Express trusts and the three certainties

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Certainty of intention

An express trust arises only where the settlor manifests an intention that the trustee hold property for the benefit of another. No particular words are needed. The intention is found by construing the words and conduct of the parties in context. A court will not infer a trust merely because a trust would be a convenient protective device for one party. That is the holding of the Court of Appeal in *Quoine*, adopting the words of French CJ in the High Court of Australia.[1] The *Quoine* majority then applied that principle to an exchange's standard operating model. Quoine's terms were silent on trust. It recorded customer balances in an internal database and kept the coins in commingled cold storage. The judge below had treated the fact that customer assets were recorded separately from Quoine's own as decisive. The Court of Appeal disagreed. Segregation in the records is a necessary element of a trust but is never sufficient on its own. The absence of any segregation of specific coins for each customer weighed against inferring one.[2]

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The practical lesson has been learned by drafters in both directions. Platforms that wish to avoid trust obligations state that deposited assets become the property of the platform and that the customer has a contractual right to redelivery of equivalent assets. Platforms that wish to offer insolvency protection state that customer assets are held on trust, that the platform has no beneficial interest, and that the assets are held in designated wallets separate from the platform's own. The Hong Kong decision in *Re Gatecoin* illustrates how far the wording controls the outcome. The exchange had used several versions of its terms. The earlier versions used trust language, under which the court found that customer assets were held on trust. A 2018 version stated expressly that assets were not held on trust and were treated as the exchange's property, which the court held effective to negate any trust for customers who had accepted those terms.[3]

Certainty of subject matter and the omnibus wallet

The second certainty is where the technology creates the most difficulty. Most custodians hold customer coins in a small number of omnibus wallets instead of one wallet per customer. The reasons are practical. Fewer wallets mean lower transaction fees, simpler key management and faster withdrawals. The legal consequence is that no customer can point to a specific coin or unspent transaction output as hers. If a trust requires identifiable subject matter, the omnibus wallet appears to defeat it.

The common law has two lines of authority on this. In *Re Goldcorp Exchange*, customers who had bought unallocated gold from a bullion dealer failed to establish a trust. No specific gold had ever been set aside for them.[4] In *Hunter v Moss*, by contrast, a declaration of trust over 50 of a holding of 950 identical shares was upheld. Shares are intangible and indistinguishable, so no appropriation was needed.[5] The English Court of Appeal reconciled the two in the Lehman Brothers litigation by treating a trust over a specified quantity of fungible intangibles held in a bulk as a trust over the bulk in co-ownership shares.[6] Fungible tokens of the same kind are the paradigm of intangible interchangeable assets. The New Zealand High

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Court in *Ruscoe v Cryptopia* applied exactly this analysis to a hacked exchange. It found a separate express trust for each type of coin, with the customers of that coin as co-beneficiaries of the omnibus holding in proportion to their account balances.[7]

Singapore has not yet decided an omnibus-wallet trust case on the merits. The *Quoine* majority's remark that Quoine held customer coins in commingled storage was directed at intention, since the question was whether the commingling showed that no trust was meant. It should not be read as holding that commingling defeats a trust that is otherwise clearly intended. The better view, consistent with *Ruscoe* and with the regulatory requirements described below, is that a Singapore court would uphold an express trust over an omnibus wallet as a trust of the bulk in co-ownership shares. The condition is that the custodian's records allow each customer's entitlement to be determined at any time. The weak point is the shortfall case. If the omnibus wallet is hacked or the custodian has misapplied part of the pool, the co-owners bear the loss pro rata unless the terms allocate it differently. A customer whose deposit was made after the loss occurred is in the same position as one who deposited before, because the trust is of the bulk and not of particular coins.[8]

Certainty of objects

A custody trust has no difficulty here. The beneficiaries are the customers whose accounts show a balance. Protocol treasuries present the opposite picture. A foundation or company that holds tokens "for the benefit of the community" or "for token holders from time to time" has not identified a class of beneficiaries with sufficient certainty to found a private express trust. Such arrangements are better analysed as purpose trusts, which Singapore law does not recognise outside charity, or as contractual or corporate arrangements. The Singapore company limited by guarantee that many protocols use as a foundation holds its treasury beneficially for itself and applies it according to its constitution (Part K, Chapter IX). Token holders have no proprietary interest in the treasury. A founder who tells the community otherwise should be told that his statement is either untrue or an invitation to litigation.

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Notes

1. *Quoine Pte Ltd v B2C2 Ltd* [2020] SGCA(I) 02 at [144], citing *Korda v Australian Executor Trustees (SA) Ltd* [2015] HCA 18 at [11]. ↩
2. *Quoine* [2020] SGCA(I) 02 at [145]–[146], citing *Vintage Bullion DMCC v Chay Fook Yuen* [2016] SGCA 52 at [61]. ↩
3. *Re Gatecoin Ltd* [2023] HKCFI 914 (Linda Chan J, 31 March 2023), holding that cryptocurrency is property capable of being held on trust. Whether a trust arose depended on which version of the exchange's terms the customer had accepted. ↩
4. *Re Goldcorp Exchange Ltd (in receivership)* [1995] 1 AC 74 (PC). ↩
5. *Hunter v Moss* [1994] 1 WLR 452 (CA). ↩
6. *Pearson v Lehman Brothers Finance SA* [2011] EWCA Civ 1544 at [69]–[76], approving the co-ownership analysis of a trust of part of a fungible bulk. ↩
7. *Ruscoe v Cryptopia Ltd (in liq)* [2020] NZHC 728 (Gendall J) at [181]–[191]. ↩
8. The pro rata sharing of a shortfall in a fungible bulk held on trust follows the approach in *Re Lehman Brothers International (Europe) (in administration)* [2012] UKSC 6 on client money pools, which Singapore courts treat as persuasive. ↩

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