

HONG KONG / JUDGMENT

RE GATECOIN LTD (in liquidation)

[2025] HKCFI 493

COURT

Court of First Instance

DECIDED

24 January 2025

CASE / FILE NUMBER

HCCW18/2019

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HCCW 18/2019

[2025] HKCFI 493

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

COMPANIES (WINDING-UP) PROCEEDINGS NO 18 OF 2019

IN THE MATTER of GATECOIN LIMITED (in liquidation)

and

IN THE MATTER of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32)

Before: Hon Linda Chan J in Chambers

Date of Hearing: 20 November 2024

Date of Decision: 24 January 2025

D E C I S I O N

By Decision dated 31 March 2023 (“Decision”), this Court decided 2 of the 4 issues raised in the Liquidators’ summons on the basis that determination of those issues, which concern whether the Currencies (or any part thereof) were held by Gatecoin on trust for its customers, might obviate the need to decide the remaining issues (which were premised on there being a trust). In summary, it was held that:

Cryptocurrency is property and is capable of being held on trust;

With the exception of the Non-consenting Customers (“NCCs”), the 2018 T&C applied to, and governed the relationship between all the Customers (be it Group A, B or C) and Gatecoin. Under the 2018 T&C, the Currencies are not held by Gatecoin on trust for the Customers; and

The Currencies recorded in BlueFire’s accounts are assets of Gatecoin.

The Liquidators were directed to give notice to all Group A and B customers, informing them of the court’s determination on the 2 issues and inviting them to notify the Liquidators if they are NCCs and provide evidence in support of their claims. If and to the extent that there are NCCs for whom Gatecoin held the Currencies on trust, the Liquidators would be able to ascertain the amount of their claims and assess whether the Currencies are sufficient to meet their claims.

As the Platform had ceased to exist by the time of their appointment, the Liquidators had to rely on the Exchange Ledger kept by Gatecoin which recorded the transactions carried out by the Customers and the balance of the Currencies held by each of them as at different dates.

According to the Liquidators’ investigations:

There are 4,499 Group A and B customers whose accounts did not record any transactions from 6 March 2018 (i.e. the date when 2018 T&C became effective) (“Relevant Date”) onwards and, therefore, fall within the definition of NCCs.

The remaining Group A and B customers, to the extent that they were ascertainable and contactable, were invited to provide evidence to demonstrate that they are NCCs. Only 141 customers reverted with evidence and/or responses. The names of the customers, the evidence provided by them and the view of the Liquidators are summarised in the tables and elaborated in Chi 7th and Chi 8th.

There are at least 1,240 Group A and B customers whose accounts recorded transactions after the Relevant Date but the transactions appeared to be automated or carried out without requiring the customers to access or use the Platform. These customers may qualify as NCCs (collectively “Potential NCCs”).

By summons dated 11 October 2023, Mr Nico Constantijn Antonius Samara (“Mr Samara”) claims that the 45.08883459 bitcoins (“Subject Bitcoins”) remaining in the account maintained by Mr Stive Jean-Paul Dan (“Mr Dan”) at Gatecoin under trade identification #20984 (“Specified Account”) were held by Gatecoin on trust for him.

Reliance is placed on the judgment dated 28 April 2022 in HCA 902/2018 and HCA 2332/2018 (“HCA Judgment”) where Wilson Chan J found that Mr Dan had acted in breach of fiduciary duties owed to Mr Samara, and Mr Dan held the cash balances in Mr Dan’s accounts at Citibank, the insurance policies at AIA International Ltd and the Subject Bitcoins in the Specified Account on trust for Mr Samara.

Mr Samara now claims (a) the same declaration in these proceedings; (b) the Specified Account should be treated as a NCC notwithstanding the 3 transactions carried out by Mr Dan after the Relevant Date; and (c) a declaration that Gatecoin (not Mr Dan) holds the Subject Bitcoins on trust for him.

The Liquidators therefore seek the court’s directions and determination on the following issues:

Issue 1: Classification of Potential NCCs. The Liquidators have identified 7 scenarios and consider that (a) 4 of them should be treated as NCCs, and (b) 2 of them should likewise be treated as NCCs if the customers are able to prove to the satisfaction of the Liquidators that they fall within the definition of NCCs (Section A below).

Issue 2: (a) The nature of NCCs’ beneficial interest in the Currencies; (b) how their trust claims should be met, with or without shortfall, (c) the mode of allocating the trust assets (in specie or in cash) to NCCs, and (d) how to deal with the trust assets where the NCCs cannot be identified or contacted (Section B1-B4 below).

Issue 3: Nature of the claims of ETD Holders, the remedy available to them and how their claims should be assessed (Section C below); and

Issue 4: Whether Gatecoin holds the Subject Bitcoins and/or the Specified Account on trust for Mr Samara. This is notwithstanding that the parties have jointly applied for an order to adjourn Mr Samara’s summons sine die with liberty to restore on the basis that the Liquidators’ application covers the same matters raised in the summons (Section D1-D6 below).

A.

ISSUE 1: CLASSIFICATION OF POTENTIAL NCCS

Some customers contend that although there were transactions recorded in their accounts after the Relevant Date, such transactions were the result of “automated transactions”, the acts of Gatecoin or the acts of other third parties, and the customers did not access or use the Platform to effect the transactions in question.

On the basis of the information and representations provided by the customers, the Liquidators have identified 7 scenarios (discussed in §9 below) where the transactions, although recorded after the Relevant Date, might not require the customers to access or use the Platform. The Liquidators have sought the view of Mr Casper Cheng Tsz Chun (“Mr Cheng”), an investment strategist at Satori Research (a cryptocurrency market-making firm) who prepared an expert report used at the last hearing. On each scenario, Mr Cheng’s views are line with those of the

Liquidators.

For the reasons explained in §9 below, except the last scenario, I agree with the view of the Liquidators and hold that:

The transactions described in the 1st to 4th scenarios did not involve the customers to have accessed or used the Platform. The customers should be regarded as NCCs unless there is evidence to show that they have accessed or used the Platform to effect the transactions; and

The transactions described in the 5th to 6th scenarios on their face required the customers to access or use the Platform to effect them and, prima facie, the customers fall outside the definition of NCC. However, if the customers are able to prove that they gave the instruction to Gatecoin before the Relevant Date or without using the Platform, they should be regarded as NCCs.

The transactions described in the 7th scenario did not exist and the customers should not be regarded as NCC.

The 7 scenarios are:

Referral rewards: These were free cryptocurrencies credited by Gatecoin into the customers' account upon their successful referral of new customer in the past. The customers needed to click a referral link to obtain the reward, which could have been done before the Relevant Date. It would be extremely difficult and costly to require the Liquidators to investigate into when the customers clicked the links and the time taken by Gatecoin to process and credit the reward. As a matter of practicality, these customers who received the referral rewards should be treated as NCCs.

TRX and XJP delisting: These were "manual updates" made by Gatecoin by deducting TRX and XJP from the customers' accounts following TRX's delisting on 15 June 2018. The manual update was made by Gatecoin and did not require the customers to access or use the Platform. These customers should be regarded as NCCs. However, if the customer logged into the Platform to withdraw TRX, it would not be a NCC.

Initial asset or coin offering of ARC and SAT: The customers subscribed for ARC and SAT before the Relevant Date, but the cryptocurrencies so subscribed were only deposited into the customers' accounts after the Relevant Date. These customers should be regarded as NCCs.

Cryptocurrencies mining: These were cryptocurrencies deposited into the customers' accounts by a third-party service provider (miner) upon reaching a certain threshold (of that level of cryptocurrency) mined or certain time intervals. These customers should be regarded as NCCs.

Private sale of GEN: The private sale of GEN only started accepting subscriptions in May 2018. The customers must have accessed or used the Platform to make the subscriptions, and should not be regarded as NCCs.

Limit Orders: These were orders placed by the customers which would only be executed when the target price set by the customers was met. The Liquidators have no means to determine if a particular order was a market order (i.e. executed immediately) or a limit order. These customers should not be regarded as NCCs unless they are able to prove that the transactions were the result of limit orders placed by them before the Relevant Date.

Orders placed face-to-face or over the phone or over-the-counter (collectively “OTC”) : These were transactions said to have been effected by the customers contacting Gatecoin’s staff or through OTC trades effected directly with Gatecoin’s financial partners. In view of the modus operandi of Gatecoin, there is no factual basis to show that such OTC trades existed. These customers should not be regarded as NCCs.

B1.

Issue 2(a): Nature of NCCs’ beneficial interest

As the relationship between Gatecoin and NCCs was one of trust, it is necessary to consider the nature of the beneficial interest of each NCC, as it may impact on the method by which the Currencies should be allocated.

Ms Eva Sit SC (leading Mr Justin Ho), counsel for the Liquidators, submits that:

Where the assets subject to a trust are intangible assets, the trust works by creating a beneficial co-ownership share in the identified fund or by seeking to identify a particular part of that fund which the beneficiary owns outright. The former view is considered to be more persuasive in *Re Lehman Brothers International (Europe) (in administration)* [2010] EWHC 2914 (Ch) §232, per Briggs J (as he then was), and was favoured in *Ruscoe v Cryptopia (No 1)* [2020] NZHC 728 at §§104, 145 (per Gendall J). In *Re CA Pacific Finance Ltd & anor* [1999] 2 HKLRD 1 (“CA Pacific (No.1)”) at 19J-20D, Yuen J (as she then was) adopted the latter view based on the terms of the client agreements.

The better view is that each NCC is a beneficial tenant-in-common who shares the pool of cryptocurrency between all NCCs in proportion to the total account balance of such cryptocurrency.

I agree with Ms Sit’s submissions. The view that each NCC is a beneficial tenant-in-common in a pool of cryptocurrency (and fiat currency) is consistent with the following facts and matters.

First, clause 7.3.1 of the Trust T&C provides that “Digital Assets” would be held in “pooled digital wallets” and a User “will have beneficial ownership interest in the Digital Assets”. This term is consistent with each NCC being a tenant-in-common in a pool of cryptocurrency.

Second, the manner in which cryptocurrencies were transferred and recorded means that it would be impossible for any NCC or the Liquidators to identify a particular part of a pool of cryptocurrency which a NCC owns outright.

Third, the modus operandi of Gatecoin was that once a NCC deposited a cryptocurrency with Gatecoin, the same would be received by an External Wallet, and then transferred from that External Wallet to a Mother Wallet and eventually mixed with the same cryptocurrency kept in that Mother Wallet. In addition, Gatecoin also used Operational Wallets and Multifunction Wallets to receive cryptocurrencies from its customers. This mode of operation coupled with the way cryptocurrency is transferred and recorded in the blockchain means that it would be impossible for the Liquidators to identify and trace which cryptocurrency (or part thereof) was deposited by which NCC or what has become of such cryptocurrency.

Fourth, the view is also consistent with the Decision, in which this Court endorsed the notion that each pool of cryptocurrency is held in favour of the beneficiaries as beneficial tenants-in-common, holding that:

A trust of part of a fungible mass without appropriation does not fail for uncertainty of subject matter provided that the mass is sufficiently identified and the beneficiary's proportionate share of it is certain. Such a trust works by creating a beneficial co-ownership share in the identified fund instead of having to identify a particular part of the fund which the beneficiary owns outright (Decision §61(2)).

In the case of Gatecoin, certainty of subject matter can be derived from a claim to a proportionate share of an undivided bulk given that the amounts of cryptocurrency held by the customers were recorded in the Exchange Ledger, and they co-own and share each type of cryptocurrency and fiat currency in proportion to the credit balance standing in their accounts (Decision §62(4)).

Fifth, the view that an exchange platform held the pool of each cryptocurrency on trust for the accountholders is also consistent with the holding in *Ruscoe v Cryptopia* (No 1), where Gendall J held (at §§168, 184) that a series of express trusts in favour of the accountholders had arisen in respect of their digital assets having regard to (1) Cryptopia's operations, (2) the terms and conditions of the agreement between Cryptopia and the accountholders, and (3) Cryptopia's principal duty under each of these trusts was to hold the relevant pool of currency on behalf of those accountholders (and to deal with their share in the pool as directed by the accountholders).

The same applies to Gatecoin. There is no requirement under the Trust T&C which imposes an obligation on Gatecoin to hold the very Currency deposited by a NCC on trust. Gatecoin's duty as trustee would be to hold the pool of Currency on trust for the NCCs and to follow their instructions.

In any event, the distinction between individual trusts and a single trust over each pool of Currency may not yield different results in practical terms:

As explained in CA Pacific (No.1) (18D-F, 19H-20B), given that one pari passu share is exactly the same as another, there is no need for delivery of the very share even if, on true analysis, the shares were held on individual trusts, so long as an equivalent quantity of such shares could be allocated to satisfy a proprietary interest (citing Solloway v McLaughlin [1938] AC 247). The analysis in CA Pacific (No.1) 18D-F was recently adopted in Ding Huirong v China Times Securities Ltd [2021] 4 HKC 217 (CA) §46 (albeit not in the context of distribution upon insolvency).

The analysis in CA Pacific (No.1) and Solloway applies with equal force in relation to the Currencies: one unit of cryptocurrency of the same type is just the same as another. The same goes to fiat currency.

B2.

Issue 2(b): How NCCs' trust claims should be met

B2.1

No shortfall

Where there is no shortfall, each NCC should be entitled to his trust property (CA Pacific (No.2), p.13). As each NCC is a tenant-in-common in a pool of Currency, the obligation of Gatecoin would be to return the equivalent amount of the Currency to each NCC.

Ms Sit submits that the recovery of trust assets by NCCs should be subject to an appropriate portion of the Liquidators' costs being borne by the trust assets, following the approach in CA Pacific (No.2) pp.13-14 and Re Forluxe Securities Ltd, HCCW 310/1998, 20 December 2000 §21.

In CA Pacific (No.2), Yuen J considered that the recovery of shares by the clients held by the company on trust should be made subject to payment of proper and reasonable costs, fees and expenses of the liquidators attributable to (1) determination of the entitlement to such delivery; (2) management of that portfolio of shares prior to delivery; and (3) carrying out the actual work of delivering the shares. The rationale is that it would only be right for those costs to be borne by the trust assets, and not by the free assets as that would place an unfair burden of costs on unsecured creditors, applying Re Berkeley Applegate (Investments Consultants) Ltd (in liq) [1989] Ch 32).

It seems to me that the same principle should apply here.

The Liquidators have spent much time and costs in investigating the issue of the Customers' entitlement to the Currencies held by Gatecoin including identifying and differentiating the rights and interests of Group A, B and C customers; receiving and investing the claims made by the Customers; seeking directions or determination from the court on the relevant issues; managing the Currencies pending allocation to NCCs; and allocating the Currencies to NCCs in accordance with their entitlements.

The time and costs spent by the Liquidators in dealing with these matters should be treated as the costs of administering the trust assets (“Administration Costs”), and should be paid out of the trust assets before allocating them to NCCs.

The Liquidators should be able to distinguish and apportion the time and costs spent in dealing with the liquidation of Gatecoin generally, the claims of unsecured creditors and the Administration Costs. If and insofar as it is necessary, they may apply to the court for further directions.

The same treatment applies to fiat currencies subject to trust claims. As at the time of liquidation, the total amount of fiat currencies held by Gatecoin was HK\$11,589,477, which exceeds the total value of NCCs’ claims for fiat currencies which stands at HK\$3,642,927.

After the Administration Costs are deducted and the claims of the NCCs satisfied or provided for, the surplus Currencies will fall into the free assets of Gatecoin, and should be applied and distributed in accordance with the statutory scheme of winding-up including making distributions to the unsecured creditors in proportion to their claims.

B2.2

Shortfall

The issue of shortfall only arises in respect of certain types of cryptocurrencies. Other than bitcoins and ETH, the quantities of cryptocurrencies held by Gatecoin are not sufficient to satisfy all the trust claims and the Administration Costs. The Liquidators propose that the cryptocurrencies in question should be allocated amongst NCCs on a proportionate basis using an ex post facto approach.

As discussed in CA Pacific (No.2) pp.16-17, where there is a shortfall, there are various methods of allocating the remaining trust assets:

adopting the rule in Clayton’s case, whether by way of “First In First Out” or “Last In Last Out;

adopting the “pari passu ex post facto” approach and its variations viz., the “North American” or “rolling charge” basis and the “weighted pro rata” basis; or

a method whereby for each line of stock, priority would be given to the clients as a class, with clients in each class as between themselves sharing pari passu.

The Liquidators consider the first and third methods to be inapplicable for the following reasons:

The rule in Clayton’s case has no application beyond the case of a running banking account (CA Pacific (No.2) pp.20-21, citing *Re Diplock’s Estate* [1948] Ch 465, at 555). It is based on the presumed intention that the company would have first withdrawn the cryptocurrencies that were deposited in its Wallet first, which has no application given the way cryptocurrencies were deposited, mixed and withdrawn. In *Ruscoe v Ryan Houchens & Anor* (“Ruscoe No. 2”) [2024] NZHC 419 §11, Palmer J also considered, in the context of a failed crypto exchange which held

cryptocurrencies on trust for its customers, that the rule in Clayton's case should not be applied because it was not practical to trace investors' moneys or doing so would involve enormous effort unlikely to produce a reliable result.

The third option was based on the specific circumstances of CA Pacific (No.2), where there was an issue as to whether the transfer of shares undertaken by the securities brokerage had been made with the authorisation of the clients, and the court determined that the "innocent" clients (those who did not authorise the transfers) should have priority over others.

The Liquidators consider the "pari passu ex post facto" approach is the appropriate method of allocation in the present case. I agree.

The approach was explained in Barlow Clowes (International) Ltd (in liq) v Vaughan [1992] 4 All ER 22 at p.36 in this way:

"this involves establishing the total quantum of the assets available and sharing them on a proportionate basis among all the investors who could be said to have contributed to the acquisition of those assets, ignoring the dates on which they made their investment....It has the virtue of relative simplicity and therefore relative economy and also the virtue of being in this case more than just the solution [the rule in Clayton's case]. It would have the effect of sharing the pool of assets available proportionately among the thousands of investors in a way which reflected the fact that they were all the victims of a 'common misfortune.'"

The same approach has been applied in other cases where there was mixing of trust assets and a forensic tracing exercise was found to be impracticable and should not be adopted (Re MF Global HK Ltd [2012] 2 HKLRD 1; Re Performance Investment Products Corporation Ltd, HCCW 348/2007, 17 March 2014).

The approach applies where, as here, the contractual position of all NCCs is the same such that their rights vis-à-vis Gatecoin are identical. Aside from the benefit of simplicity and economy, the approach also closely approximates the nature of NCCs' interest as tenants-in-common in a pool of cryptocurrency.

For completeness, I do not consider the variations discussed in CA Pacific (No.2) to be applicable:

The "North American" or "rolling charge" variation involves treating credits to a Wallet at different times as a blend such that when a withdrawal is made from that Wallet, it is treated as a withdrawal in the same proportions as the different interests in the Wallet bear to one another before the withdrawal. This means that if the Wallet is depleted, contributions before that date would not be able to share in any balance in the Wallet at a later date (CA Pacific (No.2) p.24). This exercise is akin to tracing. For the reasons stated in §28(1) above, it would involve substantial time and costs even assuming it is possible to do so. It would not be in the interests of NCCs to bear the costs for the Liquidators to undertake such an exercise.

The “weighted pro rata” variation was recommended by the liquidators in CA Pacific (No.2) pp.24-25 as 2 pools of shares were recovered, one under the company’s control and the other under the lender’s control, and the variation was proposed to reflect the proportions of each stock in each pool. The same consideration does not arise here.

Accordingly, subject to deducting the Administration Costs, where there is a shortfall of a particular type of cryptocurrency, the Liquidators should adopt the *pari passu ex post facto* approach in allocating that type of cryptocurrency to NCCs concerned.

B3.

Issue 2(c): Mode of allocation

As regards the mode of application, Ms Sit submits that where the trust assets are shares:

It was held by Kwan J (as she then was) in *Re Chark Fung Securities*, HCCW 362/1998, 20 November 2002 that the client can elect one of 3 options (all subject to deducting the liquidators’ costs) namely, to (a) have the shares delivered in specie; (b) have the shares sold and proceeds paid; or (c) deal with the matter based on whether there is a shortfall – if there is a shortfall, sell the shares and pay the proceeds, and if no shortfall, delivery of the shares in specie.

In subsequent cases where there was shortfall (see for eg., *Re Law Siu Kong*, HCMP 2477/2022, 24 February 2006 at §§17-19; *Re TS Wong (Investment & Finance) Co Ltd*, [2008] 5 HKLRD 469 at §§8-13), the court was prepared to direct the entire portfolio of shares be sold and proceeds distributed in proportion to individual client’s claim to the total value of claims, where the value of shares was very modest, the costs of distributing shares were disproportionate, and forensic tracing exercise was impracticable. The court took the view that no further step should be taken to avoid further diminishing the value of the shares, and a rough-and-ready and economical way should be adopted to distribute the little assets left.

In the present case, the Liquidators propose, and I agree, that subject to deducting an appropriate portion of the Administration Costs, if there is no shortfall of the type of cryptocurrency, there should be allocation of the cryptocurrency to NCCs in specie. This is consistent with the proprietary nature of the NCCs’ interest in the cryptocurrencies.

However, there are a number of factors which would render allocation in specie to become impractical or inappropriate.

First, the cost of effecting transfer of cryptocurrencies. In order to transfer the cryptocurrencies to NCCs in specie, it is necessary to engage a service provider to set up a designated wallet for each type of cryptocurrency and, thereafter, transfer the amount of cryptocurrency to each NCC. According to the lowest quote obtained by the Liquidators, the fees charged by the agent are as follows:

A set-up fee of US\$500 to US\$1,000 for setting up a designated wallet for each type of cryptocurrency;

A transaction fee of US\$45 to US\$65 will be charged for each transaction;

The minimum charge for providing the service described in §§(1)-(2) above is US\$150,000; and

The cost of realising the cryptocurrency into cash is 1% of the value of the cryptocurrency.

Having regard to the amount of cost involved in transferring the cryptocurrency to NCCs, it seems to me that it would not be in the interest of NCCs or it would be impracticable for the Liquidators to effect allocation in specie in the following (non-exhaustive) scenarios:

If the amount of a type of cryptocurrency available is small as compared to the cost of setting up a designated wallet for that cryptocurrency, even if there is no shortfall;

If there are a large number of NCCs who have claims over a pool of cryptocurrency, and after satisfying the bulk of their claims, the cost involved in allocating the remaining cryptocurrency would be disproportionate to the value of their claims;

If the transaction cost (including the apportioned cost for setting up a designated wallet) for transferring the cryptocurrency to the NCCs is disproportionate to the value of the claims;

If the NCC elects to receive cash in lieu of allocation in specie; or

If there is a shortfall in a pool of cryptocurrency after deducting the apportioned Administration Costs, the available cryptocurrency is small as compared to the transaction cost for transferring the cryptocurrency to NCCs.

In the above scenarios, the Liquidators should be allowed to sell the cryptocurrency in question and apply the sale proceeds to meet the claims of NCCs.

As for the cryptocurrencies which are not subject to any proprietary claims, the Liquidators should be at liberty to realise them and apply the proceeds for the purposes of defraying the expenses of liquidation and making distributions to the unsecured creditors in accordance with the statutory scheme of winding-up of Gatecoin.

B4.

Issue 2(d): Unidentified or uncontactable NCCs

The Liquidators believe that a large number of NCCs (including Potential NCCs who are able to prove that they have not accessed or used the Platform after the Relevant Date) have not come forth to make their claims. This is because although the Liquidators have contacted over 102,600 customers, only 1,132 of them have PODs. The Liquidators propose that in the event that the NCCs do not come forth to claim their trust assets, the court should direct the Liquidators to invoke ss.62 or 67 of the Trustee Ordinance (Cap. 29) ("TO") for the following reasons:

In *Re Peregrine Brokerage Ltd & anor* [2004] 1 HKLRD 856 §22 and *Re Nava SC Securities Finance Ltd*, HCMP 1038/2008, 14 October 2008, §§12, 14 & 16, the court held that on proper construction of s.285(1) of the former Companies Ordinance (Cap. 32), any unclaimed trust property (in the form of funds and securities) would not form part of the assets of the company, and where the trust clients are identified, the funds and securities may be transferred and administered by the Official Trustee pursuant to ss.67-68 of TO.

However, ss.67-68 of the TO only provide for “moneys” and “securities” – that would cover fiat currencies, but not cryptocurrencies. This means that in order for the Liquidators to avail themselves of the provisions under the TO, they would need to realise and convert the cryptocurrencies into cash first.

Further, the invocation of ss.67-68 of the TO requires the consent of the Official Trustee, which the Liquidators would have to obtain as and when the need to so invoke arises. If the Official Trustee is not prepared to give consent, the Liquidators may have to invoke s.62 of the TO.

Accordingly, the Liquidators should be allowed to pursue the course under ss.62 or 67 of the TO in such scenario, subject to the matters discussed in §§(1) to (3) above, with liberty to apply.

In my view, the assumption that there are untraceable or uncontactable NCCs such that it is necessary for the Liquidators to set aside certain cryptocurrencies or the proceeds thereof for the purpose of satisfying their claims may not be real or correct. The starting point is that each customer has to lodge a claim by filing a proof of debt (together with evidence in support of the claim) within the time limit for doing so. If the customers do not come forth to make their claims within the time limit, there is no reason why the Liquidators should assume that they must be NCCs such that it is necessary to set aside sufficient amount of cryptocurrencies to satisfy their claims.

As matter now stands, I do not think that it is appropriate to give the directions proposed by the Liquidators.

C.

ISSUE 3: ETD HOLDERS

As stated in Decision §29, after the Hack in 2016 which resulted in loss of ETH in various customers' accounts, Gatecoin credited those accounts with ETD, which represented the amount of ETH owed by Gatecoin to the relevant customers (i.e. ETD Holders), with the value of ETD linked to the market price of ETH, but the ETD Holders could not withdraw the same until Gatecoin had liquidity to honour it. The Liquidators have identified additional facts which reinforce their view that ETD is only a record of the debt owed to the ETD Holders and intended to compensate their loss suffered as a result of the Hack.

At the last hearing, the Liquidators took the position that ETD was merely an accounting entry in the Exchange Ledger recording the debt owed by Gatecoin of the amount of ETH stolen and was compensatory in nature. On the other hand, Cumberland (an ETD Holder) argued that ETD Holders should not be classified as unsecured creditors.

Ms Sit submits that having further considered their position, the Liquidators now take the view that ETD ought to be characterised as a record of each ETD Holder's claim or cause of action against Gatecoin for breach of trust (rather than being a contractual claim). This is because:

The Hack took place at the time when the 2016 T&Cs were in force. This means all the stolen ETH were held on trust by Gatecoin.

The loss of the ETH gave rise to a breach of trust on the part of Gatecoin which would entitle the ETD Holders to the trust asset if they were recovered by Gatecoin (*Libertarian Investments Ltd v Hall* (2013) 16 HKCFAR 681 §79).

This was in fact what happened, when Gatecoin managed to recover a small portion of the stolen ETH which were returned pro rata to the affected customers.

The ETD represents the balance of the ETD Holders' breach of trust claims.

Having regard to the holding that Gatecoin held the Currencies on trust for Group A customers (i.e. those subject to 2016 T&Cs and have not agreed to 2018 T&C), I agree that for the reasons submitted by Ms Sit, ETD represents a cause of action by the ETD Holder against Gatecoin for breach of trust, and the claim is proprietary in nature. It follows that Gatecoin is liable to return the amount of ETH lost which remains unaccounted for.

The next issue is how to quantify the ETD Holders' claims for breach of trust. As submitted by Ms Sit:

Where there is a breach of trust involving loss of trust asset, the primary relief is recovery of the trust asset if it is still in the hands of the wrongdoer (*Libertarian*, §79).

Where the trust asset or its traceable proceeds cannot be restored in specie, the remedy is for the wrongdoer to pay a sum of money sufficient to restore the trust fund to the position it would have been if the trust assets had not been misapplied (i.e. equitable compensation) (*Snell's Equity*, 34th edn., §30-013).

Gatecoin never managed to recover the rest of the stolen ETH, the ETD Holders' claims would sound in equitable compensation accordingly.

As to quantification, the law considers that there is a strict duty to restore the trust estate either in specie or by value in breach of trust cases, and the court is entitled to take into account any post-breach changes affecting the value of the lost trust property (*Libertarian* §§79, 91). The Liquidators propose to take the highest value of ETH prices in Hong Kong dollar during the period from 1 May 2016 (the day after the Hack) to 13 March 2019 (date of liquidation), based on an average of the prices reported in various market sources as the basis for quantifying the

claims of the ETD Holders:

Source of

Market Price

Date of Highest Closing price

Highest Closing Price (HK\$)

Yahoo Finance

13/1/2018

10,923.36

Business Insider

13/1/2018

10,821.50

Coingeko

13/1/2018

11,328.24

Coinmarketcap

13/1/2018

10,923.36

Investing.com

13/1/2018

10,794.91

Average

10,958.27

The latest position adopted by the Liquidators has been communicated to Cumberland, and Cumberland agrees with the Liquidators' proposal.

The Liquidators' proposal is consistent with the nature of the claims of the ETD Holders and the liability of the trustee to compensate the beneficiary for the loss of the trust asset. Accordingly, it is appropriate to give the directions proposed by the Liquidators to the effect that ETD is a record of the ETD Holder's claim against Gatecoin for breach of trust and sounding in equitable compensation, which should be quantified at the highest closing price on 13 January 2018 at HK\$10,958.27 per ETH.

D.

ISSUE 4: MR SAMARA'S CLAIM

D1.

Relevant facts

The following facts are either not in dispute or are indisputable.

Mr Dan opened the Specified Account on 12 May 2016.

On 1 June 2017, Mr Samara and Mr Dan entered into an oral agreement whereby Mr Dan would act as Mr Samara's agent in selling the latter's bitcoin for a commission.

The Exchange Ledger shows that Mr Dan had carried out 3 transactions in the Specified Account on 7 March 2018 (collectively "3 Transactions"), details as follows:

ID

Trader ID

Currency Amount

Type

Date

Time

19901032

20984

BTC 0.18997644

Trade

7/3/2018

06:50

19901033

20984

USD

-2108.149557

Trade

7/3/2018 06:50

19901035

20984

USD

-5.27037389

Trade Fee

7/3/2018

06:50

The 3 Transactions were also shown in the document adduced by Mr Samara as evidence in support of his claim.

In view of the modus operandi of Gatecoin in carrying out the 3 Transactions, Mr Dan must have used or accessed the Platform on 7 March 2018. As the 3 Transactions took place after the Relevant Date, the Specified Account does not fall within the definition of NCC.

In the consolidated action commenced in 2018, Mr Samara claimed that Mr Dan had acted in breach of his duties as agent and did not account for the sale proceeds of the bitcoins sold.

On 5 September 2019, Mr Samara filed a proof of debt claiming the Subject Bitcoins, which were valued at US\$155,137.60 as at the date of the winding-up order or US\$423,314.40 as at 4 September 2019 (“SPOD”) . Reliance was placed on §§40-46 and 99-101 of Mr Samara’s affirmation and the consolidated statement of claim dated 11 December 2018 both filed in the consolidated action.

The trial of the consolidated action took place on 11 April 2022 at which Mr Dan did not appear or adduce any evidence. In the HCA Judgment handed down on 28 April 2022, Wilson Chan J:

noted that the Specified Account was Mr Dan’s account (§16);

found that Mr Dan acted in breach of fiduciary duties owed to Mr Samara qua agent, in that Mr Dan sold the bitcoins which had been transferred from Mr Samara to the Specified Account but failed to account for the sale proceeds and any income or profits derived therefrom (§33);

found that Mr Dan was liable to account for Mr Samara’s bitcoins, their sale proceeds and any income or profits derived therefrom which included all the assets located in Hong Kong as identified by Mr Samara, one of which was the Subject Bitcoins in the Specified Account (§§33, 37(3)); and

granted declarations that the 465.287 bitcoins transferred by Mr Samara to the Specified Account and the 387.18422 bitcoins transferred by Mr Samara pursuant to Mr Dan’s instructions in respect of the TD Ameritrade Sales, the sale proceeds and the fruits thereof, including the Subject Bitcoins in the Specified Account, were at all material times and are held by Mr Dan on trust for Mr Samara absolutely (“Declarations”) (§39(1)-(2)).

On 16 May 2022, Mr Samara through his solicitors provided the HCA Judgment to the Liquidators. In their letter dated 7 June 2022, the Liquidators (1) acknowledged receipt of the SPOD and that Mr Samara is the beneficial owner of the Subject Bitcoins in the Specified Account; (2) confirmed that the proof of debt filed by Mr Dan would not be admitted; (3) outlined the next steps to be taken by the Liquidators including their intention to apply to the court for directions on various issues including the trust issues described in their first report to creditors dated 10 August 2021; and (4) considered that Mr Samara's rights in respect of the Specified Account and any transfer should properly be considered as part of the Liquidators' application for directions.

D2.

Summary of parties' contentions

Ms Sit submits that the relief sought in Mr Samara's summons is wholly misconceived and invite the court to direct the summons to be brought up and dismissed with costs for the following reasons:

§1.1(a) of the summons seeks a declaration that Mr Samara is the beneficial owner of the Subject Bitcoins in the Specified Account. The court has already granted the Declarations in the consolidated action. It is superfluous for Mr Samara to seek the same declaration in these proceedings.

§1.1(b) of the summons seeks a declaration that the Specified Account was a NCC. This is unsustainable as there is clear evidence to show that Mr Dan carried out the 3 Transactions after the Relevant Date, such that the Specified Account cannot be treated as a NCC.

§1.1(c) of the summons seeks a declaration that Gatecoin holds the Subject Bitcoins on trust for Mr Samara. The claim is bound to fail given that:

As between Mr Dan and Gatecoin, Mr Dan had the authority to operate the Specified Account, and he did so by carrying out the 3 Transactions;

In the SOC, no viable factual foundation has been pleaded for any claim that Gatecoin held the Subject Bitcoins on trust for Mr Samara; and

The causes of action pleaded in the SOC are based on a false factual premise as to the nature of the representation made by Gatecoin to Mr Samara.

Mr Byron Chiu, counsel for Mr Samara, does not dispute that the declaration sought in §1.1(a) is superfluous. He submits that the Subject Bitcoins in the Specified Account are held by Gatecoin on trust for Mr Samara for the following reasons:

There was "no proper and valid agreement to and acceptance of the 2018 T&C so as to alter the undisputed extant trust over the Subject Bitcoins created and existing prior to [the Relevant Date]. The Liquidators have not shown that even if a customer accessed the Platform and conducted a trade after the Relevant Date, he accepted and agreed to the 2018 T&C.

Gatecoin was on “express notice” that Mr Dan had no authority to carry out the 3 Transactions given that Mr Samara had in February 2018 requested Gatecoin to block the Specified Account. The request “must mean blocking the [Specified Account] not just in terms of withdrawing funds, but dealing with funds (including buying bitcoins with Mr Samara’s fiat currencies without Mr Samara’s consent)”. Gatecoin was aware of Mr Dan’s breach of fiduciary duties owed to Mr Samara.

Gatecoin is estopped from relying on the 3 Transactions carried out by Mr Dan after the Relevant Date, either because (a) Mr Samara and Gatecoin had operated under the shared assumption that the Specified Account was “blocked”, such that it would be unjust to allow Gatecoin to act inconsistently with that shared assumption or (b) Gatecoin had made representation to the effect that the Specified Account had been blocked.

The above arguments boil down to the following issues:

Did Mr Dan have actual authority to carry out the 3 Transactions (Actual Authority Point) (Section D3 below);

If Mr Dan had actual authority, was Gatecoin put on notice of Mr Dan’s breach of fiduciary duties and lack of authority such that it was unconscionable for Gatecoin to have relied on Mr Dan’s actual authority in carrying out the 3 Transactions (Unconscionability Point) (Section D4 below);

If it was not unconscionable for Gatecoin to have relied on Mr Dan’s actual authority in carrying out the 3 Transactions, whether it is open to Mr Samara to re-open the issue as to whether the Specified Account is a NCC (Re-open NCC Point) (Section D5 below); and

Whether Gatecoin is estopped from relying on the 3 Transactions (Estoppel Point) (Section D6 below).

D3.

Actual Authority Point

Mr Chiu’s arguments go like this:

The court in the HCA Judgment held that the Subject Bitcoins belonged to Mr Samara absolutely at all material times, “it must mean that whatever funds (USD or otherwise) used to buy some or all of the Subject Bitcoins now sitting in the [Specified Account], those funds were also Mr Samara’s. In other words, both fiat and cryptocurrencies in the [Specified Account] were Mr Samara’s at all material times since February 2018, such that Mr Dan had no authority to deal with the same. Hence the request for a block”.

Gatecoin was “put on express notice that Mr Dan did not have any actual or apparent authority to deal with the Subject Bitcoins (or the funds used to purchase bitcoins which formed a part of the Subject Bitcoins). He had no authority to carry out the [3 Transactions] (and hence no authority to agree to the 2018 T&C to change the nature of the extant trust over the Subject Bitcoins which belonged to Mr Samara)”.

This is a reflection of ordinary principle of agency law. Reliance is placed on O'Connell & Ors v LPE Support Ltd [2022] EWHC 1672 (Ch) §§8-11:

“If a person dealing with an agent knows that the agent does not have actual authority to conclude the contract or transaction in question, the person cannot rely on apparent authority. Apparent authority can only be relied on by someone who does not know that the agent has no actual authority.” (§9)

Here, Gatecoin knew Mr Dan did not have actual authority to conclude the 3 Transactions or agree to the 2018 T&C to effect a change to the nature of the trust over Mr Samara's Subject Bitcoins.

Where an agent acted in breach of duties to the principal in entering into an agreement with a third party which knew or had notice of the breach, the agreement is void, and the company / principal can “disavow” the same (O'Connell §10).

“Gatecoin was aware of Mr Dan's breach of fiduciary duty to Mr Samara, and his lack of authority to deal with the currencies in the [Specified Account] or enter into any agreement which would affect Mr Samara's property (i.e. the trust over his Subject Bitcoins)”.

The argument that Mr Dan did not have actual authority to carry out the 3 Transactions or agree to the 2018 T&C is flawed:

There is no dispute that Mr Dan was at all material times the holder of the Specified Account.

As between Mr Dan and Gatecoin, Mr Dan was the only person who had actual authority to operate the Specified Account including giving instructions to Gatecoin to carry out the 3 Transactions. Gatecoin was contractually bound to act in accordance with the instructions given by Mr Dan unless it was restrained by the court or other competent authority from doing so. It was only until 1 November 2019 when DHCJ Le Pichon granted a Mareva injunction against Mr Dan enjoining him from dealing with, inter alia, the cryptocurrencies and fiat currencies deposited in the Specified Account that Gatecoin did not have to comply with the instructions given by Mr Dan.

No evidence has been adduced by Mr Samara as to why Mr Dan did not have actual authority to carry out the 3 Transactions or agree to the 2018 T&C. The suggestion that the HCA Judgment obtained by Mr Samara in April 2022 somehow had the effect of retrospectively taking away Mr Dan's actual authority in carrying out any trades in respect of the Specified Account from February 2018 is untenable.

As regards the arguments described in §62(5)-(6) above, they are irrelevant to the Actual Authority Point and will be dealt with under the Unconscionability Point.

D4.

Unconscionability Point

The factual evidence relied upon by Mr Chiu in support of his argument that Gatecoin knew or had notice of Mr Dan's breach of fiduciary duty and lack of authority to operate the Specified Account is the correspondence exchanged between Mr Samara and Mr Menant/Gatecoin during the period from February 2018 to June 2018.

As the parties seek to put different gloss on the emails exchanged, it is necessary to set out the contents of those emails and the other objective facts in chronological order.

On 16 February 2018, Mr Samara emailed Gatecoin (and reached Mr Menant) to "report a scammer that used your website to sell my bitcoin". After stating his name, Mr Samara said:

"[Mr Dan] "sold for 1,6 million usd of my bitcoin through gatecoin. because I could not sell the bitcoin directly and stive has his own exchange (www.soybit.com), stive used gatecoin to sell my bitcoin and then send the money to my account. stive only send a small part of the money to my account. and i want to report that stive is a scammer and has arrested many times for financial crimes. if you can block his account because if you do not you will be cooperating with a scam ...

...Maybe you can not help me, maybe you can, but at least I report this scam, and also i can report that i will report this very soon at the authorities." (underlined added)

On 19 February 2018, Mr Menant acknowledged receipt of Mr Samara's email and stated:

"We know Stive as he sold large amounts through our exchange. We dont want to be involved in any form of illegal activity and will open an internal investigation to find out what happened, and if required, we will forward the info we collected to relevant authorities. Can you explain more in details how the scam happened and provide elements to prove it?"

On 20 February 2018, Mr Samara sent an email to the Joint Financial Intelligence Unit ("JFIU") to report "a client of citibank hong kong who is involved in scams, money laundering", and provided particulars and statements of the bank account. In the same email, he said he had asked Mr Dan to sell 1,000 bitcoins for him in return for 3% commission, and that Mr Dan sold the bitcoins through Gatecoin. On 21 February 2018, Mr Samara forwarded his email to JFIU to Mr Menant.

On 22 February 2018, Mr Samara sent another email to Mr Menant stating that he would come to Hong Kong and report the case to the Police "officially" and said:

"Steve did not steal the bitcoin because I send the bitcoin out of free will so that steve could sell the bitcoin for me, steve promised to pay me and sell the bitcoin for me, but disappeared with the money and thus stole the money. Steve all the time had excuses that gatecoin bank accounts were blocked and that you were setting up a company so you could send steve the money of the btc sales.

Secondly Steve fabricated the source of funds to his bank. I do not know if gatecoin send the money to his citibank personal bank account or to his business account. But for the other transactions he did for me, i had access to his bank (attached steves bank statement) and for all these incoming transactions, steve fabricated the source of funds. I reported this to citibank, and his account is blocked now.

....

... all you can do is to find out how Steve obtained his bitcoin and try to ask for his transaction proof. i think it is your legal duty to do kyc/aml and my request and report gives you enough reason to an investigation and cooperate with authorities.” (underlined added)

Mr Menant replied on the same day, assuring Mr Samara that they would not say anything to Mr Dan and said “Yet we could close his account, so please move forward quickly” and suggested Mr Samara to report the matter in person to the Hong Kong Police.

In his email dated 22 February 2018, Mr Menant told Mr Samara that Mr Dan had “40btc on gatecoin. We can lock his account if you want. I was just afraid that it might put you in trouble”. In response, Mr Samara on 23 February 2018, said that “Octagon” and Citibank had shut down / blocked Mr Dan’s accounts, but did not request Gatecoin to block the Specified Account.

No further email was exchanged until 7 March 2018 14:35 (i.e. after the 3 Transactions had been carried out) when Mr Menant emailed Mr Samara, asking if he had any update on his claim as Mr Dan was trying to withdraw his funds and Gatecoin “wont be able to block them for ever”.

In his email dated 9 March 2018, Mr Samara informed Mr Menant that he had reported the matter to the Police and was told that his case was “more likely a civil case”. Mr Samara acknowledged that Gatecoin could not block the Specified Account any longer without a court order:

“Now regarding the 40 btc you blocked.

I can only proof that i send 275 of my bitcoins to gatecoin through my wallet (i have the private key and wallet). But it will take a long time until i have a court order that will order steve to pay me back bitcoin/money. I don’t think that without court order you can block funds any longer and unfortunately a criminal will walk away freely for now. But it is up to your legal department to decide.” (underlined added)

On the same day, Mr Menant through email recommended a lawyer from Messrs. RPC (“RPC”) to Mr Samara and said: “regarding the funds, we told Stive we were doing KYC review, and that it would be blocked for another week, we can probably extend it a bit, but I am afraid it will never be long enough. I am actually interested in having [the recommended lawyer’s] opinion on this.”

On 14 March 2018, Mr Samara emailed Mr Menant saying that he had retained RPC and was advised that he needed to apply for an injunction or got the Police to block the Specified Account in this way:

“[The lawyers] told me that either we have to file an injunction to Steve or the police has to order gatecoin to block the Bitcoin of steve. Both will take time. I guess through the police would be very fast and through the civil procedure will be slow.

...[on the issue of conflict] ... i explained [to the lawyers] that you need proof and a legal procedure to comply and that we are at the same side, but their compliance department didn't allow it. So i will be working with two law firms ... [the lawyers] for the police report and criminal and civil prosecution. And a second law firm for the bitcoin at gatecoin.

Do you want to discuss this with [the lawyers] (at my costs) to give you an advise what to do because i understand you can't hold the bitcoins of steve for ever without legal framework.” (underlined added)

It appears that the conflict issue was not resolved in the way Mr Samara wanted, and RPC continued to represent Gatecoin. Mr Samara then engaged Messrs. Hom & Associates (“HA”) as his solicitors.

No injunction was sought by Mr Samara until late April 2018 but he continued to request Gatecoin not to allow Mr Dan to withdraw the funds or bitcoins from the Specified Account:

By email dated 11 April 2018, Mr Menant asked the progress and told Mr Samara that Mr Dan “keeps asking his btc, so I am going to release them at some point, unless I m told by a legitimate authority to freeze them”.

In his email dated 12 April 2018, Mr Samara said that he had another appointment with the Police on 18 April, and “his lawyers are working on a Mareva injunction. But the goal is that by next week the police will give the order to freeze all steve's assets.” He asked if Mr Menant wanted to be provided with his statement given to the police and “the legal reasoning why you have to freeze the funds? I can tell them to do so, so you have a legal, reason to hold the coins. Please confirm.” (underlined added)

Subsequently, Mr Samara obtained a Mareva injunction on ex parte basis but the same was discharged on 27 April 2018 by Recorder Yvonne Cheng SC (as she then was). As stated in the Recorder's Reasons for Decision in HCA 902/2018 dated 15 May 2018 [2018] HKCFI 1022:

On 20 April 2018, Mr Samara applied for and obtained an ex parte Mareva injunction in an intended action enjoining Mr Dan from removing his assets from Hong Kong up to US\$2,597,639 (\$1).

The basis of the application was that he had transferred 1,000 bitcoins to Mr Dan to sell in return for a 3% commission as Mr Samara could not open a bank account in Hong Kong to handle the sale proceeds. Between June and September 2017, some bitcoins were traded through Mr Dan's account at Gatecoin. The total amount payable by Mr Dan for trading of the bitcoins was US\$3,118,139 but only US\$520,500 had been transferred to Mr Samara, hence his claim for balance of sale proceeds. Since 27-28 October 2017, Mr Samara had not been able to locate Mr Dan. In February 2018, he requested Gatecoin to block Mr Dan from accessing his account. While

Mr Menant agreed to block Mr Dan from withdrawing the bitcoins, he would need a legal basis to block the account for any extended period of time (§§4-10).

On 23 April 2018, Mr Samara commenced HCA 902/2018 against Mr Dan seeking damages for fraud, conversion, unjust enrichment and constructive trust (§11).

At the hearing on 27 April 2018, the Recorder discharged the ex parte injunction on the ground that there was neither urgency nor need for secrecy which would justify the ex parte application given that Mr Dan's accounts at Citibank and Gatecoin had effectively been frozen since February 2018 (§§16-26). Mr Samara was guilty of material non-disclosure in failing to draw to the attention of the court the fact that Citibank had frozen Mr Dan's bank account (§§32-34). The judge refused to re-grant an injunction in view of Mr Samara's scant regard for the requirements for an ex parte application and his failure to offer a meaningful undertaking in damages (§§42-43).

By letter dated 1 June 2018 to HA, RPC (on behalf of Gatecoin) made clear that the agreement was to block Mr Dan from withdrawing bitcoins from the Specified Account and it could not continue with such block in the absence of an injunction:

"As you are aware, our client agreed in February 2018 to temporarily block Mr Dan from withdrawing bitcoins from the [Specified Account], but explained that it would need a legal basis to block the account for any extended period of time.

We are instructed that the [Specified Account] currently remains 'blocked'. However, over three months have now passed since our client agreed to put the 'block' in place, and we note that the injunction order you recently obtained has been discharged. In the circumstances, unless an injunction order or other appropriate legal framework is put in place imminently, our client will have no choice but to release the block on the [Specified Account] if Mr Dan requests that it do so.

Our client certainly cannot agree to your request that it commit to 'freezing' the [Specified Account] until the trial of [HCA 902/2018] (which, we assume, may be several months from now), and is not in a position to confirm the duration for which the [Specified Account] will remain blocked. Our client therefor urges your client to pursue this matter without delay." (underlined added)

On 11 June 2018, Mr Samara issued a summons renewing his application for a Mareva injunction on the ground that the evidence justified reconsideration or constituted a material change of circumstances. At the callover hearing on 15 June 2018, Mr Dan gave an undertaking not to remove from Hong Kong any of his assets up to US\$2,337,279.83 pending determination of the renewed application.

The renewed application (together with another summons dated 24 April 2018 for an order to inspect the records kept by Citibank and Gatecoin) was heard before DHCJ Le Pichon on 21 October 2019. By then, the 2 actions commenced by Mr Samara had been consolidated. Gatecoin had also already been put into liquidation, and both Mr Samara and Mr Dan lodged proofs of debt claiming the Subject Bitcoins.

In the Re-grant Decision, DHCJ Le Pichon considered that Mr Samara met the threshold for making out a good arguable case of fraud and dishonesty as (1) there was no issue over the transfer of 662.2 bitcoins (of which 275 related to Gatecoin) from Mr Samara to Mr Dan, and (2) there was evidence in support of Mr Samara's case on commission (§§51-53). These matters taken together were sufficient for the court to conclude that there was a real risk of dissipation of assets (§57). A proprietary injunction over Mr Dan's assets up to the amount of US\$2.6 million was granted (§§66, 69).

It is clear from the emails exchanged between Mr Samara and Mr Menant from February 2018 to June 2018 that:

At no time did Mr Samara suggest that Mr Dan had no authority to deal with the Specified Account. All that Mr Samara requested Gatecoin to do was not to allow Mr Dan to withdraw funds/bitcoins from the Specified Account. This is unsurprising given that Mr Dan was at all materials times the holder of the Specified Account and was the only person who had authority to operate the Specified Account.

Indeed, the very fact that in April 2018, Mr Samara applied for Mareva injunction from the court was precisely because he had been advised (rightly) that without such injunction, Gatecoin would have to comply with Mr Dan's request and allowed him to withdraw funds/bitcoins from the Specified Account.

Mr Menant/Gatecoin never agreed to block the operation of the Specified Account as Mr Samara now alleges. It is not open to Mr Samara to re-write the contents of the emails by suggesting that his request for blocking the Specified Account extended to "dealing with the funds (including buying bitcoins with Mr Samara's fiat currencies without Mr Samara's consent)".

For the above reasons, I do not think that there is any factual basis in support of Mr Samara's allegation that Gatecoin knew or had notice of the lack of authority on the part of Mr Dan in operating the Specified Account including carrying out the 3 Transactions. I reject the Unconscionability Point.

D5.

Re-open NCC Point

In my judgment, it is not open to Mr Samara to ask the court to re-open the issue as to whether Mr Dan, as holder of the Specified Account, had agreed to the 2018 T&C by reason of his having accessed and used the Platform in carrying out the 3 Transactions for the following reasons:

In the Decision, this Court determined the question as to which Customers fall within the definition of NCC.

The determination was made in the context of an application for directions under s.200(3) of the CWUMPO in the winding-up proceedings of Gatecoin.

Prior to the determination, all known creditors including Mr Samara had been notified of the application and was given the opportunity to file evidence and make submissions on the issues for which the Liquidators sought directions from the court.

The Decision binds all the creditors unless it is reversed by the appellate court. No creditor (including Mr Samara) has appealed against the determinations.

D6.

Estoppel point

Mr Chiu relies on estoppel by convention and estoppel by representation and submits that Gatecoin is estopped from relying on the 3 Transactions as Mr Dan's agreement to the 2018 T&C. Reliance is placed on "the long-established legal principle that a person is not permitted to take advantage of his own wrong" (Kensland Realty Ltd v Whale View Investment Ltd (2001) 4 HKCFAR 381, §91).

The argument on estoppel by convention is based on the allegation that both Gatecoin and Mr Samara operated on the shared assumption that "no trade could be conducted via the [Specified Account]". The allegation is not supported by any of the evidence relied on by Mr Samara (see §§67-85 above). The correspondence exchanged show that far from operating under the alleged shared assumption, neither Mr Samara nor Mr Menant/Gatecoin has ever operated under such assumption.

As for estoppel by representation (Wilken & Ghaly, The Law of Waiver, Variation and Estoppel, 3rd ed., §9.02), the argument is premised on the allegations that (1) Gatecoin had made a representation to Mr Samara that Mr Dan had no authority to operate the Specified Account, which was false; (2) Gatecoin knew that Mr Samara would upon the representation; and (3) Mr Samara acted to his detriment in reliance on the representation in taking his time to report to the Police and applying for an injunction.

For the same reasons stated in §84 above, all that Gatecoin agreed was to block Mr Dan from withdrawing funds/bitcoins from the Specified Account temporarily. There is no evidence in support of Mr Samara's allegations that Gatecoin made any representation to the effect that Mr Dan had been blocked from operating or carrying out any transactions through the Specified Account. It follows that the argument on estoppel by representation must be rejected.

Ms Sit makes one further point. She submits that Mr Samara has pleaded no viable factual foundation for any claim that Gatecoin held the Subject Bitcoins on trust for him:

In the SOC, the only facts pleaded are the correspondence exchanged between 20 February 2018 and 1 June 2018. To leapfrog from those facts to Gatecoin holding on trust for Mr Samara, the following variations are pleaded:

Estoppel by representation: The Liquidators are not entitled to rely on the 3 Transactions in denying Mr Samara's beneficial entitlement to the Subject Bitcoins because it is inequitable for the Liquidators to resile from the express representation made by Gatecoin that the Specified Account had been blocked since February 2018.

Promissory estoppel: the Liquidators are prevented from relying on Gatecoin's own breach of its promise to block the Specified Account and to rely on the same to suggest that he had consented to the 2018 T&C (which he had not).

Want of authority: The 3 Transactions and any consequential acceptance of the 2018 T&C by Mr Dan are not binding on Mr Samara, as Mr Dan did not have authority to conduct the 3 Transactions on behalf of Mr Samara, and Gatecoin was put on notice of the same.

Quite apart from the fact that those correspondence did not convey the alleged representation or promise, all of the causes of action pleaded are misconceived.

Estoppel by representation and promissory estoppel are not proper causes of action. They can only be used as a "shield, not a sword" – and hence cannot be relied on to mount a freestanding cause of action. In *Spencer Bower on Reliance-Based Estoppel* (2018, 5th edn.) §§8.49, 14.36, the principle is stated thus:

"if the representation (or convention) ... purports to create or affect rights, being promissory, it is suspensory in effect only (so far as necessary to avoid inequity), and will not found a cause of action" (§8.49)

"the doctrine does not 'create new causes of action where none existed before' and 'the principle never stands alone as giving a cause of action in itself" (§14.36).

The causes of action relied on above are in any case based upon a false factual premise as to the nature of the representation made by Gatecoin to Mr Samara. At best, the alleged representation only concerned preventing Mr Dan from withdrawing currencies (crypto and fiat) – it was not a representation to prevent trading in the account.

Mr Chiu accepts that estoppel cannot be relied on to mount a freestanding cause of action. He submits that the pleas in the SOC relate to (1) the existing trust between Mr Dan and Gatecoin (§1), and the existing trust between Mr Dan and Mr Samara (§17). Mr Samara is only using estoppel in answer to the Liquidators' assertion that there was an agreement between Mr Dan and Gatecoin as regards the 2018 T&C.

For the reasons explained in Section D5 above, it is not open to Mr Samara to re-open the issue as to whether having carried out the 3 Transactions, Mr Dan can be regarded as a NCC. It follows that Mr Samara cannot use estoppel to answer the Liquidator's assertion that the Specified Account was not a NCC.

Mr Chiu confirms that although Mr Samara's summons has been adjourned, as the parties have advanced all their arguments, it is desirable for the court to determine Issue 4. He accepts that once the issue is determined, there will be issue estoppel as between Mr Samara and Gatecoin/the Liquidators.

E.

DISPOSITION

For all the above reasons, in respect of the 4 issues which require determination of the court:

Issue 1 Potential NCCs: of the 7 scenarios identified by the Liquidators, the 1st to 4th scenarios did not involve the customers to have accessed or used the Platform and the customers should be regarded as NCCs unless there is evidence to suggest otherwise. The 5th to 7th scenarios prima facie fall outside the definition of NCC but if the customers can prove that they gave the relevant instructions to Gatecoin before the Relevant Date or without using the Platform, they should be regarded as NCCs.

Issue 2(a) Nature of NCCs' beneficial interest: Each NCC is a beneficial tenant-in-common in a pool of cryptocurrency and fiat currency.

Issue 2(b) How NCC's claims should be met: Where there is no shortfall in a specific pool of cryptocurrency, subject to deduction of the Administration Costs apportioned to that pool, Gatecoin should return the cryptocurrency to the NCCs in the amounts claimed. Where there is shortfall in a pool of cryptocurrency, after deducting the Administration Costs apportioned to that pool, the remaining cryptocurrency should be allocated to NCCs on a proportionate basis using an ex post facto approach.

Issue 2(c) Method of allocation: Subject to deducting the Administration Costs, if there is no shortfall in a pool of cryptocurrency under the scenarios described in §35 above, the Liquidators should return the cryptocurrency to the NCCs in specie. In the scenarios described in §35 above, the Liquidators are empowered to sell the cryptocurrency in question and apply the sale proceeds to meet the claims of NCCs.

Issue 2(d) Unidentified or uncontactable NCCs: The Liquidators should set a deadline for submissions of claims by all customers including NCCs. It is up to NCCs to lodge their claims and provide evidence to prove their claims. There may not be any unidentified or uncontactable NCCs for whom the Liquidators have to set aside any Currencies to meet their claims. As matter now stands, the court does not consider it appropriate to give the directions sought by the Liquidators.

Issue 3 ETD Holders: ETD represents a cause of action by ETD Holder against Gatecoin for breach of trust. Gatecoin is liable to return the ETH lost which remains unaccounted for. For this purpose, each ETH is valued at HK\$10,958.27.

Issue 4 Mr Samara's claim: Gatecoin does not hold the Subject Bitcoins or the Specified Account on trust for Mr Samara. The Specified Account is not a NCC and, therefore, Mr Samara is only an unsecured creditor to the extent of his claim less the amount he already received through execution of the HCA Judgment.

I give the directions set out in the Annexure to this Decision.

As regards the summons issued by Mr Samara:

the parties are directed to make a joint application for dismissal of the summons within 7 days of this Decision; and

there be a costs order nisi that the costs of and occasioned by Mr Samara's summons be paid by Mr Samara to Gatecoin, with certificate for 2 counsel. For the purpose of taxation, I assess the costs of the Mr Samara's summons to be 30% of the costs of the Liquidators incurred in the present application.

As for costs of the application under s.200(3), Ms Sit submits that as a matter of principle, a portion of the costs of the Liquidators' application should be borne by the NCCs being trust claimants (Re CA Pacific Finance Ltd & anor (No.2) [1999] 2 HKLRD 102). Nevertheless, the Liquidators invite the court to adjourn the issue for further consideration and application, in part because they relate to (potentially) different sets of costs and allocation of costs between trust claimants and unsecured creditors, which could only be done in a meaningful way after:

the court makes determination on the issues raised in the present application, whereupon the Liquidators would be in a position to decide which Customers have trust claims and which have unsecured claims against Gatecoin;

with that finalised, the Liquidators would be able to provide more concrete information on the different categories of costs that may be relevant. At this juncture, the Liquidators consider that there are at least the following categories of costs – (a) costs of the liquidation; (b) costs of the s.200(3) application; and (c) costs of delivery and/or sale of the cryptocurrencies and delivery of fiat currencies (including management costs in the interim) to the creditors. Which category should fall within the Liquidators' costs require careful consideration when more concrete facts and figures are available, in particular when the securing, determination and allocation of trust assets may involve costs in all 3 categories; and

while the total HKD value of the assets is not insubstantial, the holding of (and hence value recoverable by) a Customer may be relatively small, in which case how much costs are to be borne by such Customer may be a matter of significant interest to that Customer in question.

It seems to me that the course suggested by the Liquidators is a sensible one. As observed by Palmer J in *Ruscoe No. 2* §§32-42, the question of costs in this type of scenario can be a highly complicated matter. Once the Liquidators ascertain the total amount of the claims of the NCCs and that of the unsecured creditors, they will be in a better position to decide and put forward what they consider to be the appropriate costs allocations to the creditors for their consideration

and invite them to provide comments on the proposal. Thereafter, they may apply to the court for further directions on the question of apportionment of costs.

Accordingly, the costs of the Liquidators' application for directions be adjourned sine die with liberty to the Liquidators to restore the application.

(Linda Chan)

Judge of the Court of First Instance

High Court

Ms Eva Sit, SC leading Mr Justin Ho, instructed by Clifford Chance, for the Liquidators

Mr Byron Chiu, instructed by Hom & Associates, for an interested party, Mr Nico Constantijn Antonius Samara

Mr Tom Fyfe, of Simmons & Simmons, for a creditor, Cumberland DRW LLC

ANNEXURE

Issue 1

The following categories of automated transactions taking place in the accounts held with Gatecoin after 6 March 2018 as recorded on Gatecoin's database ("Exchange Ledger") be treated as having taken place automatically without a customer ("Customer") having to log on, use or otherwise physically access the Gatecoin platform after 6 March 2018:

Transactions relating to crediting of referral rewards involving a Customer being automatically credited a referral reward in the form of crypto or fiat currency (individually, "Currency"; collectively, "Currencies") into his or her account held with Gatecoin upon the successful referral of another customer by such Customer clicking onto a referral link;

Transactions relating to the delisting of TRX / XJP involving a Customer being automatically debited TRX or XJP from his or her account held with Gatecoin as part of Gatecoin's manual updating exercise arising from the delisting of TRX or XJP;

Transactions relating to the initial asset / coin offering of ARC and SAT involving the coins being automatically credited into the Customer's account held with Gatecoin upon the subscription of ARC or SAT by such Customer, which took place before 6 March 2018; and

Transactions relating to crypto-coin mining involving a third-party service provider or miner automatically depositing Currencies into a Customer's account upon the reaching of a certain threshold of that level or time interval of the relevant Currencies.

The following categories of automated transactions taking place in a Customer's account held with Gatecoin after 6 March 2018 as recorded on the Exchange Ledger be treated as requiring such Customer having to log on, use or otherwise physically access the Gatecoin platform after 6 March 2018:-

Transactions relating to the private sale of GEN which only started subscriptions from May 2018 (i.e. after 6 March 2018); and

Transactions relating to limit order which a Customer claims was not executed immediately but only when the set price was reached, unless such Customer is able to prove that the order was placed before 6 March 2018.

Subject to paragraph 1.4 below, the transactions described in paragraphs 1.1 and 1.2(b) above, despite having been recorded on the Exchange Ledger after 6 March 2018, would not have the effect of rendering the Customers to fall outside the definition of “Non-Consenting Customers” as defined in paragraph 39 of Decision in these proceedings dated 31 March 2023 [2023] HKCFI 914:

Any Customer who claims to have transactions enumerated in paragraphs 1.2(b) shall notify the Liquidators and provide evidence to the Liquidators in support of such a claim within 21 days from the date hereof.

Issue 2

The nature of each Non-Consenting Customer’s beneficial interest in the Currency in a Customer’s account is by way of co-ownership in a pool of Currencies of the specific type to which the Customer has a positive balance as recorded on the Exchange Ledger.

As to the allocation of Currencies held on trust for the Non-Consenting Customers:-

Where there is no shortfall in Currency of a specific type (i.e. the total amount claimed by the Non-Consenting Customers does not exceed the total amount of the specific type of the Currency and the Administration Costs), such pool shall be allocated to each relevant Non-Consenting Customer with a positive account balance of the same in the amount recorded on the Exchange Ledger (i.e. without regard to the identity of the individual unit(s) of Currency deposited or purchased by each Non-Consenting Customer), subject to payment of the Liquidators’ costs, fees and expenses in administering such Currency (collectively “Administration Costs”) to be determined. To the extent there is any Currency remaining after allocation, such surplus will form part of the general assets of Gatecoin.

Where there is a shortfall in Currency of a specific type (i.e. the total amount claimed by Non-Consenting Customers exceeds the total amount of the specific type of the Currency and the Administration Costs), the Currency available should be allocated amongst the Non-Consenting Customers with positive account balances on the same on a proportionate basis by reference to the records in the Exchange Ledger (i.e. a “*pari passu ex post facto*” approach), subject to payment of the Administration Costs, with the remaining (unsatisfied) claims of the Non-Consenting Customers being treated as claims by unsecured creditors in the liquidation.

The Liquidators be at liberty to effect the allocation of the Currencies in the following manner:

The Currencies be distributed in specie to each relevant Non-Consenting Customer subject to the Administration Costs being borne by the Currencies and set-off of any liability owed by such Non-Consenting Customer to Gatecoin.

The Liquidators may sell any or all of the Currencies and convert the same into Hong Kong dollars (“HKD”), and for such sale proceeds to be allocated to the relevant Non-Consenting Customers on the basis determined by the court in paragraph 1.6 above, subject to the Administration Costs being payable out of such proceeds and set-off of any liability owed by such Non-Consenting Customer to Gatecoin, in the following (non-exhaustive) circumstances:

If the amount of a type of cryptocurrency available is small as compared to the cost of setting up a designated wallet for that cryptocurrency, even if there is no shortfall;

(ii)

If there are a large number of Non-Consenting Customers who have claims over a pool of cryptocurrency, and after satisfying the bulk of their claims, the cost involved in allocating the remaining cryptocurrency would be disproportionate to the value of their claims;

(iii)

If the transaction cost (including the apportioned cost for setting up a designated wallet) for transferring the cryptocurrency to the Non-Consenting Customers is disproportionate to the value of the claims;

**If the Non-Consenting Customer elects to receive cash in lieu of allocation in specie;
or**

If there is a shortfall in a pool of cryptocurrency after deducting the apportioned Administration Costs, the available cryptocurrency is small as compared to the transaction cost for transferring the cryptocurrency to Non-Consenting Customers.

Issue 3

The Ethereum Debt (“ETD”) held in the accounts of Customers (“ETD Holders”) who lost Ethereum (“ETH”) as a result of a cyberattack against Gatecoin’s platform in 2016 is a reflection or record of each ETD Holder’s claim or cause of action against Gatecoin for breach of trust entitling each ETD Holder to claim equitable compensation against Gatecoin.

The quantum of equitable compensation for each ETD Holder’s claim based on ETD identified at paragraph 1.8 above is HK\$10,958.27 per each unit of ETD, being the average of the highest value of ETH prices in HKD during the period from 1 May 2016 to 13 March 2019.

Issue 4

The account opened in the name of Mr Stive Jean-Paul Dan at Gatecoin under trade identification #20984 (“Specified Account”) was not an account of a Non-Consenting Customer.

Gatecoin did not and does not hold the Subject Bitcoins or the Specified Account on trust for Mr Nico Constantijn Antonius Samara (“Mr Samara”).

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Prepared on 28 October 2026 · Esheria