

Client Alert

Cryptoassets may be ‘hot property’, but are they property under English law?

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A number of recent decisions in the English courts, combined with a recent legal statement by the UK Jurisdiction Taskforce (“UKJT”), have clarified the legal status of cryptoassets (such as Bitcoin). This clarification has important implications for real-world situations involving cryptoassets with which commercial parties and the English courts are increasingly having to grapple.

In this client alert, we focus on the decision in *AA v Persons Unknown* from earlier this year.¹ This decision, which includes an analysis of the UKJT’s conclusions, provides the most detailed consideration of the legal status of cryptoassets by the English courts to date.

I. The UKJT Statement

In November 2019, the UKJT (chaired by Chancellor Vos) published a “*Legal Statement on the Status of Cryptoassets and Smart Contracts*” (the “UKJT Statement”). The UKJT Statement addressed, amongst other things, the question of whether cryptoassets should be treated as property under English law (rather than merely information or data). The UKJT concluded that they should, for the reason discussed below.

II. AA v Persons Unknown

The UKJT Statement is not legally binding but, importantly, was analysed for the first time – and endorsed – by the English High Court in *AA v Persons Unknown*. Having done so, the court held that cryptoassets are to be recognised as property under English common law principles, at least in the circumstances of the case, where (as described below), the claimant sought an urgent proprietary injunction to protect its ownership interests in the cryptoassets in question.

¹ [2019] EWHC 3556 Comm. The hearing was held in private in December 2019 and the judgment was not released for publication until earlier this year.

A. Facts

The claimant, an insurance company (“AA”), provided cyber-crime attack insurance to one of its clients. A hacker managed to infiltrate and encrypt this client’s computer systems. Unknown persons (the first defendant), presumably connected to the hacker, then sent the client a ransom request in Bitcoin in exchange for the decryption tool. AA paid the ransom on behalf of its client. Thereafter, AA hired a tracking specialist to attempt to identify where the Bitcoin had been transferred on the basis of the public Bitcoin blockchain. A substantial proportion of the Bitcoin was tracked to an account on the cryptocurrency exchange, Bitfinex.

AA made an application seeking, amongst other things, a proprietary injunction over the Bitcoin in the account on Bitfinex. The unknown persons in control of this account were the second defendant and the entities operating Bitfinex were the third and fourth defendants.

B. The court’s decision

Bryan J began by analysing the position under English common law as to what constitutes property. Traditionally, English law has recognised two types of property:

- choses in possession (i.e., tangible assets that can be physically possessed); and
- choses in action (i.e., intangible rights over property which can only be claimed or enforced by action, such as money due on a bond).

He acknowledged that the difficulty with cryptoassets is that they “do not sit neatly within either category”.² The intangible nature of cryptoassets means that they cannot be physically possessed and are not, therefore, choses in possession. The fact that cryptoassets (i) use a distributed and decentralised transaction ledger with no one entity having responsibility for maintaining it, and (ii) rely on self-governance rather than governance by contract or other legally-binding mechanism, means that they cannot be claimed or enforced by action; and are not, therefore, choses in action.

However, Bryan J found that this did not preclude cryptoassets from being property, noting the flexibility the courts have traditionally demonstrated in treating intangible things as property, even if they are not strictly choses in action. In particular, Bryan J held that the important question was whether cryptoassets meet the four criteria set out in the classic definition of property in *National Provincial Bank v Ainsworth*.³ Here, Lord Wilberforce held that property must be:

- definable;
- identifiable by third parties;
- capable in nature of assumption by third parties; and
- have some degree of permanence.

Bryan J held that Bitcoin (and, by implication, other cryptoassets) satisfied all four criteria in the case in question.⁴ This is fully in line with the UKJT Statement, which concluded that cryptoassets “have all the indicia of property” and thus should be “treated in principle as property”.⁵ Moreover, it is clear that Bryan J found the UKJT Statement persuasive on the question of the proprietary status of cryptoassets: he referred to the analysis therein as “detailed and carefully considered”, “compelling” and “an accurate statement of the position under English law”.⁶

² Ibid., at [58]

³ [1965] 1 AC 1175

⁴ [2019] EWHC 3556 Comm, at [59]

⁵ UKJT Statement, at [15]

⁶ [2019] EWHC 3556 Comm, at [57, 61]

Bryan J also referred to two English court judgments that were published in 2019 (both pre-dating the UKJT Statement) which treated cryptoassets as property on their particular facts (albeit with more limited reported judicial consideration of the question than in *AA v Persons Unknown*):

- In July 2019, the High Court granted an asset preservation order over Bitcoin held in a wallet on a cryptocurrency trading platform (*Robertson v Persons Unknown (unreported)*).⁷
- In a decision from September 2018 (which was only published in November 2019), the High Court granted a freezing order and proprietary injunction over cryptoassets (Bitcoin and Ethereum) held via another cryptocurrency trading platform (*Elena Vorotyntseva v Money-4 Service Limited t/a Nebeus.com and others*).⁸

Taking into account all of the above, Bryan J concluded that the Bitcoin held via Bitfinex were property for the purposes of granting the proprietary injunction sought by AA.

C. *Implications*

Whilst the decision in *AA v Persons Unknown* is only a binding precedent in the context of proprietary injunctions, it may indicate that the English courts are willing to recognise cryptoassets as property in other areas, such as corporate insolvency, the granting of security, trusts, and cases of theft and fraud.

Looking first at Bryan J's judgment:

- When analysing the definition of property under English common law, Bryan J looked at case law (by reference to the UKJT Statement) from a broad range of areas, rather than case law focused on proprietary injunctions alone.
- The UKJT Statement, which Bryan J confirmed to contain “*an accurate statement of the position under English law*”, concluded that cryptoassets should be “*treated in principle as property*” and this conclusion is not limited to proprietary injunctions.
- The judgment shows again the ability of English common law to stretch traditional definitions and concepts to adapt to new business practices.

The UKJT Statement directly addresses the consequences of treating cryptoassets as property in two particular areas: insolvency and the granting of security. The UKJT Statement concludes that, since cryptoassets can be property at English common law:

- they can be subject to security, such that a mortgage or an equitable charge can be created over them.⁹ However, given the intangible nature of cryptoassets, pledges and liens cannot be created over them; and
- they fall within the definition of property in section 436(1) of the Insolvency Act 1986 (which is wider than the traditional definition at common law).¹⁰

These conclusions are yet to be tested by the English courts and are not, therefore, legally binding. However, the approach of Bryan J in *AA v Persons Unknown* indicates that the court may find them persuasive.

Moreover, similar conclusions have been drawn in at least one other common law jurisdiction. The Singapore International Commercial Court recently found in the case of *B2C2 Ltd v Quione* (which is not binding on the English courts) that cryptoassets “*may be treated as property that may be held on trust*”.¹¹

⁷ CL-2019-000444, unreported, 15th July 2019

⁸ [2018] EWHC 2596 (Ch)

⁹ UKJT Statement, at [100-106].

¹⁰ UKJT Statement, at [107-109].

¹¹ Pte Ltd [2019] SCHC(I) 03, at [142]. The SICC also concluded that cryptoassets meet the four criteria set out in the classic definition of property in *National Provincial Bank v Ainsworth*, observing that they “*are not legal tender*”

III. Comment

Why does it matter if a cryptoasset is capable of being property? A succinct answer is contained within the UKJT Statement:

“It matters because in principle proprietary rights are recognised against the whole world, whereas other—personal—rights are recognised only against someone who has assumed a relevant legal duty. Proprietary rights are of particular importance in an insolvency, where they generally have priority over claims by creditors, and when someone seeks to recover something that has been lost, stolen or unlawfully taken. They are also relevant to the questions of whether there can be a security interest in a cryptoasset and whether a cryptoasset can be held on trust.”¹²

In circumstances where cryptoassets are increasingly being used in the global financial services industry and beyond, the decision in *AA v Persons Unknown*, combined with the UKJT Statement, provides an important indication of the approach the English courts are likely to take in relation to whether cryptoassets can be treated as property. More generally, these developments support the UK’s leading position in the recognition of cryptoassets.

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.” See also UKJT Statement, at [58].

¹² UKJT Statement, at [36]

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