IN THE SESSIONS COURT AT SHAH ALAM
IN THE STATE OF SELANGOR DARUL EHSAN, MALAYSIA
CIVIL SUIT NO: BA-B52NCVC-389-12/2017

BETWEEN

1. LUNO PTE LTD
   (No. Syarikat Singapura: 201209545R)
2. BITX MALAYSIA SDN BHD
   (No. Syarikat: 1136927-A) ... PLAINTIFFS

AND

ROBERT ONG THIEN CHENG
(No. K/P: 720928-04-5317) ...DEFENDANT

GROUND OF JUDGEMENT

BACKGROUND FACTS

1. The 1st Plaintiff conducts its business as an online wallet and exchange of digital currencies, also known as cryptocurrencies including Bitcoin under the trade name of 'LUNO' ("Luno"). Every registered customer of Luno will be allocated a Luno account known as 'LUNO Wallet' whereby they are able to buy, sell, send, receive and store cryptocurrencies.

2. The 1st Plaintiff wholly owns the 2nd Plaintiff and the 2nd Plaintiff acts as the intermediary regional operating centre of the 1st Plaintiff which holds the bank account that accept deposits from Luno customers in Malaysia.

3. After the customer deposits the sum to the account held by 2nd Plaintiff, the 2nd Plaintiff will then allocate the deposit to the customers' respective LUNO wallets for them to utilise the deposits to trade cryptocurrencies.

4. SD-1 (the Defendant) has been a registered user of Luno since 6.7.2017 and his Luno wallet address is "1FxCM896VFcKtUjP8HpdgkqiSHeYj6wrd" ("said LUNO Wallet").

5. On 30.10.2017, SD-1 deposited RM300,000.00 into the bank account held by the 2nd Plaintiff which was subsequently transferred into the said LUNO Wallet and reflected therein accordingly.

6. At that juncture, SD-1 had a total of RM300,228.58 and 0.616814 Bitcoin in his said LUNO Wallet.

7. On 1.11.2017, SD-1 converted RM300,228.00 contained in the said LUNO Wallet into 10.70163257 units of Bitcoins, leaving the total number of Bitcoins in his said LUNO Wallet to be 11.31844657.

8. On the same day (i.e.: 1.11.2017), SD-1 requested for 11.3 Bitcoins to be withdrawn from the said LUNO Wallet to be to his Bitfinex e-wallet account at the address "1AbbJJzevwFFVBBKvZRtQHHFgrJyYTKaMw2" ("SD-1's Bitfinex Account") and his request was duly carried out.

9. The SD-1's Bitfinex Account is managed and operated by iFinex Inc. (BVI) ("Bitfinex") another third party cryptocurrency online trading platform unrelated to the Plaintiffs.

10. On 1.11.2017, the 1st Plaintiff then mistakenly transferred an additional 11.3 Bitcoins ("the mistakenly transferred 11.3 Bitcoins") into SD-1's

Bitfinex Account after having transferred the initial 11.3 Bitcoins on the same day.

11. The 1st Plaintiff's Chief Technology Officer ("CTO"), Timothy Stranex had notified SD-1 of the mistakenly transfer of the additional 11.3 Bitcoins on 2.11.2017 via email dated 2.11.2017.

12. SD-1 acknowledged and admitted that he is required to return the additional 11.3 Bitcoins that were mistakenly transferred to him. SD-1 had offered to pay the 1st Plaintiff cash of RM300,000.00 at the end of November 2017, about one (1) month after the mistaken transfer. However, this was not acceptable to the 1st Plaintiff as the value of Bitcoins fluctuates day-to-day.

13. The 1st Plaintiff's CTO requested for 11.3 Bitcoins to be returned to the 1st Plaintiff as it was Bitcoins that were mistakenly transferred into SD-1's Bitfinex Account. A series of correspondences ensued between the 1st Plaintiff's CTO and SD-1.

14. SD-1, although admitting to receiving the addition 11.3 Bitcoins and acknowledging the need to return them, has failed, refused and/or neglected to do so.

CLAIM OF THE PLAINTIFF

15. In the Statement of Claim, the prayers of the Plaintiff is as follows:

"23. WHEREOF the Plaintiffs seek the following reliefs against the Defendant –

(1) the Defendant is hereby ordered to return or cause to return 11.3 Bitcoints to the 1st Plaintiff within fourteen (14) day from the date of judgment;

(2) in the event the Defendant fails and/or refuses to comply with prayer (1) herein, the Defendant is hereby ordered to pay the 1st Plaintiff –

(a) the sum of RM810,837.00 equivalent to 11.3 Bitcoins calculated based on the LUNO exchange market price of RM71,756.00 per Bitcoin at the time of the filing of this action;

(b) in the alternative to prayer (2) (a) herein, the sum in Ringgit Malaysia equivalent to 11.3 Bitcoins to be calculated based on the LUNO exchange market price of Bitcoin on the date of judgment;

(3) the Defendant to give an account of all profit gained from the Bitcoins retained by the Defendant and pay the same to the 1st Plaintiff;

(4) the Defendant to pay interest at the rate of 5.0% per annum on any judgment sum starting from the date of the Writ until the date of full and final settlement;

(5) the Defendant to pay the cost of this action to the Plaintiffs."

COUNTERCLAIM BY THE DEFENDANT

16. In summary, the Defendant's cause of action against the Plaintiffs are economic tort of negligence and tort of unreasonable and unlawful interference of trade by the Plaintiffs into the contract between the Defendant and iFinex.

17. It is the Defendant's case that the Plaintiffs' tortious actions and conducts have caused the Defendant's rights prejudicially and unfairly affected and further, such tortious conducts have led to the Defendant's losses, injuries and damages.

18. The Defendant in the Counterclaim prays as follows:

"55. MAKA Defendan menuntut penghakiman terhadap Plaintif-Plaintif seperti berikut:

(a) Jumlah wang yang bersamaan dengan kerugian dan kehilangan kesemua B2x CST iaitu 169.6267258 unit B2x yang mempunyai nilai sebanyak RM806,071.87 atau pada mana-mana nilai yang ditaksirkan;

(b) Satu deklarasi bahawa Defendan adalah pemilik berdaftar dan benefisial kepada baki 1.61635077 yang disimpan dalam Akaun Bitfinex tersebut;

(c) Secara alternatifnya kepada perenggan 55(b), jumlah wang yang bersamaan dengan kerugian dan kehilangan baki 1.61635077 yang disimpan dalam Akaun Bitfinex tersebut yang mempunyai nilai sebanyak RM49,634.09 atau pada mana-mana nilai yang ditaksirkan;

(d) Faedah pada kadar 5% setahun...

(e) Kos-kos tindakan."

ISSUES, ANALYSIS AND FINDINGS BY COURT

19. This Court finds that the case is straight forward concerning the mistakenly transfer of 11.3 Bitcoins into SD-1's Bitfinex Account.

20. The 1st Plaintiff had on various occasions engaged with SD-1 to allow him an opportunity to return the mistakenly transferred 11.3 Bitcoins.

21. Despite the attempts made by the 1st Plaintiff, SD-1 failed, refused and/or neglected to return the mistaken transferred Bitcoins.

22. This Court finds that SD-1 does not have a defence to the Plaintiffs' claim for the return of the mistakenly transferred 11.3 Bitcoins. In this regard, SD-1 has clearly admitted that the mistakenly transferred 11.3 Bitcoins does not belong to him and that he is under a duty to return the same.

23. Further, there are also contemporaneous documents to show that SD-1 had agreed to return the mistakenly transferred 11.3 Bitcoins, albeit in the form of cash. In this regard, SD-1 had offered to pay the 1st Plaintiff the sum of RM300,000.00 and this is evident from his email dated 2.11.2017 to the Plaintiffs. The excerpt of SD-1's email dated 2.11.2017 is as follows:-

> "As there is no bitcoin left with me, would you consider an additional RM300,000.00 (Ringgit Malaysia: Three Hundred Thousand) being the maximum limit allocated to me by your management, which I used to purchase the 11.3 bitcoins initially."

24. Also, in another email dated 4.11.2017, SD-1 had stated that the price of Bitcoin was volatile and high and requested for more time for the Bitcoin to settle at a better rate for him to repay back the mistakenly transferred 11.3 Bitcoins. It is thus obvious to the Court that the reason why he refused to repay back the mistakenly transferred 11.3 Bitcoins was due to the very high rate and it was on that basis he had requested for the price to settle so that he can buy it at a lower rate.

25. SD-1 has contended that cryptocurrency is illegal in Malaysia and therefore, the Plaintiffs are not entitled to recover the same. However, SD-1 too has now filed a counter claim to recover the alleged loss of cryptocurrencies, the very thing which SD-1 is not alleging as being "illegal".

26. In this regard, SD-1's allegation is fallacious for the following reasons. First and foremost, whilst cryptocurrency is not recognised as legal tender in Malaysia, this does not mean that the Plaintiffs' operation is illegal. In fact, the 1st Plaintiff is registered as a reporting entity with Bank Negara Malaysia and this is supported by contemporaneous documents.

27. SP-1 had also explained that the Plaintiffs' operations are not illegal.

28. The fact that the 1st Plaintiff is registered as a reporting entity to Bank Negara on cryptocurrency is in itself proof that the 1st Plaintiff's operations are not illegal. If the 1st Plaintiff's operations are deemed illegal by Bank Negara, reasonably the 1st Plaintiff would not be registered as a reporting entity.

29. This Court is of the view that there is also local legal literature expressly stating that whilst cryptocurrencies are not recognised as legal tender, cryptocurrencies are not illegal in Malaysia.

30. The article entitled *"Prospects and Challenges: Blockchain Space In Malaysia [2018] 3 MLJ cx"* by Nur Husna Zakaria and Dr Sherin Kunhibava and Prof Abu Bakar Munir is instructive. The relevant excerpts of the article is reproduced herein below for ease of reference (at p. 13):-

> "In Malaysia, bitcoin is not recognised as legal tender, at the same time it has not been expressly made illegal. Currently, BNM is studying cryptocurrencies. As a

> start, BNM has announced that from 2018 onwards, all parties acting as exchanges in digital currency would be deemed as 'reporting institutions' under the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001. This means that businesses that are involved in converting cryptocurrencies to fiat money would be required to provide detailed information on buyers and sellers of such currencies."

31. Further, the fact that the Bank Negara Malaysia put forth the initiative to have cryptocurrency exchanges registered as reporting institutions is indicative that the trading of cryptocurrencies are not illegal in Malaysia. Further, this recognises that cryptocurrencies carry value that may be exchanged with real money despite not being recognised as legal tender.

32. Another contention by SD-1 is that the said 11.3 Bitcoins do not belong to the Plaintiffs and therefore the Plaintiffs do not have any locus to commence this action to recover the 11.3 Bitcoins.

33. The Court finds that SD-1's objection does not hold water as the position of the 1st Plaintiff in "holding" the cryptocurrency (i.e.: Bitcoins) is akin to that of the bank where customers deposit the monies. As such, if the bank had mistakenly transferred monies into another person's account, this does not mean that the bank has no locus to initiate an action to recover the monies.

34. SD-1 has contended that this Court has no jurisdiction to hear the Plaintiffs' claim. In this regard, SD-1 is claiming that the Plaintiffs' claim is subjected to Singapore law.

35. This Court disagrees with the contention. To this Court, the terms and conditions containing the jurisdiction clause in Singapore does not apply to the present case as the new terms and conditions only took effect on 1.3.2018. In this regard, the present case is governed by the old terms and conditions which does not contain any jurisdiction clause.

36. Further, there is no basis in the SD-1's contention as he has now submitted to the jurisdiction of this Court by filing his counter claim against the Plaintiffs.

37. This was conceded by SD-1 in cross-examination.

38. In any event, the Court finds that the purported terms and conditions that SD-1 is now seeking to rely on does not apply to him as it is expressly stated on Luno's website that the new terms and conditions are to take effect on 1.3.2018.

39. In the circumstances, the Court finds that SD-1 is obliged in law and in equity to return the mistakenly transferred 11.3 Bitcoins to the Plaintiffs. The mistakenly transferred 11.3 Bitcoins never belonged to SD-1.

40. In view of SD-1's testimony (i.e.: that he is required to return the mistakenly transferred 11.3 Bitcoins) and the contemporaneous documents before this Court, the Court is of the view that SD-1 is now estopped from reneging on his obligation to return the same.

41. The Court cannot accept the reason why SD-1 has refused to return the mistakenly transferred 11.3 Bitcoins because of the losses he had allegedly suffered as a result of the suspension of his cryptocurrency account maintained by a third party (i.e.: iFinex Inc. (BVI)).

42. On the counterclaim, after considering the evidence in totality, this Court finds that SD-1's counterclaim for the sum of RM806,071.87 is unsubstantiated.

43. SD-1 attributes his loss of 169.6267258 units of the futures B2x CST due to the suspension of SD-1's Bitfinex Account which is maintained and operated by Bitfinex (another third party cryptocurrency online trading platform) unrelated to the Plaintiffs. SD-1 is alleging that the Plaintiffs had caused the suspension of SD-1's Bitfinex Account and therefore the Plaintiff is liable for the losses.

44. SD-1 does not dispute that Bitfinex Account is maintained by Bitfinex and not by the Plaintiffs herein. In fact, SD-1 specifically blamed Bitfinex as shown in the evidence during cross examination.

45. The Court however observes that although SD-1 is blaming Bitfinex for suspending SD-1's Bitfinex Account, yet SD-1 did not file an action against Bitfinex for the suspension of SD-1's Bitfinex Account or added Bitfinex as a party to his counter claim.

46. The Court is satisfied that based on the undisputed facts, the Plaintiffs have no control over the operation and maintenance of SD-1's Bitfinex Account. Hence, the Plaintiffs cannot be made liable for the suspension of SD-1's Bitfinex Account.

47. On the issues to be tried, the Parties have filed separate issues to be tried. But to the Court's view, the most significant issue to be tried in respect of the Plaintiffs' claim is whether the Defendant is liable to return the mistakenly transferred 11.3 Bitcoins to the Plaintiffs.

48. In respect of SD-1's counter claim, the ultimate issue to be decided is whether the Plaintiffs are liable for the loss allegedly suffered by SD-1.

49. Based on the evidence, the Court is satisfied that an additional 11.3 Bitcoins has been transferred to SD-1's Luno Wallet. After all, SD-1 also does not dispute that the mistakenly transferred 11.3 Bitcoins does not belong to him.

50. The Court also finds that SD-1 admits to receiving the mistakenly transferred 11.3 Bitcoins and this is evident in his email to the Chief Executive Officer ("CEO") of the 1st Plaintiff, Marcus Swanepoel on 4.11.2017.

51. The Court is of the view that it is the Plaintiffs' pleaded case that SD-1 cannot now refuse and/or deny the Plaintiff from claiming the return of 11.3 Bitcoins.

52. In this regard, the law is clear that SD-1 is bound under section 73 of the Contracts Act 1950 to return the mistakenly transferred 11.3 Bitcoins to the Plaintiffs on the basis that the 11.3 Bitcoins was transferred to SD-1 by way of mistake. Section 73 of the Contracts Act 1950 provides:

> "A person to whom money has been paid, or anything delivered, by mistake or under coercion, must repay or return it."

53. Also the Court finds that cryptocurrency although is not money in the legal sense, is a form of commodity as real money is used to purchase the cryptocurrency. Accordingly, cryptocurrency falls within the definition of "anything" under section 73 of the Contracts Act 1950.

54. The Court finds that reasonably, there is value attached to Bitcoin in the same way as shares do. Bitcoin may not be currency or money per se, but it is a form of commodity, albeit in an intangible form.

55. Accordingly SD-1 is bound in law and/or equity to return the additional 11.3 Bitcoins to the Plaintiffs that never belonged to the Defendant.

56. In *The Royal Bank of Scotland Bhd v Seng Huah Hua & Ors [2013] 9 MLJ 681*, where the bank had mistakenly transferred RM308,000 based on forged documents, in ordering the return of the sum to the bank, the High Court held as follows (at p. 690):-

> "[27] It is settled law that in an action for the recovery of money paid under mistake the bank's negligence is irrelevant. In the instant case the funds were transferred from the plaintiff to the first defendant based on forged documents. The plaintiff had paid the said sum to Kear Seng by mistake as it was under the mistaken belief that the authorisation letter as well as the manual payment form was by an authorised signatory of Supermax. This fact is not disputed by the defendants.
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> [28] I have carefully scrutinised the facts, both oral and documentary evidence and considered the submissions of the counsels. Upon so doing I am of the considered view that the funds were transferred to Kear Seng accounts by mistake and in the circumstances it would not be right in law for the first defendant to retain and utilise the said funds.

> [29] I agreed with learned counsel for the plaintiff that the plaintiff is entitled to recover the sum transferred as money had and received under s 73 of the Contracts Act 1950."

57. In addition, SD-1 was at material times aware of the mistaken transfer of the 11.3 Bitcoins but proceeded to use and convert the total of 22.6 Bitcoins in his Bitfinex account to B2x CST futures.

58. In furtherance to the above, SD-1 had claimed that all 22.6 Bitcoins in his Bitfinex account were converted into B2x CST futures on an "automated setting" and it was completed at 2.07pm of 2.11.2017, allegedly prior to his knowledge of the mistakenly transferred additional 11.3 Bitcoins.

59. The Court is satisfied that SD-1's allegation that all the Bitcoins in his Bitfinex Account was automatically converted into B2x CST futures based on the "automated setting" is without substance.

60. The Court finds that SD-1 did not lead any evidence to establish that there was any "pre-set and automated setting" that converted all 22.6 Bitcoins, including the mistakenly transferred 11.3 Bitcoins belonging to the Plaintiffs, into B2x CST futures. In fact, it is now clear from SD-1's own testimony and contemporaneous documents that there was no such thing as "automated setting" as alleged and it was SD-1 who had in fact carried out the conversion manually after realising there was extra Bitcoins in his Bitfinex account.

61. The Court also notes that SD-1's allegation of this "automated setting" was never raised at any material time when he was corresponding with the 1st Plaintiff.

62. After assessing SD-1's evidence in totality, the Court finds that SD-1 has not been truthful. In *Karumalay Vanniyan & Anor v Ananthan Rethinam [2005] 3 MLJ 600 (CA)*, His Lordship Richard Malanjum (as His Lordship then was) held as follows (at p. 610):-

> "It is settled law that once part of a witness's evidence is disbelieved the rest should be considered with caution. (See Khoon Chye Hin v Public Prosecutor [1961] MLJ 105). And if any part of it is relied upon, cogent reason for doing so should be given. (See Ee Choon Bok & Anor v Public Prosecutor [1951] MLJ 183)."

63. This Court also treats with caution the transaction charts tendered by SD-1 which were marked as Exhibit "D2A-2C" ("the charts") purportedly to show that the conversion of all 22.6 Bitcoins to B2x CST futures in his Bitfinex were allegedly "automated".

64. The Court is of the view that the charts in no way illustrate that the conversion from Bitcoins to B2x CST futures were based on an "automated and pre-set setting" as alleged SD-1.

65. Further, the charts carried no indicative headings or markings that could possibly demonstrate or illustrate to anyone reading or looking at the charts that they had indeed been extracted from the Bitfinex's website. The Court finds that this is nothing more than bare assertions unsupported by any reliable documents.

66. In *Jaafar Bin Shaari & Anor (Suing As Administrators Of The Estate Of Shofiah Bte Ahmad, Deceased) v Tan Lip Eng & Anor [1997] 3 MLJ 693*, the then Supreme Court held as follows (at pp. 706 & 707):-

"First and foremost, the agreed bundle of documents means that the documents therein are authentic and they do exist, therefore they require no proof of their authenticity by calling, eg their makers.

Secondly, the truth of contents of any of the documents in the agreed bundle of documents is always not admitted unless the contrary is indicated directly or indirectly and such truth of such contents is liable to be challenged in court at the instance of either of the parties.

Thirdly, such documents therein do not form automatically a part of the evidence of the case in question ipso facto, but any of such documents does become part of such evidence if it is read or referred to by either of the parties, wholly or partly, at length or in a briefest of mention, either in examination of any witness, in submission at any stage or even on any unilateral drawing of court's attention to it by either of the parties at any time before the conclusion of the case.

Fourthly, at the end of the whole case, the truth of the contents of any of the document is up to the court to determine, regard being had, inter alia, to any absence of challenge by either of the parties on any part of the document and similarly, the question of weight, eg either great or no weight to be given to any part of any document is also a matter for the trial court, which considers the documents including any 'written

> hearsay' contained therein. The court may refuse to give any weight at all to any document, but then it is accountable like in other matters, to the parties and to the appellate court for reasons for such refusal."

67. The Court finds that SD-1 is bound under section 73 of the Contracts Act 1950 to return the addition 11.3 Bitcoins to the 1st Plaintiff.

68. Further and in the alternative, considering SD-1's actual knowledge and awareness prior to converting 22.6 Bitcoins to B2x CST futures, SD-1 is bound by principles of natural justice and equity to return the mistakenly transferred 11.3 Bitcoins to the Plaintiffs. SD-1 cannot be allowed to be unjustly enriched at the expense of the 1st Plaintiff.

69. In *Bank Bumiputra (M) Bhd v Hashbudin Bin Hashim [1998] 3 MLJ 262* where the bank is claiming the sum of RM25,000 which was mistakenly transferred, the High Court ordered repayment of the sum and held as follows (at p. 272):-

> "In the particular circumstances of this case, it is not right for the respondent to keep the money. He is bound by the ties of natural justice and equity to refund the money to the bank.
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> He would be unjustly enriched at the bank's expense if the bank could not recover from him. The dispute between the respondent and PW4 relating to payment of the post-dated cheques could be resolved on its merit in the civil suit."

70. Further, in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd [1942] 2 All ER 122*, the House of Lords held as follows (at p. 61):-

> "It is clear that any civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from, another which it is against conscience that he should keep."

71. The principle of the claim of unjust enrichment is set out by the Federal Court in *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd [2015] 2 MLJ 441* as follows (at p. 484):-

> "(a) the plaintiff must have been enriched;
> (b) the enrichment must be gained at the defendant's expense;
> (c) that the retention of the benefit by the plaintiff was unjust; and
> (d) there must be no defence available to extinguish or reduce the plaintiff's liability to make restitution."

72. The Court finds that items (a)-(c) above are not relevant as the 11.3 Bitcoins had been mistakenly transferred to SD-1 at the Plaintiffs' expense and the fact that SD-1 utilised the 11.3 Bitcoins despite being aware that the additional 11.3 Bitcoins did not belong to him.

73. It is to be noted that SD-1 is claiming an alleged bona fide change of position on the basis that the 11.3 Bitcoins are no longer available as the B2x CST futures purchased by him did not materialise and its value is now close to nil.

74. However, the Court finds that this altered position of SD-1 was self-induced and not bona fide due to the established fact that SD-1 conducted the transaction to convert all 22.6 Bitcoins to B2x CST futures despite realising that morning that something was "amiss", quoting SD-1.

75. In *United Bank of India v A.T. Ali Hussain & Co AIR 1978 Cal 169*, the Calculatta High Court held that (at pp. 3 & 4):-

> "9. It follows from the above English decisions that when a case comes within the purview of the rule laid down in Kelly v. Solari, (1.841) 9 M & W 54, the plaintiff should succeed, notwithstanding that the recipient of the money also acted in good faith and parted with the same to another person without any chance of recovery of the same. Under the rule, if anybody acting under a mistake pays money or delivers any property to another, the latter must repay or redeliver the same to the former. The House of Lords by a majority in R. E. Jones & Co. Ltd v. Waring and Gillow Ltd., 1926 AC 670, applied the said rule En a case where the respondents, acting under a mistake of fact, paid money to the appellants as a result of a fraud committed on both of them by a third person.
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> Further, it was observed by the Lord Chancellor that it was true that where the payee had done nothing more than to expend the money on his own purposes, that would afford no defence, for the payee had suffered no real detriment. The Lord Chancellor referred to and relied on, amongst others, the case of Kleinwort v.

> Dunlop Rubber Co., (1908) 97 LT 263, where Lord Loreburn said, "It is indisputable that if money is paid under a mistake of fact and is re-demanded from the person who received it before his position has been altered to his disadvantage, the money must be repaid in whatever character it was received."

76. It is the Court's finding that SD-1 cannot claim the defence of bona fide change of position as he utilised the additional 11.3 Bitcoins in his Bitfinex Account to purchase another type of cryptocurrency.

77. It is also critical to note that the 1st Plaintiff had demanded the return of the mistakenlly transferred 11.3 Bitcoins prior to his conversion of 22.6 Bitcoins to B2X CST futures in his Bitfinex Account.

78. In this regard, criterion (d) to establish unjust enrichment is fulfilled in which SD-1 has no sustainable defence to the Plaintiffs' claim to the addition 11.3 Bitcoins.

79. To further substantiate the above, in *Fernrite Sdn Bhd v Perbadanan Nasional Bhd [2011] 6 CLJ 1*, the Court of Appeal citing *Kleinwort Benson Ltd v. Birmingham City Council [1996] 4 All ER 733* held that (at p. 12):-

> "(e) Notwithstanding its roots in natural justice and equity, the principle does not give the courts a discretionary power to order repayment whenever it seems in the circumstance of the particular case just and equitable to do so. The recovery of money in restitution is not, as a general rule, a matter of discretion for the court. A claim to recover money at common law is made as a matter of right; and, even

> though the underlying principle of recovery is the principle of unjust enrichment, nevertheless, where recovery is denied, it is denied on the basis of legal principle."

80. The Court of Appeal further held that (at p. 13):-

> "[25] The doctrine of unjust enrichment applies to the facts in the instant appeal, more specifically when the defendant has never paid the purchase price for the shares, in which case, the defendant is not entitled to retain the dividends declared for the shares. The plaintiff has proved that the defendant has been unjustly enriched at the plaintiff's expense. The plaintiff has the right to recover the dividends from the defendant by way of restitution as it is unjust for the defendant to keep them."

81. In any event, the mere fact that SD-1 had utilised the additional 11.3 Bitcoins does not provide SD-1 with a valid defence in law of change in position. This is in view of the position taken in *Lipkin Gorman v Karpnale Ltd [1991] 2 AC 548* by the House of Lords where Lord Goff held that (at p. 580):-

> "I wish to stress however that the mere fact that the defendant has spent the money, in whole or in part, does not of itself render it inequitable that he should be called upon to repay, because the expenditure might in any event have been incurred by him in the ordinary course of things. I fear that the mistaken assumption that mere expenditure of money may be regarded as amounting to a change of position for present purposes has led in the past to opposition by some to recognition

> of a defence which in fact is likely to be available only on comparatively rare occasions."

82. In this regard, SD-1's conduct of converting the 22.6 Bitcoins to B2X CST futures despite being aware of the Plaintiffs' mistaken transfer is against conscience and he is bound by ties of natural justice and equity to return the 11.3 Bitcoins to the Plaintiffs.

83. The Court finds that when SD-1 became aware of his receipt of the additional 11.3 Bitcoins, the principles of equity comes into play whereby if his conscience would be affected upon learning of the mistake, SD-1 is then imposed a constructive trust by the laws of equity which he is then placed under a fiduciary as a constructive trustee.

84. In *Westdeutsche Landesbank Girozentrale v Islington London Borough Council [1996] AC 669*, the House of Lords held (at p. 715):-

> "However, although I do not accept the reasoning of Goulding J., Chase Manhattan may well have been rightly decided. The defendant bank knew of the mistake made by the paying bank within two days of the receipt of the moneys: see at p. 115A. The judge treated this fact as irrelevant (p. 114F) but in my judgment it may well provide a proper foundation for the decision. Although the mere receipt of the moneys, in ignorance of the mistake, gives rise to no trust, the retention of the moneys after the recipient bank learned of the mistake may well have given rise to a constructive trust: see Snell's Equity, p. 193; Pettit, Equity and the Law of Trusts, 7th ed. (1993) p. 168; Metall und Rohstoff A.G. v. Donaldson Lufkin & Jenrette Inc. [1990] 1 Q.B. 391, 473-474."

85. In furtherance to that, in *RHB Bank Bhd v Travelsight (M) Sdn Bhd & Ors and another appeal [2016] 1 MLJ 175*, the Federal Court held that (at pp. 196 & 197):-

> "[31] It could be reasonably assumed that the circumstances that would have been known to Atlas and liquidators were: (i) the full purchase price had been paid; (ii) the property belonged to Travelsight as purchaser and RHB as assignee; (iii) the order dated 15 November 2002 validated rescission and ordered a refund of the purchase price; and (iv) the purchase price had not been refunded. Given those latter circumstances that would have been known to them, it could be further assumed that Atlas and liquidators should have known that the property was not that of Atlas to deal and dispose as its own. Fairly said, the circumstances that would have been known to Atlas and liquidators were such that it would be unconscionable of Atlas and liquidators to treat the property as its unencumbered asset and deny the beneficial interest of Travelsight and RHB. The circumstances were such that gave rise to a constructive trust, in the remedial sense, which equity imposed on Atlas and liquidators, to deal not with the property as its beneficial property (on the duty imposed by equity to account to the true owner of money or property, see also Koh Siew Keng (P) & Anor v Koh Heng Jin [2008] 3 MLJ 822)."

86. In regard of the above, SD-1 ought to return the 11.3 Bitcoins as he is not only bound by section 73 of the Contracts Act 1950, he is also

obligated by principles of equity to return the 11.3 Bitcoins to the Plaintiffs.

87. The Court also finds that SD-1 is liable to account for all losses suffered by the Plaintiffs.

88. Similarly the Court also finds that SD-1 is liable to account for all the profits made by SD-1. In this regard, SD-1 should not be unjustly enriched at the expense of the Plaintiffs.

89. In relation to SD-1's counter claim for 169,6267258 units of B2x CST futures or RM806,071.87 being the sum equivalent arising out of his allegation that the 1st Plaintiff had control and authority towards the freezing and/or suspension SD-1's Bitfinex Account, the Court finds that SD-1 has failed to lead any evidence to substantiate his allegation that the 1st Plaintiff had colluded with Bitfinex and/or interfered in Bitfinex's decision in suspending SD-1's Bitfinex Account that in turn resulted in his alleged losses of B2x CST futures.

90. At the outset, the Court is satisfied that the 1st Plaintiff have no control or authority over the conduct and management of Bitfinex and/or SD-1's Bitfinex Account. [See the testimony evidence of SP-1]. Accordingly, SD-1's counter claim against the 1st Plaintiff is clearly unsustainable.

91. In any event, this Court is of the view that all the Plaintiff did was to notify Bitfinex on the mistaken transfer and requested Bitfinex to hold the funds belonging to SD-1 in his Bitfinex account in order to preserve status quo pending negotiations and their attempts to reclaim the 11.3 Bitcoins from SD-1 and nothing more.

92. The Court is satisfied that the 1st Plaintiff did not at any material time request Bitfinex to freeze and/or suspend SD-1's Bitfinex Account.

93. Contrary to SD-1's allegations, it is evident from the evidence of SP-1 that the Plaintiffs had no control or authority over the decisions made by Bitfinex.

94. Further, SD-1 had acknowledged that Bitfinex is an independent company from the Plaintiffs and a neutral party.

95. It is trite law that under the section 101 of the Evidence Act 1950 a party that alleges must prove its claim.

96. Accordingly, the Court finds that the Defendant fails to adduce any form of reliable evidence to sustain the finding that the Plaintiffs had interfered with the contractual obligation between Bitfinex and SD-1.

97. In this regard, the Court finds that the Defendant had not in any way proved that the 1st Plaintiff had any role in the decision to freeze and/or suspend his Bitfinex Account.

98. The Court also finds that SD-1 did not lead any evidence on the losses allegedly suffered as a result of the suspension of SD-1's Bitfinex Account.

99. Further and in the alternative, the Court finds that any losses that SD-1 may have suffered if any, is in no way attributable to the Plaintiffs because all the 1st Plaintiff did was to notify Bitfinex on the mistakenly transferred 11.3 Bitcoins into SD-1's Bitfinex Account.

100. The Court is satisfied that the 1st Plaintiff (and/or the 2nd Plaintiff) had no part to play in the decision to freeze and/or suspend SD-1's Bitfinex Account and the decision to do so is that of Bitfinex and not the Plaintiffs.

101. To this Court, SD-1 is in essence claiming tort of interference against the 1st Plaintiff for alleged interference in the contractual relationship between Bitfinex and SD-1 resulting in Bitfinex breaching its contractual obligation towards SD-1 in freezing and/or suspending his Bitfinex account.

102. The principle is clear that the tort of unlawful interference with a contract is unlawful means extended to any prevention of the due performance of a primary obligation in the contract. However, SD-1 had failed to lead any evidence to show that there was such "unlawful interference".

103. In *Sarawak Shell Bhd v The Owners or other persons interested in The Ship or Vessel The 'Red Gold' and another action [2011] 1 MLJ 239*, the High Court held as follows (at p. 293):-

> "[143] It is therefore necessary to establish the tort to show that Shell deliberately and knowingly committed an overt act seeking to interfere in the performance of Petrokapal's contract with the owners, that it sought a benefit for itself or detriment for a third party. It requires an overt act committed with the intention of procuring a breach.
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> ...
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> ....
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> [144] Further there is no deliberate or overt act to show that Shell deliberately sought to cause detriment to the owners. The fact that the negotiations on the letter of undertaking failed by reason of a lack of consensus on

> the quantum to be stipulated in the letter of undertaking and the failure of Shell to return the letter to Petrokapal and/or the owners does not, in my view amount to a deliberate act calculated to cause damage to the owners. It simply shows that negotiations to resolve the entirety of this matter in relation to collision damage and hire failed.
>
> ...
>
> [145] Secondly it is not evident that Shell utilised unlawful means albeit directly or indirectly to procure an interference with Petrokapal's contract with the owners as alleged."

104. To succeed in a claim for tort of interference, SD-1 is required to prove that the 1st Plaintiff deliberately caused Bitfinex to breach its primary contractual obligation with SD-1.

105. However, this Court is satisfied that SD-1 has not proved that Bitfinex had breached its contractual obligation towards him to begin with and/or that the Plaintiffs have unlawfully interfered in Bitfinex's contract with SD-1's.

106. In fact, what was conveyed by the 1st Plaintiff to Bitfinex was nothing illegal or untruthful.

107. The 1st Plaintiff had merely relayed the facts to Bitfinex on the mistakenly transferred 11.3 Bitcoins.

108. Further, the Court finds that SD-1's claim for the 169.6267258 units of B2x CST futures includes the portion purchased with the additional 11.3

Bitcoins which did not belong to SD-1 in the first place. This was never disputed by SD-1.

109. In the circumstances, the Court finds that SD-1's counterclaim for RM806,071.87 cannot be sustained as SD-1 cannot be allowed to claim for the "loss" of the B2x CST futures when he had used the mistakenly transferred 11.3 Bitcoins belonging to the Plaintiff to purchase the B2x CST futures.

110. Also, the Court finds it unjust and unfair to allow SD-1 to claim for the alleged loss when he had used the mistakenly transferred 11.3 Bitcoin to purchase the B2x CST futures. SD-1 should not be allowed to "profit" from his own wrong-doing.

111. Further, there is no evidence to prove that SD-1 had in fact purchased the B2x CST futures using the mistakenly transferred 11.3 Bitcoins as alleged. This was confirmed by SP-1 in re-examination.

112. There is also no basis in SD-1's counterclaim for the 1.6 Bitcoin as SD-1 has clearly admitted in cross-examination that the 1.6 Bitcoin is still in his Bitfinex Account. Accordingly, SD-1 has not "lost" the 1.6 Bitcoin.

113. In the circumstances, the Court finds that SD-1 would be able to withdraw the 1.6 Bitcoin once his Bitfiex Account has been unfrozen. As such, there is no "loss" as alleged by SD-1 vis-à-vis the 1.6 Bitcoin. To allow SD-1 to now recover the 1.6 Bitcoin from the Plaintiffs would amount to double recovery and to make a profit from the Plaintiffs.

114. Curiously, during cross-examination, although SD-1 had stated that it is not his counter claim to seek for an order to unfreeze SD-1's Bitfinex Account, he later informed that he is actually asking for the same.

115. However, this Court cannot make such an order for the simple reason that Bitfinex, the party operating and maintaining SD-1's Bitfinex Account is not made a party to the counter claim. It is trite law that an order cannot be made to bind Bitfinex who is not a party to this action or counter claim.

116. The Court cannot agree to allow SD-1 to recover his alleged losses from the "non-materialisation" of B2x CST futures as there is no assurance that SD-1 is to make a profit from the B2x CST futures. It is also presumptuous that SD-1 would have been able to sell off the B2x CST futures before the value declined to the current minimal value as alleged. It is only SD-1's bare assertion that it was due to the freezing and/or suspension of his Bitfinex Account that he lost practically all the cryptocurrencies he owned.

117. The Court finds that SD-1 has failed to prove that his losses arose from the suspension of his Bitfinex Account. Also, the party responsible for suspending the Bitfinex Account is Bitfinex and not the Plaintiffs.

118. In *Lian Meng Wah v Uma Parvathy Thothathri [2013] 10 MLJ 288*, the High Court held as follows (at p. 301):-

> "[33] Based on the foregoing, the court finds that the plaintiff has failed to prove the plaintiff's alleged loss of profit amounting to RM415,135 from the purported sale of land to Gunasekaran. Other than the plaintiff's own uncorroborated testimony of the purported sale, there is no evidence before this court to support the plaintiff's claim of alleged sale and alleged loss of profit from the aborted sale of the plaintiff's land. The plaintiff's testimony in court is generally mere bare assertion and appears to be inconsistent with the contemporaneous

> documents before the court and, in some parts contradictory with his own testimony. The court finds the plaintiff's narration of events unreliable, and concludes that the plaintiff is the maker of his own misfortune."

119. In this regard, the Court is of the opinion that it would be unjust to pin SD-1's alleged losses on the 1st Plaintiff where the alleged losses were unforeseeable even by SD-1 himself.

120. SD-1 sought to rely on the Plaintiffs' Affidavit in Reply affirmed by Vijay Ayyar on 20.3.2018 ("the said affidavit") in PSD-1 without calling the maker of the said affidavit. The said affidavit was filed in a previous proceeding to oppose SD-1's application to set aside the Judgment in Default.

121. This Court finds that SD-1 cannot now seek to rely on the contents of the said affidavit without calling the maker of the said affidavit. Pursuant to section 73A of the Evidence Act 1950, the maker of the affidavit has to be called for examination unless the deponent, which is Vijay Ayyar, is proven to be unable to attend court for the reasons stated in section 73A of the Evidence Act 1950.

122. In view of the fact that Vijay Ayyar was not called to tender evidence and no justification was provided by SD-1's solicitors in relation to the prerequisites of section 73A of the Evidence Act 1950, this Court is of the view that the said affidavit cannot be admitted as evidence.

123. In any event, though if this Court is wrong on this issue, this Court cannot give much weigh to it as the maker of the said affidavit has not been made available for cross-examination to precisely ascertain and verify

the accuracy of the contents in the said affidavit, in particularly the context in which it was deposed in.

124. In *Diana Clarice Chan Chiing Hwa v Tiong Chiong [2002] 1 CLJ 721*, the High Court held as follows (at pp. 726 & 727):-

> "Needless to say the affidavit evidence alone, conflicting as they are, cannot form the basis of deciding the truth of the matters complained of in the absence of any cross examination of the makers of the affidavits.
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> ...
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> ...
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> Faced with such conflicting affidavit evidence what the trial judge should have done was to sieve through such evidence, consider only those that are undisputed or uncontroverted and balance these with the consideration of what would work towards the betterment and interests of the four children."

125. This Court is not in agreement with SD-1's allegation that the Plaintiffs are not allowed to "accept deposits" and therefore illegal is frivolous. In fact, SD-1 had conceded in cross-examination that there is no issue for the 1st Plaintiff to take deposits as this is for the purposes of exchanging digital currency, an activity recognised by Bank Negara Malaysia.

126. Further, SD-1 had also argued that the Plaintiffs are unable to "recover" the 11.3 Bitcoins due to the Risk Warning which is found on the Luno Exchange website which states that all transactions that occurs under the Luno Wallet of any user is irreversible.

127. The Court finds that SD-1's interpretation of the Risk Warning is misplaced. It is to be observed that the Risk Warning stating that the transactions is irreversible applies to those transactions between users and the 1st Plaintiff is still entitled and able to ask for the "return" of the 11.3 Bitcoins from the SD-1. This was explained by SP-1 in re-examination.

128. It is SD-1's position that once monies have been mistakenly transferred to someone, than the monies should be left with them and according to SD-1, this is a "common position accepted in the cryptocurrency world". The Court cannot accept the argument. When asked to show evidence of this "common position accepted in the cryptocurrency world", SD-1 was unable to do so.

129. Accordingly, the Court is of the opinion that SD-1's position taken herein is untenable and does not reflect the intent of the Risk Warning which applies to users only. Even if SD-1's interpretation of the Risk Warning is correct, SD-1 is able to still return the mistakenly transferred 11.3 Bitcoins.

130. It is clear that SD-1 had agreed to return or repay back the mistakenly transferred 11.3 Bitcoins and this argument on "irreversibility" was only raised at this juncture to defeat the Plaintiffs' claim. At the time when the Plaintiffs demanded the return of the mistakenly transferred 11.3 Bitcoins, SD-1 never raised any issue that the same cannot be returned due to the Risk Warning. SD-1's position is an afterthought and he is now estopped from reneging his earlier position taken.

131. SD-1 also claims that the Plaintiffs are estopped from bringing this claim against SD-1 on the basis that the Plaintiffs had turned down SD-1's offer

to pay the Plaintiffs RM300,000.00 out of 'goodwill' for the mistakenly utilising the mistakenly transferred 11.3 Bitcoins.

132. The Court is not with the Defendant on the issue. To this Court, estoppel does not apply herein as the Plaintiffs have never indicated to SD-1 that they are agreeable to SD-1's so called 'goodwill' proposal to pay RM300,000.00. In fact, it is clear from the contemporaneous documents that the Plaintiffs have never accepted SD-1's 'goodwill' proposal of RM300,000.00. In any event, the sum of RM30,000.00 proposed by SD-1 is insufficient to cover for the mistakenly transferred 11.3 Bitcoins. As such, SD-1's reliance on the doctrine of estoppel in this case is misplaced in fact and in law.

133. On the issue of the Inland Revenue Department ("IRD") freezing the 2nd Plaintiff's account, it is clear that this is a non-issue and does not impact the Plaintiffs' claim in any way at all or affect the legitimacy of the Plaintiffs' operations in Malaysia. In any event, the 2nd Plaintiff's account had been unfrozen. The reason as to why the 2nd Plaintiff's account was frozen is a tax-related issue and this was explained by SP-1 in the evidence.

134. The Court finds that SD-1's counterclaim is only filed against the 1st Plaintiff and not the 2nd Plaintiff. In fact, there are no allegations directed against the 2nd Plaintiff.

CONCLUSION

135. The principle is clear that the standard of proof in a civil claim is only on the balance of probabilities. It is not as high as the standard of beyond reasonable doubt and what more, certainty.

136. In the case of *Civil Appeal No. Q-01-783-2010 Superintendent of Lands and Surveys Kuching Division and State Government of Sarawak v. Mohamad Rambli bin Kawi*, the Court of Appeal said the following effect:-

> "[11] The standard of proof in civil cases is upon a balance of probabilities. This balance of probabilities is not the proof beyond reasonable doubt required in criminal cases. This balance of probabilities may be visualised as a scale with the plaintiff placing his evidence on one side and the defendant likewise on the other. The Court evaluates the evidence as to the weight it carries. Of course incredible evidence carries no weight. Denials without evidence to justify the denial likewise can carry no weight, and hence the term "bare denial". At the end of the case, the Court determines who, between the plaintiff and the defendant, has placed such evidence that the scale tilts in his favour. Sections 101 and 102 mean that to succeed, the scale must tilt in his favour."

137. After considering the pleadings, evidence and submissions by both parties, the Court is satisfied that the plaintiff has proved most of the prayers in the Statement of Claim. They are the prayers in paragraph 23 (1), (2) (A) and 23 (4) of the Statement of Claim. Hence the prayers are allowed by the Court.

138. The Court however finds that the Plaintiff fails to prove the prayer in paragraph 23 (3). Accordingly the prayer is disallowed.

139. Applying the same principle, the Court finds that the Defendant fails to prove the counterclaim. Accordingly the counterclaim is dismissed.

Dated: 15 November 2018

(Zulqarnain bin Hassan)
Sessions Judge
Sessions Court 8
Shah Alam