

# From Cryptic to (Some) Clarity: English Law and Policy Rising to the Challenge of Cryptoassets (Part 1)

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Sir Geoffrey Vos, the Master of the Rolls, wants English law to be at the forefront of developments relating to cryptoassets and smart contracts. In his thought-provoking foreword to the government-backed UK Jurisdictional Taskforce's (UKJT) [Legal Statement on Cryptoassets and Smart Contracts](#), he explained that English law should aim to provide *“much needed market confidence, legal certainty and predictability in areas that are of great importance to the technological and legal communities and to the global financial services industry”* as well as to *“demonstrate the ability of the common law in general, and English law in particular, to respond consistently and flexibly to new commercial mechanisms.”* He returned to the same theme in a [speech](#) on 24 February 2022 at the launch of the Smarter Contracts report by the UKJT in which he said *“[m]y hope is that English law will prove to be the law of choice for borderless blockchain technology as its take up grows exponentially in the months and years to come”*.

The law defines whether and how an owner can find and recover a stolen asset, whether a contract about an asset can be enforced and whether rights are owed between parties in relation to an asset. English law has traditionally been very flexible in fashioning remedies to uphold contracts and to allow parties to preserve and follow (trace) assets – by interim protective relief in the form of injunctions, disclosure orders against third parties (Banker's Trust orders), by recognising trusts over assets and by the English Courts accepting jurisdiction over claims in the first place. If English law allows owners of cryptoassets to access these remedies, it should provide the *“market confidence, legal certainty and predictability”* described by Sir Geoffrey Vos. In this article, we explore the extent to which recent developments in English law have furthered these objectives and address in turn:

- Are cryptoassets property?
- Can cryptoassets be held on trust?

In the second part of this series, we will review recent developments concerning jurisdictional issues relating to digital assets and in the third part we will preview key legal and policy developments which are in the pipeline.

Key regulatory developments announced by the UK Government as part of the same initiative to establish the UK as a crypto-hub, are reported on [here](#).

## 1. **Are cryptoassets property?**

As noted above, the gateway question of whether cryptocurrencies (and certain other forms of digital assets) can be regarded as property is important because its resolution helps define the nature and scope of potential rights, remedies and defences under English law in disputes concerning cryptocurrency (and some other digital assets). Until relatively recently, the issue had been the subject of some technical debate. English law traditionally recognises two classes of property (i) a thing (or “chose”) in possession (anything tangible that can be possessed); and (ii) a thing (or “chose”) in action (a right that can be legally enforced). This immediately creates a perceived difficulty for cryptoassets as they are not tangible and ownership of them may not create legally enforceable rights.

Prior to the emergence of cryptoassets, the English Courts grappled with similar issues in the context of an EU emissions allowance, which was found to be an intangible personal property (but not necessarily a chose in action and not a chose in possession), in respect of which a proprietary claim may be brought<sup>[1]</sup> In 2015, however, the Court of Appeal held in *Your Response Ltd v Datateam Business Media Ltd*<sup>[2]</sup> that information cannot be treated as property (so a common law possessory lien could not exist over the information in a database).

Thankfully, there have now been a number of judgments essentially confirming that English law treats cryptocurrency as a form of property meaning that that various forms of interim relief to freeze, preserve or identify such cryptoassets are potentially available to claimants.<sup>[3]</sup> The most important of these decisions is *AA v Persons Unknown*<sup>[4]</sup>, in which the Court granted an interim proprietary injunction over Bitcoin.

In *AA*, a Canadian insurance company suffered a cyberattack that prevented it from accessing its malware-encrypted IT systems. The hackers demanded a ransom of US\$950,000 payable in Bitcoin to a specified Bitcoin wallet in exchange for decryption software. The ransom was paid and the systems restored. The company's English insurers then tracked the Bitcoin ransom payment to a specific address linked to the cryptocurrency exchange Bitfinex, and applied for a proprietary injunction to recover the Bitcoins which remained in the account.

In concluding that Bitcoin is a form of property capable of being the subject of a proprietary injunction, the judge stated<sup>[5]</sup>:

*"The conclusion that was expressed [in the Law Tech paper<sup>[6]</sup>] was that a crypto asset might not be a thing in action on a narrow definition of that term, but that does not mean that it cannot be treated as property. Essentially, and for the reasons identified in that legal statement, I consider that crypto assets such as Bitcoin are property. They meet the four criteria set out in Lord Wilberforce's classic definition of property in *National Provincial Bank v Ainsworth* [1965] AC 1175 as being definable, identifiable by third parties, and having some degree of permanence.<sup>[7]</sup> That too was the conclusion of the Singapore International Commercial Court in *B2C2 Ltd v Quoine PTC Ltd* [2019] SGHC (1) 03 [142]<sup>[8]</sup>.*

*...I am satisfied for the purpose of granting an interim injunction in the form of an interim proprietary injunction that crypto currencies are a form of property capable of being the subject of a proprietary injunction."*

The recognition by the English Courts that cryptocurrencies are a form of property is a key development for several reasons.

First, from a macro perspective, the uncertainty around the legal status of cryptocurrencies has been regarded by some as an impediment to their wider adoption. Clarification of this issue is a significant building block towards establishing legal certainty, predictability and confidence in the English legal system for the resolution of complex crypto-disputes.

Second, for the owners of such assets, the recognition of cryptocurrencies as a form of property opens up the possibility to a claimant who has been dispossessed of such assets of various forms of protective interim relief to secure them pending final judgment and to final enforceable relief.

The English Courts' willingness to provide effective remedies to litigants in crypto-disputes is evidenced by the increasing number of cases in which the Courts have been willing to grant proprietary injunctions, asset preservation orders, freezing orders and Banker's Trust orders in respect of cryptocurrencies.

For example, in *XY v Persons Unknown (1) Binance Holdings Ltd (2) Huobi Global Limited (3)*[\[9\]](#), the Commercial Court granted a combination of a worldwide freezing order, a proprietary injunction and Banker's Trust order against the defendants, in a case involving the theft of cryptocurrency, US Dollar Tethers, by cyber criminals acting on the dating site Tinder and other social media, using a practice called honey trapping[\[10\]](#).

In *Ion Science Ltd. v Persons Unknown and others* (unreported, 21 December 2020), at the pre-judgment stage, the Commercial Court granted a proprietary injunction and a worldwide freezing order against defendants which could then not be identified in respect of Bitcoin that had been dissipated by the wrongdoers following a cyber-fraud. The Court also granted permission to serve Banker's Trust disclosure orders against the coin exchanges that processed the transactions in order to help locate the missing assets and identify the wrongdoers.

In the [final judgment decision](#) in *Ion Science*, and to assist enforcement of the judgment, the Court granted the first third-party debt order in respect of Bitcoin. These orders enable enforcement of a money judgment by allowing recovery of sums owed to the judgment debtor from assets of the judgment creditor held in the hands of a third party.

In *Fetch.ai Ltd and another v Persons Unknown Category A and others*[\[11\]](#), discussed below in the context of jurisdiction, the claimants obtained a worldwide freezing order and proprietary injunctive relief against unknown fraudsters; and orders allowing the claimants to receive information from the cryptocurrency exchange to assist them in a claim to trace assets.

Finally, in *Danisz v Persons Unknown*<sup>[12]</sup>, in a decision which followed AA's analysis of the property status of cryptocurrency, the claimant obtained an interim proprietary injunction, a worldwide freezing order and a Banker's Trust order in a claim relating to the alleged misappropriation of Bitcoin.

These decisions also indicate that cryptocurrency is capable of being traced and enforced against, similarly to other classes of property in English law. The nature of blockchain itself renders tracing relatively straightforward, at least with the assistance of forensic specialists with expertise in information gathering.

We anticipate that this trend will only increase and cases such as those describe above will become common place in the English Courts. Whether the principles will be extended to other forms of digital assets remains to be seen.

## **2. Can cryptoassets be held on trust?**

The question of whether cryptoassets can be held on trust is significant as it affects the availability of certain proprietary claims in respect of cryptoassets, for example whether tracing claims (following assets through different accounts or forms) might be available following a breach of trust. In *Wang v Darby*<sup>[13]</sup> the Court considered the issue.

Although on the facts of the case the Court determined that no trust arose, it recognized that on appropriate facts a trust might exist.

W and D entered into two contracts exchanging specified quantities of the cryptocurrencies Tezos and Bitcoin, with the option to repurchase the exchanged cryptocurrencies at a later date. The arrangement would allow D to "bake" the Tezos (i.e. to generate profit by pooling those assets) and to then share the proceeds of that "baking" with W. Despite W seeking to exercise the option to repurchase, D did not "sell-back" the Tezos to W.

W argued that there existed an express, resulting or constructive trust in respect of the Tezos transferred to D such that D held such assets for W's benefit. D denied this given that the bilateral exchange and obligatory re-exchange (upon demand) of the cryptocurrencies constituted a sale and buy-back arrangement which, by definition, precluded any trust arising. D therefore applied to strike out or obtain summary judgment in respect of the proprietary claims made against him.

The key issue was whether some form of trust arose in respect of the Tezos that W had transferred to D. It was common ground between the parties that, as a matter of English law, a unit or token of Tezos constituted property which could in principle be the subject of a trust (consistently with the trend described in the previous section).

The Court found that the “*essential economic reciprocity*” of the transaction, which involved the transfer (and re-transfer) of ownership, was incompatible with the concept of a trust, as “*a beneficiary has an interest in and right to receive the trust property, not an option to (re-)acquire it for value or indeed (re)purchase it for consideration*”. The Court therefore concluded that there had been no trust of any kind, and that such an argument had no real or reasonable prospect of success at a full trial. Whilst no trust was found to exist, the Court did conclude that W had an arguable claim against D for breach of fiduciary duty.

Although not expressly confirmed in the judgment, the implication of its reasoning is that there is no reason in principle why cryptoassets cannot be held on trust like any other property. Given the increasing number of crypto-disputes, this issue is likely to be expressly determined in England sooner rather than later. Indeed, other common law jurisdictions have already had to engage with the matter. In New Zealand, in *Ruscoe v Cryptopia Ltd (in Liquidation)*<sup>[14]</sup>, it was decided that digital assets of its customers, held by the Cryptopia crypto exchange, constituted “property” and were also held on express trust on behalf of such customers.

As mentioned, in part 2 of this series of articles, we will be reviewing recent developments concerning jurisdictional issues relating to digital assets, and will continue to report on new trends and significant changes in the law and regulation of cryptoassets in the UK on Proskauer’s [Blockchain and the Law](#) blog, so watch this space!

<sup>[1]</sup> See *Armstrong DLW GmbH v Winnington Networks Ltd* [2012] EWHC 10 (Ch), [2013] Ch 156 [58], [94].

<sup>[2]</sup> [2014] EWCA Civ 281, [2015] QB 41 [42]

<sup>[3]</sup> Examples of decisions in which the English court treated cryptocurrencies as property when granting a worldwide freezing order (*Vorotyntseva v Money-4 Limited* [2018] EWHC 2596 (CH)) and an asset preservation order (*Robertson v Persons Unknown* (unreported)).

<sup>[4]</sup> [2019] EWHC 3556 (Comm)

[5] [59], [61] (Bryan J.)

[6] Lawtech Delivery Panel, [Legal Statement on Cryptoassets and Smart Contracts](#) (November 2019) [71]-[84]

[7] The fourth criterion, not quoted by the judge, is that it is “*capable in its nature of assumption by third parties*”.

[8] This case involved claims of breach of contract between B2C2 and Quoine in relation to participating in Quoine’s automated cryptocurrency trading platform, and for breach of trust. The Singapore International Commercial Court confirmed that cryptocurrencies constituted property capable of being held on trust, and the Court was satisfied that they met all the requirements of the classic definition of a property right described in *National Provincial Bank v Ainsworth*.

[9] [2021] EWHC 3352 (Comm)

[10] Honey trapping normally involves an attractive person enticing another into revealing information or doing something unwise.

[11] [2021] EWHC 2254 (Comm)

[12] [2022] EWHC 280 (QB)

[13] [2021] EWHC 3054 (Comm)

[14] [2020] NZHC 728

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- **Julia Bihary**  
Pro Bono Counsel
- **Steven Baker**  
Partner