

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION**

CLAIM NO. BVIHC (COM) 0031 OF 2021

BETWEEN:

**PHILIP SMITH AND JASON KARDACHI
IN THEIR CAPACITY AS JOINT LIQUIDATORS OF
TORQUE GROUP HOLDINGS LIMITED (IN LIQUIDATION)**

Applicants

and

TORQUE GROUP HOLDINGS LIMITED (IN LIQUIDATION)

Respondent

Appearances:

Mr. Brian Child, with him Miss Rachael Stitt for the Applicants

2021: May 25;
July 2.

JUDGMENT

- [1] **WALLBANK J (Ag):** This is the written Judgment of the Court in respect of an urgent application made by Mr. Philip Smith and Mr. Jason Kardachi, the Joint Liquidators ('the Joint Liquidators') of the Respondent, Torque Group Holdings Limited (In Liquidation) ('the Company'), on 12th May 2021.

The Joint Liquidators sought the Court's sanction pursuant to subsection 186(5) of the BVI Insolvency Act, 2003 ('the Act'), in respect of various actions proposed to be taken by the Joint Liquidators pertaining to crypto currencies. The Court granted the sanction sought. In doing so, the Applicants' Counsel was directed pursuant to rule 42.5(1)(c) of the Civil Procedure Rules, 2000, and readily agreed, to prepare a draft for a brief written judgment explaining the matter, as similar situations are likely to arise in the future.

Background

- [2] The Company operated as an online crypto-currency trading platform for crypto currency-to-crypto currency trading called 'Torque'. This Company provided users with a trading platform and other crypto currency related services. The services were provided via the Company's websites as well as mobile applications.
- [3] Trading was suspended on the 'Torque' application, and via the Company's website, by the Company after a number of unauthorised leveraged trades that resulted in the Torque group of companies suffering losses.
- [4] Following an application made by the sole shareholder, sole director and Chief Executive Officer of the Company, Mr. Bernard Ong Hock Fong on 26th February 2021, on 2nd March 2021 the Court appointed the Joint Liquidators as Joint Provisional Liquidators over the Company. On 18th March 2021 the Court appointed the Joint Liquidators as joint liquidators of the Company.
- [5] Upon being appointed as joint liquidators of the Company, the Joint Liquidators secured the Company's account within which the majority of the assets of the Company are held ('the Tran Account') on an exchange known as the Binance Exchange, another online exchange where users can trade cryptocurrencies.

- [6] The Tran Account has assets ('the Crypto Assets') held by the Company, in the various cryptocurrencies that they were denominated in, as at the date of the appointment of the Joint Liquidators as Joint Provisional Liquidators, being 2nd March 2021.
- [7] As a result of fluctuations in the cryptocurrency markets, the estimated book value of the Crypto Assets has fluctuated significantly since the appointment of the Joint Liquidators as Joint Provisional Liquidators.
- [8] The Joint Liquidators have expressed concern at the volatility of the Crypto Assets. As such, the Joint Liquidators sought approval from this Court to convert or otherwise exchange the Crypto Assets to US Dollars or, alternatively, to Tether (a cryptocurrency pegged to the US Dollar). This is discussed further below.
- [9] Within the Tran Account, the Joint Liquidators identified various 'wallets', including 'User Trading Wallets' and 'User Personal Wallets' containing Crypto Assets.
- [10] Having taken legal advice in Singapore and the BVI, the Joint Liquidators were of the view that:
- (1) the Crypto Assets within the User Trading Wallets are assets of the Company, and affected customers of the Company may have corresponding contractual claims against the Company for debt claims in relation to their Crypto Assets lost and/or misappropriated; and
 - (2) the User Personal Wallet Crypto Assets are not assets of the Company's estate, on the basis that legal and beneficial ownership was never transferred from the Users to the Company.
- [11] On 3rd March 2021, the Joint Liquidators 'froze' the User Personal Wallets by disabling the user interface on the 'Torque' application. As a result, Users have been unable to access the User Personal Wallets to effect any transfer of Crypto Assets held in their individual digital Personal Wallets. The Joint Liquidators now sought to reactivate these Personal Wallets to permit Users to regain control of their Crypto Assets and deal with them as they see fit.

- [12] The Joint Liquidators sought the Court's approval of their proposed treatment of the Crypto Assets contained within these wallets (as outlined above) and approval of the Joint Liquidators' reactivation of the User Personal Wallets' functionality to allow Users to withdraw their assets. This is also further discussed below.
- [13] In addition to the above, the Joint Liquidators also sought the sanction of this Court to utilise an online 'Proof of Debt Form' in an effort to reduce the administrative burden associated with the potential creditor claims of the 14,000 customers of the Company.
- [14] On 7th May 2021 the Joint Liquidators sent a copy of their Preliminary Report to the known creditors of the Company, along with a '4th Circular to Creditors' by email. The Preliminary Report and the 4th Circular to Creditors notified the creditors of the Company of the Joint Liquidators' intention to seek sanction from this Court in respect of the various proposed actions outlined above.

Discussion

- [15] Cryptocurrency is a form of virtual asset that is available for use by private individuals and corporations. A cryptocurrency exchange facilitates the trading of cryptocurrencies in return for other cryptocurrencies, other crypto assets or currency.
- [16] A 'cryptoasset' may be defined as follows:

"A cryptoasset is ultimately defined by reference to the rules of the system in which it exists. Functionally, it is typically represented by a pair of data parameters, one public (in that it is disclosed to all participants in the system or to the world at large) and one private. The public parameter contains or references encoded information about the asset, such as its ownership, value and transaction history. The private parameter—the private key—permits transfers or other dealings in the cryptoasset to be cryptographically authenticated by digital signature. Knowledge of the private key confers practical control over the asset; it should therefore be kept secret by the holder. More complex

cryptoassets may operate with multiple private keys (multisig), with control of the asset shared or divided between the holders.”¹

- [17] The Crypto Assets held by the Company within the Tran Account include the following cryptocurrencies:

Bitcoin (BTC)

Ether (ETH)

Tether (USDT)

Litecoin (LTC)

Ripple (XRP)

Tron (TRX)

Bitcoin Cash (BCH)

Torque

(1) Conversion of the Crypto Assets

- [18] It has been demonstrated that regardless of any perceived advantages of cryptocurrency, it is also extremely volatile. Indeed, the Joint Liquidators’ evidence was that Bitcoin experienced a significant drop in value, which, in turn caused a decrease in value of the Crypto Assets held by the Company, in the region of approximately 28%.

- [19] It is due to this volatility that the Joint Liquidators sought to convert the Crypto Assets to US Dollars or, alternatively, to Tether (USDT). The advantages of converting the Crypto Assets to US Dollars is evident – it is significantly more stable and would provide more certainty for the creditors of the Company. The advantages of converting the Crypto Assets to Tether are less evident, other than that Tether is ‘pegged’ to the US Dollar. The Applicants have filed evidence that converting the Crypto Assets to Tether would involve substantially reduced conversion fees compared to conversion to US Dollars. Additionally, 13% of the Company’s Crypto Assets are already held in

¹ UK Jurisdiction Taskforce, ‘Legal statement on cryptoassets and smart contracts’ (November 2019), paragraph 28.

Tether – this means only 87% (rather than 100%) in value of the Crypto Assets would incur conversion fees if converted to Tether rather than US Dollars.

- [20] In all of the circumstances, and having had the benefit of the Joint Liquidators' evidence and analysis, the proposed conversion of the Crypto Assets to US Dollars, or alternatively to Tether, appeared to be a sensible approach that would better secure the value of the Crypto Assets and maximise the return for the creditors of the Company.

(2) Treatment of the Crypto Assets as 'Assets' and 'Property'

- [21] Pursuant to subsection 2(1) of the Act, an "asset" is defined as including,

"money, goods, things in action, land and every description of property wherever situated and obligations and every description of interest, whether present or future or vested or contingent, arising out of, or incidental to, property."

- [22] Pursuant to subsection 185(1) of the Act, it is the duty of the Joint Liquidators to take possession of, protect and realise the 'assets' of the Company. In this case, this necessarily includes the Crypto Assets held by the Company.

- [23] There is a lack of BVI case law that deals directly with cryptocurrency as an asset in liquidation or as 'property'. As such, I have been guided by the UK Jurisdiction Taskforce ('UKJT') publication, 'Legal statement on cryptoassets and smart contracts' in the consideration of this application.

- [24] The UKJT concluded that crypto assets are to be treated in principle as any other property. This has been cited with approval by the English High Court in **AA v Persons Unknown & Ors., Re Bitcoin**². Specifically, the UKJT stated,

"Since cryptoassets can be property at common law, we have no doubt that they can be property for the purposes of the Insolvency Act. If a particular cryptoasset is not property at common law, depending on circumstances it could still be property for the purposes of

² [2019] EWHC 3556 (Comm).

the Insolvency Act if it is, for example, within the words “obligations and every description of interest, whether present or future or vested or contingent, arising out of, or incidental to, property”.”

[25] Applying the above analysis, it is a reasonable conclusion that crypto assets are to be considered as assets for the purposes of liquidation.

[26] The Crypto Assets should, therefore, be treated as assets or ‘property’ for the purposes of the liquidation of the Company.

[27] When considering the ownership of the crypto assets, I have again been guided by the UKJT. For instance, paragraph 86(b) states,

‘(b) We would expect that the person with knowledge of a private key would generally be considered the owner of the cryptoasset (or the right in the asset) that the key controls, but that may depend on the circumstances and the rules of the system.’

[28] A ‘private key’ is a method of securing access for an individual or corporate ‘user’ to access the crypto assets.

[29] Within the User Trading Wallets the Crypto Assets were ‘co-mingled’ across various wallets. The Joint Liquidators have provided evidence that the Company had exclusive control to deal with the Crypto Assets in the User Trading Wallets. Additionally, the Company had knowledge of the private key.

[30] Applying the analysis employed by the UKJT, this would indicate that the Crypto Assets in the User Trading Wallet are assets of the Company within the estate. In giving this indication, it will be open to any stakeholder with an interest in the User Trading Wallets to seek to have this Court come to an alternative conclusion.

[31] By contrast, the User Personal Wallets did not involve Users transferring Crypto Assets to wallets that were controlled by, or that belonged to, the Company. The provision of the User Personal

Wallets was a separate service offered by the Company to its Users. The Users utilised the Company's platform as a 'hosting' service and the Company would not have access to, or knowledge of, the private key (despite the private key being generated by the Company's platform).

- [32] I find that it is likely that the owner(s) of the Crypto Assets within the User Personal Wallets is/are the individual User(s). This conclusion is supported by the fact that at no time did the Company have the ability to deal with, transfer or control the Crypto Assets held in the User Personal Wallets.

Conclusion

- [33] The Court granted the orders sought, with the costs of the application to be paid out of the assets of the Company as an expense of the liquidation.
- [34] The seal on these proceedings has also been lifted to enable this judgment to be published.
- [35] I take this opportunity to thank learned Counsel and the Applicants for their assistance during this matter.

Gerhard Wallbank
High Court Judge

By the Court

Registrar