



JDMT-7006950626-1655



Claim No. DEC 002/2024

IN THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

In the name of His Highness Sheikh Mohammad Bin Rashid Al Maktoum, Ruler of Dubai

IN THE DIGITAL ECONOMY COURT

BETWEEN:

(1) GATE MENA DMCC (FORMERLY KNOWN AS HUOBI OTC DMCC)

(2) HUOBI MENA FZE

Claimants

and

TABARAK INVESTMENT CAPITAL LIMITED

Defendant

Hearing: 2 to 6 February 2026

Counsel: Andrew Spink and Stephen Doherty instructed by Charles Russell Speechlys LLP for the Claimants

Richard Hill KC and Bushra Ahmed instructed by KBH Limited for the Defendant

Judgment: 17 June 2026

JUDGMENT OF H.E. JUSTICE MICHAEL BLACK

UPON the Claim Form dated 2 July 2024 and the Amended Claim Form dated 30 October 2024 (the "Claim")

AND UPON the Case Management Order of H.E. Justice Michael Black dated 29 July 2024

AND UPON hearing Counsel for the Claimants and Counsel for the Defendant at the in person retrial before H.E. Justice Michael Black on 2 to 6 February 2026

IT IS HEREBY ORDERED THAT:

1. The Claimants' Claim is dismissed.
2. The parties are to serve and exchange submissions on the incidence of costs within 14 days of the date of the date of this Judgment and reply submissions within 7 days thereafter.
3. The Court will then make orders as to the costs on the papers and remit any necessary assessment to the Registrar.



Issued by:
Delvin Sumo
Assistant Registrar
Date of issue: 17 June 2026
At: 3pm

SCHEDULE OF REASONS

INTRODUCTION

1. This is the judgment on the retrial of a single issue ordered by the Court of Appeal on 13 June 2024 (CA-002-2023) following an original trial before Justice Sir Richard Field (the “**Judge**”) (now retired) sitting in the Technology and Construction Division heard in November and December 2021 followed by closing submissions in March 2022 and judgment on 5 October 2022 (TCD-001-2020) (the “**Judgment**”).
2. The First Claimant, Gate MENA DMCC was formerly and at all material times known as Huobi OTC DMCC (“**Huobi DMCC**”). Huobi DMCC is an entity licensed by the Dubai Multi Commodities Centre. Its business is “*Over the Counter*” (“**OTC**”) trading in cryptocurrencies, that is to say, the sale and purchase of cryptocurrencies for fiat currencies such as the US Dollar or UAE Dirham.
3. The Second Claimant Huobi MENA FZE (“**Huobi MENA**”) is based in Dubai. Huobi MENA focuses on the Middle East, Africa and Turkey, trading Bitcoin (“**BTC**”) and other cryptocurrencies on international markets including on a ‘cryptocurrency-for-cryptocurrency’ basis. Until 23 September 2021 Huobi MENA was the majority shareholder in Huobi DMCC.
4. I will refer to the Claimants collectively either as the Claimants or “**Huobi**” although I do not lose sight of certain issues where their separate legal personalities may be of relevance.
5. Huobi MENA was part of Huobi Global. Huobi Global is a company registered in the Seychelles but operating out of China. It is a world leading digital asset financial services provider.
6. On 23 September 2021, Huobi DMCC and Huobi MENA entered into an agreement for the assignment from Huobi DMCC to Huobi MENA of the benefit of Huobi DMCC’s claim in these proceedings.
7. Sultan Bin Kharsham Al Ali (“**Mr Al Ali**”) was at all material times the General Manager of Huobi DMCC and Chairman of the Board of Directors and Co-Founder together with Mohit Davar of Huobi MENA (“**Mr Davar**”).

8. Shantnu Saxena (“**Mr Saxena**”) was the General Manager of Huobi MENA and worked on strategy, management and marketing on behalf of Huobi DMCC. Sushant Kunjabihari Nahak (“**Mr Nahak**”) was a trader working for both Huobi entities.
9. The First Defendant, Tabarak Investment Capital Limited (“**Tabarak**”), is a company registered in the DIFC. It is authorised by the DFSA to provide various financial services. Its Commercial Licence describes its activities as Advising on Financial Products, Arranging Credit and Advising on Credit, Arranging Custody, Arranging Deals in Investments and Managing Assets. The Judge described it as a “*small merchant bank*”. Its founder and CEO is Mohamed Ahmadi (“**Mr Ahmadi**”).
10. Christian Thurner (“**Mr Thurner**”) was employed by Tabarak as Director of Investments. His assistant was Ms Anastasia Zavyalova (“**Ms Zavyalova**”).
11. Persons calling themselves Evgeniy Morozov (“**Morozov**”) and his associate Aleksij Socin (“**Socin**”) purported to be interested in purchasing BTC on behalf of a group of investors acting through a company called Navarcon s.r.o (“**Navarcon**” or the “**Buyer**”) registered in the Slovak Republic.
12. A meeting took place on 3 February 2020 (referred to by the Judge as the “*3F Meeting*” or the “**Meeting**”) the purpose of which was the sale by Huobi of 300 BTC to Navarcon (the “**Transaction**”) Neither side trusted each other and so they arranged for Tabarak to play (as the Judge termed it) “*an intermediary role*”.
13. The Judge found that it was initially agreed that Tabarak would undertake the following in relation to the Transaction:

“I find on the evidence that it was orally agreed between Mr Al Ali acting for Huobi and Mr Thurner acting for Tabarak that, in respect of a sale of 300 BTC by Huobi to Navarcon planned to take place at Tabarak’s offices on 3 February 2020: (i) Tabarak would provide its existing wallet to receive the 300 BTC from Huobi once the price per coin had been agreed; (ii) Tabarak would only transfer the BTC to Navarcon once the purchase money had been paid by Navarcon into an account maintained by Tabarak in Dubai; (iii) if the purchase money was received into Tabarak’s account, Tabarak would transfer the BTC to Navarcon and transfer the net proceeds from the recipient account to an account nominated by Huobi; (iv) if the purchase money was not received, Tabarak would transfer the BTC back to Huobi; and (v) in consideration of the foregoing, Huobi would pay Tabarak a fee and/or a commission.”

14. At the Meeting Morozov insisted on a change of plan, namely that instead of using Tabarak’s hardware wallet (the brand used was a “**Trezor Wallet**”), an apparently new, unused and security-sealed Trezor Wallet produced by him would be used.

15. It appears most likely that Morozov and/or Socin fraudulently exploited certain functionality in the set-up process of the Trezor Wallet (which neither Huobi nor Tabarak understood) to circumvent the security arrangements and gain access to the BTC before making payment. The BTC were thus lost to Huobi and Tabarak.
16. Huobi commenced proceedings initially against Tabarak and then joined Mr Thurner.
17. The Judge found (amongst other things) that:
 - (1) The agreement concluded between Huobi and Tabarak did not incept due to the non-satisfaction of a condition precedent (the payment by Huobi of an Account Opening Fee (“**AO Fee**”) required by the Account Opening Agreement (“**AOA**”);
 - (2) Tabarak was not under an obligation to advise as to the efficacy of the proposed modalities for the Meeting;
 - (3) No duties of care arose because there was not sufficient proximity nor would it be just and reasonable to hold that Tabarak should owe the alleged duties of care;
 - (4) In relation to an alleged breach of Article 71 of the Law of Obligations (“*a bailee must take such care of the property bailed as is reasonable*”) - Tabarak’s care of the BTC was “*reasonable*”.
18. Huobi’s claims against both Tabarak and Mr Thurner were therefore dismissed. Huobi appealed.
19. The Court of Appeal found that notwithstanding the failure of the agreement concluded between Huobi and Tabarak, the Transaction did proceed. Not only did it proceed but the parties negotiated an increase in the commission due to Tabarak. The Court of Appeal found that unfortunately the Judge did not address Huobi’s alternative case that an agreement was concluded at or around the time that the increase in Tabarak’s commission was agreed. It therefore ordered a retrial of the following issues:
 - (1) whether there was an agreement formed at or before the agreement to increase the commission payable to Tabarak;
 - (2) was any contract formed applying the principles adopted in *Taaleem v National Bonds Corporation*?
 - (3) if so, what were the terms of the contract particularly in the light of the findings that Crypto assets are “*capable of being owned and transferred*” and constitute

property within the meaning of the Personal Property Law 2005 and the Law of Obligations 2005. It is therefore possible to argue as a matter of statutory construction that the definition of bailment in Article 66(1) of the Law of Obligations can extend to the factual control of crypto assets, if factual control is to be regarded as, or equivalent to, possession? and

(4) was Tabarak in breach of any of those terms?

THE RETRIAL

20. On 29 July 2025 (the “**CMC**”) this Court made a Case Management Order directing (amongst other things):

(1) All evidence, witness statements from the Court of First Instance (“**CFI**”) proceedings under TCD-001-2020 and Court of Appeal proceedings under CA-002-2023 shall be admitted as evidence into the retrial under DEC-002-2024 including all recordings and transcripts of the CFI trial;

(2) The Claimants shall by 30 September 2025 file and serve a memorial containing their legal and factual submissions for trial, together with:

(a) witness statements of fact limited to issues of causation, quantum and mitigation of loss; and

(b) expert evidence in the field of cryptocurrency, on the question of whether BTC is “*money*” or “*currency*”;

(3) The Defendant shall by 17 November 2025 file and serve its memorial.

21. Thereafter there were consent orders extending deadlines and providing for a joint expert memorandum.

22. The retrial took place in-person over 5 days between 2 and 6 February 2026.

23. The only additional evidence of fact was given by Mr Davar on behalf of Huobi. It was directed to the relationship between Huobi DMCC and Huobi MENA, the ownership of the BTC and steps taken in mitigation. The veracity of his evidence was not challenged, much of his cross-examination was addressed to eliciting further information about the relationship between the two Claimants although it was also put to him that Huobi proceeded with the Transaction in the knowledge that it was risky. The latter point was relevant to Tabark’s case on causation and contributory conduct.

24. The majority of the evidentiary part of the hearing was devoted to the expert evidence on whether BTC is “*money*” and a “*currency*”. The Claimants adduced evidence from Dr Chris Williams, an economist currently employed as a partner of HKA Global Ltd based in the company’s London office, where he set up and has since 2023 led the international economics function. He was a partner in and Managing Director of Alvarez and Marsal for 3 years from 2018 to 2021 where he led the European Economics practice. He was partner in Grant Thornton, where he led the economics function for 2 years from 2021 to 2023. He had been the partner leading the economics function for Deloitte for 11 years from 2006 to 2017. During that time, he led the global economics practice (more than 220 professionals) and undertook management roles leading the European Technology practice and the management committee of the European Financial Services practice. He was a partner in KPMG for 3 years from 2003 to 2006 leading the UK and European Economics practices, as part of 12 years with the firm across the UK and internationally between 1994 and 2006.
25. The Defendant adduced evidence from Dr Garrick Hileman, a professor, economic historian and expert in cryptoassets and blockchain technologies. His academic qualifications include a PhD in economic history from the London School of Economics (2015), obtained under the supervision of professors Niall Ferguson and Albrecht Ritschl. He also holds an MBA from IMD, Switzerland (2001), and a BA in Business Administration with a concentration in accounting from the University of Washington (1996). He has over a dozen years of full-time professional teaching and research experience focused on cryptoassets and alternative finance. He designed and taught the first UK course on blockchain technology at the University of Cambridge (2016-17). In addition to his academic experience, he has worked full-time in the crypto asset industry for seven years (2013-16, 2018-22). He has advised and engaged with numerous governmental and trade bodies and private institutions on blockchain and digital asset policy and regulation, including: the Federal Reserve, Bank of England, European Central Bank, European Banking Authority, European Securities Market Authority, Bank of International Settlements, US Army and Naval War Colleges, and US Central Intelligence Agency.
26. Both experts referenced a very large number academic and professional materials.
27. Following the hearing there were further written submissions:
 - (1) On 26 February 2026 the parties produced a compendium of decisions of the UAE Courts dealing with crypto-assets;

- (2) On 6 March 2026 the parties made submissions on the features of IMF Special Drawing Rights and their analogous functions to those of crypto-assets; and
- (3) On 17 April 2026 the parties made submissions on the Singaporean case of *Kalen & Ors v World Exchange Services Pte Ltd* [2026] SGHC 31 handed down after the retrial concluded.

THE FACTS

28. On the retrial this Court is bound by the findings of fact made by the Judge in the Judgment insofar as relevant to the issues for determination at the retrial. Where, as held by the Court of Appeal (paragraph 19 above), the Judge did not make material findings this Court may either draw inferences from his findings or receive fresh evidence. In the event the fresh evidence was limited to matters that did not arise for determination on the Judge's findings (paragraphs 23 and 24 above).
29. The parties helpfully sought to set out the Judge's findings in detail in their memorials and written submissions at trial. In this section of this judgment I shall endeavour to summarise the material findings and to interpose Mr Davar's evidence at the retrial. I may however also refer to other findings in the consideration of the parties' submissions.
30. Mr Al Ali and Mr Davar co-founded Huobi MENA in September 2018 and Huobi DMCC in December 2018. Huobi MENA was the majority shareholder of Huobi DMCC until 23 September 2021 when Huobi MENA sold its entire shareholding in Huobi DMCC. At the same time Huobi DMCC assigned its rights of action against Tabarak to Huobi MENA.
31. It is important to note in the context of what follows that no claim is made by Huobi MENA in these proceedings in its own right.
32. Huobi MENA, at the material time, had exclusive rights to market and promote, in the MENA region, a crypto-to-crypto exchange platform owned by Huobi Global, which is a Seychelles based company. Huobi MENA also held the bulk of the Claimants' crypto assets and it was the preferred counterparty in relation to any crypto-to-crypto transactions carried out on the Huobi Global exchange. Cryptocurrency assets and fiat funds were pooled between Huobi MENA and Gate MENA, and a single set of accounts was prepared for both companies up to 2021.
33. Huobi DMCC, on the other hand, typically carried out smaller crypto-to-crypto transactions. It also held a proprietary trading license issued by the Dubai Multi

Commodities Centre freezone in the UAE, which allowed it to carry out off-exchange crypto-to-fiat transactions of which the instant transaction was one.

34. Huobi MENA held the bulk of the Claimants' crypto assets in a wallet owned by Huobi MENA and which was held on the Huobi Global platform (the "**Huobi Wallet**"). The crypto assets held in the Huobi Wallet were used for the purposes of engaging in crypto-to-crypto trades and to replenish the wallet used by Huobi DMCC to enable it to carry out crypto-to-fiat trades.
35. Huobi MENA would, as and when needed, buy additional amounts of BTC from Huobi Global, Jump Trading or Kraken, to complete any transactions for amounts of BTC above the level of its existing trading stock. To enable Huobi DMCC to carry out trades, a separate wallet was set up (the "**OTC Wallet**"). Huobi DMCC also held three bank accounts with Silvergate Bank in its name to enable it to carry out crypto-to-fiat transactions (the "**Silvergate Accounts**").
36. Huobi DMCC agreed to sell 300 BTC to Navarcon at the prevailing market price (approximately USD 2.8 million). Neither side trusted the other and so they arranged for Tabarak to play an intermediary role. The intention was that Tabarak would provide both a bank account into which the sale price would be received and a wallet in which the BTC would be held. The BTC would not be transferred to Navarcon until cleared funds were received in Tabarak's bank account.
37. Prior to the Transaction taking place, a number of modalities were agreed with respect to the Transaction and Tabarak's role in it, namely: (i) the First Deal Structure, which was proposed on 16 December 2019; (ii) the Second Deal Structure, which was proposed on 20 December 2019; and (iii) the Third Deal Structure, which was proposed on 19 January 2019. In each case, the structure of the Transaction required that Tabarak would take control of BTC transferred by Huobi DMCC, but it would not transfer it to the Buyer until Tabarak first received payment of the purchase money from the Buyer.
38. The Judge held at paragraph 104 (and at paragraph 60 as recorded at paragraph 13 above) of the Judgment:

"Mr Thurner was not under a duty to advise on the modalities that Huobi and Mr Morozov had agreed on, or as to any other modalities that might be contemplated. In addition, Mr Thurner did not agree to provide what the Claimants grandiosely call "custodian and escrow services". Rather, he agreed to carry out the relatively simple tasks of: (i) using Tabarak's wallet to receive the 300 BTC from Huobi and to transfer them to Navarcon once the price had been received by Tabarak; and (ii) opening an account for Huobi. What he was obliged to do (if only the agreement had been binding and

enforceable) was to operate Tabarak's own wallet to receive the 300 BTC and to transfer them to Navarcon once the purchase money had been received in an account maintained by Tabarak and then to transfer the net sales proceeds to Huobi."

39. The agreement would operate alongside and within the framework of the AOA signed by both parties. In addition, the parties appreciated that the AOA would only incept once the AO Fee had been paid and "*all Due Diligence and Compliance matters [had] been fulfilled*". The agreement concluded between Huobi and Tabarak was subject to: (i) the conditions precedent that the AO Fee be paid and Tabarak's due diligence processes completed, unless these conditions were waived; and (ii) the commission and other sums due to Tabarak for participating in the Transaction had been agreed.
40. Mr Al Ali did not initially sign the Addendum to the AOA, because the level of commission that Tabarak would be entitled to for its role in the Transaction was not yet agreed, with Huobi DMCC offering 0.2% and Tabarak proposing 0.35%. Huobi DMCC did not pay the AO Fee. The AOA was eventually signed by Mr Al Ali on behalf of Huobi and returned to Tabarak on 20 January 2020.
41. The Judge rejected Huobi's case that on two occasions it was agreed between Huobi and Tabarak that the AO Fee would be paid out of the proceeds of the Transaction, the first occasion being a telephone call between Mr Al Ali and Mr Thurner on 29 January 2020 and the second occurring at Tabarak's offices shortly before the 3 February Meeting got down to business when Mr Ahmadi agreed this proposal.
42. On 30 January 2020, arrangements had been made with respect to the sale of 200 BTC to the Buyer, but that transaction did not proceed on that date, because the Buyer was late to the meeting, and asked to change the transaction amount to 300 BTC.
43. The Judge did accept Mr Saxena's evidence that on 29 January 2020 there was not sufficient time to transfer the funds to Tabarak to pay the AO Fee using his company's Silvergate's account into Tabarak's account ahead of the planned transaction the following day. He also accepted Mr Al Ali's evidence that he persuaded Mr Thurner over the telephone in the late afternoon to accept that the Fee would be paid out of the proceeds of the following day's transaction.
44. Nevertheless, the Judge found that while Mr Thurner had apparent authority for all that he did and said in the lead up to the 3 February Meeting he did not have apparent authority to agree to Mr Al Ali's proposal concerning the fee over the telephone on 29 January 2020. This was because he, and through him, Huobi, were on notice that Mr

Ahmadi was making it his business to ensure that the Fee was paid before Tabarak took further action in conjunction with Huobi.

45. Following the abortive meeting on 29 January 2020 it was agreed by Huobi DMCC, Tabarak and the Buyer that the transaction amount would be amended to 300 BTC and that it would take place at Tabarak's offices on 3 February 2020.
46. The Judge found that: (i) when talking to Mr Al Ali before the Meeting got down to business, Mr Ahmadi did say that Huobi was not a client of Tabarak because it had not paid the AO Fee; (ii) in response, Mr Al Ali said to Mr Ahmadi that the Fee would be paid that day out of the proceeds of the Transaction; and (iii) Mr Ahmadi did not respond to this statement from Mr Al Ali but took no steps to stop the pending Transaction. In his judgment, Mr Ahmadi's failure to respond to Mr Al Ali and letting the Transaction proceed, would not have led an objective observer in the position of Mr Al Ali and Mr Saxena clearly and unequivocally to conclude that, on behalf of Tabarak, he was waiving the AO Fee condition precedent. It followed that he found the agreement he had held to have been concluded between Huobi and Tabarak never became a binding contract. He did however dismiss the contention that the agreement also never incepted because the stipulated due diligence to be conducted by Tabarak was never completed.
47. Following Mr Ahmadi's departure, the Buyer arrived at the Meeting. Shortly after the start of the Meeting, Morozov produced two new Trezor Wallets that were still contained within an unopened box. These wallets were "*cold*" wallets meaning that they were not connected to the internet. They were small devices like a USB stick that required to be connected to a computer to be set up. They were constructed to generate a 12-word "*recovery seed*" (called the "*mnemonic*") to be noted during the initialisation of the wallet, the purpose of which is to allow access to the BTC if the wallet was no longer accessible because it had been lost or was malfunctioning.
48. Morozov put one of these wallets to one side and stated that, for security reasons, he wanted the 300 BTC to be transferred directly to one of these devices rather than to Tabarak's wallet for onward transfer to the wallet of the Buyer. This was an obvious and fundamental departure from the agreed modalities for the sale of the 300 BTC. Morozov said he wanted to set up the wallet and explained that the BTC could only be transferred from the wallet if the transferor knew all 12 words of the mnemonic, and so the thing to do was for the first six words of the seed phrase to be noted by Tabarak and the remaining six words to be noted by those representing the Buyer. Mr Saxena objected to the Buyer's team setting up the Wallet and Mr Thurner asked the Huobi team if they

wanted to set up the Wallet. The Huobi team declined to accept this proposal. Mr Al Ali on behalf of Huobi agreed to the proposal that Mr Thurner should set up the Wallet into which Huobi would transfer the 300 BTC. This Mr Thurner did, explaining how the words of the mnemonic would be divided between Huobi and Navarcon.

49. In the view of the Judge even if his conclusion that Tabarak was not subject to any binding contract by reason of the failure to pay the AO Fee in advance of the Transaction were wrong, the contract was in respect of the planned Transaction that contemplated the transfer of the 300 BTC to Tabarak's wallet after the price had been agreed where they would stay until the purchase money was received into Tabarak's account had no application to the different scenario that unfolded following Morozov's insistence that the BTC be transferred to one of the new Trezor Wallets he had brought to the Meeting.
50. He described it as "*a game changer*". It put Huobi, and in particular, Mr Al Ali, in a very tight spot. Huobi was under strong pressure from Huobi Global to start achieving large OTC sales of BYC and in addition Huobi was extremely keen on developing a relationship with Morozov in the hope that it would lead to numerous profitable sales of BTC. The Judge found that Mr Al Ali feared that the use of the Buyer's wallet, with it being passed to Mr Morozov to note the remaining 6 words of the mnemonic, posed a risk, but he unwisely chose to agree to the proposed use of the Wallet and to agree that the 300 BTC be transferred to the Wallet even though the purchase price had not been received from Navarcon. During WhatsApp messages exchanged between Mr Saxena and Mr Davar on 23 January 2020, Mr Saxena's statement "*we are trying to close deals,*" elicited this instruction from Mr Davar: "*It's OK keep pushing ... Just don't take any unnecessary risks.*" If Mr Al Ali had heeded that instruction and refused to agree to the use of Morozov's wallet, the 300 BTC would not have been lost.
51. Tabarak and Mr Thurner also had a stake in the sale of the BTC to Navarcon: they were keen to earn the commission and fees that had been agreed earlier during the Meeting and they also looked forward to being involved as a middleman in future BTC sales by Huobi to Morozov. This said, at the Meeting Tabarak/Mr Thurner were at all times subject to the direction of Huobi, whose transaction it was that was being undertaken.
52. The Judge recorded Mr Thurner's evidence that: (i) Mr Ahmadi was aware of the Transaction and that he (Mr Thurner) would be signing the AOA on behalf of Tabarak; (ii) the signed AOA was within a hardcopy file for Huobi at Tabarak's offices; (iii) he attended the meetings that Mr Al Ali and Mr Saxena say he attended; (iv) before the Meeting got underway, Mr Ahmadi agreed that the AO Fee could be paid out of the

proceeds of the Transaction; (iv) it was strictly only with the express consent of Huobi (given by Mr Al Ali) that he set up the Buyer's Trezor Wallet at the Meeting, splitting the 12 word seed phrase equally between Tabarak and Navarcon/Morozov.

53. He found that the role to be played by Tabarak at the Meeting under the agreement was straightforward and uncomplicated and did not require any appreciable knowledge of, or experience in, the trading of BTC beyond Tabarak being in possession of, and knowing how to operate, a wallet capable of receiving BTC from Huobi and sending the coins on to Navarcon once the purchase monies had been received. At no time did Mr Thurner become an active advocate in favour of the use of the Trezor Wallet; indeed, he did not take the lead in saying anything about the appropriateness of the use of the Wallet. Thus, it was the Huobi team who told Morozov and Socin, who were proposing to set up the wallet themselves, that they did not wish to set up the Wallet but wanted Mr Thurner to do so; and it was only after this that Mr Thurner was asked whether he had any concerns, to which he replied that he did not because the Wallet was going to be locked in Tabarak's safe to which only Tabarak had access.
54. All present could see that the wallet was sealed in a cellophane wrapping and it was obvious that it was new and had not been used before. Mr Thurner proceeded to set up the Wallet, plugging it into a laptop computer. Out of the view of everyone else in the room, the first six words of the mnemonic were noted by Mr Thurner and Ms Zavyalova and written down by Ms Zavyalova. The laptop into which the Wallet was plugged was then passed to Morozov and Socin who, out of the sight of the Huobi team, appeared to write down the other six words of the seed phrase when they were generated by the device. Mr Thurner put in a pin code and the Wallet's address was then created automatically and sent by email to Huobi and Navarcon.
55. The Judge thought it appropriate to say that he found that the fees and commission due to Tabarak for their role in the Transaction were agreed on 3 February 2020 sometime before the 300 BTC were transferred to Morozov's Trezor Wallet. He accepted Mr Saxena's evidence that at the Meeting, Mr Thurner approached him and Mr Nahak and in a private discussion asked that Tabarak's margin be increased by 0.05% from the 0.2% which had been previously agreed. Mr Thurner suggested that this be achieved by adding 0.05% to the sum charged to Navarcon without notice to Morozov because of the delay and inconvenience Morozov had caused by not showing up on time on 30 January 2020. Accordingly, the total fee was increased to 3.05% with Tabarak's share being increased from 0.2% to 0.25%.

56. After the price of the BTC had been settled and agreed, Mr Nahak of the Huobi team transferred the 300 BTC to the wallet. Proof of the transfer was confirmed through the “*Internet Blockchain Watch*” and Mr Thurner sent to the parties a screen-shot of the balance shown on the wallet. The device was then locked in the safe situated in Mr Ahmadi’s room and Mr Al Ali and Socin left the Meeting, the latter stating that he had to leave for approximately 2 hours.
57. The remaining attendees went to lunch at the Burger & Lobster restaurant located in the Burj Daman building for about two hours. At about 4:30pm, the original attendees, save for Mr Al Ali and Socin, returned to Tabarak’s meeting room and were told that no funds had yet arrived from Navarcon. Morozov said that he was chasing for the money to arrive and all would be OK. At the request of Mr Saxena, Mr Thurner checked the wallet through his laptop and was shocked to discover that 299.99 of the 300 BTC had been transferred to another wallet. The Wallet was then taken out of the safe and the police were called.
58. The Judge found on the balance of probabilities, that Morozov and Socin obtained the 12 seed words either by scrolling up to look at the first six words that had been assigned to Tabarak or by deliberately making an incorrect selection of seed words so as to see the entire 12 word seed phrase.
59. He held that Mr Thurner and through him, Tabarak, acted in the honest but mistaken belief that, if the mnemonic were split into two with Morozov and Socin having access only to the remaining six words of the seed phrase, neither side could get access to the 300 BTC once they had been transferred to the Wallet. Like the Huobi team attending the Meeting, he did not know that the Trezor Wallet could be prompted to reveal the whole mnemonic phrase either by scrolling up or by deliberately inputting a small number of seed words that were not part of the mnemonic. In his judgment, in acting as he did, setting up the Wallet and passing it to Ms Zavyalova and then to Morozov stating, when asked, that he had no concerns about the proposed use of the Wallet because it would be locked in Tabarak’s safe, Tabarak/Mr Thurner were not in breach of an actionable duty of care owed to Huobi. Put another way, Tabarak’s care of the BTC was “*reasonable*”.
60. Of the 300 BTC that were stolen:
 - (1) 139 BTC were from Huobi MENA’s own trading stock;

- (2) 61 BTC were borrowed from Mr Davar who held both his own coins and some belonging to friends; and
- (3) Mr Davar said in his witness statement that the remaining 100 BTC were purchased by Huobi DMCC from Huobi Global using US dollars converted from a stablecoin, US dollars Tether (“**USDT**”), but in his oral evidence that it may have been from a liquidity provider, through Silvergate.
61. On 6 February 2020, Huobi DMCC used USD 288,905.40 of the funds it held in the Silvergate Accounts to purchase 30 BTC at a price of USD 9,630 per BTC. The 30 BTC were transferred to Mr Davar’s wallet once purchased. The remaining 31 BTC were transferred from the OTC Wallet to Mr Davar’s wallet between 3 and 11 February 2020.
62. The theft of the 300 BTC meant that it was impossible for Huobi DMCC to engage in any further transactions and it stopped operations completely in April 2020.
63. Huobi MENA still maintains a trade license but solely for the purposes of prosecuting these proceedings.
64. Under cross-examination Mr Davar stated that operationally they treated the two companies (Huobi MENA and DMCC) as one and the same.
65. He confirmed that the 100 BTC would have gone back to Huobi MENA. It may have been used for other trades or converted back into USDT. In contrast the 139 BTC would not have been converted from BTC.
66. Huobi DMCC did not reimburse Huobi MENA for any of the 239 BTC. After examining the financial statements there was the following exchange:
- “Q. So it is fair to say that when it assigned the claim, Huobi OTC wasn’t under any liability with respect to the Bitcoin?”*
- A. Huobi Mena, no.”*
67. It was put to him that loss was suffered by Huobi MENA rather than Huobi OTC. He replied:
- “A. Well, as I said, we always looked at it as one group, we never distinguished between the companies as such. The DMCC company was an extension of Mena to perform OTC trades because it was licensed as a prop trader, but the assets were always held by Mena because Mena generated the income.”*

Q. *So on that basis, it is Huobi Mena who is suffering the loss, yes? It is its money?*

A. *Yes, the Huobi group as itself suffered the loss, yes."*

68. It was put to him that before the Transaction happened on 3 February, the Huobi team discovered the Buyer, Morozov, was apparently the subject of an Interpol Red Notice. Mr Davar replied that he did not recall that but on being shown an email he accepted that it was sent to him.

69. It was put to him that on 2 February 2020 Mr Al Ali was forwarding to an individual known only as "*Rudolph*" (who had introduced the Buyer in return for 50% of Huobi's commission) an article on the website of Kraken, a well-known exchange, highlighting a vulnerability in Trezor Wallets and advising (in bold type) "*Do not allow anyone physical access to your Trezor Wallet*" or "*You could permanently lose your crypto*". Mr Davar said that he could not recall seeing the article. He was asked whether he accepted that Mr Al Ali should have been even more alive to the risk of a buyer introducing a new cold wallet into a transaction and not using the existing arrangements. He replied:

"Well, my understanding is that he got comfortable because Tabarak, who was acting as the custodian, got comfortable by using the buyer's wallet. It was their modus operandi that was agreed."

70. It was put to him that in WhatsApp exchanges during the course of the Transaction he said it was "*very risky*" to have transferred the BTC to the Trezor Wallet before cleared funds were in Tabarak's account. He replied that the risk to which he referred was not the loss of the BTC because they had a trusted intermediary but that the timing would mean they would lose their hedge. He maintained that the only risk would be the unwinding of the trade. He was not concerned about the change in modality from insisting that the money was with Tabarak before the transfer of the BTC.

71. Huobi had bought 200 BTC at a fixed price to delivered within 24 hours of the deal being done. If Huobi were not in funds the counterparty would have unwound the position and in a rising market Huobi would have had to pay more for BTC and therefore suffer a loss.

72. Mr Davar accepted that he was putting pressure on the team at Huobi DMCC to close more deals but he denied that it contributed to Mr Al Ali taking a risk he should not have taken.

THE CLAIMANTS' CASE

73. The Claimants contend that a contract was formed between Huobi DMCC and Tabarak at the 3 February Meeting prior to the transfer of 300 BTC to the Trezor Wallet in that;
- (1) The agreement that was previously negotiated based on the modalities of the Third Deal Structure, and which was to operate within the framework of the AOA, was never incepted because the AO Fee was not paid and a condition precedent to that agreement was not satisfied;
 - (2) In any event, the Third Deal Structure was superseded at the 3 February Meeting when it was agreed that the Tabarak wallet would not be used to execute the Transaction. The previously agreed terms had no application to the scenario that unfolded at the Meeting following the Buyer's insistence that the BTC be transferred to the Trezor Wallet;
 - (3) At the commencement of the Meeting, Mr Al Ali and Mr Ahmadi discussed the payment of the AO Fee. Mr Al Ali proposed on behalf of Huobi DMCC that it was to be paid that day out of the proceeds of the Transaction, and Mr Ahmadi did not respond to that statement, but took no steps to stop the Transaction which was subsequently executed;
 - (4) Mr Thurner's evidence at trial was that he understood that prior to Mr Ahmadi's departure from the Meeting, Mr Ahmadi had agreed that the AO Fee could be paid out of the proceeds of the Transaction, following the discussions that had taken place with Mr Al Ali shortly before the Meeting got underway;
 - (5) Mr Thurner was duly authorised by the Defendant to act on its behalf throughout the course of the Meeting, in all that he said and did, including following Mr Ahmadi's departure. Following Mr Ahmadi's departure from the Meeting, the terms of a new contract were discussed and agreed following the Buyer's insistence that the BTC be transferred to the Trezor Wallet;
 - (6) Specifically, the Buyer offered to proceed with the Transaction, but only if the Trezor Wallet was used. Both Huobi DMCC, and Tabarak, acting through Mr Thurner, accepted that offer, orally or by conduct, and Mr Thurner proceeded to set up the Trezor Wallet and arrange for Tabarak to take custody of 300 BTC;
 - (7) Further, Mr Thurner made an offer to Huobi DMCC and the Buyer that Tabarak would receive an increased amount of commission for the Transaction, which was

accepted by Huobi DMCC and the Buyer, orally or by conduct. As consideration for Tabarak's agreement to act as an intermediary for the Transaction, it was therefore agreed that Tabarak would receive the increased commission and the AO Fee, payable from the proceeds of the Transaction;

- (8) That agreement was subsequently recorded in a WhatsApp message sent by Mr Saxena which was directed to "*@Christian Thurner*" which set out a table describing the Defendant's entitlement to "*Tabarak's Share*" of 0.25% of the total purchase monies due to be paid by the Buyer, as well as the fact that sums paid to Huobi DMCC by Tabarak would be paid net, "*Less Tabarak Account Opening Fee including VAT*". It is averred that Mr Saxena's table is an accurate confirmation of the existence and payment terms of the contract and/or such terms became part of the contract;
- (9) Based on the terms that were agreed at the Meeting, Tabarak was prepared to, and did, participate as an intermediary in the Transaction by setting up the Trezor Wallet, facilitating the transfer of 300 BTC to the Trezor Wallet, and taking physical custody of the Trezor Wallet in Mr Ahmadi's safe, to which only Tabarak had access, during the time it was intended that the Transaction be executed;
- (10) The statements and conduct of the parties, viewed objectively, demonstrate that a binding contract was concluded, in particular: (i) Mr Thurner, acting on behalf of Tabarak, played an active role in setting up the Trezor Wallet and executing the Transaction, including by providing reassurance to Huobi DMCC that the Trezor Wallet and the BTC would be safe in Tabarak's custody; (ii) Mr Ahmadi himself locked the Trezor Wallet in his safe; (iii) Tabarak's bank account was to be used to receive payment from the Buyer; (iv) Tabarak's offices were used to execute the Transaction; (v) on the same day the Transaction was due to take place, Mr Saxena sent Mr Thurner a WhatsApp message setting out the payment terms; on 16 February 2020, Mr Thurner sent an email to the Buyer indicating that Tabarak was a party to the Transaction; and (vii) Tabarak accepted in the Court of Appeal proceedings that following the Meeting "*it was the function of Tabarak to stop the Buyers from getting their hands on the BTC until they had paid for them and that Tabarak was being paid appropriately for the service*".

74. In the premises, say the Claimants, following Mr Ahmadi's departure from the Meeting, Mr Thurner, acting on behalf of Tabarak entered into a binding contract which, unlike the previous contract, which was agreed but never incepted, proceeded on the basis that:

- (1) Tabarak would act as an intermediary in executing the Transaction by using the Trezor Wallet and not the Tabarak Wallet;
- (2) Tabarak would only transfer 300 BTC to the Buyer from the Trezor Wallet once it received the purchase money into its account; and
- (3) Tabarak would be entitled to payment of commission and the AO Fee from the proceeds of the Transaction.

75. The Claimants assert that the contract contained the following express and/or implied terms:

- (1) Tabarak would set up the Trezor Wallet and provide Huobi DMCC with a BTC address for receipt of 300 BTC;
- (2) The Trezor Wallet, and not the Tabarak Wallet, would be used to receive 300 BTC from Huobi DMCC, once the price per coin had been agreed;
- (3) Tabarak would have control over the 300 BTC received from Huobi DMCC;
- (4) Having received the BTC from Huobi DMCC, Tabarak would only transfer the BTC or allow the BTC to be transferred to the Buyer once the purchase money had been paid by the Buyer into an account maintained by Tabarak in Dubai;
- (5) Once the purchase money was received by Tabarak, it would transfer the BTC to the Buyer, and transfer the proceeds that it received from the Buyer to an account nominated by Huobi DMCC, net of the AO Fee which would be paid to Tabarak out of said proceeds;
- (6) If the purchase money was not received from the Buyer, Tabarak would transfer 300 BTC back to Huobi DMCC; and
- (7) In consideration of the foregoing, Huobi DMCC would pay Tabarak the increased commission that was agreed with Mr Thurner at the Meeting, and the AO Fee, both of which would be paid out of the proceeds of the Transaction, as set out in Mr Saxena's WhatsApp message to Mr Thurner shortly after the contract was formed, which was an accurate confirmation in writing of the existence and/or payment terms of the agreement and/or such terms became part of the contract pursuant to Article 25 of the DIFC Contract Law.

76. The Claimants claim that Tabarak was in breach of contract in that it failed to transfer 300 BTC back to Huobi DMCC when the purchase money was not received from the Buyer as a consequence of which, the Claimants suffered loss and damage.
77. The Claimants' claim damages for direct losses is made on a number of alternative bases:
- (1) A claim for payment of damages denominated in BTC, in accordance with Article 121 of the DIFC Contract Law (Law No. 6 of 2004) and/or Article 21 of the DIFC Damages Law (Law No. 7 of 2005) (the "**Primary Claim**"). The Primary Claim relies on the Court determining that BTC is "*money*" for the purposes of applying Article 20 of the DIFC Damages Law and Article 121 of the DIFC Contract Law;
 - (2) If the Court finds against the Claimants on that issue, they alternatively seek payment of damages denominated in USD (the "**Alternative Claim**"). The Alternative Claim asks the Court to assess damages on a number of alternative bases:
 - (a) First, an order that damages be assessed at the date of judgment or payment following judgment, on the basis that there was no reasonable possibility of the Claimants mitigating their losses, such that assessment at the date of breach is inappropriate (the "**First Alternative Claim**");
 - (b) Second, an order that damages be assessed at the date of judgment or payment following judgment, following the principles set out in *Southgate v Graham* [2024] EWHC 1692 (Ch) (the "**Second Alternative Claim**") and
 - (c) Third, an order that damages be assessed at the date of breach, with interest payable on those amounts (the "**Third Alternative Claim**").

THE DEFENDANT'S CASE

78. Tabarak summarises its case as follows:
- (1) It is not open to the Claimants to allege the existence of a legally binding contract entered into on 3 February 2020 in circumstances where such a contract was not pleaded and there was no application to amend before the Judge (and even now there is no application to amend);

- (2) In the alternative, no legally binding contract was entered into on 3 February 2020 because it was a condition precedent of any agreement that the AO Fee be paid in advance of the Transaction and the AO Fee was not paid in advance;
- (3) In the further alternative, if there was a legally binding contract:
 - (a) Any contract did not impose the obligations of strict liability for which the Claimants contend, and imposed no duty on Tabarak stricter than an obligation to take reasonable care in the performance of the revised role allocated to Tabarak at the Meeting;
 - (b) Tabarak did take reasonable care in the performance of the revised role allocated to it at the Meeting and did take reasonable care to ensure that the Buyer was not able to access the BTC before Tabarak received payment from the Buyer. The Court has already reached a binding determination that Tabarak's care was reasonable; and
 - (c) Accordingly, there was no breach of contract.
- (4) In the further alternative, if there was a breach of contract:
 - (a) Any loss was suffered by Huobi MENA and not Huobi DMCC as Huobi MENA provided the 300 BTC to Huobi DMCC at no cost and they would have been returned to Huobi MENA if Tabarak had transferred them back;
 - (b) Any loss suffered by Huobi DMCC was caused by its own conduct;
 - (c) Huobi DMCC mitigated its loss in relation to the 61 BTC borrowed from Mr Davar such that any damages in relation to those BTC must be assessed at the date of breach, alternatively date of mitigation;
 - (d) Huobi DMCC would not have continued to hold or trade the 100 BTC Huobi MENA purchased from Huobi Global for the purpose of the Transaction, and any damages in relation to those BTC must be assessed at the date of breach;
 - (e) Huobi DMCC would not have continued to hold or trade the 139 BTC supplied to it by Huobi MENA for the purpose of the Transaction, and any damages in relation to those BTC must be assessed at the date of breach;

- (f) If the Court finds that Huobi DMCC is entitled to recover damages and those damages are not assessed at the date of breach, the date of assessment should be the date of judgment of the first trial as any loss incurred after that date is due to the actions of the Claimants in the way they have litigated this case;
- (g) The AO Fee of USD 26,250 should be deducted from any damages award;
- (h) Any damages award should be assessed in US Dollars as that is the currency dictated by Article 20 of the DIFC Damages Law; and
- (i) Damages cannot be assessed in BTC as BTC is neither “*money*” nor a “*currency*”.

THE ISSUES

79. The parties agreed a list of issues.

- (1) Are the Claimants entitled to allege the existence of an entirely new contract entered into at the Meeting on 3 February 2020 including a term that Tabarak was under a strict liability to transfer 300 BTC back to Huobi DMCC if the purchase money was not received from the Buyer, in light of the case pleaded in the Re-Amended Particulars of Claim (“**RAPOC**”) and/or pursued at trial?
- (2) Was a new contract entered into on 3 February 2020 between Huobi DMCC and Tabarak? Specifically:
 - (a) Do the words or conduct of the parties, viewed objectively, lead to a conclusion that they intended to create legal relations in this respect and that they had agreed upon all the terms they or the law requires as essential for the formation of legally binding relations? and
 - (b) Was it a condition precedent of any agreement reached on 3 February 2020 that the AO Fee be paid in advance of the Transaction?
- (3) If there was a binding contract, what are the terms of the contract, and did it impose obligations on Tabarak stricter than an obligation to take reasonable care in the performance of the revised role allocated to Tabarak at the 3 February Meeting?
- (4) If there was a binding contract, was Tabarak in breach of any term of the contract?

- (5) In particular, is Tabarak strictly liable to Huobi DMCC for failing to return 300 BTC to Huobi DMCC, if the Buyer failed to pay for them?
- (6) Did Huobi DMCC suffer loss as a result of any breach by Tabarak? Specifically, what is the difference between the position that Huobi DMCC was in as a result of the alleged breach of contract and the position that it would have been in if the contract had been performed?
- (7) Did Huobi DMCC mitigate any loss? In particular, did it mitigate its loss in relation to the 61 BTC Huobi MENA borrowed from Mr Davar?
- (8) Was any such loss caused by Huobi DMCC's own conduct, including any failure to conduct due diligence or implement effective security protocols?
- (9) Was any loss too remote?
- (10) Can the DIFC Court award damages denominated in BTC? In particular, does BTC satisfy the threshold characteristics to be considered "*money*" and/or "*currency*", currently and in February 2020? Namely, does BTC function as:
 - (a) a unit of account?
 - (b) a medium of exchange?
 - (c) a store of value?
- (11) If the Court can award damages denominated in BTC:
 - (a) in what currency was the monetary obligation expressed?
 - (b) in what currency was the loss and/or harm suffered?
 - (c) if the answers to (a) or (b) are different, in which currency is it more appropriate to award damages?

("Claimants' Primary Claim")

- (12) If the Court awards damages in US Dollars, how should the amount of damages awarded be quantified?
 - (a) Should the Court order the Defendant to pay the US Dollar value of 300 BTC at the date of judgment following retrial or the date required for payment

under the judgment following retrial (**“First and Second Alternative Claims”**)?

- (b) Should the Court order the Defendant to pay the US Dollar value of 300 BTC at the date of breach (USD 2,899,372) (**“Third Alternative Claim”**)?
 - (c) Is any loss of Huobi DMCC limited to the value of 300 BTC at the date of breach because Huobi DMCC would not have held onto the 300 BTC if they had been transferred back to it?
 - (d) If damages are not awarded at the date of breach, should the Court order the Defendant to pay the US Dollar value of 300 BTC at the date of the CFI judgment (5 October 2022)?
 - (e) In the case of either of the circumstances in paragraph 79(12)(a) to (d) above, how should the value of the 300 BTC be ascertained?
- (13) Should any damages award take account of the non-payment of the USD 26,250 AO Fee?
- (14) If the Court awards damages in US Dollars assessed at the date of the breach (**“Third Alternative Claim”**), are the Claimants entitled to pre-judgment interest?
- (15) If the Claimants are entitled to interest:
- (a) For what period should interest be awarded? In particular:
 - (i) Should interest be calculated from the date of loss (i.e. 3 February 2020)?
 - (ii) Should interest be awarded for the period after the CFI judgment of 5 October 2022?
 - (b) At what rate should interest be awarded? In particular, can pre-judgment interest be awarded pursuant to Practice Direction No. 4 of 2017?
- (16) If the Court awards damages in US Dollars assessed at the date of the breach (Third Alternative Claim), are the Claimants entitled to post-judgment interest pursuant to Practice Direction No. 4 of 2017, and if so at what rate?

80. The issues need to be reorganised into a clearer and more logical order.

- (1) Issue (1) should be confined to the question of whether the Claimants are entitled to allege the existence of an entirely new contract entered into at the Meeting on 3 February 2020 in light of the case pleaded in the RAPOC and/or pursued at trial. The terms of any such contract will be the subject of a further issue. I will refer to this as the “**New Case Issue**”.
- (2) Issue (2) I shall refer to as the “**Contract Formation Issue**”. This will encompass:
 - (a) Do the words or conduct of the parties, viewed objectively, lead to a conclusion that they intended to create legal relations in this respect and that they had agreed upon all the terms they or the law requires as essential for the formation of legally binding relations?
 - (b) Was it a condition precedent of any agreement reached on 3 February 2020 that the AO Fee be paid in advance of the Transaction?
- (3) The remainder of Issue (1) and Issues (3) and (5) overlap and I will refer to them as the “**Contract Terms Issue**”. This will include:
 - (a) Did the contract include a term that Tabarak was under a strict liability to transfer 300 BTC back to Huobi DMCC if the purchase money was not received from the Buyer? or
 - (b) Did it impose an obligation to take reasonable care in the performance of the revised role allocated to Tabarak at the 3 February Meeting?
- (4) Issue (4) I shall refer to as the “**Breach Issue**”.
- (5) Issues (6), (7), (8) and (9) overlap and should be reordered. I will refer to them as the “**Loss Issue**” encompassing:
 - (a) Did Huobi DMCC suffer loss as a result of any breach by Tabarak?
 - (i) Specifically, what is the difference between the position that Huobi DMCC was in as a result of the alleged breach of contract and the position that it would have been in if the contract had been performed?
 - (ii) Was any such loss caused by Huobi DMCC’s own conduct, including any failure to conduct due diligence or implement effective security protocols?

- (b) Was any loss too remote?
 - (c) Did Huobi DMCC mitigate any loss? In particular, did it mitigate its loss in relation to the 61 BTC Huobi MENA borrowed from Mr Davar?
- (6) Issues (10), (11), (12) and (13) relate to the calculation of damages. I will refer to them as the “**Damages Issue**” encompassing:
- (a) Whether any damages award should take account of the non-payment of the USD 26,250 AO Fee;
 - (b) Whether the DIFC Court can award damages denominated in BTC;
 - (c) If the DIFC Court can award damages denominated in BTC;
 - (i) In what currency was the monetary obligation expressed?
 - (ii) In what currency was the loss and/or harm suffered? and
 - (iii) If the answers to (i) or (ii) are different, in which currency is it more appropriate to award damages?
 - (d) If the Court awards damages in US Dollars, how should the amount of damages awarded be quantified? In particular, what is the appropriate date for assessment and more generally how should the value of the 300 BTC be ascertained?
- (7) Issues (14), (15) and (16) concern interest and I will refer to them as the “**Interest Issue**”.

NEW CASE ISSUE

Introduction

81. The Claimants fairly recognise that this is more than a mere pleading point. Tabarak does assert that the Claimants did not originally plead that a contract was concluded on 3 February 2020. It was only in closing submissions that the Claimants stated that, “*Alternatively, the Agreement was entered into by no later than the time the Commission of 0.25% was agreed*”. It was however said that the terms of that alternative later agreement were the same as the terms of the agreement alleged to have been

concluded before the 3 February 2020 Meeting as pleaded. The pleaded terms (insofar as relevant) at paragraph 25 of the RAPOC were as follows:

- (1) Tabarak would not transfer the BTC to the Buyer until it had received payment for the BTC from the Buyer;
- (2) Tabarak would not permit the Buyer to access or retrieve the BTC until after it had received payment for the BTC from the Buyer;
- (3) Tabarak would take reasonable care to ensure that the BTC were not transferred to the Buyer before it received payment from the Buyer; and
- (4) Tabarak would take reasonable care to ensure that the Buyer was not able to access the BTC before it received payment from the Buyer.

82. Tabarak says that (3) and (4) qualify (1) and (2) and so the pleaded obligations were to take reasonable care.

83. In contrast, the Claimants contend that the contract formed at or before the agreed increase in commission contained an absolute duty on the part of Tabarak to return the BTC to Huobi DMCC in all circumstances (including those beyond Tabarak's control) if the Transaction did not close. During argument the parties variously referred to this as "*strict liability*" or a "*strict duty*". The significance is that the Judge made a finding which binds this Court that Tabarak exercised reasonable care in its dealings with the BTC.

84. Whether or not there was a strict or reasonable care duty will fall to be considered if I am satisfied that a contract was formed. The threshold issue is whether as Tabarak puts it there are "*insuperable procedural obstacles to the Claimants' shifting position*":

- (1) The Claimants signed 6 statements of truth (in 3 versions of the Claim Form and 3 versions of the Particulars of Claim) asserting that Huobi DMCC and Tabarak agreed that Tabarak's duty was one of reasonable care;
- (2) There is no witness statement before the Court hearing this retrial from any of those involved in the Transaction on behalf of Huobi DMCC asserting that the parties agreed this strict liability term or explaining how it is that Huobi DMCC's lawyers are now alleging a contractual term that is so fundamentally different to the terms of the agreement that the Claimants have until now always said governed the Transaction and in relation to which the Claimants have repeatedly signed statements of truth;

- (3) The new case engages with the principles applicable when a party wishes to withdraw an admission (the Claimants' acceptance that Tabarak's obligations were to take care being fatal to their case). The Claimants would be unable to surmount the hurdles and have not attempted to do so; and
- (4) The Claimants allege that all terms of the new agreement were "*express and/or implied*", without identifying which terms were express and which implied. In relation to the alleged agreement that Tabarak was strictly liable to return the BTC, there are no particulars of contractual words used or conduct relied upon for an express term, and no statement of the legal basis for implying such a term. To allow the Claimants to pursue this new case without providing proper particulars as required by the DIFC Rules would not be consistent with the overriding objective.

85. In short, can the Claimants raise the issue of whether there was a new contract formed at all, as opposed to the terms of any contract if formed. In my view the distinction did become blurred during oral argument.

Tabarak's Case

86. In its oral opening submissions Tabarak contended that the case that was advanced on contract, not just on tort and bailment and everything else, was one of reasonable care. Thus, if the Judge had dealt with it, he would have dismissed it for the same reasons he dismissed the rest of the case on reasonable care, because he had made a finding that Tabarak did take reasonable care of the BTC. It submits that just because the Judge failed expressly to deal with that argument, Huobi cannot through this exercise put itself in a different or better position. The Claimants cannot use this retrial as an opportunity to advance a different case from the one they advanced at trial and in circumstances where, if the Court had dealt with it, it would have been dismissed.
87. Counsel said he would develop these submissions further in closing. He began with the context of the agreement and raised two issues. First, the Judge found that Tabarak's role was "*straightforward*" and "*uncomplicated*". It was a simple middleman's role that could not be elevated to an agreement that Tabarak agreed to provide custodian and escrow services. It was not originally envisaged that Tabarak would be holding the BTC before the money arrived and so allowing access to the BTC before payment could not have been in the parties' contemplation. Secondly, the Judge did not descend in to what was the precise scope and nature of Tabarak's obligations when performing those

functions. He did not get as far as to say whether Tabarak owed a duty of care or whether in relation to any particular parts of that role Tabarak owed some lesser duty or some greater duty.

88. Tabarak suggested that none of the obligations set out at paragraph 81 above was pleaded in the alternative. Thus (1) and (2) provide that Tabarak would not deliberately or intentionally or knowingly commit those acts as opposed to something involuntary which is dealt with by the reasonable care allegations. Tabarak referred to paragraph 22 of the Claimants' opening submissions at the original trial:

"Cs' case is that the terms of the contract between C1 and D1 included:

- a. D1 would advise C1 on, arrange and supervise a deal structure which would ensure that the transaction would proceed in such a way that the Buyer or any other third party could not retrieve the BTC without first paying for them.*
- b. D1 would carry out the above services with reasonable care and skill.*
- c. In exchange, C1 would pay D1, from the proceeds of the transaction:*
 - i. An "Account Opening Fee" of US\$ 26,250; and*
 - ii. A commission in the sum of 0.25% of the Transaction proceeds."*

89. Reference was also made to paragraph 24:

"Accordingly, C1 and Ds agreed that D1 would provide custodial services in relation to the BTC, i.e. would prevent them from being transferred out of the Wallet until and unless the Buyer's payment had arrived in D1's account, and if those sums did not arrive within a reasonable period of time, return the BTC to C1."

It was submitted that the word "accordingly" referred back to the duty of reasonable care and skill.

90. It is apparent from the Judgment that the Claimants did develop their case in closing but the Judge found that it did not require amendment to the RAPOC (Judgment paragraph [59]). Paragraph 190 of their closing submissions added a further duty, *"if D1 did not receive payment from the Buyer within a reasonable time, promptly return the 300 BTC to C1."*

91. Tabarak pointed to paragraph 192 of the closing:

"The Agreement was entered into around 29.1.20 (when C1 and Ds agreed that the Flat Fee would be paid out of the Transaction proceeds), although the Commission was subsequently varied (to 0.25% on 3.2.20). Alternatively, the Agreement was entered into by no later than the time the Commission of

0.25% was agreed, which was also prior to the transfer of the BTC to the BTC Address."

92. It submitted that the case that was run and focused on a case of reasonable care, which made commercial sense, although it had problems on both facts and the law as successive courts have found. The reason it made commercial sense was if Tabarak did have an advisory role or a supervisory role and was in the form of providing quasi-custodial advisory services, then it can be understood that Tabarak owed a duty of care, because Tabarak was doing for reward something that involved it taking possession of an asset and looking after it, and if the requisite elements of contract formation were there, then Tabarak owed a contractual duty of care.
93. Tabarak made reference to the Judge's finding that it was under no duty of care to advise on the safety or modalities of the Transaction and submitted that the finding defines in a binding way the limits of what Tabarak could be taken to have agreed to and gives important commercial context to what the Judge would have spelt out if he had been asked to, given that he did not spell out the full nuances of the contract that he found.
94. A crucial part of that, says Tabarak, is that Tabarak was simply following instructions from Huobi. If a party is simply following orders, it is most unlikely that a party will be deemed to come under a liability to warrant the outcome of those orders or, come under a duty to achieve the result or outcome wanted by those giving the orders.
95. Tabarak drew the analogy of a warehouseman. The warehouseman will be under no liability for the loss of goods consigned to its care if it demonstrates that it has taken reasonable care.
96. Tabarak submitted that it gave no warranty as to efficacy of the Transaction.
97. It summarised its case on the basis that the only rational commercial world in which Tabarak could be liable, even though it was just following orders and the flaw in the system was introduced by Huobi's instruction, is if it actually had a more elevated, overall responsibility. But that is not this case. In this case, Tabarak was just following orders. In those circumstances it cannot be right for Huobi to tell it to do something that creates the loss and then say Tabarak is strictly liable and is strictly warranting things that it had no control over.
98. Tabarak made further points in oral closing submissions which were a repetition of the earlier submissions or strayed into the issue of the terms of any contract.

Huobi's Case

99. The Claimants respond with the following points:

- (1) The Court of Appeal has expressly ordered a retrial on the issue of whether a new contract was entered into at the 3 February Meeting notwithstanding Tabarak's submissions before the Court of Appeal that the assertion of a contract entered into at the Meeting was a "new allegation";
- (2) Tabarak cannot realistically contend that Huobi's case with respect to the 3 February contract is not pleaded, or that it does not know the case that it has to meet. The existence of an agreement entered into on 3 February 2020, concerning Tabarak's commission for facilitating the Transaction, is referred to at RAPOC paragraph 13. Huobi's case with respect to Article 59 of the DIFC Contract Law and the application of *Taaleem* was set out at paragraphs 183-192 of its closing submissions, which state that the 3 February contract was concluded by no later than the time that Tabarak's increased commission was agreed;
- (3) At the CMC, Tabarak again sought to raise the same pleading point that it argued before the Court of Appeal, and which it now takes at the retrial. In response to that, it was observed by the Court that the purpose of the memorial submissions was, in effect, to set out the parties' respective positions on the creation of a new contract at the Meeting, and that it seemed "*a little formalistic*" to require formal amendments to the pleadings;
- (4) Pursuant to the order made following the CMC, each party was required to file memorials setting out their legal and factual submissions for retrial, and the Claimants have done so. The Claimants' memorial is consistent with their case on appeal under Ground (3), as understood and addressed by the Court of Appeal and with the expressed intention of the Judge at the CMC. It ought to stand as accurately reflecting the case put forward by the Claimants on the retrial, and the case which Tabarak has to meet at the retrial. Further, and in any event, the Judge's order for the production of memorial submissions was consistent with the fact that the retrial is proceeding as a claim before the Digital Economy Court;
- (5) Even if as a matter of formality, it was necessary to include an amendment to the RAPOC which incorporated the contents of the Claimants' memorial, such an amendment could be made at the outset of the retrial or subsequently;

- (6) Tabarak's assertion appears to hang on to the suggestion that the Claimants cannot be put in a better position than they were before the Judge at first instance. That submission is not understood and unsupported by any authority or statement of principle. Self-evidently, it is wrong. The current status of these proceedings is that there is an extant claim on foot, albeit on narrow grounds, before the DIFC Court of First Instance (in the Digital Economy Court). Whilst the parties are bound by the Judge's prior findings at first instance, there is nothing in the Rules of the DIFC Courts ("**RDC**") which would prevent the Court from making a determination of an issue which the Court of Appeal determined was left undecided by the Judge, and which would not involve the Court making findings which are inconsistent with the previous Judgment; and
- (7) Tabarak's submission is also misconceived in assuming that, if any formalistic amendment had been deemed to be necessary by the Judge, that permission would have been refused. The Judge's approach at first instance suggests a contrary conclusion is considerably more likely.

Discussion & Conclusions

100. As I have already noted, it is important not to confuse what the terms of any contract might have been agreed with the question of whether the Claimants are entitled at all in these proceedings to argue that a contract was formed no later than the time the commission of 0.25% was agreed. The short answer is that this is the very issue that the Court of Appeal directed is to be tried in these proceedings on the grounds that the issue was before the Judge but he made no findings about it.
101. The parties have had ample opportunity to plead their respective cases following the decision of the Court of Appeal pursuant to the Case Management Order.
102. It is not entirely clear from Tabarak's submission whether it is being alleged that Tabarak is prejudiced in that it has not had the opportunity to call evidence on the making of the contract or whether it is being alleged that the Claimants did not call evidence on the point. The former would certainly be a consideration in deciding whether it was open to the Claimants to argue the point but ultimately would not be determinative because the point was a live one at the original trial, Tabarak had the opportunity to call evidence on the point and the evidence in the retrial is limited to that called at trial.
103. The last of those observations is also pertinent to any suggestion that the Claimants did not call evidence on the point at trial. The evidential burden rests on the Claimants to

establish the existence of the contract on the evidence that was available to the Judge in the circumstances where the Court of Appeal has found he did not make a finding as to its existence or (as Tabarak notes) its incidents.

104. Neither case, in my view, justifies precluding the Claimants from arguing that a contract was formed.
105. The essential thrust of Tabarak's arguments as pleaded is that any contract was either a variation of the previous contract and subject to the same vitiating factors, or was a new contract but on the same terms as the previous contract. In the former case, as held by the Judge, the varied contract never incepted; in the latter the terms of the contract were based on a duty to take reasonable care, which the duty the Judge held was satisfied. I am also of the view that neither of these arguments justify precluding the Claimants from arguing that a contract was formed. Whether any such contract ever incepted falls to be considered under the Contract Formation Issue; whether the terms of the contract were based on a duty to take reasonable care falls to be considered under the Contract Terms Issue.

THE CONTRACT FORMATION ISSUE

Introduction

106. Logically the first question is whether a contract of whatever nature was formed on 3 February 2020 at or before the renegotiation of the increased commission. This will involve consideration of whether the words or conduct of the parties, viewed objectively, leads to a conclusion that they intended to create legal relations and that they had agreed upon all the terms they or the law requires as essential for the formation of legally binding relations.
107. If a contract were formed, it will be necessary to consider whether it was an agreed variation of the previous contract or a new free-standing contract. In either case it will be necessary to consider all of the material terms of the contract, but of immediate concern is whether it was a condition precedent that the AO Fee be paid in advance of the Transaction or whether it was agreed that the AO Fee could be paid out of the proceeds of the Transaction.
108. If it was a condition precedent that the AO Fee be paid in advance of the Transaction – either because the new contract was a variation of the former contract that did not remove the condition precedent, or the new contract was a free-standing contract that

included the term – the claim must fail. The AO Fee was not paid in advance of the Transaction, and it is not suggested that any term of any new contract was waived.

The Applicable Legal Principles

109. The principles of DIFC law governing the issues are largely undisputed. The DIFC Contract Law provides:

(1) Article 9:

“No form required

Nothing in this Law requires a contract to be concluded in or evidenced by writing. It may be proved by any means, including witnesses.”

(2) Article 14:

“Manner of formation

A contract is concluded by the acceptance of an offer.”

(3) Article 15:

“Definition of offer

A proposal for concluding a contract constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in the case of acceptance.”

(4) Article 19:

“Mode of acceptance

(1) *A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance.*

(2) *An acceptance of an offer becomes effective when the indication of assent reaches the offeror.*

(3) *If, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act without notice to the offeror, the acceptance is effective when the act is performed.”*

(5) Article 25:

“Writings in confirmation

If a writing which is sent within a reasonable time after the conclusion of the contract and which purports to be a confirmation of the contract contains additional or different terms, such terms become part of the contract, unless

they materially alter the contract or the recipient, without undue delay, objects to the discrepancy in which case the confirmation shall have no effect.”

(6) Article 26:

“Conclusion of contract dependent on agreement on specific matters or in a specific form

Where in the course of negotiations one of the parties insists that the contract is not concluded until there is agreement on specific matters or in a specific form, no contract is concluded before agreement is reached on those matters or in that form.”

(7) Article 35:

“Validity of mere agreement

A contract is concluded, modified or terminated by the mere agreement of the parties, without any further requirements.”

(8) Article 49:

“Intention of the parties

(1) *A contract shall be interpreted according to the common intention of the parties.*

(2) *... if such an intention cannot be established, the contract shall be interpreted according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances.”*

(9) Article 50:

“Interpretation of statements and other conduct

(1) *The statements and other conduct of a party shall be interpreted according to that party’s intention if the other party knew or could not have been unaware of that intention.*

(2) *... if Article 50(1) is not applicable, such statements and other conduct shall be interpreted according to the meaning that a reasonable person of the same kind as the other party would give to it in the same circumstances.”*

(10) Article 51:

“Relevant circumstances

In applying Articles 49 and 50, regard shall be had to all the circumstances, including

(a) *preliminary negotiations between the parties;*

(b) *practices which the parties have established between themselves;*

(c) *the conduct of the parties subsequent to the conclusion of the contract;*

(d) *the nature and purpose of the contract.*”

(11) Article 57:

“Implied obligations

Implied obligations arise from:

- (a) *the nature and purpose of the contract;*
- (b) *practices established between the parties and usages;*
- (c) *good faith and fair dealing; and*
- (d) *reasonableness.*”

110. Both parties make reference to the English Supreme Court decision in *RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH & Co* [2010] UKSC 14 where Lord Clarke JSC stated at [45]:

“The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement.”

111. Both parties refer to the CFI decision in *Taaleem PJSC v National Bonds Corporation PJSC & anr* [2010] DIFC CFI 014 in which Steel J held:

“3. *The Supreme Court in RTS gave specific approval to the decision in Pagnan SpA v Feed Products Ltd. [1987J 2 Lloyd's Rep 601. There it was agreed that, although certain significant terms had not been agreed, neither party intended agreement of those terms to be a precondition to a concluded agreement. In his judgment in the Court of Appeal in Pagnan, Lloyd LJ (with whom O'Connor LJ and Stocker LJ agreed) summarised the relevant principles in this way at p 619:*

“(1) In order to determine whether a contract has been concluded in the course of correspondence, one must first look to the correspondence as a whole ... (2) Even if the parties have reached agreement on all the terms of the proposed contract, nevertheless they may intend that the contract shall not become binding until some further condition has been fulfilled. That is the ordinary 'subject to contract' case. (3) Alternatively, they may intend that the contract shall not become binding until some further terms have been agreed ... (4) Conversely, the parties may intend to be bound forthwith even though there are further terms still to be agreed or some further formality to be fulfilled ... (5) If the parties fail to reach agreement on such further terms, the existing contract is not

invalidated unless the failure to reach agreement on such further terms renders the contract as a whole unworkable or void for uncertainty. (6) It is sometimes said that the parties must agree on the essential terms and it is only matters of details which can be left over. This may be misleading, since the word 'essential' in that context is ambiguous. If by 'essential' one means a term without which the contract cannot be enforced then the statement is true: the law cannot enforce an incomplete contract. If by 'essential' one means a term which the parties have agreed to be essential for the formation of a binding contract, then the statement is tautologous. If by 'essential' one means only a term which the court regards as important as opposed to a term which the court regards as less important or a matter of detail, the statement is untrue. It is for the parties to decide whether they wish to be bound and if so, by what terms, whether important or unimportant. It is the parties who are, in the memorable phrase coined by the judge [at p 611J 'the masters of their contractual fate'. Of course the more important the term is the less likely it is that the parties will have left it for future decision. But there is no legal obstacle which stands in the way of the parties agreeing to be bound now while deferring important matters to be agreed later. It happens every day when parties enter into so-called 'heads of agreement'."

4. *The fact that parties continue to negotiate after a contract is concluded does not alter the binding nature of that agreement. RTS Flexible Systems at [49]; Chitty, §2-029. The parties may intend to go on to agree the implementation of the contract (Chitty, §2-029) or to record the terms of what has been agreed (Chitty, §2-136). Per Andrew Smith J. in Bear Stearns Bank plc v Forum Global Equity Ltd [2007] EWHC 1576 (COMM) AT [171]:*

"The proper approach is, I think, to ask how a reasonable man, versed in the business, would have understood the exchanges between the parties. Nor is there any legal reason that the parties should not conclude a contract while intending later to reduce their contract to writing and expecting that the written document should contain more detailed definition of the parties' commitment than had previously been agreed."

5. *The fact that payment is made is "a very relevant factor" in deciding whether a binding contract is made: RTS Flexible Systems at [54].*
6. *The test for whether a contract is concluded is objective in English law. However, even in English law, where the Court is determining the terms of a contract which is not written, the parties' understanding of those terms is some evidence of what the terms actually are. In Carmichael v National Power [1999] 1 WLR 2042 at 2050H - 2051 C, Lord Hoffman said:*

"In a case in which the terms of the contract are based upon conduct and conversations as well as letters, most people would find it very hard to understand why the tribunal should have to disregard the fact that Mr Lovatt and Mrs Carmichael both agreed that the C.E.G.B. were under no obligation to provide work and the applicants under no obligation to perform it. It is, I think, pedantic to describe such evidence as mere subjective belief. In the case of a contract which is based partly upon oral exchanges and conduct, a party may have a clear understanding of what was agreed without necessarily being able to remember the precise conversation or action which gave rise to that belief ...

The evidence of a party as to what terms he understood to have been agreed is some evidence tending to show that those terms, in an objective sense, were agreed. Of course the tribunal may reject such evidence and conclude that the party misunderstood the effect of what was being said and done. But when both parties are agreed about what they understood their mutual obligations (or lack of them) to be, it is a strong thing to exclude their evidence from consideration. Evidence of subsequent conduct, which would be inadmissible to construe a purely written contract (see Whitworth Street Estates (Manchester) Ltd v James Miller and Partners B Ltd. [1970] A. C. 583) may be relevant on similar grounds, namely that it shows what the parties thought they had agreed. It may of course also be admissible for the same purposes as it would be if the contract had been in writing, namely to support an argument that the terms have been varied or enlarged or to found an estoppel."

7. *By similar logic, the parties' understandings are relevant to determine:*
(a) *whether a contract was concluded or was "subject to contract"; and*
(b) *whether any such understanding was waived.*

Determining the terms of a contract

8. *The subjective intention of the parties has a place in deciding the terms of a contract under DIFC law. Article 49 of the Contract Law provides:*

"Intention of the parties

- (1) *A contract shall be interpreted according to the common intention of the parties.*
- (2) *If such an intention cannot be established, the contract shall be interpreted according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances."*

9. *Under Article 50:*

"Interpretation of statements and other conduct

- (1) *The statements and other conduct of a party shall be interpreted according to that party's intention if the other party knew or could not have been unaware of that intention.*
- (2) *If Article 50(1) is not applicable, such statements and other conduct shall be interpreted according to the meaning that a reasonable person of the same kind as the other party would give to it in the same circumstances."*

10. *Article 51 makes clear that, in determining the terms of the contract, the Court must have regards to all the circumstances, including preliminary negotiations (Article 51 (a)), the parties' conduct after the contract is concluded (Article 51 (c)) and the nature and purpose of the contract (Article 51 (d))."*

Huobi's Case

112. Huobi draws from the above:

- (1) The absence of significant agreed terms does not preclude the existence of a concluded agreement;
- (2) The fact that parties go on to record the terms of what was agreed does not alter the binding nature of an agreement;
- (3) The proper approach is to ask how a reasonable man, versed in the relevant business, would have understood the exchanges between the parties;
- (4) The test for whether a contract is concluded is objective, though the parties' understanding of its terms can be evidence of what the terms are. Similarly, the parties' understandings can be relevant to determining whether a contract was concluded; and
- (5) Subjective intention plays a role in determining the terms of a contract. Where the terms of a contract are not written, the parties' understanding of those terms is some evidence of what the terms actually are. The same logic applies to determining whether a contract has been concluded.

113. Huobi also notes that the Court of Appeal in *Deyaar Development PJSC v Taaleem PJSC and National Bonds Corporation PJSC* [2015] CA 010 also referred to *RTS*. Hwang CJ stated that whether there was a binding contract between the parties depends on what was communicated between the parties by words or conduct and regard must be given to the subsequent conduct of the parties when considering their common intention ([100]-[101]).

114. Huobi submits that in deciding whether or not a contract was formed, the Court needs to determine whether the words and conduct of the parties at the 3 February Meeting objectively leads to the conclusion that there was an intention to create legal relations. The Court is not being invited to re-determine whether or not Mr Ahmadi waived the strict requirement of payment of the AO Fee as a condition precedent to an earlier agreement reached on 29 January 2020. The Court is not tasked with investigating whether Mr Ahmadi made an outward representation or engaged in some conduct, at the Meeting, which would have been understood by an observer to have clearly and unequivocally waived the payment of the AO Fee as a condition precedent.

115. Huobi suggest that the principles governing whether the words and conduct of the parties at the Meeting would lead an objective observer to conclude that there was an intention to contract are as follows:^{36th}

- (1) There is a presumption that parties to commercial transactions intend to create legal relations. The onus of proving that there was no such intention is a heavy one, which rests with the party who asserts that a contract was of no legal effect: *Chitty on Contracts* (36th edition), paragraphs 4-211 to 4-212. I note that *Chitty* observes that in deciding whether the onus has been discharged, the courts will be influenced by the importance of the agreement to the parties, and by the fact that one of them acted in reliance on it;
- (2) Where there has been substantial performance of a party's obligations, the Court will readily find there was an intention to create legal relations, rather than the more drastic position of denying the existence of a contract altogether. Huobi cites the seminal passage from *G. Percy Trentham Limited v Archital Luxfer Limited & or* (1993) 1 Lloyd's Rep 25 in which Steyn LJ (as he then was) stated:

"The fact that the transaction was performed on both sides will often make it unrealistic to argue that there was no intention to enter into legal relations. It will often make it difficult to submit that the contract is void for vagueness or uncertainty. Specifically, the fact that the transaction is executed makes it easier to imply a term resolving any uncertainty, or, alternatively, it may make it possible to treat a matter not finalised in negotiations as inessential. In this case fully executed transactions are under consideration. Clearly, similar considerations may sometimes be relevant in partly executed transactions, if a contract only comes into existence during and as a result of performance of the transaction it will frequently be possible to hold that the contract impliedly and retrospectively covers precontractual performance."

116. Huobi makes reference to my decision in *Nancy v Narcissa DIFC* [2023] DIFC CFI 098 (6 August 2025) where I considered the law relating to the intention to create legal relations:

- "83. I accept that the threshold question is whether it is necessary to imply a contract to give business reality to a transaction and to create enforceable obligations between parties and that the material facts may be tested by considering whether parties would or might have acted exactly as they did in the absence of a contract: *The Aramis* [1989] 1 Lloyd's Rep 213 at 224, per Bingham LJ.
84. Secondly, if the conduct relied upon is no more consistent with an intention to contract than with an intention not to contract it is not enough. It must be necessary to identify conduct referable to the contract contended for or, at least, conduct inconsistent with there being no contract made between the parties to the effect contended for. It will be fatal to the implication of a contract if the parties would or might have acted exactly as they did in the absence of a contract: *ibid.*

85. *Thirdly, the Court must be able to infer an intention to create legal relations: Mackie Motors (Brechin) Limited v RCI Financial Services Limited [2023] EWCA Civ 476 [37].*

86. *Fourthly, while whether a contract should be implied is ultimately a matter of law and involves an objective analysis of all the relevant circumstances. Lord Justice Steyn (as he then was) held in G. Percy Trentham Limited v Archital Luxfer Limited & or (1993) 1 Lloyd's Rep 25:*

[passage cited above]

He emphasized that this was a commercial transaction which involved one party carrying out work and the other paying for it. Both parties had intended to enter into binding contractual relations. It did not matter that the parties' conduct could not be precisely analysed in terms of offer and acceptance.

87. *Fifthly, while the test is objective, the parties' understanding that there is no such contract in place explaining the terms of their relationship, and their inability to reach an agreement on the terms which such a contract should contain, are extremely powerful factors militating against any such implication. It will be unrealistic to imply a contract in a case where a party has deliberately sought to avoid entering into a contract: Tilson [50]-[51]."*

117. Huobi alleges on the facts that what was communicated between the parties at the Meeting, by words or conduct, would lead the objective observer to the conclusion that they intended to create legal relations. As is material, the relevant words and conduct include:

- (1) Mr Ahmadi's silence in respect to express discussions concerning payment of the AO Fee.
 - (a) Mr Al Ali referred to a conversation with Mr Ahmadi at the Meeting in his witness statements. That evidence is referred to in the Judgment. Mr Al Ali stated that the discussion was to the effect that the AO Fee would be deducted from the proceeds of the Transaction and that Mr Ahmadi did not object to that suggestion. Mr Saxena gave corroborating evidence.
 - (b) Mr Thurner, under cross-examination, stated that a conversation took place between Mr Al Ali and Mr Ahmadi in Arabic (which he did not understand), but it was clear from Mr Thurner's contemporaneous understanding of the conversation that it had been agreed that the AO Fee would be paid from the proceeds of the Transaction.
 - (c) Mr Ahmadi was alone in denying that the above conversation took place. The Judge described Mr Ahmadi's evidence on this issue as "weak" and found that the conversation described by the Claimants' witnesses did take place and was on the subject of payment of the AO Fee.

- (d) Specifically, the Judge held that Mr Ahmadi expressly observed that Huobi DMCC was not yet a client of Tabarak because it had not paid the AO Fee. In response, Mr Al Ali said that the Fee would be paid that day out of the proceeds of the Transaction, and Mr Ahmadi *“did not respond to this statement from Mr Al Ali but took no steps to stop the pending transaction”*.
 - (e) The Judge found that, by the time he left the Meeting, Mr Ahmadi must have understood that Tabarak was not simply allowing its meeting room to be used as a space for the Transaction, but he *“must have understood that Mr Thurner would be playing an intermediary role for which it would be paid a fee and/or a commission”*.
 - (f) If Mr Ahmadi must have understood the outcome of the Meeting to be that Tabarak would play an intermediary role for which it would receive a fee, an objective observer would plainly have understood the same thing i.e. that Huobi DMCC was engaging Tabarak to act as an intermediary, for which it would be paid.
- (2) Mr Thurner’s authority at the Meeting.
- (a) It is common ground that Mr Thurner did not possess authority to waive the AO Fee as a condition precedent to the 29 January 2020 Agreement, which was therefore never incepted. When he had previously spoken to Mr Al Ali on the telephone on 29 January 2020, the arrangements concerning the AO Fee were at that time subject to Mr Ahmadi’s final approval.
 - (b) However, that is immaterial to the retrial. What matters is Mr Thurner’s authority at the Meeting, and in particular during the period that followed Mr Ahmadi’s conduct above with respect to the AO Fee, and the *“game changing”* scenario that unfolded once the Buyer produced the Trezor Wallet and insisted upon its use which, on the Judge’s findings, meant that any previous agreement reached with respect to the Transactions no longer applied.
 - (c) When Mr Ahmadi left the Meeting, it was on the understanding that Tabarak would be acting as an intermediary in the Transaction in return for payment of a fee. He was aware that the Transaction would be going ahead, and left Mr Thurner behind in the knowledge that he would be acting as an intermediary. Subsequently, at the Meeting, when the contract was

concluded, Mr Thurner had authority for “*all that he did and said throughout the course of the 3F Meeting.*”

- (d) In the premises, Mr Thurner’s words and conduct at the Meeting are attributable to Tabarak for the purposes of the Court’s determination of whether those words and conduct would lead an objective observer to conclude that there was a binding contract.
- (3) Tabarak’s words and conduct in negotiating the contract at the Meeting.
- (a) The Buyer’s insistence that the Trezor Wallet be used, constituted an offer which materially changed the nature of the proposed Transaction, and (after some further discussion) was accepted by Huobi DMCC and by Tabarak, the latter acting through Mr Thurner.
 - (b) When the Buyer insisted on using its own Trezor Wallet, Mr Saxena expressed concerns about this and asked Mr Thurner whether he shared those concerns. The Judge held that Mr Thurner “*replied saying words along the lines that he had no concerns as once the BTC were transferred, the Wallet would be locked in Tabarak’s safe, to which only Tabarak would have access*”. Mr Thurner also made statements that “*the Wallet would be in Tabarak’s custody in its safe, so the BTC would be safe and there was no reason to be concerned*”.
 - (c) Further, it was only during the course of the Meeting that Tabarak’s fees and commission for the Transaction were agreed. The Judge accepted Mr Saxena’s evidence that, during the Meeting, he was approached by Mr Thurner, on behalf of the Tabarak, seeking to increase Tabarak’s fees as a consequence of the inconvenience that it had been put to by the Buyer. Mr Thurner had authority to conduct those negotiations on behalf of Tabarak and agree a fee for its role in the Transaction.
 - (d) Huobi referred to the Judge’s findings set out at paragraph 55 above.
 - (e) Based on the Judge’s findings: (i) the previously negotiated contract from 29 January 2020 was of no application due to non-payment of the AO Fee and the “*game changing*” introduction of the Trezor Wallet; and (ii) thereafter, Mr Thurner was authorised by Tabarak for all that he did and said at the Meeting, which must include his subsequent negotiation and agreement of

Tabarak's fees for the new transaction entered into following the "*game changing*" scenario that unfolded at the Meeting.

- (f) Mr Thurner, acting for Tabarak, made an offer during the course of the Meeting that Tabarak would receive the increased commission for its role in the Transaction (which was a better deal for Tabarak than had been previously discussed), and that offer was accepted by Huobi DMCC and the Buyer.
 - (g) An objective bystander would conclude that the negotiation of fees and commission, by an authorised agent, after Mr Ahmadi's departure from the meeting room in circumstances where he knew that Tabarak would be acting as an intermediary in exchange for a fee/commission, and having taken no steps to stop Tabarak's involvement in the Transaction, are words and conduct which are consistent with an intention to create legal relations.
- (4) Tabarak's words and conduct in performing the contract at the Meeting.
- (a) Following the "*game changing*" introduction of the Trezor Wallets, Huobi's representatives declined to allow the Buyer's representatives to set up the Trezor Wallet, and were also unwilling to do so themselves. In the circumstances, Mr Thurner, with Tabarak's authority, played an active and critical role in the execution of the Transaction.
 - (b) After some consideration, "*Huobi agreed to the proposal that Mr Thurner should set up the Wallet into which Huobi would transfer the 300 BTC*".
 - (c) Mr Thurner therefore: (i) set up the Wallet, (ii) plugged it into a laptop, (iii) inputted a pin code whereupon the Wallet's address was sent to Huobi DMCC and the Buyer, (iv) noted the words of the mnemonic which were written down by Ms Zavyalova, and (v) passed the laptop to Huobi DMCC and the Buyer to note their six words down.
 - (d) Ms Zavyalova shared the exchange rate which formed the basis of the Transaction, and Mr Thurner circulated the address for the Trezor Wallet so that BTC could be transferred to it. Thereafter Mr Thurner confirmed the price for two tranches of BTC.
 - (e) Communications regarding USD transfers were routed through Tabarak as an intermediary, by emails from Huobi DMCC's representatives to Mr

Thurner and Ms Zavyalova, consistent with the role that Tabarak was being remunerated for.

- (f) Mr Thurner confirmed and screenshotted the balance shown on the Trezor Wallet to demonstrate that 300 BTC had been transferred, whereupon he placed the Trezor Wallet in a safe situated in Mr Ahmadi's office.
 - (g) In circumstances where Huobi DMCC was uncomfortable proceeding with the Transaction following the "*game changer*", it was eventually agreed that the Trezor Wallet would be used on the condition that Tabarak fulfilled its role in the Transaction as an intermediary, by setting up the Trezor Wallet and the process through which BTC and USD would be transferred.
 - (h) The contemporaneous records demonstrate that Tabarak's bank account was due to receive payment for the BTC from the Buyer.
 - (i) If Mr Thurner had stated that Tabarak was not willing to participate in the Transaction involving the Trezor Wallet, it would not have gone ahead at all, because Huobi DMCC had indicated that it was not content for the Trezor Wallet to be set up by any party other than Tabarak. Had it not been for Tabarak's involvement as an intermediary, the Transaction would not have taken place at all (and certainly not on that day).
 - (j) An objective bystander would have concluded, by Tabarak's actual performance of its role as an intermediary in the Transaction, that there was an intention to create legal relations, consistent with Tabarak's expectation that it would receive a fee for performing that role.
- (5) Conduct after the Meeting.
- (a) Unlike in English Law, as a matter of DIFC Law a contract may be interpreted by reference to the conduct of the parties subsequent to the conclusion of the contract: Article 51(c) of the DIFC Contract Law.
 - (b) Further, terms contained in writings in confirmation, sent within a reasonable time after the conclusion of a contract, become binding terms unless the recipient objects to any discrepancy without undue delay: Article 25 of the DIFC Contract Law.

- (c) It is significant that Mr Saxena sent Mr Thurner a WhatsApp message at 1:28pm (approximately 20 mins after the BTC was transferred) setting out a table which described Tabarak's entitlement to payment of "*Tabarak's Share*" of 0.25% of the total purchase monies due to be paid by the Buyer, as well as the fact that sums paid to Huobi DMCC by Tabarak would be paid net, "*Less Tabarak Account Opening Fee including VAT*" (i.e. the "**Written Confirmation**").
- (d) The Written Confirmation had the effect of making the payment terms binding contractual terms. Further or alternatively, it is highly persuasive evidence as to the intentions of the parties, and in any event an objective bystander would, in the circumstances, have viewed the Written Confirmation as evidencing an intention to create legal relations.
- (e) On 16 February 2020, Mr Thurner sent a "*notice before legal action*" to the Buyer demanding that he settle his "*responsibility against Huobi and also against us Tabarak*".

Tabarak's Case

118. It is Tabarak's case that the allegation that a binding contract was reached is bound to fail because it would require this Court to find that it was a term of the new contract that the AO Fee would be paid out of the proceeds of the Transaction in circumstances where the Judge found that payment of the AO Fee was a condition precedent in respect of the oral agreement reached in advance of the 3 February Meeting and that that agreement was not incepted because the condition precedent was not waived at the Meeting.
119. Tabarak says that it is an essential part of the Claimants' case that it was a term of the new agreement that the AO Fee would be paid from the proceeds of the Transaction. This is inconsistent with the Judge's factual findings. The Judge found that Mr Al Ali acting for Huobi DMCC and Mr Thurner acting for Tabarak did make an oral agreement in relation to the transaction planned to take place on 3 February 2020 and in relation to that agreement the parties intended that it

"would operate alongside and within the framework of the AoA signed by both parties. ... the parties appreciated that the AoA would only incept once the AO Fee had been paid ..."

and at the Meeting the AO Fee condition precedent was not waived.

120. Tabarak submits that if it was a term of a new contract formed at the Meeting that the AO Fee would be paid from the proceeds of the Transaction, then it follows that at that same Meeting Tabarak must have waived the condition precedent in relation to the agreement found by the Judge at paragraph 60 of the Judgment. However, the Court had already addressed the events at that Meeting, and found that the AO Fee condition precedent was not waived at the Meeting. The findings of the Judge relate to the same events and apply just as much to the contract on the terms that the Claimants now allege as they do to the contract referred to by the Judge. In light of that finding, Tabarak submits that it is therefore not open to this Court to find that it was a term of that new agreement that the AO Fee would be paid out of the Transaction proceeds.
121. Tabarak submits that, as the Claimants admit, Huobi DMCC had to pay the AO Fee. If there was no agreement that it would be paid from the proceeds of the Transaction, then it must have been payable in advance of any transaction for the agreement to become binding, but it was not. Thus, there can have been no contract. Further, as noted by the Judge, Mr Al Ali admitted in cross-examination that it was his understanding that Mr Ahmadi would be the final approval for the AO Fee. It is therefore not understood how Huobi DMCC now alleges that after Mr Ahmadi left the Meeting, Mr Thurner agreed on behalf of Tabarak that the AO Fee would be paid from the proceeds of the Transaction. The Judge also made a specific finding with regard to Mr Thurner's lack of apparent authority to agree that the Fee could be paid out of the Transaction proceeds, and that Huobi DMCC were on notice that Mr Ahmadi was making it his business to ensure the Fee was paid.
122. Furthermore, says Tabarak, a finding that Tabarak (through Mr Thurner) concluded a contract on the basis that the AO Fee would be paid out of the proceeds of the Transaction would have the effect that if the Transaction did not complete, Tabarak would not get paid anything. This would be inconsistent with the Court of Appeal's finding that "*Tabarak would be paid for undertaking these responsibilities*".
123. Yet further still, Tabarak contends that the Claimants have not particularised how any such term was agreed. The Claimants have not alleged that there was an express agreement after Mr Ahmadi left the Meeting that the AO Fee would be paid out of the proceeds of the Transaction. The basis of their allegation is that because there was an express agreement to increase the commission, "*it was therefore agreed*" that the AO Fee would be paid from the proceeds of the Transaction, but it does not follow from an agreement that the commission would be increased that Tabarak agreed that the AO Fee would be paid out of the proceeds of the Transaction.

124. Tabarak says that the Claimants further rely on Article 25 of the DIFC Contract Law to allege that this term became a term of the contract because of a WhatsApp message sent by Mr Saxena to Mr Thurner after the Meeting. However, for Article 25 to operate a contract has to have already been concluded: if it was not already a term of the contract that the AO Fee would be paid from the proceeds of the Transaction (i.e., a condition precedent of any new agreement was payment of the AO Fee), then given the AO Fee had not been paid, no contract had been concluded, thus Article 25 cannot apply. Further, additional or different terms do not become part of a contract pursuant to Article 25 where that term materially alters the contract: the addition of a term that the AO Fee be paid out of the proceeds of the Transaction would amount to a material alteration of the agreement because it would have the effect that Tabarak would not receive the AO Fee (which was a “one-time non-refundable Processing/Due Diligence/Administration fee”) if the Transaction did not successfully complete. In any event, nothing in that WhatsApp communication alters the position that (a) the Judge has already dealt with events at the Meeting and concluded that the condition precedent was not waived, and (b) the Judge has already concluded that, to Huobi DMCC’s knowledge, Mr Thurner was not authorised to waive the condition precedent, such that any message sent to Mr Thurner could hardly alter that position.

Discussion & Conclusions

125. I have made it clear throughout these proceedings that I have been perplexed by the apparent inconsistency on the one hand between the findings at paragraphs 80 to 83 of the Judgment:

“... I find that: (i) when talking to Mr Al Ali before the meeting got down to business, Mr Ahmadi did say that Huobi was not a client of Tabarak because it had not paid the AO Fee; (ii) in response, Mr Al Ali said to Mr Ahmadi that the fee would be paid that day out of the proceeds of the Transaction; and (iii) Mr Ahmadi did not respond to this statement from Mr Al Ali but took no steps to stop the pending transaction.

81. *The question that arises from this finding is whether, by his reference to Huobi’s failure to pay the AO Fee and his failure to respond to Mr Al Ali’s statement that the fee would be paid that day out of the proceeds of the Transaction: (i) Mr Ahmadi agreed to waive the strict requirement that the fee had to be paid before Huobi could become an onboarded client of Tabarak; or (ii) caused Tabarak to be estopped from denying that the precondition had been waived in light of the fact that a sale of BTC was shortly to take place in Tabarak’s offices between Huobi and Mr Morozov with the assistance of Mr Thurner.*
82. *In my judgment, Mr Ahmadi’s failure to respond to Mr Al Ali and letting the transaction proceed, would not have led an objective observer in the position of Mr Al Ali and Mr Saxena clearly and unequivocally to*

conclude that, on behalf of Tabarak, he was waiving the AO Fee condition precedent.

83. *It follows that I find the agreement I have held to have been concluded between Huobi and Tabarak never became a binding contract.”*

and on the other hand:

“I find that the fees and commission due to Tabarak for their role in the Transaction were agreed on 3 February 2020 sometime before the 300 BTC were transferred to Mr Morozov’s Trezor Wallet.”

- “26. *After the price of the BTC had been settled and agreed, Mr Nahak of the Huobi team transferred the 300 BTC to the Wallet. Proof of the transfer was confirmed through the “Internet Blockchain Watch” and Mr Thurner sent to the parties a screen-shot of the balance shown on the Wallet. The device was then locked in the safe situated in Mr Ahmadi’s room”*
- “45. *... I do not accept his evidence that his understanding was that Tabarak was simply allowing its meeting room to be used as a space in which Huobi would sell BTC to Navarcon/Mr Morozov. In my judgment, Mr Ahmadi must have understood that Mr Thurner would be playing an intermediary role for which it would be paid a fee and/or a commission.”*

In other words, while Mr Ahmadi was found not to have waived the AO Fee condition precedent prior to the start of the 3 February Meeting, he allowed the Meeting to proceed and left. He may have anticipated that Mr Thurner would call the Transaction off. Instead, the proposed modalities of the Transaction changed dramatically and Mr Thurner, acting within his apparent authority, agreed an increased commission for Tabarak, executed Tabarak’s part in the Transaction, including depositing the Trezor Wallet in Mr Ahmadi’s safe. Mr Ahmadi said in paragraph 61 of his witness statement dated 12 October 2021:

“Sometime later, I did not take a note of the time (but I remember that it was during the usual window for lunch, so possibly between 12 noon and 1pm), the parties came to my office and asked if a small electronic device which looked like a USB drive (but which I now know was the Trezor wallet, and which I shall refer to as the Trezor Wallet) could be stored in my safe whilst they went out to lunch. I agreed, and in front of Mr Thurner, Mr Saxena, Sultan Bin Kharsham Al Ali, and Mr Nahak, the Trezor Wallet was put into my safe, the door locked. I did not ask any questions about the nature of the transaction, and I did not appreciate that this tiny device was holding approximately USD 3 million worth of assets.”

Mr Thurner denied that he had access to Mr Ahmadi’s safe (paragraph 26 of his witness statement dated 9 November 2021).

126. When I expressed my perplexity during oral closing submissions, Counsel for Tabarak, accepted that these were matters the Judge did not address. While I am bound to accept that Mr Ahmadi did not appreciate the Trezor Wallet held approximately USD 3 million

worth of assets, he must have appreciated that, notwithstanding his statement that Huobi were not clients, some form of dealing must have taken place and appeared to be ongoing over the lunch period (the Judge had found that Mr Ahmadi must have understood that Mr Thurner would be playing an intermediary role for which it would be paid a fee and/or a commission) as all the Huobi representatives and Mr Thurner came to his office. He must also have appreciated that the device was of some value in connection with the dealings otherwise there would have been no need to lock it in his safe. What he did not do, is at least ask why he was being asked to do this when he had said that Huobi were not Tabarak's clients and the Transaction could not proceed unless and until the AO Fee was paid.

127. I do however find many of Huobi's numerous points on this issue unpersuasive. I cannot in these proceedings revisit the Judge's findings that Mr Ahmadi did not expressly agree that the AO Fee would be payable out of the Transaction proceeds. I cannot accept that simply because the modalities of the Transaction changed Mr Thurner was clothed with the authority he did not previously possess to agree that the AO Fee would be payable out of the Transaction proceeds. I agree with Tabarak that Article 25 of the DIFC Contract Law does not assist Huobi.
128. As at the commencement of the Meeting the Judge found that Mr Ahmadi made it clear that Huobi was not a client of Tabarak because it had not paid the AO Fee and did not respond to the suggestion that the Fee would be paid that day out of the proceeds of the Transaction but merely left without taking steps to stop the pending transaction. I am bound to accept that as the Meeting started there was no contract in being between the parties. The issue then is whether subsequent events would persuade an objective observer to conclude that there was an intention to contract.
129. Tabarak submits that if the Transaction did not close the AO Fee would not have been paid. That is not correct, it would have earned the AO Fee in any event. The fee was not insubstantial (USD 26,250). It was never envisaged that Tabarak would act gratuitously. In answer to the threshold question – would the Transaction have gone ahead if there were not an agreement on the part of Huobi to pay Tabarak, the answer must be "no". This was a commercial transaction which involved one party providing services and the other paying for them.
130. This was an important transaction for both parties. I accept that there is a presumption that parties to commercial transactions intend to create legal relations. Further, not only was it agreed that Tabarak would provide services for reward, but the services were also

provided. This makes it unrealistic to argue that there was no intention to enter into legal relations.

131. While Mr Ahmadi's silence before proceedings commenced may not be taken to have amounted to a waiver of the AO Fee, I consider that the position was different when he allowed the Trezor Wallet to be stored in his safe. He must have realised that he was facilitating the Transaction during its execution in which Tabarak had an intermediary role for reward. In my judgment an objective observer would have been likely to conclude that Mr Ahmadi approved the Transaction taking place.
132. I therefore conclude that a further contract did arise between the parties sometime before the 300 BTC were transferred to Mr Morozov's Trezor Wallet notwithstanding that it could not be precisely analysed in terms of offer and acceptance (as Steyn LJ stated in *Percy Trentham v Archital Luxfer*. The coincidence of offer and acceptance may not necessarily represent the mechanism of contract formation in the case of a contract alleged to have come into existence during and as a result of performance.)

CONTRACT TERMS ISSUE

Introduction

133. While I have found that a new contract came into existence during the performance of the Transaction that was not subject to the AO Fee condition precedent, it is necessary to consider its terms, primarily whether it included a term that Tabarak was under a strict liability to transfer 300 BTC back to Huobi DMCC if the purchase money was not received from the Buyer or whether it imposed an obligation to take reasonable care in the performance of the revised role allocated to Tabarak at the 3 February Meeting.
134. The importance of the issue is that it is the Claimants' case that the duty to return the 300 BTC if the Transaction did not close was absolute. Thus, even if the BTC were lost notwithstanding that Tabarak had exercised reasonable care, Tabarak would be in breach of the duty. Tabarak's case is that its duty was to exercise reasonable care of the BTC and therefore cannot be held liable if the BTC were lost notwithstanding that it had exercised reasonable care.
135. The context of the issue is that the Judge found that Tabarak *did* exercise reasonable care. Thus, if Tabarak is correct in its interpretation of the contract, the claim must fail. It is fair to say that Tabarak majored on this issue approaching it from several different angles so that it occupied the main thrust of Tabarak's oral and written submissions.

136. While I have not held that the new contract was a variation of the previous abortive contract, Tabarak contends that it has always been the Claimants' case, and is in fact the case, that its terms materially duplicated those of the abortive contract and that the only difference (in addition the absence of the AO Fee condition) was the increased commission.

Huobi's Case

137. Huobi refers to Articles 49 to 51 and 57 of the DIFC Contract Law (paragraphs 109(8) to (11) above) and *RTS v Muller* (paragraph 110 above).

138. The DIFC Contract Law is materially different from English Law common law (and that of other jurisdictions that follow it) when it comes to the implication of terms, but there are some common principles. DIFC law permits the implication to terms according to "*the nature and purpose of the contract*". Huobi refers to the decision of the United Kingdom Privy Council in *Ali v Petroleum Company of Trinidad and Tobago* [2017] UKPC 2, [7]:

"... Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd [2015] UKSC 72; ... the process of implying a term into the contract must not become the re-writing of the contract in a way which the court believes to be reasonable [permissible under DIFC Law], or which the court prefers to the agreement which the parties have negotiated. A term is to be implied only if it is necessary to make the contract work, and this it may be if (i) it is so obvious that it goes without saying ... and/or (ii) it is necessary to give the contract business efficacy. Usually the outcome of either approach will be the same."

139. Huobi plead in their Statement of Case that based on the conduct of the parties and the statements made prior to, at, and subsequent to, the 3 February Meeting, the contract contained the following "*express and/or implied*" terms:

- (1) Tabarak would set up the Trezor Wallet and provide Huobi DMCC with a BTC address for receipt of 300 BTC.
- (2) The Trezor Wallet, and not the Tabarak wallet, would be used to receive 300 BTC from Huobi DMCC, once the price per coin had been agreed.
- (3) Tabarak would have control over the 300 BTC received from Huobi DMCC.
- (4) Having received the BTC from Huobi DMCC, Tabarak would only transfer the BTC or allow the BTC to be transferred to the Buyer once the purchase money had been paid by the Buyer into an account maintained by Tabarak in Dubai.

- (5) Once the purchase money was received by Tabarak, Tabarak would transfer the BTC to the Buyer, and transfer the proceeds that it received from the Buyer to an account nominated by Huobi DMCC, net of the AO Fee which would be paid to Tabarak out of said proceeds.
- (6) If the purchase money was not received from the Buyer, Tabarak would transfer 300 BTC back to Huobi DMCC.
- (7) In consideration of the foregoing, Huobi DMCC would pay Tabarak the increased commission that was agreed with Mr Thurner at the Meeting, and the AO Fee, both of which would be paid out of the proceeds of the Transaction.

140. In response Tabarak's asserted that any contract did not impose the obligations of strict liability for which the Claimants contend, and imposed no duty on Tabarak stricter than an obligation to take reasonable care in the performance of the revised role allocated to Tabarak at the Meeting.

141. In its skeleton argument Huobi maintained that whether it was an express or implied term, the obligation that if the purchase money was not received from the Buyer, Tabarak would transfer 300 BTC back to the Huobi DMCC was a duty to achieve a specific result.

142. Huobi noted Articles 59 and 60 of the DIFC Contract Law:

“59. Duty to achieve a specific result; duty of best efforts

- (1) *To the extent that an obligation of a party involves a duty to achieve a specific result, that party is bound to achieve that result.*
- (2) *To the extent that an obligation of a party involves a duty of best efforts in the performance of an activity, that party is bound to make such efforts as would be made by a reasonable person of the same kind in the same circumstances.*

60. Determination of kind of duty involved

In determining the extent to which an obligation of a party involves a duty of best efforts in the performance of an activity or duty to achieve a specific result, regard shall be had, among other factors, to:

- (a) *the way in which the obligation is expressed in the contract;*
- (b) *the contractual price and other terms of the contract;*
- (c) *the degree of risk normally involved in achieving the expected result; and*
- (d) *the ability of the other party to influence the performance of the obligation.”*

143. Huobi points out that it is only after the first step is completed, so that the express terms have been identified and interpreted, should the court undertake the next step of identifying, by inference, the implied terms of the contract: *Realestate.com.au Pty Ltd v Hardingham* [2022] HCA 39 [109]; *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* at [28].
144. Huobi DMCC noted that the DIFC Contract Law mirrors UNIDROIT (*The Industrial Group Ltd v Abdelazim El Shikh El Fadil Hamid* [2022] CA 005 and CA 006 (September 20, 2022) [111]) and pointed the Court to UNIDROIT's official commentary with respect to Articles 59 and 60.
145. As to Article 59 the commentary states in relation to the equivalent UNIDROIT provision:

“1. Distinction between the duty to achieve a specific result and the duty of best efforts

The degree of diligence required of a party in the performance of an obligation varies considerably depending upon the nature of the obligation incurred. Sometimes a party is bound only by a duty of best efforts. That party must then exert the efforts that a reasonable person of the same kind would exert in the same circumstances, but does not guarantee the achievement of a specific result. In other cases, however, the obligation is more onerous and such a specific result is promised. The distinction between a “duty to achieve a specific result” and a “duty of best efforts” corresponds to two frequent and typical degrees of severity in the assumption of a contractual obligation, although it does not encompass all possible situations. Obligations of both types may coexist in the same contract. For instance, a firm that repairs a defective machine may be considered to be under a duty of best efforts concerning the quality of the repair work in general, and under a duty to achieve a specific result as regards the replacement of certain spare parts.

2. Distinction provides criteria for determining whether a party has performed its Obligations

Taken together, the two paragraphs of this Article provide judges and arbitrators with criteria by which correct performance can be evaluated. In the case of an obligation to achieve a specific result, a party is bound simply to achieve the promised result, failure to achieve which amounts in itself to non-performance, subject to the application of the force majeure provision (see Article 7.1.7). On the other hand, the assessment of nonperformance of an obligation of best efforts calls for a less severe judgment, based on a comparison with the efforts a reasonable person of the same kind would have made in similar circumstances. This distinction signifies that more will be expected from a highly specialised firm selected for its expertise than from a less sophisticated partner.”

146. As to the equivalent to Article 60:

“1. Criteria for determining the nature of the obligation

It is important to determine whether an obligation involves a duty to achieve a specific result or simply a duty of best efforts, as the obligation is more

onerous in the former case. Such a determination may sometimes be difficult. This Article therefore establishes criteria which may offer guidance to parties, judges and arbitrators, although the list is not exhaustive. The problems involved are frequently matters of interpretation.

2. Nature of the obligation as expressed by the contract

The way in which an obligation is expressed in the contract may often be of assistance in determining whether the parties intended to create a duty to achieve a specific result or a duty of best efforts.

3. Price or other terms of the contract

The contractual price or other terms of the contract may also offer clues as to the nature of an obligation. An unusually high price or another particular non-monetary reciprocal obligation may indicate a duty to achieve a specific result in cases where a mere duty of best efforts would normally be assumed. Clauses linking payment of the price to the successful outcome of the operation, penalty clauses applicable if the result is not achieved and hardship clauses enabling a party to adapt the contract if circumstances make it too harsh to perform as initially agreed are other examples of contractual terms which may – in one way or another – assist in determining the nature of the obligation in question.

4. Degree of risk in performance of an obligation

When a party's performance of an obligation normally involves a high degree of risk it is generally to be expected that that party does not intend to guarantee a result, and that the other party does not expect such a guarantee. The opposite conclusion will be drawn when the desired result can as a rule be achieved without any special difficulty."

147. Huobi's primary case is that the contract was a contract in which the terms material to this retrial were express terms. In particular:

- (1) Prior to the Meeting, there were extensive discussions concerning the structuring of the Transaction which, though ultimately superseded, informed the nature of the role that Tabarak would play in the transaction i.e. as an intermediary, whose function was to ensure that the BTC and purchase monies were securely transferred, in circumstances where neither Huobi DMCC nor the Buyer trusted one another.
- (2) It had always been a feature of the Transaction that no BTC would be transferred to the Buyer until the purchase monies had been received by Tabarak. The contract concluded at the Meeting was based on the same premise.
- (3) At the Meeting, there were express discussions about the terms of the contract, including in respect of the process that would be adopted following the introduction of the Trezor Wallet, the terms governing payment of the AO Fee, and the amount

of commission that Tabarak would receive for its role as an intermediary in the Transaction.

148. Based on those discussions and the conduct of the parties, Huobi submits that a contract was concluded at the Meeting which contained the material terms set out at paragraph 139 above. The subjective intention of the Parties is relevant to determining the terms of the contract under DIFC Contract Law Article 49 and *Carmichael v National Power* [1999]. Mr Thurner accepted, under cross-examination, that he understood that whilst the Trezor Wallet was in Tabarak's custody, nobody could access the BTC and that, if payment was not made by the Buyer, the BTC would simply have been transferred back to Huobi DMCC. Mr Al Ali's subjective understanding of what was agreed was the same: if the money was not received by Tabarak, then the BTC would be returned to Huobi DMCC.
149. Huobi's secondary position was that the terms above were also capable of being implied terms and, however characterised, the terms set out above were consistent with the Judge's decision at first instance which, without identifying whether they were express or implied terms, found that specific terms were orally agreed by Mr Al Ali acting for Huobi DMCC and Mr Thurner acting for Tabarak. The critical term, for the purposes of the retrial is that, if the purchase money was not received, Tabarak would transfer the BTC back to Huobi DMCC.
150. Huobi submits that terms should be implied by necessity where it is so obvious it goes without saying and/or it is necessary to give business efficacy. The evidence given by both Mr Thurner and Mr Al Ali supports the implication of such a term given both had clearly understood that is what would have happened if the purchase money had not been paid by the Buyer. Huobi DMCC refers to the judgment of the Court of Appeal at [167]:

"It is to be noted that the Judge had found at paragraph [60] of the judgment that it was an express term of the contract he concluded had not incepted that if the purchase money were not received, Tabarak would transfer the BTC back to Huobi. If there were a contract that did come into effect after the non-incepted contract (and I emphasize "if"), I consider it is strongly arguable that it was an essential element and was necessary to give meaning to Tabarak's involvement in the transaction that Tabarak would transfer the BTC back to Huobi if payment were not received from the Buyers. Even if there were no express agreement in these terms, it would be an implied obligation necessarily arising from the nature and purpose of the transaction"

151. Huobi asserts that whether an express or an implied term, Tabarak's obligation to transfer 300 BTC back to Huobi DMCC if no purchase monies were received from the Buyer was a duty to achieve a specific result.

- (1) Having regard to the common intention of the parties, the only purpose of Tabarak's involvement was to ensure that the BTC was held safely, and would be returned to Huobi DMCC if the Buyer did not pay (with a mirror obligation with respect to the purchase money from the Buyer's perspective). Importantly, for the purposes of the retrial, Tabarak conceded before the Court of Appeal that "*in the 'new world' following the "game changer", it was the function of Tabarak to stop the Buyers from getting their hands on the BTC until they had paid for them*". It would make little sense for the term to have been a duty to take reasonable care, as Tabarak's role was limited to holding the BTC securely and only releasing it when the necessary conditions for doing so were met. Tabarak's involvement was intended to mitigate the risks and trust issues arising from the parties engaging directly, and if Tabarak could not adequately guarantee that it would safely take control of the assets, there would have been no purpose to its involvement at all.
- (2) The way that the obligation was expressed in the contract is material to the Court's determination of the kind of duty involved: Article 60(a) of the DIFC Contract Law. An illustration given in the official commentary for UNIDROIT, states that a party who undertakes that "*work will be completed*" before a particular time assumes an obligation to achieve a specific result, where a party who undertakes "*to try to complete the works*" by a particular date is under a duty of best efforts. The term found by the Judge to have existed was that "*(ii) Tabarak would only transfer the BTC to Navarcon once the purchase money had been paid by Navarcon into an account maintained by Tabarak in Dubai; (iii) if the purchase money was received into Tabarak's account, Tabarak would transfer the BTC to Navarcon and transfer the net proceeds from the recipient account to an account nominated by Huobi; (iv) if the purchase money was not received, Tabarak would transfer the BTC back to Huobi*". Those terms were described in mandatory terms, with a specific result in mind. Nothing in the language used by the Judge is consistent with there being an express or implied term requiring Tabarak to act under a duty to take reasonable care.
- (3) The commission payable to Tabarak for carrying out what the Judge described as "*straightforward and uncomplicated*" and "*relatively simple tasks*", which required no appreciable knowledge of or experience in BTC, was reasonable, and

commensurate with the importance of Tabarak's role. Before the Court of Appeal, Tabarak also accepted that it was being paid appropriately for that service.

- (4) The degree of risk normally involved in achieving the expected result is relevant: Article 60(c) of the DIFC Contract Law. The official UNIDROIT commentary states that "*when a party's performance of an obligation normally involves a high degree of risk it is generally to be expected that that party does not intend to guarantee a result, and that the other party does not expect such a guarantee. The opposite conclusion will be drawn when the desired result can as a rule be achieved without any special difficulty.*" At the time that the contract was agreed, neither Huobi DMCC nor Tabarak appreciated that there was any particularly high degree of risk involved. Indeed, the purpose of involving Tabarak in the Transaction was to ensure that there was, in effect, no risk of loss. As Mr Al Ali put it, the "*maximum [that] will happen [is] that the money will not arrive and Tabarak will give us the coins, so there is no risk*".
- (5) The ability of another party to influence performance is relevant to the nature of the obligation: Article 60(d) of the DIFC Contract Law. The official UNIDROIT commentary states: "*in some situations one party may have a degree of influence over the performance of the other party's obligations. This fact may transform into duties of best efforts obligations which might otherwise be characterised as duties to achieve specific results.*" Once Huobi DMCC transferred the BTC to the address Mr Thurner instructed it to, it had no control over what happened. Both Huobi DMCC and Mr Thurner believed that Tabarak had exclusive control of the BTC. The Buyer did not wish Huobi DMCC to have any control of the BTC, and would not transfer the purchase money until the BTC was in Tabarak's control. A contractual term that imposed on Tabarak only a duty to, in effect, take reasonable skill and care in its custodial role would, reasonably and objectively, have been inimical to Huobi DMCC (in the same way that a mirror "*reasonable skill and care*" term as applied to Tabarak's obligation to return to the Buyer its money if the Bitcoin were not received by Tabarak from Huobi DMCC would have been inimical to the Buyer). It was an essential element to give meaning to Tabarak's involvement in the Transaction that it would transfer the BTC back to Huobi DMCC if payment was not received from the Buyer. The entire structure of the Transaction was intended to make sure that the only party with any control over the BTC and the purchase money, once transferred, was Tabarak.

- (6) A term requiring the exercise of reasonable care and skill would be inconsistent with Article 22 of the DIFC Implied Terms in Contracts and Unfair Terms Law (Law No. 6 of 2005) concerning the passing of risk. *[I will not come back to this point as the provision is clearly directed to transactions where property is to pass, but it was never the intention that Tabarak would ever receive property in the BTC].*
- (7) Reference was made to the decision of the UK Supreme Court in *Philipp v Barclays Bank UK plc* [2024] AC 346. In that case a bank made payments to a fraudster on the instructions of its customers. The Supreme Court held that it was a basic duty of a bank under its contract with a customer who had a current account in credit to make payments from the account in compliance with the customer's instructions; that that duty was strict and, therefore, where a customer had authorised and instructed a bank to make a payment, the bank had to carry out the instruction promptly without concerning itself with the wisdom or risks of its customer's payment decision; that the fact that a customer's payment instruction was induced by fraud did not invalidate the instruction or give rise to any claim against the bank. In the course of its judgment the Supreme Court considered the bank's duty of care ([34]-[35] insofar as relevant):

“34 As with any contract for the supply of services in the course of a business, there is a term implied by law in the contract between a bank and its customer that the bank must carry out the services with reasonable care and skill... A similar duty is owed in tort; but as the duty in tort arises out of the contractual relationship, it can be no more extensive than the contractual duty and adds nothing to the analysis for present purposes.

35 The requirement to exercise reasonable care and skill only applies, and is only capable of applying, insofar as the contract gives the supplier any latitude in how the relevant services are carried out. Insofar as the contract prescribes what the supplier must do or achieve in carrying out the services, failure to do or achieve what is required will be a breach of the contract and it is irrelevant whether the supplier has acted with skill or care. The bank's obligation to carry out payment instructions in accordance with its mandate from the customer leaves the bank with very little latitude in performing the obligation. But where the contract does not completely specify what the bank must do, it must act in the way that a reasonably skilful and careful banker would.”

Huobi submits that Tabarak had no latitude as to how to perform its services. In circumstances where the purchase money was not paid by the Buyer, the BTC would either be returned to Huobi DMCC (in compliance with the contract terms) or not (in breach of contract).

152. In oral submissions Huobi argued that in accepting that duty it was Tabarak's role and responsibility to conduct any risk assessment of that it was assuming in terms of the contractual risk. The fact that the task was straightforward made it easier to understand why they might do that and take on that responsibility, and why the Claimants might have expected them to do that. The key point is that Mr Thurner had understood precisely what was required and, vested with that knowledge, decided on behalf of Tabarak to assume the role as he was being asked to do for the benefit of both parties. Tabarak's role as envisaged by the Judge was to operate the wallet. This was entirely separate from any question of the duty to advise Huobi about the situation and the modalities. This was about what Tabarak was assuming within its own role on the basis of its own assessment of the risk of taking that role on.
153. Huobi submitted that it was not inconsistent with a contract to achieve a result that Tabarak received instructions from Huobi. Tabarak was not a mere conduit, Mr Thurner had to be satisfied that the arrangements proposed by Huobi and Morozov enabled Tabarak to perform the services delegated to it: namely to take possession of the BTC until payment. The meaning of "*middleman*" is not some responsibility-free conduit. "*Middleman*" is taking control of two sets of assets so that neither party can get at them until they are entitled to. That is what the Judge meant when he said "*middleman*".
154. It is said that there was no perception of any risk on the part of Huobi or Mr Thurner that the BTC could be removed from the Wallet. The Judge found that Mr Thurner had said the Bitcoin would be safe and only Tabarak would have access to it, and that is a finding that is effectively binding on this Court. Article 60(c) of the Contract Law indicates that this is a feature of a contract to achieve a specific result. The official UNIDROIT commentary contrasts the situation where there is a high degree of risk militating against any guarantee of the result. Thus, the perceived simplicity of Tabarak's role is a factor which strongly weighs in favour of finding that there was an obligation to achieve a specific result. The short point is that Tabarak thought the role was straightforward, as did Huobi. It satisfied itself through Mr Thurner that its role in taking possession of the Wallet, operating it, setting it up and, through that, taking control of the BTC was straightforward, in the same way as it would have concluded that taking control of the purchase monies when transferred into the bank account it controlled was simple and straightforward and should not lead to any difficulties in its performing the intermediary for which they were going to receive a significant amount in fees.
155. The "*game changer*", as referred to by the Judge, meant that if Tabarak was going to take possession of the BTC, it would do so by a brand new and unopened Trezor Wallet,

which had been supplied by the Buyer, and at that point, it was for Tabarak to reassess its appetite to assume the same contractual risk it had agreed in the previously agreed modalities. If Tabarak took the view that it was not content to assume that risk, then it was for it to pull out of the deal, but it did not. In fact, Mr Thurner's perceptions of the complexity or risk involved in using a different wallet from the one previously contemplated, was not that it was a game changer in their assessment of that risk in terms of the security of the BTC.

156. I asked Counsel about Mr Ali's perception of risk. Mr Al Ali's expectation had been that the Trezor Wallet would have been Tabarak's and Morozov would have had no access to it. The change was that Morozov would now be involved in the setup of the wallet. Counsel replied that there is no evidence to suggest that Mr Al Ali was specifically focusing on any perception of risk about the way in which the mnemonic seed words were set up and then shared with the Buyer, because the reassurance that he was given that the Wallet would be safe and because it was going to be in the physical custody of Tabarak. So, it would be factually wrong to say that Mr Al Ali had a different perception of the risk from the perception that Mr Thurner had. The perception was the same, and that plays into Article 60(c) in a relatively straightforward way.
157. Huobi submits that the Judge's findings, that knowledge of or experience in the trading of BTC beyond Tabarak being in possession of and knowing how to operate a wallet and that the obligation was to return the BTC if the purchase price was not received, are far more consistent with Tabarak's duty being one to achieve a specific result than anything less than that. The Judge's finding that Tabarak's role was not an advisory one serves to underscore the distinction between, on the one hand, parts of the pleaded cases where there would be an exercise of some kind of latitude and skill in performance, e.g. advisory obligations, and on the other hand, those parts of the case where the term was much more straightforward and indeed the role was much more straightforward and gave no such latitude.
158. Huobi continues that the findings, that Mr Thurner was not the originator of the proposed modalities by which the BTC were to be held and transferred and that the modalities were an uncomplicated and pretty obvious way of dealing with the conflicting demands of Huobi and Morozov, were entirely in accordance with assessment of the role. Tabarak had to make an assessment of the risks to it involved in the Transaction. As originally contemplated the purchase monies would be deposited before the BTC were transferred to Tabarak's own wallet. The change in the room was to a different wallet which both Huobi and Tabarak still thought Tabarak controlled. Once the parties decided to move

forward with it, Tabarak was not, in anything it did in fulfilling its obligations, acting at the behest of Huobi or abdicating any responsibility for the BTC once it came into the wallet.

159. The finding that Tabarak did not have an advisory role, it is said, says nothing about whether they accepted responsibility to take possession and control, in other words, effectively to be the custodian. The two are distinct.
160. Huobi suggests that what the parties understood subjectively is relevant to construction. It cited passages from (1) Mr Thurner's cross-examination where he said that his understanding was that nobody could do anything without the device and without the pin code and (2) Mr Al Ali in WhatsApp messages saying Mr Thurner said it was safe to transfer the BTC before receipt of the funds. Huobi says that the two passages are examples of a mutual understanding in the room as to what Tabarak's role was to be. The role itself was simple, there could not have been any confusion as to it and its purpose, which was to be the middleman to deal with the lack of trust issue. Huobi also emphasised that the parties expected there to be further business along these lines.
161. Huobi denied that bailment sits well with the findings of the Judge that there was an express term to return the BTC at the end and the Judge's finding that there was no contractual obligation to exercise reasonable skill and care. The warehouse analogy is unhelpful and unrealistic, because if it is right that the normal warehouse arrangement is a bailment, it is a contractual relationship which requires the warehouse to exercise reasonable skill and care; it is an example of a retainer which involves a wide degree of latitude over how to perform that role.
162. Counsel went on to make some points in summary on commerciality:
 - (1) Tabarak was introduced into the process (a) to take control of the Wallet, initially its own, (b) to take possession of the BTC, (3) to remove both the Buyer and Huobi from having any control over the BTC and indeed the purchase monies if received. Where the wallet was Tabarak's own, as originally intended, the commercial understanding would be that the party having control bears risk, and it is being paid a fee for doing so. When the modalities changed following the game changer, it was for Tabarak to decide to continue accepting that risk or not. It could have chosen to back out, but it did not;
 - (2) Under understanding of risk, on the facts, it is clear Huobi understood contemporaneously that the risk lay with Tabarak. He gave two WhatsApp references;

- (3) The simplicity of the transaction. Based on the subjective understanding of the parties, if the US dollars were not paid, the BTC would simply be returned. Given the simplicity, there is no issue for Tabarak considering that it assumed a major risk. The parties mutually understood (a) that the BTC would be safe in the Trezor Wallet, and (b) if the US dollars were not paid, the BTC could simply be returned;
- (4) Risk must be viewed from Huobi's perspective. Huobi would not pay substantial sums for Tabarak to do effectively nothing or be a mere conduit. If Tabarak had said we assume no risk, Huobi would not have used Tabarak as an intermediary. It would have been entirely uncommercial to do so from their point of view. That is the whole point of using a commercial intermediary;
- (5) Mr Thurner had to be satisfied that he understood the process. It was on Tabarak to assess its risk appetite;
- (6) On the assumption that the Buyer was honest, Tabarak was to receive the dollars into a bank account, then pay Huobi. Tabarak controlled that bank account. If the money went missing from Tabarak's bank account, there is no question that Tabarak would bear the risk of that. On the other side, Tabarak was receiving the BTC into its wallet under its control. Even with a different wallet, it was still the same, Tabarak had control and set it up. Why would their assumption of risk be any different vis à vis Huobi and the BTC than it would be for the Buyer vis à vis the US Dollars?

Tabarak's Case

163. As noted at paragraphs 81 and 82 above the pleaded terms of the original contract (insofar as relevant) were at paragraph 25 of the RAPOC:

- (1) Tabarak would not transfer the BTC to the Buyer until it had received payment for the BTC from the Buyer;
- (2) Tabarak would not permit the Buyer to access or retrieve the BTC until after Tabarak had received payment for the BTC from the Buyer;
- (3) Tabarak would take reasonable care to ensure that the BTC were not transferred to the Buyer before Tabarak received payment from the Buyer; and
- (4) Tabarak would take reasonable care to ensure that the Buyer was not able to access the BTC before Tabarak received payment from the Buyer.

Tabarak says that (3) and (4) qualify (1) and (2) and so the pleaded obligations were to take reasonable care and none of the terms is pleaded in the alternative.

164. Tabarak points out that in their skeleton for trial the Claimants stated that the terms of the contract between Huobi DMCC and Tabarak included terms that Tabarak would arrange and supervise a deal structure which would ensure that the other third party could not retrieve the BTC without first paying for them and that Tabarak would carry out those services with reasonable care and skill. Similarly in their closing submissions at trial, Tabarak notes that Huobi submitted that it was a term of the contract that Tabarak would take reasonable care to ensure that the Buyer was not able to access the BTC before it received payment from the Buyer.
165. Huobi asserted that, in relation to the pleaded terms that Tabarak would take reasonable care to ensure that the BTC were not transferred to the Buyer before Tabarak had received payment from the Buyer and that the Buyer was not able to access the BTC before Tabarak received payment from the Buyer, they were subject to the implied term (the standard of skill and care required of Tabarak was that ordinarily exercised by reasonably competent providers of crypto escrow/custody services in relation to OTC crypto-fiat transactions, alternatively of reasonably competent investment banks, asset managers and/or DFSA authorised firms who profess the same specialisation as Tabarak did, namely providing and having expertise in providing crypto escrow/custody services in relation to OTC crypto-fiat transactions).
166. In their skeleton argument for their appeal the Claimants stated that the Judge ought to have found that a binding agreement between Huobi DMCC and Tabarak was made which included the following terms:
 - (1) Tabarak would provide Huobi a BTC Address for receipt of the 300 BTC from Huobi and in relation to which Tabarak would have positive and negative control over the 300 BTC from Huobi;
 - (2) Having received the BTC at the BTC Address, Tabarak would only transfer the BTC or allow the BTC to be transferred to the Buyer once the purchase money had been paid by the Buyer into an account maintained by Tabarak in Dubai;
 - (3) If the purchase money was received into Tabarak's account, Tabarak would transfer the BTC to the Buyer and transfer the net proceeds from the recipient account to an account nominated by Tabarak;

- (4) If the purchase money was not received, Tabarak would transfer the BTC back to Huobi; and
- (5) In consideration of the foregoing, Huobi would pay Tabarak a fee and/or a commission.

167. This was the first occasion, says Tabarak, that the Claimants alleged that Tabarak was under a strict obligation to transfer the 300 BTC back to Huobi DMCC if the Buyer did not transfer the purchase money. The Claimants' pleaded case had always been that Tabarak "*would take reasonable care to ensure that the Buyer was not able to access the BTC before [Tabarak] received payment from the Buyer*". Accordingly, it is the Claimants' pleaded case that the agreement Huobi DMCC reached with Tabarak imposed obligations no stricter than an obligation to take reasonable care in the performance of the modified role allocated to (and agreed by) it at the Meeting (the "**Reasonableness Term**"). As the Claimants originally contended, if there was a binding contract between Huobi DMCC and Tabarak, it contained an obligation no stricter than the Reasonableness Term. Tabarak submits there could be no sound basis for implying any stricter obligation.

168. It is Tabarak's case that having regard to the nature and purpose of the agreement, it was the common intention of the parties that Tabarak was required to do no more than take reasonable care in the performance of the modified role allotted to it (whether with regard to ensuring that the Buyer was not able to access the BTC before Tabarak received payment from the Buyer, or otherwise). Tabarak was not subject to a strict obligation to transfer the BTC back to Huobi DMCC if the purchase money was not received from the Buyer. Tabarak points to the following findings of the Judge in support of its case:

- (1) Tabarak was not and is not a professional adviser on the modalities that can be used in BTC Transactions;
- (2) The role of Tabarak at the 3 February Meeting was straightforward and uncomplicated and did not require any appreciable knowledge of, or experience in, the trading of BTC beyond Tabarak being in possession of, and knowing how to operate, a wallet capable of receiving BTC from Huobi and sending the coins on to the Buyer once the purchase monies had been received;
- (3) Tabarak was not under an obligation to advise as to the efficacy of the proposed modalities for the Meeting, the process for the Meeting having been agreed and

accepted by Huobi DMCC and Morozov as an appropriate and effective one, with Tabarak going along with their judgment;

- (4) The basic modalities of the transfer had in effect been set by Huobi DMCC and Morozov leaving it to Tabarak to agree to perform the contemplated function of the middleman once he, Mr Thurner, had made sure that he understood precisely what they required;
- (5) At the meeting Tabarak/Mr Thurner were at all times subject to the direction of Huobi, whose transaction it was that was being undertaken;
- (6) Mr Al Ali feared that the use of the Buyer's Wallet, with it being passed to Morozov to note the remaining 6 words of the mnemonic, posed a risk, but he unwisely chose to agree to the proposed use of the wallet and to agree that the 300 BTC be transferred to the Wallet even though the purchase price had not been received from Navarcon;
- (7) Tabarak agreed to perform a task in a manner that had been agreed by Huobi and the Buyers. Tabarak had given no advice as to how that task should be performed (but merely confirmed a common understanding) nor was Tabarak given any discretion in how the task was to be performed; and
- (8) the relationship between Tabarak and Huobi DMCC was not sufficiently proximate for the imposition of a tortious duty of care in respect of how the Trezor Wallet was handled.

169. Tabarak says that all of the foregoing is irreconcilable with the notion that Tabarak owed an obligation of strict liability to Huobi DMCC, and that Tabarak agreed to underwrite the safety of the Transaction (whatever the circumstances) when asked to participate in the altered modalities on the day.

170. Tabarak's alternative case is that a reasonable person of the same kind as the parties would interpret the contract as requiring Tabarak to do no more than take reasonable care, including with regard to ensuring that the Buyer was not able to access the BTC before Tabarak received payment from the Buyer, and did not subject Tabarak to a strict obligation to transfer the BTC back to Huobi DMCC if the purchase money was not received from the Buyer.

- (1) Tabarak was not a professional adviser on the modalities that can be used in BTC transactions;

- (2) Tabarak was not under an obligation to advise as to the efficacy of the proposed modalities for the Transaction which had been agreed and accepted by Huobi DMCC; and
- (3) Tabarak had given no advice as to how its task should be performed, nor given any discretion in how the task was to be performed.

Tabarak says that, provided that Tabarak complied with the limited duties on it in the performance of its role, including any duty of care, Tabarak could not conceivably have been thought to be under a strict obligation to transfer the BTC back to Huobi DMCC (irrespective of the circumstances) if the purchase money was not received from the Buyer.

171. Tabarak contends that this interpretation of the agreement between the parties is reinforced by Schedule A of the AOA, which any new contract operated alongside and within its framework. Schedule A provides that:

- (1) Huobi DMCC will indemnify Tabarak for liabilities and expenses, including arising from a claim brought by Huobi DMCC, *“arising out of or in connection with advice or services rendered or to be rendered by any Indemnified Person pursuant to this Agreement, the transactions contemplated hereby or any Indemnified Person’s actions or inactions in connection with any such advice, services or transactions”*.
- (2) Huobi DMCC *“also agrees that no Indemnified Person shall have any liability (whether direct or indirect, in contract or in tort or otherwise) to [Huobi DMCC] for or in connection with advice or services rendered or to be rendered by any Indemnified person pursuant to this Agreement, the transactions contemplated hereby or any Indemnified Persons’ actions or inactions in connection with any such advice, services or transactions.”*

It would be remarkable if, notwithstanding this express obligation, with which the parties were *ad idem*, there were somehow an implied obligation, completely at odds with that obligation.

172. More generally, says Tabarak, it would be curious if this Court were to find that Tabarak was under a strict liability to return the BTC in circumstances where the trial Judge found that the relationship between Tabarak and Huobi DMCC was not sufficiently proximate for the imposition of a tortious duty of care in respect of how the Trezor Wallet was handled nor that it would be just and reasonable that Tabarak should owe the alleged

tortious duties of care in circumstances where Mr Al Ali feared the use of the Buyer's wallet posed a risk but unwisely agreed that the 300 BTC be transferred to it even though the purchase price had not been received.

173. The foregoing were contained in Tabarak's written submissions, it expanded upon them orally at trial in both opening and closing submissions. Counsel submitted that Tabarak's role under this contract was a simple middleman's role that could not be elevated to an agreement that Tabarak agreed to provide custodian and escrow services. Tabarak's role had the well-recognised hallmarks of a bailee for reward. The core duty is that the bailee has to take reasonable care of the goods entrusted and to return the goods in the condition that they were provided on demand, but all subject to an obligation of care, not one of strict liability or strict duty.

174. My attention was directed to an extract from *Palmer on Bailment* (Third Edition) at paragraphs 14-009 to 14-011, in particular

"The custodian for reward owes certain duties in common with every category of bailee, ... [M]ore especially, he must safeguard the goods with reasonable care and redeliver them reasonable wear and tear expected [sic] in the condition in which they were bailed..."

The custodian must accordingly show that any established loss or injury to the chattel did not result from a failure on his part to exercise such care and circumspection as could reasonably have been expected from a bailee of his trade and standing in all the circumstances of the case...

Once these three interdependent facts have been established [delivery, loss and acceptance as bailee], the defendant bailee must either disprove neglect or must detonate the inference of neglect by demonstrating its irrelevance to the ultimate misadventure...

On one point the authorities are virtually unanimous. The bailee, confronted by proof of damage or loss, is not bound to establish precisely how those phenomena occurred. Proof of reasonable care or of the irrelevance of its lack will be sufficient: he need not go further (although it may often be helpful for him to do so) and demonstrate the cause of the injury in question."

175. Counsel continued that the Claimants' approach does not adequately distinguish between a role and an obligation attaching to that role. One general statement of Tabarak's function may well be that in the event the money did not come in the coins would be returned to Huobi, but that does not address precisely what level of obligation Tabarak was under with regard to the BTC. Just as it would not if a warehouseman, who undoubtedly is under a duty of care only, agrees to a general role of looking after something and giving it back on request. All that the warehouseman has is a role to

look after the goods, a role which involves giving the goods back on request, but the duty attaching to the role is one of reasonable care.

176. In the present context, it was said, the obligation to return the BTC cannot be more in substance than an obligation to return the BTC provided that Tabarak was able to do so having taken reasonable care of the BTC in its role as bailee for reward.
177. How could Tabarak, it was asked, realistically be under any duty, beyond a duty simply to follow Huobi's request, as a non-expert complying as middleman with the duty to set up the Wallet honestly and in good faith or, at most, to do so with reasonable care. What sensible term could be constructed that fixed Tabarak with liability merely for doing, in this context, precisely what Huobi asked it to do and for doing so without fault. Tabarak did not have a duty to achieve any particular result.
178. If the absolute duty is to be imposed, Tabarak submitted that it would have to be an implied term. It is unlikely that the parties would have intended to impose such an onerous term:
 - (1) If a party is simply following orders, it is most unlikely that a party will be deemed to come under a liability to warrant the outcome of those orders or, to put it another way, be coming under a duty to achieve the result or outcome wanted by those giving the orders;
 - (2) Unless Tabarak were to be in breach of some duty in and around the setting up of the Wallet and the splitting of the seed words (which was not found by the Judge), it would be extraordinary if it is liable for loss in the absence of any overall supervisory or advisory role;
 - (3) Especially when the parties did not contemplate that the BTC would be transmitted to the Trezor Wallet unless and until the purchase funds were in Tabarak's bank account. That makes it more unlikely that the Court will construe a strict obligation on Tabarak to achieve any particular result in terms of returning the BTC to Huobi in any circumstances when this was not even an operative part of the main role to be played by Tabarak; and
 - (4) Where Tabarak does not have the BTC because of some anterior failing, through no fault of Tabarak's and the consequence of following Huobi's instructions.

179. Tabarak emphasised that the Judge had found (in connection with tortious liability) it to be unreasonable for Huobi to place reliance on any assurance from Tabarak given Tabarak's lack of expertise and the fact the Transaction was being dictated by Huobi. In fact, Tabarak says, the Judge went even further and found that there was no duty of care in respect of how the Trezor Wallet was handled. It submits that it would be surprising if, objectively, in these circumstances, Tabarak was, on a contractual basis, assuming all responsibility for the safety and success of the transaction and indemnifying Huobi against any risk of loss.
180. Finally, Tabarak turned to answer some points made by Huobi:
- (1) Huobi's analysis of the terms of the contract is a high level description on the whole of the role, which is apt to be misleading if you try to reduce the precise words of the points elaborated there into unqualified terms of the contract;
 - (2) In particular the proposed term at paragraph 51(f) of the Statement of Case ("*If the purchase money was not received from the Buyer, the Defendant would transfer 300 BTC back to the First Claimant*") does not address what would happen if the BTC had been removed from the Trezor Wallet because of some flaw in the set-up process unbeknownst to Tabarak and introduced by following Huobi's instructions;
 - (3) Once you do start to build in the appropriate form of implied qualifications and limitations, you end up at Tabarak's result rather than the Claimants', because you would need to qualify it with an implied limitation for example that Tabarak was able to return the BTC unless any inability to do so resulted from a breach of Tabarak's obligations;
 - (4) The strict duty pleaded at paragraph 54 of the Statement of Case is inconsistent with the Judge's findings that Tabarak in fact played a narrow role, operating at Huobi's direction, implementing modalities that Huobi and Navarcon, in their private discussions, agreed between them, with Tabarak going along with their judgement;
 - (5) There was no obligation to achieve a specific result and the argument that there was is circular and pre-supposes its conclusion, because Tabarak did not have a duty to make the Transaction effective, it simply played the narrow role. Rather than having a duty to achieve a particular result, Tabarak instead was just under

an obligation to play the role it played and that role involved performing its functions with reasonable care;

- (6) You can test the fallacy in the Claimants' approach by considering the warehouseman example, where you assume a simple situation where a bailee is asked to store a person's goods for a fee. The bailee's job does involve looking after the goods and returning them to their owner when requested in the same condition;
- (7) There are multiple fallacies in the Claimants' approach where they contend that Tabarak needed to guarantee safety or there would be no purpose to its involvement –
 - (a) In almost any case involving a bailee looking after something, the purpose is to keep the property safe;
 - (b) The only purpose of Tabarak's involvement was not to ensure the property was safe. As the Judge found, the main purpose of Tabarak was that it had an account and a wallet that could receive BTC, and when the contract was made, it was not even envisaged that Tabarak would be receiving the BTC in a situation where it did not already have the money;
 - (c) That it was inherent in the arrangements that Tabarak guaranteed the safety of the transaction when it was not advising on safety and was not an expert in BTC is uncommercial and absurd; and
 - (d) Even the most onerous obligations on Tabarak, whatever they were, could only extend to its actual care of the Trezor Wallet and there was nothing wrong with Tabarak's actual care. The flaw arose at the earlier stage of the process of entering the seed words, and that was simply something that Tabarak was asked to do and which Huobi had devised, so it is even more uncommercial to suggest that that phase introduced a strict obligation.
- (8) There are several problems with the Claimants' argument that it would not sufficiently serve Huobi's purpose if the obligation was limited to one of reasonable care –
 - (a) If it were correct, it would apply in almost every bailee scenario, the warehouseman, for example, and in those situations the obligation is to take reasonable care;

- (b) It mischaracterises Huobi's intentions going into the transaction, because the intentions were not to transfer the BTC to the Trezor Wallet in the first place before the money was received;
 - (c) Tabarak could not have hung on to the BTC; and
 - (d) The Claimants overlook the fact that the flaw in the transaction took place when Mr Thurner was simply inputting the seed words, which was something that Huobi instructed him to do. According to the UNIDROIT commentary, this would be a situation where, even if Tabarak had otherwise been under a strict duty, in fact it was only, at most, a best efforts obligation although the better analysis is that there can be no liability on a party who simply follows the mandate of someone instructing him.
- (9) Huobi submits that there was no obligation other than limited to one of reasonable care because Tabarak did not have latitude about how it performed its duties. Tabarak did have latitude as to how it handled the Trezor Wallet, like any bailee that does have a duty of care; it had to keep it safe.

Discussion & Conclusions

181. The issue was encapsulated in the following exchange on Day 3 of the hearing at pages 166-167 of the transcript:

“18 HE JUSTICE BLACK: And if there is the contract immediately
19 before the transfer of the Bitcoin with, as you say, the
20 agreement (inaudible) for them, it then becomes
21 a question of the interpretation of that contract and
22 whether against the commercial background if in the
23 unforeseen circumstances Bitcoin is lost , then where
24 does liability lie for that responsibility as between
25 your clients and Tabarak, and that issue may be informed
1 by the analysis of the basis of whether or not the
2 contract is a simple contract to achieve a result .
3 You would say yes, it is a simple contract to
4 achieve a result . Mr Hill says no, it is not, that
5 would be a wholly uncommercial interpretation. That is
6 the difference between you.
7 MR SPINK: It is the difference between us.
8 MR HILL: Just to be clear, I'm not disputing that however
9 you construe the contract, in broad terms it is part of
10 Tabarak's role to give the Bitcoin back. Of course it
11 is. The point is when you descend to the granularity of
12 a nuance, what is Tabarak's duty in circumstances where
13 it can't be returned as a result of simply complying
14 with what Huobi asked it to do with regard to the set-up
15 of the seed words. That's the critical question.
16 HE JUSTICE BLACK: Yes, I understand that.”

182. In carrying out the interpretation of the contract I have found to exist I am bound by the facts found by the Judge even if I may have made different findings. My position is different from that of the Judge in that while I have the benefit of the more focused submissions of senior counsel, I have not had the advantage enjoyed by the Judge of actually hearing the witnesses in person. I am pressed to make further findings based on the documents and the transcripts of the evidence. It may be said that these would supplement the findings of the Judge but it seems to me that if the material was before the Judge but in his careful factual analysis he did not consider it appropriate to make reference to that evidence that does not mean he omitted to consider the evidence or failed to take it into account. I am reinforced in believing that he did by reason of the fact the matters now pressed upon me were highlighted in the written submissions to the Judge. I must also bear in mind that the Court of Appeal found no grounds on which to set aside any findings by the Judge. In the circumstances I am of the view that I should (1) hesitate to make any findings in addition to the actual findings of the Judge save any obvious inferences from those findings when assessing the background within which the contract was made, and (2) confine any findings I may make to issues with which the Judge did not deal.
183. I do not consider that the issue can be resolved on the English theory of the implication of terms. It is neither so obvious that it goes without saying nor necessary to give the contract business efficacy of the contract that Tabarak should bear the risk of the loss of the BTC through fraud. In my view an English court would in any event address the question as one of interpretation as to what was implicit in what had been found to be expressly agreed. This is the exercise mandated by Articles 49 to 51 of the DIFC Contract Law. As there was no discussion on the point nor any other pointer to the common intention of the parties, the contract and the statements and other conduct of the parties must be interpreted according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances.
184. I do not find the analogy with a bank helpful. The relationship between customer and bank is that of creditor and debtor. The relationship between Huobi DMCC and Tabarak was not creditor and debtor. Property in the BTC was never to pass to Tabarak, Tabarak was to hold the BTC on behalf of Huobi DMCC only to release it to the Buyer on the receipt of payment. I was initially (but am no longer) attracted to Huobi's submission that as between Tabarak and the Buyer if the funds were lost Tabarak would be liable to make good the loss so in the same way of the BTC were lost Tabarak would have similar liability to Huobi DMCC. First, whether Tabarak would be liable to make good the Buyer's

loss would depend on how one were to characterise the relationship. If Tabarak were found to be a debtor to Buyer, I can see that there could be liability. There may also be regulatory liabilities. Secondly, the Judge found that the BTC was “*property*”. The case was never put on the basis that BTC was itself money at least for these purposes. Different issues will arise in relation to the loss of money or property. Thirdly, the terms on which Tabarak accepts deposit of cash may well be different from those on which it accepts the custodianship of digital assets. Finally, it is not without significance that Huobi in fact previously agreed to Schedule A of the AOA which (at least arguably) may have exonerated Tabarak from any liability whether for loss of cash or BTC.

185. In my judgment Tabarak’s position was closer to that of a custodian than that of banker - as is now the position of Tabarak. It does seem to me that Tabarak has executed something of a *volte face* in that its submissions at trial persuaded the Judge to describe the suggestion that Tabarak was a custodian as “*grandiose*”. Tabarak now accepts that it did owe a duty of reasonable care and skill but at the trial it persuaded the Judge that it did not owe any duty of care to Huobi. Perhaps the explanation is that Judge was applying the criteria applicable to negligent misstatement and was not considering the duties that might arise by reason of custodianship.
186. The analogy with a warehouseman is not wholly satisfactory because Tabarak was not just acting as a custodian. It was also intended to act as the recipient of the purchase monies and to transfer the BTC to a third party. The analogy is however helpful in informing the capacity in which Tabarak held the BTC. Even if Tabarak was holding in the capacity of custodian, not debtor as would be the case of a bank, Huobi says that the hallmarks of a contract to achieve a result are all present – the low perception of risk, the perceived inability of the counterparty to influence the performance of the obligation and the lack of latitude in how the relevant services are carried out.
187. It seems to me that the provisions relied on by Huobi (particularly the *Philipp v Barclays* case) are looking through the wrong end of the telescope. The distinction in the provisions is being made between a simple contract to do what a party is instructed to do and a contract where there are potentially more onerous duties to advise on the wisdom of the contract. The present case is the obverse: the simple contract to do what a party is instructed to do is relied on to impose more onerous obligations than a contract to exercise reasonable care and skill.
188. Helpful though the guidance may be in other circumstances, in the present case I agree with Tabarak that one must interpret the granularity of the obligations in the context of

the facts found by the Judge. The essential question is: on a true construction of the contract I have found to have been concluded and having regard to the facts as found by the Judge, what would reasonable persons of the same kind as the parties in those circumstances have agreed with regard to which party bore the risk of the loss of the BTC by fraud without fault on the part of either party.

189. The very complexity of the phrasing of that question indicates that it cannot be resolved simply by reference to Tabarak's admitted obligation to return the BTC if the purchase price were not paid. It seems to me irrelevant that had the BTC remained in Tabarak's possession Tabarak would have been bound to return them if the purchase monies were not forthcoming. The real question is what are the parties taken to have agreed if at that stage Tabarak were no longer in possession of the BTC through no fault of its own. I am not persuaded either party actually applied its mind to the possibility on the basis of the WhatsApp exchange briefly referred to at paragraph 111 of the Judgment or the Kraken article reference to which appears in the record but was not mentioned in the Judgment, as the Judge made no finding on the point and I have not heard any live evidence on it.
190. I am also not convinced that the simple dichotomy between a contract to achieve a result and a contract to exercise reasonable care and skill is dispositive of the question. It really does depend on defining the result and whether (as is often the case as recognised in *Philipp v Barclays*) the duty of reasonable care and skill includes a duty to advise on the wisdom of the transaction in question. In the present case the Judge has ruled that there was no such duty and there can be no challenge to that finding. Thus, we are brought back to interpreting *this* contract by reference to what reasonable persons of the same kind as the parties in *these* circumstances have agreed.
191. I regard the following circumstances (broadly in chronological order) as material (all numbers in square brackets are paragraph number in the Judgment):
 - (1) “[T]he role to be played by Tabarak at the 3F Meeting under the agreement was straightforward and uncomplicated and did not require any appreciable knowledge of, or experience in, the trading of BTC beyond Tabarak being in possession of, and knowing how to operate, a wallet capable of receiving BTC from Huobi and sending the coins on to Navarcon once the purchase monies had been received” [62]
 - (2) “Nor, in my judgment, was Tabarak under an obligation to advise as to the efficacy of the proposed modalities for the 3F Meeting, the process for the meeting having

been agreed and accepted by Huobi and Mr Morozov as an appropriate and effective one, with Tabarak going along with their judgment. Indeed, I reject the evidence of Mr Al Ali and Mr Saxena that it was Mr Thurner who took the initiative in coming up with the modalities by which the sale of BTC by Huobi to Mr Morozov's principals could be achieved." [63]

- (3) *"There was therefore no necessity or scope for Mr Thurner to propose the basic modalities of the transfer. They had in effect been set by Huobi and Mr Morozov leaving it to Tabarak to agree to perform the contemplated function of the middleman once he had made sure that he understood precisely what they required."* [63];
- (4) *"[T]he contract was in respect of the planned transaction that contemplated the transfer of the 300 BTC to Tabarak's wallet after the price had been agreed where they would stay until the purchase money was received into Tabarak's account and therefore it had no application to the different scenario that unfolded following Mr Morozov's insistence that the BTC be transferred to one of the new Trezor Wallets he had brought to the meeting."* [86]
- (5) *"On any view, Mr Morozov's insistence that the BTC be transferred into one of the Trezor Wallets he had brought to the meeting was "a game changer". It put Huobi, and in particular, Mr Al Ali, in a very tight spot. Huobi was under strong pressure from Huobi Global to start achieving large OTC sales of Bitcoin and in addition Huobi was extremely keen on developing a relationship with Mr Morozov in the hope that it would lead to numerous profitable sales of BTC. Tabarak and Mr Thurner also had a stake in the sale of the BTC to Navarcon: they were keen to earn the commission and fees that had been agreed earlier during the meeting and they also looked forward to being involved as a middle man in future BTC sales by Huobi to Mr Morozov. This said, at the 3F Meeting Tabarak/Mr Thurner were at all times subject to the direction of Huobi, whose transaction it was that was being undertaken."* [107]
- (6) *"At no time did Mr Thurner become an active advocate in favour of the use of the Trezor Wallet; indeed, he did not take the lead in saying anything about the appropriateness of the use of the Wallet. Thus, it was the Huobi team who told Mr Morozov and Mr Socin, who were proposing to set up the Wallet themselves, that they did not wish to set up the Wallet but wanted Mr Thurner to do so; and it was only after this that Mr Thurner was asked whether he had any concerns, to which*

he replied that he did not because the Wallet was going to be locked in Tabarak's safe to which only Tabarak had access." [108]

- (7) *At the 3F Meeting, once Mr Morozov insisted that the Transaction be done using one of the two Trezor Wallets he had come with, Mr Thurner and through him, Tabarak, acted in the honest but mistaken belief that, if the Mnemonic were split into two with Mr Morozov and Mr Socin having access only to the remaining six words of the seed phrase, neither side could get access to the 300 BTC once they had been transferred to the Wallet. Like the Huobi team attending the meeting, he did not know that the Trezor wallet could be prompted to reveal the whole Mnemonic phrase either by scrolling up or by deliberately inputting a small number of seed words that were not part of the Mnemonic. In my judgment, in acting as he did, setting up the Wallet and passing it to Ms Zavyalova and then to Mr Morozov stating, when asked, that he had no concerns about the proposed use of the Wallet because it would be locked in Tabarak's safe, Tabarak/Mr Thurner were not in breach of an actionable duty of care owed to Huobi."* [103]

(8) *" I ... set out the statements I find Tabarak made at the 3F Meeting as follow:*

Statement (1)

The Buyer said they wished to use one of the apparently brand new wallets they had brought to the meeting

a. Mr Saxena was concerned about this. Mr Saxena asked Mr Thurner whether he had any concerns arising from this.

b. Mr Thurner replied saying words along the lines that he had no concerns as once the BTC were transferred, the Wallet would be locked in Tabarak's safe, to which only Tabarak would had [sic] access.

Statement (2)

At 12:23, Mr Saxena emailed Mr Thurner providing the bank details for payment to Huobi.

Mr Saxena and Mr Al Ali objected to transferring the BTC as Tabarak had not yet received the Buyer's payment.

Mr Thurner responded using words along the lines that the Wallet would be in Tabarak's custody in its safe, so the BTC would be safe and there was no reason to be concerned." [96]

- (9) *"I find that the fees and commission due to Tabarak for their role in the Transaction were agreed on 3 February 2020 sometime before the 300 BTC were transferred to Mr Morozov's Trezor Wallet. I say this because I accept Mr Saxena's evidence in paras 32 and 33 of Mr Saxena (3) that at the 3F Meeting, Mr Thurner approached him and Mr Nahak and in a private discussion asked that Tabarak's margin be increased by 0.05% from the 0.2% which had been previously agreed. Mr Thurner suggested that this be achieved by an adding 0.05% to the sum charged to Navarcon without notice to Mr Morozov because of the delay and inconvenience Mr Morozov had caused by not showing up on time on 30 January 2020. Accordingly, the total fee was increased to 3.05% with Tabarak's share being increased from 0.2% to 0.25%."* [85]
- (10) *"I have also held that Mr Thurner was not under a duty to advise on the modalities that Huobi and Mr Morozov had agreed on, or as to any other modalities that might be contemplated. In addition, Mr Thurner did not agree to provide what the Claimants grandiosely call "custodian and escrow services". Rather, he agreed to carry out the relatively simple tasks of: (i) using Tabarak's wallet to receive the 300 BTC from Huobi and to transfer them to Navarcon once the price had been received by Tabarak; and (ii) opening an account for Huobi. What he was obliged to do (if only the agreement had been binding and enforceable) was to operate Tabarak's own wallet to receive the 300 BTC and to transfer them to Navarcon once the purchase money had been received in an account maintained by Tabarak and then to transfer the net sales proceeds to Huobi."* [104]
- (11) *"I have also held that Mr Thurner was not the originator of the proposed modalities by which the BTC were to be held and transferred, those modalities being an uncomplicated and pretty obvious way of dealing with the conflicting demands of Huobi and Mr Morozov that were agreed in principle by Mr Morozov and Mr Al Ali. Further, whilst Mr Thurner might have said something to Huobi to the effect that Tabarak was involved in advising on and/or arranging custodial services in respect of crypto assets, I am quite sure that Huobi did not set much store by this bit of puffing. What Huobi was primarily interested in was whether Tabarak, a DIFC company and small merchant bank, would act as middle man and provide an account in Dubai to which and from which the purchase monies resulting from*

OTC BTC transactions could be transferred. It is to be noted that Mr Thurner was never asked by Huobi to provide any particulars, let alone detailed particulars, as to his experience in conducting BTC transactions. It was enough for Huobi that Tabarak had a BTC wallet that had been used in the trial transaction conducted on 22 January 2020” [106]

(12) *“I hold that the relationship between Tabarak/Mr Thurner was not sufficiently proximate for the alleged duty of care in respect of how the Trezor Wallet was handled, to exist. I also find that the Claimants have failed to establish that Tabarak/Mr Thurner owed the alleged duty of care in respect of the “assurances” given by Tabarak/Mr Turner. I say this because I find that Tabarak, acting by Mr Thurner, did not assume responsibility quoad Huobi for these statements and it was not reasonable for Huobi to trust Tabarak/Mr Turner to exercise such a degree of care as the circumstances required” [110]*

(13) *“I also hold that, in the circumstances as I have found them to be, it would not be just and reasonable that Tabarak should owe the alleged duties of care. Mr Al Ali feared that the use of the Buyer’s Wallet, with it being passed to Mr Morozov to note the remaining 6 words of the Mnemonic, posed a risk, but he unwisely chose to agree to the proposed use of the Wallet and to agree that the 300 BTC be transferred to the Wallet even though the purchase price had not been received from Navarcon.” [112]*

192. It is important to bear in mind that the Judge was directing his findings to somewhat different issues than that I must determine. He had held that the contract between the parties did not incept and that he was bound to consider what occurred on 3 February 2020 in terms of tortious duties. I have to consider the terms of a contract that came into existence by performance some time before the 300 BTC were transferred to the Trezor Wallet.

193. In my judgment the significant factors in determining what reasonable persons of the same kind as the parties in these circumstances would have agreed immediately prior to the transfer of the 300 BTC to the Trezor Wallet derived from the extracts of the Judgment set out above are:

(1) It was always contemplated that Tabarak would play a straightforward and uncomplicated role as a middleman by executing modalities that were pretty obvious ways of dealing with the conflicting demands of Huobi and the Buyer;

- (2) The modalities did not require any appreciable knowledge of, or experience in, the trading of BTC beyond Tabarak being in possession of, and knowing how to operate, a wallet capable of receiving BTC from Huobi and sending the coins on to Navarcon once the purchase monies had been received;
- (3) The modalities were agreed in principle by Morozov and Mr Al Ali. There was no necessity or scope for Mr Thurner to propose the basic modalities of the transfer. They had in effect been set by Huobi and Morozov;
- (4) When the contemplated procedure was changed by Morozov, Mr Thurner did not become an active advocate in favour of the use of the Trezor Wallet; indeed, he did not take the lead in saying anything about the appropriateness of the use of the wallet. The new procedure was agreed in principle by Morozov and Mr Al Ali;
- (5) Mr Thurner was not under a duty to advise on the modalities that Huobi and Morozov had agreed on, or as to any other modalities that might be contemplated; and
- (6) Mr Thurner agreed to carry out the relatively simple tasks of: (i) using Tabarak's wallet to receive the 300 BTC from Huobi and to transfer them to Navarcon once the price had been received by Tabarak; and (ii) opening an account for Huobi. What he was obliged to do was to operate Tabarak's own wallet to receive the 300 BTC and to transfer them to Navarcon once the purchase money had been received in an account maintained by Tabarak and then to transfer the net sales proceeds to Huobi.

194. In addition, it is now common ground that it went without saying that if the purchase monies were not received in an account maintained by Tabarak, Tabarak would return the BTC to Huobi DMCC.

195. I should also add the comment that not too much should be made of the Judge's statement that Mr Al Ali unwisely chose to agree to the proposed use of the wallet and to agree that the 300 BTC be transferred to the wallet even though the purchase price had not been received from Navarcon. I think that there is a degree of hindsight in the statement. The Judge had found that neither Mr Thurner nor the Huobi team knew that the Trezor Wallet could be prompted to reveal the whole mnemonic phrase either by scrolling up or by deliberately inputting a small number of seed words that were not part of the mnemonic. Further had Tabarak's 6 seed words been input after the Buyer's there

would have been no opportunity for them to operate the fraud on the Judge's finding as to the manner in which it was perpetrated.

196. In my judgment the Judge's findings point to a simple contract. Tabarak was to provide a wallet in which to hold the BTC and a bank account into which the proceeds of sale were to be deposited. It was to maintain control of both and only release the BTC once the purchase monies arrived. Both Huobi and Tabarak believed that Tabarak did have control of Trezor Wallet by reason of their mutual understanding that the Buyer did not have the full recovery mnemonic, only Mr Thurner knew the pin code and Tabarak had physical possession of the Wallet. Mr Thurner did not devise this system nor was he under any duty to advise as to its wisdom. The system was agreed between Huobi and the Buyer and Mr Thurner acted on their directions.

197. All of those factors indicate to me that reasonable persons of the same kind as the parties in those circumstances would not have contemplated that Tabarak would bear any greater liability than liability for a failure on its part to comply with the instructions of Huobi and the Buyer, or for failing to act with reasonable care and skill in maintaining control over the BTC. Put another way, in my judgment reasonable persons of the same kind as the parties in the circumstances would *not* have agreed that Tabarak bore the risk of the loss of the BTC by fraud without fault on its part.

198. Thus, as to the questions:

(1) Did the Contract include a term that Tabarak was under a strict liability to transfer 300 BTC back to Huobi DMCC if the purchase money was not received from the Buyer?

The answer is: No, if Tabarak no longer had control of the BTC through no fault of its own.

(2) Did it impose an obligation to take reasonable care in the performance of the revised role allocated to Tabarak at the 3 February Meeting?

The answer is: Yes, Tabarak was obliged to exercise reasonable care in maintaining control over the BTC.

THE OTHER ISSUES

199. My findings on the Contract Terms Issue render the other issues moot as it is agreed that I am bound by the Judge's finding that Tabarak's care of the BTC was "*reasonable*".

200. I say this not without some regret, but only because the other issues are complex and of general importance. The parties have expended considerable time and effort upon them. I wish to express my gratitude and admiration for the diligence of the legal teams and the experts, and counsel's exceptionally cogent and lucid submissions. Unfortunately, resolution of those issues must await another occasion when they arise on the facts of the case.

DISPOSITION

201. The Claimants' claim is dismissed.

202. The parties are to serve and exchange submissions on the incidence of costs within 14 days of the date of the date of this Judgment and reply submissions within 7 days thereafter. The Court will then make orders as to the costs on the papers and remit any necessary assessment to the Registrar.