Developers, validators and protocols

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The Tulip Trading question

In *Tulip Trading v van der Laan* the English Court of Appeal held that it was seriously arguable that the developers who control the software of a bitcoin network owe fiduciary duties to the owners of bitcoin on that network. Those duties might include a duty to implement a software patch that would restore access to assets lost through a hack. The court stressed that it was deciding only that the issue should go to trial and that recognising such a duty would be a significant development of the common law.[1] The claim did not reach trial, Tulip Trading having discontinued after its principal's claims to be the inventor of bitcoin were rejected in separate proceedings.

How would a Singapore court approach the same question? The *Spandeck* framework gives the court more room than English law. Factual foreseeability is satisfied: a developer who ships a bug can foresee that users will lose assets. Proximity is the difficult stage. Developers of an open-source protocol have no relationship with individual users, make no representations to them and in most cases receive nothing from them. Users do not rely on any particular developer. In

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my view a Singapore court would find proximity lacking for the developers of a decentralised protocol with thousands of contributors and no governing entity. It might find proximity where a small identified team controls the code through admin keys, publishes a front-end, markets the protocol and earns fees from it, because that pattern has the hallmarks of assumption of responsibility. At the policy stage the court would weigh the chilling effect on open-source development against the absence of any other remedy for users. The Swiss analysis under Art. 41 CO reaches a similar place by asking whether the developer breached a protective norm or a duty of care arising from the creation of a dangerous situation (Part D, Chapter VII).

Governance token holders and DAOs

Where a protocol is governed by token holders who vote on upgrades, the question becomes whether those holders are liable for the consequences of what they approve. Under Swiss law an unincorporated DAO is a simple partnership under Art. 530 ff. CO and its members are jointly and severally liable (Part D, Chapter VII). Singapore has no equivalent doctrine of automatic partnership for participants in a common enterprise who have not agreed to carry on business in common with a view of profit. The Partnership Act 1890 requires that agreement, and voting on a protocol parameter does not supply it.[2] A Singapore court would therefore look for the governing entity, usually a company limited by guarantee or a foreign foundation, together with the individuals who in fact controlled the keys. Those individuals can be sued in negligence if proximity is shown, or in equity if they held assets on trust. Passive token holders are at little risk.

Notes

1. *Tulip Trading Ltd v van der Laan and others* [2023] EWCA Civ 83 (Birss LJ, with Lewison and Popplewell LJJ, 3 February 2023) at [76]–[78], [86] and [91]. ↩
2. Partnership Act 1890, s 1 (definition of partnership as the relation between persons carrying on a business in common with a view of profit). ↩

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