

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE**

ACTION NOS 902 AND 2332 OF 2018

BETWEEN

NICO CONSTANTIJN ANTONIUS SAMARA Plaintiff

and

STIVE JEAN-PAUL DAN also known as Defendant
STEVE JEAN-PAUL DAN, STIVE JEAN
PAUL DAN and STEVE JEAN PAUL DAN

(Consolidated)

Before: Deputy High Court Judge Le Pichon in Chambers

Date of Hearing: 21 October 2019

Date of Decision: 1 November 2019

DECISION

1. This was the substantive hearing of (1) a renewed *Mareva* application by Nico Constantijn Antonius Samara (“the plaintiff”) by summons dated 11 June 2018 (“the injunction summons”) on the ground that there is evidence that justifies reconsideration or constitutes a material change of circumstances; and (2) the plaintiff’s summons dated 24 April 2018 for an order to inspect and take copies of bankers records used and kept by Citibank (Hong Kong) Limited, and the defendant or Gatecoin Ltd (“Gatecoin”) to provide copies of certain information and documents (“the discovery summons”).

A 2. The injunction is sought to restrain Stive Jean-Paul Dan also
B known as Steve Jean-Paul Dan, Stive Jean Paul Dan and Steve Jean Paul
C Dan (“the defendant”) from disposing of assets in Hong Kong up to a value
D of US\$2,603,639. At the conclusion of the hearing, the Decision on both
E summonses was reserved which I now give.

F *PROCEDURAL HISTORY*

G 3. On 20 April 2018, the plaintiff made an *ex parte* application on
H an urgent basis and obtained an injunction. At the subsequent *inter partes*
I hearing on 27 April 2018, it was discharged by Madam Recorder Yvonne
J Cheng SC (“the Recorder”) on grounds of material non-disclosure and
K abuse of process. The plaintiff had failed to disclose that both the Citibank
L account and the Gatecoin account, being the main accounts he was seeking
M to target with the injunction order had already been frozen independently
N of any court order.

O 4. The plaintiff then applied for a re-grant of the injunction which
P was refused. As the plaintiff had given no information as to his financial
Q means, lives in Curaçao with no assets in Hong Kong and has no Hong Kong
R connection, he was unable to satisfy the court that his undertaking was a
S meaningful one. The Recorder’s Reasons for Decision (“the 2018 Decision”) were handed down on 15 May 2018 to which reference should be made.

T 5. At the call over hearing of the injunction summons on 15 June
U 2018, the defendant gave an undertaking pending the determination of the
V injunction summons not to remove from Hong Kong any of his assets up to a value of US\$2,337,279.83.

BACKGROUND

6. The relevant background to these proceedings is set out in §§4 – 10 of the 2018 Decision which I gratefully adopt. For ease of reference, they are set out below:

“ 4. The Plaintiff made an affirmation dated 20 April 2018 (“the Plaintiff’s 1st Affirmation”) in support of his *ex parte* application. He is a citizen of the Kingdom of Netherlands living in Curaçao. He says that he had 1,000 bitcoins (“**the Bitcoins**”) and came to Hong Kong during part of June 2017 so that the Defendant could help sell the Bitcoins for him, for a 3% commission.

5. As the Plaintiff (being a non-resident) could not open a Hong Kong bank account to handle the sale proceeds, he agreed that they should be deposited into the Defendant’s account in Hong Kong with Citibank, from whence the funds would be transferred to the Plaintiff’s bank account in Germany. The Defendant gave the Plaintiff access to the Citibank account by providing him with the login details and security token. The Plaintiff could then make transfers of funds to his account in Germany.

6. The Plaintiff says that between June and September 2017 some of the Bitcoins were traded. A main way in which this was done was through the Defendant’s nominated bitcoin wallet at Gatecoin. The Plaintiff transferred some bitcoins from his personal bitcoin wallets into the Defendant’s bitcoin wallet at Gatecoin so that they could be traded by the Defendant. The agreed arrangement was that the proceeds of sale would be transferred to the Citibank account.

7. The Plaintiff says that the total amount payable by the Defendant to him for the trading of the Bitcoins was US\$3,118,139. Between 3 July 2017 and 6th September 2017, the Plaintiff transferred US\$520,500 from the Defendant’s Citibank account to his bank account in Germany.

8. The Plaintiff says that from around 14 September 2017, he noticed that the money in the Citibank account had been placed on time deposits and could not be transferred. From around the beginning of November 2017, the Plaintiff has been unable to gain online access to the account at all. The Plaintiff says that the Defendant therefore owes him US\$2,597,639.

9. The Plaintiff says that he has not been able to locate or communicate with the Defendant since 27 or 28 October 2017.

10. In February 2018, the Plaintiff contacted Gatecoin to notify it of his concerns regarding the Defendant and to ask that Gatecoin block the Defendant from accessing his Gatecoin account. On 23 February 2018, the Plaintiff was informed by Aurelien Menant, the CEO of Gatecoin, that 40 bitcoins remained in the Defendant's Gatecoin wallet. Mr Menant agreed to block the Defendant from withdrawing the bitcoins from the wallet, but said that he would need a legal basis to block the account for any extended period of time."

THE PLAINTIFF'S RENEWED APPLICATION

7. To justify the plaintiff's renewed application, the plaintiff's counsel, Ms Seto, relied on the following 'new' evidence:

- (a) An official certificate issued by the relevant French authorities, recording a decision of 21 April 2018 of the registrar of births, marriages and deaths that the defendant is called "Steve, Jacob, DAN".
- (b) Evidence from the defendant's former assistant to the effect that he had been told by the defendant that the defendant had recently acquired a new passport¹ under yet a different name² "Stephane Jean-jacque Dan".
- (c) Citibank: (i) an apology from the plaintiff³ to address the adverse comments made in the 2018 Decision to show that the underlying assumption he had made that the account had been blocked was not an established fact; (ii) Citibank's letter dated 16 October 2019 stating its inability to provide further information regarding the defendant's account (if any) absent a court order ordering disclosure.

¹ The country issuing the passport was not specified.

² There is evidence from the defendant's former wife that he has also used several other names.

³ See the plaintiff's 3rd affirmation dated 14 June 2018 ("P 3rd") §§ 11 – 16.

A (d) Gatecoin’s insolvency and the appointment of liquidators on
B 20 March 2019 with the plaintiff and the defendant lodging
C proofs of debt asserting competing proprietary claims over
45.08883 Bitcoins in the Gatecoin account.

D (e) The serial number appearing on the Citibank’s security token,
E a photograph of which is part of exhibit NCAS 6 to the
plaintiff’s 1st affirmation dated 20 April 2018 (“P 1st”).

F 8. The plaintiff submitted that as the present case involves
G fraud, the fact that the defendant has multiple passports and names⁴ is a
H significant factor. It was suggested that only someone who has something
I to hide would resort to having different identities. It was further submitted
J that without an injunction, the defendant will be in a position to dissipate
K monies in his Citibank account as well as those in the Gatecoin account
L in the event of any distribution by the liquidator. As the defendant is the
account holder, it was said that the liquidator will likely accept his claim
rather than the plaintiff’s.

M 9. At the hearing, the defendant made no oral submissions to
N the effect that the court should not entertain the renewed application. It is
O to be noted that at the hearing before the Recorder, the court did not have
P to consider the substantive merits of the plaintiff’s case because of issues
Q of material non-disclosure and abuse of process. On the plaintiff’s
renewed application, the focus was on the defendant’s objection
R regarding the absence of evidence of the plaintiff’s ability to make good
his undertaking and the absence of an offer of fortification.

S
T ⁴ In relation to the French name change, the plaintiff initially sought to attach significance to
U the fact that it occurred the day after the *ex parte* injunction was granted but had to accept
V the established fact that the injunction was only served on the defendant on 26 April 2018: see
§2 of the 2018 Decision.

A *THE RELEVANT LEGAL PRINCIPLES* A

B 10. It is common ground and well established that for a B
C *Mareva* injunction to be granted, the applicant has to satisfy the court that C
D (a) he has a good arguable case on his claim; (b) there are assets within the D
E jurisdiction; (c) there is a real risk of dissipation of assets so as to render E
F any judgment that may be made in his favour nugatory, and (d) the F
balance of convenience is in favour of grant.

G *WHETHER THE PLAINTIFF HAS A GOOD ARGUABLE CASE* G

H (1) *The trades* H

I 11. The plaintiff's case is that he entered into an oral agreement I
J with the defendant in Hong Kong on 1 June 2017 who agreed to sell J
K the plaintiff's 1,000 Bitcoins as agent in return for a commission of 3%. K
L Between June and September 2017, the plaintiff transferred Bitcoins to the L
defendant for trading with, *inter alia*, Gatecoin and TD Ameritrade ("TDA").

M 12. The relevant evidence concerning these two accounts⁵ is M
N set out below. N

O (a) *Gatecoin* O

P 13. The plaintiff claims to have transferred 450 Bitcoins to the P
Q defendant's nominated wallet at Gatecoin. However, he was only able Q
R to produce contemporaneous records showing the transfer of 275 Bitcoins R
S from his Electrum wallet to the defendant's Gatecoin wallet on various S
T dates between 8 August and 6 September 2017. The relevant transfer T
S dates and the quantity of Bitcoins transferred are set out in §41 of P 1st.
T That much is common ground.

U

⁵ Together they account for approximately 84% of the Bitcoins in issue. U
V

14. It is the plaintiff’s case that between July and August 2017, he had also transferred a further 175 Bitcoins to the defendant’s Gatecoin wallet (“the disputed Gatecoin transfers”) from another of his Bitcoin wallets but is unable to provide documentary evidence because he no longer has the Bitcoin wallet containing the relevant record “as the same has been emptied”.

15. He went on to explain⁶ that:

“ a bitcoin wallet can only be accessed by inserting a seed (which is a random 12-word phrase), which is only known to the owner. Thus, the ownership of the bitcoin wallet is asserted by possession of the seed. By not keeping the empty bitcoin wallet, it means that I no longer keep or remember the seed which is vital in accessing or restoring the old or empty bitcoin wallets.”

16. The plaintiff acknowledged that Bitcoin transactions including those relevant to “lost” Bitcoin wallets can be traced in the public domain “by experts” but that he (the plaintiff) did not have the requisite knowledge or skills to do so.

17. Based on information that the defendant had “provided” the plaintiff between 28 July 2017 and 6 September 2017, the plaintiff set out in the table to §45 of P 1st (reproduced below) 7 trades of Bitcoins via his Gatecoin account that the defendant had facilitated:

<i>Date</i>	<i>BTC quantity</i>	<i>BTC unit price</i>	<i>Total price</i>	<i>Transaction type</i>
28 July 2017	25 BTC	US\$ 2,683.92	US\$ 67,098	OTC
31 July 2017	145.265 BTC	US\$ 2,692.00	US\$ 391,054	Exchange
8 August 2017	29.735 BTC	US\$ 3,344.82	US\$ 99,458	OTC
14 August 2017	25 BTC	US\$ 3,955.15	US\$ 98,878	OTC
25 August 2017	25 BTC	US\$ 4,109.44	US\$ 102,736	OTC / Exchange
6 September 2017	100 BTC	US\$ 4,202.88	US\$ 420,288	Exchange

⁶ See P 1st §43.

<i>Date</i>	<i>BTC quantity</i>	<i>BTC unit price</i>	<i>Total price</i>	<i>Transaction type</i>
6 September 2017	100 BTC	US\$ 4,491.27	US\$ 449,127	OTC
<i>Total :</i>	<u>450 BTC</u>		<u>US\$ 1,628,639</u>	

18. The 2nd and 3rd transactions listed involved the disputed Gatecoin transfers as to which the plaintiff is unable to provide documentary evidence to prove the transfers.

19. What is not known is the basis upon which the plaintiff was able to make the entries for the 2nd and 3rd transactions shown in §17 above. The plaintiff did not explain how the defendant provided the relevant information to him, what form it took and why it is no longer available.

20. For his part, the defendant does not accept the plaintiff's explanation for his inability to produce transfer records. He maintains that even if a seller's own wallets (or public/private keys) are lost, a public record of the transaction is still searchable, if he is in possession of any of the following: (1) the seller's public key to his Bitcoins wallet, (2) the buyer's public key to his Bitcoins wallet, (3) the transaction hash, (4) time, volume, quantity of the Bitcoins transacted.⁷

21. Whether Bitcoin transaction records are susceptible to public searches and, if so, how that is to be done, are not matters about which any preliminary view can usefully be formed given the state of the evidence on this issue and must be a matter for resolution at trial.

22. The issue concerning the 275 Bitcoins is different. There is no dispute that they were transferred to the defendant. The issue is

⁷ See defendant's 1st affirmation dated 30 October 2018 ("D 1st") at §§ 17 and 20.

whether the defendant acted as principal or agent, and his rate of commission.

23. The defendant's case is that he is a Bitcoin trader who had traded with the plaintiff prior to the matters in issue in these proceedings. His relationship with the plaintiff was exclusively that of seller and buyer dealing directly with each other; all trades between them were concluded on the spot with payment being made in cash there and then or by wire transfer. However, it is noted that no mention was made of the fee/commission charged for those transactions. The defendant denied that he ever acted or agreed to act as agent for the plaintiff.

24. The defendant stated that the plaintiff approached him in 2016 wanting to sell his 1000 Bitcoins, the defendant stated he could no longer continue to trade with the plaintiff as the defendant did not have sufficient liquidity to absorb that amount of Bitcoins, "as [the plaintiff] did not wish to receive funds by bank transfer any more"⁸.

25. The defendant stated that the plaintiff did not want to register or trade on soybit.com which was an online Bitcoin trading exchange the defendant started in Curaçao in November 2015. Trading on soybit.com would have required the customer/client to register on the website and provide a copy of their passport, ID and proof of address. In other words, the plaintiff wished to trade anonymously.

26. Ms Cheung, counsel for the defendant, explained that there was a price to be paid for privacy and the average commission or fee rate for OTC trades in cash for clients who wished to trade anonymously

⁸ See D 1st at §13.

ranged from 12% to 50%. In the defendant's case, where the trade was to be anonymous, his average commission/fee rate is 40% and falls within the range.

27. The defendant referred to the website <http://richfund.pe> (said to be one of the largest OTC Bitcoin traders) which allegedly shows a 50% fee for conducting cash transactions in the Caribbean and Latin American region but adduced no documentary evidence in support. According to the plaintiff, the site given is defunct⁹.

28. In reply, the plaintiff exhibited an article from a website reporting Bitcoin news which stated that public brokers including Richfund (whose website the defendant had relied on) and OTC's settle for a fee between 1% to 5% for which "high net worth individuals and others get privacy and security".

29. In his Consolidated Defence dated 13 March 2019 ("CD") §11(3) (reproduced below) the defendant summarised the payments he made to the plaintiff as follows:

	<i>Date (2017)</i>	<i>Bitcoin bought</i>	<i>BTC price (USD)</i>	<i>Total (USD)</i>	<i>D's fee (40%)</i>	<i>Total payout (USD)</i>	<i>Paid to P by Citibank SWIFT transfer (Transaction #)</i>	<i>Paid to P in cash (USD equivalent)</i>
1.	7 August	25	3,340	83,500	33,400	50,100	50,000 (8071235065)	
2.	13 August	25	3,923	98,075	39,230	58,845	50,000 (8151237626)	9,000
3.	23 August	25	4,000	100,000	40,000	60,000	50,000 (8221239538)	10,000
4.	3 September	50	4,100	205,000	82,000	123,000	50,000 (8251240538)	50,000

⁹ See the plaintiff's 4th affirmation (14 December 2018) ("P 4th") at §10.

	<i>Date (2017)</i>	<i>Bitcoin bought</i>	<i>BTC price (USD)</i>	<i>Total (USD)</i>	<i>D's fee (40%)</i>	<i>Total payout (USD)</i>	<i>Paid to P by Citibank SWIFT transfer (Transaction #)</i>	<i>Paid to P in cash (USD equivalent)</i>
5.	4 September	50	4,230	205,000	82,000	123,000	50,000 (8311242611)	50,000
6.	5 September	50	4,230	211,500	84,600	126,900	50,000 (9051244213)	100,000
7.	6 September	50	4,230	211,500	84,600	126,900	50,000 (9061244680)	100,000
<i>Total :</i>						<u>668,745</u>	<u>350,000</u>	<u>319,000</u>

30. What is immediately striking is that all of the SWIFT transfers were for amounts of US \$50,000 each and what is even more striking is that the amounts involved all happen to be expressed in neat sums ending with three zeros.

31. It will be seen from the table that payment was said to have been effected in part by SWIFT transfers and the balance in cash at either defendant's office in Curaçao or at a location of the plaintiff's choosing¹⁰. Pausing there, it is to be noted that bank transfers were made to the plaintiff, despite the defendant's evidence referred to in §24 above.

32. The SWIFT transfers show the amount paid to the plaintiff and the transaction number for each of the transfers¹¹. It is to be noted that for each of trades 4 and 5, when according to the defendant a sum of US \$123,000 was due, only US \$100,000 is shown to have been paid without accounting for the outstanding balance of US \$23,000.

33. At the hearing, the court was informed that cash deliveries were made by messenger but other than the defendant's bare assertion,

¹⁰ CD §11(5).

¹¹ See §§42 – 43 below.

A there is no independent evidence corroborating such payments. There are
B also no particulars given (as to when, where and in what currency they
C were made) and no evidence as to how the plaintiff's instructions were
D communicated to the defendant.

E (b) TDA

F 34. It is the plaintiff's case that between 27 June 2017 and
G 5 August 2017, the defendant acted as the plaintiff's agent in five trades
H totalling 387.18422 Bitcoins to TDA, a US listed brokerage firm for a
I total price of US \$950,000. There is a supporting affirmation from
J Mr Sukenik who, according to the plaintiff, had brokered those
K transactions and provided the plaintiff with the WhatsApp messages
L exhibited as NCAS 32.

M 35. Mr Sukenik's evidence is to the effect that in his Bitcoin
N dealings with the defendant in June and July 2017, the defendant had
O represented to him that one "Nick" (ie the plaintiff) was the seller of
P the Bitcoins and that as brokers, the defendant and Mr Sukenik together
Q would charge a commission fee of no more than 5% of the sales price of
R the plaintiff's Bitcoins sold to TDA.

S 36. It is common ground that 387.2 Bitcoins were transferred
T by the plaintiff into a co-pay account. The defendant maintained¹² that he
U purchased those Bitcoins and that he paid the plaintiff immediately from the
V Citibank account and in cash delivered to the plaintiff¹³ via an employee
of the defendant.

T ¹² Mr Sukenik's affirmation is dated 22 February 2019 and the CD 13 March 2019.

U ¹³ See CD §12(3).

37. As pleaded in CD §12, the defendant's case is that he sold those Bitcoins to his client ("TD client") who used a TDA bank account (but who was not in any way affiliated with TDA). The defendant had asked the plaintiff to directly transfer the Bitcoins into a wallet nominated by TD client known as the co-pay wallet. TD client used a broker, Mr Sukenik, whose signature was also required by the co-pay wallet. Once the Bitcoins had been transferred into the co-pay wallet, the defendant would initiate payment and upon receipt of the payment, the plaintiff would give instructions to release the Bitcoins from the wallet.

38. A table was produced setting out the five trades with the relevant information and in particular Citibank SWIFT transfers with transaction numbers evidencing payments. It is the defendant's case that all transactions were settled by bank transfer to the plaintiff's account or/and in cash.

<i>Date</i> <i>(2017)</i>	<i>Bitcoin</i> <i>purchased</i>	<i>BTC</i> <i>price</i> <i>(USD)</i>	<i>Total (USD)</i>	<i>D's fee</i> <i>(USD)</i>	<i>Total</i> <i>payout</i> <i>(USD)</i>	<i>Paid by</i> <i>Citibank</i> <i>transfer</i> <i>(Transaction #)</i>	<i>Paid in</i> <i>cash (USD)</i> <i>equivalent)</i>
1. 28 June*	85.106	2,164	184,169.38	73,667.75	110,502	500 (7032068080) 10,000 (7031224133)	100,000
2. 9 July	42.553	2,350	99,999.55	39,999.82	60,000		60,000
3. 18 July	68.027	2,205	149,999.54	59,999.81	90,000		90,000
4. 25 July	97.352	2,568	249,999.94	99,999.97	150,000	10,000 (7251231017) 50,000 (8071235065)	90,000
5. 28 July	94.162	2,655	250,000.11	100,000.04	150,000	50,000 (8151237626) 50,000 (8221239538)	50,000
<i>Total :</i>	<u>387.2</u>		<u>934,168.52</u>	<u>373,667.39</u>	<u>560,502</u>	<u>170,500</u>	<u>390,000</u>

*The wire transfer of the two sums of US\$500 and 10,000 were initiated on 28 June 2017 but left the defendant's bank account on Monday 3 July 2017

39. The relevant extracts¹⁴ from the WhatsApp messages in NCAS 32 exchanged on 31 July 2017 appear to relate to trades 4 and 5 and lend support to the plaintiff's case that the defendant acted as broker. Significantly, one of the messages from the defendant stated that "[the defendant], [Sukenik] and Mike¹⁵ were all brokers in this deal"¹⁶ and the commission involved for the brokers was no more than 5%.

(2) *The Citibank transfers*

40. The plaintiff's case is that as he had no Hong Kong bank account and as a visitor without a Hong Kong address and identity card he was unable to open one. In those circumstances, the defendant gave him access to the defendant's Citibank account which would be used only for the purposes of receiving the sale proceeds of the plaintiff's Bitcoins and transferring them to the plaintiff's account with the authorisation of the defendant and the defendant would not make any transfers from that account without first obtaining the plaintiff's approval¹⁷. On that basis, the defendant provided the plaintiff with the login details and security token.

41. The plaintiff claims to have made 11 online transfers from the defendant's account to the plaintiff's personal account in Germany between 25 July 2017 and 6 September 2017. Those transfers are set out in §30(3)(a) – (k) of the Consolidated Statement of Claim ("CSOC") and it seems they were made under the defendant's instructions¹⁸.

42. The defendant denies ever having given the plaintiff access rights to his Citibank account. In response to §30(3) of the CSOC, the

¹⁴ At the court's request, a typed up version of the extracts relied on was made available.

¹⁵ "Michael" was the broker for the buyer: see message at 11:36 am.

¹⁶ This message was sent at 11:34 am, 31 July 2017 from Mr Sukenik to the defendant.

¹⁷ P 1st §38.

¹⁸ P 1st §40.

defendant dealt with those Citibank transfers by way of a table in CD §19 reproduced below:

	<i>Transfer date (2017)</i>	<i>Amount (USD)</i>	<i>Relevant trade</i>	<i>Citibank transaction reference</i>
(a)	25 July *	10,000	TD #4	7251231017
(b)	26 July	50,000	TD #4	8071235065
(c)	28 July	50,000	TD #5	8151237626
(d)	4 August	50,000	TD #5	8221239538
(e)	7 August	50,000	Gatecoin #1	8071235065
(f)	15 August	50,000	Gatecoin #2	8151237626
(g)	22 August	50,000	Gatecoin #3	8221239538
(h)	25 August	50,000	Gatecoin #4	8251240538
(i)	31 August	50,000	Gatecoin #5	8311242611
(j)	5 September	50,000	Gatecoin #6	9051244213
(k)	6 September	50,000	Gatecoin #7	9061244680

* additionally, on 3 July 2017, [the defendant] had transferred US\$500 and 10,000 to [the plaintiff]

43. On closer consideration, an inexplicable and troubling feature emerged: three of the transaction references appears to have been used twice for different trades effected on different dates, albeit involving the same amount.

44. Take for example, the Citibank transaction reference number 8071235065. It not only evidenced a transfer made on 26 July for TD #4 but also a transfer made on 7 August for Gatecoin #1. The other transaction reference numbers used twice are 8151237626 and 8221239538.

45. There can be no rational or innocent explanation for that state of affairs. It suggests that there is something seriously awry with the evidence presented. The inference is compelling that the table was concocted to correlate with the outgoing transfers shown on the printout,

A undermining the defendant's truthfulness. Necessarily, the other tables
B produced (§§17 and 29 above) must suffer the same fate.

C (3) *Absence of contemporaneous supporting evidence*

D 46. The main criticism of the plaintiff's case of agency is that it
E rests on a bare assertion of an oral agreement. It was said that there is a
F total absence of contemporaneous material: there are no confirmatory
G texts, emails or other communications at the time of the trades, no
H account or running account of the amounts due have been produced.

I 47. The same criticism may be made of the defendant who has also
J not given supporting evidence of cash payments he made to the plaintiff
K which, on his own evidence, involving no less than US\$669,000, made over
L a period of approximately two months.

M 48. The defendant submitted that the only piece of evidence
N tendered in support of trades said to have occurred is a printout of incoming
O and outgoing transactions of the Citibank account from 30 November 2016
P to 16 October 2017 ("the printout").

Q 49. That of course is not quite true since the WhatsApp messages
R exhibited are contemporaneous documents containing messages sent by the
S defendant at the time of the TDA trades relating to the capacity in which
T the defendant was acting and the rate of brokerage commission.

U 50. As regards the printout, it was said that the plaintiff has
V conducted a "reverse engineering" exercise claiming that various incoming
sums are from trades and various outgoing sums were transfers of sales

A proceeds made to his account. In my view, both parties have made use of
B the Citibank printout and indulged in a bit of “reverse engineering”.

C *(4) Conclusion*

D 51. As earlier noted, there is no issue over the transfer of 662.2
E Bitcoins (comprising 275 Gatecoin Bitcoins and the 387.2 TDA Bitcoins)
F from the plaintiff to the defendant. The only questions are the amounts
G payable and whether they were paid.

H 52. As to the rate of commission, such evidence as is before
I the court supports the plaintiff’s case. The necessary consequence is that
J the defendant’s calculations of the amounts payable shown in the tables
K he has compiled cannot be believed.

L 53. When that is coupled with the misgivings that arise from
M his use of bank transaction reference numbers for wire transfers (as to
N which see §§42 – 45 above), and taking an overall view of the evidence, I
O am satisfied that the plaintiff has met the threshold of making out a good
P arguable case of fraud and dishonesty.

Q *DELAY*

R 54. By 1 November 2017, the plaintiff could no longer gain online
S access to the Citibank account. He made attempts but could not locate the
T defendant. It was not until 22 January 2018 that he sent a written demand
U by way of email to the defendant. He then contacted both Citibank and
V Gatecoin but did not make a report to the police until 18 April 2018, two
days prior to his *ex parte* application.

A 55. That there has been some delay is undeniable but
B considering the material involved in the present case, the paucity of written
C documentation, I do not consider it inexcusable.

D *RISK OF DISSIPATION*

E 56. I do not consider it appropriate to rely on the evidence of third
F parties (namely, the defendant's former employee and his former wife) to
G show that the defendant's behaviour in the past discloses an "unacceptably
H low standard of commercial morality". Their evidence is nothing more
I than hearsay from persons who may possibly entertain a grudge against
J the defendant.

K 57. However, where a good arguable case of fraud and dishonesty
L against a defendant has been established, the court may conclude that there
M is a real risk of dissipation of assets, citing *CAC Brake Co Ltd Zhuhai v*
N *Bene Manufacturing Co Ltd & Others CACV 94/1998* (30 April 1998). I
O would so conclude the present case.

P *BALANCE OF CONVENIENCE*

Q 58. The known assets of the defendant comprise the Citibank
R account, any distribution by the liquidator that may be made in respect
S of the 45 Bitcoins in the defendant's Gatecoin account and the
T defendant's insurance policies with AIA International Limited.

U 59. At the directions hearing in June 2018, the defendant
V voluntarily provided an undertaking pending determination of the injunction
summons. The defendant has not put forward reasons why the grant of a
Mareva injunction which would preserve the *status quo* until trial would
cause him real hardship.

A 60. Exhibited to P 3rd are the plaintiff's the latest available bank
B statements (as at the date of that affirmation) from two bank accounts
C which show a total balance of some €660,000. That was of course the
D position in June 2018 rather than what the situation is currently which may
E be very different. Nevertheless, one would expect that an update would
have been provided to the court if any significant changes had occurred.

F 61. Apart from offering the usual undertaking as to damages, the
G plaintiff has offered to provide a fortification of such undertaking in the
H sum of HK\$1 million to be paid into court within 14 days upon grant of
an order in terms of the injunction summons.

I 62. The defendant submitted that, as matters stand, this amount is
J inadequate. Given the fact of Gatecoin's insolvency and having regard to
K its statement that a large part of their funds has been retained by a
L payment service provider, it was submitted that the liquidators are unlikely
M to recover those funds in full. It was said that, potentially, the defendant
will stand to lose more than HK \$2.52 million which, "arguably", he
could have withdrawn from Gatecoin but for the injunction.

N 63. The Gatecoin statement gave no specifics. In any event, as the
O defendant himself acknowledged, whether the injunction would
P necessarily be the cause of that loss is "arguable".

Q 64. Taking all relevant factors into account, I remain of the view
R that on the balance of convenience, the *Mareva* injunction sought should
S be granted.

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ORDER

65. A draft order was attached to the summons. The defendant objected to the order for discovery against Citibank in (3) and Gatecoin in (4) extending to account opening documents on the ground that no explanation has been given as to why the account opening documents are relevant. The defendant's evidence is that he has had a relationship with Citibank since 2008. The plaintiff did not explain why such documents are relevant.

66. In the circumstances, there will be an order in terms save that (i) the sum of US\$2,603,639 be substituted for the sum of US\$2,597,639 wherever it appears, and (ii) paragraphs (3) and (4) be amended to omit any reference to account opening documents.

67. There is to be an order *nisi* of costs with certificate for counsel in favour of the plaintiff.

THE DISCOVERY SUMMONS

68. The discovery sought by this summons is against Citibank and Gatecoin who have no objection to the summons being made. At the hearing, the court intimated that the discovery summons should stand or fall with the injunction summons.

69. As the court is granting the injunction in relation to claims that are proprietary in nature, the approach must be whether the exercise of the power to order discovery is required in order to ensure that the *Mareva* jurisdiction is properly exercised and to secure its objective.

A 70. While the defendant has raised numerous objections to
B discovery on the grounds that the material sought contain confidential
C and commercial material involving the privacy of other individuals with
D whom the defendant trades and are private to the defendant in his
E capacity as a client of Citibank and/or Gatecoin, they would have more
F relevance had the discovery sought not been in the context of and in aid
G of a *Mareva* injunction.

H 71. The information is relevant to the plaintiff's proprietary claims
I and would reveal what has become of the Bitcoins and the fund flow of
J the sale proceeds. That will enable steps to be taken for their recovery. It
K is evident that such discovery would be in aid of the *Mareva* jurisdiction
L and should be granted.

M 72. Accordingly, there will be an order for discovery in terms of
N the discovery summons. There is to be an order *nisi* of costs with certificate
O for counsel of the discovery summons in favour of the plaintiff.

P (Doreen Le Pichon)
Deputy High Court Judge

Q Ms Kay Seto, instructed by Hom & Associates, for the plaintiff

R Ms Janine Cheung and Ms Amanda Lee, instructed by
S Jonathan Mok Legal, for the defendant

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