Neutral Citation Number: [2021] EWHC 3054 (Comm)

Case No: LM-2021-000172

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES
LONDON CIRCUIT COMMERCIAL COURT (QBD)

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 17/11/2021

Before:

Stephen Houseman QC (Sitting As A Deputy Judge of the High Court)

- -

Between:

ZI WANG **Cla**

- and -

GRAHAM DARBY **Defe**

- -

- -

Tim Penny QC and Daniel Scott (instructed by **Curzon Green Solicitors**) for the **Claimant**

James Collins QC and Philip Jones (instructed by **Mackrell.**) for the **Defendant**

Hearing dates: 9 & 10 November 2021

Judgment Approved by the court
for handing down
Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 17 November 2021 at 11AM

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APPROVED JUDGMENT

Stephen Houseman QC sitting as a Deputy Judge of the High Court:

INTRODUCTION

1.
The present dispute concerns two related contracts entered into by the Claimant (“Mr Wang”) and the Defendant (“Mr Darby”): the first on 28 December 2018 as allegedly varied on or about 10 January 2019 (“First Contract”) and the second on 24-25 January 2019 (“Second Contract”) coinciding with or comprising a further alleged variation of the First Contract.

2.
Broadly speaking both contracts involved the individual parties exchanging specified quantities of respective cryptocurrencies, namely Tezos and Bitcoin, on terms as to reciprocal restoration of the same amounts of each currency upon or after an agreed period of two years, i.e. on/after 28 December 2020 and 25 January 2021, respectively. The parties' cases as to the correct legal characterisation of the transactions, and their proprietary consequences for the Tezos transferred by Mr Wang to Mr Darby, are diametrically opposed. This central issue was fully and forcefully contested at the present hearing.

3.
There are three separate applications before the Court:

(i) Mr Wang's application dated 3 August 2021 to continue a worldwide freezing order (WFO) and proprietary injunction (together, "Injunction Order") granted by HHJ Pelling QC at a without notice hearing on 2 August 2021 ("WFO Continuation Application" and "PI Continuation Application", respectively; together, "Continuation Application").

(ii) Mr Darby's application dated 6 September 2021 seeking to strike out or enter reverse summary judgment in respect of the "proprietary claims" pleaded against him in this action ("SJ Application").

(iii) Mr Wang's application dated 25 October 2021 seeking to vary the terms of the WFO in the Injunction Order as regards Mr Darby's expenditure allowance, which is necessarily contingent upon Mr Wang's prior success on the WFO Continuation Application ("WFO Variation Application").

4.
A further application dated 2 November 2021 was made by Mr Wang seeking permission to refer to a second expert report dated 21 October 2021 in connection with the Continuation Application and the SJ Application. Such report was served in support of the WFO Variation Application and was out of time in respect of the other applications, Mr Wang having previously obtained a series of extensions resulting in a final extension for service of his reply evidence on the Continuation Application. Mr Wang sought relief from sanctions in this context and for this purpose. Mr Darby did not contend that he would be prejudiced by the admission of this second expert report for such purposes, even though first intimated on behalf of Mr Wang at a hearing on 29 October 2021, at any rate so long as he (Mr Darby) was entitled to rely upon his own fourth witness statement dated 5 November 2021.

5.
I gave permission to both sides to refer to all such evidence in relation to all applications before the Court. The contested admissibility of the second expert report had been stood over to the present hearing from the hearing before HHJ Pelling QC on 29 October 2021 at which a separate application by Mr Darby dated 13 October 2021 seeking variation of the Injunction Order to permit use of funds for legal expenditure was dismissed. Mr Darby was ordered to pay Mr Wang's costs of that application and hearing, assessment of which was reserved to the present hearing.

6.
Mr Darby has not served any expert evidence. The nature and uses of Tezos are explained in the expert evidence served on behalf of Mr Wang, in particular the first report of Mr Sanders. This general background is not disputed.

7.

The SJ Application concerns the proper legal characterisation of the relevant contracts pursuant to which Mr Wang transferred two separate parcels of 200,000 Tezos to Mr Darby in return for 13 Bitcoins (First Contract, concerning the “First 200k” as it was known) and 17 Bitcoins (Second Contract, concerning the “Second 200k” as it was known) transferred by Mr Darby to Mr Wang by way of simultaneous digital exchange. The key issue is whether some form of trust arose in respect of the 400,000 Tezos transferred by Mr Wang to Mr Darby. Both sides contend that both contracts were of the same essential nature and structure as one another: the core dispute concerns their proper legal characterisation as a matter of objective common intention.

8.
It is common ground that whether cryptocurrency such as Tezos is regarded as property which can be the subject of a trust is to be determined by English law for present purposes. English law is also assumed to govern the relevant contracts and any fiduciary duties arising in connection with such transactions. It is further agreed that, as a matter of English law, a unit or token of Tezos constitutes property which can in principle be the subject of a trust. This is so notwithstanding its entirely fungible character and non-identifiable status: no single unit bears any unique serial number or means of identification.

9.
Mr Wang contends that there was an express or resulting or constructive trust in respect of the 400,000 Tezos in the hands (i.e. digital wallet) of Mr Darby and/or that Mr Darby owed fiduciary duties in respect of such digital assets, notwithstanding that Mr Wang himself was free to use or dispose of the 30 Bitcoins he received from Mr Darby. Hence the proprietary claim against Mr Darby in respect of the Tezos. Mr Darby says such claim lacks any real or reasonable prospect of success: the bilateral exchange and obligatory re-exchange (upon demand after two years) of different cryptocurrencies constituted a sale and buy-back arrangement akin to a ‘repo’ transaction which, by definition, precluded any trust arising in respect of the Tezos.

10.
A notable feature of the present case is that the only evidence said to contain or demonstrate both contracts is comprised within the parties’ private dialogue via an online communications platform called Telegram (“Telegram Transcript”). The parties communicated extensively through this platform between late December 2018 and early March 2019 predominantly in writing but with occasional voice messages left by Mr Wang. Mr Darby controlled the underlying Telegram account and blocked Mr Wang from it on 6 March 2019. The Telegram Transcript was, however, produced by Mr Wang and underwent modifications from its native format (including removal of voice messages) as described further below. There is a separate transcript of the deleted voice messages (“Voice Message Transcript”) which augments the Telegram Transcript in a limited way so far as material.

11.
This judgment deals with the SJ Application and the WFO Continuation Application. The PI Continuation Application was stood over to await the outcome of the SJ Application. The WFO Variation Application was stood over to await the outcome of the WFO Continuation Application.

12.
I am grateful to counsel on both sides for the high quality of their oral and written submissions, including additional focussed written submissions requested by me as to the formation and content of the contracts.

RELEVANT BACKGROUND

13.
The relevant background is of two kinds: general background about Tezos and specific background relating to the parties, their mutual dealings and other circumstances relevant to the determination of the SJ Application and WFO Continuation Application.

14.
As regards Tezos, the following summary suffices for present purposes:

(1)
Tezos (XTZ) is one of the estimated 2000+ cryptocurrencies now in existence, the best known of which is Bitcoin (BTC). Tezos underwent its Initial Coin Offering (ICO) in mid-2017. Tezos is a so-called ‘altcoin’ denoting the fact that due to its scale it is not commonly used as a primary trading currency, in contrast to Bitcoin.

(2)
As noted above, individual units or tokens lack any unique identification. Their functional identification is achieved by reference to the unique digital wallet (i.e. account) in which they are held at any given time. They are readily transferable and completely fungible. They can be traded, i.e. bought and sold, in return for e.g. other cryptocurrency and/or traditional (so-called ‘fiat’) currency. They can in principle be held on trust by one account-holder for and on behalf of another account-holder.

(3)
Tezos offers what is known as a ‘baking’ option whereby individual tokens are utilized so as to yield rewards in the form of additional tokens credited to the relevant account-holder by the global issuer. The underlying activity which constitutes baking involves the signing and publishing of a new block in the blockchain, thereby validating transactions and growing the digital system organically so as to increase its capital base. It is akin to ‘mining’ in other crypto contexts. Baking requires the relevant holder - known as the ‘baker’ - to run a blockchain node with appropriate software and to keep it online and current. There is, in effect, a minimum capital margin requirement for this activity which requires that the baker holds at least 8.74% of the currency being baked by them at any given time. This is known as a ‘bond’.

(4)
An account-holder may simply designate or delegate the voting rights associated with some or all of their Tezos to another account-holder for baking without any transfer of currency: this is a form of personal mandate or authorisation known as ‘delegation’ between delegator (principal/owner) and delegate (agent/baker). It involves a private arrangement between account-holders that will ordinarily determine the baking service fee or any baking reward split. Depending on usage of terminology, the delegator in this scenario is ‘staking’ their Tezos by authorising another account-holder to bake them without receiving or holding such units. This is akin to ‘farming’ in other crypto contexts.

(5)
Alternatively, an account-holder may transfer currency into the account of another to undertake baking through what is sometimes known as a ‘bond pool’, i.e. a mixed account or wallet. The principal account-holder in this scenario ordinarily loans or entrusts their currency to another to undertake third party baking known as ‘stake bonding’ (as distinct from ‘staking’ simpliciter). The additional currency in the latter’s wallet/account enables them to undertake a higher volume of baking for other third party delegators by reference to the 8.74% bond margin requirement described

above. This may be reflected in enhanced economic benefits to the staking party (i.e. transferor) as compared with delegation, depending on the terms of the parties' private arrangements.

(6)
Tezos experienced some post-ICO delays before becoming fully live and operational. It began to trade and bake about a year later in mid-2018 which is when Mr Wang first made contact with Mr Darby via Telegram.

(7)
The value of Tezos rose significantly from around the time the parties entered into their contracts in late 2018 / early 2019. It had effectively trebled in price by April 2019.

15.
Mr Wang is an Australian national who has been a cryptocurrency trader for a number of years. He obtained 400,000 Tezos through its ICO. He was 21 or 22 years old during the key period in late 2018 to early 2019.

16.
Mr Darby is a UK national who held himself out as an experienced cryptocurrency trader offering baking and equivalent services. His evidence explains that he suffers from mental health issues resulting in memory impairment. He has no independent recollection of the details of the relevant communications and circumstances. The expert evidence suggests that Mr Darby is or was a sophisticated cryptocurrency trader and registered baker of Tezos who operated an extensive and complex web of digital accounts/wallets, although the precise extent of his current or prospective ability to do so is a matter of doubt given his mental health condition.

17.
Mr Wang first contacted Mr Darby via Telegram in early July 2018. Both he and Mr Darby held Tezos acquired through its ICO a year earlier. The precise amount held by Mr Darby then or at any given time is not known, save for glimpses into the digital wallet referred to as his OTC ('over the counter', i.e. trading) account ("OTC Account") at different dates in the crucial period.

18.
Discerning the precise terms or basis of the parties' dealings from the Telegram Transcript, as augmented or clarified by the Voice Message Transcript, requires some effort, not least in order to disregard the immaterial aspects of the parties' extensive and at times intensive or repetitive dialogue. The written messaging on some days exceeds 14 pages of text. One person's response to a single message forming part of a sequence of messages (e.g. a single composite message in terms of coherent meaning) appears on the page in a way that makes it difficult at first glance to follow the flow of the conversation between them. The Telegram Transcript runs to 175 pages. I refer to pages in this transcript as "TT" for convenience.

19.
Each communication bears a time marker (hour:minute:second) by reference to an unspecified time zone assumed to be the location of Mr Wang in Australia. It appears that Mr Wang communicated extensively through the night and often initiated contact after any gaps in communication. The dialogue was conversational in tone, somewhat disjointed in places and included occasional colourful or even abrasive language on the part of Mr Wang.

20.

Mr Wang's negotiating technique is somewhat idiosyncratic. He was given to asserting something as already agreed which was obviously not or seeking to re-open a settled and executed position within a matter of days. Nothing turns on this for present purposes. It is common ground that the two contracts and their respective alleged variations are contained within the four corners of the Telegram Transcript, as augmented in one material respect by a deleted voice message at the point of concluding the First Contract on 28 December 2018.

21.
It is clear from the Telegram Transcript that Mr Wang was keen to get Bitcoins from Mr Darby. Mr Wang initiated and advocated both transactions and expressed a desire to obtain Bitcoins on an urgent basis from Mr Darby. Mr Wang's underlying purpose in obtaining Bitcoins, or what he did with the 30 BTC which he received from Mr Darby pursuant to these two swapping transactions, is not explained and does not ultimately matter. It may be inferred that Mr Wang wanted Bitcoins to trade and that is what he did with them, hence him subsequently insisting or requesting that his own counter-restoration obligation under both contracts be pegged to a USD equivalent value (see below). Mr Wang contends that he was ready, willing and able to transfer 30 Bitcoins or USD equivalent to Mr Darby at/after the relevant maturity dates - 28 December 2020 and 25 January 2021, respectively - and when he made formal demand on 15 February 2021 and at all times since then.

22.
There was some discussion at the hearing as to the role of factual matrix in ascertaining the proper meaning and effect, including the proper legal characterisation, of the two transactions as recorded in the Telegram Transcript. Beyond a presumed knowledge of how Tezos worked, as summarised in paragraph 14 above, and the fact that Mr Darby held himself out publicly online (including through social media) as a trader and baker of cryptocurrency, it is difficult to see how any factual matrix could impact the analysis of what they agreed or their commercial objectives or, therefore, the correct legal characterisation of their transactions. No material dispute exists as to any fact said to be admissible as matrix for present purposes.

23.
The First Contract was concluded on 28 December 2018 (TT p.30) and the relevant cryptocurrency exchanges executed the same day (TT pp.32-35). This contract was later varied on 10 January 2019, according to Mr Wang, as to the terms of Mr Wang's counter-restoration obligation and the profit share split (TT pp.84-85). The Second Contract was concluded on 24 or 25 January 2019 on the same basis save for Mr Wang's enhanced entitlement to baking rewards and stake bonding profits, also said to have further varied the First Contract, and the relevant cryptocurrency exchanges executed on 25 January 2019 (TT pp.128, 132; pp.134, 140-141).

24.
The Particulars of Claim (POC), which were in draft form at the time of Mr Wang's first affidavit sworn in support of his application for the Injunction Order, include the following allegations:

(1) As regards the First Contract it is alleged that Mr Darby was under an obligation to "transfer the First 200k back to" Mr Wang after a two year period "in consideration for transfer [by Mr Wang to Mr Darby] of 13 bitcoins" (paragraph 8.5.1) (emphasis added).

(2) As regards the variation of the First Contract, which is not said to have altered the basis or nature of such transaction, it is alleged that Mr Wang asked Mr Darby "to vary the said obligation to sell the First 200k back to [Mr Wang] for 13 bitcoins" (emphasis added) so as to allow Mr Wang to perform his counter-obligation in terms of an agreed figure in US Dollars (paragraph 12.1) and that this was

agreed at US$50,000 (paragraph 13.2). The reference to “said obligation to sell” is to the obligation pleaded in paragraph 8.5.1 as quoted in (1) above. Paragraph 13.2 speaks of “in consideration for the transfer back to [Mr Wang] of the First 200k” in the same way as paragraph 8.5.1.

(3) As regards the Second Contract it is alleged that Mr Darby was under an obligation to “sell back to [Mr Wang] the Second 200k in consideration for the bitcoin equivalent of US$60,000…” (emphasis added) after a two year period (paragraph 15.5.1). Paragraph 15.6 alleges a specific term whereby Mr Wang could “require the return of 100,000 Tezos in return for payment of the then equivalent of US$30,000” in defined circumstances within two years. Paragraph 15.7 alleges a further specific term whereby Mr Darby was strictly liable “to transfer 200,000 Tezos back to [Mr Wang]” after the two year period, even if his account was hacked and the Tezos taken from him. The primary obligation of re-delivery or restoration on the part of Mr Darby is pleaded as one to “sell back” the Second 200k.

(4) Paragraph 22 pleads the existence of a constructive trust in respect of all 400,000 Tezos based upon a “specifically enforceable agreement between the parties that after 2 years the 400k would be sold back by [Mr Darby] to [Mr Wang] for a consideration of the bitcoin equivalent of the sum of US$110,000…” (emphasis added). Leaving aside that this allegation fuses two separate contracts into a single composite contract, it is conspicuous that Mr Darby’s primary obligation of re-delivery or restoration is pleaded as one of re-sale, consistent with paragraphs 12.1 and 15.5.1 (quoted in (2) and (3) above).

(5) Likewise, Mr Wang alleges in paragraph 28 that he was “required to pay the sum (or bitcoin equivalent) of US$110,000 for the purchase back of the 400K…” (emphasis added)

25.
Thus, it is Mr Wang’s own pleaded case that both contracts involved a sale and buy-back of 400,000 Tezos. Mr Wang’s sworn evidence confirms this expressly in relation to the Second Contract and, therefore, impliedly in relation to the First Contract. Paragraph 31 of his first affidavit confirms the draft pleaded case and then sets out his own “understanding of those terms” in a series of sub-paragraphs. Sub-paragraph (e) says: “After the expiry of the 2 year period [Mr Darby] would sell back to me the Second 200k in consideration for the Bitcoin equivalent of US$60,000…” (emphasis added). Paragraph 23 is in a similar format in respect of the First Contract, save that the language is the neutral or descriptive version: “transfer the First 200k back to me” / “transfer him back the 13 Bitcoins”. It is unlikely that Mr Wang used ‘transfer back’ and ‘sell back’ in any different way. As noted above, the pleaded case does not. This language is used interchangeably. The pleaded claim for constructive trust presupposes a valid and binding contract or option of re-sale.

26.
As noted already, it is accepted by both sides that the proper legal characterisation of the two transactions is the same and, as part of this, that there was no change to the basis or nature of the First Contract after it was concluded. The subsequent alleged variations to the First Contract and the additional specific terms agreed for the Second Contract are not said to alter the legal characterisation of the First Contract or (therefore) the Second Contract or vice versa. The parties appear to have regarded them as a single composite transaction (albeit distinct ‘trades’ or ‘deals’) in various communications.

27.
Mr Wang’s sworn evidence endorsing the pleaded case, as identified above, is itself based on his stated review of the Telegram Transcript. He makes no reference in his first affidavit to the Voice Message Transcript.

28.
The crucial exchange between the parties for present purposes took place at around 08:10 - 08:12 on the morning of Friday 28 December 2018 (TT p.30). This is accepted to be the point of conclusion of the First Contract.

29.
By way of immediate context to this, Mr Wang had requested Bitcoins from Mr Darby the day before on the basis of a collateralised loan arrangement, i.e. borrowing Bitcoins in exchange for his Tezos as collateral (TT p.14 at 4:10:41AM). Mr Darby instead proposed that Mr Wang just sell some Tezos to him in return for Bitcoins to which Mr Wang replied "I don't wanna sell … I wanna bake" and suggested "You can add the tezos I have to your baking pool" (TT p.15 at 4:19:43AM – 4:22:17AM). Mr Darby reverted within the hour rejecting the idea of a loan arrangement (TT p.19 at 5:09:27AM) to which Mr Wang said: "It's not even a loan / Just a temporary swap" (5:11:52AM / 5:11:56AM).

30.
Mr Wang chased five minutes later for Bitcoins ("Come on please" / "Help me out") (TT p.20 at 5:16:14AM / 5:16:16AM). Mr Darby suggested a sale and buy-back as an alternative to Mr Wang trading through an exchange: "You can sell it to me and then buy back that would keep things simple and you wouldn't need to deal with exchanges" (5:18:53AM). Mr Wang then revived or repeated his prior request to "just do a loan" (TT p.21 at 5:20:11AM). With a loan having already been flatly ruled out by Mr Darby, Mr Wang pressed further: "I need the btc ASAP" (5:25:49AM) and then, "I really need the btc today though can you like sell it to [me] at the price you'll buy it back for" (TT p.22 at 5:27:19AM - 5:27:30AM) (emphasis added).

31.
Mr Darby reiterated overnight that he wasn't interested in any loan arrangement due to his accounting position: "only looking to buy or sell at the moment" (TT p.28 at 12:01:25AM - 12:01:39AM). Mr Wang confirmed the following morning that the proposed swap would not be a loan, that he wished to "bake together" and offered 300,000 Tezos to Mr Darby at around 05:20 - 05:25AM on 28 December (TT p.28).

32.
After exploring other baking options, Mr Wang then made his revised offer at 08:10AM (TT p.30): "I'll give you 200k tezos just give me 50%" / "And the profits from staking we can share 5050 even though I'm contributing more" (8:10:09 / 8:11:32AM). (The latter was a reference to baking profit share, on the basis that the additional 200k would represent more than 50% of the Tezos in the OTC Account, i.e. 200,000 out of 356,000 at that time.) Mr Darby agreed to this in principle offering 12 BTC on the basis that Mr Wang "wouldn't want [the First 200k] back for at least one year so I can increase my delegates without the risk of being over delegated" - a reference to using the First 200k for stake bonding in his account - adding: "I'd be happy to give you 50% and then you could of course buy them back for 12 BTC" (8:16:43AM) (emphasis added). (The reference here and above to 50% reflected the fact that Mr Darby would be transferring Bitcoins of half the current value of 200,000 Tezos.) Mr Darby gave Mr Wang the link to the OTC Account for transferring 200,000 Tezos (8:17:32AM). The parties then agreed a minimum term of at least 2 years for this swapping arrangement (8:18:16AM - 8:18:43AM) and struck on an exchange price of 13 BTC for the First 200k (8:18:54AM - 8:20:43AM). The First Contract was thereby concluded, as is common ground.

33.

Without more, the crucial exchange summarised above would suggest that the basis of the swapping arrangement was a sale and buy-back. It was not intended to be a loan arrangement given the prior discussion. Nor was it a unilateral transfer by principal to agent solely for the purposes of stake bonding. Both parties used the word “give”; Mr Wang used the word “sell” and the phrase “buy it back”; Mr Darby used the phrase “buy them back”. The proper characterisation of the First Contract - and, hence, the Second Contract as is common ground - was set at this point.

34.
It is here that the integrity of the Telegram Transcript becomes material. It shows in places that there was a “Cancelled Call” but all references to voice messages have been removed, evidently by Mr Wang when creating the transcript from the original native format. The existence of voice messages within the chain of communication is only revealed by a separate transcript prepared by Mr Wang in which he had changed Mr Darby’s name from “tezosotc” (being an abbreviation for Tezos OTC) to “Tezos Scammer 400k” after falling out with and being blocked by Mr Darby. Page 30 of this separate edited transcript shows that there were three voice messages - all of them left by Mr Wang - between 05:32 and 08:11 on the morning of Friday 28 December 2018.

35.
The third of these voice messages from Mr Wang lasted 23 seconds and was sent at 08:11:35AM. That was three seconds after Mr Wang finished the messages comprising his revised offer (TT p.30 at 8:10:46AM - 8:11:32AM) and, therefore, five minutes or so before Mr Darby responded (8:16:43AM), both as described above. According to the Voice Message Transcript, Mr Wang suggested that Mr Darby just tally the trade in his own internal record or accounts: “as you just bought under market … and then when you sell me back the Tezos for Bitcoins, you can tally it as a loss … or something like that when we trade back. So just tally it as if you’re trading with me” (emphasis added). Mr Wang uses “bought”, “sell me back” and “trade back” to describe the counter-restoration of 200,000 Tezos under the proposed transaction. Mr Darby’s response five minutes later, as noted above, was framed on the basis that Mr Wang would “buy them back” for the relevant number of Bitcoins.

36.
Pausing here, and as addressed further in the context of the SJ Application below, a sale and buy-back is legally and logically preclusive of a trust arrangement in respect of either the First 200k or Second 200k. When confronted with this proposition based on Mr Wang’s own pleaded case and sworn evidence at the beginning of the hearing, Mr Penny QC indicated that Mr Wang may wish to amend his pleaded case to remove references to ‘sale’ and ‘buy back’ or equivalent – and, by logical extension, the claim for constructive trusteeship. No such application has been made. Nor is it easy to see how it could succeed in light of Mr Wang’s own sworn evidence based, as it is, upon the Telegram Transcript, as quoted in paragraph 25 above. The Voice Message Transcript makes that position even harder for Mr Wang, in my view.

37.
A conspicuous feature of the parties’ dialogue throughout the Telegram Transcript - as illustrated by Mr Darby’s own use of “buy them back” (different emphasis added) when concluding the First Contract - is what might be called possessive or proprietary language to describe the Tezos (to be) transferred by Mr Wang and/or re-transferred by Mr Darby after the applicable two year period in each case. (No similar language was used in respect of the Bitcoins (to be) transferred to Mr Wang, it seems.) Mr Wang repeatedly referred to the First 200k and/or Second 200k as “my” or “mine” and Mr Darby was prone to using the correlative “your” or “yours” to describe such currency. Perhaps the best example of this is when Mr Wang looked at the OTC Account on 24 January 2019 and saw that its

balance had reduced from 356,000 to 259,000 Tezos. Mr Darby responded: “The 200k in there is yours and the 59k mine” (TT p.131 at 11:30:12AM).

38.
In a similar way, Mr Wang referred to the 17 Bitcoins (to be) transferred to him under the Second Contract as “borrowed” (e.g. TT p.129 at 11:15:01AM). This was said notwithstanding the fact that the transactions were agreed not to be loans (and neither side contends that they are) and on Mr Wang’s own case he took full ownership of both tranches of Bitcoins from the moment of receipt. There are numerous references to “trust” both in the context of the mutual trust required when digitally executing the currency swaps and by reference to Mr Darby accounting to Mr Wang at the end of the day for baking rewards and stake bonding profits referable to the 400,000 Tezos.

39.
This type of language, used by laypersons during conversational online messaging, does not dictate the proper legal characterisation of their transactions as a matter of objective common intention. The same might be said about the language of ‘sale’ and ‘buy-back’ at the time of concluding the First Contract, although one obvious difference is that Mr Wang’s pleaded case, settled by leading and junior counsel, uses the language of sale/purchase back in relation to the Tezos, as set out above. The use of possessive or proprietary connotations to describe entirely fungible digital assets such as Tezos is, in any event, somewhat ambiguous. In the early stages of negotiation, Mr Wang suggested that Mr Darby could trade Tezos and “buy the amount of tezos back at the end of the day so you don’t lose my tezos” (emphasis added). This suggests that possessive or proprietary terminology was being used as a means of identification or description, in particular given the use of a mixed wallet.

40.
The Second Contract was concluded on 24-25 January 2019. This followed an alleged variation of the First Contract on or about 10 January 2019 as regards profit share for baking the First 200k during the applicable minimum period and the terms upon which Mr Wang could perform his counter-restoration obligation in order to get the First 200k back upon maturity. In the course of that dialogue, Mr Wang reiterated that “I need to stake that’s the whole point” (TT p.82 at 9:45:45AM). The agreed minimum term of the First Contract was reiterated as “at least 2 years” on 10 January 2019 (TT p.85 at 10:11:49AM -10:12:27AM) and (therefore) offered as “for 2 years +” when negotiating the Second Contract on 24 January 2019 (TT p.127 at 11:04:30AM).

41.
It is clear from the totality of the exchanges that Mr Wang wished to remain invested in Tezos (as pleaded) and expected the 400,000 Tezos (or their fungible equivalent) to be used by Mr Darby during the applicable minimum period in each case for baking and/or stake bonding.

42.
As to the former, Mr Darby appears to have undertaken a strict obligation to return the same number of Tezos to Mr Wang following the minimum contract period, which formed part of the Second Contract (but not apparently a further variation of the First Contract) (TT p.130 at 11:28:25AM - 11:29:05AM). It was understood at all material times that Mr Wang’s entitlement to return of Tezos was conditional upon him restoring to Mr Darby the corresponding number of Bitcoins - 13 for the First 200k; 17 for the Second 200k - with discussion around how that counter-restoration obligation would or could be performed at the relevant time. The nucleus of this reciprocal arrangement is reflected in an exchange between the parties on 25 January 2019 in which Mr Darby assented (“Yes”) to Mr Wang’s recap as follows: “so 110k usd yeah?” / “Upon returning that I get 400k” / “Plus all the

staking rewards?" (TT p.135 at 5:55:13AM - 5:55:36AM). When Mr Darby informed Mr Wang on 12 February 2019 that he had "hedged the XTZ now on exchanges", Mr Wang immediately sought confirmation that "My tezos will still be returned even if it goes up yeah?" to which Mr Darby replied, "Yes, for the $110,000 BTC" (TT p.148-149 at 7:55:58PM - 7:57:45PM).

43.
As to the latter aspect, and putting it neutrally for now, it is clear that the contractual arrangements contemplated that Mr Darby would bake or stake-bond the 400,000 Tezos during the applicable minimum period for each tranche and account to Mr Wang upon reciprocal restoration for the rewards or profits from such activities. The precise content of any obligation to do so, as distinct from unilateral option or discretion on the part of Mr Darby, is not for me to determine. The parties apparently reached agreement on 25 January 2019 to revise the profit share so that Mr Wang would receive 100% of the baking/staking profits from the use of the 400,000 Tezos during the applicable minimum periods (TT p.135 at 5:15:08AM - 5:15:43AM) as reflected in Mr Wang's uncontroversial recap at 05:55AM quoted above. On several occasions, Mr Wang sought to persuade Mr Darby to reduce his commission charged to third party delegators so as to attract more stake bonding business, demonstrating his (perceived) interest in Mr Darby's use of the 400,000 Tezos to generate profit from third party delegation.

44.
Thus, in a very real sense, Mr Wang wished to remain and did remain invested in Tezos. The transactions guaranteed the return to him of 400,000 Tezos after the applicable minimum period in each case, so long as he restored (the agreed value of) 30 Bitcoins to Mr Darby; plus profits from baking or stake bonding performed by Mr Darby using such currency volume in the meantime.

45.
There was a measure of fluidity in the parties' dealings as well as informality. As can be seen, certain terms especially concerning profit share and Mr Wang's counter-restoration obligations were the subject of discussion and apparent revision. In so far as occurring in the context of concluding the Second Contract on 24-25 January 2019, the same dialogue may also have varied relevant aspects of the First Contract. Nothing seems to turn on this for present purposes. It is common ground that nothing said or done after 28 December 2018 could alter the proper legal characterisation of the First Contract or, therefore, the Second Contract. The latter replicated the former as to its nature and structure.

46.
Mr Darby told Mr Wang on several occasions that he would return the 400,000 Tezos to him at any time in return for the corresponding Bitcoin or US$110,000, i.e. effectively cancelling the contracts if Mr Wang so wanted (e.g. TT p.143 at 7:25:44PM on 4 February 2019). This was framed in terms of Mr Wang buying back the 400,000 Tezos (e.g. TT p.151 at 6:29:37AM on 16 February 2019). Mr Wang accused Mr Darby of scamming him on 4 March 2019 by reference to the level of fees charged by Mr Darby to third parties for his baking services. Mr Darby responded: "I am not scamming as said you are welcome to buy the tezos back" (TT p.160 at 7:40:30AM). (Mr Wang didn't dispute the notion of having to "buy" the 400,000 Tezos back from Mr Darby.)

47.
Matters came to a head two days later on 6 March 2019. Mr Wang appears to have reiterated a request he had made the previous day for yet more Bitcoins (TT p.167 at 3:14:29AM). This prompted Mr Darby to say: "I'm going to be shutting the baking service down, but continuing the OTC for

Tezos" (3:28:19AM). (The reference to OTC is to currency trading.) Mr Wang's reaction prompted Mr Darby once again to offer to cancel and unwind both transactions: "I'm happy to return the Tezos and you return the BTC" (3:29:30AM). Mr Wang became suspicious. His tone became more aggressive. He demanded compensation and asked at a minimum to be given five additional Bitcoins (TT p.169 at 3:36:06AM). Mr Darby offered to compensate Mr Wang for "any real world" losses he had suffered, but stated that none yet existed (3:37:39AM). He reiterated his standing offer to unwind the transactions: "Better to just send XTZ to you and you send BTC" (TT p.170 at 3:41:02AM).

48.
The dialogue ends at 03:54AM that day when Mr Darby blocked Mr Wang from his Telegram account. Mr Wang subsequently made contact with Mr Darby on Telegram from another device, demanding the return of his 400,000 Tezos on 15 February 2021. Mr Darby blocked him again. Mr Darby then blocked Mr Wang a third time when contact was made by other means a month or so later. Mr Darby did not return any Tezos to Mr Wang.

49.
From around March 2019, when the value of Tezos started to rise, Mr Darby transferred the 400,000 Tezos out of his OTC Account into a deposit address at the Kraken exchange, a centralised global cryptocurrency exchange based in the USA. Mr Darby removed his social media presence at around the same time, according to forensic/digital investigative evidence served on behalf of Mr Wang. It is assumed that Mr Darby traded the 400,000 Tezos. He had told Mr Wang on several occasions during their dialogue that he made significantly more return (i.e. for himself) from OTC than he did from baking or stake bonding Tezos. He described baking and bond staking as a bit of fun.

50.
None of the above narrative contains or constitutes any findings by me for present or any other purposes. It is the impression formed on a close reading of key passages in the Telegram Transcript.

SJ APPLICATION

Legal Framework

51.
The proper approach to applications seeking (reverse) summary judgment is summarised by Lewison J (as he then was) in EasyAir Limited (t/a OpenAir) v. Opal Telecom Limited [2009] EWHC 339 (Ch) at [15] in seven numbered propositions (i) to (vii). There was no material difference between the parties as to this approach. Mr Collins QC for Mr Darby gave emphasis to the final proposition whereby a court faced with a short point or law or construction should 'grasp the nettle' and decide it on a final basis. This approach can be appropriate where the Court is assured that no additional evidence is likely to turn up that could affect the outcome of the particular issue or claim.

52.
As regards the circumstances in which an express trust will be found to exist in a commercial transaction or relationship, the guiding principles are summarised by Briggs J (as he then was) in Re Lehman Brothers International (Europe) (In Administration) [2010] EWHC 2914 (Ch) at [225] in ten numbered propositions (i) to (x). (This exposition of the relevant test is not affected by the judgment of the Court of Appeal in the same case: [2011] EWCA Civ 1544; [2012] 2 B.C.L.C. 15.) I do not set out the ten propositions here, save to observe that the guiding principle is one of objective common intention assuming the foundational requirements of certainty are met in the first place (propositions (i)-(v)). The parties' language is not determinative: it is a matter of substance not form (proposition

(vi)). Special care is needed in a business or commercial context, such that: (a) a trust will be imposed where the parties' commercial objective calls for it; but (b) the law should not unthinkingly impose a trust where purely personal rights between the contracting parties sufficiently achieve their commercial objective (proposition (ix)).

53.
Briggs J went on to give commentary on these ten propositions at [226]-[262]. In relation to the two limbs of proposition (ix), he commented at [261] that (a) the law should not be hidebound by traditional rules about trusts derived from their origins in family settlements; and (b) the parties' commercial agreements and arrangements should be interpreted purposively in order to ascertain their commercial objective.

54.
There was some discussion at the hearing before me as to whether proposition (ix)(b) in the Lehman case involved a test of necessity, as might appear to be suggested by some of the language when Briggs J came to apply the legal principles to the various positions presented in that case (see e.g. [277]). Mr Collins QC for Mr Darby did not go so far as to say that the test was one of necessity, but where purely personal rights between the contracting parties sufficiently achieve their commercial objective that is a powerful contra-indication as to the creation of a trust. Stepping back slightly, it seems the overriding approach in the context of a commercial transaction or arrangement is to ask whether a trust makes sense by furthering (rather than frustrating) the parties' commercial objectives.

55.
As noted above, it is common ground that fungible and non-identifiable digital assets such as Tezos constitute property that is capable of being bought and sold as well as held on trust as a matter of English law. This reflects the position at first instance in this jurisdiction: see AA v. Persons Unknown [2019] EWHC 3556 (Comm); [2020] 4 WLR 35 at [55]-[61] (Bryan J) and Ion Science Limited & another v. Persons Unknown (21 December 2020, Butcher J). In both those cases the Commercial Court granted (interim) proprietary injunctions against the defendants in respect of cryptocurrencies that had been fraudulently extracted or misappropriated from the claimant or the traceable proceeds of such digital assets. The relevant hearings in both cases took place on an uncontested basis, the defendant not appearing or being represented in either matter as the case titles suggest.

56.
The High Court of New Zealand in Ruscoe & another v. Cryptopia Limited (In Liquidation) [2020] NZHC 728 held that a cryptocurrency trading exchange, known as Cryptopia, held the digital assets of its customers (i.e. account-holders) on express trust. Cryptopia operated as a form of depository and trading exchange/platform. The accounts of its customers were operated through so-called 'hot' wallets that were live and interconnected rather than so-called 'cold' wallets. Cryptopia's own web-based instruction pages and live customer interfaces made it clear that account-holders would be depositing, trading and owning their own cryptocurrency in return for certain fees charged by Cryptopia. The possessive or proprietary language used to describe this position (e.g. "your" cryptoassets) was consistent with the existence of an express trust, rather than determinative of its creation (see [172] under "Additional matters").

57.
Moving from express trusts to the position with Quistclose-resulting trusts, the relevant principles are summarised by the Court of Appeal in Bieber & others v. Teathers Limited (In Liquidation) [2012]

EWCA Civ 1466 at [14] endorsing the first instance judge's seven propositions based on the House of Lords decision in Twinsectra Limited v. Yardley [2002] UKHL 12; [2002] AC 164. The touchstone, as always, is objective intention - specifically, that the relevant money should not become part of the general assets of the recipient but should be used exclusively to effect certain payments only. Where such trust arises, the beneficial interest in the transferred money remains in the transferor/payor (beneficiary) who mandates the transferee/payee (trustee) to apply the money paid for a particular purpose which is identifiable with sufficient certainty.

58.
Patten LJ added for emphasis at [15] that in deciding whether particular arrangements involve the creation of a trust and with it the retention by the paying party of beneficial control of the monies, proper account needs to be taken of the structure of the arrangements and the contractual mechanisms involved. The most common structure to preclude the creation of such a trust was identified as a sale/purchase transaction under which advance payment would not ordinarily be impressed with any trust in favour of the purchaser/payor. Transfer of ownership in the sale/purchase context is inimical to the creation or imposition of a trust. This is inherent in the concept of consideration.

59.
No case has been identified in which a Quistclose-resulting trust has arisen in the context of a transaction involving reciprocal exchange (and re-exchange) of assets or economic value. A trust of this kind involves an asymmetrical transaction whereby one party transfers money to another for a specific use or purpose. In a sale/purchase or other transaction involving reciprocal economic exchange, the money is paid by way of consideration for the counter-benefit rather than being paid for future or onward use by the payee. Hence the focus, if not strict requirement, on circumstances such as payment into a segregated bank account: see First City Monument Bank Plc v. Zumax Nigeria Limited [2019] EWCA Civ 294 at [35].

60.
A constructive trust of the kind said to be relevant in the present case can arise when a specifically-enforceable contract of sale is concluded, such that beneficial ownership passes to the buyer and the seller is constituted a trustee on behalf of the buyer pending completion. This illustrates the maxim that Equity deems as done that which ought to be done. The best known example is, of course, sale of land; but this principle applies to other unique or sufficiently rare pieces or parcels of personal property such as unquoted shares or volumes of quoted shares that are not readily obtainable in the market. No constructive trust arises if the relevant sale contract is conditional (in the sense of requiring fulfilment of a condition outside the control of the buyer, such as third party or public authority approval) or is a mere option as yet unexercised. The trusteeship, if otherwise constituted, may cease through the conduct of the beneficiary/purchaser. See generally Lewin on Trusts (20th ed.) at 4-003 to 4-010.

61.
Echoing some of the principles applicable to express trusts and resulting trusts summarised above, it is equally important not to rush to pigeonhole a transaction into a familiar category (e.g. loan, sale, swap, agency, etc.) if that does not give optimum or proper effect to the parties' commercial objectives. The process of characterisation, being a product of the more general process of contractual construction, is not necessarily the same thing as categorisation. Taxonomy is a helpful guide, but no more. Where the parties reach their own agreements through informal online dialogue,

without legal advice or formal documentation, the process of characterisation needs to be sensitive to those features of the consensual dynamic.

62.
As regards the existence or imposition of fiduciary duties on a party to a commercial contract absent the existence of a trust, i.e. non-trustee or independent fiduciary duties, it is possible for these to arise where there is a relationship of trust and confidence that justifies such equitable duties in conjunction with and consistent with the relevant contractual framework. A contractual obligation to use certain property (i.e. belonging to the obligor, in the absence of any trust) for a particular economic purpose and account to the contractual counterparty (i.e. seller) for the rewards of such promised endeavour is theoretically capable of being conditioned or augmented by fiduciary duties in so far as consistent with such contractual scheme. The precise scope of any fiduciary duties must be moulded to the nature of the particular relationship and facts of the case so as to ensure that any fiduciary duties are consistent with non-fiduciary (i.e. contractual) duties: see Snell's Equity (34th ed. 2019) at 7-009 & 7-012.

63.
A constructive trust may arise where a fiduciary receives a bribe or secret commission in breach of fiduciary duty. A constructive trust in this context gives effect to the fiduciary's obligation to account to their principal for profit generated in such capacity: see Snell's Equity at 7-057. The same does not apply in respect of equitable compensation for breach of fiduciary duty: ibid. 7-058.

64.
With these principles in mind, I turn to the proprietary claim pleaded against Mr Darby in the present case. I deal first with the trust claims and then, so far as relevant in this context, the claim based on breach of fiduciary duty.

Present Case

65.
The SJ Application targets the "proprietary claims" by reference to a series of paragraphs in the POC identified in the attached draft order, some of which are included only to the extent or for the purpose identified. Broadly speaking this covers all allegations as to the existence or breach of any form of trust or fiduciary duty on the part of Mr Darby to transfer back to Mr Wang the same digital assets comprising the First 200k or the Second 200k. This is said to include the pleaded claim for equitable compensation by reference to POC paragraph 40 and paragraph (3) of the prayer, as well as the claim for an account of profits at paragraph (4) of the prayer. It is not clear to me that these latter claims for relief are proprietary in nature.

66.
As regards the pleaded case, the claim form makes no mention of fiduciary duties at all, i.e. independent from (breach of) trust as a matter of necessary implication. It contains a claim for "damages and other relief including proprietary remedies for breach of contract and/or breach of trust in relation to a series of agreements between the parties concerning cryptocurrencies."

67.
The POC were attached to the claim form. They contain a claim based on dishonest breach of fiduciary duty which extends beyond the claim based on the existence (and hence alleged dishonest breach of) trust: see paragraph 20. The precise scope and content of such alleged independent fiduciary duties is said to arise from the "nature and terms of the contracts" as pleaded; none of them is said to have

required Mr Darby to preserve any of the 400,000 Tezos in his wallet (including the OTC Account) or prohibit him from dealing with or disposing of any of them - in contrast to the so-called “trustee duties” pleaded at paragraph 24. (The fact that the alleged trustee duties pleaded at sub-paragraphs 24.1 to 24.4 are different in kind is further reflected by the fact that sub-paragraph 24.5 pleads a further duty “[t]o comply with the fiduciary duties set out above”, i.e. in paragraph 20.)

68.
The pleaded case of (dishonest) breach of fiduciary duty is at POC paragraph 38. It fails to distinguish between which conduct is said to have been a (dishonest) breach of the pleaded fiduciary duties (or which specific duty), on the one hand, and a (dishonest) breach of the pleaded trustee duties (or which specific duty), on the other hand. The gist of the complaint is nevertheless improper use or disposal of the 400,000 Tezos and failure to return them to Mr Wang, plus a separate and standalone complaint about failure to provide information about dealings with the Tezos (POC paragraph 38.3(iv)).

69.
The claim for equitable compensation is at POC paragraph 40. It pleads three separate heads of loss and damage, namely: (i) loss of the value of the 400,000 Tezos (minus credit for the “consideration” of US$110,000 required to obtain their return); (ii) loss of baking rewards during the applicable contractual periods; and (iii) loss of opportunity to earn third party baking profits through stake bonding during the applicable contractual periods. The only relief claimed by reference to (dishonest) breach of fiduciary duty is equitable compensation and an account of profits (paragraphs (3) & (5) of the prayer, as noted above).

70.
Leaving aside the fact that the claim form did not mention (breach of) fiduciary duty independent from (breach of) trust, my reading of the pleaded case is that the claim based on such independent (i.e. non-trustee) fiduciary duty does not concern the allegations based upon Mr Darby’s disposal of and/or failure to return the 400,000 Tezos. That is, in a sense, a ‘capital’ claim, as distinct from a ‘profit’ or ‘accounting’ (i.e. ‘non-capital’) claim, and it is made by reference to the existence of a trust over 400,000 Tezos - either an express trust, Quistclose-resulting trust or constructive trust. Paragraph 36 of Mr Penny QC’s skeleton argument for the present hearing asserts that Mr Wang “puts his proprietary claims in three different ways” by reference to the three trust variants (addressed in paragraphs 37, 38 and 39, respectively). This is consistent with the prayer for relief, which at paragraph (1) asserts a proprietary claim by way of declarations of beneficial interest by reference only to trust.

71.
The case based on independent (i.e. non-trustee / non-capital) fiduciary duties concerns the failure to generate and/or account for any generated baking rewards or stake bonding profits during the applicable contractual periods, coupled (perhaps) with the distinct complaint about failure to provide information described in paragraph 68 above. This pleaded case is theoretically consistent with the absence of any trust, i.e. on the basis that Mr Darby assumed such duties in respect of the 400,000 Tezos notwithstanding that he owned them from the point of transfer in each case.

72.
This distinction is important given that the SJ Application targets the pleaded claim for breach of fiduciary duty under the blanket description of “proprietary claims” as noted above. On my reading of the pleaded case, any independent claim for breach of fiduciary duty does not give rise to any proprietary claim. The basis for asserting beneficial ownership over the 400,000 Tezos or their

traceable proceeds is said to be trust and only trust (POC paragraphs 21-24 and 39; declarations sought at paragraph (1) of the prayer). A claim for equitable compensation or account of profits for (dishonest) breach of a fiduciary duty of a ‘non-capital’ nature and scope is not, without more, a proprietary claim: cf. paragraph 63 above as regards secret profit.

73.
With that survey of the pleaded case in mind, I turn to the analysis of the SJ Application.

74.
The existence of any trust or fiduciary duties on the part of Mr Darby arising out of the relevant contracts involves a self-contained question of contractual construction or characterisation based upon a closed set of potentially relevant evidence, namely the Telegram Transcript (augmented as necessary by the Voice Message Transcript) and the limited undisputed factual matrix identified above. None of this is controversial, save in the sense that Mr Darby does not accept the veracity or integrity of the transcripts for all purposes. The SJ Application proceeds on the basis that such transcripts nevertheless show that Mr Darby is obviously correct and the proprietary claims are bound to fail.

75.
I am satisfied that this is a case in which the Court should ‘grasp the nettle’ and determine the viability of the proprietary claims on a final basis. The issues have been fully analysed and argued before me by reference to what is accepted to be the entirety of the evidence that matters or could realistically matter for such purposes.

(i) Trust Claims

76.
Mr Wang’s pleaded case as reflected in Mr Penny QC’s skeleton argument for this hearing is that the 400,000 Tezos were held on trust for him by Mr Darby in one of three ways: express trust, Quistclose-resulting trust or constructive trust. The same is said to apply to the traceable proceeds of such digital assets.

77.
Mr Penny QC conspicuously did not press the constructive trust analysis during the hearing, notwithstanding its inclusion in his skeleton argument. It is, after all, premised upon a valid and binding contract of sale or, more accurately, conditional option to re-purchase (see paragraph 36 above). It is difficult to see how a constructive trust as pleaded could arise in respect of entirely fungible and non-identifiable digital assets. There is no obvious analogy to a specifically-enforceable contract for the sale of land or some unique or sufficiently rare piece or parcel of personal property: see paragraph 60 above.

78.
The fundamental problem with the existence or imposition of any kind of trust over the 400,000 Tezos is the essential economic reciprocity of the transactions, as described above. In order for Mr Wang to become entitled to the return of the 400,000 Tezos, assuming identification were possible or guaranteed for such purposes, he had to return corresponding value in (or equivalent to) Bitcoins to Mr Darby so as to reverse the swap. Whether or not this is characterised as a sale and re-purchase, still less a repo transaction, may not ultimately matter for present purposes. It is the essential economic reciprocity that precludes any trust, in my judgment.

79.
No case was identified in which a beneficiary under a trust is obliged to transfer or indeed re-transfer economic value to the trustee in order to obtain the trust property. This transactional element is inimical to the concept of a trust on both sides, let alone a trust on one side only. A beneficiary has an interest in and right to receive the trust property, not an option to (re-)acquire it for value or indeed (re-)purchase it for consideration. The analogy to the position of a purchaser of land is inapt. As noted above, Mr Penny QC did not press the constructive trust analysis at the hearing.

80.
If Mr Wang had defaulted on his own restoration obligation at the relevant time, Mr Darby would have been entitled to keep the 400,000 Tezos according to Mr Wang's own case. How is that consistent with a trust? At what point does the trust expire or dissolve in light of Mr Wang's own default or insolvency? None of this is accommodated by Mr Wang's asymmetrical trust analysis.

81.
If the essential economic reciprocity of the transactions were not in itself enough to preclude the creation of a trust, the pleaded characterisation of Mr Wang's restoration obligation as one of sale or purchase back is fatal to any trust analysis. A sale/purchase back of an asset (akin to the 'off leg' in a repo transaction) presupposes its original or prior sale/purchase in the other direction (akin to the 'on leg' in a repo transaction). Each sale/purchase transfers ownership from transferor/seller to transferee/purchaser. This is anathema to the existence of a trust over the relevant property arising upon or from the original outward transfer. It is the antithesis of a trust.

82.
As already noted, Mr Wang accepts and in fact avers (as he has to) that the transfer of Bitcoins to him from Mr Darby was a full transfer of ownership and concomitant freedom to deal with such property as he saw fit. This is consistent with Mr Wang's persistent requests to modify the terms of his counter-restoration obligation under the First Contract and to seek the same modified obligation for the Second Contract, recognising that he may or would not have the relevant currency to give back and may not be able to obtain a substitute for it at the required time. A trust over the 400,000 Tezos would impose a stark asymmetry in this reciprocal capital-swapping arrangement. Mr Wang himself recognised the possibility (at least) that Mr Darby might trade and therefore need to acquire other Tezos with which to perform his own restoration obligation when called upon to do so: see paragraph 39 above.

83.
If Mr Wang's analysis is correct, such that the 400,000 Tezos were held on trust for him, what would that make the other side of the transaction involving 30 Bitcoins? The obvious and perhaps only available characterisation is a loan. It would be an interest-free loan of 30 Bitcoins for the minimum contractual period. That is the very thing which Mr Wang sought initially, which Mr Darby ruled out as a possibility and which Mr Wang accepted was not available or desirable (see paragraphs 29 to 31 above). Neither party contends that the proper characterisation for these capital-swapping transactions was a loan.

84.
There is no bootstrapping involved in this approach to characterisation. The sale/purchase structure logically precludes a trust, and vice versa. The Court is entitled to rely on the pleaded characterisation of sale/purchase, consistent with Mr Wang's own sworn evidence based upon his

review of the Telegram Transcript and, of course, the contracting parties' use of such notorious or iconic transactional language when concluding their transactions: see paragraph 39 above.

85.
A trust over the 400,000 Tezos is not necessary to give effect to the parties' legitimate expectations or commercial interests, in the sense that they are sufficiently served by the existence of personal rights and obligations (see paragraph 54 above). On the contrary, a trust would subvert or frustrate the essence of their bargain. Whatever specific obligations Mr Darby may have assumed to keep the 400,000 Tezos in the OTC Account for the minimum applicable period or use them for baking or stake bonding are personal in nature and comfortably consistent with Mr Darby having become full owner of such digital assets when transferred to him. There is nothing objectionable in a purchaser undertaking to a seller in this way so long as the obligations are clear and enforceable. It is a personal obligation albeit capable of being conditioned by fiduciary duties where trust and confidence underpins the relationship. The existence of such post-transfer obligations does not alter or presuppose a contrary basis for the underlying proprietary position.

86.
The fact that the parties used possessive or proprietary language at times to describe the 400,000 Tezos does not come close to dislodging this legal characterisation of the transactions, in my judgment. Such language used by laypersons in an informal dialogue such as this one is consistent with description and identification, especially in the context of a mixed account/wallet held by the transferee (Mr Darby) that remains visible to the transferor (Mr Wang). Such language is not enough to create a trust where none is appropriate to give effect to their commercial objectives or chosen transactional structure.

87.
The absence of a trust does not mean that Mr Wang ceased to be invested in Tezos: he had a personal right or option to buy back 400,000 Tezos after a minimum period and an additional personal right to receive any baking rewards and stake bonding profits generated in respect of such currency volume during that minimum period. He was not selling up or selling out altogether. He remained vested in Tezos, despite having sold his holding to Mr Darby on terms as to future re-acquisition. In return for this he got his hands on Bitcoins. That was the primary driver on his side for proposing and concluding these swapping transactions in the first place.

88.
Other matters are of lesser importance. The fact that the 400,000 Tezos were transferred into a non-segregated account/wallet, namely the OTC Account, is not determinative although tends to contra-indicate the existence of a trust. Likewise the fact that Mr Darby may have undertaken a strict obligation to return the Second 200k come what may, in contrast to the usual duty of a trustee to exercise care to preserve trust assets, is a further contra-indication of trusteeship, but not a big point in the scheme of things.

89.
I do not need to decide the proper characterisation of a pure, i.e. unilateral or asymmetrical, stake bonding relationship between two account-holders. This is not relevant in the present case due to the reciprocal currency-swapping structure of their transactions. There is limited utility in embarking upon a hypothetical discussion of the non-reciprocal scenario, save to observe that the transfer of digital assets from one account-holder to another for the purpose of baking or stake bonding could

involve or constitute a trust. That would depend on all the circumstances, including whether a loan or sale was the more appropriate characterisation to give effect to the parties' commercial objectives.

90.
As regards the case that an express trust was created in respect of the 400,000 Tezos upon receipt by Mr Darby, I conclude that such case has no real or reasonable prospect of success at trial and there is no other compelling reason for such allegation to proceed to trial. As indicated above, I am satisfied nevertheless that this issue is capable of being determined by me on a final basis given the evidential matrix peculiar to this case. I conclude that there was no express trust.

91.
As regards the case that the 400,000 Tezos were subject to a resulting trust in accordance with Quistclose principles, I reach the same conclusion and for the same essential reasons. No case has been identified in which such a trust arose over property transferred as part of reciprocal exchange of assets and on terms whereby its re-transfer was expressly conditional upon a reciprocal or equivalent re-transfer of value from beneficiary to trustee. It is that obligatory economic reciprocity that precludes a trust of any kind, in my judgment.

92.
As regards the case that the 400,000 Tezos were subject to a constructive trust, in so far as this variant was advanced on behalf of Mr Wang at the hearing, I reach the same conclusion as above and for the same essential reasons. It is impossible to say that Mr Darby's conditional obligation to return 400,000 Tezos after the minimum contractual period would be enforceable by decree of specific performance given the entirely fungible and non-identifiable nature of such digital currency. There is no meaningful analogy with a seller's obligation to convey title to land following exchange of contracts.

93.
The only circumstance advanced as a compelling reason for the trust claim to proceed to trial absent threshold substantive prospects was said to be jurisprudential novelty, this being the first contested hearing in this jurisdiction (so far as counsel could discern) to deal with the question of whether a trust exists over cryptocurrency: cf. Andoro Trading Corp, Uroco Limited & others v. Dolphin Financial (UK) Limited & others [2021] EWHC 1578 (Comm) concerning an arguable trust over money paid as an investment in cryptocurrency. If there were serious controversy as to whether cryprocurrency constitutes property under English law, that submission may have more force. But that juridical substratum is common ground. The task of this Court is to apply well-known principles of English private law to an ultra-bespoke set of facts in which all relevant evidence is contained within the four corners of verbatim transcripts. My conclusions on the relevant issues are such that I do not consider there to be any good let alone compelling reason for such claims to proceed to trial.

94.
It follows from the conclusions set out above that the proprietary claim based on the existence of a trust should be dismissed.

(ii) Fiduciary Duty

95.
As explained in paragraphs 65 to 72 above, I read the pleaded claim for breach of fiduciary duty absent or beyond any trust to be limited to what I call non-capital and hence non-trustee obligations, i.e. using 400,000 Tezos to generate rewards/profits during and accounting for such rewards/profits

after the applicable contractual periods. This may carry with it the correlative obligation not to use such currency to trade for personal profit. The only remedies claimed for (dishonest) breach of such independent fiduciary duties are equitable compensation and account of profits. These are not proprietary in nature and do not without more constitute proprietary claims such as to justify the grant of a proprietary injunction against Mr Darby.

96.
In so far as I am wrong about the meaning of the pleaded case, and the claim for (dishonest) breach of fiduciary duty overlaps with the pleaded trustee duties such as to impose a capital obligation upon Mr Darby - i.e. to return the same 400,000 Tezos when his conditional obligation to do so crystallised - then I find that such claim has no real or reasonable prospect at trial and there is no other compelling reason for such allegation to proceed to trial. Even if properly pleaded, such claim would in substance amount to the imposition of trustee duties in the absence of any trust. It would, in effect, introduce a trust by the back door. That conclusion is precluded by my finding as to the impossibility of any trust arising through the conclusion or execution of the transactions. Put another way, there is no room for a non-trustee fiduciary duty to restore the relevant assets given the essential economic reciprocity of the parties' bargain. Such fiduciary duties would be inconsistent with the contractual structure.

97.
Any surviving claim based on fiduciary duty which could proceed to trial is, therefore, personal in nature, in the sense that it concerns only non-capital duties and supports only personal claims for equitable compensation and account of profits as matters stand. The profits which are the subject of this claim could be those generated by Mr Darby by baking or stake bonding the 400,000 Tezos (i.e. direct or authorised gains) or any profits he made from trading the 400,000 Tezos (i.e. indirect or unauthorised gains) instead of generating such direct or authorised gains as contemplated. Such claim if properly pleaded could have a real or reasonable prospect of success consistent with the position on the other personal claims pleaded against Mr Darby for breach of contract. These personal claims underpin the WFO.

98.
I say no more at this stage as regards the merits of the personal claims against Mr Darby for breach of contract and/or breach of fiduciary duty. The precise terms of the parties' contracts, including any variations as alleged, and breach of such terms are all matters for the trial judge. That said, and so far as relevant in light of my conclusions above on the proprietary claims, I regard it as unarguable that either contract was for a fixed term of two years. The Telegram Transcript is tolerably clear that the applicable period in each case was a minimum of two years. The precise mechanism for bringing it to an end, so as to trigger any conditional option to re-acquire 400,000 Tezos or Mr Darby's accounting or related obligations to account for baking rewards or stake bonding profits, is a matter for trial.

99.
Mr Darby concedes a good arguable case against him on all pleaded personal claims for the purposes of the WFO, to which I now turn.

WFO CONTINUATION APPLICATION

100.
I can deal with this briefly in light of Mr Darby's sensible concession as to threshold substantive prospects on the personal claims against him.

101.

The key issue concerns the existence of a real risk of unjustified dissipation of assets by Mr Darby that might render enforcement of any future judgment against him more difficult or less effective. There is no dispute between the parties as to the applicable principles, summarised by the Court of Appeal in Lakatamia Shipping Company Limited v. Morimoto [2019] EWCA Civ 2203; [2020] All ER (Comm) 359 at [34].

102.
I conclude without serious hesitation that such risk of dissipation exists in the present case. The position before HHJ Pelling QC at the without notice hearing for injunctive relief on 2 August 2021 has become more difficult for Mr Darby as a result of (i) his own incomplete and inconsistent asset disclosure pursuant to the Injunction Order, (ii) his own evidence (including conspicuous omissions) contained in four witness statements served in the meantime, and (iii) the expert evidence of Mr Sanders on behalf of Mr Wang, including the second report served in support of the WFO Variation Application and admitted for the purposes of the other applications at this hearing.

103.
The available evidence shows that Mr Darby is an experienced and sophisticated cryptocurrency trader with current or potential means of control over many digital wallets and access to different trading exchanges or platforms. The two reports of Mr Sanders demonstrate that Mr Darby holds or held substantial quantities of Bitcoins worth, at current values, far in excess of his disclosed net worth. I make allowance for Mr Darby's mental state and memory impairment, said to have resulted in loss of passwords and inaccessibility of digital wallets or platforms. The inconsistencies, omissions and conspicuous obscurities in some of his explanations raise justifiable doubts about whether the correct or complete position has been disclosed or explained. No application has yet been made for contempt of court, but Mr Darby must know by now that this is in prospect.

104.
The precise terms of the contracts and any breach by Mr Darby are for trial, as explained above. It seems likely, however, that Mr Darby must have appreciated - at the very least - that by transferring the 400,000 Tezos out of the OTC Account (which Mr Wang could view online) into a wallet at the Kraken exchange in mid-March 2019 and proceeding to trade such currency, rather than keep it in its original and visible wallet and use it to generate baking rewards or stake bonding profits for Mr Wang's benefit, he was not honouring the spirit or purpose of the swapping transactions. The minimum applicable periods had a long way to run when he did this: it was less than three months into the staking term for the First 200k and less than two months into the staking term for the Second 200k. Mr Darby appears to have decided not to use the 400,000 Tezos for baking or stake bonding at all, and instead to trade them for his own gain. Whether or not this was dishonest, and whether or not dishonesty forms an essential part of the personal claims remaining in these proceedings, it was manifestly arguably dishonourable or commercially colourable behaviour.

105.
It is not necessary for me to form a view, still less make any findings, about the circumstances in which Mr Darby ex-communicated Mr Wang without notice on 6 March 2019 and subsequently. He says this was because Mr Wang became abusive. Mr Wang was clearly angered at being informed by Mr Darby on 6 March 2019 that he was ceasing baking Tezos: that must have felt like a wholesale repudiation of their mutual arrangement, so his reaction was understandable even if his tone and choice of language was not appreciated by Mr Darby. Mr Wang demanded compensation and accused Mr Darby of defrauding him.

106.
What matters for present purposes is that Mr Darby immediately or very soon moved the 400,000 Tezos elsewhere and traded them for his own gain. He took advantage of the rising value of Tezos. The trading profit he made was at the expense of Mr Wang in so far as Mr Darby was under an obligation to seek to generate baking rewards or stake bonding profits for Mr Wang's benefit from the 400,000 Tezos. Mr Darby also removed his social media presence at about the same time, according to forensic investigative evidence served by Mr Wang.

107.
No point was taken before me about delay in seeking the WFO. This aspect was broached properly and fairly before HHJ Pelling QC at the without notice injunction hearing on 2 August 2021. For the reasons given by the Court on that occasion, any delay on the part of Mr Wang is explicable and not such as to undermine or preclude the inference as to a real risk of unjustified dissipation on the part of Mr Darby.

108.
I conclude without serious hesitation that there is, at least, a real risk of unjustified dissipation by Mr Darby if not restrained by continuation of the WFO. Such risk existed at the time of grant of the Injunction Order. It persists today. Mr Wang deserves asset-freezing protection to the extent of his personal claims against Mr Darby. There is no manifest injustice or inconvenience to Mr Darby in continuing the WFO at this level, given the evidence as to his ownership of Bitcoins with a value far in excess of such frozen sum. The grant and continuation of such relief is and remains just and convenient in all the circumstances.

DISPOSITION

109.
In summary:

(i) The SJ Application is granted save for the pleaded claim for equitable compensation and account of profits based upon alleged (dishonest) breach of fiduciary duty independent of any trust. Mr Wang's proprietary claims are struck out, save in so far as a viable claim can be maintained for a constructive trust in respect of any direct or indirect gains made by Mr Darby and not accounted for by him to Mr Wang (see paragraphs 63 and 97 above) on the basis of alleged (dishonest) breach of fiduciary duty independent of any trust.

(ii) In light of (i) above, the proprietary injunction contained in the Injunction Order should be set aside given its current pleaded basis. The further hearing of the PI Continuation Application will provide an opportunity for Mr Wang to persuade the Court that a proprietary injunction is appropriate in some form by reference to any viable residual claim for constructive trusteeship as outlined in (i) above. That is very different and much smaller than the original pleaded proprietary claim based on capital deprivation, i.e. non-return of the 400,000 Tezos. It is not yet clear whether any such claim exists or, even if it does, whether any proprietary injunction is appropriate.

(iii) The WFO Continuation Application is granted on the basis of the personal claims made against Mr Darby such that the WFO will continue until further Order of the Court.

(iv) The WFO Variation Application will be heard in light of (iii) above.

(v) The assessment of costs reserved from the hearing on 29 October 2021 and the costs associated with the ancillary application described in paragraphs 4 and 5 above will be dealt with at the further hearing consequential upon issuance of this judgment.

110.
I will direct that a Draft Amended POC is provided on behalf of Mr Wang in time for it to be considered at the consequentials hearing. That way I can deal with any pleading disputes arising out of this judgment and give permission for amendments as required, whilst also determining whether any new proprietary injunction ought to be granted and making appropriate costs orders by reference to the new pleaded position.