# COURT OF APPEAL FOR ONTARIO

CITATION: Lochan v. Binance Holdings Limited, 2025 ONCA 221
DATE: 20250321
DOCKET: COA-24-CV-0591



Sossin, Favreau and Monahan JJ.A.

BETWEEN

Christopher Lochan and Jeremy Leeder

Plaintiffs (Respondents)

and

Binance Holdings Limited, Binance Canada Capital Markets Inc. and Binance Canada Holdings Ltd.

Defendants (Appellants)

Caitlin Sainsbury, Graham Splawski, and Pierre N. Gemson, for the appellants

James C. Orr, Alexandra Allison, and Jonathan Careen, for the respondents

Heard: February 26, 2025

On appeal from the order of Justice Edward M. Morgan of the Superior Court of Justice, dated April 19, 2024, with reasons reported at 2024 ONSC 2302.

**Monahan J.A.:**

## OVERVIEW

[1] The appellants, Binance Holdings Limited, Binance Canada Capital Markets Inc. and Binance Canada Holdings Ltd. (collectively, “Binance” or the “appellants”) appeal the certification of an action brought on behalf of Canadian investors who purchased cryptocurrency derivative products through an asset trading platform

operated by the appellants. The respondents propose to represent investors who purchased such products between September 13, 2019 and the date of certification (the "Class"). They allege that the appellants engaged in the business of trading in securities without registering, and distributed securities without complying with applicable prospectus requirements, in violation of the *Securities Act*, R.S.O. 1990, c. S-5 (the "*OSA*") and various other Canadian securities laws, giving rise to both common law and statutory causes of action (the "Claim").

[2] The motion judge found that the Claim satisfied the requirements of s. 5(1) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the "*CPA*"), certified the proceeding as a class action, and appointed the respondents as representative plaintiffs.

[3] The appellants argue that the motion judge erred in three respects: (i) by finding that the Claim pleads a reasonable cause of action, as required by s. 5(1)(a) of the *CPA*; (ii) by holding that the Claim raises common issues, as required by s. 5(1)(c) of the *CPA*; and (iii) because these two core conclusions were erroneous, the motion judge's findings on the remaining certification criteria were also tainted by error and cannot stand.

[4] As I explain below, the motion judge made none of the errors alleged by the appellants and correctly certified the Claim as a class proceeding. Accordingly, I would dismiss the appeal.

## BACKGROUND FACTS

[5] A derivative is a financial instrument whose value is derived from or based on an underlying interest or asset (the "Underlying Asset").[1] The purchaser of a derivative does not necessarily own the Underlying Asset but, rather, is contracting to deal in that Asset for a certain price or value at a later time. In effect, the holder of the derivative is speculating or hedging against the price movement of the Underlying Asset, depending on the nature of the contractual commitment they undertake.

[6] The cryptocurrency derivatives sold through the Binance website (the "Cryptocurrency Derivatives") were contracts which derived their value based on the price movement of cryptocurrencies. Retail investors could purchase Cryptocurrency Derivatives by registering and opening an account on the Binance website, loading funds or other assets into a digital wallet, and then clicking on the type of Derivative they wished to purchase. Binance operated a retail business in Canada involving three types of Cryptocurrency Derivatives: futures contracts, options contracts, and leveraged tokens. While each of these has distinct characteristics, they are all based on cryptocurrencies as the Underlying Asset.



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[1] See s. 1(1) of the *OSA*, which, subject to certain exceptions, defines a "derivative" as "an option, swap, futures contract, forward contract or other financial or commodity contract or instrument whose market price, value, delivery obligations, payment obligations or settlement obligations are derived from, referenced to or based on an underlying interest (including a value, price, rate, variable, index, event, probability or thing)…"

[7] Binance did not register with the Ontario Securities Commission ("OSC") to engage in the business of trading in securities, nor did it file or deliver a prospectus to purchasers of Cryptocurrency Derivatives. In April 2021, the OSC notified Binance that it was contemplating enforcement proceedings with respect to Binance's failure to register or comply with the applicable prospectus requirements. Various discussions ensued between the OSC and Binance over the next two years, which eventually resulted in the OSC issuing an investigation order and summons to Binance pursuant to ss. 11 and 13 of the *OSA* in May 2023.

[8] There is ongoing litigation between the OSC and Binance with respect to these matters: see e.g., *Binance Holdings Limited v. Ontario Securities Commission*, 2024 ONCA 805. In the meantime, in May 2023, Binance announced it would withdraw from operating in Canada and asked users to close any open positions by September 30, 2023.

**THE CLAIM**

[9] The Claim pleads that prospectus requirements are fundamental to Canadian securities laws since they ensure that investors are provided with full, true, and plain disclosure of all material facts relating to the securities being offered.

[10] The Claim further asserts that such disclosure is particularly important in the context of Cryptocurrency Derivatives. Cryptocurrency prices are said to be highly

volatile, and purchasers of Cryptocurrency Derivatives are typically highly leveraged, which magnifies both profits and losses associated with such transactions. The Claim alleges, for example, that an investor with $1,000 to trade could use that amount as collateral to open a contract position with Binance with a value of up to $125,000.

[11] The Claim alleges that Binance illegally sold securities to members of the Class, in that Binance's sale of Cryptocurrency Derivatives was a distribution of securities to Canadian investors without a prospectus, contrary to ss. 53(1) and 71(1) of the *OSA* and equivalent provisions in other Canadian securities law. The Claim further alleges that Binance actively, intentionally, and fraudulently concealed the fact that it was illegally trading in securities in Canada. The Claim asserts that because of such illegality, members of the Class are entitled to various remedies, including rescission or damages, pursuant to s. 133 of the *OSA* and equivalent provisions in other Canadian securities laws, or alternatively at common law.

## THE MOTION JUDGE'S DECISION

### (1) The cause of action criterion under s. 5(1)(a)

[12] The motion judge began his analysis by noting that the relevant legal test with respect to the "cause of action" requirement under s. 5(1)(a) of the *CPA* is identical to that on a motion to strike a statement of claim under r. 21 of the *Rules*

*of Civil Procedure*, R.R.O. 1990, Reg. 194, namely, whether it is “plain and obvious” that the statement of claim fails to disclose a reasonable cause of action. The allegations in the statement of claim are taken as being proven unless they are patently ridiculous or incapable of proof and, accordingly, no evidence may be considered for this part of the certification test: citing *McCreight v. Canada (Attorney General)*, 2013 ONCA 483, 116 O.R. (3d) 429, at para. 29. The bar that plaintiffs must meet is low and a claim will fail this criterion “only in the clearest cases”: citing *Temilini v. Ontario Provincial Police (Commissioner)* (1990), 73 O.R. (2d) 664 (C.A.), at para. 13.

[13] The motion judge found that the respondents had little difficulty in satisfying the cause of action requirement. He observed that the Capital Markets Tribunal (the “CMT”) has held that the sale of a cryptocurrency derivative is the sale of an “investment contract” and, therefore, of a “security” within the meaning of the *OSA*: *Polo Digital Assets, Ltd (Re)*, 2022 ONCMT 32, at para. 69. The CMT has also held that the *OSA* requires that persons engaged in the business of trading in cryptocurrency futures contracts be registered and comply with prospectus requirements unless an exemption applies: *Mek Global Limited (Re)*, 2022 ONCMT 15, at paras. 65, 89. The Claim alleges that Binance sold Cryptocurrency Derivatives in violation of these requirements, since they did not register under securities law and they failed to file and deliver a prospectus.

[14] The motion judge concluded that, taking the pleaded facts to be true, it is not plain and obvious that the Claim fails to disclose a recognizable cause of action. In fact, he described how the causes of action pleaded in the Claim are "squarely within the statutory terms, and there is at least some basis in fact in the record to substantiate them." He therefore found that the Claim satisfied the cause of action requirement under s. 5(1)(a) of the *CPA*.

**(2) The common issues criterion under s. 5(1)(c)**

[15] The motion judge noted that, in contrast to the "cause of action" requirement in s. 5(1)(a), a plaintiff must show that there is "some basis in fact" for the remaining elements of the certification analysis under s. 5(1) of the *CPA*. However, he also observed that the some-basis-in-fact standard is "much less stringent" than the ordinary balance of probabilities standard of proof in civil litigation. While the some-basis-in-fact standard has to be a "meaningful screening device" and the common issues must not be "bereft of factual support", at the certification stage the court is ill-equipped to "resolve conflicts in the evidence or to engage in the finely calibrated assessments of evidentiary weight": citing *Pro-Sys Consultants Ltd. V. Microsoft Corporation*, 2013 SCC 57, [2013] S.C.R. 477, at paras. 102-103.

[16] The respondents sought to certify eight common issues, four pertaining to liability and four pertaining to remedies. Pursuant to s. 5(1)(c) of the *CPA*, the respondents were required to show that there was "some basis in fact" that the

issues raised are common to the class. In order to satisfy this requirement, the respondents tendered documentary evidence, including the contracts that they had entered into with Binance, and argued that since these contracts were all the same, the issues raised could be resolved on a common, class-wide basis.

[17] Binance's argument on the common issues criterion was focused primarily on whether the Class members were entitled to recission, the fifth of the proposed common issues.

[18] Binance's position was that it was not a party to the trades in Cryptocurrency Derivatives but, rather, that it merely operated a platform that enabled buyers and sellers of such products to trade with each other. Binance argued that in these circumstances, recission of the transactions would require the party that profited from the transaction to return its profits to the party that suffered a loss. Not only would such a remedy be mechanically unworkable, but it would also create a built-in conflict of interest between different Class members since each member seeking recission would be making a claim against another Class member or Binance user.

[19] The motion judge dismissed Binance's argument with respect to the availability of recission for two related reasons.

[20] First, he held that there was no evidence in the record to support Binance's claim that Binance website users contracted with each other and that Binance was only a medium for these contracts. The only contracts that had been produced

were between Class members and Binance itself. Thus, there was no factual basis for Binance's position that rescission would necessitate an unwieldy unwinding of user-to-user contracts, or a conflict of interest among class members.

[21] Second, the motion judge pointed out that on a certification motion, the question is whether the remedial approach for one class member will be the remedial approach for all class members. It suffices that the record supports the conclusion that the class members' contracts are all the same and that the remedial approach can be answered on that basis. Evidence to the contrary may well emerge at a later stage of the proceeding but that will be a matter to be resolved at the common issues trial rather than the certification stage.

**(3) Remaining certification issues**

[22] The motion judge's analysis of the remaining certification criteria in ss. 5(1)(b), (d) and (e) of the *CPA* was relatively straightforward.

[23] On the issue of "identifiable class", the motion judge found that the Class definition proposed by the respondents could be applied objectively and was neither overly broad nor did it define the Class unduly narrowly.

[24] With respect to whether a class proceeding is the "preferable procedure", the motion judge noted that the OSC has reported that more than half of Canadian cryptocurrency asset owners have less than $5,000 in the market. Consistent with this court's decision in *Fischer v. IG Investment Management Ltd.*, 2012 ONCA 47,

109 O.R. (3d) 498, at paras. 79-82, the principle of access to justice supports the conclusion that a large number of small individual claims is not preferable to a class proceeding.

[25] Finally, on the issue of whether the representative plaintiffs are appropriate in the circumstances, they have no apparent conflict with any other Class members and can be expected to represent the interests of the class fairly and adequately.

[26] Accordingly, the motion judge certified the proceeding as a class action.

**GROUNDS OF APPEAL**

[27] Binance advances the following grounds of appeal:

1. the motion judge erred in his "cause of action" analysis, since the statutory causes of action does not fit within the scheme of the *OSA*, and the common law cause of action was not properly pleaded and in any event is not available in the circumstances;
2. the motion judge erred in his "common issues" analysis by improperly reversing the burden of proof and by failing to consider relevant evidence regarding the lack of commonality between class members, particularly on the availability of the remedy of rescission; and
3. the motion judge's errors on these two core issues permeated his analysis of the remaining certification criteria, with the result that his conclusions on those issues are also tainted by error and cannot stand.

**STANDARD OF REVIEW**

[28] The standard of review on appeal from a certification motion depends on the nature of the issue. In general terms, decisions on questions of law are reviewable on a standard of correctness whereas determinations of fact or of mixed fact and law are reviewable on a standard of palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 8, 10 and 36.

[29] In class action certification appeals, the identification of the necessary elements of the pleaded cause of action is a question of law reviewable on a standard of correctness, whereas the assessment of whether the pleaded material facts actually support those causes of action is a question of mixed fact and law reviewable on a standard of palpable and overriding error: *Lilleyman v. Bumble Bee Foods LLC*, 2024 ONCA 606, at para. 36; *Jensen v. Samsung Electronics Co. Ltd.*, 2023 FCA 89, 482 D.L.R. (4th) 504, at para. 43.

[30] Similarly, the identification of the correct legal test for determining whether there is “some basis in fact” for the proposed common issues is subject to review on a correctness standard, while the determination of whether the evidence adduced satisfies that test is a question of mixed fact and law that should not be disturbed absent a palpable and overriding error: *Lilleyman*, at para. 37; *Jensen*, at para. 43; *Palmer v. Teva*, 2024 ONCA 220, 98 C.C.L.T. (4th) 9, at para. 103; and *Pioneer Corp. v. Godfrey*, 2019 SCC 42, [2019] 3 S.C.R. 295, at para. 94.

[31] As is explained below, the first ground of appeal advanced by the appellants involves questions of law, namely, the correct interpretation of the relevant provisions of the *OSA*. These issues are reviewable on a standard of correctness.

[32] Similarly, the issue of whether the motion judge reversed the burden of proof in his "common issues" analysis is a question of law reviewable on a standard of correctness. However, the motion judge's determinations as to whether the respondents established that there is "some basis in fact" for the common issues involve issues of mixed fact and law, reviewable on a standard of palpable and overriding error.



## ANALYSIS

### (1) The motion judge did not err in finding that the Claim pled a reasonable cause of action pursuant to both the *OSA* and at common law

[33] This first ground of appeal challenges the motion judge's findings that the Claim pled a reasonable cause of action both pursuant to the *OSA* and at common law. I consider, first, whether the motion judge erred in his conclusion on the statutory cause of action, before turning to his analysis of the common law cause of action.

#### (a) It is not plain and obvious that the statutory cause of action pleaded in the Claim is bound to fail

[34] The appellants acknowledge that no prospectus was filed or delivered to the Class members who purchased Cryptocurrency Derivatives on the Binance

website. The appellants nevertheless maintain that it is “plain and obvious” that the Class members are not entitled to a remedy pursuant to s. 133 of the *OSA*, since such a remedy is only available in cases where a prospectus has been filed but not delivered to a purchaser. In other words, if a dealer sells a security by way of a distribution to a purchaser without filing a prospectus at all, although they have violated the requirement in s. 53(1) to file a prospectus, they have not run afoul of the obligation in s. 71(1) to deliver a prospectus, which only applies in cases where a prospectus has been filed. The further consequence is that the purchaser has no remedy in respect of such a transaction under s. 133(1) of the *OSA*, since such remedy is dependent upon a breach of s. 71(1).

[35] The appellants advance this argument based on the wording of s. 71(1), specifically the reference to the requirement to deliver “the latest prospectus and any amendment to the prospectus filed” (emphasis added). The appellants argue that the use of the word “filed” means that the filing of a prospectus is a necessary precondition for an offence under s. 71(1). Absent a filed prospectus, s. 71(1) (and by extension, s. 133(1)) has no relevance or application.

[36] This interpretation might appear at first blush to be counterintuitive, given the fact that the prospectus requirements in the *OSA* have been repeatedly described as a “cornerstone of Ontario’s securities regulatory regime”, that are “fundamental to protecting the investing public”: *Polo Digital Assets*, at para. 84; *Mek Global*, at para. 83. However, the appellants point out that that this

understanding of the limited scope of ss. 71(1) and 133 is supported by *Jones v. F. H. Deacon Hodgson Inc.* (1986), 56 O.R. (2d) 540 (H.C.).

[37] In *Jones*, a plaintiff had purchased shares from an investment dealer who failed to file a prospectus as required by s. 52(1) (now s. 53(1)) of the *OSA*. Four years later, the purchaser brought an action for a declaration that the sale of shares was void and an order for return of the purchase price. The defendant moved to dismiss the action on the basis that the *OSA* contained a three-year limitation period for remedies created by Part XXII, including the remedies under s. 130 (now s. 133), and the action was therefore statute barred.

[38] The court in *Jones* found that, given the reference in s. 70(1) (now s. 71(1)) to “the latest prospectus and any amendment to the prospectus filed”, that provision only applied in cases where a prospectus had been filed with the OSC. Because the seller in *Jones* had not filed a prospectus, the purchaser had no right to a remedy under s. 130: at pp. 548-9. At the same time, *Jones* went on to find that the purchaser had a remedy at common law arising from the failure to file a prospectus contrary to s. 52(1), since the requirement to file a prospectus was “fundamental to the protection of the investing public”: at p. 546. In such a case, the contract for the sale of the security would be void at common law due to illegality. Moreover, this common law right was not subject to the three-limitation period for breach of s. 130, with the result that the defendant’s motion to dismiss the action as statute barred was denied.

[39] The appellants submit that the motion judge's failure to consider *Jones*, which they describe as a binding decision of a court of coordinate jurisdiction that has never been overruled, constituted a reversible error of law.

[40] I accept that in light of the use of the word "filed" in s. 71 of the *OSA*, as well as the holding in *Jones*, the respondents' claim for a remedy under s. 133 may well prove unsuccessful at trial. But the issue on a certification motion is not whether the claim will ultimately succeed but, rather, whether it is "certain to fail". *Jones* is not binding on this court, and there are certainly good reasons to doubt the correctness of its determination that a remedy is not available under s. 133 if no prospectus was filed.

[41] It is well established that the words of a statute are to be read "in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the *Act*, the object of the *Act*, and the intention of Parliament": *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21, citing Elmer A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983), at p. 87. The goal of the interpretive exercise "is to find harmony between the words of the statute and the intended object": *R. v. Breault*, 2023 SCC 9, 481 D.L.R. (4th) 195, at para. 26, quoting *MediaQMI inc. v. Kamel*, 2021 SCC 23, [2021] 1 S.C.R. 899, at para. 39. It follows that the interpretation of s. 71(1) of the *OSA*, and particularly the use of the word "filed", must be interpreted in a manner consistent with the purpose of the statutory scheme as a whole.

[42] The *OSA* has been described as remedial legislation that is to be given a broad interpretation: *Kerr v. Danier Leather Inc.*, 2007 SCC 44, [2007] 2 S.C.R. 331, at para. 32. Its stated purposes include “protection to investors from unfair, improper or fraudulent practices”, and the primary means for achieving this purpose include “requirements for timely, accurate and efficient disclosure of information”: *OSA*, s. 1.1(a) and 2.1(2)(i). The *OSA* “supplants the “buyer beware” mindset of the common law with compelled disclosure of relevant information”: *Danier Leather*, at para. 32.

[43] It is precisely for this reason that the *OSA*’s prospectus requirements have been repeatedly described as fundamental to achieving the objects of the statute. Indeed, *Jones* highlighted the importance of the requirement to file a prospectus in protecting the general public “against schemes or campaigns to sell shares or securities of doubtful value to unwary investors”: at p. 546 quoting *Re Northwestern Trust Co.*, [1926] S.C.R. 412, at pp. 430-1. It was for this reason that *Jones* found that breach of s. 52(1) resulted in a contract that was void at common law. *Jones* also found that this common law right could only be abrogated through the use of express statutory language, and that no such express language was included in the *OSA*.

[44] The interpretation of ss. 71(1) and 133 proposed by the appellants appears inconsistent with this well-established understanding of the *OSA*’s statutory purposes. Although s. 133 would result in civil liability for failing to deliver a

prospectus that had been duly filed, no such liability would attach to the arguably more serious and harmful circumstance where no prospectus has been filed at all. This appears to reward prior non-compliance and may well create an incentive for issuers not to file a prospectus, thereby reducing the disclosure available to investors.

[45] The absence of adequate disclosure appears particularly concerning in relation to Cryptocurrency Derivatives which, as the motion judge observed, have been described by the CMT as “novel and complex products that are inherently risky”: citing *Polo Digital Assets*, at para. 68 The CMT has also identified “serious investor protection concerns” with offering retail investors cryptocurrency derivatives, arising from “their inherent risks, complexity, the use of margin or leverage and the potential volatility of the underlying assets”: *Mek Global*, at para. 64. This only highlights the importance of prospectus requirements in relation to Cryptocurrency Derivatives and renders an interpretation of the *OSA* which would deny Class members a civil remedy for failure to file a prospectus seem out of step with the overall purposes of the statutory scheme.

[46] To be sure, *Jones* supports the interpretation advanced by the appellants and, as they point out, *Jones* has been cited on numerous occasions by Ontario courts. But *Jones* adopted this interpretation in order to provide a remedy to purchasers of a security from a dealer who had failed to file a prospectus. The appellants invoke *Jones* in this case for precisely the opposite purpose: to deny

the appellants a statutory remedy in circumstances where, as discussed below, they also claim there is no common law remedy available.

[47] As noted above, the issue is not whether the respondents will ultimately succeed in their claim for relief under s. 133 but merely whether it is plain and obvious that they will fail. I conclude that it cannot be said at this stage that the statutory claim is certain to fail and, therefore, the motion judge did not err in finding that the respondents had properly pled a cause of action under s. 133.



**(b) The claim properly pleads a common law cause of action and there is no clear language in the *OSA* purporting to abrogate this common law right**

[48] The appellants acknowledge that, in *Jones*, the court held that the failure to file a prospectus as required by s. 53(1) violates a common law right of purchasers to set aside the transaction for illegality. They also concede that they failed to file a prospectus prior to offering Cryptocurrency Derivatives to Class members.

[49] However, the appellants raise two arguments in support of a finding that this common law right is not available to the Class members.

[50] First, they argue that the Claim fails to properly plead such a common law cause of action.

[51] Second, they argue that the definition of "trade" in s. 1 of the *OSA* captures purchasers of derivatives as well as sellers.[2] As a result, they argue that the Class

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[2] The appellants rely upon s. 1(1)(b.1) of the definition of "trade" as including "entering into a derivative or making a material amendment to, terminating, assigning, selling or otherwise acquiring or disposing of a derivative" (emphasis added).

members themselves are illegally trading in securities in violation of s. 53, since they did not file a prospectus for the Cryptocurrency Derivatives they purchased through the Binance trading platform. Because the Class members are in breach of s. 53, they have no entitlement to the common law cause of action arising from a violation of the provision.

[52] In my view, there is no substance to either of these arguments.

[53] With respect to the first argument, paragraphs 54-57 of the Claim allege that Binance failed to file or deliver a prospectus and that, in addition to their statutory remedies, the Class is entitled to recission and damages at common law. Nothing further is required from a pleadings perspective.

[54] Nor is it plain and obvious that this common law right has been abrogated by the definition of “trade” in the *OSA*. There is a well-established presumption that the legislature does not intend to eliminate common law rights in the absence of clear statutory language to that effect: *Lizotte v. Aviva Insurance Company of Canada*, 2016 SCC 52, at para. 56; R. Sullivan, *Sullivan on the Construction of Statutes* (7th ed. 2022), at § 15.05. The definition of “trade” in s. 1 of the *OSA* does not purport to limit an investor’s common law rights, either expressly or by necessary implication. As such, it is far from “plain and obvious” that the legislature intended, through this definition, to abrogate the common law right to relief where there has been a breach of s. 53(1)’s requirement to file a prospectus.

[55] At a practical level, more than half of Canadian crypto asset owners are small investors with less than $5,000 in the market: *Lochan v. Binance Holdings Limited*, 2023 ONSC 6714, at para. 15. How–and, more importantly, to what end–would these thousands of unsophisticated investors have undertaken the complex task of preparing a prospectus before selecting and clicking on their preferred Cryptocurrency Derivative on the Binance website?



**(c) Conclusion on cause of action criteria**

[56] I conclude that the motion judge correctly found that the Claim sufficiently pleaded causes of action, both statutory and at common law, and would dismiss this ground of appeal.

**(2) The motion judge did not err in finding that the respondents had met their burden of establishing that there was "some basis in fact" for the proposed common issues**

[57] The appellants take issue with the motion judge's finding that there was "no evidence" that recission of the Cryptocurrency Derivatives would mean an unwieldy unwinding of user-to-user contracts and a conflict of interest among class members that made the question unanswerable on a class wide basis.

[58] The appellants argue that there are two errors with this finding.

[59] First, they argue that the motion judge improperly reversed the burden of proof by requiring Binance to disprove that that the commonality requirement in s. 5(1)(c) had been satisfied, whereas the burden was actually on the respondents

to prove that there was some basis in fact that the issues identified in the Claim are common across the class.

[60] Second, the appellants argue that the motion judge erred in finding that there was "no evidence" in support of their position that individual Binance users were contracting with each other, rather than with Binance, when they purchased Cryptocurrency Derivatives on the Binance website. The appellants cite affidavit evidence they filed on the motion which indicated that different Binance investors would likely be on opposite sides of a win-lose dichotomy in these transactions, making it impractical to now attempt to unwind these transactions through the remedy of recission. They also cite to the contested expert evidence at the motion.

[61] I do not accede to either of these arguments.

[62] First, it is clear from the motion judge's reasons that he understood that the burden was on the respondents to show there is some basis in fact for their position that the proposed issues, including the availability of recission, were common to the class. But, as explained earlier, the some-basis-in-fact standard set a low bar, one that "does not involve weighing the merits of the claim or the resolution of conflicts in the evidence, but merely asks whether there is some minimal evidence in support of it": *Lilleyman*, at para. 74.

[63] The motion judge found that the respondents had met their burden by providing documentation showing that the contracts for Cryptocurrency Derivatives were between Class members and Binance, pursuant to standard form terms and

conditions. This was a finding of mixed fact and law that is entitled to deference and is reviewable on a standard of palpable and overriding error.

[64] It is true, as the appellants point out, that the motion judge went further and found that there was "no documentary evidence" supporting Binance's position that the Class members were buying and selling Cryptocurrency Derivatives from and to each other. But this finding was unnecessary and superfluous to the issue that the motion judge had to decide, which was simply whether the respondents had shown that there was "some basis in fact" for their position that Binance was a counterparty to the Cryptocurrency transactions through the Binance trading platform. Having made that finding, it mattered not whether Binance tendered some evidence to the contrary since, as the motion judge pointed out (and as the jurisprudence on s. 5(1) of the *CPA* makes plain), conflicts in the evidence, including expert evidence, are matters to be decided at the common issues trial, rather than at the certification stage: *Pro-Sys Consultants*, at paras. 102, 126; *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.), at para. 50.

[65] Binance has not identified any palpable and overriding error in the motion judge's finding that there was some basis in fact for the respondents' position that the Class members contracted with Binance rather than each other and that, accordingly, the remedial issues (including the availability of recission) could be answered on a class-wide basis. Even if Binance is correct in claiming that it tendered some evidence to the contrary, this would not disturb the correctness of

the motion judge's finding that the respondents had satisfied the commonality requirement in s. 5(1)(c).

[66] I would therefore dismiss this ground of appeal.

### (3) The motion judge did not err in his analysis of the remaining certification issues

[67] As the motion judge did not commit either of the errors alleged in relation to what Binance describes as the "core issues" under ss. 5(1)(a) or (c), there are no errors which would permeate the motion judge's analysis of the remaining certification criteria.

## DISPOSITION

[68] For the above reasons, I would dismiss the appeal. In accordance with the agreement of the parties, Binance will pay the respondents' costs of the appeal in the amount of $30,000, on an all-inclusive basis.

Released: March 21, 2025 "L.S."

"P.J. Monahan J.A."
"I agree. L. Sossin J.A."
"I agree. L. Favreau J.A."