

CRYPTOASSETS AND THE LAW

Legal issues raised by cryptoassets, key judicial decisions and emerging trends, and interim relief/substantive claims for misappropriated cryptoassets

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OUTLINE

- Key terms and concepts
- Does English law recognise cryptoassets as property? How are cryptoassets classified and what are the implications of that classification?
- How can claims to recover misappropriated cryptoassets be framed, in light of digital registers and their other unique features?
- What kinds of interim relief can be obtained in relation to cryptoassets? How does this work in practice?

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WHAT ARE CRYPTOASSETS?

- Built on blockchain technology
- Tradeable digital assets / virtual form of money / digital representations of value
- Tokens, cryptosecurities and cryptocurrency

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WHAT IS A CRYPTOCURRENCY?

“A digital representation of value that:

- (i) is intended to constitute a peer-to-peer (“P2P”) alternative to government-issued legal tender;*
- (ii) is used as a general-purpose medium of exchange (independent of any central bank);*
- (iii) is secured by a mechanism known as cryptography; and*
- (iv) can be converted into legal tender and vice versa”*

(European Parliament July 2018 paper ‘Cryptocurrencies & Blockchain’ at paragraph [2.2.2(h)])



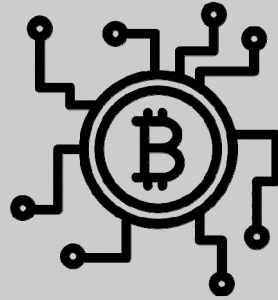
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KEY TERMINOLOGY (1/3)

Blockchain: Digital decentralised ledger



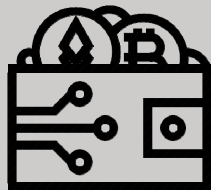
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KEY TERMINOLOGY (2/3)

Wallet: Comparable to bank account, with public and private “keys”



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KEY TERMINOLOGY (3/3)

Address/Wallet ID: Used to receive funds



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HOW DOES CRYPTOCURRENCY WORK?

- Logging transactions into a database
- Two key differences to conventional banking:
 - Purely digital
 - Decentralised form of currency

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LEGAL ISSUES – IS CRYPTOCURRENCY PROPERTY? (1/3)

Simon Thorley J of the Singapore International Commercial Court in *B2C2 Ltd v Quoine Pte Ltd* [2019] SGHC(I) 03 at [142]:

“It is convenient to consider the second certainty [of express trusts], certainty of subject matter, first. Quoine was prepared to assume that cryptocurrencies may be treated as property that may be held on trust. I consider that it was right to do so. Cryptocurrencies are not legal tender in the sense of being a regulated currency issued by a government but do have the fundamental characteristic of intangible property as being an identifiable thing of value. Quoine drew my attention to the classic definition of a property right in the House of Lords decision of National Provincial Bank v Ainsworth [1965] 1 AC 1175 at 1248: ‘it must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability’. Cryptocurrencies meet all these requirements. Whilst there may be some academic debate as to the precise nature of the property right, in the light of the fact that Quoine does not seek to dispute that they may be treated as property in a generic sense, I need not consider the question further.”

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LEGAL ISSUES – IS CRYPTOCURRENCY PROPERTY? (2/3)

Armstrong DLW GmbH v Winnington Networks Ltd [2012] EWHC 10 (Ch), [2013] Ch 156 [58], [94] (Stephen Morris QC): An EU emissions allowance could be intangible personal property (not necessarily a chose in action and not a chose in possession), in respect of which a proprietary claim may be brought

Your Response Ltd v Datateam Business Media Ltd [2014] EWCA Civ 281, [2015] QB 41 [42]: Information cannot be treated as property (so a common law possessory lien could not exist over the information in a database)

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LEGAL ISSUES – IS CRYPTOCURRENCY PROPERTY? (3/3)

See, now, *AA v Persons Unknown* [2019] EWHC 3556 (Comm), [2020] 4 WLR 35 [59]-[61] (Bryan J):

"The conclusion that was expressed [in the LawTech paper¹] 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, capable in their nature of assumption by third parties, and having some degree of permanence. That too, was the conclusion of the Singapore International Commercial Court in *B2C2 Ltd v Quoine PTC Ltd* [2019] SGHC (I) 03 [142].

There are also two English authorities to which my attention has been drawn where crypto currencies have been treated as property, albeit that those authorities do not consider the issue in depth. They are, and I have already mentioned them, in *Vorotyntseva v Money-4 Ltd (trading as nebeus.com)* [2018] EWHC 2596 (Ch), the decision of Birss J, where he granted a worldwide freezing order in respect of a substantial quantity of Bitcoin and Ethereum, another virtual currency, and *Robertson*, where Moulder J granted an asset preservation order over crypto currencies in that case.

... 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."

¹ LawTech Delivery Panel, *Legal Statement on Cryptoassets and Smart Contracts* (November 2019) [71]-[84] <<https://technation.io/about-us/lawtech-panel>>

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LEGAL ISSUES – CLASSIFICATION AND DEFENCES TO PROPRIETARY CLAIM?

Available defences to a claim to recover misdirected cryptocurrency may depend on how cryptocurrency is characterised in property terms

Availability of defence of good faith purchase for value depends on whether cryptoassets are to be classified as:

- Money — defence available (position advocated by FMLC, *Issues of Legal Uncertainty Arising in the Context of Virtual Currencies* (July 2016) at 14–15)
- A chose in possession (other than money) or a chose in action — in principle *nemo dat*, but contrary authority in *Armstrong* at [99], [101]–[102]

Change of position not available as a defence

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ROBERTSON v PERSONS UNKNOWN – FACTS

- Mr Robertson “held” 100 Bitcoin worth approximately US\$1.2 million
- He intended to invest the Bitcoin with an investment firm
- Mr Robertson was the victim of a “spear-phishing” attack, whereby a fraudster (D1) impersonated the persons at the investment firm with whom Mr Robertson had communicated, and in consequence he “transferred” the Bitcoin to the fraudster
- This was realised when a person at the investment firm saw fraudulent emails in their outbox, after the “transfer” had been effected
- Chainalysis, a blockchain investigation firm, was able to establish that 80 of the Bitcoin had been “transferred” to a “wallet” of Coinbase UK Limited and an associated entity (D3 and D4), the UK-arm of a San Francisco based leading cryptocurrency exchange (others had been dissipated)
- Coinbase UK operated accounts of individual customers (including D2) for the Bitcoin held in its “wallet”
- Coinbase UK would not freeze the Bitcoin in D2’s account for more than a few days or disclose details of the account holder (D2) unless Mr Robertson obtained a court order

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WHO IS THE DEFENDANT?

- Blockchain provides a means of sufficiently identifying a “Persons Unknown” defendant by using:
 - Addresses / Wallet IDs
 - Transaction IDs

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FRAMING THE CLAIM TO RECOVER MISAPPROPRIATED BITCOIN IN *ROBERTSON*

When framing Particulars of Claim for the claim for service out, the proprietary claim in *Robertson* was put in three main ways:

- **Mistake as to identity of transferee:** Initial transfer of the 100 Bitcoin to D1 was void due Mr Robertson's fundamental mistake about D1's identity, so Mr Robertson retained title to the 80 Bitcoin (against D1 and D2) – compare *Shogun Finance Ltd v Hudson* [2003] UKHL 62, [2004] 1 AC 919
- **Rescission for fraud:** Initial transfer of the 100 Bitcoin to D1, if effective, was rescinded for D1's fraudulent misrepresentation (and D1 could not pass to D2 any better title than D1 had)
- **Quistclose trust:** If initial transfer of the 100 Bitcoin to D1 was effective, D1 held the 100 Bitcoin on a *Quistclose* trust, because D1 was aware that Mr Robertson intended them to be used only for the purpose of his investment with the finance company, and D2 received the 80 Bitcoin with sufficient knowledge of the breach of trust to make it liable to restore them (ie knowing/unconscionable receipt)

Framing claim is necessarily fact-sensitive, and depends on exactly how cryptoasset was misdirected

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CRYPTOASSETS & INTERIM RELIEF

- **Freezing Orders** (or *Mareva* injunctions)
 - See: *Vorotyntseva v Money-4 Ltd* (trading as nebeus.com) [2018] EWHC 2596 (Ch)
- **Proprietary Injunctions**
 - See: *Vorotyntseva and AA v Persons Unknown* [2019] EWHC 3556 (Comm)
- **Asset Preservation Orders**
 - As in *Robertson*
- **Bankers Trust Orders**
 - As in *Robertson*
- **Norwich Pharmacal Orders**

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CRYPTOASSETS AND INTERIM RELIEF: THE PROBLEM OF ANONYMITY

- Anonymous & decentralised nature of cryptocurrency and blockchain means challenges due to anonymity or 'pseudonymity'
- Vast majority of cryptocurrency users will convert to another asset quite quickly
- Time and patience is key

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"BREAKING COVER"

- This occurs whenever a user converts cryptocurrency to acquire other assets
- Nature of blockchain then renders tracing relatively straightforward for litigation support specialists with expertise in information gathering

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PRACTICAL ADVICE

- It is essential to explain the technology accurately to the court, particularly for example:
 - Specific characteristics of precise platform used for storing/trading, which can vary widely
 - How conventional platforms interface with cryptocurrency
 - Time is of the essence due to the volatility in price of assets and the speed with which they can be dissipated

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