Arbitrability, Corporate Insolvency, and Fractured Disputes: The NSW Court of Appeal's Approach in Clough v Elecnor and the Lex Domicilii vs. Lex Arbitri Divide

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Introduction: The Collision of Party Autonomy and Public Policy

The intersection of international commercial arbitration and corporate insolvency consistently generates profound jurisdictional friction. While arbitration is a private, consensual mechanism governed by party autonomy, corporate insolvency is a collective, statutory procedure rooted in public policy and designed to bind third parties.

When a commercial dispute triggers corporate restructuring mechanisms, courts face a critical question: is the dispute still "capable of settlement by arbitration," or must it be resolved by national courts? The New South Wales Court of Appeal (NSWCA) recently addressed this tension in *Clough Projects Australia Pty Ltd v Elecnor Australia Pty Ltd* [2026] NSWCA 111.

By dissecting the arbitrability of corporate matters and addressing the procedural fracturing of disputes, highlighted prominently in Ground 5 of the appeal, the NSWCA delivered a judgment that mirrors global approaches to the conflict between the law of the arbitral seat (*lex arbitri*) and the law of the corporate domicile (*lex domicilii*).

The Factual Matrix: *Clough v Elecnor*

The dispute arose from an unincorporated joint venture between Elecnor and Clough to deliver a major energy infrastructure project in Australia. The Joint Venture Deed contained a broad arbitration clause designating Singapore as the arbitral seat under ICC Rules.

In late 2022, Clough entered voluntary administration and subsequently executed a Deed of Company Arrangement (DOCA) under Part 5.3A of the Australian *Corporations Act 2001* (Cth). Under the DOCA, specified assets were transferred to a Creditors' Trust. Following this insolvency event, Elecnor sought to exercise a compulsory acquisition clause to buy out Clough's participating interest in the joint venture for a nominal $1.00. The DOCA trustees resisted, arguing that the DOCA had already transferred Clough's interest to the trust, thereby altering or extinguishing Elecnor's contractual buyout rights.

Elecnor commenced litigation in the NSW Supreme Court seeking specific performance of the buyout (the "Clause 21.3 Matter"). In response, Clough and the trustees filed a cross-claim seeking $55 million in commercial contribution for called bank guarantees (the "Call Contribution Matter"). Elecnor subsequently applied to stay the cross-claim and refer it to arbitration in Singapore, prompting Clough to argue that the entire dispute should be heard together in court, or alternatively, that Elecnor's primary claim should be temporarily stayed pending the arbitration.

The Arbitrability of Corporate Matters: The Statutory Shield

Central to the appellate review was determining which matters were "capable of settlement by arbitration" under the Australian *International Arbitration Act 1974* (Cth). The NSWCA affirmed the primary judge's ruling that the dispute must be fractured into two distinct matters.

The Call Contribution Matter was identified as a discrete, purely contractual controversy and was stayed and referred to arbitration in Singapore. However, the Court held that the Clause 21.3 buyout dispute was **non-arbitrable**.

The Court's reasoning hinged on the statutory nature of the DOCA. Resolving Elecnor's buyout rights required construing the DOCA and the operation of the *Corporations Act* in a manner that would inherently affect the rights of third-party creditors. The Court noted that a DOCA is not merely a private agreement; it is a statutory instrument that effects a change in the company's legal status and binds all creditors by operation of law. Consequently, there is a "legitimate public interest in seeing that disputes of the type in question are resolved by public institutions… rather than institutions and structures established by the parties."

Ground 5 and the Reality of Fractured Proceedings

Because the corporate buyout matter was non-arbitrable, it remained within the jurisdiction of the NSW courts, while the financial contribution claim was sent to arbitration. This bifurcation formed the basis of Ground 5 of the appeal, wherein Clough challenged the primary judge's refusal to temporarily stay the non-arbitrable court proceedings pending the determination of the Singapore arbitration.

The NSWCA dismissed Ground 5, affirming that the decision not to stay the Clause 21.3 Matter was a valid exercise of discretionary case management. The Court held that the resolution of the corporate acquisition dispute did not depend on the outcome of the arbitrated contribution claim. The dismissal of Ground 5 underscores a harsh procedural reality: when an arbitration agreement collides with a non-arbitrable statutory regime, the fracturing of the dispute across dual forums is often an inevitable consequence of enforcing the arbitration agreement to the extent permissible by law.

Global Reflections: *Lex Domicilii* vs. *Lex Arbitri*

The *Clough* judgment reflects a universal paradigm in cross-border dispute resolution: the supremacy of the *lex domicilii* over the *lex arbitri* in matters of corporate status and insolvency.

In international arbitration, parties select a seat (e.g., Singapore) whose laws, the *lex arbitri*, govern the procedural framework of the arbitration and typically determine objective arbitrability. However, the legal personality, restructuring, and insolvency of a corporation are governed exclusively by its *lex domicilii* or *lex concursus* (e.g., Australia).

Globally, courts align with the NSWCA's approach. Purely *in personam* commercial claims, such as quantifying a debt, can be arbitrated. But *in rem* claims, or disputes that strike at the core mechanics of an insolvency proceeding and affect the collective rights of the creditor pool, are universally guarded by the domestic courts of the corporate domicile. The public policy underlying the *lex domicilii* acts as a firm boundary that private arbitral tribunals cannot cross.

Strategic Takeaways for International Commercial Disputes

For corporate entities managing cross-border agreements, the *Clough v Elecnor* decision offers several practical, jurisdiction-neutral insights:

- **Evaluate the Scope of Arbitrability:** When disputes involve distressed counterparties, parties should recognize that arbitration clauses may not cover issues that invoke statutory restructuring regimes or impact the collective rights of third-party creditors.
- **Prepare for Parallel Proceedings:** As demonstrated by the NSWCA's dismissal of Ground 5, courts are willing to fracture disputes, retaining jurisdiction over corporate status issues while sending discrete commercial claims to arbitration.

- **Assess the Interplay of Governing Laws:** During the drafting and enforcement phases, it is essential to analyze how the procedural laws of the chosen arbitral seat (*lex arbitri*) will interact with the mandatory corporate and insolvency laws of the counterparties' home jurisdictions (*lex domicilii*), anticipating that local courts will intervene to protect statutory frameworks.

Conclusion

The NSW Court of Appeal's judgment in *Clough v Elecnor* is a definitive modern precedent on the limits of arbitrability. It illustrates that while international commercial arbitration remains the preferred mechanism for resolving cross-border contractual disputes, the statutory gravity of corporate restructuring and insolvency remains firmly within the domain of domestic courts. Navigating the resultant procedural fractures requires a sophisticated understanding of both the procedural flexibility of the *lex arbitri* and the mandatory public policy of the *lex domicilii*.

Wasel & Wasel advises on complex commercial disputes, international arbitration, and cross-border corporate litigation. The firm possesses extensive experience navigating multi-jurisdictional matters, addressing the intricate conflicts of law between arbitral seats and corporate domiciles, and managing parallel proceedings involving statutory insolvency regimes and commercial arbitration across global jurisdictions.

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Misappropriated Mining Hardware and Newly Minted Tokens: Analysis of Yimiao v 3V (Supreme Court of Victoria) – Opportunity Loss, Unjust Enrichment, and Constructive Trusts

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Introduction

The Supreme Court of Victoria's judgment in *Yimiao Australia Pty Ltd v 3V Development Australia Pty Ltd* [2026] VSC 133 provides a detailed examination of how established common law and equitable doctrines apply to the unauthorized retention of cryptocurrency mining hardware and the subsequent generation of digital assets. Delivered by Justice Attiwill, the decision addresses the quantification of damages in volatile digital asset markets, the application of unjust enrichment to misappropriated infrastructure, and the equitable classification of newly minted cryptocurrency.

This article objectively outlines the facts and legal findings of the judgment, and it compares the Victorian Supreme Court's approach with the legal frameworks in the United Kingdom (UK), Hong Kong (HK), the Dubai International Financial Centre (DIFC), and the Abu Dhabi Global Market (ADGM), focusing on global hot topics such as digital asset valuation and

equitable tracing.

The Factual Matrix

The plaintiff, Yimiao Australia Pty Ltd, purchased 1,598 Bitmain L7 Antminer machines, configured to mine Litecoin and Dogecoin. These machines were hosted at a site in Victoria owned by the defendant, 3V Development Australia Pty Ltd (3V).

The Court found that on 25 July 2022, 3V excluded Yimiao's agents from the premises. The Court stated that "3V voluntarily took possession of the Yimiao Machines without any legal right to do so" [987]. Subsequently, 3V disconnected the hardware from Yimiao's designated mining pool and connected a portion of the machines to F2Pool and ViaBTC mining pool accounts linked to 3V personnel, including its sole director, Dajian Li. The Court found that 3V utilized the hardware to mine 8,850,529 Dogecoin and 4,806 Litecoin [1010].

Yimiao initiated proceedings claiming bailment, detinue, conversion, trespass to goods, restitution, and knowing receipt of trust property against 3V and Dajian Li.

Quantification of Damages and Loss of Commercial Opportunity

A primary issue before the Court was the quantification of damages for Yimiao's "loss of a commercial opportunity" to mine cryptocurrency over the hardware's four-year lifespan. Yimiao sought over AUD $26 million, relying on expert evidence projecting future network hashrates (mining difficulty), token issuance, and a realization strategy where tokens would be held until reaching specific fiat values.

Justice Attiwill confirmed the availability of damages for a lost commercial opportunity but rejected Yimiao's calculation. Applying principles from *Sellars v Adelaide Petroleum NL* and quoting the High Court in *Cessnock City Council v 123 259 932 Pty Ltd*, the Court noted that a plaintiff is given a "'fair wind' but not a 'free ride'" [541] when a defendant's

wrongdoing causes uncertainty.

The Court found the expert's methodology unreliable, observing that it failed to properly account for the mathematical hard caps on token issuance and abandoned historical average pricing when updating forecasts. Justice Attiwill held:

"In my view, the value of the opportunity that Yimiao lost cannot be ascertained by reference to the degree of possibilities and probabilities. There is insufficient evidence of what the value of that opportunity might have been. Yimiao did not adduce important evidence of value, despite being able to do so. In addition, important evidence of Mr McNew is not cogent and is unreliable. As a result, there are substantial and important gaps in the evidence concerning value. In these circumstances, it is not for the Court to use uninformed guesswork to determine the issue of damages." [653]

Consequently, the Court awarded nominal damages of $100 for the torts of conversion and detinue regarding the lost profits [917].

The insistence on objective, non-speculative evidence when claiming damages in volatile digital asset markets is consistent across major common law jurisdictions. In the UK and Hong Kong, courts demand rigorous economic models to establish quantum in digital asset disputes. For example, in the UK (*B2C2 Ltd v Quoine Pte Ltd* [2020] SGCA(I) 02, applying common law), courts have rejected retrospective, hypothetical trading strategies for volatile assets. Similarly, the DIFC Digital Assets Law (DIFC Law No. 3 of 2024) expressly defines digital assets as property but relies on standard common law principles of foreseeability and certainty for damages. The ADGM, applying English common law via the Application of English Law Regulations 2015, mirrors this approach, aligning with the Victorian Court's refusal to engage in "uninformed guesswork."

Restitution and Unjust Enrichment: Objective Valuation of Hardware

While the claim for future crypto profits failed due to evidentiary deficiencies, Yimiao successfully recovered AUD $14,850,066.72 under the doctrine of restitution for unjust enrichment.

The Court determined that 3V was unjustly enriched by obtaining possession of the machines. Quoting the High Court in *Redland City Council v Kozik*, Justice Attiwill noted:

“A claim for restitution of unjust enrichment requires a defendant to have received some benefit for which restitution must be made. Unlike compensation or loss, and unlike the prophylactic principle of accounting for and disgorging a defendant’s net profits, restitution of unjust enrichment focuses upon the benefit of the transaction between the plaintiff and the defendant.” [936]

The Court categorized the relevant benefit not as the actual cryptocurrency generated, but as the “opportunity to use the machines.” The Court observed:

“Where a person obtains property of another person without the authority or consent of that person, and obtains a benefit in doing so (ie the opportunity to use it), this may give rise to a claim for restitution of an unjust enrichment.” [942]

To value this benefit, the Court utilized the objective replacement cost of the hardware at the time of the misappropriation. Relying on expert evidence that a new L7 Antminer was valued at $19,310.88 AUD on 25 July 2022, the Court awarded restitution based on the 769 unreturned machines:

“The missing Yimiao Machines were received by 3V, and have never been returned to Yimiao. On and from 25 July 2022, 3V received the benefit of the opportunity to use the Yimiao

Machines… In these circumstances, the replacement value as at 25 July 2022 is an appropriate measure of the objective value of the missing Yimiao Machines… It is the amount of $14,850,066.72. This is the value of the benefit retained by 3V at the expense of Yimiao." [964-965]

The treatment of digital asset infrastructure as property subject to objective restitution aligns with approaches in the UK, HK, DIFC, and ADGM. Under English law, unjust enrichment requires that a defendant be enriched at the claimant's expense without a juristic reason. Courts frequently grant restitutionary remedies for the objective value of misappropriated property, often assessed via a hypothetical "reasonable hiring fee" or replacement cost (*Attorney General v Blake* [2001] 1 AC 268). The DIFC and ADGM Courts apply similar tests derived from English equity. By anchoring the unjust enrichment claim to the physical hardware's replacement cost rather than the volatile digital tokens it produced, the Victorian Court utilized a valuation mechanism widely accepted across these international jurisdictions.

Constructive Trusts and Knowing Receipt: Hardware vs. Newly Minted Tokens

A central legal issue was whether the newly minted Dogecoin and Litecoin constituted trust property, which would trigger third-party liability for Dajian Li under the "knowing receipt" doctrine (*Barnes v Addy*), as the mined tokens were deposited into his F2Pool accounts.

The Court bifurcated its analysis between the physical hardware and the newly minted tokens. For the physical hardware, the Court applied the principle from *Black v S Freedman & Co*:

"Where money has been stolen, it is trust money in the hands of the thief, and he cannot divest it of that character." [980]

Justice Attiwill concluded:

"I find that 3V held the Yimiao Machines on constructive trust (institutional) for Yimiao upon the principles in *Black v S Freedman & Co* on and from 25 July 2022. 3V misappropriated the Yimiao Machines." [982]

However, the Court reached a different conclusion regarding the newly minted Dogecoin and Litecoin. While 3V breached its fiduciary duty as a constructive trustee by using the machines for its own profit, the resulting cryptocurrency was not trust property at the exact moment of its creation.

Quoting *Grimaldi v Chameleon Mining NL [No 2]* and *Hospital Products Ltd v United States Surgical Corporation*, the Court explained that under Australian law, the trust imposed over profits generated in breach of fiduciary duty is a *remedial* constructive trust, which only comes into existence upon a court order:

"The imposition of such a constructive trust is remedial, not institutional. In *King v Fister*, the Queensland Court of Appeal stated that a 'remedial constructive trust is, as its name suggests, one imposed by way of remedy in order to do equity. It is a trust imposed by the court and arises at the time of the making of the order'." [1007]

Consequently, because the cryptocurrency was not classified as institutional trust property at the time it was received by Dajian Li's wallet, the cause of action for knowing receipt failed:

"As a result, any receipt of the cryptocurrency by Mr Dajian Li did not involve the receipt by him of trust property. The cryptocurrency was not trust property when it was misappropriated by 3V or when it may have been subsequently received by Mr Dajian Li… To the extent the cryptocurrency may be the subject of a constructive trust, that constructive trust would be remedial rather than institutional, and thus

would not apply to the cryptocurrency until the time of this Court making an order to that effect. The claim against Mr Dajian Li must be dismissed." [1008]

The distinction between institutional and remedial constructive trusts highlights a notable divergence between Australian equity and English law. English courts have rejected the concept of the remedial constructive trust. In *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45, the UK Supreme Court held that unauthorized profits or bribes obtained by a fiduciary are held on an *institutional* constructive trust from the moment of receipt.

If the *Yimiao* facts were adjudicated in the UK, or in jurisdictions that strictly follow English equity such as Hong Kong, the DIFC, or the ADGM, a court would likely determine that the newly minted cryptocurrency was held on an institutional constructive trust immediately upon generation. Under that framework, the tokens would constitute "trust property" upon deposit, potentially satisfying the necessary elements for a "knowing receipt" claim against the director. The Australian retention of the remedial constructive trust for fiduciary profits creates a temporal gap that limits third-party recipient liability prior to a court order, a framework that contrasts with the approaches in the UK, HK, DIFC, and ADGM.

Conclusion

As digital asset operations mature, *Yimiao Australia v 3V Development* outlines the application of common law frameworks to hardware misappropriation and cryptocurrency generation. The Victorian Supreme Court's rigorous approach to the quantification of damages, combined with the jurisdictional variances identified in equitable tracing and trust doctrines across the UK, DIFC, ADGM, and Hong Kong, confirms that digital asset recovery requires a jurisdictionally tailored strategy.

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No Signatory, No Standing: Queensland Court Overturns Arbitrator on Trustee Joinder

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The resolution of commercial disputes through arbitration is often praised for its efficiency and privacy, yet its foundational authority remains strictly tethered to the consent of the parties. Unlike the broad jurisdiction of a court, an arbitrator's power extends only as far as the written agreement allows. This limitation becomes a critical battleground when complex corporate structures, such as family trusts involving split ownership and operational entities, collide with the rigid terms of a contract. In the recent decision of *Tailing Gully Farming Pty Ltd v Pratt* [2025] QSC 353, the Supreme Court of Queensland provided a definitive ruling on the limits of an arbitrator's jurisdiction over third-party trustees. The judgment serves as a stern reminder that financial entanglement is not a substitute for legal privity, establishing that a court must intervene when an arbitrator wrongfully expands their reach to include a "stranger to the contract."

The dispute arose from a lease of cane farming land in Queensland. The registered owner of the land, William Robert Pratt, entered into a written lease in 2019 with Tailing Gully

Farming Pty Ltd (TGF). The agreement was explicit: Mr. Pratt was defined as “the Lessor” and TGF as “the Lessee.” Clause 18 of the document contained a standard arbitration agreement, requiring that any dispute regarding the construction of the lease or the rights and liabilities of the parties be referred to arbitration.

As the commercial relationship soured, Mr. Pratt alleged that TGF had breached various covenants of the lease, resulting in significant financial losses. He referred the matter to arbitration. However, a significant legal complication emerged during the proceedings. While Mr. Pratt was the signatory and land owner, the actual farming business was conducted by a related entity, Janella Farming Pty Ltd (Janella), acting as the trustee for the William Pratt Family Trust. Consequently, it was uncontroversial that the “overwhelming majority of losses claimed to have been suffered by Mr Pratt in the arbitration are in fact losses suffered by Janella.”

Recognizing that the true financial victim was not the named lessor, the arbitrator decided to join Janella to the proceedings. The arbitrator reasoned that although Janella was not a signatory, the “inclusion of Janella as a party in the Arbitration is necessary because of the subject matter in controversy, rather than the formal nature of the claim.” The arbitrator concluded that Janella had standing because it had a claim “through or under” Mr. Pratt.

TGF challenged this decision in the Supreme Court, arguing that the arbitrator had exceeded his jurisdiction. The Court’s analysis, delivered by Justice Kelly, focused on the strict legal definition of a “party” under the *Commercial Arbitration Act 2013* (Qld). While the Act extends the definition of a party to include “any person claiming through or under a party to the arbitration agreement,” the Court held that this phrasing is not a catch-all for related entities.

Drawing on the leading authority of *Tanning Research*

Laboratories Inc v O'Brien, Justice Kelly explained that the prepositions "through" and "under" convey the specific notion of a "derivative cause of action." To fall within this definition, a third party must rely on a right or defense that is "vested in or exercisable by the party." This typically applies to assignees, liquidators, or trustees in bankruptcy who legally stand in the shoes of the original signatory. In this case, Janella was not claiming a right derived from Mr. Pratt; it was asserting its own distinct claim for damages while Mr. Pratt remained the lessor. The Court found that Mr. Pratt had "failed to articulate a coherent or maintainable basis" for contending that Janella was effectively claiming through him.

The respondents attempted to preserve the arbitrator's jurisdiction by arguing theories of agency and estoppel. They contended that Mr. Pratt had entered into the 2019 Lease as an agent for Janella, thereby making Janella the true lessor, or alternatively, that TGF was estopped from denying Janella's status because they had paid rent to the trustee.

The Court dismissed these arguments as "sufficiently weak as to be not sustainable." It was undisputed that Mr. Pratt, not Janella, was the registered owner. Justice Kelly reasoned that "as Janella was not the owner of the Land, Mr. Pratt can have had no actual or ostensible authority to represent that Janella was 'the Lessor'." The lease explicitly defined the lessor as Mr. Pratt, and there were "no words contained in the 2019 Lease to the effect that Mr. Pratt entered the 2019 Lease as agent for and on behalf of Janella."

Similarly, the estoppel argument failed because the express terms of the written contract were "plainly inconsistent with, and contradict," the alleged assumption that the trustee was the lessor. The mere fact that TGF paid rent to Janella at Mr. Pratt's direction was not enough to override the written agreement. Mr. Pratt's own evidence admitted that he operated the business through Janella because he "considered the

farming business to be mine … notwithstanding how it is legally held," rather than due to any mutual agreement with the lessee.

Critically, the judgment clarifies the standard of review a court must apply when an arbitrator's jurisdiction is challenged. The Court confirmed that the review is a hearing *de novo*, meaning the court looks at the jurisdiction question afresh to ensure the arbitrator was correct. Justice Kelly held that the arbitrator's reliance on the "subject matter in controversy" was a fundamental error. By ignoring the strictures of privity, the arbitrator had strayed beyond his authority. The Court declared that "the doctrine of privity of contract applies and Janella as a stranger to the 2019 Lease cannot seek to recover damages by reason of its breach."

Consequently, the Court set aside the arbitrator's decision. Justice Kelly concluded that "curial intervention is necessary to prevent the arbitration from foundering by reason of the wrongful inclusion of the second respondent." The decision stands as a clear directive that the efficiency of arbitration cannot come at the expense of fundamental contractual principles. The position of the Court pursues that a trustee entity, no matter how closely related to the signatory or how deeply involved in the financial operations, cannot force its way into an arbitration without a clear legal basis found within the agreement itself.

This case serves as a cautionary tale for families and trustees managing complex asset holding structures where arbitration is the preferred method of dispute resolution. Often, families separate land ownership from operational risk for "legal and tax reasons," as Mr. Pratt admitted was his motivation. However, when a trustee entity like Janella is the operational engine incurring expenses, the legal documentation must explicitly reflect this role. Effective asset management requires that the entity bearing the financial risk is also the entity named in the arbitration agreement. If a trustee

intends to enforce rights under a contract, it must ensure it is not merely a passive beneficiary of rent payments but an active, defined party within the arbitration agreement.

Furthermore, the judgment highlights the precise legal scaffolding required for a trustee to access arbitration provisions without being a primary signatory. To successfully argue that a trustee is claiming “through or under” a signatory, there must be a clear legal mechanism, such as an assignment or a formalized agency agreement, that bridges the gap between the individual owner and the corporate trustee. The court emphasized that the prepositions “through” and “under” require a “derivative cause of action” that is “vested in or exercisable by the party.” Simply being a related entity or the “invoicing entity” does not create this legal bridge. Trustees must consider structuring their commercial relations so that the cause of action for financial loss resides with the signatory, or ensure the arbitration clause is broad enough to expressly include related entities. Without such foresight, a trustee remains a “stranger to the 2019 Lease,” unable to utilize the efficiency of arbitration to recover its losses.

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Ex NF v Munneke: A Supreme Court of South Australia

Analysis of Private Keys, Insolvency, and the Tracing of Corporate Digital Assets

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The judgment of the Supreme Court of South Australia in *EX NF PTY LTD (IN LIQ) & ANOR v MUNNEKE & ORS* [2025] SASC 165 (2 October 2025) represents a significant and forensically detailed application of orthodox corporate law principles to the distinct evidentiary challenges posed by digital assets. While the case involved the ownership and disposition of Bitcoin (BTC) and Ether (ETH), its true value, particularly for international digital asset disputes and arbitration, is not in the creation of novel "crypto law." Rather, the judgment provides an authoritative framework for insolvency practitioners, creditors, and counsel on how established principles of beneficial ownership, directors' duties, and shareholder ratification are to be applied when corporate assets are held in pseudonymous wallets controlled by a fiduciary. The court's methodical approach demonstrates a refusal to be confounded by the technical nature of the assets, focusing instead on a rigorous, evidence-based analysis of off-chain records, competing narratives, and the objective conduct of the parties to establish title and remedy breaches of duty. This analysis will deconstruct the court's reasoning, focusing on the key takeaways for digital asset disputes, specifically the court's treatment of provenance over possession, its method for deconstructing "personal investment" claims, the primacy of off-chain financial records, the seamless application of tracing principles, and the critical invalidation of shareholder ratification once a company enters the "zone of insolvency."

A primary challenge in digital asset disputes is the common defense that technical control of a private key is tantamount to legal and beneficial ownership. The *Munneke* judgment provides a clear rebuttal to this presumption, establishing that a court's inquiry will prioritize the *provenance* of the asset over the mere *possession* of the keys. The director, Mr. Munneke, "contended that he…is presumed by law to be the owner of the cryptocurrency" [para 50], a claim supported by his exclusive control of the CoinJar account and the associated private keys [para 135]. The court, however, looked past this technical control to determine the asset's true character at its inception. The foundational finding was that "the bitcoin was purchased in February and August 2014…using Ex NF's funds from the NAB account" [para 798]. The court noted that the CoinJar exchange account "was linked only to the NAB account" [para 798], despite Mr. Munneke's awareness that he could have linked a personal bank account [para 798]. This direct, objective link between the company's fiat funds and the acquisition of the digital asset was the court's starting point and a fact that the director's defenses could not overcome. The director's claim that corporate funds "were used from the NAB account because it was convenient" [para 50] was implicitly rejected in favor of the court's finding that the purchases were, "on their face, company transactions" [para 830]. This demonstrates a clear judicial method: the "on-ramp", the source of the fiat currency used to acquire the asset, will be a paramount consideration in determining beneficial ownership, regardless of whose name is on the exchange account or who controls the subsequent wallet.

From this finding of provenance, the court's analysis then turned to dismantling the director's *post facto* rationalization for the holding. This is a crucial takeaway for the digital asset industry, where the line between corporate treasury and personal holdings is often blurred, particularly in founder-led enterprises. The court was faced with conflicting defenses: Mr. Munneke claimed the crypto was

a “family investment” [para 50], possibly for the ZALD Trust [para 156], while Ms. Zaccara, the sole shareholder, “assert[ed] that the cryptocurrency was purchased for the benefit of only Ms Zaccara personally” [para 50]. The court systematically deconstructed these narratives by privileging contemporaneous evidence of *corporate purpose* over subsequent, self-serving claims of *personal investment*. The most compelling piece of evidence was an “unguarded” 2018 email from Mr. Munneke to a broker, written years after the acquisition but before the dispute. In it, Mr. Munneke explained his early involvement with Ethereum: “Bought in at the pre-sale to use it, never expected it to be an investment, just thought it was a cheaper way to get gas for development” [para 806]. The court was “ultimately persuaded that Mr Munneke’s email…constitutes an admission” [para 841] that the asset was acquired for a specific business utility, not as a personal investment. This finding was bolstered by other objective evidence of corporate purpose, including the company co-hosting a “Blockchain Hackathon” [para 846] and expert testimony regarding the benefits for a developer to hold ETH at the time [para 112]. The court’s finding was decisive: “I am satisfied that the ethereum was purchased by Ex NF in the course of its business for use in its business at some point in the future” [para 845]. This provides a clear test for future disputes, weighting contemporaneous evidence of business utility far more heavily than subsequent, inconsistent claims of personal ownership.

Further cementing the asset’s corporate character, the court gave significant weight to the objective, off-chain financial records. This analysis was twofold. First, the court noted where the company’s *own conduct* demonstrated ownership. It was submitted, and the court accepted, that Ex NF had “claim[ed] a tax credit in respect of the cryptocurrency in 2014” [para 400] and, critically, “assum[ed] a GST collection obligation in 2018” [para 431] upon the sale of the ETH to fund the Ward Street property. The respondents’ defense that these were

simply “mistakes” by the accountants [para 432] was unpersuasive. This objective conduct, recorded in statutory filings, was treated as powerful evidence of the asset’s true character. Second, the court’s analysis of the company’s *failure* to keep proper records for its other transactions demonstrated the director’s breach of duty. The court found that contrary to section 286(1) of the *Corporations Act*, Ex NF “did not maintain written financial records that correctly recorded and explained its transactions…and which would enable true and fair financial statements to be prepared and audited” [para 775]. This failure meant the director was incapable of making an informed decision. As Mr. Munneke himself admitted in his s 597 examination, “he did not know in January 2016 whether Ex NF was solvent or insolvent” [para 738]. This dual focus, using the records that *did* exist to establish ownership of the crypto, and the *absence* of records to establish a breach of duty in disposing of it, highlights the central, determinative role that financial accounting plays in digital asset disputes.

Once the court established that the digital assets were the company’s property, it had no difficulty applying traditional equitable tracing principles to the asset’s subsequent metamorphosis. This is a vital confirmation for liquidators and creditors. The court seamlessly followed the company’s ETH, which it found was “the property of Ex NF” [para 850], through its liquidation by the director. It noted the fiat proceeds were deposited into the company’s NAB account, and that these specific funds were then “drawn from the NAB account to be paid as settlement monies for the purchase of Ward Street” [para 25]. The court also noted that the surplus funds from the sale, some $121,988.89, “were retained by Ex NF in the NAB account” [para 816], conduct which the court found was consistent only with corporate ownership. This clean application of tracing, from ETH to fiat in a corporate account, to the acquisition of a real property asset in a third party’s name, affirms that these established equitable

remedies are perfectly equipped to unwind complex misappropriations, allowing the liquidator to claim the resulting real-world property as a traceable proceed of the company's original digital asset.

The final and most critical legal disposition of the court was its invalidation of the director's primary defense: shareholder ratification. In the digital asset space, which is dominated by closely-held companies, the alignment of the director and sole shareholder often presents a significant hurdle for creditors. The respondents' case relied heavily on this alignment, arguing "that Ms Zaccara, as sole shareholder of Ex NF, agreed, ratified, and acquiesced to the release of Ex NF's funds" [para 54]. The court, however, deployed the established "zone of insolvency" doctrine to neutralize this defense completely. It first established that the *Kinsela* duty, which requires directors to consider creditors' interests, had been enlivened. For the 2015 O'Connell Street transaction, the court found "a 'real and not remote risk of insolvency'" [para 773]. For the 2018 Ward Street transaction, the company was "facing insolvency" [para 863]. The court then articulated the legal consequence by citing *Kinsela v Russell Kinsela Pty Ltd (In Liq)*: "where a company is insolvent the interests of the creditors intrude…It is in a practical sense their assets and not the shareholders' assets that…are under the management of the directors" [para 645].

This finding was fatal to the defense. The court held that the power of the shareholder to ratify the director's self-dealing was extinguished. "shareholders cannot," the court found, "ratify conduct of directors that is adverse to the interests of creditors in circumstances of doubtful solvency, near insolvency, or the like" [para 801(c)]. This principle was applied to both property transactions. Furthermore, the court invalidated the ratification defense on several other independent grounds. It found the consent was not "informed," as "Ms Zaccara had no better knowledge of Ex NF's financial

situation…than Mr Munneke did" [para 801(d)]. Specific to the Ward Street transaction, the court identified a fatal contradiction: "no issue of ratification arises…given Ms Zaccara was, she says, unaware that Ex NF ever held cryptocurrency. Therefore, it follows that she was never consenting to Ex NF's cryptocurrency being deployed" [para 876]. The court also affirmed that ratification is irrelevant for breaches of *statutory* duties, such as sections 180, 181, and 182, which it found the director had breached [para 801(a)]. This systematic rejection of the unanimous consent defense is perhaps the judgment's most significant contribution, providing a clear path for liquidators to overcome collusive behavior between directors and shareholders in founder-driven companies.

Having defeated the ratification defense, the court found the director's breaches of duty were plain. He failed to exercise care and diligence (s 180(1)), as a "reasonable director…would not have made a gift of the bulk of Ex NF's cash…without any idea of Ex NF's real financial position" [para 800(a)]. He acted for an improper purpose (s 181(1)), admitting the goal was to place an asset "not tied to the success or failure of Ex NF" [para 800(c)]. And he improperly used his position (s 182(1)) [para 800(d)]. The court also summarily rejected the statutory "business judgment rule" defense, as the director had a clear "material personal interest" and had failed to "inform themselves" [para 800(b)]. The transactions were therefore found to be voidable "unreasonable director-related transactions" under section 588FDA [paras 802, 877], allowing the liquidator to recover the assets for the benefit of the creditors.

In conclusion, the *Munneke* judgment is a powerful illustration of the judiciary's capacity to apply orthodox legal and equitable principles to complex digital asset disputes. It serves as an authoritative guide, confirming that beneficial ownership will be determined by a forensic examination of fiat

provenance, corporate purpose, and off-chain financial records, not merely by the control of a private key. Most importantly, it reaffirms the power of the *Kinsela* "zone of insolvency" principle as a critical tool for creditors, demonstrating that shareholder ratification is no defense to the misappropriation of corporate assets when the interests of creditors have been placed at risk. The decision confirms that the established tools of corporate law and equity are robust, fit for purpose, and fully capable of providing remedies for malfeasance in the digital age.

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Spain's EU Law Defence Rejected in Australian Award Ruling

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In a landmark decision clarifying the relationship between European Union law and public international law obligations, the Federal Court of Australia has delivered a comprehensive judgment in *Blasket Renewable Investments LLC v Kingdom of Spain* [2025] FCA 1028. Stewart J has ordered the enforcement of four arbitral awards, totalling approximately €500 million, against the Kingdom of Spain, providing a robust affirmation of the integrity of the international investment arbitration

system. The judgment navigates a complex intersection of foreign State immunity, treaty interpretation, and the so-called “intra-EU objection” that has been litigated fiercely in courts worldwide.

The proceedings arose from Spain’s alterations to its renewable energy regulatory framework in the early 2010s. Foreign investors, alleging that these changes breached the fair and equitable treatment standard under Article 10 of the Energy Charter Treaty (ECT), initiated arbitrations under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention). Having secured favourable awards from ICSID tribunals, the investors, or their assignees, sought to enforce those awards in Australia under the *International Arbitration Act 1974* (Cth). Spain resisted, mounting a multifaceted defence that struck at the very foundation of its consent to arbitrate.

Spain’s primary contention was that it was immune from the Court’s jurisdiction pursuant to section 9 of the *Foreign States Immunities Act 1985* (Cth). While the High Court’s recent decision in *Kingdom of Spain v Infrastructure Services Luxembourg Sàrl* [2023] HCA 11 held that accession to the ICSID Convention constitutes a waiver of immunity for enforcement proceedings, Spain sought to distinguish the present case. It argued that the High Court’s ruling did not govern a situation where the binding status of the awards themselves was in dispute. This challenge to the awards’ validity was predicated on the jurisprudence of the Court of Justice of the European Union (CJEU), notably in cases such as *Achmea* and *Komstroy*. Those decisions established that arbitration clauses in investment treaties are incompatible with the foundational treaties of the EU when applied to disputes between an EU Member State and an investor from another Member State. Spain argued that this principle of EU law rendered its offer to arbitrate under the ECT inapplicable to the EU-based investors, meaning no valid arbitration agreement was ever

formed. Consequently, the awards were not "binding" under Article 53 of the ICSID Convention, and Spain had not waived its immunity in respect of them.

Stewart J firmly rejected this line of reasoning by returning to the fundamental architecture of the ICSID Convention. His Honour affirmed the widely-held view that the Convention establishes a "self-contained or closed-loop system" for the review and enforcement of awards. The Court found that once an ICSID tribunal has determined its own jurisdiction and rendered an award, and internal remedies such as annulment have been exhausted, the role of a domestic court in an enforcement proceeding is circumscribed. As the Full Court had previously noted, the sole issue for a competent court under Article 54(2) of the Convention is the presentation of a certified copy of the award. An Australian court cannot look behind the award to re-examine the tribunal's jurisdiction or merits. This principle, the Court reasoned, is central to the Convention's object of providing legal security for international investments by mitigating sovereign risk.

Critically, the judgment addressed the apparent conflict between Spain's obligations under EU law and its duties under the ICSID Convention. Stewart J determined that the primacy of EU law, as articulated by the CJEU, is a rule that operates within the autonomous EU legal order. It does not extinguish Spain's pre-existing obligations under public international law owed to non-EU states such as Australia. As a party to the ICSID Convention, but not the EU treaties, Australia's obligation under Article 54 to recognise and enforce the awards remained unaffected by Spain's "juridical dilemma".

The Court also dismissed Spain's alternative contention that the EU treaties had effected an *inter se* modification of the ICSID Convention among EU Member States. Applying the principles of treaty modification reflected in the Vienna Convention on the Law of Treaties, Stewart J found that the obligations under the ICSID Convention, particularly those

concerning the recognition and enforcement of awards, were *erga omnes partes*—owed to all contracting states collectively, not merely bilaterally. Such obligations, which protect the common interest in the stability of the entire investment framework, cannot be modified by a sub-group of parties without affecting the rights of others.

Further, the Court resolved a novel issue concerning the assignment of the awards. In two of the proceedings, the original award creditors had assigned their rights to Blasket Renewable Investments LLC. Spain argued that the Court lacked power to enforce an award in favour of a non-party to the original arbitration. His Honour rejected this, concluding that the rights under an ICSID award, once given the force of law in Australia, constitute a chose in action capable of assignment. Nothing in the ICSID Convention itself prohibits such an assignment.

The decision in *Blasket* represents a significant contribution to the global jurisprudence on the enforcement of investor-state awards. It confirms that an Australian court will not permit a foreign state to use conflicts within another legal order, however profound, as a shield to resist its clear obligations under public international law as implemented into Australian domestic law. The judgment provides unequivocal support for the principle that the ICSID regime is a self-contained system, reinforcing Australia's status as a reliable and pro-enforcement jurisdiction.

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Superintendent’s Certificate to Arbitration: Interpreting Liquidated Damages from a Queensland Court of Appeal

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In the recent decision of **Pacific Diamond 88 Pty Ltd v Tomkins Commercial & Industrial Builders Pty Ltd [2025] QCA 50**, the Queensland Court of Appeal offered some illuminating perspectives on how arbitration clauses can interact with (and ultimately safeguard) the parties’ substantive rights when a contract’s payment and security mechanisms are under strain. Although the dispute at hand revolved largely around liquidated damages and set-off provisions, the Court’s reasoning provides a clear reminder of the “final safety net” that arbitration can represent for parties who wish to challenge a Superintendent’s certifications or the Principal’s contractual interpretations.

From the outset, Justice Bond observed that “in this form of contract disputes would ultimately be resolved by arbitration, although parties were permitted to have recourse to the courts in certain circumstances.” The judgment underscores that an **arbitral process** can be the ultimate recourse when a party seeks to contest Superintendent-issued certificates or claim extensions of time. Justice Bond explained that because the parties had **deleted** vital passages in the standard form contract (AS4902-2000) that would otherwise allow the Principal to set off liquidated damages progressively, the correct interpretation was that “the Principal would only be able to utilise any certified liquidated damages as part of

the final certificate process."

Where that final certificate process might yield a sum payable by the Contractor—or, conversely, reduce the amount payable to the Contractor—the aggrieved party retains the right to dispute the Superintendent's certification through arbitration. Justice Bond phrased it succinctly:

> *"If the Contractor disputed that by giving notice pursuant to cl 37.4(d) on the basis that it should have been granted an extension of time, it might vindicate that position in arbitration obtaining a direction from the arbitrator that there should have been an extension of time."*

This statement highlights a crucial lesson: even if the Superintendent has issued a certificate imposing a monetary liability on the Contractor (or absolving the Principal from having to pay), that certificate does not necessarily settle the question once and for all. The presence of an **arbitration clause** in the contract—and the parties' careful drafting around final certificates and dispute notices—means the Contractor (or the Principal) can still put those issues before an arbitrator, seeking an authoritative ruling about the correctness of the Superintendent's or the Principal's stance.

Justice Bond also pointed out the logical sequence under which arbitration would be triggered. Once the Superintendent's final certificate is issued, the "final certificate shall be conclusive evidence" except in certain circumstances, including "unresolved issues the subject of any notice of dispute pursuant to clause 42, served before the 7th day after the issue of the final certificate." That notice of dispute procedure, in turn, funnels the parties into arbitration if they cannot otherwise resolve their differences.

Practitioners should note, too, the Court's observation that this approach—deferring any real monetary consequences of

Superintendent certifications to the final certificate stage—does not leave a party permanently deprived of its entitlement. Instead, it reflects a commercial bargain that ensures the Principal can still seek the benefit of liquidated damages, but only when the project is sufficiently far along (or completed) such that final entitlements are being ascertained in a single accounting. Meanwhile, the Contractor retains a robust right to **arbitrate** any alleged missteps in certifying or quantifying that liability.

All told, **Pacific Diamond 88** serves as a timely reminder that parties who strike out the more immediate set-off or recourse mechanisms in standard forms are not banishing themselves to a realm of indefinite uncertainty. Instead, as Justice Bond indicates, they are choosing to "unite in rejecting" a mid-project set-off process, and deferring the question of liability or entitlement until the end-game—knowing the law, and the arbitration clause in particular, will still allow them to test the Superintendent's conclusions when it truly matters.

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When Private Keys Mean Real Control: A Landmark Ruling on

Crypto

June 23, 2026

A recent decision in the Supreme Court of Tasmania, reported as **[2025] TASSC 2**, provides clear guidance on how principles of **possession** apply to cryptocurrency. The matter involved an **appellant** and a **respondent** who agreed that the appellant would invest ten thousand dollars of the respondent's money in **Bitcoin**. A dispute later arose when the appellant retained some of the purchased cryptocurrency as a fee, rather than transferring all of it to the respondent. In considering whether the respondent could successfully bring claims in **detinue** and **conversion**, the court turned to a principle that remains vital in physical and digital property cases alike: **it is trite law that a person is in possession of property if that person has actual control of the property and an intention to possess it**.

In this dispute, the court examined whether the appellant maintained actual control over the relevant Bitcoin and intended to possess it as his own. Although Bitcoin is intangible, the court emphasized that its owner is the one who controls the **private keys** for the digital wallet in which the currency is held. Because possession for legal purposes depends on excludability and control, having sole access to the private keys is essentially equivalent to having physical custody of a tangible item. Moreover, the appellant did not disclose or prove any arrangement suggesting that the appellant lacked such control or that another entity actually had possession of the keys.

An important dimension to the court's reasoning was the fact that the appellant consistently acted as if he personally oversaw the Bitcoin and had sole authority regarding

transfers. The respondent had trusted the appellant to invest the funds, and the court concluded that the appellant was the only individual capable of granting or denying access to the cryptocurrency. That exclusive ability to decide who received the Bitcoin, combined with evidence of the appellant's intent to keep some of it as a fee, satisfied the requirement for possession as traditionally defined by **case law**. The intangible nature of Bitcoin did not undermine its status as **property** and did not invalidate claims that relied on principles of physical property law. The court made it clear that so long as something can be controlled, held, and excluded from others, it can be the subject of **detinue** and **conversion**.

The key lessons from this matter are straightforward. First, cryptocurrency is property and can be possessed in the eyes of the law. Second, a court will look closely at who actually controls the **private keys**. If a person has those keys and no one else can move the cryptocurrency without that person's cooperation, that person is in possession. Third, to establish **detinue**, the respondent had to show that the appellant held the Bitcoin in a manner inconsistent with the respondent's rightful claim and refused to return it after demands were made. Fourth, to demonstrate **conversion**, the respondent had to prove that the appellant's actions were so inconsistent with the respondent's ownership that it amounted to a denial of that ownership. In both these torts, actual possession by the appellant was crucial, and the court had little trouble concluding that he held the digital property under his sole control.

The judgment also touched on the appellant's claim for a fee. The appellant insisted that a portion of the respondent's Bitcoin constituted his fee, but the court determined that the appellant never secured express agreement that he could retain the cryptocurrency in that manner. Although it was recognized that the appellant was entitled to some compensation for his

services, the judge refused to accept that the appellant could simply keep part of the digital currency as that fee. The judge took note of an original suggestion that any fee might be based on a "percentage over base," meaning a fee on top of the ten thousand dollars. Since the respondent had wanted ten thousand dollars' worth of Bitcoin, the court found it reasonable that an appropriate fee should be reflected in normal currency rather than in withheld cryptocurrency. The appellant's unilateral decision to keep some of the Bitcoin was inconsistent with the respondent's ownership rights, leading directly to liability.

Because the appellant maintained control over the private keys, the court found that he possessed the Bitcoin and was responsible for returning it upon demand. By refusing to do so, the appellant exposed himself to damages. The court observed that the demand and refusal elements had been established on several occasions. When the respondent requested the immediate transfer of the entire amount of Bitcoin, the appellant delivered only a portion. When further demands were made, the appellant again refused to hand over the remainder. These facts all supported the finding that the appellant both detained the currency unjustly (detinue) and dealt with it in a way inconsistent with the respondent's rights (conversion).

The ruling demonstrates how digital assets, though intangible, are not beyond the reach of ordinary legal principles. The central premise continues to be that **actual control** plus the **intention to possess** qualifies as possession, no matter whether the subject property is a physical object or an electronic asset safeguarded by cryptography. The holder of the private keys enjoys the same kind of power that someone holding a physical item would have: it can be kept, transferred, or refused to others. Accordingly, courts can use familiar rules of property and tort to resolve disputes over cryptocurrency.

This matter reaffirms that individuals handling cryptocurrency for others should do so with clear agreements in place, especially regarding **fees** and **possession**. Failing to clarify whether any commission will be in cryptocurrency or in ordinary currency often sets the stage for these disputes. Above all, the court's approach confirms that **the law does not require tangibility for an asset to be owned and possessed**, so long as those hallmarks of control and intention are in place.

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Supreme Court of NSW Enforces Adjudicator's Money Order Amid Ongoing Arbitration

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The recent decision in *Martinus Rail Pty Ltd v Qube RE Services (No 2) Pty Ltd (No 2) [2024] NSWSC 1223* sheds light on the complex interplay between adjudication under the Building and Construction Industry Security of Payment Act 1999 ("SOPA") and arbitration clauses in construction contracts. This case underscores the importance of meticulously drafted dispute resolution clauses and the strategic considerations parties must weigh when disputes arise in large-scale infrastructure projects.

The dispute centered on two adjudications under SOPA arising

from contracts between the head contractor, **Qube RE Services**, and the subcontractor, **Martinus Rail Pty Ltd**, for work on the **Moorebank Intermodal Terminal Project** in Western Sydney. The adjudications obligated Qube to pay Martinus a total of $71 million. While Martinus sought to enforce these payments, Qube aimed to set aside the adjudications or, alternatively, stay their enforcement pending the determination of the parties' rights through **arbitration**.

At the heart of the matter were significant **delays** in project completion. Martinus attributed these delays to Qube's late and inadequate provision of designs and failure to grant timely site access. Qube, on the other hand, did not accept these explanations and eventually terminated the contracts, citing both cause and convenience. The validity of the termination for cause remains contested.

The contracts contained elaborate **dispute resolution clauses**, mandating a multi-stage process that included negotiations, escalation to senior executives, and ultimately arbitration. Despite this, Martinus pursued adjudication under SOPA for payment claims, which resulted in favorable determinations totaling over $15 million in earlier proceedings and the substantial sums at issue in this case.

Qube challenged the adjudications on several grounds, alleging **jurisdictional errors** by the adjudicator, particularly in his failure to consider key submissions and arguments. One pivotal issue was whether the adjudicator went beyond his jurisdiction by addressing matters not properly before him, effectively nullifying previous court decisions, such as the earlier judgment by Rees J in December 2023.

Justice Parker, presiding over the case, found that **jurisdictional error** was established. He concluded that the adjudicator's award went beyond the scope of the adjudication proceedings, as it included matters not raised in Martinus's payment claims and did not adequately consider Qube's

submissions. This led to the partial setting aside of the adjudication determinations and associated judgments, specifically those components affected by the errors.

An essential aspect of the judgment was the court's consideration of whether to grant a **stay of enforcement** of the adjudicated amounts pending arbitration. Qube argued that if the payments were enforced and they ultimately succeeded in arbitration, Martinus might be unable to repay the sums, causing irreparable prejudice. The court examined precedents such as *Grosvenor Constructions v Musico* and *Veolia Water Solutions v Kruger Engineering*, which acknowledge that while the SOPA regime is designed to be "pay now, argue later," there are circumstances where a stay is appropriate to prevent injustice.

However, Justice Parker refused the stay application, emphasizing that granting a stay would undermine the legislative intent of SOPA to ensure prompt payment to contractors, thereby supporting their cash flow. The court noted that Martinus was trading profitably and that there was insufficient evidence to suggest a significant risk of insolvency that would prevent repayment if required. The decision reflects a cautious approach, balancing the need to uphold the statutory scheme against the potential for prejudice to the paying party.

This case illustrates the nuanced challenges that parties in construction contracts may face, particularly concerning dispute resolution mechanisms and financial considerations during litigation. The elaborate dispute resolution clauses in the contracts, which culminated in arbitration, highlight the necessity for clearly defined mechanisms to resolve disputes. Parties must be acutely aware of how these contractual provisions interact with statutory remedies like SOPA adjudication. Understanding this interplay is crucial, as it can significantly impact the strategies employed when a dispute arises.

Moreover, the case underscores the strategic use of adjudication and arbitration. While adjudication under SOPA offers a quicker route to payment, especially for contractors seeking to maintain cash flow, arbitration provides a comprehensive forum for resolving more complex disputes, including those involving substantial claims and counterclaims. Parties need to carefully consider which avenue is more appropriate for their situation, weighing factors such as the urgency of payment, the complexity of the dispute, and the potential for prolonged litigation.

The judgment also brings to light the jurisdictional limits of adjudicators. Adjudicators must operate strictly within the confines of the matters properly before them. In this instance, the adjudicator's failure to consider key submissions and his inclusion of matters not raised in the payment claims led to a finding of jurisdictional error. This serves as a reminder that both parties and adjudicators must ensure procedural compliance to avoid determinations being set aside.

Financial considerations, particularly the risk of insolvency, play a significant role in such disputes. When seeking a stay of enforcement, the applying party must provide compelling evidence of the other party's inability to repay, going beyond mere speculation about financial difficulties. The court's refusal to grant a stay in this case demonstrates the high threshold required to override the statutory intent of SOPA, which aims to protect contractors' cash flow and ensure prompt payment.

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Landmark Ruling by Federal Court of Australia on Crypto Margin Extensions

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In the recent case of **Australian Securities and Investments Commission v Bit Trade Pty Ltd [2024] FCA 953**, the Federal Court delivered a pivotal judgment that resonates deeply within the cryptocurrency industry. The court scrutinized the nature of Bit Trade's "Margin Extension" product, ultimately finding that it constitutes a credit facility under Australian law. This finding has significant implications for crypto exchanges operating in Australia, particularly regarding regulatory compliance.

Bit Trade, trading as Kraken in Australia, offers a platform where customers can purchase and sell digital assets, including cryptocurrencies. One of their offerings is the **"Margin Extension" product**, which allows customers to receive extensions of margin—in the form of digital assets or legal tender—to make spot purchases and sales of digital assets on the Kraken Exchange.

The crux of the case revolved around whether the Margin Extension product is a financial product requiring a **target market determination (TMD)** under **Part 7.8A of the Corporations Act 2001 (Cth)**. The Australian Securities and Investments Commission (ASIC) alleged that Bit Trade contravened sections 994B(1) and (2) of the Act by issuing this product to retail clients without first making a TMD.

Bit Trade contended that the product was exempt under

regulation 7.8A.20 of the Corporations Regulations, arguing that it did not involve a "deferred debt" as required by subparagraph (a) of regulation 2B(3) of the **ASIC Regulations**. They asserted that obligations arising from the Margin Extension did not constitute a debt because they might not involve an obligation to pay money.

However, the court disagreed. **Justice Nicholas** meticulously analyzed the Terms of Service (TOS) under which the Margin Extension product was offered. He highlighted that the provision of a Margin Extension in national currency, such as Australian or US dollars, indeed gives rise to a **"deferred debt"**.

From the judgment:

> *"The provision of a Margin Extension in national currency (including in Australian or US dollars) gives rise to a 'deferred debt' which is incurred by the customer when they are provided with the Margin Extension and which becomes payable upon the customer ceasing to be eligible to receive the Margin Extension."*

This finding was pivotal. It established that the Margin Extension is a **credit facility involving credit of a kind referred to in subparagraph (a) of regulation 2B(3) of the ASIC Regulations**. Consequently, the exception under regulation 7.8A.20 did not apply.

Justice Nicholas further elaborated:

> *"By issuing the Product to retail clients without having first made a target market determination for the Product, Bit Trade contravened s 994B(1) of the Corporations Act when read with s 994B(2)."*

The court's reasoning hinged on the interpretation of "debt" within the regulatory framework. Bit Trade argued that "debt"

implies an obligation to pay money and that cryptocurrency is not money. Therefore, obligations to return cryptocurrency do not create a debt. However, the court noted that the Margin Extension could be provided in national currency, and obligations arising from such transactions do constitute a debt.

Justice Nicholas emphasized:

> *"An obligation to pay an amount of cryptocurrency of some type is not an obligation to pay a sum of money and therefore cannot be a debt… However, in circumstances where a Margin Extension is provided by Bit Trade in a national currency… this amounts to 'a conditional but unavoidable obligation to pay a sum of money at a future time.'"*

The judgment underscores the importance of understanding how financial regulations apply to products offered in the crypto space, especially when traditional financial concepts like "debt" intersect with digital assets. The court's interpretation aligns with the view that when a product involves an obligation to repay in national currency, it falls within the ambit of a credit facility under the regulations.

For crypto exchanges and service providers, this case serves as a cautionary tale. Offering products that involve financial accommodations in national currency without adhering to regulatory requirements can lead to significant legal repercussions. The need for a **target market determination** is not merely a procedural formality but a critical compliance requirement designed to protect consumers.

The court's decision also reflects a broader trend of regulators and courts applying existing financial laws to the evolving crypto industry. While cryptocurrencies themselves may not be considered money in the traditional sense, products and services involving them can still be subject to financial regulations when they intersect with national currencies or

create obligations akin to traditional financial instruments.

In conclusion, the **Federal Court's judgment in ASIC v Bit Trade** reinforces the necessity for crypto businesses to diligently assess their products against the regulatory landscape. The provision of margin extensions in national currency creates a **deferred debt**, categorizing the product as a credit facility requiring compliance with specific provisions of the Corporations Act.

As the crypto industry continues to mature, adherence to regulatory obligations becomes ever more critical. Exchanges must ensure that they are not only innovative in their offerings but also compliant with the laws that govern financial products. This case highlights that the intersection of crypto and traditional finance is not a legal vacuum; existing laws can and will be applied to new technologies and products.

The judgment serves as a reminder that while cryptocurrencies may challenge traditional notions of money and finance, the legal frameworks in place are adaptable. Businesses operating in this space must stay informed and proactive in their compliance efforts to navigate the complex regulatory environment successfully.

The decision reaffirms the principle that innovative financial products are not beyond the reach of existing legal and regulatory frameworks. Companies must ensure that their offerings are compliant, thereby safeguarding both their operations and their customers.

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Supreme Court of Western Australia on the Limits of Expert Determination vs. Arbitration

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The **judgment** in *Silverstream SEZC v Titan Minerals Ltd* from the Supreme Court of Western Australia shines a light on a vital and often misunderstood aspect of **dispute resolution**—the interaction between **expert determination** and **arbitration**. The case pivots around the **refusal of a stay of proceedings** sought by Titan Minerals Ltd ("Titan"), based on a clause in a set of **royalty agreements** that mandated disputes related to the **calculation of royalties** be referred to **expert determination**. What emerges from the court's reasoning is a nuanced understanding of the differences between these two forms of **alternative dispute resolution** (ADR) and the conditions under which courts should intervene.

At the heart of the dispute, Silverstream SEZC ("Silverstream") accused Titan of breaching several **royalty agreements** by failing to maintain mining properties in good standing, thus forfeiting the entitlements that generated the royalties. Titan responded by tendering alternative royalties and sought to stay the court proceedings, arguing that the dispute over the valuation of these substituted royalties should be determined by an expert, as stipulated in the agreements. However, Justice Solomon, presiding over the case, disagreed and dismissed the application for a stay, offering a

rich commentary on the broader relationship between expert determination and arbitration.

Expert determination is a consensual process where parties agree to have an independent expert resolve specific technical issues. This process is typically informal, **speedy**, and effective for disputes requiring specialized knowledge, such as those involving **technical valuations**. However, unlike **arbitration**, which is governed by a legislative framework—such as the **Commercial Arbitration Act 2012 (WA)** in this case—expert determination does not automatically trigger a stay of proceedings. This is because expert determination, by its nature, is intended to resolve **specific, often narrow technical issues**, while arbitration can address the **entirety of a dispute**.

Justice Solomon made a critical distinction between the scope of disputes appropriate for expert determination versus those suitable for arbitration. He underscored that while **arbitration** is a comprehensive dispute resolution mechanism, designed to deal with all facets of a conflict, **expert determination** is more limited in scope, typically confined to particular **technical or factual issues**. The court emphasized that even if a dispute concerning the **valuation of royalties** might be subject to expert determination, this did not preclude the court from addressing other issues, such as **breaches of contract** and the appropriate **remedies** for such breaches.

The court’s refusal to grant the stay was rooted in its interpretation of the royalty agreements, specifically **Clause 9**, which mandated expert determination for disputes regarding the **calculation of gross revenue or royalties**. Justice Solomon noted that the current dispute was not genuinely about the **calculation** or **valuation** of the royalties—at least not yet—but rather about whether Titan had breached its obligations under the agreements by failing to maintain the mining properties in good standing. Since this issue did not fall within the scope

of Clause 9, it was not appropriate to stay the proceedings in favor of expert determination.

Justice Solomon also considered the broader **principles** governing the exercise of discretion in staying proceedings. He observed that courts generally respect the **parties' agreements** to resolve disputes in a specified manner, but only when the dispute actually falls within the scope of the agreed process. Where a dispute does not lend itself to expert determination or where the dispute encompasses issues beyond the expertise of the appointed expert, a court should be cautious in granting a stay. This aligns with the principle that **parties should be held to their bargains** only when the agreed process is suitable and just for resolving the dispute.

A key takeaway from the judgment is the emphasis on the **specificity** of the issues being referred to expert determination. The court acknowledged that expert determination is designed to resolve **technical questions**—for instance, the fair market value of royalties derived from mining operations—but it is not equipped to handle broader legal questions, such as whether a party has breached its contractual obligations. As Justice Solomon noted, staying proceedings in such a scenario could result in **duplication of effort** and potentially **multiplicity of proceedings**, which runs contrary to the principles of **efficient dispute resolution**.

The judgment also illustrates the importance of **evidence** and **procedural fairness** in the context of expert determination. Silverstream had sought substantiation for the valuation of the replacement royalties tendered by Titan, which Titan had not provided. The court found that without such substantiation, it was premature to characterize the dispute as one solely about valuation and, consequently, premature to refer the matter to expert determination.

In a broader comparative perspective, this judgment serves as a reminder that while both **expert determination** and

arbitration are valuable tools in the arsenal of ADR, they serve distinct purposes. **Arbitration** is a more formal and expansive process, suitable for resolving entire disputes, while **expert determination** is a more limited mechanism, typically employed for resolving **specific technical issues**. Courts, therefore, play a crucial role in determining the appropriate scope and application of these processes, ensuring that disputes are resolved in a manner that is both **fair** and **efficient**.

The *Silverstream* decision reinforces the idea that not all disputes are apt for expert determination, particularly when the issues at hand extend beyond mere technical calculations and touch upon broader legal rights and obligations. In such cases, the courts retain a vital oversight function, ensuring that parties are held to their agreements only when it is just and appropriate to do so.

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