

FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v Bit Trade Pty Ltd

[2024] FCA 953

File number: NSD 1039 of 2023

Judgment of: **NICHOLAS J**

Date of judgment: 23 August 2024

Catchwords: **CORPORATIONS** – where respondent issued financial product involving a margin extension facility used to purchase cryptocurrency on digital exchange – whether financial product issued without target market determination in contravention of Part 7.8A of the *Corporations Act 2001* (Cth) – whether debt incurred through use of financial product – whether obligation to pay cryptocurrency is a monetary obligation in the nature of a debt – whether conditional obligation to pay margin extension amount in national currency is a monetary obligation in the nature of a debt

Held: contravention of s 994B of the *Corporations Act 2001* (Cth) established

Legislation: *Australian Securities Investments Commission Act 2001* (Cth) s 12BAA
Corporations Act 2001 (Cth) ss 761E(2), 766C, 994AA, 994B, 1317S(2)
Evidence Act 1995 (Cth) s 191
Australian Securities and Investments Commission Regulations 2001 (Cth) reg 2B
Bankruptcy Regulations (2021) (Cth) regs 12, 24
Corporations Law (Repealed) s 588G1(1)
Corporations Regulations 2001 (Cth) reg 7.8A.20
Companies (NSW) Code (Repealed) s 556

Cases cited: *AA v Persons Unknown* [2019] EWHC 3556
Australian Securities and Investments Commission v Web3 Ventures Pty Ltd [2024] FCA 64
Daewoo Australia Pty Ltd v Suncorp Metway Ltd (2000) 48 NSWLR 692
Fryer v Powell (2001) 159 FLR 433
Geeveekay Pty Ltd v Director of Consumer Affairs Victoria

(2008) 19 VR 512
Hawkins v Bank of China (1992) 26 NSWLR 562
International Litigation Partners Pte Ltd v Chameleon Mining NL (Receivers and Managers Appointed) (2012) 246 CLR 455
Jolley v Mainka (1933) 49 CLR 242
Miliangos v George Frank (Textiles) Ltd [1976] AC 443
Tulip Trading Limited v Bitcoin Association for BSV [2023] EWCA Civ 83
Travelex Limited v Commissioner of Taxation [2008] FCA 1961
Vehicle Wash Systems Pty Ltd v Mark VII Equipment Inc (1997) 80 FCR 571
Webb v Stenton (1883) 11 QBD 518

Proctor, *Mann and Proctor on the Law of Money*, Eighth Edition, Oxford University Press, 2022

Division: General Division

Registry: New South Wales

National Practice Area: Commercial and Corporations

Sub-area: Commercial Contracts, Banking, Finance and Insurance

Number of paragraphs: 47

Date of hearing: 1 July 2024

Counsel for the Plaintiff: Mr J Giles SC with Ms K Petch

Solicitor for the Plaintiff: Australian Securities and Investments Commission

Counsel for the Defendant: Mr J Arnott SC with Ms A Campbell

Solicitor for the Defendant: Gilbert + Tobin

ORDERS

NSD 1039 of 2023

BETWEEN: **AUSTRALIAN SECURITIES & INVESTMENTS
COMMISSION**
Plaintiff

AND: **BIT TRADE PTY LTD ACN 163 237 634**
Defendant

ORDER MADE BY: **NICHOLAS J**

DATE OF ORDER: **23 AUGUST 2024**

THE COURT ORDERS THAT:

1. Within 7 days, the parties provide agreed short minutes of order to the Associate to Nicholas J.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

NICHOLAS J:

BACKGROUND

- 1 In this proceeding the plaintiff (“ASIC”) alleges that the defendant (“Bit Trade”) contravened s 994B(1) and (2) of the design and distribution obligations (“DDO”) in Part 7.8A of the *Corporations Act 2001* (Cth) (“Corporations Act”) in relation to a financial product known as “Margin Extension” (“the Product”). ASIC seeks relief under relevant provisions of the Corporations Act including a declaration that Bit Trade contravened s 994B(2), injunctive relief, and a pecuniary penalty. Bit Trade denies liability and seeks an order for dismissal of the proceeding.
- 2 Under the DDO, the issuer of a financial product to which the relevant obligations apply, must make a “target market determination” prior to the financial product being offered to consumers. A target market determination must, inter alia, describe the class of retail clients that comprises the target market for the product: s 994B(5). The target market determination must be such that it would be reasonable to conclude that, if the product were to be issued or sold to a retail client in the target market, “it would likely be consistent with the likely objectives, financial situation and the needs of the retail client”: s 994B(8).
- 3 The principal question arising in this case is whether the Product is a financial product in respect of which Bit Trade was required by s 994B(1) and (2) to issue a target market determination. It is common ground that Bit Trade is the issuer of the Product and that it has never issued a target market determination in relation to the Product. However, Bit Trade contends that the Product is a financial product of a kind prescribed by a regulation made for the purpose of s 994B(3)(f) of the Corporations Act, with the consequence that the Product is not a financial product to which ss 994B(1) and (2) apply.
- 4 The present hearing is concerned with the question of liability and the relief that should be granted if ASIC is successful, excluding any pecuniary penalty. Bit Trade says that if found liable it will rely on s 1317S(2) of the Corporations Act to resist any order for the payment of a pecuniary penalty.
- 5 There is an Agreed Statement of Facts (“ASF”) dated 1 July 2024 made pursuant to s 191 of the *Evidence Act 1995* (Cth). The description in these reasons of Bit Trade’s business and, in

particular, the Product, is based on the description of those matters contained in the ASF. The ASF includes as an annexure a copy of a document entitled “Terms of Service” (“the TOS”) dated 19 June 2023 pursuant to which Bit Trade provided services to Australian customers as at that date.

FACTS

Bit Trade’s Business

6 Bit Trade was incorporated on 10 April 2013, from which time it conducted a digital currency exchange. In January 2020, Bit Trade was acquired by the Payward Group and became a subsidiary of Payward Inc (registered in Delaware, United States of America). Payward Inc, trading as “Kraken”, provides a digital currency exchange and trading platform servicing customers worldwide through its subsidiaries.

7 Following its acquisition by Payward Inc, Bit Trade has provided services, including access to a digital asset exchange (“Kraken Exchange”) on which its customers can purchase and sell certain digital assets (including “cryptoassets”), to Australian customers via the website www.kraken.com (“Website”) and a mobile application. Bit Trade has provided services to Australian customers pursuant to the TOS, available on the Website. Although the TOS were updated a number of times during the period 5 October 2021 to 20 September 2023 when the relevant conduct took place (“Relevant Period”), the ASF states that the terms specifically relating to the Product did not materially change.

The Product

8 From about 9 January 2020, Bit Trade provided access to the Product as part of its services to Australian customers. In the ASF, the Product is described as margin services, through which Australian customers could receive extensions of margin in the form of digital assets or legal tender to use to make spot purchases and sales of digital assets on the Kraken Exchange.

9 The Product was offered and provided to customers on terms contained in the TOS that included the following:

- (a) Products and services provided pursuant to the TOS were provided through local operating entities which were subsidiaries of Payward, Inc. If the customer resided in Australia, their counterparty to the TOS was Bit Trade.

- (b) For customers who wished to use the Product, a platform (known as a margin account) was established for their benefit and in their name to receive extensions of legal tender and digital assets to use to make spot trades through the customer's Kraken Account.
- (c) Bit Trade was under no obligation to allow a customer to carry out margin transactions and could decline a request to initiate such a transaction in its sole discretion.
- (d) Customers were required to keep in their Kraken Account, at all times when margin had been extended, a specified minimum amount of legal tender or digital assets as collateral. If the collateral level fell below the required minimum, the customer agreed that assets purchased with the margin extension could be sold and the proceeds could be applied towards terminating margin extension, and that any other assets within the customer's Kraken Account could be liquidated, as necessary to terminate the margin extension or to restore the value of the collateral assets to an amount equal to the minimum margin requirement.
- (e) Assets purchased by a customer using the Product were held within the Payward Group as custodian for the benefit and on behalf of the customer.
- (f) From 6 December 2022, there were no term limits on margin obligations, meaning that a customer could elect to maintain open positions on margin for an unlimited duration provided they continued to have sufficient collateral in their Kraken Account to support the extended margin.
- (g) Customers could terminate margin extensions by transferring sufficient assets from their Kraken Account to their margin account or selling the requisite collateral or other assets in their Kraken Account and applying the proceeds to terminate the extension.
- (h) The assets used to terminate a margin extension had to be the same asset type as the denomination of the margin extension. For example, if a customer was extended margin denominated in bitcoin, they had to transfer bitcoin to terminate the margin extension.
- (i) Customers were charged fees on and in connection with margin extensions at the rates and methods of computation specified in the Fee Schedule contained on the Website. During the Relevant Period, that included an opening fee and rollover fee for the Product. The fees varied dependent on the type of funds made available pursuant to the extension.

10 Customers could receive an extension of margin of up to five times the value of the collateral in their Kraken Account, though the amount of leverage offered through a margin extension depended on the asset to be purchased.

Terms of Service

11 The TOS annexed to the ASF include the following provisions:

1. **Complete Terms of Service**

These Terms of Service and any terms expressly incorporated herein (“**Terms**”) apply to your access to and use of the websites and mobile applications provided by Payward, Inc. and its wholly owned subsidiaries (collectively, “**Payward**”, “**Kraken**”, “**we**”, or “**us**”), and the trading, staking, NFT and other services provided by Payward as described in these Terms (collectively, our “**Services**”).

Our products and services are provided through local operating entities that are subsidiaries of Payward, Inc. ...your sole and exclusive counterparty to these Terms is as follows:

1.1. If you reside in Australia - Bit Trade Pty Limited, Unit 610, 478 George Street, Sydney, NSW 2000, Australia.

...

Key Definitions

Capitalized terms not otherwise defined in these Terms will have the following meaning:

“**Asset**” means any Digital Asset, Legal Tender, and/or NFT.

“**Digital Asset**” means bitcoin, ether and any other digital assets that may be traded via the Services, excluding NFTs.

“**Digital Asset/NFT Account**” means any Digital Asset or NFT address or account owned, controlled or operated by you that is maintained outside of the Services, and is not owned, controlled or operated by Payward.

“**External Account**” means any Financial Account or Digital Asset/NFT Account: (i) from which you may load Assets into your Kraken Account, and (ii) to which you may transfer Assets from your Kraken Account.

“**Financial Account**” means any financial account of which you are the beneficial owner that is maintained by a third party outside of the Services, including, but not limited to third-party payment service accounts or accounts maintained by third party financial institutions.

“**Funds**” means any Digital Asset and/or Legal Tender.

“**Kraken Account**” means a user account accessible via the Services where Assets may be custodied by Payward on behalf of a user.

“**Legal Tender**” means any national currency, such as U.S. dollars, that may be used in connection with a purchase or sale of Digital Assets or NFTs via the Services, and does

not include any Digital Asset or NFT.

“NFT” means a ‘non-fungible’ token or similar digital item ...

...

5. General Obligations

...

5.6 **Insufficient Assets.** If you have an insufficient amount of Assets in your Kraken Account to complete a transaction via the Services, we may cancel the entire transaction or may fulfill a partial transaction using the amount of Assets currently available in your Kraken Account, less any fees owed to Payward in connection with our execution of the trade ...

...

6. Kraken Account Assets

6.1 **Funding your Kraken Account.** In order to complete an offer, bid, order, trade or transaction via the Services ... you must first load Assets to your Kraken Account using one of the approved External Accounts identified via the Services ...

About Legal Tender Held In Your Kraken Account - Be advised that Legal Tender held in your Kraken account is exclusively for the purchase of Digital Assets or NFTs or for withdrawal to your approved External Account. Proceeds from the sale of Digital Assets or NFTs for Legal Tender will be credited to your Kraken Account, less any transactional or other fees or commissions ...

...

6.2 **Transferring Assets to an External Account.** Provided that the balance of Assets in your Kraken Account is greater than any minimum balance requirements needed to satisfy any of your open positions, and subject to the restrictions set forth in Section 7.11 ... you may transfer any amount of Assets, up to the total amount of Assets in your Kraken Account in excess of such minimum balance requirements, and any unencumbered NFTs held in your Kraken Account, from your Kraken Account to an External Account, less any fees charged by Payward for such transactions ...

...

6.5 **Ending Digital Asset Support.** Kraken may, in its sole discretion, stop supporting any particular Digital Asset. If you do not remove such Digital Asset from your Kraken account before Kraken stops supporting such Digital Asset, then Kraken may, in its discretion, take any measures it deems appropriate to remove such Digital Asset from your Kraken account, including attempting to sell such Digital Assets at a cost to you.

...

6.7.1 **Ownership.** Title to Digital Assets and NFTs, at all times remains with you and is not transferred to Payward, except as provided herein. All interests in Digital Assets and NFTs we hold for Kraken Accounts are held for customers and are not property of Payward ...

...

7.11 **Margin Transactions.**

In accordance with and subject to this Section 7.11, as part of the Services you may receive from Payward extensions of margin in the form of Digital Assets or Legal Tender (“margin transactions”) to use to make spot purchases and sales of Digital Assets on the Kraken exchange.

...

Margin transactions on the Kraken exchange are made available under the following terms:

7.11.1 *Margin Account.* Payward agrees to establish for your benefit and in your name a platform for you to receive Legal Tender and Digital Assets (“Extended Funds”) from Payward to make spot trades through your Kraken Account (your “Margin Account”). Your Margin Account is a component of your Kraken Account.

7.11.2 *Margin Extensions and Trades.*

7.11.2.1. Subject to the Terms, Payward agrees to provide to you, and you may obtain from and return to Payward from time to time, Funds to support spot transactions (each such provision of Funds, a “Margin Extension”). No Margin Extension will occur unless you meet or exceed any minimum balance requirements imposed by Payward for your Margin Account. Moreover, notwithstanding anything to the contrary herein, Payward is under no obligation to make any Margin Extensions to you and may decline a request to initiate a Margin Extension in its sole discretion.

7.11.2.2. When you use a Margin Extension to effectuate a spot transaction, you are entering into a spot Digital Asset purchase or sale transaction. For example, you might use a U.S. dollar Margin Extension from Payward to buy bitcoin. In executing such spot transactions, Payward records the transfer of ownership of the applicable Funds (such Funds -- e.g., the bitcoin in the preceding example -- “Received Assets”) by registering you as the owner of the Received Assets on Payward’s internal book-entry system.

7.11.2.3. If you are not (or are no longer) eligible to receive Margin Extensions, each of your then-existing Margin Extensions will become due and must be terminated: (i) on or before the 28th day after such Margin Extension was made; or (ii) immediately upon loss of eligibility if such Margin Extension was made earlier than 28 days prior to the date on which you were no longer eligible. If you do not terminate your Margin Extensions in full within the required time period, then Payward reserves the right to, without further notice to you: (a) sell your Received Assets and apply the proceeds to the termination of the Margin Extension; and (b) liquidate such other Funds in your account, in the manner and amount practicable, in

Payward's reasonable discretion, to terminate the Margin Extension in full.

7.11.3 *Received Assets.* All Received Assets are custodial assets held by Payward for your benefit, subject to the terms in Section 6.7 (Digital Asset Custody & Title), Section 7.11 (Margin Transactions), and as otherwise provided herein.

7.11.4 *Terminating Margin Extensions.* To terminate a Margin Extension, you must transfer sufficient Funds from your Kraken Account to Payward through the Services. The Funds you use to terminate a Margin Extension must be the same asset type as the denomination of the Margin Extension (for example, you must terminate a bitcoin-denominated Margin Extension by transferring bitcoin from your Kraken Account to Payward through the Services). If received with respect to Extended Funds (and not Received Assets), you must return any incremental tokens generated as a result of a fork in the digital currency protocol of any Margin Extension or an airdrop of any tokens on the protocol of any Margin Extension. You may terminate a Margin Extension by either: (i) directing immediately available Funds in your Kraken Account to Payward; or (ii) selling requisite Collateral Assets (as defined below) or other assets in your Kraken Account on the Kraken exchange and applying the proceeds to the termination of the corresponding Margin Extension. Prior to satisfying the corresponding Margin Extension pursuant to the preceding sentence, Received Assets and requisite Collateral Assets may not be otherwise transferred to an External Account or traded on the Kraken exchange.

7.11.5 *Restrictions on your Kraken Account subject to satisfaction of your Margin Extension obligations.*

7.11.5.1. You agree to maintain in your Kraken Account, at all times during the term of a Margin Extension, a specified minimum amount of Funds approved by Payward to qualify as collateral ("Collateral Assets") ... This minimum amount of Collateral Assets (the "Maintenance Margin Requirement") will be defined through the Services and you will be notified of any changes to the Maintenance Margin Requirement prior to those changes taking effect. Such notice shall indicate the effective date for those changes.

...

7.11.5.4. You hereby authorize and instruct Payward, in the event the value of your Collateral Assets falls below the Maintenance Margin Requirement, to, without further notice to you: (a) sell your Received Assets and apply the proceeds towards terminating your Margin Extension(s); and/or (b) liquidate such other Funds in your account in the manner and amount practicable, in Payward's reasonable discretion, to terminate the Margin Extension either in full, or in an amount sufficient, in Payward's reasonable discretion, to restore the value of your Collateral Assets to an amount equal to or exceeding the Maintenance Margin Requirement.

7.11.6. *No Margin Obligation Period.* There are no term limits on margin obligations, meaning that you may elect to maintain open spot positions on margin for an unlimited duration, as long as you continue to meet your Margin Extension obligations as detailed in Section 7.11.5.

7.11.7. *Payment of Fees; Default.*

...

7.11.7.2. Upon your failure to satisfy the Maintenance Margin Requirement, to make any payment of fees when due, including Margin Fees, or to terminate a Margin Extension when required, or upon otherwise materially breaching this Section 7.11, your Margin Extensions shall be immediately due and must be terminated (and any accrued and unpaid fees thereon and any fees and costs of collection must be paid) and, to the extent permitted by applicable law and in addition to any other remedies available to it, Payward, in its sole discretion, may apply the proceeds from the sale of any Digital Assets in your Margin Account, whether such Digital Assets are considered Collateral Assets as defined in the Terms or not, first to the payment of any outstanding fees, commissions, charges or other expenses then due to Payward, and then to the termination of your Margin Extensions. If your Kraken Account balance becomes negative, you agree to pay the amount of Funds owed to Payward within 48 hours. You may not trade on a negative Kraken Account.

7.11.8. *Discontinuance of Margin Extension Services.* In exercising its rights under Section 18, Payward may cease making available Margin Extensions for certain Digital Assets or Legal Tender for any or all users, or otherwise terminate Margin Extensions for any or all users. You hereby authorize and instruct Payward, without notice to you, as of the date that Payward elects, to: (a) liquidate your Received Assets, in the manner practicable, in Payward's reasonable discretion, and apply the proceeds to the termination of the Margin Extension; and/or (b) liquidate such other Funds in your account, in the manner and amount practicable, in Payward's reasonable discretion, to terminate the Margin Extension in full.

...

18. **Discontinuance of Services**

We may, in our sole discretion and without liability to you, with or without prior notice and at any time, modify or discontinue, temporarily or permanently, any portion of our Services.

...

Margin Disclosure Statement

...

When you purchase digital assets for legal tender or vice versa, you may pay in full

with your own funds or by posting assets in your account as collateral, with funds provided by Payward to you pursuant to an extension of margin. If the collateral supporting your extension of margin declines in value by an amount specified by Payward, you authorize Payward to issue a margin call and/or sell assets in your account, in order to maintain equity in the account that meets or exceeds the minimum maintenance margin requirement.

...

- 12 It is useful at this point to draw attention to some key aspects of the TOS and their operation.
- 13 First, provision of Funds (as defined) pursuant to cl 7.11.2.1 is described as a “Margin Extension”. By cl 7.11.2.1 Bit Trade agrees, subject to the TOS, to provide Funds to support spot transactions. However, cl 7.11.2.1 also makes clear that Bit Trade is not under any obligation to provide a customer with a Margin Extension.
- 14 Second, Margin Extensions may comprise or include any Legal Tender (as defined) or Digital Assets (as defined) including bitcoin. US dollars are expressly referenced in the definition of Legal Tender and cl 7.11.2.2 refers to (by way of example) “a U.S. dollar Margin Extension”. While the agreed facts do not identify all of the national currencies that may be used in connection with a purchase of Digital Assets by customers resident in Australia, I infer that these would include US dollars and (although there is no direct evidence to this effect) Australian dollars.
- 15 Third, by cl 7.11.2.1, subject to the TOS, the customer agrees to “return” to Bit Trade the Funds provided to support spot transactions by way of Margin Extension. The use of the word “return” rather than “repay” is perhaps understandable given that the Funds provided by Bit Trade might comprise or include Digital Assets. However, where the Funds to be provided comprise a national currency such as Australian or US dollars, the word “return” clearly implies an obligation to repay the Margin Extension. The Margin Extension terminates upon repayment.
- 16 Fourth, cl 7.11.4 provides that to terminate a margin extension, a customer must transfer sufficient Funds from their Kraken Account to Bit Trade. These Funds must be of the same type as that used for the Margin Extension. It follows that if the Margin Extension is provided in the form of US dollars, the Margin Extension may only be terminated by the customer in US dollars. By cl 7.11.4, the customer may terminate the US dollar Margin Extension by depositing the required amount of US dollars into their Kraken Account or selling “Collateral Assets”, as defined in cl 7.11.5.1, or other assets in their Kraken Account, the proceeds of

which may then be used to terminate the Margin Extension. While the agreed facts are not explicit about it, I infer that the proceeds of any such sale, if not in US dollars, must be exchanged for US dollars, which are then applied to terminate the US dollar Margin Extension.

17 Fifth, cl 7.11.6 provides that there are no term limits on margin obligations meaning, according to this clause, the customer may maintain open positions using a Margin Extension indefinitely if the customer continues to meet their obligations under cl 7.11.5 concerning maintenance of collateral including the minimum amount of collateral (referred to in the TOS as the “Maintenance Margin Requirement”). That clause also includes cl 7.11.5.4, by which the customer authorises Bit Trade to sell “Received Assets” (as defined in cl 7.11.2.2, i.e. those acquired by the customer using the Margin Extension) or liquidate any other Funds in the customer’s account to terminate the Margin Extension either in full or in an amount sufficient to restore the Collateral Assets to a value that meets or exceeds the Maintenance Margin Requirement.

18 Sixth, cl 18 provides that Bit Trade may at any time discontinue any portion of the services provided by Bit Trade as described in the TOS. Clause 7.11.8 makes clear that this includes the provision of Margin Extensions. If Bit Trade ceases to make available a Margin Extension to a customer, Bit Trade is authorised and instructed by the customer by cl 7.11.8 to liquidate the customer’s Received Assets and apply the proceeds to termination of the Margin Extension, and to liquidate any other Funds in the customer’s account to terminate the Margin Extension in full.

19 Seventh, under cl 7.11.7.2, if the Maintenance Margin Requirement is not satisfied, there is a failure to pay fees or to terminate a Margin Extension when required, or if there is a material breach of cl 7.11, a customer’s Margin Extensions are immediately due and must be terminated. In that circumstance, Bit Trade can apply the proceeds from the sale of any Digital Assets which are Collateral Assets to the payment of any outstanding fees, charges or other expenses, and then to the termination of the Margin Extension. If the customer’s Kraken Account balance is at any time negative the customer agrees “to pay the amount of Funds owed to [Bit Trade] within 48 hours”. The reference to “Funds” in this context is significant because it would permit the customer to make payment using Digital Assets such as bitcoin.

THE RELEVANT STATUTORY PROVISIONS

20 Part 7.8A of the Corporations Act (which is within Ch 7) is entitled “Design and distribution requirements relating to financial products for retail clients”. Division 1 of Part 7.8A includes s 994AA which provides as follows:

994AA **Meaning of *financial product*—Part 7.8A**

(1) In this Part, ***financial product*** includes a financial product within the meaning of Division 2 of Part 2 of the ASIC Act.

Note: Whether a target market determination is required to be made in relation to financial products covered by this extended definition is determined under section 994B, including any regulations made for the purposes of paragraph 994B(3)(f).

(2) In determining the meaning of a term used in a provision of this Part (other than this section), treat a reference in this Act to a financial product as being a reference to a financial product within the meaning of subsection (1) of this section.

21 Section 994B is in Division 2 of Part 7.8A. Section 994B relevantly provides:

994B **Target market determinations for financial products**

Requirement to make a target market determination

(1) Subject to subsection (3), a person must make a target market determination for a financial product if:

(a) under Part 6D.2, the person is required to prepare a disclosure document for the product; or

(b) under Part 7.9, the person is required to prepare a Product Disclosure Statement for the product; or

(ba) the product is not a financial product (as defined in Division 3 of Part 7.1) and:

(i) the person issues the product to another person as a retail client; or

(ii) the person sells the product under a regulated sale; or

(c) regulations made for the purpose of this paragraph require the person to make a target market determination for the product.

(2) A person required by subsection (1) to make a target market determination for a financial product must do so before:

(a) if paragraph (1)(a), (b) or (ba) applies—any person engages in retail product distribution conduct in relation to the product; or

(b) if paragraph (1)(c) applies:

(i) the time or event specified in regulations made for the purposes of that paragraph; or

- (ii) if there is no time or event so specified—any person engages in retail product distribution conduct in relation to the product.
- (3) Subsections (1) and (2) do not apply to:
- ...
- (f) a financial product of a kind prescribed by regulations made for the purposes of this paragraph.

(Notes omitted)

22 Division 2 of Part 2 of the *Australian Securities Investments Commission Act 2001* (Cth) (“ASIC Act”) includes a definition of “financial product” in s 12BAA. Section 12BAA(7) relevantly provides:

Subject to subsection (8), the following are **financial products** for the purposes of this Division:

- ...
- (k) a credit facility (within the meaning of the regulations);
- ...

23 For the purposes of s 12BAA(7)(k) of the ASIC Act, reg 2B of the *Australian Securities and Investments Commission Regulations 2001* (Cth) (“ASIC Regulations”) relevantly provides:

2B Financial products: credit facility

(1) For paragraph 12BAA(7)(k) of the Act, each of the following is a **credit facility**:

- (a) the provision of credit:
 - (i) for any period; and
 - (ii) with or without prior agreement between the credit provider and the debtor; and
 - (iii) whether or not both credit and debit facilities are available;
- ...

...

(3) In this regulation:

credit means a contract, arrangement or understanding:

- (a) under which:
 - (i) payment of a debt owed by one person (a **debtor**) to another person (a **credit provider**) is deferred; or
 - (ii) one person (a **debtor**) incurs a deferred debt to another person

(a *credit provider*); and

- (b) including any of the following:
 - (i) any form of financial accommodation;

...

...

24 It is common ground that the Product is not a financial product as defined in Div 3 of Part 7.1 of the Corporations Act and that, consequently, the allegation of contravention of s 994B in this case arises under s 994B(1)(ba) of the Corporations Act, when read with the extended definition of “financial product” in Div 2 of Part 2 of the ASIC Act referred to in s 994AA.

25 The *Corporations Regulations 2001* (Cth) (“Corporations Regulations”) includes reg 7.8A.20 which specifies kinds of financial products prescribed for the purposes of s 994B(3)(f) of the Corporations Act. Consistent with the relevant legislation scheme described in *International Litigation Partners Pte Ltd v Chameleon Mining NL (Receivers and Managers Appointed)* (2012) 246 CLR 455 at [5] per French CJ, Gummow, Crennan and Bell JJ, reg 7.8A.20 narrows the field of operation of s 994B by excluding certain kinds of credit facilities that would otherwise fall within its scope.

26 Bit Trade’s defence relies on the exemption contained in reg 7.8A.20 of the Corporations Regulations. It relevantly provides:

7.8A.20 Financial products for which target market determinations are not required

- (1) For the purposes of paragraph 994B(3)(f) of the Act, each kind of financial product covered by a subregulation of this regulation is prescribed.

...

Credit facilities

- (9) This subregulation covers each of the following:
 - (a) a credit facility that is not or was not issued, or that will not be issued, in the course of a business that is wholly or partly a business of providing credit;
 - (b) a credit facility under the terms of which the credit is, or must be, applied wholly or predominantly for business purposes;
 - (c) a credit facility that:
 - (i) involves a matter referred to in paragraph (b) of the definition of *credit* in subregulation 2B(3) of the *Australian Securities*

and Investments Commission Regulations 2001; but

- (ii) does not involve credit of a kind referred to in paragraph (a) of that definition;

...

...

27 By reg 7.8A.20 of the Corporations Regulations, a target market determination is not required for credit facilities of the kind referred to in subpara (9). Bit Trade relies on subpara (9)(c)(ii) and contends that the Margin Extension product does not involve credit of a kind referred to in subpara (a) of subreg 2B(3) which is reproduced at [23] above. Bit Trade accepts that the Margin Extension product is a form of financial accommodation within the meaning of subpara (b)(i) of subreg 2B(3) of the ASIC Regulations.

SUBMISSIONS

28 Bit Trade submitted that a customer who is provided a Margin Extension does not incur a debt because the word “debt” in reg 2B(3) is limited to an obligation to pay money. Bit Trade submitted that the TOS do not create any such obligation. It submitted that a customer who receives a Margin Extension in cryptocurrency may be required to return to Bit Trade an equivalent amount of the same cryptocurrency. Since cryptocurrency is not money, that is not an obligation that can constitute a debt for the purposes of reg 2B(3). Further, Bit Trade submitted that the relevant obligation must require payment in Australian dollars, and that an obligation to pay an amount in a foreign currency such as US dollars could never be a debt within the meaning of that term as used in reg 2B(3). Bit Trade relied on the judgment of Dixon J in *Jolley v Mainka* (1933) 49 CLR 242 (“*Jolley*”) at 260 and submitted that an obligation to pay an amount in a foreign currency does not create a debt.

29 Bit Trade also submitted that for the purposes of reg 2B(3), the word “debt” refers to “a definite present obligation unavoidably to pay an ascertainable monetary amount in the future, which does not include an obligation to make a payment that may or may not arise” citing *Geeveekay Pty Ltd v Director of Consumer Affairs Victoria* (2008) 19 VR 512 at [87] per Bell J. On this argument, even if the customer’s obligations under the TOS involve an obligation to pay money, that obligation will still not constitute a debt because, according to Bit Trade, that obligation may or may not arise. In their written submissions, Bit Trade emphasised the fact that from around 6 December 2022, there was no obligation to close a position that utilised the Margin Extension feature. Bit Trade contended that this was not merely a matter of uncertainty

as to the time for payment, but rather, uncertainty as to whether any payment obligation exists at all.

30 Bit Trade also submitted that Margin Extensions are notional transactions in that there never is an actual advance of funds. Precisely what “notional” means in this context is not entirely clear. As I understand the submission, in the case of a US dollar Margin Extension, there is no US dollar advance, not merely because there is no physical currency provided to the customer, but because the customer’s spot transaction occurs at the same time as the Margin Extension is provided. According to this argument, there is an exchange of US dollars for cryptocurrency which is recorded by way of entry in the customer’s Margin Account but at no stage is there any amount of US dollars the customer can use. In support of the submission Senior Counsel for Bit Trade, Mr Arnott SC, pointed to cl 7.11.4 which he described as the “key clause”. He submitted (T67.37-68.3):

MR ARNOTT: ... So the reason why I say it’s notional, your Honour, is that, of course, to effect a trade in the US dollar Bitcoin market, there has to be the exchange of US dollars for Bitcoin, but that occurs not by making available to the customer US dollar [sic] which they can choose to use for Bitcoin. By controlling the whole transaction, the customer is recorded as owning the Bitcoin, and then having an obligation when they terminate the margin extension to return assets of the same type, and that’s – is – that’s the sense in which we say it’s notional, because it follows in effect from the fact they have to return US dollars in clause 7.11.4 that they’ve in effect been advanced US dollars, but they have not actually been given access to [at] any point in time US dollar currency ... it’s not a case whereby they have available to them US dollars within the system that they can use for any particular transaction, or any particular purpose.

31 ASIC submitted that the definition of debt relied on by Bit Trade was unduly narrow. It submitted that “debt” within the meaning of reg 2B(3)(a) was not limited to a monetary obligation and that an advance of cryptocurrency coupled with an obligation to return an equivalent amount and type can also constitute a debt for the purpose of that regulation. ASIC submitted that the word “debt” is not a word of “precise and inflexible denotation”, and it is a term that must be applied in a “practical and commonsense fashion” and consistent with its context: *Hawkins v Bank of China* (1992) 26 NSWLR 562 (“*Hawkins*”) at 572 per Gleeson CJ.

32 ASIC did not submit that cryptocurrency is money. The ASF does not provide any evidentiary basis for such a submission: see the judgment of Emmett J in *Travelex Limited v Commissioner of Taxation* [2008] FCA 1961 at [23]-[28]. However, ASIC submitted that the meaning of debt as the word is used in reg 2B(3)(a) is not limited to an obligation to pay money. It submitted that debt, for this purpose, is a liability or obligation to pay or render something, citing *Fryer*

v Powell (2001) 159 FLR 433 (“*Powell*”) at [61]-[62] per Olsson J (Duggan and Williams JJ agreeing). Accordingly, an obligation to provide a particular type and amount of cryptocurrency could constitute a “debt” within the meaning of reg 2B(3)(a).

33 ASIC submitted that even if an obligation to return cryptocurrency provided by way of Margin Extension does not create a debt because cryptocurrency is not money, the Product made available by Bit Trade is one through which the Margin Extension may be provided in a national currency, including either Australian dollars or US dollars. It submitted that it is the distribution of a financial product (i.e. the Product) that allows for Margin Extensions denominated in national currency to the customer, which gives rise to contravention of s 994B. To put this another way, the contravention relates to making the Product available and does not depend on whether each customer has used the Product in a particular way.

CONSIDERATION

34 The meaning of the word “debt” relied on by ASIC is derived from the Macquarie Dictionary, Second Revision, which was referred to by Olsson J in *Powell*. That was a case concerned with the meaning of the word “debt” and the phrase “incurs a debt” in s 588G(1) of the now repealed *Corporations Law*. His Honour said at [61]-[62]:

[61] The word “debt” is not defined by the statute. It appears in a series of sections. Prima facie one would expect that it is used in a constant sense and according to its natural and ordinary English meaning.

[62] It is pertinent to note that the normal meaning of the word is simply “a liability or obligation to pay or render something; that which one person is bound to pay to or perform for another”: *Macquarie Dictionary*, Second Revision. As Professor O'Donovan, of counsel for the respondents put it: “...a debt is simply an obligation of one party to pay a sum of money to another”. The obligation may be present and absolute, or contingent.

35 While Olsson J cited the definition of debt provided in the Macquarie Dictionary, he appears to have accepted the considerably narrower meaning submitted by counsel for the respondents. That meaning is also consistent with the longstanding authority holding that “a debt is a sum of money which is now payable or will become payable in the future by reason of a present obligation ”: *Webb v Stenton* (1883) 11 QBD 518 at 527 per Lindley LJ.

36 The nature of monetary obligations is considered in Proctor, *Mann and Proctor on the Law of Money*, Eighth Edition, Oxford University Press, 2022 (“*Mann and Proctor*”). The learned authors state at para 3.03:

Monetary obligations primarily exist where the debtor is bound to pay a fixed, certain specific, or liquidated sum of money. Recent authorities have tended to reinforce this view, holding that ‘a debt for a liquidated sum must be a pre-ascertained liability’ such as ‘a contractual liability where the amount due is to be ascertained in accordance with a contractual formula or contractual machinery which, when operated, will produce a figure’. This definition presupposes that money is to be paid in the sense of a medium of exchange or in similar monetary context, for example, where a bank advances a loan to its customer.

(Footnotes omitted)

- 37 The reasons of all three members of the Court of Appeal in *Hawkins* implicitly assume that the word “debt” in s 556 of the now repealed Companies (NSW) Code comprises an obligation to pay a sum of money. *Hawkins* makes clear that, at least in that context, a debt may be incurred by a company when entering into a guarantee by which it subjects itself to a conditional but unavoidable obligation to pay a sum of money at a future time. I note Gleeson CJ referred at 572 to dictionaries that define “debt” as a liability or obligation to pay or render something. However, I do not understand his Honour to have suggested that a debt might consist of something other than a monetary obligation.
- 38 An obligation to pay an amount of cryptocurrency of some type is not an obligation to pay a sum of money and therefore cannot be a debt. While an obligation to pay cryptocurrency does not amount to a monetary obligation, it has been held in the United Kingdom that cryptocurrency is property: see *AA v Persons Unknown* [2019] EWHC 3556 (Comm) at [55] – [61] per Bryan J, approved by the UK Court of Appeal (Lewison, Popplewell and Birss LJ) in *Tulip Trading Limited v Bitcoin Association for BSV* [2023] EWCA Civ 83 at [24]. If that view is correct, then the breach of an obligation to pay an amount of cryptocurrency may sound in damages in a claim for breach of contract. Whether it is correct is a question to which Jackman J referred but did not decide in *Australian Securities and Investments Commission v Web3 Ventures Pty Ltd* [2024] FCA 64 at [10] after noting that “there is a legal controversy as to whether cryptocurrency is property, as that concept is understood by the common law”.
- 39 Historically, an action for failure to pay a sum of money due in foreign currency was characterised as a claim for damages for breach of an obligation to pay the foreign currency, rather than an action in debt: *Vehicle Wash Systems Pty Ltd v Mark VII Equipment Inc* (1997) 80 FCR 571 at 576 per Finkelstein J citing *Jolley* at 260. Justice Finkelstein observed at 576 – 577 that in *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443 (“*Miliangos*”) the House of Lords decided “that the court had a procedure available under which orders could be made

for payment of foreign currency claims in the foreign currency” and that this “does not alter the character of the claim that is made”. The authors of *Mann and Proctor* describe his Honour’s observation as “interesting...but...contrary to the now prevailing practice of the courts” in a footnote to para 8.04. In any event, Finkelstein J went on to say at 577 that “[t]here is much to be said in favour of the view that where a foreign currency functions as money an action for its recovery should be regarded as an action in debt”.

40 It is now well established that a statutory demand may be made for an amount payable in a foreign currency. In *Daewoo Australia Pty Ltd v Suncorp Metway Ltd* (2000) 48 NSWLR 692 Austin J expressed the view at [31] that the House of Lords’ decision in *Miliangos* “destroyed any theoretical basis for contending that a claim for failure to pay foreign currency is a claim for damages rather than debt”. Moreover, the *Bankruptcy Regulations (2021)* (Cth) now make clear that both a bankruptcy notice and a proof of debt may be for a sum of money payable in a foreign currency: see regs 12 and 24. Regulation 2B(3)(a) of the ASIC Regulations should be interpreted in the context of these developments. In my opinion the reference to debt in reg 2B(3)(a) will include monetary obligations payable in foreign currency.

41 It is clear from the TOS that a Margin Extension may be provided in Australian or foreign currency. Provision of a Margin Extension in that form would involve, as was rightly conceded by Bit Trade, the provision of “financial accommodation” to the customer. But it does not necessarily follow that the provision of financial accommodation in Australian or, say, US dollars, gives rise to a debt. It is also necessary to consider how any payment obligation imposed on the customer may be satisfied. If Bit Trade is contractually obliged to accept cryptocurrency in satisfaction of that obligation, then it is difficult to see how that obligation would amount to a monetary obligation capable of constituting a debt because it would not require the payment of a sum of money. It is therefore necessary to scrutinise the TOS closely to ascertain the content of the customer’s obligations and whether or not those terms require the customer to pay a sum of money.

42 As discussed above, cl 7.11.7 deals with the payment of fees and default. Under cl 7.11.7.2, the customer agrees to pay the amount of “Funds” owed to Bit Trade within 48 hours if their account balance becomes negative. Assuming that negative balance is in US dollars, then the question is whether, in those circumstances, the customer is obliged to pay the balance due in US dollars or whether it is equally open to the customer to do so in cryptocurrency. The reference to “Funds” (as defined) suggests that it is open to the customer to satisfy the

obligation with cryptocurrency. That in turn suggests that the obligation to make a payment under cl 7.11.7.2 is not a monetary obligation in the nature of a debt.

43 However, in circumstances where a Margin Extension is provided by Bit Trade in a national currency and the customer is at some later point in time no longer eligible to receive Margin Extensions (including by reason of an exercise of rights under cl 18), then cl 7.11.2.3 requires that the Margin Extension be terminated either within 28 days of the making of the Margin Extension or immediately upon the loss of eligibility if that Margin Extension is older than 28 days. To terminate the Margin Extension the customer is required by cl 7.11.4 to transfer sufficient Funds (as defined) from their Kraken account to Bit Trade. The Funds transferred must be of same asset type that was provided by way of Margin Extension. Hence, if the customer is required to terminate a US dollar Margin Extension, then they must pay the US dollar amount to Bit Trade. In my opinion, this amounts to “a conditional but unavoidable obligation to pay a sum of money at a future time”: *Hawkins* at 572 per Gleeson CJ.

44 The fact that the obligation to pay depends upon loss of eligibility does not mean that the obligation cannot fall within reg 2B(3) of the ASIC Regulations. If the conditions of cl 7.11.2.3 are met, an unavoidable obligation to pay to Bit Trade an amount of national currency (should the Margin Extension be denominated in a national currency) will arise. There is nothing “notional” about this obligation.

45 ASIC has submitted, and I agree, that it does not matter that some customers who agree to the TOS may not utilise the Product to obtain a Margin Extension in US Dollars or another national currency. The contravention of s 994B(1), when read with s 994B(2), occurred when Bit Trade engaged in “retail product distribution conduct” in relation to the Product, without first making a target market determination. “Retail product distribution conduct” is defined in s 994A of the Corporations Act, and includes “dealing” the financial product. “Dealing” is defined in s 766C of the Corporations Act as including issuing a financial product. A financial product is “issued” each time it is “first issued, granted or otherwise made available to a person”: s 761E(2) of the Corporations Act. As a result of these provisions, ASIC submitted, and I agree, that there will be a contravention of s 994B(1) when read with s 994B(2) each time the Product is first issued, granted or made available to a person without a target market determination having first been made.

CONCLUSION

- 46 The contract entered into between Bit Trade and customers evidenced by the TOS provides for the provision of a Margin Extension by Bit Trade to the customer. The provision of a Margin Extension in national currency (including in Australian or US dollars) gives rise to a “deferred debt” which is incurred by the customer when they are provided with the Margin Extension and which becomes payable upon the customer ceasing to be eligible to receive the Margin Extension. It follows that the Product is a credit facility which involves credit of a kind referred to in subpara (a) of reg 2B(3) of the ASIC Regulations. Consequently, the exception provided for under reg 7.8A.20 of the Corporations Regulations does not apply to the Product. By issuing the Product to retail clients without having first made a target market determination for the Product, Bit Trade contravened s 994B(1) of the Corporations Act when read with s 994B(2).
- 47 The parties sought and will be given an opportunity to agree upon an appropriate form of declaratory and injunctive relief in light of these reasons.

I certify that the preceding forty-seven (47) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Nicholas.



Associate:

Dated: 23 August 2024