Proskauer

From cryptic to (some) clarity:

English law and policy rising to the challenge of cryptoassets

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?
- Where are cryptoassets located?

We also review the next expected legal developments relating to cryptoassets including initiatives such as the UK Law Commission's Digital Assets Project and the UKJT's Digital Dispute Resolution Rules.

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[1]. In 2015, however, the Court of Appeal held in *Your Response Ltd v Datateam Business Media Ltd*[2] 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.[3] The most important of these decisions is *AA v Persons Unknown*[4], 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[5]:

"The conclusion that was expressed [in the Law Tech paper[6] 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[7]. That too was the conclusion of the Singapore International Commercial Court in B2C2 Ltd v Quoine PTC Ltd [2019] SGHC (1) 03 [142][8].

…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.

[1]See Armstrong DLW GmbH v Winnington Networks Ltd [2012] EWHC 10 (Ch), [2013] Ch 156 [58], [94].
[2][2014] EWCA Civ 281, [2015] QB 41 [42]
[3]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).
[4][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.

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*[12], 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*[13] 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)*[14], 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.

[11] [2021] EWHC 2254 (Comm)
[12] [2022] EWHC 280 (QB)
[13] [2021] EWHC 3054 (Comm)
[14] [2020] NZHC 728

3. Where are cryptoassets located?

Where assets are located in the eyes of the law is relevant to questions of what governing law applies to them, the Court's determination of its own jurisdiction (including the appropriate forum for a claim to be resolved) and questions of service of court documents outside the jurisdiction. Crypto-disputes raise questions of where cryptocurrency exchanges are located, the identification and location of defendants, and where cryptoassets (which have no traditional physical form) are situated.

The law of the jurisdiction in which property which is subject to litigation is located is referred to as the *lex situs* of the property.

In general terms, Courts determine the *lex situs* of land and chattels based on their (physical) location, and in respect of enforceable personal rights over property (known as choses in action) where they are recoverable or can be enforced. Given their intangible nature, determining the *lex situs* of cryptoassets is a question the English Courts have needed to grapple with sooner or later.

The *Ion Science* case presented an opportunity to do so. It suggested that for the purposes of English law the *lex situs* of cryptocurrency is the place where the person or company who owns it is domiciled.[15] This approach was followed in *Fetch.ai Ltd and another v Persons Unknown Category A and others*[16] as part of the Court's consideration of whether to grant permission for the claimants to serve proceedings outside the jurisdiction. (In that case, the claimants were then able to obtain a worldwide freezing order and proprietary injunctive relief against unknown fraudsters, among other orders.)

In the recent decision in *Tulip Trading Limited v Bitcoin Association for BSV*[17], in rejecting some ambitious legal arguments, the Court appears to have adopted a different tack on the *lex situs* of a cryptoasset, preferring residency rather than domicile as the influencing factor.

The claimant (TTL, a Seychelles company owned by Dr Craig Wright, who claims to be the creator of the Bitcoin system) claimed to own Bitcoin worth ca. US$4.5 billion, which he accessed and controlled from his computer and network in England, facilitated by secure private keys. The keys were deleted by hackers who accessed Dr Wright's computer as a result of which Dr Wright lost access to the Bitcoin.

TTL claimed that the defendants, the developers who developed the relevant Bitcoin software owed a fiduciary, or alternatively a tortious, duty to TTL to enable it to re-access the Bitcoin. TTL sought a declaration that it owned the relevant assets and orders requiring the defendants to take reasonable steps to ensure that it had access to them, or for equitable compensation or damages, claiming that it would not be technically difficult for the defendants to write and implement a software "patch" enabling it to regain control of the lost cryptoassets. It obtained permission to serve the claim on the defendants out of the jurisdiction. Following service, some of the defendants challenged the English Court's jurisdiction.

When determining whether the English Court has jurisdiction, the Courts apply a three-limb test:

(1) whether there is a serious issue to be tried on the merits of the claim meaning that it must be demonstrated that there is a real, as opposed to a fanciful, prospect of success;

(2) whether there is a good arguable case that the claims fell within one of the "gateways" under CPR PD 6B (good arguable case meaning, essentially, the better of the argument on the material available); and

(3) whether in all the circumstances (i) England is clearly or distinctly the appropriate forum for the trial of the dispute, and (ii) the Court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction.[18]

[15] A company's domicile is in the country under whose law it is incorporated.
[16] [2021] EWHC 2254 (Comm)
[17] [2022] EWHC 667 (Ch)
[18] For a summary of the principles and case law see [36]-[48] of Tulip Trading.

The Court set aside a previous order permitting service of the proceedings on the developers out of the jurisdiction, as TTL had not established a serious issue to be tried on the merits (i.e. it failed on the first limb of the test). In reaching this conclusion, the Court held that cryptoassets systems and software developers did not owe a fiduciary or tortious duty to TTL (the cryptoasset owners) to permit or enable access to the assets where the owners had lost control over the assets following a hack.

A number of notable points arise from the judgment, reflecting the scope of the arguments deployed:

a. Fiduciary duty — The Court concluded that the defendants owed no fiduciary duty to TTL. In reaching that conclusion, the judge noted that an imbalance of power (and vulnerability to its abuse) is often a feature of fiduciary relationships, but it is not a sufficient condition for the existence of the duty. Cryptoasset owners cannot be described as entrusting their property to a fluctuating, and unidentified, body of developers of the software, and the defendants did not owe continuing obligations to remain as developers and make future updates whenever it might be in the interests of cryptoasset owners to do so. Further, TTL was seeking to require the defendants to take actions for TTL's benefit alone (to recover their property), and not for the benefit of all users (such as a systemic software change). This was not characteristic of a relationship of single-minded loyalty owed by the fiduciary to his principal, which is the distinguishing feature of a fiduciary relationship.

The Court did not entirely rule out the possibility of the existence of a fiduciary duty in certain circumstances, however. The judge observed that any holder of digital assets on the networks would have certain expectations, e.g. about the security of the networks and private keys, the efficacy of the "proof of work" processes and anonymity. Software changes that compromised these might create some cause for complaint (so this might be seen as an indication of bases for actions in the future) but this was not argued to be the case here.

b. Tortious duty — TTL said that the Court should recognise an actionable duty owed to owners of digital assets who have lost access to their private keys by developers who are able to assist them to regain control of their assets. This argument was rejected. The Court concluded that the required special relationship to found a duty of care could not be said to be an incremental extension of the existing law, and could not realistically be argued to be fair, just and reasonable.

c. Disclaimer in software notice — the defendants relied on a disclaimer of liability in the terms of the licence under which the relevant code was released, purporting to exclude liability for any claim, damages or other liability in contract, tort or otherwise arising from or in connection with the software or use or other dealings in the software. The Court accepted that the disclaimer was relevant to the question of the existence of a duty of care in tort, but its application to the facts was not sufficiently clear to make a difference to the outcome of the determination. The disclaimer was in broad terms, but it was not clear to the Court that it would reasonably be understood to mean that controllers of the network assumed no responsibility for any aspect of its operation.

d. Public policy considerations — TTL relied on various public policy considerations to support its case for the existence of a tortious duty. These arguments included that (i) there was no rationale for a person to be denied access to assets they own with the result that those assets are lost or become available to fraudsters, (ii) the defendants alone were able to remedy the situation, and (iii) widely held cryptoassets (such as Bitcoin) should not be amenable to manipulation by fraudsters, beyond the reach of law and the standard of accountability applied to those in control of these systems should reflect the significance of the services provided. The Court acknowledged that important issues were raised about the recourse that Bitcoin owners may have if private keys are lost. However, it found that there was no basis for imposing a duty which did not otherwise exist in law.

e. Good arguable case and forum conveniens — Having determined that there was no serious issue to be tried, the Court went on to consider, for completeness, the appropriate ground for service of the claim out of the jurisdiction. The key issue here concerned the *lex situs*, and whether the relevant Bitcoin was located in the jurisdiction, the parties having accepted that Bitcoin constituted property. They disagreed, however, as to the test to be applied to determining whether they were located in England & Wales.[19]

In determining the relevant test to apply, the Court considered *Ion Science,* which, as mentioned above, suggested that *"the lex situs of a cryptoasset is the place where the person or company who owns it is domiciled"*. The Court concluded that it would have preferred the relevant test to be that of residency. Accordingly, whether the test for the *lex situs* of cryptoassets is domicile or residence remains a live issue to be determined in future cases. The Court also noted that the location of control of a digital asset, including by the storage of a private key, may be relevant to determining the *lex situs,* which could indicate that arguments based on the location of storage of private keys may also find favour in a future case.

On the final limb of the test, the issue of forum, the Court was satisfied that England would have been the appropriate forum for the trial of the dispute, and that the Court would likely have exercised its discretion to permit service of the proceedings out of the jurisdiction, had there been a serious issue to be tried. The factors that provided the relevant connection to England were: (i) TTL's and Dr Wright's presence in the jurisdiction, which was not ephemeral; Dr Wright has lived in the jurisdiction since 2015 and intended to apply for citizenship; (ii) TTL had the better argument that the cryptoassets were located in the jurisdiction and that damage has been or would be sustained in England; (iii) the claim was brought under English law; (iv)

[19]TTL argued that its place of residence (England) was the key determining factor (being the place where its central management and control was exercised), while the defendants argued that domicile was the correct test, which would make the *lex situs* of the assets, being the Seychelles, where TTL is incorporated.

TTL's documents are generally located in England; (v) there was no other clear place where the "factual focus" will be, and the Seychelles was clearly not appropriate; (vi) the defendants were based in a number of different jurisdictions, but not one which had a closer link than England; (vii) there was no language difficulty and the relevant documents were in English.

4. What's next for cryptoassets and crypto-disputes in the UK?

A number of other legal policy initiatives, outside the regulatory sphere, aim to continue the development of the legal infrastructure to assist the UK's development as a leading cryptoasset and smart contracts hub. There are three notable initiatives.

Initiative 1: The Digital Assets Project

It is possible that the Law Commission's Digital Assets Project (the **Project**) will propose potentially significant changes to the law surrounding digital assets (including cryptocurrencies). The Law Commission may make recommendations for reform to ensure that English law is capable of providing a legal framework to allow crypto and other digital assets to flourish whilst providing appropriate security and support for investors.

Specifically, the project will consider whether digital assets should be "possessable". As mentioned above, English law does not recognise the possibility that a digital asset can be "possessed" because the concept of "possession" is currently limited to physical things. This has consequences for how digital assets are transferred, secured and protected under the law, and the Project will look at whether reform in this regard that would provide legal certainty is feasible. The Law Commission is also considering whether English law's historic characterisation of personal property as having to be either a thing in possession or a thing in action (which has caused much of the technical difficulty around recognising cryptoassets as property, discussed in *AA v Persons Unknown* above) may have outlived its usefulness, and whether it may be time to include a third category of personal property, which would fit the circumstances of digital assets and which would be neither a thing in action nor a thing in possession. The UKJT has suggested that the argument that no such third category of property could (ever) exist would entail reading more into the 19th century case law than (unsurprisingly) could have been intended by the judges at the time who were more concerned with whether shares were things in action within the meaning of the Bankruptcy Act 1883[20], than with how to deal with Bitcoins.

Adding a third category of personal property and clarifying its characteristics would be a welcome development to the extent it provides some further clarity on the legal characterisation of digital assets, including cryptocurrencies. This would bring increased legal certainty and promote potentially wider and more secure use of cryptocurrencies in the UK.

The Law Commission has recently published an interim update, with the digital assets consultation paper expected to be published in mid-2022. We will continue to report on developments as the Project progresses.

Initiative 2: UKJT's Digital Dispute Resolution Rules

In 2021, the UKJT published the Digital Dispute Resolution Rules (the **Rules**) with the aim of enabling the rapid, innovative and cost-effective resolution of blockchain and crypto-disputes, as part of the same drive to establish the UK's dominance and attractiveness in the digital asset world.

The Rules aim to facilitate the resolution of digital disputes by offering a procedural framework for the resolution of disputes by arbitration under the English Arbitration Act 1996 or an expert determination process. Some of the key features of the Rules are as follows:

- They may be incorporated into a contract, digital asset or digital asset system by including reference (which may be in electronic or encoded form) to the Rules.
- They set out a fast procedure, with the tribunal to use its best endeavours to resolve the dispute within 30 days from appointment and are intended to offer maximum flexibility to adapt to as yet undeveloped technologies.
- Arbitrators and experts will have appropriate digital technology expertise (to be appointed by the Society for Computers and Law). The Rules also provide for the possibility of an automatic dispute resolution process, where a legally binding resolution will be automatically selected by an artificial intelligence agent, whose vote or decision will be implemented directly within the digital asset system.
- The Rules include provisions specific to digital technologies including, where the relevant network enables such functionality, optional anonymity for parties and enabling on-chain implementation of decisions by giving the Tribunal powers in relation to digital assets (by operating, modifying or cancelling any digital asset relevant to the dispute).
- The Rules aim to provide easy enforcement of arbitral award and expert determinations in the English courts and of arbitral awards under the New York Convention.

It remains to be seen to what extent the Rules will be adopted (and they will have inevitably more utility in commercial disputes than in cases involving crypto-fraud), but in any event they provide a further building block to establish market confidence in English law and England as a preferred location for crypto-related dispute resolution.

[20] *The Colonial Bank v Whinney* (1886) 11 App. Cas. 426.

Initiative 3: Potential Civil Procedure Rule changes to grounds for serving claims out of the jurisdiction.

In his speech on 24 February 2022, Sir Geoffrey Vos foreshadowed that the English Civil Procedure Rules may be amended to facilitate the English courts' ability to manage crypto-fraud cases. He explained: *"In the world of crypto fraud, there are no national barriers and unlawfully obtained cryptoassets can be difficult to trace. That is the experience of lawyers working in this field. Accordingly, the Deputy Head of Civil Justice and I have set up a sub-committee of the Civil Procedure Rules Committee to look at amending or expanding the grounds on which proceedings can be served out of the jurisdiction. It is that obstacle that has impeded many sets of proceedings aimed at tracing the proceeds of crypto fraud. Under current case law, third party disclosure applications cannot easily be served outside the jurisdiction, even if one can serve out orders requiring a third party to disclose documents relating to the account of someone who can be shown to be prima facie responsible for a fraud. I hope that developments in the court's rules will make this fine distinction less significant and will make it generally easier to litigate issues that arise in relation to on-chain transactions and the tracing of cryptoassets."*

We 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!

For more information, please contact:

Steven Baker
Partner, Litigation
+44.20.7280.2238
sbaker@proskauer.com

Julia Bihary
Associate, Litigation
+44.20.7280.2092
jbihary@proskauer.com