Bitcoin Cash. The claim for the forgone growth effect is put on the basis that BSV would have become a major cryptocurrency, or alternatively that the relevant class members have suffered the loss of a chance that it would have become a major cryptocurrency.

18. The Proposed Class is broken down into three Sub-Classes (noting that users might be members of more than one sub-class, for different holdings of BSV):

    (1) Sub-Class A comprises an estimated 155,000 class members who held BSV coins on 11 April 2019 and sold at least some of those between that date and 29 July 2022. Mr Noble assumes in his initial analysis that Sub-Class A suffered only the immediate and persistent effect.

(2) Sub-Class B comprises an estimated 75,000 class members who held BSV coins on 11 April 2019 and continued to hold them on 29 July 2022. Mr Noble assumes that Sub-Class B suffered both the immediate and persistent effect and the forgone growth effect.

(3) Sub-Class C comprises an estimated 13,000 class members who held BSV coins on 11 April 2019 but thereafter lost access to them as a result of Binance and Kraken cutting off access to the BSV on their exchanges. The loss calculated by Mr Noble for these class members differs according to whether the BSV coins were listed on Binance or Kraken:

(i) For the Binance holdings, the loss is calculated based on the forgone growth effect, as with Sub-Class B, save that unlike Sub-Class B the withdrawal of access to the BSV holdings meant that the holders lost the entirety of the value of their BSV retained on the Binance exchange.

(ii) For the Kraken holdings, the loss is calculated on the basis of the immediate and persistent effect, similar to Sub-Class A, plus the fee charged for the conversion of the BSV holdings to Bitcoin in December 2019.

19. Mr Noble's report explains that his estimate of the class sizes is based on an overall estimate of the total value of the BSV holdings of UK class members on 11 April 2019 (i.e. prior to the delisting events) as £82.4m, using various sources for that figure, together with FCA survey data regarding the proportion of the UK adult population who have invested in cryptocurrencies in general and BSV specifically, and FCA survey data showing the proportion of cryptocurrency investors who monitored their holdings daily, weekly, monthly, quarterly, yearly or never. Mr Noble classifies investors who monitored their holdings, on at least a yearly basis, or more frequently, as active cryptocurrency investors, estimating this at 65% of investors on the basis of the FCA survey data for December 2018. The same survey found that the remaining 35% of investors never monitored their holdings.

20. The sizes of the Sub-Classes is then estimated as follows:

(1) To calculate the size of Sub-Class A, Mr Noble assumes that 65% of UK BSV holders were active investors. He assumes that those investors would have divested at least some of their BSV holdings, save for those who he estimates (based on FCA survey data) had holdings on Binance and Kraken and who monitored their holdings on only a quarterly or yearly basis. Mr Noble assumes that this latter category were likely to have missed the deadlines imposed by those exchanges for withdrawal of BSV holdings, such that they lost access to their BSV holdings and were not able to divest them. The removal of the estimated Binance/Kraken holdings to which access was lost from the total value of commerce for the assumed 65% active investors results in an estimate of the total value of commerce for Sub-Class A on 11 April 2019.

(2) Sub-Class B is comprised of the remaining assumed 35% inactive UK BSV investors, excluding those who (Mr Noble estimates) had holdings on Binance and Kraken. Mr Noble assumes that the entirety of Sub-Class B would have maintained their holdings in BSV following the delisting events.

(3) Sub-Class C is comprised of all of the BSV users who are estimated to have had holdings on Binance and Kraken, save for those who (according to Mr Noble's estimates) monitored their holdings on a daily, weekly or monthly basis. The latter are assumed to have been aware of the delisting events in time to withdraw their BSV holdings from those exchanges, and Mr Noble assumes that they would indeed in those circumstances have withdrawn their BSV holdings, placing them in Sub-Class A.

21. At this stage Mr Noble assumes that the average holding of BSV is the same across all class members, and that the distribution of active and inactive BSV holders (including investors with holdings on the Binance and Kraken exchanges) mirrors the assumed distribution of active and inactive cryptocurrency investors as a whole.

22. Mr Noble's analysis is necessarily provisional, at this stage, and he notes that disclosure will enable him to refine his calculations. As an example, he expects that disclosure from exchanges on the value of BSV coins held with them at the time of the alleged infringement will provide further details as to the size of each sub-class (both by number and by value).

23. Table 7.10 of Mr Noble's report sets out his initial quantification of the total damages (excluding interest) for the three Sub-Classes as follows, using Bitcoin and Bitcoin Cash as indicative comparators at this stage, and assuming a 100% probability of BSV obtaining the price of the appropriate counterfactual comparator:

Metric	**Bitcoin**	**Bitcoin Cash**
Total damage to Sub-Class A	£18.2m	£17.2m
Total damage to Sub-Class B	£8,991.9m	£25.9m
Total damage to Sub-Class C	£925.5m	£5.7m
of which: Binance	£924.7m	£4.9m
of which: Kraken	£0.8m	£0.8m
Total damage	**£9,935.6m**	**£48.7m**

24. Sub-Class B is the subject of the application for strike out or reverse summary judgment. As set out in the foregoing table, the losses claimed for Sub-Class B and the Binance holdings in Sub-Class C vary enormously depending on the counterfactual used, and for the Bitcoin comparator make up the vast majority of the total potential claim of the PCR. The reason for that disparity is the element of loss consisting in the forgone growth effect. We return to this point later in the judgment.

D. LEGAL FRAMEWORK

(1) Certification conditions

25. Section 47B CA and Rule 77 of the Competition Appeal Tribunal Rules 2015 (the "Tribunal Rules") set out the requirements that must be fulfilled in order for the Tribunal to make a collective proceedings order.

26. First, the Tribunal must be satisfied that the entity bringing the proceedings can be authorised as the PCR (the "authorisation condition"): section 47B(5)(a) and Rule 77(1)(a). The authorisation condition is met if the Tribunal considers that it is just and reasonable for the PCR to act as a representative in the proceedings: section 47B(8)(b) and Rule 78(1)(b).

27. The factors relevant to the determination of whether it is just and reasonable for the PCR to act as the class representative are set out in Rule 78(2). These include, at (d), the question of whether the PCR will be able to pay the defendant's recoverable costs if ordered to do so. That requires an inquiry into the adequacy of the funding arrangements where (as is now almost always the case) a third party litigation funder is involved.

28. Secondly, the claims must be eligible for inclusion in collective proceedings (the "eligibility condition"): section 47B(5)(b) and Rule 79(1). That condition comprises three cumulative requirements:

    (1) The proposed claims must be brought on behalf of an identifiable class of persons: Rule 79(1)(a).

    (2) The proposed claims must raise common issues, or in other words the same, similar or related issues of fact or law: section 47B(6) and Rule 79(1)(b).

    (3) The proposed claims must be suitable to be brought in collective proceedings: section 47B(6) and Rule 79(1)(c).

29. It is now well-established that, when considering the commonality and suitability requirements for certification, the Tribunal is not generally required to consider the merits of the proposed collective proceedings: *Merricks v Mastercard* [2020] UKSC 51, [2021] 3 All ER 285, [59]. That rule is subject to two exceptions.

30. The first exception is that is that when determining whether collective proceedings should be opt-in or opt-out proceedings, the Tribunal may take into account all matters it thinks fit, including the strength of the claims: Rule 79(3)(a). In *O'Higgins v Barclays Bank* [2023] EWCA Civ 876, [2024] Bus LR 366, however, the Court of Appeal took the view that the strength of the claim (either way) is simply one factor which may, but need not, be taken into account, and that in general the strength of the claim will be neutral as to whether the proceedings should be opt-in or opt-out. The Court considered that the Tribunal's provisional view as to the merits of the claim will only be a relevant factor where that has a bearing on the choice to be made: [93] and [134].

31. The second exception arises where a strike out or summary judgment application is made at the certification stage. We consider this in more detail below.

32. It should be emphasised that although in this case no objection is taken to certification in principle, beyond the points raised by Binance in its strike out/reverse summary judgment application, the absence of objection does not make certification automatic, and the Tribunal must consider on the material before it whether it is appropriate to make a collective proceedings order: *Gormsen v Meta* [2023] CAT 10, [3].

(2) Strike out/summary judgment at the certification stage

33. Under Rule 41(1)(b) of the Tribunal Rules, the Tribunal may strike out in whole or in part a claim at any stage of the proceedings if it considers that there are no reasonable grounds for making the claim.

34. Rule 43(1) provides that the Tribunal may give summary judgment against a claimant on the whole of a claim or on a particular issue if it considers that the claimant has no real prospect of succeeding on the claim or issue, and there is no other compelling reason why the case or issue should be disposed of at a substantive hearing.

35. Strike out and summary judgment under the Tribunal Rules is approached on the same basis as in the High Court under the Civil Procedure Rules: *Gutmann v First MTR South Western Trains* [2021] CAT 31, [52]. The relevant principles are not in dispute.

36. In considering an application for strike out, it is necessary to consider whether the claimant has a realistic as opposed to a fanciful prospect of success. While the Tribunal should not automatically accept the claimant's factual contentions at face value, it will normally do so unless those factual assertions are demonstrably unsupportable: see *Begum v Maran* [2021] EWCA Civ 325, [22].

37. The classic summary of the principles to be applied in a summary judgment application is set out in the judgment of Lewison J in *Easyair v Opal Telecom* [2009] EWHC 339 (Ch), [15]. Again, the court must consider whether the claimant has a realistic as opposed to a fanciful prospect of success and may reject factual assertions made if it determines them to have no real substance, particularly if contradicted by contemporaneous documents. The court should, however, take into account not only the evidence before it, but also the evidence that can reasonably be expected to be available at trial. In that regard, the court should consider whether there are reasonable grounds for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to the trial judge and so affect the outcome of the case.

38. It is not generally appropriate to strike out a claim on assumed facts in an area of developing jurisprudence. Decisions as to novel points of law should instead be based on findings of fact: *Begum v Maran*, at [23]. In the competition context, that principle was noted by Roth J in *Sel-Imperial v BSI* [2010] EWHC 854 (Ch), [16].

E. THE STRIKE OUT APPLICATION

(1) The market mitigation rule

(a) The law

39. The primary basis for Binance's strike out application relies on a principle that has been referred to as the "breach date rule" (*Aylwen v Taylor Joynson Garrett* [2001] EWCA Civ 1171; *The Golden Victory* [2007] 2 AC 353) or "market mitigation rule" (Lord Leggatt in *Stanford International Bank v HSBC Bank* [2022] UKSC 34, [2023] AC 761, referring to Dyson and Kramer, "There is No 'Breach Date Rule'" (2014) 130 LQR 259). We adopt the latter of those terms in this judgment. The rule applies in various contexts in both contract and tort, and was described in *The Golden Victory* at [79] (per Lord Brown) as follows:

> "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".

40. The market mitigation rule therefore reflects a basic principle of mitigation, namely that the injured party must take all reasonable steps to mitigate their loss consequent upon the wrong, and cannot recover damages for any such loss which should reasonably have been avoided: *Sharp v Viterra* [2024] UKSC 14, at [85]. The principle of market mitigation arises, however, in a specific context, where the loss concerns a product or service for which there is an available market, and for which the claimant can therefore readily obtain a reasonable substitute (which does not necessarily have to be on identical terms).

41. In such a case, the damages recoverable will generally be based on the cost to the claimant of entering into the reasonably substitutable transaction. If the claimant chooses not to take advantage of the available market to mitigate their loss, that is (in principle) an independent decision made by the claimant, made on the basis of their assessment of the market, and which does not arise from the wrongful conduct of the defendant: *The Elena d'Amico* [1980] 1 Lloyds Rep 75, p. 89; *Sharp v Viterra*, [86], [90] and [98].

42. The consequence is that, provided that there is an available market, damages will be assessed by reference to the cost of the reasonable substitutable transaction, at the time at which it was reasonable for the claimant to enter into that transaction, irrespective of whether the claimant actually does so: Lord Sumption in *Bunge v Nidera* [2015] UKSC 43, [17]. As Lord Toulson put it at [79]–[80] of *Bunge v Nidera*:

> "The availability of a substitute market enables a market valuation to be made of what the innocent party has lost, and a line thereby to be drawn under the transaction. … The guilty party is not liable to the innocent party for the adverse effect of market changes after the innocent party has had a free choice whether to re-enter the market, nor is the innocent party required to give credit to the guilty party for any subsequent market movement in favour of the innocent party. The speculation which way the market will go is the speculation of the claimant."

43. Other than the charterparty cases, paradigm cases in which the rule may be applicable are cases concerning the sale of goods or shares: *The Elena d'Amico*, p. 89; *The Golden Victory*, [80]. It has also been applied to interests in property: *Aylwen v Taylor Joynson Garrett* [2001] EWCA Civ 1171; *Salford City Council v Torkington* [2004] EWCA Civ 1646.

44. Whatever the context, however, the market mitigation rule presupposes that the claimant is either actually aware of the relevant wrongful conduct, or should have been aware of that conduct. As Henderson J indicated in *Secretary of Health v Servier* [2016] EWHC 2381 (Ch), at [42], constructive knowledge of the wrongful conduct is sufficient, and it is therefore not necessary to confine the analysis to the actual subjective knowledge of the claimant.

45. In some cases, the existence of an available market will mean that it is appropriate to take a valuation date at or near to the date of breach of contract or tortious conduct. If, however, the claimant is not aware of the defendant's breach until later, or if there is not an available market at that time, damages will fall to be assessed at a later date: Lord Leggatt in *Stanford International Bank v HSBC Bank*, at [43]. A later date may also be relevant where the defendant's wrongful conduct continues to influence the conduct of the claimant, or locks the claimant into continuing to hold the relevant asset which

is the subject of the transaction: *Smith New Court Securities v Citibank* [1997] AC 254, p. 266.

(b) The parties' submissions

46. Mr Kennelly's submission was that on the PCR's own case as regards the losses suffered by Sub-Class B, there was at all times following the delisting events an available market for BSV holders to sell their BSV and purchase alternative cryptocurrencies with the same or similar investment potential. The delistings were announced publicly on Twitter and were widely commented on; Mr Noble's proposed methodology assumes an immediate market reaction; and that methodology also assumes that it will be possible to identify suitable counterfactual comparators in the form of other cryptocurrencies such as Bitcoin and Bitcoin Cash.

47. Mr Kennelly therefore contended that this is a paradigm case for the application of the market mitigation rule, crystallising the loss at the point in time at which BSV holders either were, or should have been, aware of the delisting events and could therefore have reinvested in alternative cryptocurrencies. Whenever that point was reached (which he accepted would be a matter for trial), his submission was that on any basis it cannot not be regarded as reasonable for BSV holders to have failed to mitigate up to the date on which the claim was filed. Accordingly, he submitted that the Sub-Class B claim for a forgone growth effect is unsustainable, even taking the PCR's case at its highest, and should be struck out or summarily dismissed.

48. Ms Ford contended that the application of the market mitigation rule, in relation to the forgone growth claim for Sub-Class B, is manifestly unsuitable for strike out or summary dismissal, on the basis that it raises fact-sensitive issues which can only properly be determined at trial. Ms Ford relied on essentially four specific matters which she said could not be determined summarily at this stage:

    (1) She submitted that the claim that members of Sub-Class B could, as a class, have sold their BSV and invested in other cryptocurrencies suffered from a "fallacy of composition", given that if the entire class

did so it would have caused BSV prices to fall even further and thereby increased rather than mitigated their losses.

(2) She submitted that BSV holders typically held small amounts of cryptocurrencies as speculative investments and were willing to retain them despite falling prices, such that it would not be reasonable to expect them to divest their holdings following the delisting events, particularly given that any alternative investments would have been speculative and may have been perceived as being risky.

(3) She relied on the possibility of ongoing coordination on the part of the Proposed Defendants not to relist BSV.

(4) She contended that a significant proportion of BSV holders may not have been aware of the delisting events and were therefore not in a position to divest their holdings.

49. We address each of these in turn.

(c) Fallacy of composition

50. Mr Noble's supplemental report refers to the "fallacy of composition" which occurs where properties that are true for part of a group are assumed to be true for all members of the group, but which cannot in fact be true for all members. Simple examples which are often given include:

– If one runner runs faster, they can win the race. Therefore if all runners run faster they can all win the race.

– If one person in the theatre stands up, they may be able to see the stage better. Therefore if everyone in the theatre stands up, they will all be able to see better.

51. Mr Noble opines that while divesting from BSV may have been an optimal response for individual BSV investor, if every BSV investor who could divest

had done so the result would have been a dramatic fall in the price of BSV. The overall scale of the aggregate losses to Sub-Class B might in that event have increased.

52. In light of that evidence, Ms Ford argued that the strike out/summary judgment application raises novel issues as to the application of principles of causation and mitigation in the context of collective proceedings seeking aggregate awards of damages in respect of an entire class. Accordingly, on the basis of the principles set out in *Begum* and *Sel-Imperial*, she said that it would be inappropriate to dismiss the Sub-Class B claims at this stage.

53. We do not accept that argument. The market mitigation rule does not give rise to a fallacy of composition, because the rule does not assume any particular subsisting value of the asset which has been lost. Rather, the function of the rule is to crystallise the claimant's loss on the basis of the cost of a notional reasonably substitutable transaction, which the claimant could (and reasonably should) have entered into to replace the transaction affected by the alleged wrongful conduct of the defendant.

54. It may well be that if the entirety of Sub-Class B had divested their BSV holdings following the delisting events, the price of BSV would have been lower than it was in fact, in circumstances where some but not all BSV holders sold their coins. If that were to be established, the consequence would be an increased "immediate and persistent effect" loss for that class, reflecting the greater loss in value of the relevant BSV holdings. That loss would represent, however, the entirety of the loss to that class, if those BSV holders could immediately have replaced their BSV holdings with holdings in another substitutable cryptocurrency.

55. We note in this regard that there is no suggestion that any of the BSV holders lacked the funds to reinvest, or might have lacked the funds if the value of BSV had fallen further than it did. (See the similar comment of Arden LJ in *Aylwen v Taylor Joynson Garrett* at [38].) That is not surprising in circumstances where the PCR's own evidence, in Mr Noble's supplemental report, is that investors in cryptocurrencies tend to hold relatively small amounts of money in

cryptocurrencies, with a 2023 FCA report showing that 60% of cryptoasset owners hold cryptoassets worth £500 or less; that a substantial proportion of cryptoasset owners check the value of their cryptoassets only infrequently; and that holders of cryptocurrencies (including Proposed Class Members holding BSV) are likely to be speculative investors who are willing to take higher risks in return for higher potential returns.

56. That being the case, whatever price BSV might have fallen to, its holders could have replaced their holdings with another cryptocurrency. In principle, therefore, their loss should be based on the cost to those holders of doing so.

(d) Reasonableness of divestment

57. The next question is whether it is reasonable to expect BSV holders to have divested their holdings following the delisting events, in light of Mr Noble's evidence as to the motivations and investment strategy of typical cryptocurrency investors.

58. The fact that typical cryptocurrency investors are speculative investors who are willing to retain their holdings during periods when prices are falling does not, in our judgment, displace the application of the market mitigation rule. As Leggatt J (as he was then) noted in *Thai Airways v KI Holdings* [2015] EWHC 1250 (Comm), [2016] 1 All ER (Comm) 675, [34]–[35], the test of what is reasonable in this context is not simply one of general rationality, but is governed by legal rules. Where the claimant is or should be aware of the wrongful conduct, and there is an available market for whatever has been lost, the expectation is that the claimant will go into that market as soon as possible and obtain a substitute; and damages are then calculated on the basis that the claimant has done so. That rule still applies if the claimant failed to enter into a substitute transaction for reasons which represent a commercially reasonable business decision from the subjective perspective of the claimant, or which reflect the claimant's personal objectives: see *Thai Airways*, [37] and *Sharp v Viterra*, [95].

59. The fact that a BSV holder's investment strategy may be to retain their cryptocurrency holdings for the long term notwithstanding falling prices does not, therefore, affect the analysis. If they were aware or should have been aware of the delisting events, and failed to replace their BSV holdings with alternative cryptocurrencies, a decision to retain their BSV holdings was a decision taken at their own risk.

60. Ms Ford's related submission was that alternative cryptocurrency investments may have been perceived as risky, and that the authorities indicate that claimants are not obliged to mitigate loss by risking capital in a speculative venture. She relied in this regard on the decision in *Jewelowski v Propp* [1944] 1 KB 510, in which Lewis J found that a claimant claiming damages for fraudulent misrepresentation could not be called upon to spend money to minimise the loss. That case concerned a claimant who had been induced by fraudulent misrepresentations to lend money to a company, which subsequently went into liquidation. The claimant claimed the difference between the amount of the loan and the amount which had been recovered under the security for the loan. The question was whether that claim should be reduced to take account of the fact that the claimant had subsequently bought the assets of the company in question from the receiver and resold them at a profit. The court found (perhaps unsurprisingly) that the damages representing the loss arising from the loan should not be reduced by the profits subsequently gained by the claimant's purchase of the company's assets.

61. The *Jewelowski v Propp* decision preceded the development of the market mitigation rule in the authorities to which we have referred above. In any event it is easy to see why in that case the claimant's purchase of the liquidated company's assets was not regarded as mitigating the loss, since it was a completely different business transaction. The case is not, however, authority for the proposition that the market mitigation rule should never operate where the relevant substitute investment is a speculative one. On the contrary, the rationale of the rule is precisely to crystallise the claimant's loss by reference to a substitutable transaction in markets where the eventual outcome may be inherently speculative, and where the defendant should not therefore be liable

for the adverse effect of market changes after the point at which that substitutable transaction should reasonably have been made.

62. In the present case, in circumstances where the investments in question were in cryptocurrencies and were inherently speculative, the PCR cannot avoid the operation of the market mitigation rule by protesting that any alternative cryptocurrency investment would also have been speculative.

63. We note, moreover, that the PCR's evidence does not establish that alternative cryptocurrency investments would have carried any greater risk to BSV holders than their BSV investments. Rather, Mr Noble's evidence, in his supplemental report, is simply that a BSV holder may reasonably have taken the view that after the fall in price of BSV following its delisting, the price was likely eventually to recover, or that other cryptocurrencies might be vulnerable to suffering the same type of delisting event as BSV at some future date. Those considerations illustrate, however, the speculative nature of any cryptocurrency investment, and do not establish that an alternative cryptocurrency investment should not be regarded as an adequate substitute for a holding of BSV. On the contrary, Mr Noble's supplemental report states expressly that an investor in BSV who withdrew their money from that cryptocurrency after the delisting events may reasonably have considered investing in alternative cryptocurrencies instead.

64. We therefore reject the submission that the reasonableness of mitigating by investing in alternative cryptocurrencies should be based on the investment motivations of the BSV holders and their reasons for retaining their holdings. The relevant question is whether there was, at the time of the delisting events (and thereafter), an available market on which substitutable cryptocurrency investments could have been made. Mr Noble's evidence confirms that there was such a market. Indeed, as Mr Kennelly pointed out, it is essential to Mr Noble's methodology that alternative cryptocurrencies can be identified as suitable comparators for the period following the delisting events.

65. We bear in mind, of course, that Mr Noble's evidence is necessarily provisional, and that the identification of the precise comparators for the quantification of

loss will be a matter for trial. But there was in the PCR's evidence, unsurprisingly, no suggestion at all that a different picture might emerge at trial as to the availability of alternative cryptocurrencies in general, in which investments could have been made.

(e) Ongoing coordination

66. Ms Ford submitted that the market mitigation rule could only be applicable if the Tribunal could be satisfied that the infringement and any "lingering effects" of that had ceased. In this case, she relied on Mr Noble's suggestion that the continuing lack of any relisting of BSV after the delisting events might potentially indicate ongoing coordination on the part of the Proposed Defendants not to relist BSV. Alternatively, she submitted that even absent further collusion the lack of relisting might reflect the ongoing consequences of the original infringement, in the form of concerns about loss of credibility.

67. We do not accept those submissions. In the first place, the suggestion of further collusion after the delisting events is not set out anywhere in the PCR's amended Claim Form, and no application to re-amend that to add further alleged collusion has been made by the PCR. Mr Noble's suggestion that there might be continuing coordination is therefore not a case advanced by the PCR.

68. As to the alternative submission regarding the ongoing consequences of the original alleged infringement, the market mitigation rule is not displaced by the fact that wrongful conduct may have continuing effects on the market. Rather, the question is the point in time at which it was reasonable for the claimant to enter into a substitute transaction on an available market. Once that point of time is established, the market mitigation rule requires a valuation of damages at that point, so as to draw a line under the transaction.

69. That valuation takes into account the potential for further loss of value to the product or service affected by the wrongful conduct, on the basis of continuing market effects, in the same way that it will reflect any other risks inherent in trading on the relevant market. Any continuing effects of the wrongful conduct are thus "priced into" the market value of the product or service which is lost,

at the time at which it was reasonable for the claimant to replace that with an available market substitute, and are therefore reflected in the calculation of loss at that point in time. As Lord Mance noted in *Salford City Council v Torkington*, at [62], in the context of breaches of undertakings by the council which had rendered a business worthless, the assessment of the value at the point at which the business was closed "necessarily takes into account the business's future potential, including any risks likely to affect it".

70. The fact that there may be continuing market effects is not, therefore, a reason not to apply the market mitigation rule, provided that those effects can be accounted for in the quantification of damages.

(f) Awareness

71. The final question is the extent to which BSV holders were actually, or should have been, aware of the delisting events. Mr Kennelly's submission was that the delisting of BSV by the Proposed Defendants was widely publicised at the time, following the various announcements on Twitter. He referred to a selection of news articles, published between 12–17 April 2019 by mainstream financial news media (Yahoo Finance, Bloomberg, the Financial Times) as well as specialist cryptocurrency sites (CoinDesk News, Bitcoin.com News, Blokt News, CoinDesk News, Finance Magnates and CoinTelegraph).

72. In addition, he referred to posts on the social media platform Reddit. The relevance of this was that the PCR itself states in its Amended Litigation Plan that most Proposed Class Members are likely to be technologically sophisticated, and the Amended Litigation Plan includes a proposal that consultation with the Proposed Class will take place (among other means) by "taking account the nature of the class, a campaign on Reddit, the global social news aggregation and discussion website, with a list of targeted subreddits (niche discussion forums on Reddit)".

73. Mr Kennelly said that, in these circumstances, the delisting events were reasonably discoverable by BSV holders, although (as noted above) he accepted

that the precise time at which those events were or ought to have been discovered would be a matter for evidence at trial.

74. Ms Ford's submission was that it could not be assumed that BSV holders as a class either were aware, or should have been aware, of the delisting events. Mr Noble's supplemental report opines that in light of the evidence available to him regarding the characteristics of cryptocurrency investors, there is a realistic prospect that a "significant portion" of BSV holders may not have been immediately aware of the delisting events, and could have remained unaware for a period of months, and that "some" might have remained unaware of the delisting events for many months or even years. He notes that the majority of investors in cryptocurrencies are individual retail investors; that not all holders of BSV would have been users of the relevant exchanges; and that a substantial minority of cryptocurrency holders do not check the value of their holdings frequently.

75. Mr Noble's further letter dated 24 May 2024 acknowledges the relevance of media coverage of the delisting events, but notes that the publications relied upon by Binance in this regard are financially-orientated media, or specialist cryptocurrency news websites, or Reddit forums focused on cryptocurrencies. He therefore does not consider that the news media coverage of the delisting events changes his conclusion that a significant portion of BSV holders may not have been immediately aware of the delisting events, and could have remained unaware of those events for "a period of months" after those events took place.

76. We observe, at the outset, that while Mr Chakrabarti exhibits the reports of the delisting in the news and social media channels referred to above, he does not adduce any evidence as to the extent to which BSV holders are likely to have gained awareness of the delisting events through those reports. The evidence cited by Mr Noble is, therefore, the only evidence before the Tribunal as to the awareness of BSV holders of the delisting events.

77. Mr Noble is an economist specialising in competition economics and quantification of damages, and is not an expert in the behaviour of cryptocurrency users. His comments about the likely awareness of BSV holders

are therefore entirely derived from FCA survey evidence as to the identity of cryptocurrency investors in general, their motivations for investing, and the frequency with which they monitor their holdings. It is not surprising, in those circumstances, that he puts the point no more highly than saying that a "significant portion" of BSV holders could have remained unaware of the delisting events for some months, and that "some" may have remained unaware for a period of years.

78. We do not regard this as particularly compelling evidence. Even leaving aside the fact that Mr Noble's comments are wholly based on the FCA survey evidence, and even then are put in very cautious terms, the proportions of cryptocurrency holders monitoring their holdings at given intervals has at best a tenuous connection to the question of what proportion of the *value* of BSV was held by people aware of the specific events. We also note that Mr Noble's evidence, such as it is, does not grapple with the question of whether investors *should have* been aware of the delisting events, irrespective of whether they were *actually* aware of those events.

79. Nonetheless, the test at this stage (whether we are considering strike out or reverse summary judgment) is not whether the PCR's case has been established on the facts, but whether it has a realistic as opposed to a fanciful prospect of success. We consider that the evidence before us (just about) crosses the threshold of providing a realistic basis for the proposition that at least *some* BSV holders may reasonably have remained unaware of the delisting events throughout the relevant period. We are also mindful of the point that we must consider not only the evidence before us but also the evidence that can reasonably be expected to be available at trial. We consider that it is reasonable to expect that at least some further relevant evidence *may* be available at trial as to what BSV holders can be expected to have known of the delisting events (and when), whether in the form of factual evidence or expert evidence.

(g) Conclusion on the market mitigation rule

80. It follows from our conclusion on the awareness issue that the Sub-Class B claim cannot be struck out or summarily dismissed. We will, however, return

below to the question of how this issue should be tried, having regard to the paucity of evidence currently before us on this issue.

(2) The loss of a chance claim

(a) The law

81. It is by now well-established that where a claim for loss is based on a counterfactual analysis of whether the claimant would have obtained some benefit but for the defendant's wrong, and that question turns on the hypothetical decisions or actions of a third party, loss may be calculated on the basis of the lost chance of the benefit to the claimant. In such a case, provided that the claimant can show that it had a real or substantial chance of obtaining that benefit, the assessment of quantum will be based on the evaluation of where in the range of probability the chance lay: *Allied Maples v Simmons & Simmons* [1995] 1 WLR 1602, p. 1614D.

82. Applying that principle, in *Equitable Life v Ernst & Young* [2003] EWCA Civ 114, at [83], the Court of Appeal considered that Equitable Life could maintain a claim for the lost chance of selling the company, in circumstances where the claim "depends on the hypothetical reactions of a third party, as here the willingness of a potential buyer to buy Equitable's business at an acceptable price", drawing a distinction between this and "a readily available market like a commodity market" (at [83] and [87]). Likewise in an *obiter* discussion at [54] of the *Salford* case, Potter LJ endorsed a loss of chance analysis where the chance that a particular course of events would have occurred was "dependent on the hypothetical actions of third parties". More recently in *Vasiliou v HajiGeorgiou* [2010] EWCA Civ 147521, Patten LJ described the *Allied Maples* approach as being applicable "where the recovery of the alleged loss depends upon the actions of a third party whose conduct is a critical link in the chain of causation".

83. By contrast, where the claimant does not rely on a lost opportunity to make a specific benefit which is dependent on particular actions of a third party, but rather claims that it lost the opportunity to trade profitably more generally, the

question is whether the claimant would have traded profitably, and if so what that profit would have been, making the best attempt the court can to establish that on the evidence: Bryan J in *AssetCo v Grant Thornton* [2019] EWHC 150 (Comm), [2019] Bus LR 2291, [441]–[422].

84. As the Court of Appeal noted in *Vasiliou* at [25]:

> "Where the quantification of loss depends on an assessment of events which did not happen, the judge is left to assess the chances of the alternative scenario he is presented with. This has nothing to do with loss of chance as such. It is simply the judge making a realistic and reasoned assessment of a variety of circumstances in order to determine what the level of loss has been."

85. That approach is routinely applied to the quantification of damages in a competition law context. Thus in *Royal Mail Group v DAF Trucks* [2023] CAT 6, the Tribunal emphasised the need to apply the "broad axe" approach, in order to accommodate the difficulties of proof inherent in the quantification of competition law damages (at [174]). It went on to apply that approach to the evidence presented in the (diametrically opposed) expert models, together with the other witness evidence, resulting in the determination of an overcharge figure of 5% (at [484]). That approach was upheld on appeal, with the Chancellor commenting that once loss had been established on a balance of probabilities, the court would do its best to quantify the compensation on the available evidence, deploying the principle of the broad axe: [2024] EWCA Civ 181, [145].

(b) The parties' submissions

86. Mr Kennelly contended that the PCR's alternative case on loss of a chance should be struck out or summarily dismissed on the grounds that it does not fall within the established parameters of the loss of chance doctrine, since the forgone growth effect is not alleged to arise from the loss of a specific opportunity dependent on the actions of a particular third party. In any event, he said, a claim for the forgone growth effect framed on the basis of a loss of chance would also be subject to the market mitigation rule, so should be struck out or summarily dismissed on the same basis as set out above.

87. Ms Ford emphasised that her primary case was that if not delisted BSV would have become a major cryptocurrency; and that if that was established on a balance of probabilities then the question was simply quantification on the evidence before the court, applying the usual principles. On that basis, she suggested that the loss of chance analysis might turn out to be "relatively narrow".

88. It is, nevertheless, apparent that the PCR's loss of chance claim is maintained as a fallback position in the event that the Tribunal cannot find that BSV would have become a major cryptocurrency on a balance of probabilities. Ms Ford submitted that, in that context, the *Allied Maples* principle is not limited to the actions of an identified third party, but extends to a situation where what is at issue is the reactions of the market to a particular event. She also contended that the application of that analysis is not a purely legal question but is a fact-sensitive question for trial.

(c) Discussion and conclusion

89. We agree with Mr Kennelly (indeed we do not understand it to have been disputed by Ms Ford) that the market mitigation rule, if it applies in this case, must apply equally to a claim advanced on a loss of chance basis. Nevertheless, it follows from our conclusion above as to the market mitigation rule that we do not consider that the Sub-Class B claim can be struck out or summarily dismissed on that basis. The market mitigation rule is therefore not a basis for the dismissal, at this stage, of the alternative loss of chance claim.

90. We do not, however, consider that the loss of chance claim is sustainable as a matter of principle, for the reasons given by Mr Kennelly. In so far as any claim for a forgone growth effect can be advanced following determination of the market mitigation issue on the facts, the PCR's claim is that BSV would have been higher absent the alleged infringement, because it would have become a major cryptocurrency. That claim does not depend on any particular actions or decisions of any particular third party, but turns rather on the general question of whether, as the PCR contends, BSV would (but for the infringement) have developed into a "top tier" cryptocurrency in the long term.

91. That is a causation question that can readily be determined by the Tribunal on a balance of probabilities (as Ms Ford accepted), taking into account the particular features of BSV, specific events that occurred in the period following the delisting events (described by Mr Noble as "possible catalytic events" which "could have propelled BSV to the status of a top-tier currency"), and the relevant characteristics of the markets as a whole. If that is established, the Tribunal will then have to establish what the trading price of BSV would have been at the relevant point(s) in time in the counterfactual case, doing the best it can on the material before it at trial. The fact that both questions will involve consideration of a broad range of factors including the features of BSV, market characteristics, and the risks and possibilities of market changes, is inherent in any damages quantification exercise which turns on the question of the profitability of hypothetical future trading. That does not mean that the claimant in every such case can simply fall back on a loss of chance claim in the event that they are unable to establish the claimed profitable trading on a balance of probabilities.

92. We do not regard the court in *BritNed v ABB* [2018] EWHC 2616 as indicating the contrary. Ms Ford relied on the passage at [12(6)] of that judgment where Marcus Smith J commented that:

> "An assessment or quantification of damages involves the taking into account of all manner of risks and possibilities … Of course, 'loss of a chance' analysis may be appropriate when quantifying a claimant's loss, but that is by no means the only tool or even the most useful tool that is available to the court."

93. We do not read that passage as doing anything other than recognising the (unexceptionable) proposition that loss of a chance is an approach to the quantification of loss that is available to the court in appropriate cases. That does not mean that it is available as an alternative to proof of loss on a balance of probabilities, in every case in which the loss claimed turns on factors which are uncertain or contingent.

94. In the present case, for the reasons given above, we do not consider that a loss of chance analysis is applicable. That is not, in our view, a fact-sensitive question which needs to await a full trial. Indeed, Ms Ford was unable to explain at the hearing what facts would have to be found at the trial in order to determine whether this is a case in which a loss of chance claim is available to the PCR.

Rather, her submission was ultimately that it is necessary to identify (i) the circumstances in which a loss of chance claim may be advanced, and (ii) to what extent the claims in the case fall within the scope of that principle. The first of those two questions is a legal question which, as we have set out above, is in our judgment established by the existing case law. The second of those questions turns on the nature of the case advanced by the PCR. For the reasons we have given, the claimed loss for Sub-Class B does not rely on any feature which would render a loss of chance analysis appropriate.

(3) Conclusion on the strike out application

95. We therefore strike out the loss of chance claim for Sub-Class B. We do not, however, otherwise strike out or summarily dismiss the claim for Sub-Class B.

F. CERTIFICATION OF THE PROPOSED CLAIMS

96. As we have said at the outset of this judgment, none of the Proposed Defendants oppose certification of the claims in principle. While that does not (as noted at [32]) render certification automatic, we have considered carefully the material in the PCR's amended Claim Form and evidence, and the submissions made in the PCR's skeleton argument, and we do not in this case consider that there are any grounds on which we should decline to make a collective proceedings order.

97. Having said that, in light of the submissions made in writing and at the hearing, we make some further comments on two issues, namely (1) the funding arrangements; and (2) the case management of the proceedings in the light of the issues raised by Binance's application.

(1) The funding arrangements

98. We note that while there has been extensive correspondence from the Proposed Defendants taking points of objection to the funding arrangements, none of the Proposed Defendants now object to the certification of the collective proceedings on funding (or indeed any other) grounds. Nor did any of the Proposed Defendants make any submissions at all at the hearing (whether in

writing, or orally) on the adequacy of the funding arrangements. We therefore comment only briefly on the arrangements that have been put in place.

99. The PCR's original Litigation Funding Agreement with Softwhale was entered into on 29 July 2022. Following the judgment of the Supreme Court in *PACCAR v Competition Appeal Tribunal* [2023] UKSC 28, [2023] 1 WLR 2594, the PCR and Softwhale agreed an Amended and Restated Litigation Funding Agreement ("Amended LFA"), with effect from 1 October 2023, which provides up to £18.6m of funding for the PCR's costs. The funder's fee under the Amended LFA is calculated by reference to a multiple of the total funding commitment, which the Tribunal has confirmed does not give rise to a breach of the Damages Based Agreement Regulations 2013 or section 58AA of the Courts and Legal Services Act 1990: see e.g. *Alex Neil v Sony* [2023] CAT 73, [158] and *Mark McLaren v MOL (Europe Africa)* [2024] CAT 10. The funder's return under the Amended LFA is not payable in priority to the Proposed Class, but is payable only from the undistributed damages pursuant to Rules 93(4) or 94 (as applicable) of the Tribunal Rules. Softwhale's performance of the Amended LFA is guaranteed by Mt Burgos Holdings Ltd, up to an amount of over £9.8m.

100. While this is the first time that Softwhale has funded litigation in England and Wales, and Softwhale is not a member of the Association of Litigation Funders ("ALF"), it has agreed to provide an undertaking to comply with the ALF Code of Conduct requirements on cash flow and capital adequacy for as long as it continues to provide funding in these proceedings. We consider that this undertaking, specifying precisely which Code of Conduct requirements will be complied with, should be a condition of certification.

101. Adverse costs were initially covered by an indemnity under the original LFA, but are now addressed by an After the Event ("ATE") insurance policy which provides cover of £2m up to certification and £14m post-certification. The policy includes an Anti-Avoidance Endorsement ("AAE") effective from 3 October 2023. In so far as the ATE policy is insufficient to cover any adverse costs order, a deposit of £5m cash is held in the Claim Trust Account, and the LFA includes an undertaking to ensure that the Claim Trust Account is maintained at a minimum level of £5m.

102. In light of the terms of these agreements and undertakings, and particularly the amendments to the arrangements made under the Amended LFA and ATE policy, we consider that the funding arrangements are robust and that the PCR will (pursuant to Rule 78(2)(d) of the Tribunal Rules) be able to pay the Proposed Defendants' recoverable costs if ordered to do so. We do not consider it necessary to impose any of the further conditions that have been suggested by various of the Proposed Defendants in correspondence.

(2) Case management

103. As we have already noted, the claim for the forgone growth effect for Sub-Class B and the Binance holdings in Sub-Class C has a dramatic effect on the overall size of the claim. The result is that while the majority of class members (64%) are estimated by Mr Noble as falling into Sub-Class A, the vast majority of the estimated value of the claim is derived from the claim for Sub-Class B and the Binance holdings in Sub-Class C. On Mr Noble's estimates, using Bitcoin as the relevant comparator, 99.8% of the claim is for Sub-Class B and the Binance holdings in Sub-Class C. If Bitcoin Cash is the relevant comparator, that figure reduces to 63% but is still a significant majority of the claim.

104. There are several reasons why, in our view, it would be unsatisfactory for a full trial to proceed with extensive evidence (including expert economic evidence) as to the quantification of the forgone growth effect, for the purposes of Sub-Class B and the Binance holdings in Sub-Class C, on the basis of the material currently before the court regarding the claim for those Sub-Classes.

105. First, we have concluded that we cannot exclude at this stage the possibility that at least *some* BSV holders may reasonably have remained unaware of the delisting events throughout the relevant period, and hence do not strike out or summarily dismiss the claim for Sub-Class B. However, the evidence currently before us as to the extent to which any BSV holders could reasonably have remained sufficiently unaware so as to exclude the market mitigation rule is (as we have said) scant and high-level, with no detailed explanation of the further evidence that is expected to be available at trial. If the evidential position is not

substantially improved following further investigation, the PCR may well not be able to establish any case at all as to the forgone growth effect.

106. Secondly (and related to the first point), any claim for a forgone growth effect for the purposes of Sub-Classes B and C will require quantification of the size of those Sub-Classes and the value of commerce in respect of which that loss is said to arise. As set out above, Mr Noble's provisional analysis calculates the size of those Sub-Classes and the corresponding value of commerce on the basis of a series of assumptions based largely on FCA survey data, together with further assumptions as to the relative distribution of BSV holdings across different investors. Mr Noble suggests that disclosure will enable him to refine his calculations in this regard. But the material currently before us provides little illumination as to what further disclosure might be available to enable the PCR to establish the volume and value of BSV holdings in respect of which a forgone growth effect for Sub-Classes B and C can be claimed.

107. In particular, even if the PCR were to be able to establish the existence of *some* BSV holders who might reasonably have been unaware of the delisting events throughout the relevant period, there is no explanation (whether from Mr Noble or otherwise) as to the evidence that is expected to be available at trial as to the proportion of BSV holders falling into that category, and the value of their holdings as compared to other BSV holders.

108. Thirdly, there may be a more general question of whether (even leaving aside the market mitigation rule) the claimed forgone growth effect can be maintained as a matter of causation and/or remoteness.

109. We will therefore wish to consider with the parties, at an early stage, the extent to which it may be appropriate to order a preliminary issue trial to determine the extent to which the current claims for Sub-Classes B and C, and in particular the forgone growth effect claimed in relation to those Sub-Classes, can be maintained as a matter of principle. There may obviously be other matters which might be canvassed for inclusion in any preliminary issue trial. Careful consideration will also have to be given to the extent of any disclosure required for any preliminary issues that are suggested.

G. CONCLUSION

110. For the foregoing reasons, we intend to grant the application for certification of the proposed claims, subject to the strike out of the loss of chance claim for Sub-Class B, and subject to the requirement that the Proposed Class Representative's funder provides the undertaking specified in paragraph [100] above. Upon receipt of that undertaking, subject to any points which would cause us to reconsider, we will make the formal order to grant the collective proceedings order.

111. This Judgment is unanimous.

The Hon. Mrs Justice Bacon
Chair

Michael Cutting

John Davies

Charles Dhanowa O.B.E., K.C. (*Hon*)
Registrar

Date: 26 July 2024