

# Discretionary distributions made by investment manager in bitcoin investments does not constitute a breach of trust

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Investments in cryptocurrency and bitcoin has increased considerably in the UAE over the last few years. This article discusses a case relating to the recovery of profits arising from Bitcoin investments. In a decision dated 24 April 2019, the Ras Al Khaimah (RAK) Court of Appeal (in Appeals No.'s 898, 900-2018) considered the nature of the transaction, the balance between maximising shareholder profit and maintaining the cryptocurrency's competitiveness in the exchange market.

## Background

Bitcoin mining is the process by which new bitcoins enter into circulation. It is performed using very sophisticated computers that solve extremely complex computational math problems.

In 2017, the claimant entered into an investment agreement with an offshore company (the **"Company"**) directed by the accused for the purchase and operation of a Bitcoin mining unit. The mined bitcoins were transferred to a cryptocurrency wallet opened in the name of the Company. It was agreed that the Company would enjoy discretion to determine the timing of Bitcoin payments to investors, including the payment to the claimant.

In 2018, the claimant filed a complaint claiming that the accused, the manager of the Company, defrauded him by deferring the payments of the mined Bitcoin by not transferring to his personal wallet during the peak price period when the value of the Bitcoin was estimated to be around USD 19,000 in December 2017.

## Fraud or Breach of Trust

The Prosecution brought charges against the accused for fraud pursuant to Article 399 of the UAE Federal Penal Law No 3 of 1987, as amended (the **"Penal Code"**) and referred the matter to trial before the RAK Criminal Court.

Before the Criminal Court, the accused pleaded not guilty on the basis that the value of the Bitcoins payments transferred to the claimant's wallet comprised the latter's investment capital plus profit earnings.

In October 2018, the Criminal Court dismissed the charges and held that the elements of the crime of fraud could not be established and the matter fell under the jurisdiction of the civil courts as it is related to a contractual dispute.

The claimant and the Prosecution challenged the judgment before the Court of Appeal on the basis that the charges should be revised to breach of trust pursuant to Article 404 of the Penal Code as the accused withheld the payments for considerable time during the peak price period for no justified reason and, deliberately, caused loss of profit to the claimant.

The Court of Appeal issued a preliminary judgment in which it agreed to accept the appeal and appointed an independent IT Expert to determine (i) whether the claimant had received payments from the Bitcoin mining commensurate with his investment contribution, until his investment was reimbursed, (ii) whether the claimant had received any profits or earnings against his investment in the mining unit and (iii) the amount of such profits.

In April 2019, the Court of Appeal decided to accept the Prosecution's plea to adjust the charges from fraud to breach of trust considering that the accused had received investment from the claimant on account of their partnership and was entrusted to act in the best interests of his client.

The Court of Appeal, however, dismissed the amended charges and found the accused not guilty of breach of trust for the following reasons:

1. The Court noted in its analysis the contractual relationship between the claimant and the accused according to which the accused, being the manager of the Company, enjoyed absolute and sole discretion in deciding whether the profits would be distributed as Bitcoin or converted to any other currency.
2. The Court found that the nature of this investment required unique expertise to ensure a successful, secure and cost-effective outcome. The accused was required to act as a seed investor in order to organise and execute the transaction on his behalf as well as the investors' behalf. The claimant, on the other hand, was a typical partner that made a capital contribution to the venture, and his role was limited to receiving payments from the Company, which is managed by the accused. Therefore, the accused should enjoy the discretion and power to manage the investment and operate the Bitcoin exchange as he saw fit.
3. The Court found that the claimant received a 100% return on investment plus a considerable profit and that the accused had exerted due care in maintaining the profitability of investment which entailed deferring the distribution of payments. This was based on his sole discretion as agreed under the investment agreement, especially in view of the fact that the agreement did not impose any liability or penalty for delayed payments.
4. In sum, the Court found that the accused was under no obligation to distribute profits on a scheduled basis. Therefore, it could not be said that the accused delayed the distribution of returns or that losses were caused by such delay. No charge of misappropriation was established against the Accused.

Neither the Prosecution nor the claimant appealed the judgment to the Court of Cassation.

## Conclusion

The Court of Appeal upheld the discretionary pay out terms under the investment agreement. In its judgment, however, the Court also provides that in exercising such discretion a manager must exert professional care in managing the investment. Nonetheless, the judgment is also a timely reminder to ensure in any given cryptocurrency investment contract that the discretion afforded to the investment manager is not unfettered.

***Al Tamimi & Company's litigation team regularly advises on investment related disputes. For further information please contact [Adnan Al Erqsousi \(a.alerqsousi@tamimi.com\)](mailto:a.alerqsousi@tamimi.com).***