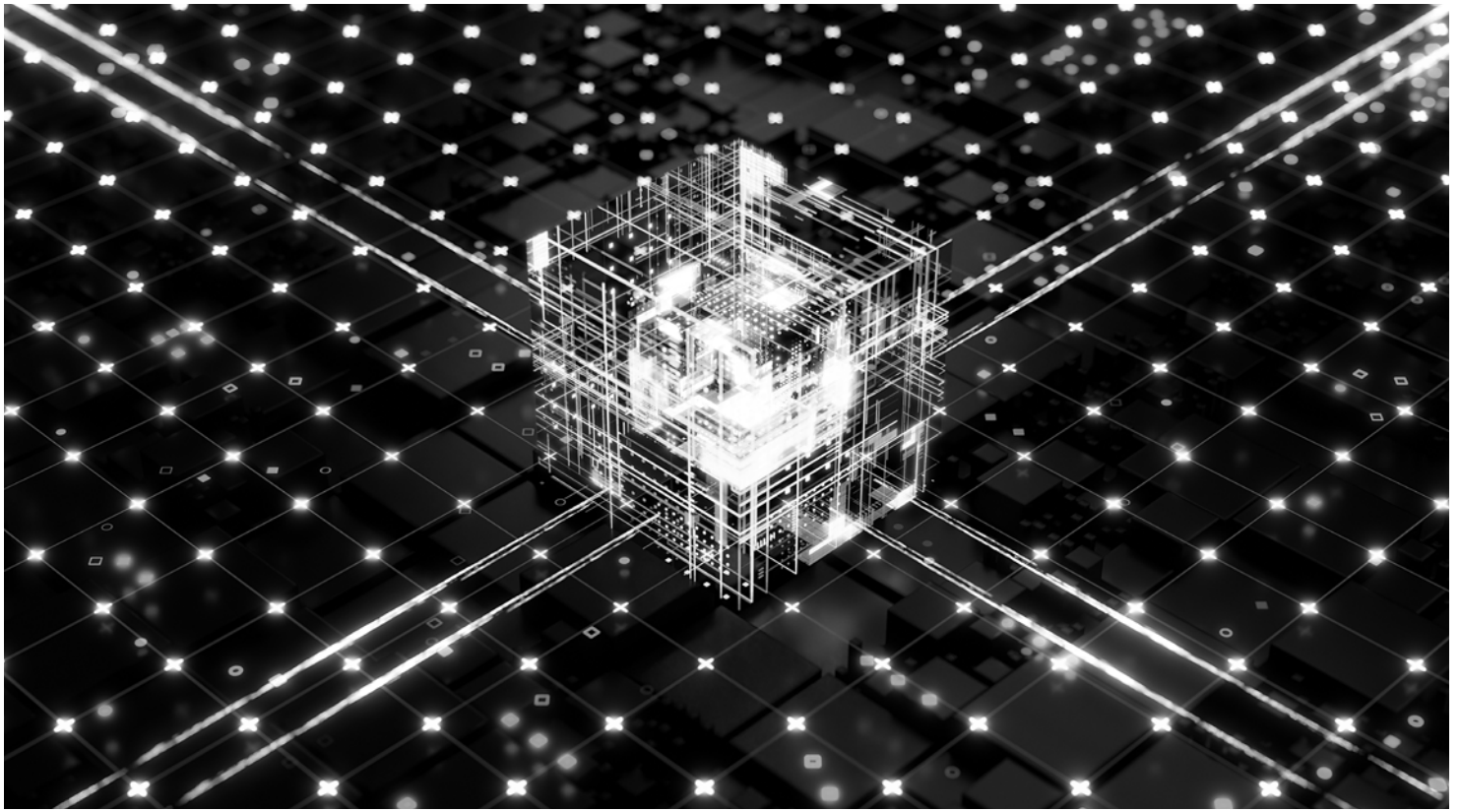




CRYPTOCURRENCY: A ROUND UP OF RECENT DECISIONS
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There is very little regulatory or legal guidance on cryptocurrency, and the developments in this area are piecemeal, but fast moving. This thought leadership piece seeks to provide an overview of the UK's approach to and English cases on cryptocurrency, a digital asset with unique features that is here to stay.

What is Cryptocurrency?

Cryptocurrency is a tradable, digital currency that can be bought and sold without the need for a central monetary authority such as a government or bank. Instead, the exchange and transfer of cryptocurrencies is enabled by blockchain technology, a decentralised form of technology which utilises peer to peer trading. Examples of cryptocurrencies include Bitcoin, Ethereum, and Litecoin.

Some of the stated benefits of cryptocurrency include the fact that it is very difficult to counterfeit. Further, data relating to cryptocurrency transactions cannot be destroyed or edited and is permanently recorded and viewable

by everyone, thus creating a highly transparent network of exchanges.

On the other hand, cryptocurrencies tend to be extremely price volatile, are virtually unregulated in the UK (much to the joy of some and to the frustration of others) and the loss of a password (or recovery code) to a digital wallet can result in catastrophic losses for individuals (as was the case when the CEO of QuadrigaCX died in 2018, taking with him the only known password to the company's wallets and the loss of some US\$190 million).

Today, cryptocurrency transactions are prolific. They have gained popularity in recent years as a

medium of exchange and the largest cryptocurrency exchanges now handle transactions totalling billions of dollars each day. However, with an increase in the popularity of cryptocurrency transactions, and the fact that cryptocurrency exchanges take place on a decentralized platform, there is a significant pressure on countries across the globe to provide remedies in cases of cryptocurrency frauds, which are increasing. The UK has sought to adapt to the new issues that arise from cryptocurrencies in several ways and there is a growing body of English case law, which is intended to specifically assist claimants in frauds such as these.

The Proprietary Nature of Cryptocurrency under English Law

When Bitcoin, today's most heavily subscribed cryptocurrency across the globe, came onto the scene over a decade ago, it was perhaps impossible to suppose that it would be described as property within the legal context. Being neither a chose in action nor a chose in possession, cryptocurrencies did not fall squarely within the traditional definition of property as espoused in *Colonial Bank v Whinney* [1885] 30 Ch.D 267. However, in the seminal case of *AA v Persons Unknown* [2019] EWHC 3556 (Comm), the court concluded that cryptocurrencies were a species of property. Indeed, the court acknowledged that cryptocurrencies were not strictly "an action" in the narrowest sense of the term, but nevertheless held that cryptocurrencies plainly have the characteristics of property. Further reasons given in favour of the proposition included that:

- the Jurisdictional Task Force's Legal Statement on Crypto assets and Smart contracts advised that cryptoassets should legally be considered property;
- cryptocurrency falls within Lord Wilberforce's definition of property in *National Provincial Bank v Ainsworth* [1965] 1 AC 1175 (namely that cryptocurrency is capable of being defined; identifiable by third parties; capable of nature of assumption by third parties; and capable of having some degree of performance);
- the court in *Vorotyntseva v Money -4 Limited (t/a as Nebeus.com)* [2018] EWHC 2596 (Ch) found cryptocurrency to be a form of property (although it should be noted that, in this case, the parties did not argue that cryptocurrency could not be property); and
- the court in *Liam David Robertson v Persons Unknown* (unreported, 15 July 2019), considered cryptocurrency to be property.

This approach to cryptocurrencies has since been considered and affirmed in subsequent English cases, including *Director of Public Prosecutions v Briedis & Anor* [2021] EWHC 3155 (Admin), in which the High Court found that it would be a "serious lacuna" if cryptoassets were not considered to be property for the purposes of s.316(4)(c) of the Proceeds of Crime Act 2002. More recently, in *Lavinia Deborah Osbourne v Persons Unknown & Anor* [2022 EWHC 1021 Comm], the High Court said that there is at least a realistically arguable case that Non-Fungible Tokens (**NFTs**) are to be treated as legal property, the first time that NFTs have been treated this way. Although the decision in *Lavinia* was far from surprising given that the English Courts had previously ruled that cryptocurrencies constitute property under English law, it does nevertheless indicate to users of digital assets across the globe that the English Courts will more than likely adopt a flexible and incremental approach to the law of digital assets.

Remedying the inconsistency with Colonial Bank

However, whilst it is now accepted that cryptocurrency is property in English law, it still remains unclear as to **how** it can be classified as property in accordance with *Colonial Bank*. It is for this reason that the Law Commission has recommended the creation of a third category of property which covers digital assets explicitly. In particular, it is currently evaluating whether the following indicia could be used to determine whether a digital asset falls within this proposed new third category of personal property, namely (i) *the digital thing* has an existence independent of both persons and the legal system; (ii) *the digital thing* is rivalrous (i.e., the consumption of the thing by one person, or a specific group of persons, inhibits use or consumption by others); and (iii) *the digital thing* is fully divestible or transferable.

The implications of declaring crypto as property

Whilst the question as to whether cryptocurrencies are property may seem academic only, **the ability to obtain certain interim remedies in England will often turn on whether there is identifiable property**. An example of this is an application for a freezing injunction which requires the claimant to prove that the defendant has identifiable property which can be frozen in the first place. Similarly, an application for a proprietary injunction rests on there being identifiable property in place. Indeed, in *Ion Science Ltd v Persons Unknown* (unreported, 21 December 2020, Commercial Court), the claimants obtained a proprietary injunction against persons unknown after they were induced into transferring approximately 64.35 bitcoin (equivalent at the time to £577,002) to the defendants under the belief that they were investing their money into real cryptocurrency products. The court accepted that cryptocurrencies were property in English law and, accordingly, a claimant would be entitled to put forward a proprietary tracing claim to those currencies.

However, it is important to note that in the examples of *AA* and *Ion Science*, where the court has been heralded for adopting a flexible approach to cryptocurrencies and its willingness to grant interim remedies such as freezing and proprietary injunctions, these remedies were given almost always in the context of without notice applications with no adversarial debate. In other cases, certain issues have simply been assumed (as was the case in *Zi Wang v Graham Derby* [2021] EWHC 3054 (Comm) in which the defendant and claimant did not dispute whether cryptocurrency could theoretically be held on trust and the court accepted that to be the case). It therefore remains to be seen whether future cases in the arena of cryptocurrency will continue the trend of helpful interim remedies and whether or not limits may be imposed on their use.



Can you use cryptocurrency as security in English Litigation?

Cryptocurrency is increasingly the subject matter of issues in litigation before the courts. In *Tulip Trading Limited v Bitcoin Associated for BSV and Ors* [2022 EWHC 141 (Ch)], the claimant alleged that he was the subject of a computer hack which saw him losing access to certain cryptocurrencies. The claimant's beneficial owner was Dr Craig Wright, who claimed to be Satoshi Nakamoto, the alleged creator of Bitcoin.

In response to the claim, the defendants issued an application to challenge the jurisdiction of the English courts (the **Jurisdiction Challenge**) and issued a security for costs application in relation to the costs of the Jurisdiction Challenge.

The court determined that the claimant was required to give security for costs, it being a holding company, incorporated in the Seychelles, with no discernible assets, bank accounts and/or tax returns. The question then turned to the manner of security. In relation to this matter, the defendant's agreed to accept a payment of cash into court, a payment of cash made to

the claimant's solicitors (and held to the order of the court accordingly) or the provision of a bank guarantee granted by a first-class London bank. However, the claimant suggested that it provide security through Bitcoin by transferring Bitcoin to its solicitors, plus a 10% buffer to deal with any fluctuations in the value of the cryptocurrency. In support of its position, the claimant noted that it did not have a bank account (and therefore could not provide a bank guarantee) and further added that the Claimant would need to convert its cryptocurrency into cash in order to meet the defendant's demands, which transfer would give rise to capital gains tax.

The court rejected the claimant's proposition, indicating that cash is still king when it comes to funding an order for security for costs. In its judgment, the court noted that the unexpected fall in the value of Bitcoin could result in the security being effectively valueless. This would expose the Claimant to a risk of which they would not usually be exposed to with other forms of security (such as cash). In

coming to its conclusion, the court considered *Monde Petroleum SA v Westernzagros Ltd* [2015] EWHC 67 (Comm) in which Mr Justice Popplewell (as he then was) accepted the possibility of alternative forms of security, but only in circumstances where the security is just as good as a payment into court or the provision of a first-class London bank guarantee. Bitcoin was clearly not as good.

Cryptocurrency and Cybercrime

Because cryptocurrencies utilise blockchain technology to enable their trades, anyone can view the repository of crypto transactions made in a single day. Cryptocurrencies are therefore celebrated for their transparency. However, despite this unique characteristic of blockchain technology, the lack of a centralised governing body (for example, a bank) and Know Your Client procedures prevents transactions from being checked specifically for their legality. Accordingly, the use of blockchain technology is no block to the possibility of being subject to a very real cybercrime. **The Courts have**

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already seen an array of criminal cases involving cryptocurrencies.

By way of example, in *R v Read (Christopher)* [2018] EWCA Crim 2186, the perpetrator stole information from a company via multiple malware attacks and blackmailed members of staff to try and have the victims remit bitcoin to the perpetrator. Mr Read, also an employee of the victim company, was sentenced to seven and a half years due to the financial loss and psychological harm incurred. The case is a simple reminder of how traditional forms of crime can be used in relation to digital assets.

Similarly, in *AAA plc & Ors v Persons Unknown* [2021] EWHC 2529 (QB), the claimants became aware of a website which criticised and made derogatory remarks about its CEO and accountants. Numerous social media accounts were also set up for the purposes of promulgating these accusations. When the claimant hired a cyber expert to locate the publisher, the publisher

agreed to withdraw its allegations in return for a payment in Bitcoin. In a decision which reflects the court’s ability to act pre-emptively, the court granted the claimant’s application for a prohibitory injunction against the defendants (being persons unknown) and also agreed to anonymise the names of the claimants as disclosure of the claimants’ name would put the defamatory allegations in the public domain and would defeat the very purpose of the prohibitory injunction.

Despite the court’s willingness to assist victims of cybercrime, it is clear that further measures will need to be introduced to address the complexities of cryptocurrency and their use in cybercrime. The recent amendment to s. 67(7A)(b) of the Proceeds of Crime Act 2002 (as introduced by the Serious Crime Act 2015), which now gives the police the power to seize and retain money held by a defendant including cryptocurrencies, is a prime example of this.

It should also be noted that the UK’s Jurisdiction Taskforce (the **UKJT**), chaired by Sir Geoffrey Vos, has advocated the use of arbitration to deal with disputes arising from the use of blockchain and digital assets. The UKJT has drafted a set of rules, published in February 2021, which could in theory lead to a faster and more cost-effective resolution to disputes arising out of cryptocurrencies and blockchain technology more generally. It is even suggested that “*where a digital asset system provides for it, arbitrators should be able to implement decisions directly on a blockchain or within the system, using any private key or control mechanism made available to them.*”¹ The desire to create a system of rules explicitly for disputes related to digital assets once again demonstrates a willingness from the English judiciary to improve, and make simple, the procedure for cryptocurrency disputes in England and Wales.

Regulations around Cryptocurrency in England and Wales

There is currently no dedicated legislation in England and Wales regulating cryptocurrency and the new UK's government's approach to regulation is currently unclear. However, when the former UK government sought *"to make the UK a global hub for cryptoasset technology and investment"*², there were certainly signs of regulation of Cryptocurrency in the UK.

The former Government's Approach to Cryptocurrency

A recent consultation on the UK's regulatory approach to cryptoassets and stablecoins confirmed that the former Government intended to bring stablecoins (a cryptoasset which seeks to maintain a stable value by being pegged to fiat money or exchange-traded commodities) into the regulatory framework. Accordingly, the former UK Government was looking towards stablecoin as a recognised, and potentially widespread, form of payment and it is possible that the new UK Government may adopt the same approach.

Further, the Bank of England is considering whether or not it should introduce a "central bank digital currency" (CBDC), namely a digital currency issued by a central bank. However, it remains unclear as to how CBDCs will in fact regulate the cryptocurrencies which are already available on the market.

Advertising of Cryptocurrency

In January 2022, HM Treasury announced an intention to regulate cryptocurrency advertisements, with the intention of bringing the promotion of cryptocurrency within the scope of the Financial Services and Markets Act 2000 (**FSMA**) and the Financial Conduct Authority (**FCA**). Following a consultation period, the Government has proposed a definition of "qualifying cryptoassets"

to be included as a controlled investment under the Financial Services and Markets Act (Financial Promotion) Order 2005 (FPO).

The provisional definition of "qualifying cryptoasset" suggests that the asset must be fungible, transferable, not electronic money as defined by the Electronic Money Regulations and not a currency issued by a central bank or authority. Notably, this will explicitly exclude some cryptoassets from its remit, such as non-fungible tokens.

If introduced, any "qualifying cryptoassets" will be subject to s. 21 FSMA which provides that a person must not, in the course of business, communicate an invitation or inducement to engage in an investment activity or claims management activity unless that communication (i) is made by an authorised person; (ii) has been approved by an authorised person; or (iii) is exempted under the **FPO**.

However, until the legislation comes into play, the Advertising Standards Authority (**ASA**) has been turning its focus towards cryptocurrency advertisements. On 22 March 2022 the ASA issued an enforcement notice targeting over 50 cryptocurrency advertisers, instructing these companies to review their adverts so that they complied with the UK Code of Non-broadcast Advertising and Direct & Promotional Marketing along with guidance on how to do so. The enforcement notice provides that all cryptocurrency advertisements must:

- state that cryptocurrency is unregulated in the UK;
- state that cryptocurrency profits may be subject to CGT; and
- state that the value of cryptocurrency investments can go up as well as down.

The ASA has also stated that cryptocurrency advertisements cannot contain any "problem claims". That is, cryptocurrency advertisements cannot imply that:

- cryptocurrency is regulated by the FCA;
- past performance of any cryptocurrency is a guide for future income/profits;
- investments in cryptocurrency are low risk;
- there is any urgency in investing in a cryptocurrency;
- cryptocurrency investments are trivial and suitable for everyone; and
- cryptocurrency is suitable to be purchased on credit.

The ASA's approach shows a proactive approach to implement rules to protect consumers who might not be as informed as to the risks of cryptocurrency.

Conclusion

It is an exciting time for cryptocurrency firms, enthusiasts or newcomers. However, with the desire to have the UK as a global hub for cryptocurrency, and with the frequency of crypto transactions increasing day by day, the law in this area will need to change to protect those involved. Case law is being developed incrementally, the Law Commission is recommending a third category of property, and the judiciary is keen to explore new rules for the arbitration of crypto disputes so watch this space!

² Government sets out plan to make UK a global cryptoasset technology hub - GOV.UK (www.gov.uk)

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