

## Are crypto assets property in law?

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### Digital assets, insolvency and asset tracing in the Cayman Islands and BVI

With the rise of digital asset fraud and liquidations in the crypto industry globally, the courts have shown a continued willingness to assist litigants in overcoming the nuanced issues in the crypto present.

The BVI Court is one of the frontrunners in this developing jurisprudence, having deemed crypto assets to be "property" in line with recent English Court decisions and it is expected that, when faced with the issue, the Cayman Islands Court will follow suit.

As the case law continues to develop in relation to crypto assets, the key legal questions in the context of asset tracing and insolvency will be addressed.

In this article, Ogier partners Gemma Lardner (Cayman Islands) and Grant Carroll (BVI) and associates Corey Byrne (Cayman) and Romauld Johnson (BVI), give a broad overview of the issue of treating crypto assets as "property".

### Crypto assets have the indicators of property

The English High Court's decision in *AA v Persons Unknown*<sup>[1]</sup> is authoritative on the subject. The court noted that English law generally did not recognise property other than choses in possession and choses in action. Crypto assets do not sit neatly within either category. A crypto asset is not a thing in possession because it is not tangible and so cannot be possessed in the traditional sense. While it is debatable whether crypto assets are things in action, the UK Jurisdiction Taskforce in its report - *Legal statement on crypto assets and smart contracts (the UKJT's report)* considered that failing to meet this criteria does not in itself preclude a cryptoasset from being treated as property.

In support of the proposition that a crypto asset is property, Bryan J in *AA v Persons Unknown* considered that a crypto asset (in that case, Bitcoin) satisfied the four criteria set out in Lord Wilberforce's classic definition of "property" in *National Provincial Bank v Ainsworth*<sup>[2]</sup>:

- Definable
- Identifiable by third parties
- Capable in their assumption by third parties
- Having some degree of permanence<sup>[3]</sup>

The UKJT's report<sup>[4]</sup> adds that "certainty, exclusivity, control and assignability" are additional characteristics of property rights. Although these features may not always be sufficient or definable, the English Courts have treated them as important indicators of property.

While there remains debate as to the category of property that digital assets fall within (for instance, in the subsequent case of *Fetch.ai Ltd v Persons Unknown*<sup>[5]</sup>, Pelling J indicated his view that cryptocurrencies should be considered a chose in action but did not elaborate further<sup>[6]</sup>), it is now well established in England and other Commonwealth jurisdictions that digital assets constitute a form of property over which owners may exercise traditional property rights.

The approach in *AA v Persons Unknown* has been influential and cryptocurrency has subsequently been recognised as property in other common law jurisdictions including the BVI<sup>[7]</sup>, Singapore<sup>[8]</sup>, New Zealand<sup>[9]</sup>, Hong Kong<sup>[10]</sup>, the United States<sup>[11]</sup> and Canada<sup>[12]</sup>. This approach has also been applied in public law contexts including for the purpose of orders relating to the proceeds of crime<sup>[13]</sup>.

It does not appear to make any difference whether fungible and non-fungible assets to the property analysis are being discussed. As a reminder, fungible assets like most stocks and bonds, physical currency, and indeed crypto assets such as Bitcoin and Ethereum, are interchangeable while carrying the same value in the market. In contrast, a non-fungible token (NFT) is one of a kind because each bears unique identification codes on the blockchain distinguishing them from other (including seemingly identical) assets.

However, very recently the English Court in *Osbourne v Persons Unknown Category A*<sup>[14]</sup> endorsed the decision in *AA v Persons Unknown* and considered that there is at least a realistically arguable case that NFTs are to be treated as property in law, affirming the conclusion reached in *Osbourne v Persons Unknown*<sup>[15]</sup>.

## **The benefits of crypto assets as property**

The most important benefit of treating crypto assets as property is the availability of proprietary

remedies against third parties. The English Court's decision in *D'Aloia v Person Unknown & Ors*[16] is a good example, where interim injunctive relief was granted against multiple defendants arising out of the fraudulent misappropriation of cryptocurrency by persons unknown.

Jack J in *Chainswap Limited v The Owner of Digital Wallet et al*[17] also indicated the BVI Court's willingness to grant a proprietary injunction in that case, had the applicant (the service-provider) presented an arguable case that the stolen tokens were its property. Similarly, in *Re Gatecoin Limited*[18] Chan J confirmed that cryptocurrencies constitute "property" under Hong Kong law such that the Hong Kong Court of First Instance would be willing to find that the assets were held on trust by an exchange, subject to satisfaction of the "three certainties" test[19].

The availability of these remedies is also an indication of the English and BVI courts' flexibility and willingness to look past the idea that crypto assets are only representations of data. In English law, and indeed likely the case in BVI and Cayman Islands law, there is a reluctance to treat 'pure information' as property. The UKJT's report identified one of the difficulties in recognising information in general as property being that it is not 'exclusive'. This being, information can be easily duplicated while carrying equivalent commercial value, and once disseminated, information can be used simultaneously by different people[20].

The English Court in *FetchAI Limited v Persons Unknown Category A and ors*[21] distinguished the cryptoasset itself from the associated private key used to exercise control over the cryptoassets at a particular wallet address. In the court's view, the private key constituted confidential information. The BVI Court also made a similar observation in *Philip Smith v Torque Group Holdings Limited et al*[22], where Wallbank J, relying on the UKJT's report held that the private key was a means of access to a token and was therefore "information".

As such, the wrongful access to confidential information and the manipulation of accounts in the course of a fraud amounted to a breach of the duty of confidence (as opposed to interfering with proprietary rights), only attracting remedies such as non-proprietary injunctions, damages or accounts of profits.

## **Crypto assets as assets in insolvency**

The treatment of crypto assets as property is equally important to insolvency proceedings as it is to fraud and asset recovery matters. The core functions of officeholders include taking possession of, protection, realisation and distribution of "assets" (or proceeds thereof). An asset in BVI Insolvency law includes "money, goods, things in action, land and every description of property wherever situated and obligations and every description of interest, whether present or future or vested or contingent, arising out of, or incidental to, property"[23].

Although this definition does not expressly mention crypto, digital or virtual assets, Wallbank J in *Torque*, relying on the UKJT's report, considered that crypto assets were nonetheless 'property' and

captured by the definition of an asset. The benefits of this may include exercising the officeholder's powers to seek orders for the delivery of crypto assets as well as seeking to examine individuals and companies in relation to crypto assets belonging to the entity in liquidation.

As this area of law continues to develop, the BVI and Cayman Islands Courts are likely to adopt similar analyses as the English Courts as they expound upon the characteristics of crypto assets. However, it remains to be seen what nuances crypto assets will invite to the discussion of proprietary rights and enforcement, and the extent to which the court will continue to treat them like more familiar forms of property.

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[1] [2019] EWHC 3556 (Comm)

[2] [1965] 1 AC 1175

[3] It was noted that this was also the conclusion reached by the Singapore International Commercial Court in *B2C2 Limited v Quoine PTC Limited* [2019] SGHC (I) 03 [142]

[4] See paragraph 39 of Legal statement on cryptoassets and smart contracts

[5] [2021] EWHC 2254 (Comm)

[6] *Fetch.ai* at [9]

[7] *Smith v Torque Group Holdings Limited (in liquidation)* BVIHC (COM) 0031 of 2021

[8] *Quoine Pte Ltd v B2C2 Ltd* [2020] 2 SLR 20 at [137]-[144] affirming *B2C2 Limited v Quoine PTC Limited* [2019] SGHC (I) 03. See also *CLM v CLN* [2022] SGHC 46 at [40]-[46]

[9] *Ruscoe v Cryptopia Ltd (in liquidation)* [2020] NZHC 728 at [50]-[133]

[10] *Re Gatecoin Limited (in liquidation)* [2023] HKCFI 914 at [45]-[59]

[11] Most recently *Lagemann v Spence*, 2020 U.S. Dist. LEXIS 88066 (SDNY 18 May 2020); *Meta-Tech Consultants, LLC v Niu*, 2021 US Dist LEXIS 209207 (D Nev, 29 October 2021); *BDI Capital v Bulbul Investments LLC* 446 F.Supp.3d 1127 (2020)

[12] *Copytrack Pte Ltd v Wall* [2018] BCJ 3325; *Shair.Com Global Digital Services Ltd v Arnold* [2018] BCJ 3114

[13] In *DPP v Briedis* [2021] EWHC 3155 (Admin), McGowan J held that the cryptocurrencies concerned could be considered "property" within the meaning of s 316(4)(c) of the Proceeds of Crime Act 2022 capable of being subject of a freezing order. See also *Australian Federal Police v Bigatton* [2020] NSWSC 245

[14] [2023] EWHC 39 (KB)

[15] [2022] EWHC 1021 (Comm)

[16] [2022] EWHC 1723 (Ch)

[17] BVIHC(COM)2022/0031 *Chainswap Limited v Persons Unknown & Ors* (4 May 2022) [16]

[18] [2023] HKCFI 914

[19] Per *Knight v Knight* (1840) 49 ER 58. In *Gatecoin*, the Court ultimately found that no such trust existed, as the claimants were not able to satisfy the Court of the certainty of the exchange's intention to create a trust for customers

[20] See paragraphs 59-63 of Legal statement on cryptoassets and smart contracts.

[21] [2021] EWHC 2254 (Comm)

[22] BVIHC(COM) 2021/0031; 4 May 2022

[23] Section 2 of the BVI Insolvency Act 2003. There is no comparable statutory definition in the Cayman Islands

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