Beneficiary or unsecured creditor?

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The terms-of-service analysis

Whether a customer of a failed platform recovers in specie or receives a dividend depends on the characterisation of the relationship in the terms. The analysis has three stages. First, did the customer retain beneficial ownership, so that the platform held the assets on trust? That requires the certainties discussed in Chapter II and in particular an intention to create a trust, which the Court of Appeal in *Quoine* refused to infer from internal segregation alone.[1] Second, if the customer transferred title to the platform, what did the platform promise in return? A yield product under which the platform may use the assets as its own and must return equivalent assets plus interest is a loan. The customer is a lender and an unsecured creditor. Third, if the terms are ambiguous or inconsistent across products, which terms govern which assets? Zipmex's structure illustrates the point. Assets in the trading wallet were held for customers and were returned. Assets in the yield wallet had been lent on to Babel and Celsius under terms permitting that use, so the customers of that product were creditors.

The United States bankruptcy court's decision in *Celsius* in January 2023 is the most-cited foreign authority. The court held that the terms of Celsius's "Earn" programme unambiguously transferred title to the deposited crypto to Celsius, so that the assets

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belonged to the estate and the customers were unsecured creditors.[2] A Singapore court would reach the same result on the same terms. The lesson, again, is that the words decide.

What the customer should look for

A customer assessing a platform's insolvency risk should read the terms for five things. Does the platform state that customer assets are held on trust or that title passes? Does it reserve the right to lend, stake, pledge or otherwise use the assets? Does it segregate customer assets in identified wallets and publish proof of reserves? Does it state that in insolvency customers are treated as creditors? Does it provide that a halt on withdrawals suspends the platform's obligations? The last clause was absent from Hodlnaut's terms, which is why the court found that liabilities continued to accrue during the halt.[3] For MAS-licensed custodians the first three questions are now answered by regulation, since customer assets must be held on trust and segregated (Part K, Chapter II). For yield products, offshore platforms and unlicensed services they remain open.

Client question

"I had 12 bitcoin on a Singapore platform that has applied for a moratorium. Are they still mine?" The answer depends on which product held them and what the terms say. If they were in a custody or trading wallet under terms that declared a trust and the platform segregated customer assets, you are a beneficiary. The bitcoin never belonged to the platform and should be returned, subject to a pro rata share of any shortfall in the pool. If they were in a yield or earn product under terms that let the platform use them, you lent them and are an unsecured creditor for their value. Your claim will be converted into a currency amount at a date fixed by the court or the scheme, and you will receive a dividend. Ask for the exact version of the terms you accepted, with the date, together with the wallet address in which your assets were held. Those two documents decide the case.

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Notes

1. *Quoine Pte Ltd v B2C2 Ltd* [2020] SGCA(I) 02 at [144]–[146]. ↩
2. *In re Celsius Network LLC*, 647 B.R. 631 (Bankr SDNY 2023) (Glenn J), holding that Earn programme assets were property of the estate under the terms of use. ↩
3. *Loh Cheng Lee Aaron v Hodlnaut* [2023] SGHC 323 at [15]. ↩

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