



Crypto Update Who, what and where?

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Cryptoassets as property

- ***Osbourne v Persons Unknown [2022] EWHC 1021 (Comm) HHJ Pelling stated at paragraph 13:***

“I am satisfied on the basis of the evidence available that the claimant has demonstrated a good arguable case that she has been defrauded of the non-fungible tokens to which she refers in her evidence. There is clearly going to be an issue at some stage as to whether non-fungible tokens constitute property for the purposes of the law of England and Wales, but I am satisfied on the basis of the submissions made on behalf of the claimant that there is at least a realistically arguable case that such tokens are to be treated as property as a matter of English law.”

- ***Ruscoe v Cryptopia [2020] NZHC 728:***

“...the cryptocurrencies here situated in Cryptopia’s exchange are a species of intangible personal property and clearly an identifiable thing of value”.

- ***Tulip Trading Ltd v Bitcoin Association for BSV [2022] EWHC 667 (Ch), at paragraph [141].***

- ***Tulip Trading Ltd v Bitcoin Association for BSV [2023] EWCA Civ 83***

“...as Bryan J held in AA v Persons Unknown [2019] EWHC (Comm) 3556 (paragraphs 55-61) citing Ainsworth, a cryptoasset such as bitcoin is property”.



What next?

- **Sir Geoffrey Vos MR speaking extrajudicially at the launch of the LawtechUK Smarter Contracts Report said:**

“Cases are, however, proving complex because of the difficulty of applying our historic analogue rules to the digital environment.”

- **Law Commission Report, ‘Digital Assets Consultation Paper 256 (28 July 2022):**

“Overview of the criteria necessary for a thing to be a data object

5.10 In summary, we provisionally propose that a thing should be recognised as falling within our third category of personal property if:

(1) it is composed of data represented in an electronic medium, including in the form of computer code, electronic, digital or analogue signals;

(2) it exists independently of persons and exists independently of the legal system; and

(3) it is rivalrous”.



Insolvency - property

- **Section 436 of the Insolvency Act 1986** defines “*property*” so as to include:

“money, goods, things in action, land and every description of property wherever situated and also obligations and every description of interest, whether present or future or vested or contingent, arising out of, or incidental to, property.”

- **UK Jurisdiction Taskforce’s *Legal Statement on Crypto assets and Smart Contracts (November 2019)***, concludes at paragraph 109 that:

“Since cryptoassets can be property at common law, we have no doubt that they can be property for the purposes of the Insolvency Act. If a particular cryptoasset is not property at common law, depending on circumstances it could still be property for the purposes of the Insolvency Act if it is, for example, within the words “obligations and every description of interest, whether present or future or vested or contingent, arising out of, or incidental to, property.”

- ***Re Three Arrows Capital Limited, BVIHC (COM) 2022/0119***
- ***Smith & Ors v Torque Group Holdings Limited (in liquidation)***
BVIHC (COM) 0031/202
- ***FTX Trading Ltd [2022] Case 22-11068 (US bankruptcy)***
- ***Re Gatecoin [2023] HKCFI 914***



Jurisdiction – the lex situs of a cryptoasset

- *Ion Science v Persons Unknown* (unreported), [13] and [21].
- *Fetch.ai Limited v Fetch.ai Foundation PTE Ltd* [2021] EWHC 2254, [14].
- *Tulip Trading Ltd v Bitcoin Association for BSSV* [2022] EWHC 667 (Ch), [144].
- *LMN v Bitflyer* [2022] EWHC 2954 (Comm).
- Professor Andrew Dickinson’s analysis in the book ‘Cryptocurrencies in public and private law’ at 5.109:

“5.109 That analogy with goodwill supports the submission that the benefits accruing to a person who is a participant in a cryptocurrency system such as Bitcoin or Ripple (i) are a species of intangible property in the English conflict of laws, which (ii) arises from the participation of an individual or entity in the cryptocurrency system, and (iii) is appropriately governed by the law of the place of residence or business of the participant with which that participation is most closely connected. Rather than deciding a fictional situs, the choice of law rule can be more straightforwardly, and appropriately, expressed in the terms that the proprietary effects outside the cryptocurrency system of a transaction relating to cryptocurrency shall in general be governed by the law of the country where the participant resides or carries on business at the relevant time or, if the participant resides or carries on business in more than one place at that time, by the law of the place of residence or business of the participant with which the participation that is the object of the transaction is most closely connected”.

Digital Assets: which law, which court?

Consultation Paper expected in the second half of 2023

Its project is broadly aimed at *“ensuring the rules of applicable law and jurisdiction can accommodate an increasingly digitised world”*.



Fiduciary duties

Tulip Trading Ltd v Bitcoin Association for BSV

[2023] EWCA Civ 83; 4 WLR 16

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OLD BUILDINGS

“I recognise that for Tulip’s case to succeed would involve a significant development of the common law on fiduciary duties. I do not pretend that every step along the way is simple or easy. However, there is, it seems to me, a realistic argument along the following lines. The developers of a given network are a sufficiently well-defined group to be capable of being subject to fiduciary duties. Viewed objectively the developers have undertaken a role which involves making discretionary decisions and exercising power for and on behalf of other people, in relation to property owned by those other people. That property has been entrusted into the care of the developers. The developers therefore are fiduciaries.”



“The content of the duties includes a duty not to act in their own self-interest and also involves a duty to act in positive ways in certain circumstances. It may also, realistically, include a duty to act to introduce code so that an owner's bitcoin can be transferred to safety in the circumstances alleged by Tulip...”

“If the decentralised governance of bitcoin really is a myth, then in my judgment there is much to be said for the submission that bitcoin developers, while acting as developers, owe fiduciary duties to the true owners of that property.”



DEFI

Sarcuni v bZx DAO, No. 22-cv-618-LAB-DEB, 2023 WL2657633 (SD Cal Mar 27 2023)

Commodity Futures Trading Comm'n v Ooki DAO, No. 3:22-cv-05416-WHO, 2022 BL 454541, 2022 U.S. Dist. Lexis 228820



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