Neutral Citation Number: [2025] EWCA Civ 661

Appeal No: CA-2024-002264
Case No: 1523/7/7/22

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COMPETITION APPEALS TRIBUNAL
Mrs Justice Bacon, Michael Cutting and John Davies
[2024] CAT 48

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/05/2025

Before:

SIR GEOFFREY VOS, MASTER OF THE ROLLS
LORD JUSTICE MALES
and
LORD JUSTICE SNOWDEN

- -

Between:

BSV CLAIMS LIMITED

Applicant/Appellant

v.

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

Respondents/Respondents

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John Wardell KC and **William Hooper** (instructed by **Velitor Law**) appeared on behalf of **the Appellant**, the class representative (the representative).

Brian Kennelly KC and **Jason Pobjoy KC** (instructed by **Steptoe International (UK) LLP**) appeared on behalf of **the Respondent**, the sixth defendant (Binance).

Hearing date: 8 May 2025

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JUDGMENT

This judgment was handed down remotely at 2.00pm on 21 May 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

SIR GEOFFREY VOS, MASTER OF THE ROLLS:

Introduction

1. The representative brought these opt-out collective proceedings on behalf of some 243,000 holders of a cryptocurrency known as Bitcoin Satoshi Vision (BSV). The value of BSV is alleged to have been reduced by the defendants' anti-competitive and collusive conduct in delisting BSV from their cryptocurrency exchanges between 12 April and 5 June 2019. One of these exchanges, Binance, applied to strike out (and for reverse summary judgment in respect of) the part of the representative's claim that was being brought on behalf of one category of BSV holders, namely some 75,000 holders in sub-class B. The sub-class B holders were those who held BSV on 11 April 2019 and continued to hold them on 29 July 2022, when these proceedings were initiated.

2. The Competition Appeal Tribunal (the Tribunal) declined to strike out the claims made by the representative on behalf of sub-class B. At first sight, therefore, the representative had nothing to appeal. Instead, the Tribunal gave a decision which, according to the Registrar of the Tribunal, has had the effect of narrowing the claim on behalf of sub-class B. The Tribunal's decision has never been reflected in an order, so this appeal takes the form of a challenge to the correctness of parts of the Tribunal's reasoning. I shall return to say something about the desirability of that approach in due course.

3. The defendants' conduct allegedly caused the value of a single BSV coin to fall from £55 on 11 April 2019 to £39 on 18 April 2019. Thereafter, BSV's value fluctuated but was always capable of being bought and sold on other exchanges notwithstanding the defendants' exchanges having delisted it. The representative is essentially claiming: (a) the fall of £16 per BSV coin (£55 less £39) on behalf of sub-class A holders who sold BSV coins before the start of these proceedings, and (b) the entire £55 per coin on behalf of sub-class C holders who completely lost access to their BSV coins on the Kraken exchange as a result of the defendants' conduct, and greater sums for those on the Binance exchange in a similar position (see below). No attempt was made by Binance to strike out the claims of sub-classes A and C.

4. In contrast to the representative's claims on behalf of sub-classes A and C (Kraken), the representative is claiming much more on behalf of sub-class B holders. Such an additional claim is also made on behalf of sub-class C holders who completely lost access to their BSV coins on the Binance exchange, but for some reason that claim was not the subject of the strike out application.

5. The claim on behalf of sub-class B holders is put on the basis of what Mr Robin Noble, the representative's expert (Mr Noble) has termed a "foregone growth effect". The case theory suggests that the defendants' anti-competitive conduct has deprived the sub-class B holders of the massive growth in the value of BSV, which would have occurred when it (or had it) become a top-tier crypto-currency such as Bitcoin itself or Bitcoin Cash. On the counterfactual assumption that BSV would have increased massively in value like Bitcoin, the total claim made on behalf of sub-class B holders is put at £8.9919 billion. On the basis that sub-class B's BSV coins were worth £25.5 million on 11 April 2019 (as Mr Noble contends), the representative's maximum claim is for 352.62 times the value of sub-class B's BSV coins before the conduct complained of began.

6. I asked Mr John Wardell KC, leading counsel for the representative, at an early stage in the hearing how the representative could possibly claim hundreds of times more than the value of the assets that the defendants had allegedly damaged. He was unable to give any answer. Nonetheless, the representative argued that the Tribunal ought not to have limited the claims of the sub-class B holders at the summary judgment stage. As Mr Wardell put it orally, evidence was required as to "precisely what BSV is, how unique it is, whether or not there is a substitute, [and] how reasonable was it to hang on to the coins after … the delisting". Moreover, Mr Wardell introduced a new argument that all the sub-class B holders wanted was to be able to argue at trial that their damages should be assessed as at that date. Presumably that was an argument that they should be compensated by the difference between BSV's putative value at that date, had it become a top-tier cryptocurrency (like Bitcoin), less its actual value at the date of trial.

7. As the Tribunal explained, its decision depended on what is called either the "breach date rule" or the "market mitigation rule" explained in *Aylwen v. Taylor Joynson Garrett* [2001] EWCA Civ 1171 (*Aylwen*) and *The Golden Victory* [2007] 2 AC 353. Lord Brown said this in the latter case at [79]:

> 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.

Lord Leggatt explained the exception to this rule in *Stanford International Bank v. HSBC Bank* [2022] UKSC 34, [2023] AC 761 at [43] as follows:

> So where, for example, a seller wrongfully fails to deliver goods, the market mitigation rule generally means that the measure of damages is the difference between the contract price and the market price of the goods at (or shortly after) the date when the goods should have been delivered: hence the prima facie measure of damages stated in section 51 of the Sale of Goods Act 1979. But where the market mitigation rule does not yield this result - as, for example, where the claimant is not aware of the defendant's breach until some time later or where there is no available market in which an adequate substitute for the lost performance can be obtained - the relevant loss will occur, and the damages will therefore be measured, at a different date.

8. The Tribunal also held that the market mitigation rule presupposed that the claimant was either actually aware of the relevant wrongful conduct, or should have been aware of that conduct (see *Secretary of Health v. Servier* [2016] EWHC 2381 (Ch) at [42]).

9. The Tribunal explained its decision at [64]-[65], where it said:

> 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.
> …

> 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.

10. The representative's solicitors wrote to the Tribunal in August 2024 asking about the scope of what had been decided by the Tribunal in relation to the application of the market mitigation rule to the facts of the case, and what remained to be determined at trial. They asked whether the Tribunal considered that it had already determined the damages issue against all the sub-class holders who were aware of the delisting events. The Registrar replied that the Tribunal had decided at [64]-[65] on the basis of the representative's own evidence "that there was, at the relevant time, an available market on which substitutable cryptocurrency investments could have been made, for the purposes of the application of the market mitigation rule". Accordingly, the Tribunal had rejected the representative's arguments that, for various reasons, it would not have been reasonable to expect sub-class B holders to have divested their holdings following the delisting events.

11. On the basis of that correspondence, the representative was in no doubt that, despite Binance having failed to strike out the representative's sub-class B claims, and subject to arguments about whether sub-class B holders were aware of the delisting events, it would be assumed at trial that those holders could and should have sold their holdings of BSV after those events and bought another substitutable cryptocurrency. The sub-class B holders would, therefore, generally only be entitled to the same damages as the sub-class A holders, namely the fall in the value of BSV as an immediate result of the delisting events (which was £55 less £39 per BSV coin, according to Mr Noble's evidence – see [3] above). They would **not** be entitled to 352.62 times (or any other multiple depending on which cryptocurrency was shown to be the appropriate equivalent) the value of BSV.

12. The main issue on this appeal is whether the Tribunal was right to make this determination on Binance's strike out application. The subsidiary question is whether the Tribunal was also right to reject the representative's argument that it could claim the same sums as the loss of a chance, the chance being the possibility that BSV would have increased dramatically in value to become a top-tier cryptocurrency, like Bitcoin.

13. I have decided that the representative's appeal must fail on both points, because it is clear now, without a trial, that those sub-class B holders who knew of the delisting events could have mitigated their loss by divesting themselves of BSV on the basis that there was an available market of substitutable cryptocurrencies. That was Mr Noble's unequivocal evidence, and also the basis on which he argued that the sub-class B holders had suffered a loss worth many times the value of their BSV coins.

14. I shall explain my reasons for having reached these conclusions under the following headings: (i) factual background, (ii) the Tribunal's decision, (iii) whether the Tribunal was right to decide that the market mitigation rule applied to the sub-class B holders, (iv) whether the Tribunal was right to reject the representative's claim for the same damages as the loss of a chance, (v) whether the Tribunal ought to have reflected its findings in an order, and (vi) conclusion.

Factual background

15. I have already dealt with the facts that are relevant to this appeal. Readers should refer to the Tribunal's decision for the details. The additional facts in this section are largely taken from [1]-[24] of the Tribunal's decision.

16. Alongside the strike-out, the Tribunal decided that an opt-out collective proceedings order should be made in respect of the representative's claims pursuant to section 47B of the Competition Act 1998. It is to be noted that, despite the parties providing the Tribunal with a draft order in respect of both applications, the Tribunal has not yet made an order. The order that the parties agreed in respect of the strike out was as follows:

> 1. The Partial Strike-Out Application is refused, save for the loss of chance claim for Sub-Class B, which is struck out.
>
> 2. The foregone growth effect asserted by [the representative] in relation to Sub-Class B is irrecoverable in law save to the extent that BSV holders reasonably remained unaware of the delisting events through the relevant period.

17. The representative's claim is against the defendant operators of cryptocurrency exchanges in respect of conduct infringing article 101 of the Treaty on the Functioning of the European Union and the Chapter I prohibition under section 2 of the Competition Act 1998. It is alleged that the defendants colluded to delist BSV from their exchanges between 12 April 2019 and 5 June 2019. The defendants operated four exchanges known as Bittylicious, Kraken, ShapeShift and Binance.

18. None of the defendants opposed certification, but Binance applied, as I have said, to strike out parts of the claim. Evidence was filed on both sides, but the evidence most relevant to this appeal was Mr Noble's two reports dated 29 July 2022 and 12 April 2024 respectively.

19. Bitcoin was created in 2009 by an inventor using the pseudonym of Satoshi Nakamoto. Some cryptocurrencies have appeared as a result of protocol changes in the Bitcoin blockchain causing splits, known as hard forks. Hard forks led to the creation of Bitcoin Cash in 2017 and BSV in 2018. BSV was promoted by Dr Craig Wright, who became notorious for claiming to be Satoshi Nakamoto. That claim has now been discredited (see *Crypto Open Patent Alliance v. Craig Steven Wright* [2024] EWHC 1198 (Ch)). The controversy over Dr Wright's claims led the defendants to make public statements between 12 and 19 April 2019 objecting to Dr Wright's conduct and denouncing him as a fraud. In those statements, the defendants announced their intention to delist BSV from their exchanges, and called upon others to do the same. The defendants then delisted BSV between 15 April and 5 June 2019.

20. So far as Binance is concerned, BSV holders were required to withdraw their holdings before 22 July 2019. Although withdrawals were open for two weeks in late 2021, remaining holdings were thereafter converted to another cryptocurrency. In effect, these holders lost free access to their BSV holdings. Kraken likewise disabled access to BSV held on its exchange with effect from 5 June 2019, converted those holdings to Bitcoin on 7 December 2019, minus a 10% conversion fee.

21. Mr Noble's reports refer to two main categories of loss: (i) an "immediate and persistent effect" arising from the fall in the price of BSV in the immediate aftermath of the delisting events (mainly the £55 less £39 referred to at [3] and [11] above), and (ii) the "foregone growth effect", resulting from what is described as being a lost opportunity for BSV to develop into a top tier cryptocurrency, comparable to Bitcoin or Bitcoin Cash.

22. The three sub-classes of claims are as follows:

    i) Sub-class A comprising some 155,000 members who held BSV coins on 11 April 2019 and sold some of them before 29 July 2022. Sub-class A claims only the so-called immediate and persistent effect.

    ii) Sub-class B comprising some 75,000 members who held BSV coins on 11 April 2019 and continued to hold them on 29 July 2022. Sub-class B claims both the immediate and persistent effect and the forgone growth effect.

    iii) Sub-class C comprises some 13,000 members who held BSV coins on 11 April 2019 and lost access to them on the Binance and Kraken exchanges. The Kraken members claim as sub-class A plus the 10% fee charged to convert them to Bitcoin. The Binance members claim broadly as if they were sub-class B holders.

23. Mr Noble's quantification of damages claimed is as follows (using Bitcoin and Bitcoin Cash as indicative comparators), assuming a 100% probability of BSV obtaining the price of the 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. As Mr Noble recorded in his reports, a 2023 FCA Report shows that (a) 39% of cryptoasset owners held cryptoassets worth £100 or less, (b) 60% of cryptoasset owners held cryptoassets worth £500 or less, and (c) only 11% of owners held cryptoassets

valued at over £5,000. It was not suggested that this profile would not have applied also to sub-class B holders of BSV.

25. Before leaving the factual background, it is worth noting that, as is common in proceedings before the Tribunal, the representative's claim is pleaded by reference to experts' reports. In this case, at [8]-[10] of the Amended Collective Proceedings Claim Form dated 6 October 2023, the damages claimed are pleaded in terms of the so-called "immediate and persistent effect" and the so-called "foregone growth effect". I note immediately that these are not legal concepts, but an expert's construction. The issues in this appeal would have been easier to grapple with if the claims had been pleaded in a more orthodox fashion. The loss of or damage to an asset is normally pleaded as a loss of or reduction in value of the asset with or without consequential losses.

The Tribunal's decision

26. I have dealt already with the majority of the relevant reasoning of the Tribunal. I have not, however, explained how the Tribunal reached its conclusion at [81]-[95] that the representative's loss of a chance claim should be struck out.

27. The Tribunal said that it was well-established that loss may be calculated on the basis of the lost chance of a benefit to the claimant, provided that the claimant can show that it had a real or substantial chance of obtaining that benefit. In that event, the assessment of quantum was based on the evaluation of where in the range of probability the chance lay (see *Allied Maples v. Simmons & Simmons* [1995] 1 WLR 1602 at 1614D). A loss of chance analysis was appropriate where the chance that a particular course of events would have occurred was dependent on the hypothetical actions of third parties (see *Equitable Life v. Ernst & Young* [2003] EWCA Civ 114 at [83] and [87], *Salford City Council v. Torkington* [2004] EWCA Civ 1646 per Potter LJ at [54], and *Vasiliou v. HajiGeorgiou* [2010] EWCA Civ 1475 per Patten LJ at [21]).

28. The core of the Tribunal's reasoning is at [89]-[91]. First, the Tribunal said that the market mitigation rule applied equally to a claim advanced on a loss of chance basis, but since the claim survived strike out (because some sub-class B holders might not have known of the delisting events), the loss of a chance claim did too.

29. Secondly, the Tribunal held that the loss of chance claim was not sustainable as a matter of principle. The representative's claim was that BSV would have grown in value absent the alleged infringement. That claim did not depend on any particular actions or decisions of any particular third party. It turned on the causation question of whether BSV would have developed into a top tier cryptocurrency, which the Tribunal could determine on a balance of probabilities. It would entail consideration of the particular features of BSV, specific events that occurred following the delisting events and the relevant characteristics of the markets as a whole. If the causation question were resolved in the representative's favour, the Tribunal would decide the trading price of BSV at the relevant points in time, doing the best it could: "[t]he fact that both questions [involve] consideration of a broad range of factors [was] inherent in any damages quantification exercise which turns on the question of the profitability of hypothetical future trading". It did not mean that those represented could "simply fall back on a loss of chance claim in the event that they [were] unable to establish the claimed profitable trading on a balance of probabilities".

30. Finally, the Tribunal said at [94] that the loss of chance analysis was not applicable here. That was not a fact-sensitive question that needed to await a full trial. Sub-class B's losses did not rely on any feature which would render a loss of chance analysis appropriate.

Was the Tribunal right that the market mitigation rule applied to sub-class B holders?

31. As I have already recorded, the representative's main argument was that the claim for large multiples of the value of the BSV held by sub-class B holders should not be dismissed before there had been disclosure and evidence. He wanted, in essence, to preserve the argument that BSV was a unique cryptocurrency without a suitable substitute, so that it was reasonable for class B holders to keep their BSV after the defendants had delisted it. The consequence, according to the representative, is that they can claim up to some 352 times the value of their BSV coins when the conduct complained of began, whether or not they actually could have sold their BSV coins and bought Bitcoin or Bitcoin Cash so as to take advantage of the increases in the values of those replacement assets.

32. These arguments are, in my judgment, and as the Tribunal held, flawed. Each element of the argument is wrong insofar as it is suggested it should apply to those holders who were, or should have been, aware of the delisting events.

33. First, BSV was obviously not a unique cryptocurrency without reasonably similar substitutes. This is, as the Tribunal said, the representative's own case, since it uses the comparators of Bitcoin and Bitcoin Cash to make its claims for the so-called "foregone growth effect".

34. Secondly, cryptocurrencies are, by their nature, volatile investments. It is not possible to treat them as if they were real property. They are tradeable assets, equivalent (in this context) to shares, derivatives or other tradeable financial instruments. It would be unthinkable for the holders of freely tradeable shares, whose value had been reduced by tortious conduct, to be able to claim more than the current value of those shares to compensate them for the prospect that their value might have substantially increased in the future. The same principle applies here. It is called the market mitigation rule.

35. Thirdly, once the sub-class B holders knew of the allegedly wrongful delisting events, they had a decision to make. They were at liberty to retain their BSV holdings or to sell them and crystallise their loss (just as the sub-class A holders did). If the sub-class B holders retained their BSV coins, that was their right, but it did not entitle them to argue that their losses should be assessed by reference to the value of some other better-performing cryptocurrency at some future unspecified date. If they wanted to invest in Bitcoin or Bitcoin Cash or anything else, they were always at liberty to do so. Once the sub-class B holders knew of the delisting events, their investment decisions were nothing to do with the defendants. They had a duty to mitigate their losses, and they cannot recover losses that they could reasonably have mitigated. In relation to tradeable assets such as BSV, that meant selling them or retaining them, but either way their maximum loss is calculated by reference to the value they could have received for them once they knew or ought to have known of the wrongful conduct.

36. A number of other arguments were addressed as to the value of BSV. For example, it was suggested that, if all the holders claiming had sold, the value would have reduced

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

37. I agree with the Tribunal's approach to the legal position (see [7]-[9] above). There was no need for a trial as to whether or not there were suitable substitutes for BSV, since it was accepted that it was a freely tradeable cryptocurrency and that other comparators were available to the sub-class B holders.

Was the Tribunal right to reject the representative's claim for the loss of a chance?

38. In my judgment, the loss of a chance analysis is flawed for the same reasons. The representative seeks to argue that it can claim for the loss of a chance because the future value of BSV depends on the vagaries of third-party actions in relation to the market in BSV. That argument assumes that it was reasonable mitigation for the sub-class B holders to have retained their holdings once they became aware of the delisting events. To be clear, it was **not** reasonable mitigation of the damage caused by the alleged tortious events to retain the damaged BSV coins in the vain hope that they might become a top-tier cryptocurrency. The loss caused could and should have been crystallised as soon as it was known about. As I have already said, if the sub-class B holders chose to retain their damaged holdings of BSV, they did so at their own risk.

39. This reasoning is not entirely the same as that of the Tribunal (see [28]-[30] above). I agree with the Tribunal that the loss of chance analysis was not applicable here. I agree also that that question is not a fact-sensitive one that needed a full trial. I agree also that sub-class B's losses did not rely on any feature which would render a loss of chance analysis appropriate. I am not sure that any further analysis is required. Whether or not the future value of BSV depended on the actions of third parties is irrelevant in the current case for the reasons I have given. The loss of a chance claim cannot survive the normal principles requiring the sub-class B holders to mitigate their losses.

Ought the Tribunal to have reflected its findings in an order?

40. I should make clear immediately that this point was raised by the Court, not by the parties. Both parties agreed, however, that it would have been better if the Tribunal had encapsulated what it had decided in an order.

41. As I have said at [16] above, the parties invited the Tribunal to make an order following correspondence with the Registrar. Had an order been made, the parties would have been able to address a concise statement of what the Tribunal had decided, instead of needing to undertake a diffuse challenge to and defence of the reasoning as a whole. In court proceedings, orders are always required. As I understand the position, the Tribunal sometimes refrains from making orders, even when an appeal is in prospect. I have not found any rule in the Competition Appeal Tribunal Rules 2015 that requires orders in addition to decisions. Nor have I found any rule that justifies the Tribunal in refraining from making an order.

42. In my judgment, an order of the Tribunal is useful and appropriate, at least whenever an appeal is in prospect. Further, even without an appeal, an order in this case would

have encapsulated the decision of the Tribunal and explained precisely what the representative could and could not argue at trial. The correspondence with the Registrar recorded at [10] above would not have been necessary.

43. The Registrar said that the Tribunal's decision was that: (a) there was, at the relevant time, an available market on which substitutable cryptocurrency investments could have been made, for the purposes of the application of the market mitigation rule, and (b) it would have been reasonable for sub-class B holders to have divested their holdings following the delisting events. The draft order (recorded at [16] above) said that: (a) the loss of chance claim for sub-class B holders was struck out, and (b) sub-class B's claim for a "foregone growth effect" was "irrecoverable in law save to the extent that BSV holders reasonably remained unaware of the delisting events through the relevant period".

44. I am not sure that either formulation was entirely appropriate. There was no trial of a preliminary issue. Applications for both strike out and summary judgment are normally and properly directed at pleaded claims. As I have said, at [25] above, the claim here was pleaded by reference to Mr Noble's report, which was, in itself, unhelpful. As I have also said, the term "foregone growth effect" has no established legal meaning, and the loss of or damage to an asset is normally pleaded as a loss of or reduction in value of the asset with or without consequential losses. We have not been shown Binance's strike out application itself.

45. To be clear, it seems to me that Binance's application has succeeded here and below in striking out sub-class B's claims: (i) for damages beyond the difference in value of their BSV holdings on 11 April 2019 and a point in time shortly after they were aware or ought to have been aware of the delisting events (and any quantifiable consequential losses such as trading fees), and (ii) for damages based on a loss of a chance. For the reasons I have already given, even if BSV holders reasonably remained unaware of the delisting events for much longer periods, I cannot see how they could ever claim more than the total value of their holding before the delisting events plus any quantifiable consequential losses such as trading fees.

46. I will leave it to the parties to agree a suitable order for this court to make to reflect this judgment.

Conclusion

47. For the reasons I have given, I would dismiss this appeal.

Lord Justice Males:

48. I agree.

Lord Justice Snowden:

49. I also agree.