CA-002-2023 (1) Gate Mena DMCC (Formerly Huobi OTC DMCC) (2) Huobi Mena FZE v (1) Tabarak Investment Capital Limited (2) Christian Thurner

This Counsel informed the Court that their researches indicate that this is the first appellate decision in the world concerning cryptocurrency after a full trial.

The case arises out of a sale of Bitcoin and centres on the role and liabilities of a trusted intermediary (the Respondent to the appeal) which the trial Judge described as “a small merchant bank”, carrying on business from the Dubai International Financial Centre, licenced and regulated by the Dubai Financial Services Authority.

The First Appellant was at all material times a Dubai entity associated with a large Chinese digital asset financial services provider and the Second Appellant, another group entity, was its majority shareholder.

The Appellants agreed to sell a quantity of Bitcoin to Russian investors. There was considerable discussion over the modalities of the sale as neither side appeared to trust the other. In the end, it was agreed that the Respondent would provide a “cold wallet” to which the Bitcoin would be “transferred” by the Appellants pending receipt of the sale price from the Russian investors into a bank account operated by the Respondent. In the event that the sale price was not paid the Respondent would “return” the Bitcoin to the Appellants.

The Appellants mistrust of the Russian investors turned out to be justified. The Appellants (innocently but unwisely, as the trial Judge found) accepted a last-minute change in the modalities of the transaction that allowed the Russian investors access to the Bitcoin before having to transmit the purchase monies to the Respondent. The Russian investors stole the Bitcoin and disappeared.

The Appellants commenced proceedings against the Respondents alleging breach of contract, negligence, breach of confidence, breach of fiduciary duty and regulatory breaches. The trial Judge dismissed each of the claims and found for the Respondent. The Appellants appealed the findings in relation to breach of confidence, breach of contract, negligence and breach of fiduciary duty.

While the Court of Appeal dismissed the majority of grounds of appeal as unsustainable challenges to the trial Judge’s findings of fact and remitted a limited factual issue not decided by the trial Judge for retrial, the Court’s decision is of general interest in a number of respects:

- The Court considered in some detail the workings of “cold wallets”;

- The Court was of the view that not only was Bitcoin property but that it was neither a thing in possession nor a thing in action. A question resolved subsequently to the hearing of the appeal by the DIFC Digital Assets Law;

- The Court left open the question of whether possession of the sole tangible object conferring exclusive direct control over Bitcoin (i.e. a cold wallet) and said colloquially to contain the Bitcoin, may be argued to confer possession of the Bitcoin;

- The Court accepted that the concept of control (both in its negative and positive senses) is the most apposite way of expressing “possession” of a crypto asset. Someone who exercises control over a crypto asset in which another has superior title, with the consent of that other, may be considered a custodian of the asset;

- The Court looked at whether in terms of “holding” crypto assets, they may be held as bailee at common law. They contrasted the position under DIFC statutory law and concluded that it is possible to argue (but did not finally decide) that as a matter of statutory construction, the definition of bailment in Article 66(1) of the DIFC Law of Obligations can extend to the factual control of crypto assets if factual control is to be regarded as, or equivalent to, possession.