

Hong Kong Court Confirms the Proprietary Nature of Cryptocurrencies but Denies Clients' Proprietary Claims

This is the first decision by the Hong Kong Court on whether clients of a crypto exchange have proprietary claims to cryptocurrencies held on the platform. It confirms that cryptocurrency constitutes property under Hong Kong law.

Key Points:

- Cryptocurrency constitutes property under Hong Kong law and can therefore form the subject matter of a trust.
- Whether cryptocurrencies stored on cryptocurrency exchanges are held on trust for their customers will depend on the construction of the contractual terms and conditions governing relationships between the cryptocurrency exchange platform and its customers. The court will also assess the operational reality of the exchange, including how assets are actually maintained and applied by the exchange.
- Crypto owners and users should ensure that they understand the effect of the terms and conditions of the cryptocurrency exchange and carefully scrutinise any proposed updates to such terms before accepting them.

In the recent landmark [decision](#) of *Re Gatecoin Limited*¹ involving a Hong Kong cryptocurrency exchange in liquidation, the Hong Kong Court of First Instance expressly confirmed for the first time that cryptocurrency is “property” under Hong Kong law and can be held on trust. This decision aligns Hong Kong with the position in other major common law jurisdictions. The court also found, based on the facts and circumstances of this particular case, that the cryptocurrency exchange did not hold assets on trust for its customers under its latest applicable terms and conditions, thereby rendering such customers unsecured creditors, rather than beneficiaries, of the exchange.

Background

Gatecoin Limited (Gatecoin) is a Hong Kong incorporated company and had operated a cryptocurrency exchange platform before the court wound it up on 13 March 2019.

The liquidators of Gatecoin (Liquidators) applied to the court under s.200(3) of the Companies (Winding up and Miscellaneous Provisions) Ordinance (Cap. 32) for directions on, inter alia, (1) the characterisation of cryptocurrencies and fiat currencies (together, Currencies) held by Gatecoin; and (2) the allocation of

the Currencies to the customers. In particular, the court was invited to consider whether Gatecoin held the Currencies (or any part thereof) on trust for any of its customers.

The Liquidators identified three different sets of terms and conditions (T&Cs), which were in force at different time periods. In turn, three groups of customers registered with Gatecoin while each of the three sets of T&Cs was in effect:

- Group A customers who registered their accounts agreeing to the 2016 T&C;
- Group B customers who registered their accounts agreeing to the Trust T&C; and
- Group C customers who registered their accounts agreeing to the 2018 T&C.

The Liquidators argued that the Currencies of Group A and B customers were held by Gatecoin on trust, while Group C customers only had a contractual claim against Gatecoin for the Currencies.

Decision

Whether Cryptocurrency Is “Property”

In order to ascertain the existence of a trust, the court needed to consider whether cryptocurrency is “property” which can form the subject matter of a trust. Having reviewed the authorities in other major common law jurisdictions, including England and Wales, Singapore, Australia, and New Zealand, the court agreed with reasoning in a New Zealand [case](#), *Ruscoe v. Cryptopia*,² and the conclusion that cryptocurrency is “property”, namely, that cryptocurrency:

- is definable as the public key allocated to a cryptocurrency wallet and is readily identifiable, sufficiently distinct, and capable of being allocated uniquely to an individual account holder;
- is identifiable by third parties in that only the holder of a private key can access and transfer the cryptocurrency from one wallet to another;
- is capable of assumption by third parties in that it can be and is the subject of active trading markets; and
- has some degree of permanence or stability, as the entire life history of a cryptocurrency is available in the blockchain.

Although the Hong Kong definition of “property” under s.3 of the Interpretation and General Clauses Ordinance (Cap. 1) is distinct from those adopted in the other jurisdictions considered in the decision, the court noted that the definition of “property” should be an inclusive one and is intended to have a broad meaning to accommodate the inclusion of cryptocurrency.

Whether Gatecoin Held Cryptocurrencies on Trust

After reviewing each set of the T&Cs, the court held that whether Gatecoin held the Currencies on trust for the customers should be determined by construing the terms of the 2018 T&C. The earlier versions of the T&Cs (i.e., 2016 T&C and Trust T&C) no longer apply as they were superseded by the 2018 T&C, which came into force in March 2018. In so finding, the court placed much reliance on the fact that customers of Gatecoin (including Group A and B customers who had registered their accounts with Gatecoin prior to the 2018 T&C coming into effect) were *required* to click to acknowledge and *accept* the

2018 terms before they could continue to access and use the Gatecoin website/platform to carry out any transactions with the Currencies in their accounts.

The court then found that, insofar as the 2018 T&C were applicable, the Currencies were not held on trust by Gatecoin because, amongst other things, Gatecoin:

- expressly disclaimed fiduciary duties in the 2018 T&C;
- did not segregate client assets from its own assets but rather mixed them together (both cryptocurrency and fiat currency);
- was entitled to keep accretions to the cryptocurrency (e.g., Gatecoin would be entitled to any airdrops or cryptocurrency created by forks);
- used customer assets for proprietary trading and other purposes;
- was not required to hold an equivalent amount of customer assets on account; and
- treated customer assets as its own assets, and customer deposits as liabilities, on its balance sheet.

However, the court noted that a very small subset of Group A and B customers might have registered their accounts before the 2018 T&C came into effect and never clicked to accept the 2018 T&C up to the date of the liquidation of Gatecoin. As a result, these customers could not be said to have accepted or agreed to the 2018 T&C (Non-Consenting Customers). Insofar as such Non-Consenting Customers exist, their relationship with Gatecoin would be governed by the 2016 T&C and/or the subsequent Trust T&C (as opposed to the 2018 terms). The court found that Gatecoin would have intended to hold, and did in fact hold, the Currencies on trust for such customers because, amongst other things:

- whilst the 2016 T&C were silent on the nature of Gatecoin's holding of Currencies for the relevant customers, an intention to hold on trust was evinced by the fact that:
 - the person engaged to "update" Gatecoin's 2016 terms was instructed by a Gatecoin representative at the time that "[Gatecoin] *holds the property on behalf of the client*" and to incorporate express trust language, which led to the subsequent adoption of the Trust T&C;
 - following a cyberattack on the Gatecoin platform as a result of which 90% of Ethereum held by Gatecoin was stolen, Gatecoin agreed to compensate the affected customers in respect of the value of Ethereum stolen as at the time the compensation was paid (as opposed to the time of the hack), and such treatment was said to be consistent with Gatecoin holding the Ethereum on trust;
 - notwithstanding the pooling of the Currencies, the customers' beneficial interest can be readily ascertained from the relevant ledger maintained by Gatecoin — that is, the court was not convinced that the lack of segregation of the Currencies was conclusive to deny the existence of a trust, as certainty of subject matter can result from a claim to a proportionate share of an undivided bulk;

- even if the 2016 T&C by themselves did not create a trust, once the Trust T&C were adopted, they applied to the relevant customers and rendered the relationship they had with Gatecoin one of trust; and
- the Trust T&C (which superseded the 2016 T&C) contained express trust language and recognised that accretion to cryptocurrencies belonged to the customers. As such, they clearly evinced a mutual intention of Gatecoin and the relevant customers that the Currencies on the platform were held by Gatecoin on trust for those customers.

In this regard, the court found that the three *certainties* — namely, certainty of subject matter, certainty of object, and certainty of intention, were present in relation to these Non-Consenting Clients.

The court was not convinced that the lack of segregation of the cryptocurrencies would be conclusive to deny the existence of a trust. In particular:

- there is certainty of subject matter as the customers' amounts of Currencies were recorded in Gatecoin's internal exchange ledger, and customers co-own and share each type of cryptocurrency and fiat currency in proportion to the credit balances standing in their accounts. Certainty of subject matter can result from a claim to a proportionate share of an undivided bulk;
- there is certainty of object as the trust beneficiaries and the extent of their claim is readily available in Gatecoin's internal exchange ledger; and
- there would be certainty of intention if the Trust T&C had not been superseded by the 2018 T&C. Otherwise, Gatecoin and its customers who agreed to the Trust T&Cs would have mutually agreed that Gatecoin held the Currencies on trust for these customers.

Commentary

Whilst the Hong Kong court has previously allowed proprietary injunctions to freeze cryptocurrencies in a number of instances, none of those cases dealt expressly with the nature of cryptocurrency as property. This decision therefore provides clarity on the legal basis for owners of cryptoassets who wish to use the various proprietary remedies that a court can grant, including in a winding-up scenario. The judgment aligns Hong Kong with other major common law jurisdictions that have considered this issue.

This case also illustrates that whether cryptocurrencies stored on cryptocurrency exchanges are held on trust depends on the mutual intention of the parties, as ascertained by an objective assessment of the contractual T&Cs governing relationships between the cryptocurrency exchange platform and its customers. In considering the intention of the parties, the court will also look at the operational reality of the exchange, including how assets are actually maintained and applied by the exchange. Crypto owners and users should ensure that they understand the effect of the T&Cs of the cryptocurrency exchange, as these could significantly affect their rights, especially in a winding-up scenario. This issue is particularly relevant given the recent collapses of some major cryptocurrency exchanges.

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Endnotes

¹ [2023] HKCFI 914.

² [2020] NZHC 728.