"JF7"

**IN THE HIGH COURT OF SOUTH AFRICA**
**GAUTENG DIVISION, PRETORIA**

Case No: 24145/22

In the matter between:

| | |
|---|---|
| **ADRIAAN WILLEM VAN ROOYEN N.O.** | First Plaintiff |
| **HERMAN BESTER N.O.** | Second Plaintiff |
| **CHRISTOPER JAMES ROOS N.O.** | Third Plaintiff |
| **JACOLIEN FRIEDA BARNARD N.O.** | Fourth Plaintiff |
| **DEIDRE BASSON N.O.** | Fifth Plaintiff |
| **CHAVONNES BADENHORST ST CLAIR COOPER N.O.** | Sixth Plaintiff |

and

| | |
|---|---|
| **JACQUES ANDRÉ FISHER N.O.** | First Defendant |
| **REUNERT NDIVHUHO KHARIVHE N.O.** | Second Defendant |
| **CHARLES THOMAS WARD** | Third Defendant |
| **MONICA COETZEE** | Fourth Defendant |
| **JOSEPH USHER BELL** | Fifth Defendant |
| **FREDERIK COENRAAD RADEMAN** | Sixth Defendant |
| **CLYNTON HUGH MARKS** | Seventh Defendant |
| **CHERI MARKS** | Eighth Defendant |
| **MARIA MATSHIDISO RAMANAMANE** | Ninth Defendant |
| **THOMAS WILLIAM FRASER** | Tenth Defendant |
| **ELIZABETH KATHLEEN MALTON** | Eleventh Defendant |
| **ROMANO LORENZO SAMUELS** | Twelfth Defendant |
| **JACOBUS ECKLEY** | Thirteenth Defendant |
| **VINCENT WARD** | Fourteenth Defendant |
| **LEONARD WESLEY GRAY** | Fifteenth Defendant |
| **ANDREW GRANT CAW** | Sixteenth Defendant |
| **NERINA STEYNBERG** | Seventeenth Defendant |
| **GERALD LASSEN** | Eighteenth Defendant |
| **NGQABUTHO DON NKOMO** | Nineteenth Defendant |

# FIRST AND SECOND DEFENDANTS' PLEA

## 1. AD PARAGRAPHS 1.1 TO 2.3

1.1. The first and second defendants (**"the Steynberg trustees"**) admit the names, addresses and citation of the first to sixth plaintiffs (**"the MTI liquidators"**).

1.2. Save as aforesaid, the Steynberg trustees deny each and every allegation in these paragraphs and the MTI liquidators are put to the proof thereof.

1.3. The Steynberg trustees deny that the MTI liquidators are acting jointly as required by s382 of the Companies Act 61 of 1973 (**"the 1973 Act"**) as read with item 9 of schedule 5 of the Companies Act 71 of 2008 (**"the 2008 Act"**), in respect of the institution and prosecution of this action. The MTI liquidators are put to the proof thereof.

## 2. AD PARAGRAPHS 3.1 TO 3.5

2.1. The Steynberg trustees admit:

2.1.1. their names;

2.1.2. that they are insolvency practitioners and liquidators;

2.1.3. their appointment as trustees in the insolvent estate of Cornelius Johannes Steynberg (**"Mr Steynberg"**);

2.1.4. that they are cited in their nominal capacities;

2.1.5. that Mr Steynberg is married out of community of property to the seventeenth defendant ("**Mrs Steynberg**");

2.1.6. the court orders in terms of which the estate of Mrs Steynberg was provisionally and finally sequestrated.

2.2. Save as aforesaid, the Steynberg trustees deny each and every allegation in these paragraphs and the MTI liquidators are put to the proof thereof.

2.3. The second defendant practises as insolvency practitioner and liquidator at Stockhoff Trust at 250 Johnny Claassens Street, Garsfontein, Pretoria.

3. **AD PARAGRAPHS 4 TO 17 AND 19 TO 20**

3.1. The Steynberg trustees admit the names of the third to sixteenth and eighteenth to nineteenth defendants.

3.2. Save as aforesaid, the Steynberg trustees deny each and every allegation in these paragraphs and the MTI liquidators are put to the proof thereof.

4. **AD PARAGRAPH 18**

4.1. The Steynberg trustees admit that Mrs Steynberg is cited as the seventeenth defendant.

4.2. Save as aforesaid, the Steynberg trustees deny each and every allegation in this paragraph and the MTI liquidators are put to the proof thereof.

5. **AD PARAGRAPH 21 (INCLUDING 21.1 TO 21.6)**

5.1. The Steynberg trustees admit that:

5.1.1. Mr Steynberg was a director of MTI from 30 April 2019 when MTI was registered until 29 December 2020 when MTI was liquidated; and

5.1.2. Mr Steynberg was the shareholder of MTI.

5.2. Save as aforesaid, the Steynberg trustees deny each and every allegation in these paragraphs and the MTI liquidators are put to the proof thereof.

5.3. The Steynberg trustees deny that the MTI liquidators are possessed of primary facts to prove the disputed allegations in these paragraphs and the MTI liquidators are put to the proof thereof.

6. **AD PARAGRAPH 22 (INCLUDING 22.1 TO 22.2)**

This is admitted.

7. **AD PARAGRAPHS 23 TO 27.2**

7.1. The Steynberg trustees admit that:

7.1.1. Mr Lee presented an application for the liquidation of MTI on 23 December 2020;

7.1.2. MTI was provisionally liquidated on 29 December 2020;

7.1.3. MTI was finally liquidated on 30 June 2021;

7.1.4. the copies of the court orders referred to in paragraph 25 of the particulars of claim;

7.1.5. the deemed date of commencement of liquidation in respect of MTI is 23 December 2020.

7.2. Save as aforesaid, the Steynberg trustees deny each and every allegation in these paragraphs and the MTI liquidators are put to the proof thereof.

7.3. Without derogating from the generality of the aforesaid denial, the Steynberg trustees dispute that the MTI liquidators are possessed of primary facts, annual financial statements, management accounts or any financial records to prove the allegations that:

7.3.1. the liabilities of MTI exceeded its assets at any time prior to, or after, its liquidation; and

7.3.2. MTI was unable to pay its debts at any time prior to, or after, its liquidation.

7.4. Accordingly, the Steynberg trustees deny that MTI is a company unable to pay its debts as contemplated in s339 and s340 of the 1973

Act and that any of the relief sought in this action is competent. The MTI liquidators are put to the proof thereof.

8. **AD PARAGRAPH 28 (INCLUDING 28.1 TO 28.6.3)**

8.1. The Steynberg trustees admit the registration and incorporation of MTI as a private company with limited liability on 30 April 2019 and its registration number and registered address.

8.2. Save as aforesaid, the Steynberg trustees deny each and every allegation in these paragraphs and the MTI liquidators are put to the proof thereof.

8.3. The Steynberg trustees deny that the MTI liquidators are possessed of primary facts to prove the disputed allegations in these paragraphs and the MTI liquidators are put to the proof thereof.

9. **AD PARAGRAPH 29 (INCLUDING 29.1 TO 29.1.13)**

9.1. The Steynberg trustees deny each and every allegation in these paragraphs and the MTI liquidators are put to the proof thereof.

9.2. The Steynberg trustees deny that the MTI liquidators are possessed of primary facts to prove the allegations in these paragraphs and are put to the proof thereof.

10. **AD PARAGRAPH 30 (INCLUDING 30.1 TO 30.2.3)**

10.1. The Steynberg trustees admit that:

10.1.1. the Financial Sector Conduct Authority conducted an investigation in respect of *inter alia* Mr Steynberg;

10.1.2. the Texas State Securities Board issued an order on 7 July 2020 against *inter alia* MTI and Mr Steynberg;

10.1.3. FX Choice froze all Bitcoin held in account number 174850 in the name of Mr Steynberg ("**the Steynberg account**");

10.1.4. at the time of freezing the Bitcoin, 1,282 Bitcoin were in the Steynberg account;

10.1.5. only Mr Steynberg had a valid claim to, and in respect of, the Bitcoin in the Steynberg account;

10.1.6. only Mr Steynberg had access to and could transact in respect of the Bitcoin held in the Steynberg account.

10.2. Save as aforesaid, the Steynberg trustees deny each and every allegation in these paragraphs and the MTI liquidators are put to the proof thereof.

10.3. The Steynberg trustees deny that the MTI liquidators are possessed of primary facts to prove the disputed allegations in these paragraphs and the MTI liquidators are put to the proof thereof.

11. **AD PARAGRAPH 31 (INCLUDING 31.1 TO 33.3)**

11.1. The Steynberg trustees deny each and every allegation insofar as the alleged conduct of Mr Steynberg is concerned and the MTI liquidators

are put to the proof thereof.

11.2. Without derogating from the generality of the denial in 11.1 above, the Steynberg trustees deny:

11.2.1. the shortfall of Bitcoin;

11.2.2. the value of the alleged shortfall of Bitcoin;

11.2.3. the number of Bitcoin which the MTI liquidators allege should have been held by MTI in December 2020;

11.2.4. the total Rand value of the alleged shortfall of Bitcoin, or the Bitcoin itself,

as alleged in paragraphs 33.1 to 33.3 of the particulars of claim, and the MTI liquidators are put to the proof thereof.

11.3. The Steynberg trustees deny that the MTI liquidators are possessed of primary facts to prove the allegations in these paragraphs and the MTI liquidators are put to the proof thereof.

12. **AD PARAGRAPH 34 (INCLUDING 34.1 TO 34.7)**

12.1. The Steynberg trustees deny each and every allegation in these paragraphs.

12.2. The Steynberg trustees deny that the MTI liquidators are possessed of primary facts to prove the allegations in these paragraphs and the MTI liquidators are put to the proof thereof.

12.3. Without derogating from the generality of the aforesaid denial, the Steynberg trustees aver that the MTI liquidators made application to the Western Cape High Court for an order declaring MTI and/or its "*underlying business model*" to be an unlawful Ponzi-type investment scheme, which application was opposed by *inter alia* the seventh defendant (**"Mr Marks"**) and other individuals. Judgment was reserved and as at the date hereof, has not been handed down.

13. **AD PARAGRAPHS 35 (INCLUDING 35.1 TO 35.10) AND 36 (INCLUDING 36.1 TO 36.2) AND 37 (INCLUDING 37.1 TO 37.2)**

13.1. The Steynberg trustees deny each and every allegation in these paragraphs and the MTI liquidators are put to the proof thereof.

13.2. The Steynberg trustees deny that the MTI liquidators are possessed of primary facts to prove the allegations in these paragraphs and the MTI liquidators are put to the proof thereof.

13.3. Without derogating from the generality of the aforesaid denial, the Steynberg trustees deny that MTI is a company unable to pay its debts within the meaning of s339 and s340 of the 1973 Act. The MTI liquidators are put to the proof thereof.

14. **AD PARAGRAPH 38 (INCLUDING 38.1 TO 38.3.22)**

14.1. The Steynberg trustees deny that the MTI liquidators are possessed of primary facts to prove the allegations in these paragraphs,

accordingly the Steynberg trustees deny each and every allegation in these paragraphs and the MTI liquidators are put to the proof thereof.

14.2. Without derogating from the generality of the denial, the Steynberg trustees deny that the MTI liquidators are possessed of primary facts, financial statements, management accounts, financial documentation and financial records to prove the allegations of the MTI liquidators that MTI:

14.2.1. conducted business;

14.2.2. traded;

14.2.3. made distributions to Mr Steynberg and others;

14.2.4. owned, had access to, or was enabled to trade, Bitcoin;

14.2.5. owned, had access to, or was enabled to trade or transact upon, Bitcoin held in the Steynberg account;

14.2.6. had any valid claim to the Bitcoin in the Steynberg account.

15. **AD PARAGRAPHS 39 TO 40**

15.1. The Steynberg trustees deny each and every allegation and the MTI liquidators are put to the proof thereof.

15.2. The Steynberg trustees deny that the MTI liquidators are possessed of primary facts to prove the allegations in these paragraphs and the MTI liquidators are put to the proof thereof.

16. **AD PARAGRAPHS 41 TO 43**

16.1. The Steynberg trustees deny each and every allegation and the MTI liquidators are put to the proof thereof.

16.2. The Steynberg trustees deny that the MTI liquidators are possessed of primary facts to prove the allegations in these paragraphs and the MTI liquidators are put to the proof thereof.

17. **AD PARAGRAPHS 44 TO 48**

17.1. The Steynberg trustees deny each and every allegation and the MTI liquidators are put to the proof thereof.

17.2. The Steynberg trustees deny that the MTI liquidators are possessed of primary facts to prove the allegations in these paragraphs and the MTI liquidators are put to the proof thereof.

17.3. Without derogating from the generality of the denial, the Steynberg trustees aver that:

17.3.1. the MTI liquidators have submitted a claim for proof against the insolvent estate of Mr Steynberg, which claim was accepted by the presiding officer at a meeting of creditors, in terms of s44 of the Insolvency Act 24 of 1936 (**"the Insolvency Act"**);

17.3.2. on 25 January 2022, the Steynberg trustees made application to the Master of the High Court, Polokwane, for expungement of the claim in terms of s45 of the Insolvency Act;

17.3.3. the application for expungement of the claim is pending and as at the date hereof, the Master has not decided the application.

18. **AD PARAGRAPHS 49 TO 53.4.3 AND 54 (INCLUDING 54.1 TO 54.6.4)**

18.1. The Steynberg trustees deny each and every allegation in these paragraphs and the MTI liquidators are put to the proof thereof.

18.2. Without derogating from the generality of the denial, the Steynberg trustees deny:

18.2.1. that the liabilities of MTI exceeded its assets and/or that it was, or is, a company unable to pay its debts, as required by s339 and s340 of the 1973 Act, and the MTI liquidators are put to the proof thereof;

18.2.2. that the MTI liquidators are entitled and empowered to claim from the insolvent estate of Mr Steynberg in accordance with the provisions of s424 of the 1973 Act and in accordance with the provisions of s26, s29, s30 and s31 of the Insolvency Act, and the MTI liquidators are put to the proof thereof;

18.2.3. that Mr Steynberg deposited Bitcoin in MTI, as is alleged in paragraph 54.1 of the particulars of claim, and the MTI liquidators are put to the proof thereof;

18.2.4. that Bitcoin was transferred by MTI to Mr Steynberg, as is alleged *inter alia* in paragraphs 54.2 to 54.4 of the particulars of claim, and the MTI liquidators are put to the proof thereof;

18.2.5. that Bitcoin was transferred from MTI to Mr Steynberg,

18.2.6. that there was any disposition to Mr Steynberg within the meaning of s2 of the Insolvency Act, and the MTI liquidators are put to the proof thereof.

18.3. The Steynberg trustees aver that the MTI liquidators are not possessed of primary facts to prove the allegations in these paragraphs and the MTI liquidators are put to the proof thereof.

19. **AD PARAGRAPHS 55 TO 70.6 (INCLUCING ALL THE SUB-PARAGRAPHS)**

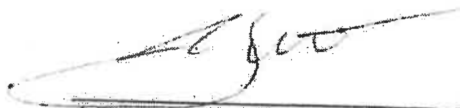
19.1. The Steynberg trustees plead that these claims and allegations are not made against them and accordingly the Steynberg trustees are not required to respond thereto.

19.2. To the extent that the MTI liquidators rely on any of these allegations in support of the claims made against Mr Steynberg, the Steynberg trustees deny each and every allegation in these paragraphs and the MTI liquidators are put to the proof thereof.

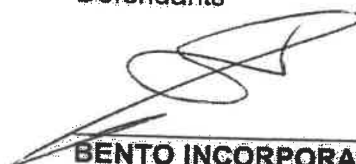
19.3. The Steynberg trustees deny that the MTI liquidators are possessed of primary facts to prove the allegations in these paragraphs and the MTI liquidators are put to the proof thereof.

**WHEREFORE** the Steynberg trustees claim for judgment in their favour *alternatively* for a dismissal of the claims, with costs.

Dated at Pretoria on this the 5th day of September 2022.



**J E SMIT**
Counsel for First and Second
Defendants

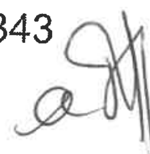


**BENTO INCORPORATED**
Attorneys for First and Second
Defendants
Tel: 011 475 4095
Ref: M Bento/AG/M05175
E-mail: mario@bento.co.za
c/o **STRYDOM & BREDENKAMP INC**
Parc Nouveau, 225 Veale Street
Brooklyn PRETORIA
Tel: 012 460 1930
Ref: H Strydom

To: THE REGISTRAR OF THE HIGH COURT
GAUTENG DIVISION
PRETORIA

And to: **STRYDOM RABIE HEIJSTEK AND FAUL INC**
Attorneys for Plaintiffs
Delmondo Office Park
169 Garsfontein Road
Ashlea Gardens
PRETORIA
Tel: 012 786 0954
E-mail: susan@srhfinc.co.za karlien@srhfinc.co.za
Ref: MTI1/0037/S Strydom





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**EX PARTE : ESTATE J STEYNBERG**

**IN RE: : ENTITLEMENT TO CERTAIN CRYPTOCURRENCY**

## OPINION

## INTRODUCTION

1. FX Choice Ltd, a virtual trading platform, reflected 1 281.7 bitcoin standing to the credit of account number 174850 ("the Bitcoin" and "the Account") in July 2020 when FX Choice suspended the Account (or rather, prevented the accountholder from trading on the FX Choice platform). Mr Steynberg, the alter ego of Mirror Trading International (Pty) Ltd ("MTI"), had initially opened the Account. FX Choice at some point amended the name of the holder either to include MTI or to substitute MTI's name for Mr Steynberg. How and why this came about and the factual and legal consequences thereof are explored in some detail below. In any event, during the second half of 2020 Mr Steynberg and MTI were publicly accused of fraud and various other forms of wrongdoing as a consequence of which Mr Steynberg fled South Africa on 16 December 2020. His flight triggered Mr Lee, an alleged creditor of MTI, to apply for MTI's liquidation, which he did on the 23rd of December 2020 (the order was granted on 29 December 2020). Shortly after their appointment, the provisional liquidators of MTI ("MTI", shorthand, where appropriate, for "the provisional liquidators of MTI") requested FX Choice to transfer the Bitcoin in the Account to them, which FX Choice did on 2 March 2021. In April 2021 MTI successfully applied for the sequestration of Mr Steynberg's estate.

2. The question which I am instructed to consider is whether FX Choice had the right to transfer and MTI the right to demand and receive the Bitcoin on that date or, to put it differently; who was entitled to the Bitcoin in the Account on March 2, 2021: MTI or Mr Steynberg? The question signifies two areas of enquiry namely the rights of MTI versus Mr Steynberg in and to the Bitcoin and the contractual relationships between each of them and FX Choice.

3. I have to say something about the evidentiary material from which the few facts are culled that are relevant to my enquiries. The greater MTI debacle and the affairs of MTI and Mr Steynberg have already been investigated from various angles by various bodies for various purposes and it is the subject-matter of ongoing proceedings. The investigations have thus far produced masses of paper, some of which were included in my brief. One is the draft report of the Financial Sector Conduct Authority ("the FSCA") dated 18 January 2021 as well as the transcripts of the evidence of the persons interviewed by the FSCA. I was also given the reports of the commissioner (Mr Justice Fabricius, retired) who chaired an inquiry into MTI's affairs in terms of section 217 and 218 of the 1973 Companies Act. Of particular importance are affidavits of Mr Daniel Stephenson of FX Choice, the first dated 28 October 2020, the second undated, which were handed to me.

4. I was also provided with copies of the contracts which ostensibly contained the terms and conditions of the scheme that Mr Steynberg ran ("the Scheme") called "Terms and Conditions of Agreement between Mirror Trading International (Pty) Ltd ("MTI") and its members". I refer to the MTI counterparties

as "the Members" because they are referred to therein as members of a club. The second contract contained the terms and conditions of the agreement between either Mr Steynberg or MTI, depending on who was the principal on that side, and FX Choice, called "FX Choice Standard Client Agreement". I refer to these two agreements below as "the MTI Agreement" and "the FX Choice Agreement".

5. I moreover received the combined summons (without annexures) in an action which the liquidators of MTI have instituted against the trustees of the Steynberg estate and others. It is of tangential importance to my instructions because the action does not as such deal with the Bitcoin in the Account but rather with the claims of the liquidators under our insolvency legislation and it concerns bitcoin other than the Bitcoin in issue herein. It also has claims based on the company law liability of directors for some or all of the debts of the company in question.

6. This opinion lies within narrow parameters and I accordingly do not consider or summarise all the facts as they have emerged thus far, or the claims by or against MTI. What makes the opinion even narrower is that the focus herein falls on the period before the transfer of the Bitcoin to MTI and it is thus also limited in time. Of particular importance, however, are the factual instructions which I received from my instructing attorney, Mr Bento. Mr Bento addressed questions about the opening of the Account to FX Choice. The answers that he received are summarised below.

7. Another point that I should make by way of introduction is that I am presently instructed by the trustees of the Steynberg estate (represented by Mr Bento) to consider the issues which I have delineated above. I have some historic knowledge of the MTI liquidation because I was asked for my views on the classification of the claims of certain of the alleged Members against the MTI estate for purposes of determining voting rights in the nomination process of the liquidators at the first meeting of the creditors. To that end I considered the nomination forms. I had no factual instructions. I concluded that the alleged Members probably do not have contractual claims against MTI but clearly have delictual claims against it. Enrichment could perhaps provide causes of action as a longstop. The views that I expressed then accordingly have no bearing on the issues which I address herein.

8. To frame the questions that I consider herein, I have to give a very broad overview of the background facts as I understand them. This includes a high-level summary of some of the features of the cryptocurrency known as bitcoin. In this regard I rely heavily on the collection of essays published as **Cryptocurrencies in Public and Private Law** edited by David Fox and Sarah Green, Oxford University Press 20-19 (to which I refer as "Fox and Green"). It is to my knowledge the most comprehensive compendium of legal analysis of the conceptual and practical problems that cryptocurrencies pose around the globe.

**THE FOUR ENTITIES**

9. For a better understanding of the narrative, the four entities to whom I have already referred should be introduced in more detail. The first is Mr Steynberg, a native of Polokwane. He has since the end of 2020 been a fugitive from justice and is presently in a prison in Brazil awaiting trial on charges that are unrelated to the present enquiry. Mr Steynberg was the originator of the Scheme.

10. The second is the cohort of victims of the Scheme. As noted, I refer to them as "the Members". I use this term because the purported aim of the Scheme was to attract persons who had cryptocurrency (bitcoin to be exact) to surrender same to a club of which they would be the members. The club would pool the bitcoin and put them up as a fund for trading in foreign exchange. I do not refer to them as "investors" because (if the MTI Agreement can be believed) they did not make investments but put their bitcoin up as a combined stake (i.e. as a deposit for trading on margin) as members of a trading club. According to the Scheme, they could turn a profit, but they could also lose the transferred bitcoin if things went poorly with the trading or perhaps if the bitcoin were stolen or rendered useless ("hacked").

11. The third is MTI itself. MTI was incorporated during April 2019 and liquidated with effect from 23 December 2020. MTI was at all times an empty shell. As I explain below, MTI itself did not receive any bitcoin (or any other currency) nor did it transfer any bitcoin. It did not even receive the revenue generated by the Scheme into its own bank account. It had no corporate governance and was not registered for any tax. Whatever debts it might have had were paid by Mr

Steynberg. It was also not licenced or authorised by any South African or foreign regulator to render any regulated service. Whether the law should recognise MTI as a company or whether its ostensible corporate personality should be ignored, are not questions which I consider herein. (That MTI is a candidate for the piercing of its corporate veil seems obvious, cf **Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd** 1995 4 SA 790 (A). Whether this could and should be done and, if so, when and how, are not part of my brief.)

12. The fourth is the company referred to in paragraph 1 above, FX Choice. It is incorporated in Belize (a Caribbean country, formerly the British Crown Colony known as British Honduras). It offers services in web-based trading in foreign exchange, about which more below. Belize is a member of the Common Law family and its judicial system is based on the English model which allows for appeals to the Privy Council. Insofar as I could gather, it generally follows English precedents.

## CRYPTOCURRENCIES IN GENERAL

13. Before turning to the doings of Mr Steynberg, some remarks about bitcoin and the derivative trade in currency exchanges should be made. By way of introduction it should be noted that although Mr Steynberg committed an ancient confidence trick, he updated it for the modern victim by choosing bitcoin as the object of the trick and currency arbitrage as the diversion. These two modern phenomena gave an aura of sophistication to the trick which had the same mystic allure that the philosopher's stone had in the Middle Ages and the

tulip madness in enlightened Holland for the gullible and the greedy. To its intended audience the Scheme was pure magic – it created wealth wrapped in mystery. But these were only the ways and means of Mr Steynberg's object namely to get as many traceless bitcoin of others into his own wallet as possible.

14. For the sake of contextualising the remarks that are made below, it may be helpful to give my understanding of the legal nature of bitcoin and the practice of currency trading at the outset. It is specifically necessary to record that as I understand the position, bitcoin to demonstrate does not constitute property and is not constituted by a contract. It is rather currency, a medium for exchange. The importance of this point of departure is that the remedy of the victim of a confidence trick whereby the victim lost its bitcoin is not the law of property or a contractual claim against an entity such as a bank, but a delictual claim against the fraudster. I can do no better than to paraphrase the short and to the point overview of the genesis of cryptocurrencies which Falk J gave in **Tulip Trading Ltd v Bitcoin Association for BSV** [2022] EWHC 667 (Ch). The facts of Tulip Trading do not have to be recited because they have no bearing on the issues considered herein. Tulip Trading concerned the cryptocurrency concept of mining, which is not presently relevant.

15. Falk J pointed out that the harbinger of cryptocurrency was the publication of the so-called White Paper under the title "Bitcoin: A Peer-to-Peer Electronic Cash System" by Satoshi Nakamoto (a pseudonym) in 2008. He proposed the creation of an electronic payment system based on cryptographic proof and using digital assets as an alternative to conventional currency which requires

financial institutions as payment system. The assets created in the crypto system would not be money in the traditional sense (which has since the introduction of cryptocurrencies increasingly become known as "fiat" money, from the Latin, "fio", indicating an ex cathedra dictate or fiat that only the medium in question serves as legal tender in a given political area), but an intangible concept to which participants spread across international boundaries, and untouched by governmental regulation, would by informal convention (that is, trust) allocate value. The system would be based on trust by its participants and used as payment mechanism in cyber space. Payment would thus be removed from governmental control and would exclude banks as payment channels.

16. Various crypto payment models have since been developed, bitcoin arguably being the most prominent "asset group", as understood in the instantly developed crypto language.

17. The bitcoin model involves digital assets (bitcoin, made up of bits, but for ease I refer herein only to bitcoin, not to bits) that are recorded in a ledger, known as a blockchain, which is a public registry recording every transaction in each and every bitcoin. No bitcoin can be transferred more than once at the same time. This feature generates the trust on which the whole system is based.

18. The following important caveat to the publicity of bitcoin transactions should be made: Whilst the blockchain provides proof that a transaction has taken place and no transaction can take place without it being reflected on the blockchain,

the blockchain does not disclose the identities of the parties to any transaction. Bitcoin are shown to be held at digital addresses. All these addresses have public keys which identify them on the blockchain and also private keys which allow the "holders" of the bitcoin access and the power or ability to transact with them. Both sets of keys consist of unique sequences of letters and numbers. The private key number of a bitcoin becomes ineffective when the bitcoin has been transferred. The "transferred bitcoin" is held by the transferee under a new number and is actually a different bitcoin from the one that the transferor held. If a private key is lost (the precise sequence of letters and numbers are for instance forgotten), the bitcoin exists untethered in cyber space and has no value to anyone, its public address is known but no-one has the means to access it. When a bitcoin is transferred from A to B and the transaction is for some reason reversed, the private key number changes so that what is returned is not what was given. The important point is that whilst all transfers are public, the identity of the transferor and that of the transferee are private.

19. Bitcoin fulfils all three conditions which are usually set for the classification of an object as money. It functions as medium of exchange, it is a store of value and it is a unit of account (Fox and Green 13 and further). Bitcoin was thus not only conceived of as money, but it functions as money. Two features of bitcoin flow from its categorisation as money, an internal feature and an external feature. Internally, that is between the transferor and the transferee, bitcoin has value and it can be used to express an item's price. Externally, it has a relative value if compared to other currencies so that it can be said that one bitcoin is worth so much US dollars at a given moment. Bitcoin is thus both a method of

internal payment and an investment in the external sense; bitcoin can be acquired to hold in the expectation of its external value increasing as against other currencies and exchanged for such currency when it may be opportune to do so, like a foreign currency speculant does (illegally in South Africa). The converse is of course also true. Losses can be made. I belabour this point because the Scheme was not intended to acquire bitcoin cheap and sell it dear. It was to use as deposit for currency speculation on margin. Furthermore, Mr Steynberg could as well have convinced members to put fiat money up as pooled stake – it made no difference to FX Choice whether the deposits would be in fiat currency or cryptocurrency. Two reasons spring to mind why the Scheme was based on bitcoin. The first is that it added to the mystery and thus the allure of the Scheme, it was exotic to - and not fully understood by the target. Second, once transferred away, bitcoin cannot be traced which opened the door for various aspects of the fraud to step out. One was that no Member could see and identify his or her bitcoin in the pool, so that the few bitcoin which were pooled as promised, could be held up as those of inquisitive Members. The second was that Mr Steynberg could pocket the bitcoin without suspicion and trace.

20. The point that cryptocurrency functions as a method of payment, thus as money as between participants in such a payment channel, must be stressed. Cryptocurrency, such as bitcoin, is not an actual thing (as understood at Common Law, or as a res in the Civil Law). It does not fall comfortably under the rules relating to the private law of property (choses in property and choses in action in the Common Law or a possessory remedy like the mandament van

spolie or an ownership remedy like the rei vindicatio in the Civil Law tradition). The legal systems which originated in the West will have to be developed dramatically to accommodate cryptocurrencies as independent objects of rights. No known legal system has done so as yet. Some terminological clarification is required: As cryptocurrency cannot be owned or possessed and cannot be the object of rights, it would be wrong to speak of ownership and possession of bitcoin in the traditional sense. As our law has not yet developed concepts to categorise the interests of someone over specific bitcoin vis-à-vis the rest of the world, property law concepts such as ownership, possession and delivery (transfer) do not apply to bitcoin. But if it is accepted that bitcoin is not property and that the use of these terms does not import the body of law behind the jargon, the judicious borrowing of these terms is unobjectionable. I accordingly refer to the entity entitled to any specific bitcoin and who is able to deal with the bitcoin (because the entity has the private key thereof) as the "holder". "True holder" in turn refers to an entity entitled to one ore more bitcoin in the abstract but who cannot deal with it because the entity does not have the private key thereto. Bitcoin is also not a contract. "Bank money" is sometimes described as a contract. A client with a positive balance has a right against the bank and the bank a concomitant obligation to the client. In the bank-analogy, the bank is the holder and the client has a contractual claim against the bank. With cryptocurrency there is no such contract because there no second party. Bitcoin is neither a thing nor a contract. It is a peer to peer form of payment. (The propositions set out in this paragraph are based on the following paragraphs of Fox and Green: I.r.o. the law of property in the Common Law

tradition, see para 6.01 and further and in respect of the Civil Law, para 7.01 and further; i.r.o. the law of contract, see para 9.01.)

21. With regards to the point that a cryptocurrency is not a contract, a qualification should be made: where there is the interposition of a third party, such as a digital wallet holder, in the crypto payment channel, contractual aspects between the title-holder of the digital asset (to coin a name) and the wallet service provider, are encountered. This relationship is in effect a contract of mandate in our law. This is also the position in the Common Law tradition (see Mark Hapgood QC gen ed **Pagét's law of banking** 13 ed 149 and further re the implied duties of a bank). The written terms thereof, if any, of course require interpretation to determine the contents of the contract, but various duties are imposed by operation of law including the duty to account. Digital wallets are contractual undertakings between the bitcoin holder and a service provider who enables the transfer of the bitcoin for the holder in and out of the wallet. A wallet is in essence an internet-based application which provides accounting support for the cryptocurrency (bitcoin) holder. The relationship between the bitcoin holder and the wallet provider is contractual and will (if tested in court) probably be held to be analogous to the rights and obligations between a bank and its client (Fox and Green 239 and 247 and further). The point is that a wallet provider will probably be held to owe fiduciary duties to the bitcoin holder similar to the duties of a bank owing to a client. Although FX Choice does not call the accounts of its clients digital wallets, they share crypto DNA with such wallets. The importance of this for the present enquiry is that FX Choice not only has the anti-money laundering obligations of a financial institution but that there is

privity of contract between it and its client, which includes the fiduciary such as the duty to act within the given mandate, which in turn implies strict liability in the Common Law (cf **Midland Bank Ltd v Seymour** [1955] 2 Lloyds's Rep 147, 168 and Fox and Green 240).

22. The remarks made in the last few paragraphs concern the private relationships between the parties to a transaction in bitcoin. I do not consider any public law aspect of bitcoin herein. Nor do I consider urgent interdictory type remedies to hold over questions to entitlements in specific transactions. Although bitcoin may be difficult to house in the traditional taxonomy of private law, there is no doubt that bitcoin has economic value and that the interests therein will as such receive legal protection where required.

23. As I explained above, I use "holder" in a metaphorical sense. "Transfer" is used in the same manner. It signifies the act by which a holder empowers another to become the holder. In the case of bitcoin this is done by the first holder giving the private key, i.e. the code recognised as such by the blockchain, to the second holder. If someone other than the present holder claims to be the holder, he or she must prove his or her assertion by ordinary evidence because there is no registry of bitcoin. The consequence is that, for all practical purposes, were the holder of bitcoin to provide any other person with the private key thereto and that person were to transfer the bitcoin on, the bitcoin disappears into the ether of cyberspace and the bitcoin transferred can never be recovered. It is only if the second holder still holds the original key, has not spent the bitcoin so that the private key can be transferred back, that the actual bitcoin can be

“recovered”, “recovered” because in this situation it was not transferred but the private key shared. The second person has spent it, the transaction is reflected on the blockchain. Should the transferee for some reason return a bitcoin, he or she has to transfer the private key to another bitcoin to the first holder.

**DERIVATIVE CURRENCY TRADING**

24. Some introductory remarks should also be made about currency trading and FX Choice.

25. FX Choice is, as mentioned, an electronic platform or marketplace specialising in currency trading. It renders services as a broker to facilitate trades. Although many aspects of its services remain obscure, what seems to be clear is that it allows clients to transfer either fiat or cryptocurrency into an account which is used to fund trades on margin. Profits are credited and losses debited to such account. To use a practical example: A client may open an account with FX Choice and transfer a given number of bitcoin to FX Choice with the necessary recordal on the blockchain. Trades are then conducted. The wins or losses are reflected in the client's FX Choice account which means that FX Choice transfers the number of bitcoin from the account because it holds the private key to them, or receives transfer of the profit bitcoin by obtaining the private keys to them. The client can withdraw the resultant bitcoin which requires recordal on the blockchain. FX Choice particularly facilitates trades in currency pairs through "CFDs" namely contracts for difference which means that a trader can adopt a position in respect of price movements between two currencies (a

currency pair) without having to acquire any asset (i.e. any currency). It is a derivative form of trading.

26. FX Choice is subject to the laws of Belize, including the requirement that it must know its clients to combat financial crime ("KYC") as imposed by the Money Laundering and Terrorism (Prevention) Act 2008, Belize, read with the rules laid down by the Central Bank of Belize (which apply to financial institutions such as FX Choice). It is regulated by the International Financial Services Commission of Belize.

**THE BACKGROUND FACTS**

27. I now turn to the most important events which form the background to this opinion.

28. By 2019 Mr Steynberg (who has no tertiary education, save for some private training in computers) knew something of crypto currency – how much is unknown, but probably more than his friends at the Polokwane golf club where he was a regular. He was also somewhat knowledgeable of foreign exchange trading and that profits can be made from such speculation. He came across FX Choice who had the platform for such trades against deposits of bitcoin. Mr Steynberg had some experience of mirror trading, a well-known concept where someone follows an experienced trader's every transactional move. As pointed out in the FSCA report, the events that followed may be divided into three phases.

29. The first phase commenced with Mr Steynberg obtaining MTI through which he would conduct trading. He managed to get other persons to join him (how many is unknown) to put their bitcoin into an account that he had with FX Choice, mirroring an experienced trader trading in derivative instruments based on forex pairs. The exercise was a disaster. Most of the bitcoin deposited were lost thanks to poor trades, the balance transferred from FX Choice and the account was closed. This account plays no role in the events which are relevant hereto.

30. In August 2019 the second phase began when Mr Steynberg changed tack. He held himself out to be a forex trading genius and that he could make money for anyone who had bitcoin. All that was required was for them to let Mr Steynberg have their bitcoin. Mr Steynberg stood in the centre of a personality cult. To expand his reach, a husband and wife team of multi-level marketeers was brought in and they designed a complex bonus system, whereby Members who brought in further Members would earn bonuses. They marketed the Scheme in cyber space on various social platforms. To give some credence to the scheme, MTI was said to be the other contracting party. The Members were told that their bitcoin would be transferred to wallets which were to be held for them by MTI. Bitcoin would be transferred from there to a pool which would be used for trades. MTI had a software programme which could show the rise and fall of credit which MTI would maintain for them. MTI had a software programme which showed the balances in the accounts of the Members. The integrity of the programme was dependent upon the integrity of the inputs. Alas, these were pure fiction. The Scheme worked well. Many Members sacrificed their bitcoin by transferring their private keys to Mr Steynberg which transactions were recorded on the blockchain. The truth was that MTI had no

wallets. Mr Steynberg stole the bitcoin. (As pointed out by Fox and Green, criminal law is much more adept at dealing with thefts of immaterial things like bank balances then the protection given by the private law.)

31. To facilitate the Scheme, Mr Steynberg opened the Account with FX Choice (which is the pivotal event herein, I return to the opening of the Account below). He did transfer some bitcoin to FX Choice to be held in the Account to enable trades and hold up pretences. But an unknown number of bitcoin were retained by Mr Steynberg or sold or used for other purposes. Mr Steynberg was free to do with the bitcoin of the investors as he saw fit. How many bitcoin of others he kept for himself or sold to get money to fuel the Scheme is not known. It is unclear how successful Mr Steynberg in fact was.

32. Mr Steynberg (aided by the spouses Marks) held out that incredible numbers of people, across almost 200 countries, were Members and thus participants in the Scheme. This gave out that the Scheme was successful beyond belief and thus trusted by multitudes. It had the imprimatur of vast numbers of people committing vast funds to the Scheme. In actual fact the Scheme was, for the greatest part, a simple confidence trick to enable Mr Steynberg to get hold of as many bitcoin as possible for his own benefit. As remarked above, the movement of bitcoin can be tracked, but the identity of the holders of a private key is unknown. Although there is no clarity on the point, it appears that Mr Steynberg sold some of the bitcoin that were sacrificed to the Scheme to generate revenue with which to pay the Members who claimed payment of the benefits promised to them under the Scheme as well as the debts due to bona

fide creditors, such as the employees of MTI. It was a pyramid scheme which was bound to fail.

33. The first sign of the implosion of the Scheme to come was in July 2020 when the Scheme reached the US state of Texas. The regulatory authorities there would have none of the Scheme in their jurisdiction and they obtained interdicts against everyone involved with it in Texas, including MTI and Mr Steynberg. News of the "cease and desist order" in Texas reached Belize placing FX Choice on guard. In South Africa, the FSCA learnt of the Scheme which lead to an investigation (but, surprisingly, not to any other action such as the appointment of a curator or some form of interdict).

34. The third phase commenced with the FSCA interviewing Mr Steynberg who, when confronted with the illegality of the Scheme, made promises to rehabilitate MTI (such as bringing in [illegible]ual independent and professional board of directors, registering for tax, doing what was required to obtain the necessary authorisations). Some of these things were attempted but in reality Mr Steynberg had a new plan namely to get a replacement for FX Choice and publicly state that the trading activities were transferred from FX Choice to this new entity, which he called Trade 300, where the trade would no longer be in foreign exchange but in crypto derivatives. Mr Steynberg at this stage (after October 2020) told one lie after another on social media in an attempt to catch new Members and to placate existing Members. The litany of lies is incredible. He told stories of a "bot", an infallible algorithm which could trade at the speed of light. But there never was such a deus ex machina. The Bitcoin (i.e. the

1,281 held in the Account) were not transferred to Trade 300 because there was no Trade 300 facility and because FX Choice had in any event suspended trading on the Account. Mr Steynberg, and it must be said his marketers, the Marks team, told long tales of eye-watering profits – but there were none. It also seems that during this phase, Mr Steynberg wildly transferred bitcoin to Members who were threatening to expose the Scheme to keep them quiet. He toiled day and night to keep up the lies reflected on the accounts of the Members (the back office). The court action referred to above essentially deals with this phase.

35. The chronology of the most important events falling mostly in the third phase for purposes hereof bears repetition: FX Choice suspended trading on the account in July 2020. Thereafter the FSCA investigation was launched. On 16 December 2020 Mr Steynberg fled from South Africa. That gave rise to fear amongst the Members. One of them, Mr Lee, applied for the liquidation of MTI on 23 December 2020 (which application was granted on the 29$^{th}$). The Master appointed the provisional liquidators in January 2021. They demanded transfer of the bitcoin in the FX Choice account. On the 2nd of March 2021 FX Choice transferred the Bitcoin to a digital wallet which the liquidators had opened for purposes of receiving the Bitcoin with the crypto currency wallet provider and bitcoin exchange, LUNO. Mr Steynberg's estate was sequestrated during April 2021.

36. Although FX Choice transferred the Bitcoin to MTI at the end of the third phase, the events of consequence for this opinion really fall into the second phase.

This is so because the rights and obligations as between MTI and Mr Steynberg on the one side and FX Choice on the other were established and developed during that phase. It ended with the suspension of the Account which froze the rights and obligations that had been created by then.

37. Before summarising my instructions on the point, I should stress that by all accounts Mr Steynberg dealt with many more bitcoin than the 1,281 Bitcoin which concern this opinion. How many of the Bitcoin in issue were initially Mr Steynberg's own bitcoin, which he placed with FX Choice, is not known. The number of Members whose bitcoin was obtained under the Scheme and whose bitcoin was placed with FX Choice is not known. The percentage of the overall bitcoin which Mr Steynberg appropriated or placed into other wallets than the FX Choice account is also not known. All that is known for sure is that the Bitcoin in issue were in the Account when it was suspended and this is the number which FX Choice transferred to the MTI provisional liquidators.

**THE FACTS RELATING TO THE ACCOUNT**

38. The facts regarding the opening, maintenance and termination of the Account are very limited.

39. Mr Steynberg had the previous account with FX Choice referred to in the narrative regarding the first phase. The grading on this account led to very substantial losses and the termination of that account. It is consequently not of any relevance hereto.

40. Mr Steynberg opened the Account in issue with FX Choice in his own name on 5 May 2019. FX Choice has not provided all the account opening documentation but confirmed that Mr Steynberg was the client. FX Choice also informed Mr Bento that the opening of the Steynberg account, viz the Account, was done in terms of the standard "Client Agreement" to which I referred above as "the FX Choice Agreement". A few remarks about the FX Choice Agreement may be made.

41. The FX Choice Agreement is a substantial document and deals with various aspects pertaining to the relationship between FX Choice and the counterparty, "the client" herein. It provides that the client has to prove his or her identity to FX Choice in terms of the know your client rules of Belize. FX Choice informed Mr Bento that the KYC requirements were completely complied with and that only after full compliance did FX Choice open the Account opened in his name.

42. The FX Choice Agreement makes it clear, at a number of places, and expressed in various ways, that privity of contract exists between FX Choice and its client. This appears, for example, from clause 2.2 of the FX Choice Agreement: "By accepting the Client Agreement the Client enters into a binding legal agreement with FX Choice," Clause 3.2 is in the same vain. It provides: "The Client Agreement is non-negotiable and overrides any other agreements, arrangements, express or implied statements made by FX Choice unless FX Choice, in its sole discretion, determines that the context requires otherwise. If the Client Agreement were to be amended, reasonable notice shall be given to the Client." Some clauses, such as clause 3.3, make it plain that the client can

by way of a formal power of attorney appoint someone else to transact on his or her account (see also clause 5.1). But such an appointment can only be to transact on the account on behalf of the accountholder, not to become the accountholder. The account cannot be ceded by one client to another. The reason for this is obvious: A client cannot be foisted onto FX Choice. The onus is with FX Choice to vet a potential client before accepting him or her as a party to a contract. This theme is taken further in clauses such as clause 8 where the potential client has to confirm that any funds deposited as contemplated in clause 9 "belong" to the would-be client, and that he or she is not a representative or trustee of any third party. It would only be possible for the client to deal with a third party's funds if "he/she produces to the satisfaction of the Firm document(s)". FX Choice did not inform Mr Bento that any of this had ever occurred.

43. Another provision of consequence is that the client is required to mandate FX Choice to merge the client's funds which seems to indicate that FX Choice may join two or more accounts of a client together, as bankers are sometimes allowed to do to avoid an unauthorised overdrawn position on one account. This, together with a plethora of other provisions, indicate that where a client deposits cryptocurrency, FX Choice is authorised and empowered to deal with the cryptocurrency. In other words, FX Choice has to be placed in possession of the private key or keys of the bitcoin deposited which transactions would be reflected on the blockchain.

44. Clause 9.4 provides that the client has the right to withdraw any part of the funds equal to the free margin that is available in the trading account. To achieve this, the client has to notify FX Choice of the withdrawal and FX Choice must effect the pay-out in the same currency (fiat or crypto) as was used to fund the account. Once again, FX Choice must be the holder, pro tem, of the bitcoin thus transferred to it. In the case of the account terminating, clause 17.6 provides expressly that "FX Choice shall immediately transfer to the Client any amount available in the relevant trading account minus any outstanding amount that is due to Firm by the Client". The obligation is owing to the client.

45. From all this it is manifest that there was privity of contract (as understood in the Common Law tradition). Mr Steynberg was the client pertaining to the Account. The implication is that any amount from the Account could be transferred only to Mr Steynberg and to no one else.

46. FX Choice also informed Mr Bento that in August 2019 there was an attempt to open a "corporate account" for MTI with FX Choice. But the attempt failed. The KYC requirements set by FX Choice were not met as late as June 2020. No corporate or any other account was opened for MTI. Mr Bento was informed that FX Choice expressly rejected the application to open such an account for MTI.

47. Incongruous as it may seem and for reasons that remain unexplained FX Choice referred to the Account from August 2019 as the MTI Account and it seems that FX Choice referred to the Account interchangeably as the MTI

account of Mr Steynberg's account. Mr Steynberg's particulars were the particulars of the Account. This never changed. MTI's name thus appeared on the Account albeit that the Account was a contract between Mr Steynberg and FX Choice, that it had not been transferred to MTI and that it would have been legally impossible to do so given the strictures of the Belize KYC legislation. FX Choice had refused to accept MTI as its client. It allowed only Mr Steynberg to transact on the Account.

48. FX Choice furthermore informed Mr Bento that it had concerns about the Account when third parties started making enquiries about the Account in the third period. As this was Mr Steynberg's account, FX Choice was concerned that third parties made enquiries. By July 2020 the trading on the Account had also become increasingly erratic and FX Choice became even more concerned. When it learnt of the Texas cease and desist order (which was not effective in Belize, it affected the status of FX Choice in the United States), FX Choice decided to suspend trade on the Account.

49. FX Choice professed to give full cooperation to the FSCA and later the liquidators of MTI. FX Choice has not provided information as to how it came about that it transferred the Bitcoin from the Account to the liquidators of MTI. It is difficult not to think that FX Choice wanted to rid itself as quickly as possible of the link with what was being fêted at the time as the biggest bitcoin swindle ever and that it gave the Bitcoin to the first official sounding claimant, not contemplating whether it was not perhaps committing breach of contract in doing so.

50. Whether FX Choice had the power or right to transfer the Bitcoin to MTI from the Account is a legal question which must be answered with reference to the Common Law legal tradition as the laws of Belize applies the Common Law. FX Choice was to my mind entirely justified in suspending trading on the Account when it learnt of the incongruities and alleged frauds pertaining to Mr Steynberg. Mr Steynberg was the client, not MTI. MTI had no right or entitlement to the Account. It did not stand in contractual privity with FX Choice. FX Choice was the debtor of Mr Steynberg and not of MTI. By paying MTI, FX Choice breached its contract with Mr Steynberg. FX Choice's conduct was for this reason unlawful. It should have refused to transfer the Bitcoin to MTI and should have insisted to transfer the Bitcoin only to Mr Steynberg unless directed differently by a competent court. Perhaps FX Choice believed that it acted as a trustee de son tort, a form of unauthorised intermeddling at Common Law in that FX Choice adopted the role of a trustee in a constructive trust. This was however, as I understand the Common Law on trusts, not possible because Mr Steynberg was the creditor and FX Choice the debtor and whilst that relationship endured, FX Choice could not assume the role of trustee. (See for example **Rowlandson v National Westminister Bank Ltd** [1978] 3 All ER 370 and Paget op cit paragraph 21.6 547 and further.)

51. It seems to me that the position would be the same in South African law. Where a bank (assuming that the relationships between banks and their clients apply mutatis mutandis to that between FX Choice and its client, Mr Steynberg) holds funds for a client, the bank's estate is neutral because whilst it is the owner of

the funds which it holds (i.e. FX Choice is the holder of the Bitcoin transferred to it because the transaction is recorded on the blockchain and it has the personal keys), the bank also owes an equal debt to the client to pay the amount held to the client (or to a third party at the client's instruction). Should it transpire that the client is for whatever reason not entitled to the funds, the bank would be enriched and if it transpires that some other entity was impoverished and a causative link can be drawn between the impoverishment and the enrichment, the bank may have to pay the funds to the impoverished party. (See for example **First National Bank of SA Ltd v Perry NO** 2001 3 SA 960 (SCA).) A bank or other entity in the position of FX Choice cannot unilaterally take the law into its own hands and pay who it may believe should get the money other than its client. It has to pay its client. Or await a court order.

52. In my view the transfer of the Bitcoin from the Account to the provisional liquidators of MTI was unlawful and without any legal consequence.

53. The right of the provisional liquidators to demand payment from FX Choice requires separate consideration: The right appears to emanate from the assertion that MTI was the true holder of the Bitcoin. But this cannot be. For one thing, the MTI Agreement did not in terms or by implication state that MTI would in any circumstance become the holder of any bitcoin. It promised a wallet to the Member, which meant that the Member still controlled his or her bitcoin in the wallet as holder. From there the Member would transferred it into the trading pool and the trading platform would hold it in own right. But the major difficulty with the assumption is that the MTI Agreement was in any event

not put into practice. The would-be Members transferred their bitcoin to Mr Steynberg. He became the holder. Some of the bitcoin (it is unclear how many, it should be stressed) found their way into the Account, where FX Choice was the holder. It is not known many were dealt with differently. It seems to be the bulk of the bitcoin transferred to Mr Steynberg. Mr Steynberg did not steal MTI's bitcoin, MTI never held bitcoin, he stole the bitcoin of the Members through false pretences. Whilst MTI was not a victim, it might be a joint wrongdoer with Mr Steynberg. MTI never had the right to claim holdership of bitcoin contractually or on the basis of an ownership or possessory remedy (choses in action or choses in possession) from anyone, not Mr Steynberg or from FX Choice. The MTI liquidators had no greater right than MTI.

54. The position as between a Member and MTI is similar: The Member had no right qua contract to the (re)transfer of any bitcoin from MTI. The Member lost holdership of the bitcoin when it was transferred to Mr Steynberg or, as the MTI Agreement envisaged, from the wallet with MTI (which was, as remarked, never in fact created) to the platform. The Member did not enter into a contract of deposit (bailment at Common Law) with MTI. The Member thought that it was putting up a stake in a risky trading venture. MTI did not promise to re-transfer any bitcoin whatever the outcome of the trade. If the stake would be lost through trading losses or if it were lost due to the platform of the trader (FX Choice) being hacked and the bitcoin stolen or if it would be stolen by someone like Mr Steynberg, the loss would fall with the Member.

55. One further point which requires attention concerns the trading statement that MTI had to provide to a Member, the back office. The purpose of the statement

was twofold. The first was to show the bonuses that were owing by MTI to the Member under the Scheme. These were part of an illegal contract (as clearly spelt out in the combined summons in the action referred to above) and on first principles the Member had no right to those amounts. These amounts may be left aside for present purposes because they were either paid and thus are irrelevant or they cannot be claimed due to the illegality. The second purpose of the statement is of importance herein. It was to reflect the growth and losses on the trading platform. The MTI Agreement (assuming it to be valid and enforceable) had to reflect the truth. There is no clause in the MTI Agreement holding MTI liable for fictions reflected in a statement. The truth that should have been reflected on a Member's account was that the bitcoin that came from him or her was not on a platform earning or losing because it was not in the pool.

56. The true facts are however that MTI never acted in terms of the MTI Agreement. It never received bitcoin, it never pooled bitcoin, it never placed bitcoin on a trading platform. The MTI Agreement was used as part of Mr Steynberg's trick.

57. I cannot come to any other conclusion but that MTI had no proprietary or contractual interest in the Bitcoin or in the Account or against FX Choice. I doubt that it had any contractual obligation to the Members. Insofar as it actually existed as a legal entity, MTI incurred delictual liability jointly with Mr Steynberg.

**CONCLUSION**

58. At the highest level my views could be summarised as follows:

63.1 Given the legal nature of bitcoin namely that it is not by itself a thing or a res in Common Law and in the Civil Law, the Members had no ownership-based or possession-based claims to any bitcoin which they transferred away under what they believed to be the MTI scheme.

63.2 The Members have no viable contractual claims against MTI. The MTI Agreement is a portmanteau of different and confusing concepts and thoughts and was clearly uncritically and inexpertly copied from other documents. It does not entail a contract of depositum (bailment) and, in any event, the Members did not transfer their bitcoin to MTI. MTI did not have wallets and MTI at no point controlled the transferred bitcoin. Apart from a claim as depositor (which I do not believe exists) the Members would at most have a claim for breach of contract against MTI for not dealing with the transferred bitcoin as MTI represented that it would have done. But the claims of the Members cannot be based on the accounting (back office) which MTI provided because it was pure fiction. MTI's breach occurred at the beginning of its relationship with a Member i.e. when it assisted Mr Steynberg in his frauds. MTI was a vehicle for fraud and the corporate veil surrounding it should probably be pierced so that the rights and obligations of the parties can be determined on the true facts.

63.3 This does not mean that MTI cannot be visited by a delictual claim. The problem is, however, that if successful, MTI will not be able to make good any judgment because it has no assets and is impecunious, save for the

Bitcoin that it obtained from FX Choice. A claim against MTI has no value if the Bitcoin should not fall into that estate.

63.4 MTI should never have obtained the Bitcoin from FX Choice. It was not a client of FX Choice and there was no contractual privity between them. FX Choice should have refused to transfer the Bitcoin in the Account to anyone other than to Mr Steynberg or it had to hold onto the Bitcoin until such time as an order of court had been obtained to direct FX Choice what to do. MTI thus had no contractual right to obtain the Bitcoin and its ongoing position and conversion thereof to cash are open to challenge.

63.5 The Members were not members of any club. The club story was part of the tissue of lies. They were defrauded by Mr Steynberg and MTI was part of the confidence trick. Their claims lie against Mr Steynberg. The claims are delictual in nature. The Members have to be placed in the position (insofar as it is possible to do so and taking into account matters such as contributory negligence) that they were in before they acted on the fraudulent misrepresentations of Mr Steynberg. Every asset of the Steynberg estate should be brought into the estate in order to make good the losses (insofar as it may be possible to do so) which Mr Steynberg caused.

59. I have consequently reached the conclusion that the Bitcoin in the Account should not have been paid to the provisional liquidators of MTI and that the latter had no right to receive the Bitcoin and have no right to hold onto same.

P F LOUW SC

Chambers, Sandton

30 May 2022