Neutral Citation Number: [2022] EWHC 1685 (Comm)

Case No: CL-2020-000392

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Rolls Building, Fetter Lane,
London, EC4A 1NL

Date: 01 July 2022

Before :

THE HONOURABLE MR JUSTICE HENSHAW

- -

Between :

HDR GLOBAL TRADING LIMITED	**Claimant**
- and -	
(1) GEORGI SHULEV **(2) NEXO CAPITAL INC**	**Defendants**

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- -

The First Defendant appeared in person
David Quest QC (instructed by **Eversheds Sutherland (International) LLP**) for the **Second Defendant**
The Claimant did not appear and was not represented

Hearing date: 5 April 2022
Draft judgement circulated to the parties: 8 June 2022

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Mr Justice Henshaw:

(A) INTRODUCTION AND BACKGROUND

1. These are stakeholder proceedings brought by the Claimant ("***HDR***") under CPR Part 86 in relation to an account ("***the Account***") opened on HDR's cryptocurrency derivatives exchange and trading platform in the name of the First Defendant ("***Mr Shulev***").

2. HDR is a company incorporated in the Republic of Seychelles. It operates a cryptocurrency derivatives exchange and trading platform under the name BitMEX ("***Bitmex***").

3. The Second Defendant ("***Nexo***"), a Cayman Islands company, is part of the Nexo group of legal entities which operate the cryptocurrency-backed lending platform "*nexo.io*", cryptocurrency exchange and wallets.

4. Mr Shulev was co-founder of the Nexo group, a former Managing Partner of Nexo and claims to be one of its beneficial owners.

5. This judgment deals with certain issues which have arisen between Mr Shulev and Nexo about entitlement to the Account and its contents, and a settlement agreement they made on 1 July 2021 ("***the Settlement Agreement***").

6. HDR commenced these proceedings as stakeholder proceedings in order to resolve Mr Shulev's and Nexo's competing claims to the Account. The Account had been opened by Mr Shulev while he was a director of Nexo, and Nexo's position (in summary) was that it was a corporate account used for corporate purposes into which

corporate assets had been transferred. Mr Shulev's position was that he had opened the account in a personal capacity and some of the cryptoassets in it belonged to him. The balance on the account is approximately 880 bitcoin, equivalent to approximately £30 million at current prices.

7. HGR is no longer substantively involved in the case, and did not take part in the hearing before me.

8. The essential issues to be determined were the enforceability of the Settlement Agreement, and (if the Agreement is not enforceable or does not dispose of the matter) the underlying question of entitlement to the Account and contents. In the event, it became common ground that the Settlement Agreement is binding.

9. I have read evidence in the form of three witness statements from Mr Shulev, five witness statements from Nexo's Managing Director Mr Trenchev, and one from Mr Yates on behalf of HDR. I have received detailed skeleton arguments and heard oral submissions from Mr Shulev in person and counsel for Nexo.

10. In response to the usual invitation to submit a list of suggested typing corrections or other obvious errors, Mr Shulev filed a noted 13 June 2022. This consisted mainly of substantive submissions, and I gave Nexo the opportunity to submit a short note in response, which was done on 27 June 2022. To the extent that I consider it appropriate to address Mr Shulev's points, I have done so at the appropriate places in this judgment.

11. As set out further below, I have concluded that, under the terms of the Settlement Agreement, further steps remain to be completed by Mr Shulev in order to become entitled to the first instalment payable by Nexo under the Agreement.

(B) FACTS

12. Nexo is in the business of trading cryptoassets and lending against them. Mr Shulev was a director and senior employee of Nexo until he was removed from those positions by the board in September 2019.

13. Nexo holds and operates cryptocurrency trading accounts with several other exchanges apart from Bitmex, including Kraken, Binance and Huobi. On Nexo's case, some of those accounts were opened in the name of Nexo itself and some in the names of individual employees, including Mr Shulev, but they were and are all treated by Nexo and its employees as corporate accounts and used to hold and trade corporate assets.

14. The genesis of the Account appears to have been as follows. On 16 May 2019, Mr Shulev had a text conversation with a Nexo trader, Mr Vasil Stoilov, in which they discussed how the rates offered by Kraken for bitcoin/US dollar exchange contracts compared with those offered by Bitmex. At the time, Nexo held an account, in its corporate name, at Kraken containing a large quantity of bitcoin. It appeared from the information provided by Mr Stoilov in the conversation that Bitmex's rates were slightly better than Kraken's.

15. Later that day, and presumably as a result of the conversation with Mr Stoilov, Mr Shulev opened the Account with HDR, providing his name and the email address "*georgi@nexo.io*". Mr Shulev opened the account by completing an electronic form on HDR's website. The only information required to open the Account was a name and email address.

16. Over the next two days, a total of 261 bitcoin were transferred into the Account. That was done by transferring them to a specific network address ("***the Account network address***") maintained by HDR and associated with the Account. All bitcoin are associated with an address identifier in the Bitcoin network, and transfers are effected between network addresses.

17. Evidence from an analysis obtained by Nexo from industry consultants Chainalysis, and public Bitcoin blockchain records, indicates that the 261 bitcoin derived ultimately from Nexo's Kraken, Huobi and Binance accounts:

    i) 51 bitcoin were transferred directly from Nexo's Huobi account; and

    ii) three transfers totalling 210 bitcoin were made from Nexo's Kraken account, via an intermediate address which Mr Shulev had created on 11 May 2019. All of the bitcoin received into that account in May 2019 came from the Kraken account.

18. On 17 May 2019, Mr Shulev told Mr Kantchev, another Nexo director, that "*[a]t Bitmex we have put 261 BTC and have opened positions for 1,988,375*". (The positions opened were the futures trades referred to below.) Mr Shulev also stated that Mr Kantchev would "*probably have to open a new position in Bitmex and sell BTC for Eur*"; and that, because a Nexo counterparty called Genesis had decided to discontinue a swap, "*more positions will have to be opened at Bitmex most likely*".

19. Further bitcoin deposits in the Account were made later in May 2019 by transfer from other Nexo accounts:

    i) on 20 May 2019, 890 bitcoin were transferred from the Kraken account via the intermediate address referred to above;

    ii) on 27 May 2019, 50.99 bitcoin were transferred directly from the Binance account and 49.03 bitcoin directly from the Huobi account; and

    iii) on 31 May 2019, 200 bitcoin were transferred directly from the Kraken account.

    Altogether 1,451.028 bitcoin were transferred into the Account in May 2019.

20. Between May and July 2019, a large number of futures contracts were traded on the Account. Two types of contract were traded: XBTUSD, a perpetual contract for the exchange of bitcoin and US dollars; and XBTZ19, a bitcoin future maturing on 27 December 2019.

21. The trades on the Account were placed by Kalin Metodiev, Nexo's head of trading and chief financial officer. On Nexo's evidence, that was possible because the login credentials for the Account were known to Mr Metodiev and generally within Nexo,

as indicated by (i) numerous logins to the Account from IP addresses at Nexo's offices, (ii) a message from Mr Metodiev to Mr Shulev on 24 July 2019 asking whether Mr Shulev had made any changes to the access and (c) an email from Mr Trenchev to Bitmex on 27 September stating "*The OTC Desk of the Nexo Group has always had access to both the email addresses and the accounts at Bitmex.*" Nexo's evidence suggests that all successful logins to the Account were by Nexo traders and risk managers, or at any rate that there were many logins by such persons.

22. Mr Shulev submits that Nexo's evidence that Mr Metodiev had operated the Account is false and that no conclusive evidence proving it has been provided. Nexo's evidence is, he says, based only on IP logs which correspond with the ordinary place where Mr Shulev himself spent most of his day.

23. This submission by Mr Shulev appears to be a new one, not foreshadowed in any of his witness evidence. Mr Trenchev said in his first witness statement that:

> "All trading activity on the Accounts was executed by Mr Metodiev of Nexo, using IP address 94.155.137.134 (pages 57 to 66). Furthermore, all IP addresses logging into the Accounts relate to IP addresses of the traders and risk managers employed by Nexo"

Mr Trenchev also referred to Mr Shulev's home IP address, a different address, from which an unsuccessful attempt had been made on 14 September 2019 to access the Account. Mr Shulev did not respond to any of this evidence in his witness statements. At least one contemporary document may also support Mr Trenchev's evidence that Mr Metodiev had accessed the Account, namely an email from Mr Metodiev to Mr Shulev on 24 July 2019 in which he asked "*over the last days, while I was gone, have you made changes to the access to the new account in Bitmex?*", to which Mr Shulev replied "*no*". It is not clear whether that email referred to the Account, opened in May 2019, or to a second account at Bitmex opened in July 2019 using the email otc@nexo.uo, though Mr Metodiev's reference to *"the new account"* may well imply that both accounts were Nexo's. In any event, in the light of the evidence as a whole, I conclude that Nexo are correct that Mr Metodiev did have access to the Account.

24. Nexo relies on the following communications as further indicating that, while he was a director, Mr Shulev discussed the Account (and also the Huobi, Kraken and Binance accounts) with his colleagues on the basis that it was a corporate account:

i) On 19 August 2019, Mr Shulev emailed Mr Kantchev and others at Nexo with details of "*the deposit addresses that we have in BITMEX*". One of those was the Account network address; the other was linked to a second account that Nexo had opened with Bitmex on 17 July 2019 (and which is not the subject of the present proceedings, though I make reference to it again later: see § 109.iv) below). Mr Shulev also provided Mr Kantchev with a transaction history for "*the two BITMEX accounts that we support*".

ii) On 30 August 2019, there was a text conversation between Mr Martin Manolov of Nexo and Mr Shulev about the reconciliation of bitcoin transactions between different wallets. Mr Shulev provided Mr Manolov with

a list of bitcoin addresses including the Account's bitcoin address, which Mr Shulev identified as "*NexoBitmex*", and an address for "*BinanceNexo*".

iii) On 2 September 2019, Nadezhda Krasteva, Nexo's CFO, raised an enquiry with Mr Shulev about the funding of futures positions on the Account. Mr Shulev responded: "*When we have done perpetual swap and then futures, we have sold BTC in Kraken for USD or EUR. Vasil Stoilov has records for absolutely all of the sales.*"

iv) On 10 September 2019, Mr Shulev discussed with Mr Metodiev, Mr Trenchev and Mr Kantchev the possible replacement of the Bitmex futures positions with a bond to be issued by Nexo.

v) Later that day, Mr Shulev enquired of Mr Stoilov "*how much was the whole exposure that we opened in Bitmex*", and was provided with that information.

vi) On 11 September 2019, Mr Manolov asked Mr Shulev for "*the history of Bitmex1 & 2 until the end of July*". Mr Shulev referred him to Mr Stoilov.

25. On 13 September 2019, Nexo's board resolved to terminate Mr Shulev's appointment as a director; and access to his corporate email was immediately withdrawn as well as access to the Account.

26. On 14 September 2019, Mr Shulev made an unsuccessful attempt to access the Account from his home IP address.

27. On 15 September 2019, Mr Shulev contacted HDR asking to change his email address recorded with them "*as I am no longer the owner of georgi@nexo.io and I believe that the funds from my account could be stolen*". At about the same time, Mr Metodiev contacted HDR warning it that Mr Shulev might attempt to "*siphon away funds*".

28. In response, HDR froze the Account. It then commenced the present action as a stakeholder claim under CPR Part 8 and Part 86, against Mr Shulev and Nexo.

29. At a CMC on 15 February 2021, Moulder J directed a hearing of the claim and settled a list of issues for determination, including the following:

i) Which of Nexo and Mr Shulev is entitled to operate and control the Account?

ii) Which of Nexo and Mr Shulev is legally entitled to the credit balance on the Account of 880.4308 bitcoin?

30. Moulder J ordered that those issues be determined "*on the basis of the written evidence filed, without oral evidence (including cross-examination)*". That reflected an agreement in correspondence between the parties to that effect, aimed at resolving their dispute rapidly and efficiently. The agreement to dispense with oral evidence and cross-examination did not involve any concession by any party as to the weight to be attached to the witness statements and does not affect the standard of proof in respect of disputed facts.

31. The hearing was listed before Mr Stephen Hofmeyr QC on 1 July 2021.

32. On the day of the hearing, Mr Shulev and Nexo entered into a written agreement, the Settlement Agreement, the terms of which are set out below. However, Nexo and Mr Shulev almost immediately fell into a further dispute about the effect of the Agreement, whether it had been complied with, and what effect it had on the proceedings.

33. After discussion with the parties, the court allowed HDR to exit the proceedings by ordering it to hold the balance on the Bitmex account as stakeholder and directing it to transfer the balance (after a deduction in relation to its costs) to such address as might be ordered by the court.

34. As regards the dispute between Nexo and Mr Shulev, the court ordered a further hearing with a time estimate of one day:

    i) for determination of the two issues concerning the Account set out in paragraph 29 above, and the following additional issues:

        a) Are the Settlement Agreement, and the Confidentiality Agreement and Release of Claims agreement deriving from it, binding and enforceable agreements or are they void for uncertainty, mistake, frustration or otherwise?

        b) Subject to a. above, what is the true construction and effect of clauses 3, 4, 8 and 11 of the Settlement Agreement?

        c) Subject to a. and b. above, have those clauses been complied with or breached, and if so in what respect and what are the consequences of that?

    ii) for the court to give any directions arising out of that determination; and

    iii) for determination of any claims for costs as between the Defendants.

35. The court granted permission for the parties to file further evidence in relation to the new issues, which they did.

(C) TERMS AND VALIDITY OF THE SETTLEMENT AGREEMENT

36. The Settlement Agreement was signed shortly after 1pm on 1 July 2021, on the day of the hearing before Mr Hofmeyr QC. The Agreement was made between Mr Shulev, Nexo and ten other companies affiliated with Nexo (these being defined together as the "*Other Nexo Companies*").

(1) Terms of the Settlement Agreement

37. The key provisions were as follows:

> "1. The Parties agree that for the purpose of this Agreement the terms below will have the following meaning:
>
> …

Assets - wallets, accounts, accounts' credentials, seed phrases, private keys, documents, materials, files, any form of communication, including emails;

2. Upon the acceptance of the terms set forth herein and the digital signing by the Parties of this Agreement via DocuSign, which will be deemed legally binding, Mr Shulev will undertake the actions below and will receive from Nexo a total of $1,000,000.00 in USDT and NEXO Tokens, in 5 installments during the next 30 months, under the agreed terms and conditions, as follows: (i) first installment of $400,000.00 in USDT; (ii) second installment of $50,000.00 in USDT; (iii) third installment of $250,000.00, $125,000.00 of which in USDT and $125,000.00 of which in 62 500 NEXO Tokens, calculated on the basis of an exchange price of the NEXO Token of $2.00; (iv) fourth installment of $50,000.00 in USDT; (v) fifth installment of $250,000.00, $125,000.00 of which in USDT and $125,000.00 of which in 62 500 NEXO Tokens, calculated on the basis of an exchange price of the NEXO Token of $2.00.

3. After the successful receipt of any requested Assets by Nexo, confirmed by Nexo without any objections to the type, amount or value of the Assets, Nexo will transfer the First installment (i) under Section 2 to Mr Shulev's indicated digital wallet address indicated below before 1 July 2021, 12:30 am BST.

…

4. Mr Shulev and Nexo will jointly inform before 1 July 2021, 12:30 am BST BitMEX/HDR Global Trading Ltd. that the disputed BitMEX/ HDR Global Trading Ltd. account will be released to Nexo and Mr Shulev will waive any rights and claims as to the operational, legal and beneficial ownership of the account and the assets within it.

5. Nexo and Mr Shulev will undertake to inform before 1 July 2021, 12:30 am BST Eversheds Sutherland LLP, RPC LLP, HDR Global Trading Ltd. and the High Court of Justice Queen's Bench Division Commercial Court Royal Courts of Justice that the dispute has been settled amicably and that all proceedings shall cease with immediate effect.

…

7. Subject to successfully closing the BitMEX Dispute, Mr Shulev undertakes to ensure, declare, warrant, acknowledge and confirm that he does not hold any residue Assets in his possession.

8. The second installment under Section 2 (ii) will be made by Nexo no longer than 7 days after the fulfilment of the terms under Sections 1-7, Mr. Shulev's signing of a Confidentiality and Non-Disparagement Agreement with the Nexo Companies and any other legal entity belonging to the Nexo Group ("**Confidentiality Agreement**"), … a Release of Claims Agreement with Kosta Kalinov Kantchev, the Nexo Companies and any other legal entity belonging to the Nexo Group, whereby Mr Shulev undertakes to declare, warrant and confirm that he does not have any rights, shareholding, title, interest, present or future claims and demands in any form to/in the Nexo Companies or the Other Companies, both as defined therein ("**Release of Claims Agreement**"), as well as Mr Shulev's full disclosure before the Nexo Companies of all the information concerning the Nexo Companies and the Nexo Group, including but not limited to its management, employees, products or services, which has been communicated by him with any third party, regardless of the reason therefor and of whether this information has had the effect of disparaging, defaming, or discrediting as to the Nexo Companies' or the Nexo Group's reputation, goodwill and commercial interests.

…

10. All the installments under this Agreement shall be due and payable by Nexo only under the condition that up to the payment date Mr Shulev has duly complied with this Agreement, including the declarations, warranties and obligations under Sections 7 and 8 hereof, the Confidentiality Agreement and the Release of Claims Agreement. For the avoidance of doubt, the Parties agree that in case of Mr Shulev's breach of this Agreement, including the declarations, warranties and obligations under Sections 7 and 8 hereof, the Confidentiality Agreement and the Release of Claims Agreement, he will not be entitled to receive any future installments under Section 2 from Nexo, and Mr Shulev further waives any right to claim such installment or any related compensation, damages or payment in this regard, and undertakes to fully indemnify Kosta Kalinov Kantchev and/or the Nexo Companies, and/or any other legal entity belonging to the Nexo Group, as the case may be, for all the damages suffered as a result of the relevant breach.

11. The Parties agree that this Agreement shall be governed by the laws of the England and Wales. Should Nexo cease payments for reasons other than those listed in Section 10, Mr Shulev would no longer be bound to the penalty, warranties and obligations under Section 8 and shall have the right to sue Nexo for compensation and damages in the courts of England and Wales. …

> 12. This Agreement is legally binding and is a full and final settlement of any and all claims each Party hereto may have against the other, except for the claims arising out of a breach of its terms or such that the Nexo Companies and/or Kosta Kalinov Kantchev, and/or any other legal entity belonging to the Nexo Group, or Mr Shulev may have to each other by virtue of the Confidentiality Agreement and the Release of Claims Agreement.
>
> …
>
> 14. If, at any time, a provision of the present Agreement is declared unlawful, invalid or unenforceable in any manner with respect to any applicable law, the lawfulness, validity and enforceability of the remaining provisions of the Agreement shall not be affected thereby. The Parties shall replace the unlawful, invalid or unenforceable provision with a provision that is as consistent with the original content as possible."

(2) Validity and effect of Settlement Agreement

(a) Duress and misrepresentation

38. It is common ground that, although clause 8 envisaged the Confidentiality Agreement and Release of Claims Agreement being executed subsequently, they were in fact signed, via the online document execution system DocuSign, at the same time as the Settlement Agreement. Mr Shulev's evidence is that that was forced upon him by Nexo because Mr Trenchev of Nexo set up the DocuSign process so as to make it impossible to insert his electronic signature into the Settlement Agreement without also doing so for the other Agreements. He says he did not wish to execute them, or intend to be bound by them, at least at that stage, and further that they were misrepresented.

39. Mr Shulev suggested in his evidence that the Confidentiality Agreement and Release of Claims Agreement, and potentially also the Settlement Agreement, were void or unenforceable. It is necessary to set out some paragraphs of his second witness statement in full in order to understand his position:

> "16. When it comes to the validity of the Confidentiality Agreement and the Release of Claims Agreements, I do believe it is worthwhile mentioning that the latter two have been introduced to me three hours prior to the hearing, while I was preparing for the hearing and reviewing the Settlement Agreement in parallel. Beyond having multiple concerns over their content, the fact that they were unilateral and that I could not consult a lawyer, Mr Trenchev had extended a threat to sign the Agreements "now or never" an hour prior to the hearing while not giving me the option to sign them separately when they were actually due under Clause 8. On a few occasions as shared below, Mr Trenchev had also comforted me that the Agreements were standard, they were made bilateral and there

were clauses that protect me, which does not seem to be the case. I do believe signing the two Agreements under the mentioned circumstances gives rise to more legal issues than they solve and thus they should be deemed void.

17. In that regard, an email sent by me on 30 Jun at 15:30 (Sofia Time) … states the following

> "...I am attaching a version (of the Settlement Agreement) with amendments, and definitely, there is no way we include clauses whose compliance depends on the signing of non-existent agreements (Confidentiality Agreement and Release of Claims Agreement). The confidentiality clause is more than sufficient and stable in terms of clarity and motivation not to be violated and it is fair for it to be bilateral. I hope for our 2 years of working together you have seen that I value fairness in a relationship more than creating a mess for myself and the people around me. However, reciprocity in that regard hasn't been demonstrated from your side and respectively I insist that the clause should be made bilateral."

18. On 30 July at 9:16 (Sofia time), one day before the hearing, regardless of my request to make the Confidentiality Agreement and Release of Claims Agreement bilateral, Mr Trenchev had sent a unilateral version of the latter, stating

> "...They are standard templates signed by thousands of people around the world. Nothing for you to worry about here…"

19. On July 1, at 9:22 (Sofia time), three hours before the hearing, Mr Trenchev had agreed to amend the latter two agreements to be made bilateral and claimed they were. I communicated it did not seem this way, to which on Jul 1, at 10:11 (Sofia time) … Mr Trenchev ensured me they are bilateral and that I am protected:

> "It is all bilateral, Joro. The release (referring to the Release of Claims Agreement) is more specific, because we do not have ownership of you, you do not have intellectual property, etc…There are clauses that protect you, read carefully."

20. Given the pressure to prepare for the hearing as a litigant in person, it has been extremely challenging to review if the Second Defendant had indeed been implementing the changes that have been negotiated over emails. On a few occasions, while I was reviewing yet another version, I was receiving emails that the same version had been amended in Docusign not indicating where the change had been executed. …

> 21. On Jul 1 2021, at 11:36 (Sofia time) …, an hour before the hearing the pressure to sign the Agreement was further enforced via a threat by Mr Trenchev sent in an email stating:
>
> > "Watch after your baby and woman (referring to my fiancé[e] who is 8 months pregnant) with cash in your pocket, and not with negative equity. I don't know if you realise how close you are to the abyss (referring to previously made threats over emails and phone calls); in order to stop the case and for you to not pay 210 000 pounds to BitMEX we need to receive the stuff before stopping it, which needs to happen now. Don't worry about us - we will be fine. However, I'm not so sure about you, the people around you and any startups, which are about to potentially take off (I presume referring to the project I am working on and/or that my fiance is working on). Do the right thing, it's now or never".
>
> …
>
> 23. Despite my best intentions to solve the dispute between the Second Defendant and myself outside the court after two years of negotiation attempts, on the basis of the evidence listed above, it is my belief the Agreements, specifically the Confidentiality Agreement and Release of Claims Agreement signed on Jul 1 2021 should be deemed void and unenforceable due to the misleading motives behind clauses (also brought forward during the hearing) that prevent the Agreement from serving its true purpose and that have been signed by me in the absence of any independent legal advice under threat and incredible time pressure exerted by the Second Defendant.
>
> 24. Should the Agreements be deemed enforced, however, below I present my evidence for complying with Clause 3 and for Nexo breaching the same clause. The consequences of the breach are also elaborated on the following paragraphs."

40. In response to this evidence, Nexo referred in its skeleton argument to the principles relating to duress, undue influence and unconscionable dealing as summarised *Chitty on Contracts* (34th ed.) § 10–084:

> "A complainant may be able to avoid a contract for duress where he or she entered it because of a wrongful or illegitimate threat or other form of pressure exerted by the other party, normally because the threat or pressure left the complainant with no practical alternative. A contract may be voidable for undue influence it has resulted from one party's abuse of the complainant's trust and confidence, or emotional or physical dependence. Unconscionable dealing occurs where one party exploits the other's ignorance or weak position to obtain the other's agreement to a contract which is substantively unfair."

41. Nexo submitted that:

    i) The Settlement Agreement was an arms-length commercial transaction between Mr Shulev and Nexo.

    ii) There was no requirement for Mr Shulev to have independent legal advice, but he could anyway have obtained it if he wanted to; he was previously represented by Stephenson Harwood in the proceedings.

    iii) The impending hearing may have created time pressure for a settlement but that is a typical feature of litigation and there is nothing unusual or oppressive about it.

    iv) Mr Shulev is clearly not a weak, ignorant, or vulnerable person.

    v) Nothing in Mr Trenchev's emails could be sensibly regarded as threatening or improper.

    vi) Mr Shulev was never without a practical alternative to settlement: he could have continued to argue the substance of the dispute at the hearing, as he now apparently wishes to do.

42. In his written and oral submissions before me, Mr Shulev took the position that (as it was put in his skeleton argument) *"the [Settlement] Agreement should be determined as valid as it resolves the BitMex Account dispute, but breached by Nexo …, whereas the Confidentiality and Release of Claims Agreements …, as they are, are invalid for misrepresentation, sharp practices, waiver beyond reason, duress, amongst other … and should be rectified to waive only any claims over the BitMex Account and signed when they are due under Clause 8"*.

43. Making allowance for the fact that Mr Shulev appears, now, as a litigant in person, I understand Mr Shulev <u>not</u> to be taking the position that the Settlement Agreement as a whole (which includes provisions about the Release of Claims Agreement and the Confidentiality Agreement, including the gist of their contents) is voidable for duress or misrepresentation; or, at least, that he is not purporting, and has not purported, to rescind it for misrepresentation or to have it set aside on the ground of duress. (I observe that if the Agreement were to be rescinded or set aside, then Mr Shulev's condition entitlements to payments under clause 2 would of course fall away with it.)

44. On the other hand, Mr Shulev did not expressly disclaim any argument that the Settlement Agreement itself, whilst binding, was induced by misrepresentation (relating, for example, to the contents of the Release of Claims Agreement for which it made provision); and he referred to the Settlement Agreement as a *"Trojan horse"* used to obtain the wide release of claims set out in the Release of Claims Agreement. As I indicate later, I have concluded that such issues as arise between the parties connected with the Release of Claims Agreement and Confidentiality Agreement cannot properly be resolved on this occasion. It is therefore unnecessary to decide at this stage whether it would be open to Mr Shulev to advance any claim that the Settlement Agreement itself, insofar as it makes provision for those two further agreements, can be impugned on the grounds of misrepresentation or duress; nor on

what basis any damages for misrepresentation might be assessed even if such a claim were to succeed. I make no findings on any of those matters.

45. The upshot for present purposes is that both parties were content to proceed on the basis that the Settlement Agreement itself, or at least the Agreement as a whole, is valid and binding. As discussed below, there did remain an issue about whether clause 3 is sufficiently clear to be enforceable, as well as disputes about the effect of certain other provisions of the Agreement, and I deal with those matters next.

(b) Clause 3

46. Mr Shulev said in second witness that *"[s]hould Nexo perceive the true structure of Clause 3 to allow for any requests of Assets to be made, different than those that have been negotiated prior to signing the Agreement, then this would make this clause virtually impossible to comply with due to its non-exhaustive nature and respectively make the fulfilment of the rest of the Agreement flawed and unenforceable"*.

47. Mr Shulev also stated there that, despite the "*vagueness*" of clause 3, he and Nexo "*clearly negotiated as to what is expected as "requested Assets" under Clause 3 and "residue Assets" under Clause 7*". Mr Shulev said that "*the nature of the assets that qualify as Confidential Information, including but not limited to seed phrases, sensitive information related to management employees concerning practices by Mr Trenchev and Mr Kantchev and business information concerning the operations of the company within multiple jurisdictions including in the United Kingdom*" was the reason why the Assets were not specified in the Agreement itself. (A seed phrase is a set of words representing the cryptographic key that gives control of the cryptoassets in a wallet.) Mr Shulev added that during these negotiations "*Mr Trenchev kept on adding not a list of Assets, but of digital addresses, bank account details and physical addresses under Clause 3, which did not make sense ... To me, this seemed like a misleading trap and I have shared this concern of mine multiple times with Mr Trenchev over direct meetings, phone conversations and emails.*"

48. I was shown by way of context, though probably strictly inadmissible, a previous draft of the Settlement Agreement bearing the date February 2020, which defined "*Assets*" as *"Cash and digital assets, as well as digital assets wallets, including but not limited to"* specified wallets and their contents, along with *"Accounts with financial institutions, and assets therein"*, and a long of non-crypto assets such as computers, software, marketing information, office equipment and credit/debit cards. This list presumably reflects, in part, the items to whose inclusion Mr Shulev says he objected and which Nexo agreed to remove.

49. In his skeleton argument Mr Shulev similarly stated that the parties had agreed in advance which "*Assets*" he was to hand over to Nexo, and that the reason why they were not named in the Settlement Agreement was that they included sensitive information that could potentially affect the price of Nexo's publicly traded security instrument, the Nexo token. Mr Shulev quoted certain observations of Mr Hofmeyr QC at the last hearing:

> "In that context, the real difficulty I have with paragraph 3 of the agreement is "after the successful receipt of any requested assets". Now, there is going to need to be discussion and

> debate as to what that encompasses. The definition of assets is wallets, account credentials, C-phrases, private keys, documents, materials, files, e-form of communication, including emails. Does that entitle Nexo to ask from Mr. Shulev any email that they wish to ask him for? No, of course it does not. Does it entitle them to ask for any wallet? No, of course it does not. Does it entitle them to ask for his bank account? No, it does not. It is limited and no doubt that is what the dispute about Clause 3 concerns, and I am just concerned that we are using up so much court time in order to resolve something for which there is a practical solution."

50. In his oral submissions, Mr Shulev gave a broad indication of the assets which he said he had already transferred to Nexo, on 1 July 2021, pursuant to clause 3. It included lists of investors, clients and advisers, sensitive information about individuals' personal finances, and information about or useful in connection with regulatory investigations into Nexo.

51. By contrast, Mr Trenchev in his fifth witness statement stated that the cryptocurrency assets which Nexo sought to recover from Mr Shulev were held in six particular wallets to which Mr Shulev had retained access, despite being wallets used exclusively for corporate purposes by Nexo. These were a Binance Chain Wallet, a Stellar Chain Wallet, an XRP Chain Wallet, an ETH Wallet, a BTC Wallet and an Additional BTC Wallet. Mr Trenchev said that he had been involved in settlement discussions with Mr Shulev since the outset of this matter in late 2019, and assisted in drafting the settlement agreement; that the draft sent to Mr Shulev on 7 February 2021 specifically listed out the Binance Chain Wallet, the Stellar Chain Wallet, the ETH Wallet and one BTC Wallet (referring also in each case to "*all cryptoassets therein*"; and that that Mr Shulev was aware that Nexo wanted these wallets to be returned to Nexo. Mr Trenchev added that Mr Shulev also retained access to the XRP Chain Wallet and the Additional BTC Wallet along with their contents. One of the wallets, the ETH Wallet (with address ending F7CEb), was the wallet which contained the Nexo tokens that Mr Shulev subsequently transferred to Nexo on 1 July and several other Nexo-claimed assets as mentioned in § 88 below. I was shown during the hearing ledgers demonstrating that the sources of transfers into these wallets were wallets owned by Nexo's business counterparties.

52. The court takes into account textual and contextual matters in interpreting an agreement: *Arnold v Britton* [2015] UKSC 36; *Wood v Capita Insurance Services Ltd* [2017] UKSC 24. On the other hand, the course of events in negotiations is generally inadmissible as a guide to the meaning of the contract, for the reasons explained by Lord Wilberforce in *Prenn v Simmonds* [1971] 1 WLR 1381:

> "There were prolonged negotiations between solicitors, with exchanges of draft clauses, ultimately emerging in clause 2 of the agreement. The reason for not admitting evidence of these exchanges is not a technical one or even mainly one of convenience, (though the attempt to admit it did greatly prolong the case and add to its expense). It is simply that such evidence is unhelpful. By the nature of things, where negotiations are difficult, the parties' positions, with each passing letter, are

> changing and until the final agreement, though converging, still divergent. It is only the final document which records a consensus. If the previous documents use different expressions, how does construction of those expressions, itself a doubtful process, help on the construction of the contractual words? If the same expressions are used, nothing is gained by looking back: indeed, something may be lost since the relevant surrounding circumstances may be different. And at this stage there is no consensus of the parties to appeal to. It may be said that previous documents may be looked at to explain the aims of the parties. In a limited sense this is true: the commercial, or business object, of the transaction, objectively ascertained, may be a surrounding fact. Cardozo J. thought so in the Utica Bank case [*Utica City National Bank v. Gunn* (1918) 118 N.E. 607, NY Court of Appeals]. And if it can be shown that one interpretation completely frustrates that object, to the extent of rendering the contract futile, that may be a strong argument for an alternative interpretation, if that can reasonably be found. But beyond that it may be difficult to go: it may be a matter of degree, or of judgment, how far one interpretation, or another, gives effect to a common intention: the parties, indeed, may be pursuing that intention with differing emphasis, and hoping to achieve it to an extent which may differ, and in different ways. The words used may, and often do, represent a formula which means different things to each side, yet may be accepted because that is the only way to get "agreement" and in the hope that disputes will not arise. The only course then can be to try to ascertain the "natural" meaning. Far more, and indeed totally, dangerous is it to admit evidence of one party's objective — even if this is known to the other party. However strongly pursued this may be, the other party may only be willing to give it partial recognition, and in a world of give and take, men often have to be satisfied with less than they want. So, again, it would be a matter of speculation how far the common intention was that the particular objective should be realised. …
>
> In my opinion, then, evidence of negotiations, or of the parties' intentions, and a fortiori of [one party's] intentions, ought not to be received, and evidence should be restricted to evidence of the factual background known to the parties at or before the date of the contract, including evidence of the "genesis" and objectively the "aim" of the transaction." (pp. 1384-1385)

53. The present case can be seen as an example. Even if it were possible to resolve the disputed evidence about the to and fro of the negotiations, it would provide little or no help in determining the meaning of the Settlement Agreement ultimately signed, unless perhaps it provided a clear point about the business object of the transaction.

54. It does not follow that clause 3 is too vague to enforce. It is at least clear from the evidence that there was a dispute about entitlement to a number of cryptoasset wallets or accounts which Nexo claimed to be corporate assets but for which Mr Shulev had access. As indicated in Chitty § 4-186:

> "The courts to not expect commercial documents to be drafted with strict legal precision. The cases provide may examples of judicial awareness of the danger that too strict an application of the requirement of certainty could result in the striking down of agreements intended by the parties to have binding force."

It is possible to give meaning to the words used in the contractual definition of "*Assets*", namely:

> "wallets, accounts, accounts' credentials, seed phrases, private keys, documents, materials, files, any form of communication, including emails"

by construing them as assets in relation to which Nexo put forward a *bona fide* claim that they were corporate assets, to which Mr Shulev had had access while working at Nexo, and which remain at least to some degree in Mr Shulev's possession or control.

55. Further, the phrase "*any requested Assets*" in clause 3, on its natural construction, at least includes Assets requested after the Settlement Agreement has been concluded, and is not confined to Asset which have been the subject of any prior request. For these reasons, I do not accept Mr Shulev's suggestion that clause 3 is too vague to be enforceable.

56. For completeness, as Nexo pointed out during the hearing, the time stated in clauses 3 and 4 must be an error since it predates the time at which the Settlement Agreement was signed. That does not, however, affect the enforceability of clause 3. The clause can be given effect as including an obligation on Nexo to make the relevant payment to Mr Shulev forthwith following "*successful receipt of any requested Assets by Nexo, confirmed by Nexo without any objections to the type, amount or value of the Assets*".

(c) Clause 4

57. Clause 4 provides:

> "Mr Shulev and Nexo will jointly inform before 1 July 2021, 12:30 am BST BitMEX/HDR Global Trading Ltd. that the disputed BitMEX/ HDR Global Trading Ltd. account will be released to Nexo and Mr Shulev will waive any rights and claims as to the operational, legal and beneficial ownership of the account and the assets within it."

58. Mr Shulev submits that the obligation to give the joint notification to HDR under clause 4 is conditional on Nexo having first complied with its obligations under clause 3. He suggests that that is also how Mr Trenchev understood the position, as indicated in his email of 1.21pm on 1 July 2019 quoted in § 74 above (i.e. very shortly

after the Settlement Agreement was entered into). Mr Shulev quotes Mr Hofmeyr's observation at the last hearing about Nexo's submission to the contrary:

> "That is a particularly unattractive, if I may say so, submission for a party to be making because the overall intention of the agreement is quite clear, as I read it, and the concern that the court has is that a party could potentially be, it could be said, seeking to steal a march on that by seeking to press one particular aspect of the agreement whilst other aspects remain unresolved….
>
> …As I say, what Mr. Shulev wants is to be certain that he is going to get the money that has been promised to him under this agreement. If he gets that money or at least the first instalment, he is entirely happy to release the account. The key thing is that one should not go ahead of the other so that a march can be stolen and that is as I see it."

59. However, clause 3 makes clear that the relevant order of events is first for Mr Shulev to transfer the requested Assets to Nexo, and then for Nexo to pay the first instalment. As I conclude later, Mr Shulev has not yet transferred all of the requested Assets. In any event, clause 4 is in my view a freestanding obligation. The dispute has been settled by the Settlement Agreement, on terms that among other things require Mr Shulev to renounce any claimed interest in the Account. That was and is the case regardless of whether either party has complied with other obligations arising under the Settlement Agreement, including clause 3. That view is reinforced by the statement in clause 12 that the Settlement Agreement is in full and final settlement of any claims between the parties (except for claims for breach of the agreement itself or the Confidentiality or Release of Claims Agreements). Moreover, it can hardly be the case that Mr Shulev can, by failing to effect timely transfer of the requested Assets, delay the required notification to HDR under clause 4 and hence Nexo's ability to get access to the Account.

60. It follows that Mr Shulev and Nexo are jointly obliged, and have been since the Settlement Agreement was signed, to inform HDR that the Account will be released to Nexo and that Mr Shulev waives any rights and claims as to its operational, legal and beneficial ownership and the assets within it. As with clause 4, the erroneously stated time in my view makes no difference: clause 4 makes sense as an obligation to give the required notification to HDR forthwith following execution of the Settlement Agreement.

61. I shall hear further from the parties as to remedies, but if Mr Shulev remains reluctant to sign the joint letter provided for by clause 4, it may be appropriate for the court now to direct HDR to transfer the balance of the Account to an address specified by Nexo (HDR having already deducted its costs).

(d) Clause 8

62. Clause 8 provides:

> "The second installment under Section 2 (ii) will be made by Nexo no longer than 7 days after the fulfilment of the terms under Sections 1-7, Mr. Shulev's signing of
>
> a Confidentiality and Non-Disparagement Agreement with the Nexo Companies and any other legal entity belonging to the Nexo Group ("Confidentiality Agreement"),
>
> …
>
> a Release of Claims Agreement with Kosta Kalinov Kantchev, the Nexo Companies and any other legal entity belonging to the Nexo Group, whereby Mr Shulev undertakes to declare, warrant and confirm that he does not have any rights, shareholding, title, interest, present or future claims and demands in any form to/in the Nexo Companies or the Other Companies, both as defined therein ("Release of Claims Agreement"),
>
> as well as Mr Shulev's full disclosure before the Nexo Companies of all the information concerning the Nexo Companies and the Nexo Group, including but not limited to its management, employees, products or services, which has been communicated by him with any third party, regardless of the reason therefor and of whether this information has had the effect of disparaging, defaming, or discrediting as to the Nexo Companies' or the Nexo Group's reputation, goodwill and commercial interests."
>
> (paragraph breaks interpolated)

63. Mr Shulev in his second witness statement suggested that the last portion of clause 8, relating to disclosure of information he has provided to third parties, suffers from "*vagueness and lack of clear-cut exhaustiveness*"; but added that he has nothing to disclose under it in any event. This issue was not argued before me at the hearing, and Nexo in its skeleton argument noted that it had not made any assertion of non-disclosure. The point therefore appears to be hypothetical, at least for the time being, and I do not consider it further.

64. In his skeleton argument and oral submissions, Mr Shulev submitted that the second part of clause 8 does not oblige Mr Shulev to execute the Release of Claims Agreement, but merely makes that a condition for his receipt of the second instalment under clause 2(ii). As noted earlier, Mr Shulev contends that he was induced to sign the Release of Claims Agreement by a combination of misrepresentation and duress.

65. This particular aspect of clause 8 was not argued in any detail before me, and does not seem to have been raised prior to Mr Shulev's skeleton argument. As indicated in section (F) below, I do not consider the misrepresentation and duress issues relating to the Release of Claims Agreement to be properly capable of resolution without oral evidence, possibly further disclosure, and fuller argument. Insofar as it might be suggested that clause 8 (read in the context of the Settlement Agreement as whole,

including clauses 10 and 11) might mean that Mr Shulev was/is positively obliged to execute the Release of Claim Agreement, that issue is in my view best determined as part of the same process. The same applies to any argument that Mr Shulev's agreement to the relevant portion of clause 8 was itself affected by any form of misrepresentation or duress.

(e) Clause 11

66. The second sentence of clause 11 provides that:

> "Should Nexo cease payments for reasons other than those listed in Section 10, Mr Shulev would no longer be bound to the penalty, warranties and obligations under Section 8 and shall have the right to sue Nexo for compensation and damages in the courts of England and Wales. …"

67. Clause 10, quoted earlier, allows Nexo to cease to pay Mr Shulev if he has not, up to the date of the relevant payment, "*duly complied with this Agreement, including the declarations, warranties and obligations under Sections 7 and 8 hereof, the Confidentiality Agreement and the Release of Claims Agreement*".

68. Mr Shulev submits that Nexo has, in breach of clause 3, ceased payments for a reason other than one set out in clause 10; and that, as a result, he is released from his obligations under clause 8, including any obligations arising under the Release of Claims Agreement and Confidentiality Agreement themselves. Mr Shulev says Mr Trenchev of Nexo understood clause 11 in the same way, citing an email from Mr Trenchev to Mr Shulev sent at 9.22am on 1 July 2021 (i.e. shortly before the Settlement Agreement was signed) saying:

> "Release of Claims: there are added clauses that release you of it, as long as you have complied with the terms of the contract."

69. Mr Shulev adds that clause 11 would be deprived of its intended effect if the Release of Claims Agreement and Confidentiality Agreement were regarded as having already come into force.

70. As set out in section (D) below, I consider that Mr Shulev has not yet completed the steps required in order to earn his entitlement to the first instalment. Nexo has not, therefore, so far ceased making payments for reasons other than those set out in clause 10. The second sentence of clause 11 has thus not yet come into play. Whether, if it were to come into play, that would release Mr Shulev from any obligations he may have under the Release of Claims Agreement and Confidentiality Agreement (assuming them already to have come into force) is a hypothetical question which it is not currently necessary to decide. As to Mr Shulev's point about clause 11 being deprived of effect if those two agreements are regarded as already having come into force, that may well be a point for consideration at any future hearing about the effect and/or validity of those two agreements: see generally section (F) below.

(D) PERFORMANCE OF THE SETTLEMENT AGREEMENT

71. The key events following signature of the Settlement Agreement at lunchtime on 1 July 2021 were as follows.

72. At 1.19pm (UK time), shortly after signature, Mr Trenchev of Nexo sent an email to Mr Shulev stating:

> **"Regarding: request for Assets under Settlement Agreement dated July 1, 2021**
>
> Dear Mr. Shulev,
>
> On the grounds of Section 3 of the Settlement Agreement dated July 1, 2021 (the "Agreement"), concluded between you, on the first side, Nexo Capital Inc. ("Nexo"), on the second side, and NEXO FINANCIAL LLC, NEXO AG, NPEM LTD., Nexo Services OÜ, Nexo Inc., Nexo Payments Limited, Nexo Clearing and Custody LTD, Nexo Financial Services LTD and Nexo Finance Limited (the "Other Nexo Companies"), on the third side, Nexo and the Other Nexo Companies jointly referred to as the "Nexo Companies", we hereby request that you immediately transfer the following Assets to the Wallet Addresses and Bank Accounts, and/or deliver them to the Address, as indicated below, according to the relevant type of the Asset:
>
> | **Type of Asset:** | **Wallet Address:** |
> |---|---|
> | BTC | [address stated] |
> | ETH/ERC20 | [address stated] |
> | BNB/BEP2 | [address stated] |
> | TRX | [address stated] |
> | XRP | [address stated] |
> | XLM | [address stated] |
> | EOS | [address stated] |
> | LTC | [address stated] |
> | BCH | [address stated] |
>
> **Type of Asset: Seed phrases and private keys**
>
> (for security reasons to be sent after sending all NEXO ERC-20 Tokens, as described above)

> First 12 words of Seed Phrases and/or 50% of private key characters to be sent by email to: katerina@nexo.io
>
> Second 12 words of Seed Phrases and/or 50% of private key characters to be sent by email to: antoni@nexo.io
>
> **Type of Asset: Bank Account:**
>
> Fiat Currency Beneficiary: Nexo Capital Inc.
>
> IBAN: …
>
> BIC: TRYULT21
>
> Bank: Transactive Systems UAB
>
> **Type of Asset: Address:**
>
> Physical Assets 41 Arsenalski Blvd., fl. 1, Sofia 1421, Bulgaria (Equipment, Computers, Documents, Ledger Devices, etc.) "

73. In his fourth witness statement, Mr Trenchev stated that the nine cryptocurrency wallets thus listed in the email were wallets to which he was asking Mr Shulev to provide access (via the seed phrases or private key characters). However, in his fifth witness statement, Mr Trenchev explained that the nine wallets listed in this email were in fact the Nexo wallet into which Nexo wished Mr Shulev to transfer nine specific values of cryptocurrency of different types.

74. About a minute later, at 1.20pm, Mr Trenchev emailed Mr Shulev saying (as variously translated):

> "Send first the Nexo tokens, then sent the 24 words according to the instructions above, then we transfer the first installment, we inform the court and we will figure the rest of the assets later."
>
> or
>
> "First, Nexo tokens, and then give the 24 words according to the instructions above, then we are releasing you the 1st Tranche from the SJS."

75. Mr Shulev then deposited 45,232,012 Nexo tokens ("***the Nexo Tokens***"), with a value of approximately US$61.4 million, into a new wallet and sent Nexo the seed phrases needed to access that wallet. (I address in §§ 89 below Mr Shulev's apparently new case that he did not himself transfer the Nexo Tokens but that they were, seemingly, transferred by someone else.)

76. At 1.30pm (UK time), Mr Trenchev sent Mr Shulev an email asking *"what is this address where you sent your [wallet address stated]"*. It appears from Mr Trenchev's evidence that he had not expected the assets to be placed in a new wallet, and was asking Mr Shulev to explain the purpose of this new wallet address.

77. Mr Trenchev's evidence is that the Nexo Tokens were assets belonging to Nexo which Mr Shulev had held, but that there were more Nexo assets which Mr Shulev was holding. Shortly afterwards, at 2.03pm (UK time) Mr Trenchev sent a further asset request to Mr Shulev, stating:

> "Regarding: request for Assets under Settlement Agreement dated July 1, 2021
>
> Dear Mr. Shulev,
>
> On the grounds of Section 3 of the Settlement Agreement dated July 1, 2021 (the "Agreement"), concluded between you, on the first side, Nexo Capital Inc. ("Nexo"), on the second side, and NEXO FINANCIAL LLC, NEXO AG, NPEM LTD., Nexo Services OÜ, Nexo Inc., Nexo Payments Limited, Nexo Clearing and Custody LTD, Nexo Financial Services LTD and Nexo Finance Limited (the "Other Nexo Companies"), on the third side, Nexo and the Other Nexo Companies jointly referred to as the "Nexo Companies", we hereby request that you immediately transfer the following Assets to the Wallet Addresses and Bank Accounts, and/or deliver them to the Address, as indicated below, according to the relevant type of the Asset:
>
> 22,149.15781817 BNB BEP-2
>
> 22,149.15781817 BNB BEP-2
>
> 4204099.6210063 XLM
>
> 4.54076107 ETH
>
> 895 BNB ERC-20
>
> 26,068 USDC
>
> 1,057 USDT
>
> 8,822,654.672306 XRP
>
> 7.77370630 BTC
>
> 9.55555439 BTC
>
> Type of Asset: Wallet Address:

BTC	[address stated]
ETH/ERC20	[address stated]
BNB/BEP2	[address stated]
TRX	[address stated]
XRP	[address stated]
XLM	[address stated]
EOS	[address stated]
LTC	[address stated]
BCH	[address stated]"

The wallet addresses provided were the same as in Mr Trenchev's earlier email.

78. This second email accordingly asked Mr Shulev to transfer to Nexo ten particular cryptocurrency values, though Mr Trenchev's evidence is that he included the first/second item (BNB BEP2) twice by mistake. Thus he intended to request nine cryptocurrency values, whose total value was approximately £10 million.

79. Mr Shulev did not transfer those assets, and in subsequent emails each party complained that the other had not complied with the Settlement Agreement. No doubt this came about partly because although clause 3 required Mr Shulev to transfer the "*requested Assets*" before receiving the first instalment, Mr Trenchev in his email at 1.20pm had said he would pay Mr Shulev as soon as the Nexo Tokens had been transferred, but then failed to do so. The problem may also partly have arisen as a result of Mr Trenchev's first email, at least, giving the impression that he was seeking the transfer <u>of</u> the nine listed Nexo wallets, which Nexo already controlled, rather than merely the transfer of specified assets <u>into</u> those wallets.

80. The parties came back before the court for a further short hearing on 2 July 2021 to discuss the effect of the settlement. Mr Shulev indicated he was unwilling to transfer the assets requested by Nexo without being paid the initial instalment of his compensation and having security for the later instalments. He said to the court:

> "what I wanted to say is the way that I will be guaranteed the parity of my compensation, which is of the amount of $1m and not the $400,000, that would be paid upon the settlement agreement being complied with, then I will be happy to proceed and find a solution which is reasonable for everyone to resolve the dispute. But transferring the entire amount of the assets at the moment to Nexo and simply sharing the comfort of only being able to receive part of the compensation after Nexo not complying with the agreement as a first step on their side, does not provide me with comfort that they will comply and provide the rest of the settlement"

The judge observed that:

> "the difficulty is that when you signed the settlement agreement you took the risk that Nexo would not be able to pay you the difference between $400,000 and $1m and that was a matter that you were going to be able to enforce against them by bringing a claim on the settlement agreement, and to ask now for security for the full $1m rather than just $400,000, again subject to hearing arguments from everybody, seems to me to be asking for more than you are entitled to."

81. In an attempt to break the apparent deadlock, Nexo made an open offer at the hearing that Mr Shulev could simply deduct the amount of the first instalment due to him from the corporate assets requested by Nexo (rather than transferring all the assets first as envisaged by clause 3). That offer was repeated openly in writing by Nexo's solicitors on 9 July 2021:

> "We are instructed to re-iterate our client's open offer (first made openly in court at the hearing on 2 July 2021) that you deliver all the Assets to our client and, prior to their delivery, deduct from the Assets the sum equivalent of $400,000 USDT as payment of the first instalment of your compensation under the Settlement Agreement. We enclose a copy of our client's notice to you requesting return of the Assets dated 1 July 2021, which we are instructed that you have only partly complied with. In any event, our client is able to evidence that it is the owner of the Assets, notwithstanding that you accepted during the hearing on 2 July 2021 that you continue to withhold the Assets from our client despite receiving the notice to return them.
>
> Alternatively, as proposed by our Counsel during the hearing on 2 July 2021, our client would be willing to give an undertaking to the Court that it will transfer the sum of $400,000 USDT upon receipt of the Assets. For your understanding, a breach of an undertaking to court is a criminal offence. To breach an undertaking is very serious and, in doing so, Nexo would open itself to criminal proceedings. Given the severity of the consequences of breach, Nexo would not give an undertaking unless it fully intended to comply with the same. This should provide you with sufficient security to resolve the current impasse."

82. On 13 July 2021, Mr Shulev made a counter-offer stating:

> "Following the court's suggestion, I am willing to deposit any residue Assets as per clause 7 at an escrow agent, while Nexo deposits my entire compensation with the same agent. The escrow agent would demonstrate to Nexo the deposited Assets and they shall be passed on to them, while my compensation would be transferred to me in full unconditionally and not

> pending on Nexo's frivolous read on follow up clauses such as the disclosure ask in clause 8. The escrow agent would then inform the court that both parties have settled and agree to close the BitMEX dispute."

83. On 16 July 2021, Nexo asked for further details of the counter-offer, including Mr Shulev's proposals for an escrow agent. Mr Shulev did not respond until 4 March 2022, when he said that Nexo's offer was "*fundamentally impossible to execute*" and that he understood that an escrow arrangement was not acceptable to Nexo. Nexo's solicitors responded on the same day reiterating that its original offer continued to be open for acceptance, and repeating Nexo's request for Mr Shulev's escrow proposals, saying "*please do not presume that this proposal is not acceptable to our client*".

84. In its skeleton argument before me, Nexo made clear that Nexo remains willing to permit Mr Shulev to deduct the value of the first instalment from the assets which it has requested him to transfer pursuant to the Settlement Agreement.

85. Mr Shulev submitted in his skeleton argument that Nexo breached clause 3, by demanding further assets: (a) without having paid the first instalment as Mr Trenchev had indicated he would and (b) including nine wallets which were already in Nexo's possession, making the request impossible to comply with. As a result, Mr Shulev says, under clause 11 he is released from any obligations under clause 8, including "*the penalties, warranties and obligations under the Confidentiality and Release of Claims Agreements*".

86. As to (a) above, Mr Trenchev's indication, in his email of 1.20pm on 1 July 2021, could at most have amounted to a waiver, or possibly formed the basis for an estoppel, the broad effect of which in either case would be that Nexo was no longer entitled to request Assets from Mr Shulev without having paid him the first instalment: though I make clear that the point was not debated before me in those legal terms. However, there is no need to address any such argument, because the effect of Nexo's open offer, which it stands by, is in substance to live up to Mr Trenchev's indication. By deducting the value of the first instalment from the further requested Assets, i.e. the nine cryptocurrency values, Mr Shulev can in substance obtain upfront payment of the first instalment.

87. As to (b) above, I consider that Mr Trenchev's second asset request on 1 July 2019, in his email of 2.03pm (UK time), made sufficiently clear that Mr Shulev was being asked to transfer the nine cryptocurrency values set out there into the nine wallets whose addresses were provided. At the very least, it was clear that those nine cryptocurrency values were being requested as Assets belonging to Nexo.

88. Mr Shulev did not in his skeleton argument appear to dispute that the nine cryptocurrency values belonged to Nexo or that they were covered by clause 3 of the Settlement Agreement. In the hearing before me, whilst again not disputing that those cryptoassets belong to Nexo (and that the six wallets Mr Trenchev had referred to would fall within the wording of clause 3), Mr Shulev said he was not in possession of the cryptoassets in question and did not know what they referred to. However, the documents show that at least four of the nine cryptocurrency values in question (895 BNB, 26,068 USDC, 1,057 Tether and 4.54076 Etherium) were present in the same wallet address (ETH wallet with address ending F7CEb) as the 45,232,012 Nexo

Tokens that Mr Shulev transferred to Nexo on 1 July 2021. Print-outs of the wallet contents show both the presence of those other assets and the transfer out of the Nexo Tokens on 1 July 2019. Nexo accordingly submitted that Mr Shulev must have had access to that wallet in order to transfer the Nexo Tokens (and, indeed, that Mr Shulev had chosen to transfer the Tokens themselves, rather than giving Nexo access to the wallet, in order to retain control of those other assets).

89. In response to that submission, Mr Shulev appeared to deny that he had transferred the Nexo Tokens. Further, in his post-hearing note dated 13 June 2022, Mr Shulev took the same position: not denying that the Tokens were transferred, but denying that it was he who made the transfer. However, Mr Trenchev's evidence, in his fourth witness statement, was as follows:

> "I sent Mr Shulev a further email stating that he should send Nexo the 24 words of the seed phrases to the nine wallets after which Nexo would transfer him the First Instalment. However, Mr Shulev did not send us the seed phrases to the wallets as requested, but deposited 45,232,012 Nexo Tokens (which then had an approximate value of $61,382,225.82) into a new wallet, and sent us seed phrases to access that wallet. The Nexo Tokens are assets that belong to Nexo but that Mr Shulev held. However, there are more Nexo assets that Mr Shulev has retained and has not returned. Shortly after receiving this email, I emailed Mr Shulev asking him to explain what this new wallet address (0x4a6836263cebe779718fbf9429678e89d9a28ee3) was."

90. Mr Shulev in his third witness statement referred to the above evidence from Mr Trenchev, and then referred to Mr Trenchev's email saying *"Send first the Nexo tokens, then send the 24 words according to the instructions above, then we (Nexo) will transfer the first instalment, we inform the court and we figure the rest of the assets after".* Mr Shulev continued:

> "In line with the specific Asset request from the e-mail quoted above and what Mr Trenchev says he has received access to in paragraph 11 of Mr Trenchev's fourth witness statement which matches the Asset request, it becomes undoubtedly clear, in his own words, that Mr Trenchev's request has been fulfilled and it is him that is within breach of Clause 3 by not following through with his obligation under the clause with the unsubstantiated excuse that there are "more Assets that Mr Shulev has retained", which again contradicts his latest email." (§ 15)

It was thus Mr Shulev's own evidence that Mr Trenchev's request – which was that Mr Shulev transfer the Nexo Tokens – had been fulfilled. Mr Shulev made no suggestion that some third party had instead effected the transfer. Similarly, in his skeleton argument Mr Shulev said:

> "At 15:21(GMT+2) [Mr Trenchev] sent an email in which he says "Send the Nexo tokens first, then we transfer you the first

> instalment, then we inform BitMEX and the Court, and we figure out the rest of the assets after" …
>
> At 15:31 (GMT+2) Mr Trenchev confirms he has received 45,232,012 Nexo Tokens (which then had an approximate value of $61,382,225.82), making Mr Trenchev's request of Assets even after signing the Agreement in his own words complied with …"

The natural meaning of these passages from Mr Shulev's witness statement and skeleton argument is that he had complied with Mr Trenchev's request to send Nexo the Nexo Tokens. Mr Shulev's has not identified who else might have transferred the Tokens, nor how or why they would have transferred them, at the precise time Nexo had requested them, unless the Tokens were in Mr Shulev's control such that he was able to effect their transfer.

91. Thus, as well as being Mr Trenchev's evidence that the tokens were transferred, it was Mr Shulev's own evidence that Mr Trenchev's request for the transfer of the Nexo Tokens had been fulfilled. Indeed, that was the premise of Mr Shulev's case that Nexo had failed to comply with clause 3 of the Settlement Agreement. There is no indication that Mr Shulev had ever previously suggested that someone else, with access to the account, had transferred the Nexo Tokens at his request, rather than his effecting the transfer himself.

92. Moreover, Mr Shulev did not suggest in any of his emails to Mr Trenchev on 1 July 2021 that any of the nine cryptocurrency values Mr Trenchev had requested either did not belong to Nexo or were not in Mr Shulev's control. Nor did Mr Shulev make any such suggestion in either of his two witness statements post-dating the Settlement Agreement (viz his second witness statement dated 26 July 2021 and his third witness statement dated 9 August 2021), even though Mr Trenchev had made clear in his fourth witness statement (dated 16 July 2021) that Nexo was seeking to recover assets that belonged to Nexo, but to which Mr Shulev retained access, and which Mr Shulev had withheld from Nexo.

93. I do not accept Mr Shulev's seemingly revised case on this point, and I accept Mr Trenchev's evidence that the nine cryptocurrency values represent assets belonging to Nexo, to which Mr Shulev had access or control. Nexo was and remains entitled to request those values, or the necessary access to and/or control over them, from Mr Shulev pursuant to clause 3 of the Settlement Agreement. Such a request was contained in Mr Trenchev's email of 2.03pm (UK time) on 1 July 2021, and Mr Shulev is obliged to comply with it by providing Nexo with the means to access and use those cryptocurrency values, subject to deduction of the value of the first instalment due to Mr Shulev under clause 2 of the Settlement Agreement.

94. It also follows that Nexo has not, in my judgment, ceased payments for reasons other than those listed in clause 10 of the Settlement Agreement: and therefore Mr Shulev has not been released, pursuant to clause 11, from whatever obligations he may have under clause 8.

(E) ENTITLEMENT TO THE ACCOUNT/ASSETS

95. I have concluded that under the Settlement Agreement, the parties have compromised any dispute about entitlement to the Account, and that the appropriate notification should be given to HDR pursuant to clause 4 of that Agreement.

96. In case I am wrong in that wrong, and it is for some reason necessary to resolve the underlying issue as to entitlement to the Account, I now address that issue.

(1) Principles

97. Nexo's case is that, although it was not expressly or fully identified to HDR as the contracting party, it is entitled to enforce the Account agreement against HDR as undisclosed principal.

98. The relevant legal principles were summarised by Lord Lloyd giving the judgment of the Privy Council in *Siu Yin Kwan v Eastern Insurance Co Ltd* [1994] 2 AC 199, 207, as follows:

> "(1) An undisclosed principal may sue and be sued on a contract made by an agent on his behalf, acting within the scope of his actual authority.
>
> (2) In entering into the contract, the agent must intend to act on the principal's behalf.
>
> (3) The agent of an undisclosed principal may also sue and be sued on the contract.
>
> (4) Any defence which the third party may have against the agent is available against his principal.
>
> (5) The terms of the contract may, expressly or by implication, exclude the principal's right to sue, and his liability to be sued. The contract itself, or the circumstances surrounding the contract, may show that the agent is the true and only principal." (paragraphs breaks interpolated)

The right of an agent of an undisclosed principal to sue on the contract ((3) above) is brought to an end by the principal's intervention (see, e.g., *Pople v Evans* [1969] 2 Ch 255).

99. Leggatt J in *The Magellan Spirit* [2016] EWHC 454 rejected the suggestion that, when considering limb (2) above, the agent's subjective intention is relevant:

> "17. … It is one thing to infringe the objective principle – as the doctrine of undisclosed principal undoubtedly does – by allowing the existence of contractual rights and obligations to depend on an intention which is not communicated to the other contracting party. But it would go a step further, and would give rise to wholly unacceptable uncertainty, if such rights and obligations were to depend on a purely private intention of the

> supposed agent which was not even communicated to the supposed principal before the contract was made. As Lord Shand observed in *Keighley Maxsted & Co v Durant* [1901] AC 240 , 256:
>
> > "There is a wide difference between an agency existing at the date of the contract which is susceptible of proof … and an intention locked up in the mind of the contractor, which he may either abandon or act on at his own pleasure, and the ascertainment of which involves an inquiry into the state of his mind at the date of the contract."
>
> …
>
> 18. The question whether an undisclosed agency relationship was created must depend in principle, as I see it, not on the state of mind of the supposed agent at the time of contracting, but on whether the supposed agent had communicated to the supposed principal an intention to contract on its behalf. The principle is confirmed by further binding House of Lords authority. In *Garnac Grain Co Inc v HMF Faure & Fairclough Ltd* [1968] AC 1130 at 1137, Lord Pearson (with whose speech the other law lords agreed) stated the principle as follows:
>
> > "The relationship of principal and agent can only be established by the consent of the principal and the agent. They will be held to have consented if they have agreed to what amounts in law to such a relationship, even if they do not recognise it themselves and even if they have professed to disclaim it … But the consent must have been given by each of them, either expressly or by implication from their words and conduct."
>
> See also *Yukong Lines Ltd v Rendsburg Investments Corp, The "Rialto"* [1998] 1 WLR 294, 303. This statement of the law makes it clear that if on an objective analysis of their words and conduct Mansel and VSA consented to the creation of a relationship of agent and principal between them, it matters not that Mr Fransen (or anyone else involved in the transaction) did not subjectively intend or perceive this to be the case."

100. For completeness, Nexo alternatively claims as <u>disclosed</u> but not (fully) identified principal, on the basis that by using his Nexo corporate email address, Mr Shulev represented to HDR that he was not opening the Account in a personal capacity. However, the distinction does not affect the outcome here and does not need to be consider further.

(2) Application

101. It is not suggested by Mr Shulev that the qualification referred to at § 98(5) above applies here. Indeed, HDR's Terms of Service for the Account expressly envisage the possibility that an individual may open and operate an account as agent for someone else. Clause 6.1(b) provides: "*If you are using the Trading Platform on behalf of or for the benefit of any person or organisation, you must be authorised to do so. The relevant person or organisation will be liable for your actions, including any breach of these Terms*". Similarly, clause 1.3(c) provides that by using HDR's platform the counterparty represents, undertakes and warrants that *"you are the legal owner (or an appropriately authorised representative of the legal owner) of the funds you add to your account with HDR and that the same funds derive from a legitimate source"*.

102. There is no suggestion by anyone that opening an account for Nexo was outside the scope of Mr Shulev's actual authority as a director of Nexo. The key question therefore relates to point (2) in the above quotation from *Siu Yin Kwan*, namely whether in opening the Account, Mr Shulev intended to act on Nexo's behalf or to act in a personal capacity.

103. I have summarised the main facts relevant to this issue in section (B) above. These indicate the following:

i) The purpose of the Account appears to have been to enable Nexo to get a better rate that it was currently receiving on its corporate account with Kraken (§ 14 above).

ii) The initial deposit of 261 bitcoin came from Nexo's existing accounts at Kraken, Huobi and Binance, and later deposits also came from those accounts (§§ 17 and 19 above).

iii) The Account was opened using Mr Shulev's Nexo email address, as distinct from any personal or private address (§ 15 above).

iv) Mr Metodiev, Nexo's head of trading, and others within Nexo had access to the Account and executed transactions on it (§ 21 above). There is no evidence of Mr Shulev himself having executed transactions on it.

v) Various communications from Mr Shulev are expressed in terms ("*we*") tending to suggest that he viewed it as a Nexo account rather than his own personal account (§§ 18 and 24 above). Further, it is hard to see why, for example, Mr Shulev would have needed to inform Mr Kantchev at all about the initial deposit into the Account, as he did (§ 18 above), had it been Mr Shulev's own personal account.

104. Mr Shulev suggests that he opened the Account using his corporate email address "*for the sake of convenience*" and that his repeated references to "*we*" when discussing the account internally within Nexo "*are not references to me and Nexo Capital, but rather to Mr Kantchev and myself as majority beneficial owners in Nexo Inc*". However, that suggestion conflates ownership of the Account with Mr Shulev's claimed ultimate beneficial interest in Nexo as a company. Mr Shulev also mentioned during the hearing that the corporate email addresses used relate to Nexo AG, rather

than Nexo itself. However, the natural starting point would remain that an account opened using such an email address was corporate rather than personal.

105. Mr Shulev had also said, in an email in October 2019 (and repeats the statement in his skeleton argument), that:

> "As further proof of my ownership, the BITMEX account has been opened by me and the following address 33W98XuD5QSCbVUwycBfhB5YmDE9MBBJ8J from which the very initial transaction and subsequent major ones have been made is also mine and not just an intermediary wallet."

106. However, Mr Trenchev in his first witness statement (dated 13 July 2020) explained that, as indicated in the Chainalysis report Nexo had obtained, that wallet was an intermediary wallet, and all funds that were transferred to the Account came from separate accounts owned by Nexo via that wallet. For example, the two withdrawals of 600 BTC on 5 November 2019 and 5 December 2019 from Nexo's Kraken account ended up being deposited in the Account through wallet 33W98XuD5QSCbVUwycBfhB5YmDE9MBBJ8J. Mr Trenchev said that intermediary wallet was opened by Mr Shulev on behalf of Nexo, in the same way that the Account was. Mr Shulev did not respond to that evidence in his subsequent witness statements.

107. Mr Shulev also states that the Binance and Huobi accounts, from which assets were transferred into the Account, were his personal accounts to. Mr Trenchev responded to that claim in detail in his third statement. Mr Trenchev stated that those Binance and Huobi accounts, too, were set up by Mr Shulev on behalf of Nexo, and used by Nexo as corporate accounts, in the same way as the Account. Mr Trenchev cites the following matters in support of his statement:

i) On 2 September 2019, Mr Shulev wrote to Ms Krasteva and Mr Manolov confirming that the network address for the Huobi account was the relevant deposit address for Nexo's PAX (a stablecoin) and was the address with which Nexo had made transactions and swaps.

ii) On 9 September 2019, following a specific request from Ms Krasteva, Mr Shulev attached the deposit history of the Binance account. He confirmed that he had not used the Binance account for personal purposes, and that all funds were deposited from Nexo accounts.

iii) An order confirmation for a cryptocurrency sale agreement between Ecology and Nexo listed the Huobi account as a Nexo account.

iv) Loan termsheets dated 12 April 2019 and 7 May 2019 between Genesis Global Capital LLC (as lender) and Nexo as borrower gave the Huobi account as the Nexo's PAX address.

In any event, Mr Trenchev also explained in his third witness statement, the majority of the bitcoin in the Account were transferred from the Kraken account, including a direct transfer of 200 bitcoin on 27 May 2019, and Mr Shulev has never disputed that the Kraken account is a Nexo corporate account.

108. Mr Shulev did not respond to this evidence from Mr Trenchev in his subsequent two witness statements. I accept Mr Trenchev's evidence as to the nature of the Binance and Huobi accounts.

109. Mr Shulev in his skeleton argument makes the further statements that:

i) it was a not uncommon practice to commingle personal and corporate Assets in personal accounts, which was the case here;

ii) by virtue of creating a personal Account with HDR, Mr Shulev accepted HDR's Terms of Service entitling him to operate and control the Account;

iii) *"In parallel, no other agreement with HDR or any of the Nexo entities, or Mr Kantchev, discussing or confirming a change of operational control over the Account or transfer of such to Nexo Capital Inc, or any of the other Nexo related legal entities generally has ever been discussed or signed. This was confirmed by Nexo's legal advisors in their communication with HDR"* (in which Nexo's solicitors told HDR that Nexo had no contract with Mr Shulev in relation to the Account and so could not itself sue him);

iv) Nexo was able to open corporate accounts, and did so in or around July 2019: as set out in one of Mr Trenchev's witness statements, Nexo opened a further Bitmex account on or about 17 July 2019 in order to increase its trading limits, using the first name "*Nexo*", surname "*Capital Inc*" and the corporate email address: otc@nexo.io; and

v) Nexo's evidence that Mr Metodiev has operated the Account is false and no conclusive evidence proving this has been provided. It is based only on IP logs which correspond with the ordinary place where Mr Shulev himself spent most of his day.

110. Taking those points in turn:

i) The fact (if it be the case) that personal and corporate assets were often mingled in personal accounts is as neutral factor. The question is whether the Account was a personal or corporate account. The fact that the assets placed in it came from Nexo corporate assets strongly suggests that the Account was a corporate account.

ii) Mr Shulev's acceptance of HDR's Terms of Service, entitling him to operate and control the Account, simply begs the question of the capacity in which Mr Shulev did so: acting personally or as an agent. As noted earlier, HDR's Terms of Service expressly contemplated that a person opening an account might be doing so on behalf of another person or organisation.

iii) The absence of any separate agreement between Nexo and HDR, or between Nexo and Mr Shulev, relating to the Account does not shed light on the true ownership of the Account or the capacity in which Mr Shulev opened it.

iv) The fact that Nexo was able to open accounts in its own corporate name does not mean that the Account was a personal account.

v) I address the point about Mr Metodiev's access to the Account in § 22 above.

111. Taking all the matters summarised above together, I consider it clear that, whether judged objectively or subjectively, Mr Shulev intended to open the Account on Nexo's behalf and to hold Nexo assets. That conclusion is consistent with the contemporary documents, the source of the funds put into the Account, its purpose, and its usage.

112. It follows that in relation to the Account Mr Shulev owed, and owes, to Nexo the duties of an agent to his principal, including a duty to act on Nexo's instructions and to hold the Account and its contents as fiduciary for Nexo.

113. Nexo also makes a proprietary claim to the cryptoassets in the Account. Bitcoin are regarded as property (see *AA v Persons Unknown & Ors, Re Bitcoin* [2019] EWHC 3556 (Comm) §§ 56-57). The cryptoassets in the Account were transferred there directly or indirectly, without any evidence of any relevant mixing, from other Nexo corporate cryptocurrency accounts. Nexo therefore has title to the cryptoassets in the Account, alternatively (if necessary) can follow its title into those assets and recover them as owner (cf *Trustee of the Property of FC Jones & Sons v Jones* [1996] EWCA Civ 1324; *Armstrong DLW GmbH v Winnington Networks Ltd* [2012] EWHC 10). Nexo's claim is in my judgment well founded, based on the evidence I have already set out.

114. For these reasons, had the matter not already been resolved between the parties by the Settlement Agreement, I would have concluded that Nexo was entitled to the Account and its contents.

(F) RELEASE AND CONFIDENTIALITY AGREEMENTS

115. As noted earlier, Mr Shulev considers that the Settlement Agreement has been used as *"a Trojan horse to show intention to resolve the BitMEX dispute, but has ultimately aimed at receiving a signature on a very wide Release of Claims Agreement … that is a supplementary Agreement due only under Clause 8, that waives any claims that I might have to the BitMEX dispute and my entire shareholding at the Nexo Group which is valued at more than $339 million*". He contends that Nexo made a misrepresentation to the effect that the Release of Claims Agreement and Confidentiality Agreement were "*standard templates signed by thousands of people around the world*" containing "*Nothing for you to worry about*"; and that his signature of those agreements was also induced by duress. He notes that Mr Trenchev's witness statements do not address the issues relating to these agreements, despite the court having identified issues to be resolved in relation to them.

116. Mr Shulev accordingly said in his skeleton argument that:

> "… I argue that the Agreement should be determined as valid as it resolves the BitMex Account dispute, but breached by Nexo …, whereas the Confidentiality and Release of Claims Agreements …, as they are, are invalid for misrepresentation, sharp practices, waiver beyond reason, duress, amongst other … and should be rectified to waive only any claims over the

> BitMex Account and signed when they are due under Clause 8."

117. As I hinted during the hearing, I do not consider that the court has adequate material, including evidence, submission and possibly disclosure, fairly to determine these issues at present, and it is possible (though I leave the point open) that they would require oral evidence in order to resolve them. They will have to be held over for resolution on a future occasion if the parties are unable to reach agreement.

(G) CONCLUSIONS

118. For the reasons set out above, I conclude that:

i) pursuant to clause 4 of the Settlement Agreement, Mr Shulev and Nexo are jointly obliged, and have been since the Settlement Agreement was signed, to inform HDR that the Account will be released to Nexo and that Mr Shulev waives any rights and claims as to its operational, legal and beneficial ownership and the assets within it;

ii) under clause 3 of the Settlement Agreement, it remains necessary for Mr Shulev to transfer to Nexo the nine cryptoassets listed in Mr Trenchev's email of 14.03 (2.03pm) UK time in order to be entitled to the first instalment provided for in clause 2 of the Settlement Agreement, provided that Mr Shulev may obtain payment of the first instalment by deducting it from the assets transferred;

iii) Nexo has not to date ceased making payments for reasons other than those set out in clause 10; the second sentence of clause 11 has therefore not yet come into operation.

119. I shall hear further from the parties as to the appropriate form of relief.

120. I am grateful to Mr Shulev and to counsel for Nexo for their written and oral submissions.