

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA565/2022
[2024] NZCA 47**

BETWEEN ECOMI TECHNOLOGY PTE LTD
 Appellant

AND MB TECHNOLOGY LTD
 Respondent

CA566/2022

BETWEEN ORBIS BLOCKCHAIN TECHNOLOGIES LTD
 First Appellant

JAHANZAIB KHAN
Second Appellant

DENISE MULLINGS
Third Appellant

AND MB TECHNOLOGY LTD
 First Respondent

ECOMI TECHNOLOGY PTE LTD
Second Respondent

DAVID SHU-HAN YU
Third Respondent

DANIEL CROTHERS
Fourth Respondent

Hearing: 4 May 2023

Court: Katz, Hinton and Churchman JJ

Counsel: C P Browne and C J L Martin for Appellant in CA565/2022
 R M Keane for Appellants in CA 566/2022
 J S Cooper KC and L C Sizer for Respondent in CA565/2022 and
 First Respondent in CA566/2022
 No appearance for Third and Fourth Respondents in CA566/2022

Judgment: 7 March 2024 at 11.30 am

JUDGMENT OF THE COURT

- A** **The appeals are dismissed.**
- B** **The appellants must pay MB Technology Ltd (the respondent in CA 565/2022 and the first respondent in CA 566/2022) costs for a standard appeal on a band A basis together with usual disbursements. We certify for second counsel.**
-

REASONS OF THE COURT

(Given by Katz J)

Introduction	[1]
The parties	[7]
Background	[11]
<i>Involvement with Ecomi</i>	[11]
<i>Involvement with Orbis</i>	[12]
Litigation history	[14]
<i>The Singapore Action</i>	[14]
<i>The New Zealand Ecomi Action</i>	[19]
<i>The Orbis Action</i>	[20]
<i>Settlement Agreement</i>	[23]
<i>Amended statement of claim filed in the Orbis proceeding</i>	[32]
The High Court decision	[35]
Has the Bonus Token Claim been settled?	[39]
<i>Ecomi's submissions</i>	[39]
<i>Orbis's submissions</i>	[47]
<i>MB Technology's submissions</i>	[48]
<i>Our view</i>	[51]
Conclusion	[70]
Result	[71]

Introduction

[1] David Yu and Daniel Crothers co-founded two related companies, Orbis Blockchain Technologies Ltd and Ecomi Technology Pte Ltd. MB Technology

Ltd, through its director Benn Godenzi, agreed to provide advisory services to Ecomi and to invest in its “Ecomi Project”, which aimed to develop and promote what was described as “a digital economic ecosystem”. MB Technology also agreed to buy shares in Orbis from both Orbis itself and two earlier investors in Orbis, Denise Mullings and Jahanzaib Khan.

[2] Unfortunately, by mid-July 2020, the relationship between Messrs Yu, Crothers and Godenzi had broken down. MB Technology brought proceedings against Ecomi, Mr Yu and Mr Crothers in Singapore (the Singapore Action). Having obtained worldwide freezing orders and other injunctive relief in the Singapore Action, MB Technology then sought mirror freezing and injunction orders against Ecomi, Mr Yu and Mr Crothers in New Zealand (the New Zealand Ecomi Action).

[3] MB Technology did not make any claims against Orbis in the Singapore Action, because the Share Subscription Agreement under which MB Technology had agreed to purchase shares in Orbis contained an exclusive jurisdiction clause in favour of the New Zealand courts. Accordingly, on 9 September 2020, MB Technology commenced proceedings in this jurisdiction against Orbis, Mr Yu and Mr Crothers in relation to MB Technology’s investment in Orbis (the Orbis Action).

[4] In December 2020, the parties entered into an agreement to settle the Singapore Action and the New Zealand Ecomi Action (the Settlement Agreement). The extent to which the Settlement Agreement also encompassed wider matters is in dispute. It is common ground, however, that the Orbis Action was not settled.

[5] MB Technology subsequently filed an amended statement of claim in the Orbis Action which included a new claim against both Ecomi and Orbis (the Bonus Token Claim). Ecomi and Orbis applied for defendants’ summary judgment and/or to strike out the Bonus Token Claim on the basis that it was barred by the Settlement Agreement. In the High Court, Jagose J found that the Bonus Token Claim did not fall within the scope of the Settlement Agreement and dismissed Ecomi and Orbis’ applications.¹

¹ *MB Technology Ltd v Orbis Blockchain Technologies Ltd* [2022] NZHC 1257.

[6] Both Ecomi and Orbis appealed against the High Court decision (CA565/2022 and CA566/2022 respectively). We determine these appeals together. The outcome of both appeals turns on the correct interpretation of cl 1.1 of the Settlement Agreement (the settlement clause) which sets out the scope of the agreement.

The parties

[7] Orbis is incorporated in New Zealand. It built, and continues to operate, a digital application called VeVe, where users can buy, sell, trade and showcase digital collectibles (otherwise known as non-fungible tokens or NFTs).

[8] Ecomi is incorporated in Singapore. It is an issuer of a cryptocurrency called the OMI token which is intended to be used to access a range of applications, products and services. OMI tokens can be used for the sale of NFTs within the VeVe application.

[9] Mr Yu and Mr Crothers are New Zealand nationals. Mr Yu is the sole director of both Orbis and Ecomi. Through his interests, he is the majority shareholder of Orbis and the sole shareholder of Ecomi. Mr Crothers is the chief operating officer of both Orbis and Ecomi.

[10] MB Technology is incorporated in the British Virgin Islands. It provides advisory services in the digital assets industry, including on blockchain projects and initial coin offering strategies. Mr Godenzi is the founder and director of MB Technology.

Background

Involvement with Ecomi

[11] Mr Yu and Mr Crothers first met representatives of MB Technology, including Mr Godenzi, at a blockchain event in Korea in July 2018. MB Technology subsequently became involved in the Ecomi Project as follows:

- (a) *The Advisor Agreement:* in September 2018, MB Technology agreed to provide advisory services to Ecomi in return for specified payments in cash and OMI tokens.
- (b) *The Investor Agreement:* MB Technology agreed to invest in the Ecomi Project by buying OMI tokens on their first release to the market (the Initial Token Offering). Between December 2018 and May 2019, MB Technology transferred 356.69 Bitcoin and 170 Ethereum to Ecomi for the purchase of OMI tokens. MB Technology claims that the Investor Agreement was conditional on the parties subsequently recording the investment in a formal written agreement known as a “Simple Agreement for Future Tokens”. The investment was to be held on trust until the agreement was reached. MB Technology says the Simple Agreement for Future Tokens was never signed as Ecomi did not adopt a “buy-back” model, which was seen by MB Technology as crucial to long-term success. Ecomi therefore continued to hold the transferred Bitcoin and Ethereum on trust, even after the Initial Token Offering had taken place.
- (c) *The Exchange Listing Agreement:* in September 2019, MB Technology advanced USD 115,000 to Ecomi in return for approximately 3.2 billion OMI tokens. MB Technology states that this was pursuant to an oral agreement in July 2019 — the terms of which included that:
 - (i) Ecomi would use the USD 115,000 towards a listing fee, in order to list the OMI token on a cryptocurrency exchange; and
 - (ii) if the funds were not used for that purpose, or the listing did not proceed, Ecomi would repay, on demand, the USD 115,000 to MB Technology, and MB Technology would repay the 3.267 billion OMI tokens to Ecomi.

Involvement with Orbis

[12] MB Technology also entered into agreements to buy shares in Orbis from Orbis itself (the Share Subscription Agreement) and from Ms Mullings and Mr Khan (the Share Transfer Agreements).

[13] On 21 August 2020, MB Technology sent a solicitors' letter to Orbis cancelling the Share Subscription Agreement on the basis that the required Orbis shares had not been issued. A similar letter was sent on 8 September 2020, cancelling the Share Transfer Agreements on the basis that Ms Mulling and Mr Khan's shares had not been transferred as agreed. MB Technology confirmed its cancellation of the Share Subscription Agreement and Share Transfer agreements on 25 March 2021.

Litigation history

The Singapore Action

[14] On 14 July 2020, MB Technology commenced action in Singapore against Ecomi, Mr Yu and Mr Crothers. MB Technology claimed:

- (a) breach of the Advisor Agreement — that Ecomi had failed to pay the 64,459,050,000 OMI tokens that were due to MB Technology under the terms of the Advisor Agreement;
- (b) breach of the Exchange Listing Agreement — that MB Technology was entitled to a refund of the USD 115,000 paid to Ecomi, upon return of the OMI tokens that it had received (approximately 3.267 billion), as the exchange listing had not proceeded; and
- (c) in respect of the cryptocurrency, it had transferred to Ecomi (356.69 Bitcoin and 170 Ethereum) pursuant to the Investor Agreement:
 - (i) Ecomi had acted in breach of trust by refusing to return the cryptocurrency to MB Technology; and/or

- (ii) MB Technology was entitled to a return of the cryptocurrency, in restitution; and/or
- (iii) Ecomi, Mr Yu and Mr Crothers were jointly and severally liable under the tort of unlawful means conspiracy by agreeing to make misrepresentations with the intention to procure the transfer of the cryptocurrency by MB Technology.

[15] MB Technology also applied for without notice freezing and injunction orders against the worldwide assets of Ecomi, Mr Yu, and Mr Crothers. The High Court of the Republic of Singapore granted the freezing and injunction orders sought.

[16] Mr Godenzi swore a lengthy affidavit (41 pages, plus exhibits) in support of MB Technology's freezing and injunction orders. His affidavit included a comprehensive 29-page background section traversing, amongst other things, the various matters summarised at [11] to [13] above. Mr Godenzi also explained the circumstances in which MB Technology had agreed to invest in Orbis and his "shock" at discovering, by conducting a search of the New Zealand Register of Companies in mid-May 2020, that MB Technology had not been issued any Orbis shares, despite having invested USD 1.075 million in Orbis pursuant to the Share Subscription Agreement. Mr Godenzi stated further that:

I would also add that MB Technology was never paid the 118.061 BTC worth of OMI Tokens which were promised to MB Technology as a bonus for its investment in Orbis.

[17] Near the end of his affidavit, under the heading "FULL AND FRANK DISCLOSURE", Mr Godenzi explained why no claims had been made against Orbis in the Singapore Action:

It should be noted that the Share Subscription Agreement under which MB Technology purchased shares in Orbis is stated to be governed by New Zealand law and contains an exclusive jurisdiction clause in favour of the courts of New Zealand. Again, this does not detract from Singapore being the appropriate forum for the dispute because MB Technology is not pursuing any claims against Orbis in these proceedings, and the claims which it is pursuing against [Ecomi, Mr Yu and Mr Crothers] are not claims "*arising out of or related to*" the Share Subscription Agreement. MB Technology seeks the recovery of the 362.25 BTC, which assets were not transferred pursuant to the Share Subscription Agreement, and specific performance and/or damages

for Ecomi's failure to abide by its obligations under two entirely separate contracts – the Advisor Agreement and the Exchange Listing Contract. The exclusive jurisdiction clause in the Share Subscription Agreement is of no relevance to these claims.

[18] Ecomi denied MB Technology's claims, and counterclaimed for the return of certain cryptocurrency assets which it said had conditionally transferred to MB Technology for the purpose of market making and to assist with the selling of OMI tokens at the Initial Token Offering. It also counterclaimed for the return of the OMI tokens it paid to MB Technology pursuant to the Exchange Listing Agreement.

The New Zealand Ecomi Action

[19] On 30 July 2020, MB Technology filed an originating application in the High Court of New Zealand seeking interim freezing and injunction orders against Ecomi, Mr Yu and Mr Crothers, to support the orders made in Singapore. The application was supported by an affidavit from Mr Godenzi that annexed and incorporated by reference his earlier Singapore affidavit. The application was initially rejected by the High Court, but a more limited version of the application was granted on appeal by this Court.²

The Orbis Action

[20] On 9 September 2020, MB Technology commenced the Orbis Action in the Auckland High Court against Orbis, Mr Yu and Mr Crothers. The original statement of claim alleged that:

- (a) Mr Yu and Mr Crothers had made certain representations regarding Orbis, which had induced MB Technology to enter into the Share Subscription Agreement and Share Transfer Agreements;
- (b) MB Technology had made the payments required of it under the agreements, but Orbis had failed to issue and transfer the shares to MB Technology; and

² *MB Technology Ltd v Ecomi Technology Pte Ltd* [2020] NZCA 363.

(c) MB Technology had cancelled the agreements.

[21] Causes of action were pleaded against:

- (a) Orbis, for breach of the Share Subscription Agreement and Share Transfer Agreements. A refund was sought of the amounts paid pursuant to those agreements.
- (b) Mr Yu and Mr Crothers, for deceit in respect of the alleged misrepresentations. These were alleged to have induced MB Technology to enter into the Share Subscription Agreement and Share Transfer Agreements.
- (c) Orbis, Mr Yu and Mr Crothers, for breach of s 9 of the Fair Trading Act 1986 in respect of the alleged representations.

[22] MB Technology's statement of claim was served together with an interlocutory application seeking summary judgment on its first and second causes of action. The summary judgment application was supported by an affidavit of Mr Godenzi dated 8 September 2020. Mr Godenzi's affidavit covered similar ground to his Singapore affidavit but was more specifically focussed on MB Technology's investment in Orbis. Mr Godenzi again described his shock at discovering that MB Technology had not been registered as a shareholder of Orbis or been issued shares in Orbis. He also asserted (as he had in his Singapore affidavit) that MB Technology had never been paid the 118.061 bitcoin worth of OMI tokens that were promised to it by Ecomi as a bonus for its investment in Orbis:

...although MB Technology is not currently seeking payment of those OMI Tokens, given it seeks repayment of the money it paid under the SSA and Transfer Agreements.

Settlement Agreement

[23] In November 2020, MB Technology and Ecomi entered into settlement negotiations. Mr Yu and Mr Crothers also sought to include the Orbis Action in the

settlement, but agreement could not be reached on this. Accordingly, the recitals to the final version of the Settlement Agreement recorded that:

The Parties wish to effect a full and final settlement of all claims in relation to the Singapore Action and the New Zealand Ecomi Action on the terms and conditions set out in this Agreement.

[24] Clause 1.1 of the Settlement Agreement (the settlement clause) set out the scope of the agreed settlement in the following terms:

1 FULL AND FINAL SETTLEMENT

1.1 The Parties hereby irrevocably and unconditionally agree, without any admission as to liability, to a full and final settlement of all claims as between the Parties in respect of, arising directly or indirectly out of, or in connection with the Singapore Action and the New Zealand Ecomi Action, and the allegations made in the Singapore Action and the New Zealand Ecomi Action however so arising, on the terms and conditions of this Settlement Agreement. For the avoidance of doubt, this clause does not apply to the New Zealand Orbis Action.

[25] Although the Orbis Action was not settled, the parties agreed (in cl 1.2 of the Settlement Agreement) to a standstill of the Orbis Action for four weeks, during which time they agreed to make a good faith attempt to settle the Orbis Action. Ultimately, however, the Orbis Action was not settled.

[26] The settlement clause comprises two sentences. The first sentence describes the scope of the settlement. The second sentence (which commences “for the avoidance of doubt”) was proposed by MB Technology’s lawyers, after rejecting the request to include the Orbis Action in the Settlement Agreement. The original wording proposed by MB Technology for the second sentence was:

For the avoidance of doubt, this clause does not apply to the New Zealand Orbis Action or to any claims or allegations arising directly or indirectly out of, or in connection with, the New Zealand Orbis Action.

[27] Three days later, and prior to receiving a response from Ecomi’s lawyers, MB Technology’s lawyers sent a revised draft of the Settlement Agreement in which the second sentence now simply read:

For the avoidance of doubt, this clause does not apply to the New Zealand Orbis Action.

[28] A drafting note under the revised sentence stated:

(Note to [Ecomi's lawyers]: We consider it necessary to make clear that this settlement does not affect any of the claims or allegations raised in the pending New Zealand Proceedings.)

[29] The covering email from MB Technology's lawyers further explained that:

Regarding [the settlement clause], we have simplified the clarificatory statement to say only that "For the avoidance of doubt, this clause does not apply to the New Zealand Orbis Action". After conferring with our New Zealand Counsel, we consider this clause to be necessary to put it beyond doubt that the New Zealand Orbis Action is not affected by this Settlement Agreement, save for what has been provided in Clause 1.2 [namely, the four week standstill agreement]. We trust that this will be acceptable to your clients.

[30] Ecomi's lawyers responded with a further version of the Settlement Agreement in which they accepted the proposed wording of the second sentence of the settlement clause and deleted the drafting note. No further changes were made to the settlement clause and the agreement was signed the next day, 1 December 2020.

[31] The parties subsequently discontinued their claims in the Singapore Action and the New Zealand Ecomi Action (the discontinued proceedings), bringing all claims then advanced against Ecomi to an end.

Amended statement of claim filed in the Orbis proceeding

[32] Mr Yu and Mr Crothers were presumably aware since about July 2020 that MB Technology believed that it had not been issued with any shares in Orbis, despite having invested US\$1.075m in Orbis pursuant to the Share Subscription Agreement. This was apparent from Mr Godenzi's July 2020 affidavit in the Singapore Action; the August and September 2020 correspondence cancelling the Share Subscription Agreement and Share Transfer Agreements; the September 2020 statement of claim in the Orbis Action; and Mr Godenzi's September 2020 affidavit in the Orbis Action.

[33] Given this context, it seems somewhat surprising that it was not until 23 December 2020 that Mr Yu provided Mr Godenzi with Orbis' share register and other documents, which showed that Orbis had in fact issued and transferred the shares

due under the Share Subscription Agreement and Share Transfer Agreements to MB Technology in February 2019.

[34] Following this disclosure, on 12 April 2021, MB Technology filed an amended statement of claim in the Orbis Action and also added Ecomi as a defendant to that proceeding. In its amended claim, MB Technology asserted that its cancellations of the Share Subscription Agreement and Share Transfer Agreements were void, as they were predicated on a misunderstanding (namely, it was not aware that the relevant shares had been issued and transferred to it). In its amended claim, MB Technology asserted continued ownership of the Orbis shares, rather than seeking a return of the consideration it had paid. Given the changed basis of the claim, MB Technology also sought payment of the bonus tokens (118.061 bitcoin worth of OMI tokens), for its investment in Orbis. Obviously, the alleged bonus could not be claimed in respect of the claim as originally pleaded, as it proceeded on the basis that the Share Subscription Agreement and Share Transfer Agreements had been cancelled.

The High Court decision

[35] Ecomi and Orbis applied to strike out the Bonus Token Claim on the basis that it was barred by the Settlement Agreement. Determination of this issue turned on the correct interpretation of the settlement clause.

[36] It was common ground that the Settlement Agreement is to be construed in accordance with the laws of the Republic of Singapore. The parties' respective experts on Singaporean law agreed on the relevant principles of contractual interpretation to be applied, which the Judge summarised as follows:³

- (a) The starting point is that one looks to the text that the parties used.
- (b) At the same time, it is permissible to have regard to the relevant context as long as the relevant contextual points are clear, obvious and known to both parties.
- (c) The reason that the court has regard to the relevant context is that it places the court in the best possible position to ascertain the parties' objective intentions by interpreting the expressions used by them in their proper context.

³ High Court judgment, above n 1, at [13]–[14].

- (d) In general, the meaning ascribed to the terms of the contract must be one which the expressions used by the parties can reasonably bear.
- (e) The aim of the exercise of construction of a contract or other document is to ascertain the meaning which it would convey to a reasonable business person.
- (f) The objective principle is therefore critical in defining the approach the court will take. A court is concerned usually with the expressed intentions of a person, not his or her actual intentions. The standpoint adopted is that of a reasonable reader.
- (g) The exercise is one based on the whole contract or a holistic approach. Courts are not excessively focused upon a particular word, phrase, sentence, or clause. Rather, the emphasis is on the document or utterance as a whole.
- (h) Although the text of the contract will undoubtedly be the first port of call for the court when interpreting a contract, the exercise in construction is informed by the surrounding circumstances or external context. Modern judgments are prepared to look beyond the four corners of a document, or the bare words of an utterance. It is permissible to have regard to the legal, regulatory and factual matrix which constitutes the background in which the document was drafted or the utterance was made.
- (i) The court should always proceed to examine the relevant context even if the relevant text appears, at first glance, to be plain and unambiguous.
- (j) Within the framework due consideration is given to the commercial purpose of the transaction or provision. The courts have regard to the overall purpose of the parties with respect to a particular transaction, or more narrowly the reason why a particular obligation was undertaken.
- (k) A construction which entails that the contract and its performance are lawful and effective is to be preferred.
- (l) Where a particular species of transaction, contract, or provision is one-sided or onerous, it will be construed strictly against the party seeking to rely on it.
- (m) A construction which leads to very unreasonable results is to be avoided unless it is required by clear words and there is no other tenable construction.

[37] Applying these principles, the Judge held that the Bonus Token Claim had not been settled for the following reasons:⁴

[20] The settlement clause is not entirely happily worded. Objectively considered, the clause means fully and finally to settle all claims sufficiently related to the discontinued proceedings. Grammatically, a settled claim is one which relates to — that is, is “in respect of, arising directly or indirectly out of, or in connection with” — both the discontinued proceedings “*and* the allegations made in [them] however so arising” (emphasis added). A necessary but insufficient condition is the claim relates to the discontinued proceedings; it also must relate to their allegations. The ungrammatical alternative is a settled claim either relates to the discontinued proceedings or specifically is an allegation made in them. There is no construction that would settle claims relating *generally* either to the discontinued proceedings or to allegations made in them. The settlement clause’s operative phrasing has not changed since its introduction in earlier drafts (although its scope reduced from all to only the discontinued proceedings).

[38] The Judge found that the Bonus Token Claim did not fall within the scope of the settlement clause for the following key reasons:

- (a) The discontinued proceedings and the present High Court proceeding (namely, the Orbis Action, as amended) are relatively distinct. The discontinued proceedings related to MB Technology’s compensation in OMI tokens (or reimbursement) for its advisory and exchange listing services to Ecomi. The present proceeding relates to MB Technology’s investments in Orbis (by way of acquisition of shares), for which it was also to acquire OMI tokens as a “bonus” for such investment: “[n]othing in MB Technology’s compensation for its provision of services to Ecomi appears to have required it to invest in Orbis.”⁵
- (b) The statements made in Mr Godenzi’s Singapore affidavit, regarding MB Technology being entitled to a bonus for its investment in Orbis, were made in the context of MB Technology seeking interim relief, without notice, in circumstances where MB Technology believed it had

⁴ Footnote omitted.

⁵ At [18].

a duty to make full and frank disclosure.⁶ These were not “allegations” for the purposes of the settlement clause because:⁷

[21] Purposively, an “allegation made” in a proceeding is one which demands response in the proceeding; if proven, would establish a material fact for the proceeding’s disposition. The phrase “however so arising” makes it plain the allegation may be more widely sourced than in the discontinued proceedings’ constitutive pleadings alone, thus escaping the conventional limitation. The settlement correspondence between solicitors appears to recognise that purposive construction in proposing and then omitting reference to “allegations” in the settlement clause’s second sentence. As the subject of the exclusion, it was enough to refer to this proceeding in itself.

[22] The common reference to cryptocurrency tokens is not a sufficient connection between the discontinued proceedings and this proceeding to render the latter’s claim for such already settled. Neither is mere contextual reference in the discontinued proceedings sufficient to exclude claims engaging that context. Mr Godenzi’s references in the discontinued proceedings to a potential bonus OMI tokens claim are purely contextual; they are not allegations of any material fact for those proceedings’ disposition.

[23] In other words, the settled claims are those of substance to the discontinued proceedings. The bonus OMI tokens claim in this proceeding was not of substance to the discontinued proceedings. Its contextual disclosure in the discontinued proceedings established no fact material to them. It was not settled with the discontinued proceedings. Its pleading in this proceeding is not abusive. It does not stand to be struck out.

Has the Bonus Token Claim been settled?

Ecomi’s submissions

[39] Mr Browne, counsel for Ecomi, proposed a “two-stage enquiry” to the interpretation of the settlement clause, where the two sentences of the clause are considered sequentially.

[40] The first sentence, he submitted, defines the scope of the settlement. If the claim falls within the scope of the settled matters, whether a particular claim is settled

⁶ At [19]

⁷ Footnotes omitted.

will then depend on the second sentence (commencing “for the avoidance of doubt...”) which Mr Browne described as a “carve-out” provision. On this approach, the “carve-out” only has a role to play if the first sentence of the settlement clause, interpreted in isolation, is found to include all or part of the Orbis Action within the settlement scope. The second sentence has no role to play as an aid to the correct interpretation of the first sentence.

[41] Mr Browne submitted that the first sentence of the settlement clause, correctly interpreted, settles:⁸

- (a) “all *claims* as between the parties in respect of, arising directly or indirectly out of, or in connection with the Singapore Action and the New Zealand Ecomi Action”; and *also*
- (b) “the *allegations* made in [those proceedings] however so arising”.

[42] Mr Browne submitted that the use of the word “allegation” in addition to “claim” in the settlement clause demonstrates an intention to cover the wide ambit of issues which arose in the proceedings. The view that both claims and allegations have been settled, Mr Browne submitted, is consistent with the apparent commercial purpose of the agreement, which was intended to be a broad “full and final settlement of all claims in relation to” the discontinued proceedings. Mr Browne submitted that this is a simpler construction than the Judge’s interpretation, which would settle only those claims that relate *both* to the discontinued proceedings and to the allegations made in them.

[43] Mr Browne submitted that this broad interpretation is also more consistent with the principle of Singapore law that a contract is to be given the “meaning which it would convey to a reasonable businessperson”. The word “allegation” would be understood by a reasonable businessperson as bearing its ordinary meaning (an accusation or assertion of wrongdoing), rather than a technical reference to pleaded causes of action, which is more similar to “claim”.

⁸ Emphasis added.

[44] Applying this interpretation to the facts, Mr Browne submitted that the various statements made in Mr Godenzi's Singapore affidavit constitute "allegations" made in the Singapore Action, despite not being "claims" made in that proceeding. These allegations fall within the scope of the settlement, unless saved by the "carve-out" in the second stage. On this approach, the Orbis Action will likely fall within the scope of the settlement, as most or all of the allegations underpinning the Orbis Action are referred to in Mr Godenzi's Singapore affidavit, and are therefore "allegations" in the Singapore Action. At the second stage of the analysis, however, the Orbis Action (as it was at the time of the Settlement Agreement) is excluded from the settlement, because it falls within the scope of the carve out.

[45] Applying Ecomi's two-stage approach to Mr Godenzi's (somewhat passing) reference in his Singapore affidavit to MB Technology not having been paid the allegedly agreed bonus for its investment in Orbis:

- (a) that allegation falls within the scope of the settlement set out in the first sentence of the settlement clause as it is an allegation made in Mr Godenzi's Singapore affidavit (and therefore the Singapore Action); and
- (b) the allegation does not fall within the carve out in the second sentence, as the Orbis Action did not include such a claim at the time of the settlement (although it did include such an allegation, on Ecomi's reasoning, as it was included in Mr Godenzi's affidavit in the Orbis Action).

[46] Mr Browne further noted that Ecomi was not a party to the Orbis Action at the time of the Settlement Agreement. It follows, he submitted, that any claims against Ecomi cannot fall within the scope of the carve out. Ecomi, therefore, cannot now be joined to the Orbis Action.

Orbis' submissions

[47] Ms Keane, counsel for Orbis, adopted Ecomi's submissions to the extent that they applied equally to Orbis. She further submitted, in summary, that:

- (a) The Judge’s finding that the claim must relate both to proceedings and allegations relies on an unnatural reading of the settlement clause which has the effect of narrowing the scope of what is being settled by adding a further condition for settlement.⁹ Read naturally, Ms Keane submitted, the settlement is of *both* claims and allegations. This is consistent with the parties’ objective intention to cast the ambit of the settlement clause broadly.
- (b) The Judge has adopted an unduly narrow interpretation of the word “allegation”, giving it a meaning equivalent to the technical word “element” in the phrase “element in a cause of action”.¹⁰
- (c) Factually, the Judge was incorrect to conclude that Mr Godenzi’s allegations in the Singapore Action in relation to the Bonus Token claim were offered as contextual material only and not “allegations however so arising”.¹¹ Rather, the allegations were made in support of a claim that Orbis and Ecomi had lost faith in Ecomi and were therefore directly related to claims that misrepresentations had been made (being the substance of the Singapore Action).
- (d) The Judge incorrectly rewrote the words used in the Settlement Agreement when he found that “[o]bjectively considered, the clause means fully and finally to settle all claims sufficiently related to the discontinued proceedings.”¹² Ms Keane submitted this meaning is not simply shorthand for the actual words used in the settlement clause, and the Judge diluted the import of the words “in respect of, arising directly or indirectly out of, or in connection with” the Singapore Action.

⁹ At [20].

¹⁰ At [21].

¹¹ At [23].

¹² At [20].

MB Technology's submissions

[48] Ms Cooper KC, counsel for MB Technology, submitted that the Judge's interpretation of the settlement clause was correct, largely for the reasons given by the Judge. The Singapore Action related to MB Technology's investment in and adviser relationship with Ecomi and focussed on the Advisor Agreement, the Exchange Listing Contract and the conditional Investor Agreement. Mr Godenzi's brief reference to MB Technology being entitled to a bonus for its investment in Orbis was unrelated to the claims made in the Singapore Action and was only included by way of general background. It was not of any substance to the settled proceedings.

[49] Ms Cooper submitted that the settlement clause should be read as a whole, rather than the two sentences being read in isolation and sequentially. The second sentence, she submitted, provides guidance as to the correct scope of the settlement referred to in the first sentence. On this approach the scope of the settlement is considerably narrower than that suggested by Ecomi and Orbis (as found by the Judge).

[50] Ms Cooper further submitted that, even if this Court accepted Ecomi's two-stage approach to interpretation of the settlement clause, and that the second sentence is a "carve-out" provision, the Bonus Token Claim is an allegation that would fall within the scope of that carve out. Specifically, any carve out is not limited to the pleaded claims in the Orbis Action, but also includes allegations in that proceeding, as is apparent from the pre-contractual context referred to at [26] to [30] above. As the Bonus Token Claim was referred to in Mr Godenzi's affidavit in the Orbis Action, as well as the Singapore Action, it is an allegation made in the Orbis Action (applying Ecomi's approach) and therefore falls within the scope of the carve out.

Our view

[51] As noted above, the Settlement Agreement is to be construed in accordance with the laws of the Republic of Singapore. The relevant Singaporean principles of contractual interpretation are set out at [36] above (and are very similar to the principles of contractual interpretation that apply in New Zealand).

[52] The starting point is the text that the parties used. As the Judge observed, with a degree of understatement, the settlement clause is “not entirely happily worded”.¹³ The first sentence is 74 words long and comprises seven subparts, each divided by a comma. The difficulty lies in attempting to determine how the different subparts of the sentence are intended to relate to each other. Some subparts can be read independently, whereas other subparts are clearly dependent on and linked to one or more of the preceding subparts. Some subparts provide extra information regarding the preceding subpart, whereas other subparts could potentially be read as items in a list or series, separated by commas. The same sentence can therefore be read in a number of different ways, depending on the view taken as to how the various subparts of the sentence are intended to relate to each other.

[53] We note that in Singapore, as in New Zealand:¹⁴

The [statutory interpretation] exercise is one based on the whole contract or a holistic approach. Courts are not excessively focused upon a particular word, phrase, sentence, or clause. Rather, the emphasis is on the document or utterance as a whole.

Hence, the correct approach to interpreting a contractual clause comprising more than one sentence will usually be to read the clause as a whole. Interpreting each sentence of the settlement clause in isolation risks misinterpreting the clause’s overall purpose and meaning within the broader context of the contract.

[54] Here, the first sentence is the operative part of the clause, in that it sets out the scope of the settlement. The second sentence commences with the phrase “for the avoidance of doubt...” which clearly, and somewhat prophetically, suggests that the draftsman envisaged that there was room for doubt as to the correct interpretation of the operative part of the clause.

[55] There appears to be limited case law on the meaning of the phrase “for the avoidance of doubt” in either a contractual or statutory context. The only case referred to by counsel was *Bathurst Resources Ltd v L&M Coal Holdings Ltd*.¹⁵

¹³ At [20].

¹⁴ At [13(g)].

¹⁵ *Bathurst Resources Ltd v L&M Coal Holdings Ltd* [2021] NZSC 85, [2021] 1 NZLR 696.

In *Bathurst*, the Supreme Court rejected an argument that the use of the words “[f]or the avoidance of doubt” signalled that the particular clause at issue was “clarificatory”.¹⁶ Rather, in the somewhat unusual and unique circumstances of that case, the relevant clause was held to constitute “the making of a concession”.¹⁷ We do not find *Bathurst* to be of assistance in interpreting the settlement clause here. The Court’s observations regarding the “for the avoidance of doubt” clause in *Bathurst* were highly fact-specific and were clearly not intended to provide any general guidance as to how such clauses should be interpreted.

[56] The only other case we have identified that considers the meaning of the phrase “for the avoidance of doubt” (albeit very much in passing) is *R v Standard 304 Ltd*.¹⁸ In that case Chambers J, writing for this Court, rejected a submission that a particular statutory provision could have been inserted solely for the avoidance of doubt on several grounds, including that:¹⁹

Thirdly, the parliamentary drafters usually use an entirely different formula to indicate a provision which has been inserted solely to remove doubt as to the scope of another provision. That is usually signalled by the expression “for the avoidance of doubt”, an expression a computer search reveals has been used 512 times in the current New Zealand statute book.

[57] This passing observation, albeit made in a statutory interpretation context, is consistent with our own view that a sentence or clause in a contract expressed to be “for the avoidance of doubt” is usually intended to clarify or remove doubt as to the correct interpretation of another provision (or, in this case, the preceding sentence). Unlike in *Bathurst*, there is nothing here to suggest that a different meaning was intended, or that the second sentence was intended to be a “carve-out” from the first sentence, rather than being intended to clarify the meaning of the first sentence, in the event of doubt.

[58] A carve out is an exception to a general rule or provision, which we would usually expect to be prefaced by words that indicated that an exception was intended, such as “notwithstanding anything to the contrary above”, “except that” or “save as”.

¹⁶ At [177]–[178].

¹⁷ At [238]–[239].

¹⁸ *R v Standard 304 Ltd* [2008] NZCA 563, [2010] NZAR 194.

¹⁹ At [14].

The phrase used here — “for the avoidance of doubt” — is of a different character and suggests that the aim is to clarify, rather than provide for an exception or exclusion.

[59] Hence, to the extent that the first sentence of the settlement clause is ambiguous, the second sentence provides guidance as to how any such ambiguity should be resolved. Specifically, any interpretation of the first sentence that would result in the Orbis Action being included in the scope of the settlement should be avoided, if reasonably possible. In this way, the two sentences can be read together as a cohesive whole.

[60] This approach precludes Ecomi’s very broad interpretation which would interpret the first sentence so as to capture the Orbis Action in the scope of the settlement. Such an interpretation would only be available if the second sentence operated as a carve out which, in our view, it does not.

[61] There are several other possible interpretations of the settlement clause, including the Judge’s interpretation. It is therefore helpful to consider the broader factual and contractual context, to see what light that might cast on the correct construction of the clause. The relevant context includes that:

- (a) The recitals to the Settlement Agreement record that the aim of the parties was to “effect a full and final settlement of all claims in relation to the Singapore Action and the New Zealand Ecomi Action on the terms and conditions set out in this Agreement”.
- (b) The Settlement Agreement expressly settled the Singapore Action and the New Zealand Ecomi Action. As set out above:
 - (i) The subject matter of the Singapore Action was MB Technology’s investment in and adviser relationship with Ecomi. MB Technology alleged breaches of the Advisor Agreement and Exchange Listing Agreement by Ecomi; a breach of trust by Ecomi; and misrepresentations and other unlawful acts by Mr Yu and Mr Crothers which

(in essence) were said to have induced MB Technology's investment in Ecomi.

- (ii) The New Zealand Ecomi Action was based on the Singapore Action and sought mirror freezing and injunction orders, following the granting of interim relief by the Singapore High Court.
- (c) An attempt was made to include the Orbis Action in the settlement agreement, but MB Technology did not agree to that. The Orbis Action was not settled and, instead, the settlement clause was amended to include a further sentence stating that: “[f]or the avoidance of doubt, this clause does not apply to the New Zealand Orbis Action.”
- (d) The subject matter of the Orbis Action was (and is) MB Technology's investment in Orbis, including alleged misrepresentations by Mr Yu and Mr Crothers which were said to have induced MB Technology to invest in Orbis. At the time of the Settlement Agreement, MB Technology claimed that it had made the required payments, but Orbis had failed to issue and transfer the agreed shares to MB Technology. Several weeks after the Settlement Agreement was signed, however, Mr Yu provided MB Technology with evidence to the effect that the relevant Orbis shares had in fact been issued and/or transferred to MB Technology in February 2019. This disclosure allegedly prompted the amended pleading in the Orbis Action, which included the Bonus Token Claim.
- (e) The first sentence should be interpreted in a way that would not capture the Orbis Action within its scope (as explained above).

[62] The Judge's interpretation requires that the first sentence of the settlement clause be read as follows:²⁰

- 1.1 The Parties hereby irrevocably and unconditionally agree, without any admission as to liability, to a full and final settlement of *all claims* as

²⁰ Emphasis added.

between the Parties in respect of, arising directly or indirectly out of, or in connection with:

- (a) the Singapore Action and the New Zealand Ecomi Action; and
- (b) the allegations made in the Singapore Action and the New Zealand Ecomi Action;

however so arising,

on the terms and conditions of this Settlement Agreement.

[63] On this approach, the first part of the sentence (referring to a full and final settlement of all claims) is overarching and (a) and (b) (which the Judge found are cumulative requirements) delineate the scope of the claims that are settled. As set out at [21] of the High Court judgment (which is quoted at [38](b)above) the Judge found that an “allegation made” in a proceeding is one which demands response in the proceeding. If proven, it would establish a material fact for the proceeding’s disposition. The Judge further observed, however, that it is plain from the phrase “however so arising” that the relevant allegations may be more widely sourced than the pleadings alone.²¹

[64] The Judge’s interpretation meets the objective of interpreting the settlement clause as a cohesive whole. Specifically, the operative part of the clause is interpreted in such a way that it does not bring the Orbis Action within the scope of the clause, unlike Ecomi’s interpretation. Further, the Judge’s interpretation is also consistent with the factual and contractual context we have set out at [61] above, in that the scope of the settlement is focussed on the Singapore Action and the New Zealand Ecomi Action, and the allegations (whether in the pleadings or other documents) that are material to the disposition of those proceedings.

[65] We differ from the Judge, however, on the issue of whether (a) and (b) (as set out at [62] above) should be read as being cumulative requirements, so that a settled claim must relate both to the settled proceedings, and *also* to the allegations made in those proceedings. Rather, in our view, the sub-parts of the clause following the words “or in connection with...” are in effect a list of the various matters that fall within the scope of the claims that are settled. In other words, the parties have agreed

²¹ High Court judgment, above n 1, at [21].

to a “full and final settlement of all claims as between [them] in respect of, arising directly or indirectly out of, or in connection with” each of the following matters:

- (a) first, the Singapore Action;
- (b) second, the New Zealand Ecomi Action;
- (c) third, the allegations made in the Singapore Action; and
- (d) finally, the allegations made in the New Zealand Ecomi Action.

[66] The listed items define the scope of the settled claims. It will be sufficient, however, if a claim arises directly or indirectly out of, or in connection with any one of these matters. It does not have to be common to all of them. We agree with the Judge, however, that the term “allegations” in this context refers to allegations that are material to the disposition of the relevant proceeding (either the Singapore Action or the New Zealand Ecomi Action). The term does not therefore encompass every assertion or statement of alleged fact made by Mr Godenzi in his affidavit in support of interim relief in the Singapore Action. As explained previously, interpreting the term “allegation” so broadly would result in the Orbis Action being brought within the scope of the settlement, which was clearly not intended.

[67] The inclusion of claims arising directly or indirectly out of, or in connection with the “allegations” made in the Singapore Action and the New Zealand Ecomi Action ensures that the settlement encompasses not only the claims that have been formally pleaded in the settled proceedings, but also any other claims that could potentially arise out of the allegations that underpin those claims. Hence, for example, MB Technology would now be precluded from bringing a different cause of action (for example in tort, or contractual mistake) based on the allegations that underpinned its claims in the Singapore Action.

[68] Although our interpretation of the settlement clause differs slightly from that of the Judge, the end result is the same. The Bonus Token Claim is not barred by the Settlement Agreement. It is not a claim arising directly or indirectly out of, or in

connection with the Singapore Action, the New Zealand Ecomi Action, the allegations made in the Singapore Action, or the allegations made in the New Zealand Ecomi Action, for the reasons explained by the Judge (as summarised at [38] above). In summary, the focus of the settled proceedings was MB Technology's investment in, and adviser relationship with, Ecomi, focussing on alleged breaches of the Advisor Agreement, Exchange Listing Agreement and the Investor Agreement. The subject matter of the Orbis Action was (and is) MB Technology's investment in Orbis. The Bonus Token Claim relates solely to the latter.

[69] Given this conclusion, it is not necessary for us to consider MB Technology's "fall back" argument, namely that Ecomi and Orbis' applications for strike out and/or defendants' summary judgment should be dismissed as a trial will be necessary to resolve disputed factual matters.

Conclusion

[70] Although our interpretation of the settlement clause differs slightly from that of the Judge, the difference is not material to the outcome. The Judge was correct to find that the Bonus Token Claim does not fall within the scope of the Settlement Agreement. It follows that the Judge was also correct to dismiss Ecomi and Orbis' applications for strike out and/or defendants' summary judgment in respect of those claims.

Result

[71] The appeals are dismissed.

[72] The appellants must pay MB Technology Ltd (the respondent in CA 565/2022 and the first respondent in CA 566/2022) costs for a standard appeal on a band A basis together with usual disbursements. We certify for second counsel.

Solicitors:

LeeSalmonLong, Auckland for Orbis Blockchain Technologies Ltd

Wilson Harle, Auckland for Ecomi Technology Pte Ltd

Buddle Findlay, Wellington for MB Technology Ltd