A short survey of the key decisions and developments

By Emily Gillett and Caroline Mattin

There has been a recent spate of decisions across common law jurisdictions relating to the status of cryptocurrencies as property.

The inherent flexibility of the common law has been used to embrace technological and cultural developments around the globe and find a way of accommodating them in the traditional legal landscape before new legislation is introduced. It is encouraging to see the judiciary’s willingness in several jurisdictions to take these steps.

This article gives a high-level overview of this growing body of case law from England, Australia, Hong Kong, Singapore, New Zealand and Canada.

ENGLAND AND WALES

Whilst there has been a number of cryptocurrency decisions of the English courts in the past two years, the more interesting development in England and Wales was the issue in November 2019 by the Law Tech Delivery Panel of a Legal Statement on the Status of Cryptocurrencies and Smart Contracts under English Law, analysing the treatment of cryptocurrencies and smart contracts under English law (the “UKJT Statement”). Written by four English barristers, the UKJT Statement does not have the force of law but it has been considered by and endorsed by judges since its issue, both in England and elsewhere in the common law world.

The UKJT Statement

The main conclusion in the UKJT Statement is that cryptocurrencies can be accommodated in the inherently flexible English common law system and should be treated as property.

The authors conclude that cryptocurrencies have all the indicia of property according to Lord Wilberforce's criteria in National Provincial Bank v Ainsworth [1965] AC 1175: they are definable, identifiable by third parties, capable of assumption by third parties and have some degree of permanence or stability. They also possess other important proprietary features, in that they are certain, controllable to the exclusion of others and assignable. The reasoning underlying these conclusions can be summarised as follows:

- The authors of the UKJT Statement saw no difficulty in concluding that a cryptocurrency could be capable of both definition and certainty. The public parameter of a cryptoasset, interpreted in accordance with the rules of its particular system, is sufficient, in principle, to define the asset and to identify it to any person with access to the system network.
The requirement for control and exclusivity is satisfied by the cryptographic authentication process which permits the holder of the private key and only that holder to deal in the cryptoasset to control it to the exclusion of others.

Cryptocurrencies are as permanent as other conventional financial assets which exist only until they are, for example, cancelled, redeemed, repaid or exercised. However, the UKJT Statement does acknowledge that the stability of a cryptocurrency may be affected by the state or reliability of the ledger (e.g. how frequently it is updated) and the possibility of divisions or forks in consensus where new ledgers may be created.

The novel features of some cryptoassets (such as intangibility, cryptographic authentication, use of a distributed transaction ledger, decentralisation and rule by consensus) does not disqualify them from being property.

The authors of the UKJT Statement recognise that cryptoassets “might not be classifiable either as things in possession or things in action” but they are clear that an inability to classify cryptocurrencies within the existing conventional categories of “things in possession” or “things in action” in English law does not exclude them from being property.

A full copy of the UKJT Statement can be found here: link

AA v Persons Unknown & Ors [2019] EWHC 3665 (Comm)

This case raised certain novel legal issues relating to the status of cryptocurrencies under English law. In coming to his conclusions, Bryan J had regard to the recent case law and legal developments on analogous issues in the decisions of Birss J in Vorotyntseva v Money-4 Limited, trading as Nebeus.com [2018] EWHC 2598 (Ch) and of Moulder J in Robertson v Persons Unknown (unreported 15 July 2019), which was the first case before the English Commercial Court which proceeded on the basis that cryptocurrencies could be personal property. Bryan J also referred to, and agreed with, the UKJT Statement’s conclusion that cryptocurrencies could be classified as property.

A copy of the full judgment can be found here: link

An application for various interim relief was brought by an English Insurer (who requested to remain anonymous) of a Canadian insurance company (“Insured Customer”) against four sets of defendants. The defendants were:

- Persons unknown who demanded Bitcoin on 10 and 11 October 2019 (the “First Defendant”).
- Persons unknown who held or controlled 96 Bitcoins in a specified Bitfinex Bitcoin address (the “Second Defendant”).
- BFXWW INC also trading as Bitfinex (the “Third Defendant”).
- Persons unknown who held or controlled 96 Bitcoins in a specified Bitfinex Bitcoin address (the “Fourth Defendant”).

The case related to the hacking of the Insured Customer. A hacker managed to infiltrate and bypass the firewall of the Insured Customer and installed malware called BitPaymer. The effect of that malware was that all of the Insured Customer’s computer systems were encrypted. The Insured Customer then received ransom notes which were left on the encrypted system by the hackers. The Insured Customer was insured against cybercrime attacks by the English Insurer which engaged an Incident Response Company (“IRC”). The IRC specialised in the provision of negotiation services in relation to cryptocurrency ransom payments. IRC was instructed by the English Insurer to correspond with the unknown persons who had demanded the ransom on its and the Insured Customer’s behalf and to negotiate the provision of the relevant decryption software which would allow the Insured Customer to re-access its data and systems. US$1.2million in Bitcoin was demanded for providing the decryption software.

After some negotiation, the English Insurer agreed to pay a ransom of US$950,000 in Bitcoin given the importance to the Insured Customer of obtaining access to its systems. Ninety-six of the Bitcoins were tracked to an address linked to the exchange known as Bitfinex, but the identity of the person operating that Bitcoin address was not publicly available.

Subsequently, the English Insurer applied for a Bankers Trust order and/or a Norwich Pharmacal order requiring the Third and Fourth Defendants (in essence, Bitfinex) to provide certain information in relation to the Bitfinex Bitcoin address owned or controlled by the Second Defendant; and/or a proprietary freezing injunction over the Bitcoin held at the account of the Fourth Defendant; and/or a freezing injunction in respect of Bitcoin held at the specified account of the Third or Fourth Defendant; and consequential orders to serve the same, including alternative service and service outside the jurisdiction.

Due to difficulties pertaining to service of an English order seeking Bankers Trust/Norwich Pharmacal relief on a respondent out of the jurisdiction, this element of the application was not pursued, and the focus was then placed on the application for a proprietary freezing injunction against all four defendants.
The first and perhaps fundamental question that arose in relation to the claim for a proprietary freezing injunction was whether or not the Bitcoins, which were being held in the account of the Second Defendant at Bitfinex, could be classified as property at all. The Court considered the difficulties arising from cryptocurrencies not being choses in possession (because they are virtual, not tangible, and they cannot be possessed) and not being choses in action (because they do not embody any right capable of being enforced by action). Bryan J referred to the judgment of Fry LJ in Colonial Bank v Whinney [1885] 30 ChD 261 where Fry LJ said: “All personal things are either in possession or action. The law knows no tertium quid between the two.”

However, after a detailed review of the UKJT’s Statement, Bryan J concluded that the analysis in the UKJT Statement as to the proprietary status of cryptocurrencies is “compelling and…should be adopted by this court”.

In particular, Bryan J referred to the UKJT Statement’s analysis of the Colonial Bank case and the possibility of the category of choses in action being extended to all intangible property. The UKJT Statement notes the “ability of the common law to stretch traditional definitions and concepts to adapt to new business practices”. Granting the interim proprietary freezing injunction, Bryan J concluded that: “...for the reasons I have given, as elaborated upon in the Legal Statement which I gratefully [sic] as what I consider to be an accurate statement as to the position under English law, 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.”

This was the first decision of the English court endorsing the UKJT Statement’s analysis of the law as applied to cryptocurrencies. It was also the first decision to expressly recognise the possibility of a proprietary remedy being available for cryptocurrencies.

A full copy of the judgment can be found here: [link](#)

**AUSTRALIA**

Her Honour Judge J C Gibson sitting in the New South Wales District Court, has taken the lead in the jurisdiction for treating cryptocurrency as property in relation to commercial disputes by approving the claimant’s cryptocurrency investment account as security for costs.

**Hague v Cordiner (No. 2) [2020] NSWDC 23**

The claimant proposed that his cryptocurrency reserves which were held by the digital currency exchange, BTC Markets, be treated as the security for costs. Despite the defendant’s objections that it was a “highly unstable form of investment”, Gibson DCJ allowed the crypto account as security.

This decision is encouraging and gives further strength to the argument that cryptocurrency is property. Gibson DCJ took a sensible approach to dealing with the volatile nature of cryptocurrency by requiring the claimant to: (1) notify the defendant’s solicitors (within 24 hours) when the balance of the digital reserves dropped below the amount of the security; and (2) provide periodic bank statements to the defendant’s solicitors.

“I am unaware of any other orders for security being made in relation to cryptocurrency, but I am prepared to assume that these are volatile sources of investment...The issue of cryptocurrency volatility can best be addressed by requiring the plaintiff to provide copies of his monthly bank statements to the solicitor for the defendant and by requiring him to notify drops below the secured amount.”

A full copy of the judgment can be found here: [link](#)

**HONG KONG**

There has been very limited judicial consideration of cryptoassets in Hong Kong law, reflecting the relative infancy of this type of asset in Hong Kong markets. The Hong Kong courts have yet to seriously consider the question of whether Bitcoins are property. However, in Samara v Dan [2019] HKCFI 2718, the Court of First Instance granted an injunction freezing the assets of a French cryptocurrency trader in a dispute over what happened to Bitcoins held in an insolvent trading platform operated in Hong Kong (by Gatecoin Limited (“Gatecoin”)). The Court found that the Plaintiff had made out a good arguable case that the Bitcoin assets valued at up to US$2.6 million should be preserved in the face of competing claims to ownership. While the judge in this case was not required to consider the question of whether cryptoassets are to be characterised as “property” for the purposes of Hong Kong law, it seems likely that, in due course, the Hong Kong courts will follow the approach of the other common law jurisdictions and conclude that cryptocurrencies can be characterised as property.
The Plaintiff had asked the Defendant to sell 1,000 Bitcoins as his agent in return for a 3% commission. As the Plaintiff was not a Hong Kong resident, he was not able to open a Hong Kong bank account. Therefore, he agreed for the sale proceeds to be deposited into the Defendant’s Hong Kong Citibank account. After the sale, the funds were to be transferred to the Plaintiff’s bank account in Germany. According to the Plaintiff, the Defendant gave him access to the Citibank account by providing him with login details and the security token, enabling the Plaintiff to make the fund transfers directly from the Defendant’s Citibank account to the Plaintiff’s bank account in Germany.

Allegedly, in accordance with this agreement, the Plaintiff transferred 450 of his Bitcoins into the Defendant’s Bitcoin wallet at Gatecoin, a cryptocurrency exchange, so they could be sold by the Defendant. Gatecoin had suffered a major security breach in May 2016 with around US$2 million said to have been lost and it entered liquidation in March 2019.

In September 2017, the Plaintiff noticed that the money in the Defendant’s Hong Kong Citibank account had been placed on time deposit and could not be transferred. Then, from November 2017, the Plaintiff was unable to access the Defendant’s Hong Kong Citibank account at all. In February 2018 (prior to Gatecoin entering liquidation), the Plaintiff contacted Gatecoin to voice his concerns. He asked Gatecoin to block the Defendant from accessing his Gatecoin wallet/account. Gatecoin’s CEO subsequently informed the Plaintiff that 40 Bitcoins remained in the Defendant’s Gatecoin wallet, but he would need a legal basis to block the account for an extended period of time. Therefore, the Plaintiff applied for an injunction to freeze the remaining Bitcoins in the Defendant’s Gatecoin wallet.

However, of the 450 Bitcoins that the Plaintiff claimed to have transferred to the Defendant’s Gatecoin wallet, the Plaintiff was only able to produce records showing the transfer of 275 of them. He explained that he could not provide documentary evidence for the remaining 175 Bitcoins as he “no longer [had] the Bitcoin wallet containing the relevant record “as the same had been emptied””. In evidence, the Plaintiff attempted to explain the inaccessible nature of the empty Bitcoin wallet due to the fact that he had disregarded the “seed” (a random 12-word phrase) which had previously been necessary to access that wallet. This highlights potential evidential issues surrounding the holding and transfer of pseudonymous cryptocurrencies in crypto-wallets.

Having assessed the evidence, the Court decided: (a) that the Plaintiff had a good arguable case on his claim; (b) that the Defendant had assets within the jurisdiction which could be frozen (the Hong Kong bank account, a potential distribution from the Gatecoin liquidation and some insurance policies); and (c) that there was a real risk such assets could be dissipated ahead of trial. Against those considerations, the Defendant had not put forward reasons why the granting of a freezing injunction would cause him real hardship. As such, the balance of convenience was in favour of granting the Plaintiff’s application and preserving the status quo.

The Court also granted an order for discovery against Citibank and Gatecoin. The order was not opposed by Citibank or by Gatecoin. But it was opposed by the Defendant on the grounds that the material sought contained confidential and commercial material concerning his own private information and private trading information of others with whom the Defendant had traded. The Court, however, held that the information sought was relevant to the Plaintiff’s proprietary claims and would reveal what had happened to the Bitcoin sale proceeds. The discovery was therefore ordered in aid of the freezing injunction.

Samara v Dan does not explicitly discuss whether cryptoassets can be considered property. However, as noted above, the Court expressly recognised that the Plaintiff’s claims were proprietary in nature and used that to justify the discovery order in this case.

A full copy of the judgment can be found here: link

SINGAPORE

In a case that is of global significance, the Singapore International Commercial Court was faced with one of the first pieces of cryptocurrency litigation in the common law world: B2C2 Ltd v Quoine Pte Ltd. It had to wrestle with how mistake in contract law and breach of trust concepts fitted into the cryptocurrency landscape. In February 2020, the majority of the Court of Appeal dismissed Quoine’s appeal on the contract issue arising from the unilateral cancellation of cryptocurrency trades, but allowed its appeal on the breach of trust issue. It concluded that no trust arose over B2C2’s accounts at Quoine.
cryptocurrencies involved in this action were Bitcoin ("BTC") and Ethereum ("ETH"). B2C2 is a company registered in England which trades as an electronic market maker. As such, B2C2 provides liquidity on exchange platforms by actively buying or selling at the prices it quotes for virtual currency pairs, thereby generating trading revenue.

B2C2’s claim arose out of an incident that occurred on the Platform on 19 April 2017. On that date, seven trades for the sale by B2C2 of ETH for BTC were made at a grossly inflated exchange rate of approximately 250 times the going rate. The proceeds of the sale in BTC were automatically credited to B2C2’s account by the platform and the corresponding amount of ETH was automatically debited from that account.

When the Chief Technology Officer of Quoine became aware of the trades the following morning, he considered the exchange rate to be such a highly abnormal deviation from the previously going rate that the trades should be reversed. Accordingly, the seven trades, which were very lucrative for B2C2, were cancelled unilaterally by Quoine and the debit and credit transactions were reversed.

B2C2 contended: (a) that Quoine had no contractual right unilaterally to cancel the trades once the orders had been effected and that its action in so doing was in breach of contract; and (b) that Quoine held the proceeds of B2C2’s account on trust for B2C2 such that the unilateral withdrawal of the BTC (which reversed the trades) was in breach of trust. The primary relief sought by B2C2 was the re-execution of the trades.

Whilst the contractual issues regarding mistake raised by the case are worthy of their own dedicated article, our present focus is on the breach of trust claim and the proprietary nature of cryptocurrencies.

The breach of trust claim

The parties accepted that for a trust to arise the three certainties had to be present: (1) certainty of intention; (2) certainty of subject matter; and (3) certainty of objects.

As for certainty of subject matter, Quoine was prepared to assume that cryptocurrencies could be treated as property that may be held on trust. At first instance, Simon Thorley IJ agreed: “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.” In particular, Simon Thorley IJ considered the classic definition of property as set out in the case of National Provincial Bank v Ainsworth [1965] 1 AC 1175 that property “must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability.” He adopted that definition and applied it to cryptocurrencies, concluding:

“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.”

The Judge also concluded that the certainty of objects was also satisfied as the beneficiaries were identifiable from individual accounts of each of the members.

The real dispute arose in connection with the first certainty, that of certainty of intention to create a trust. There were no express words in the contract between the parties creating a trust and so intention had to be inferred from the wording of the document as a whole and from Quoine’s conduct when handling the assets. At first instance, the decisive factor was that the assets were held separately as a member’s assets rather than as part of Quoine’s trading assets. This was considered to be a clear indication that Quoine claimed no title to those assets and clear recognition that Quoine was holding the assets to the order of the member, who could demand withdrawal at any time. The Judge held: (a) that this was sufficiently clear evidence that Quoine intended to hold the assets on trust for the individual member; and (b) that if Quoine was not entitled to reverse the trades on the basis of mistake under contract law, the reversal and hence the unilateral removal of the BTC from B2C2’s account was in breach of trust. Quoine appealed the whole of the Judge’s decision at first instance.

On appeal, in respect of the property and the trust issue, the Singapore Court of Appeal held that it was not necessary for it to decide whether Bitcoin was a species of property capable of being held on trust. This was because on the prior question of whether a trust arose in relation to B2C2’s account at all, the Court of Appeal decided that there was no certainty of intention to create a trust. The mere fact that Quoine’s assets were segregated from its customers’ could not in and of itself lead to that conclusion.

A link to the Court of Appeal’s judgment can be found here: [link]

A link to the first instance judgment can be found here: [link]
NEW ZEALAND

On 8 April 2020, about six weeks after the Singapore Court of Appeal’s judgment in *B2C2 v Quoine*, the New Zealand High Court handed down a decision holding that cryptocurrencies are property for the purposes of New Zealand law (following the analysis in the UKJT Statement) and that they were held on trust for the users of a cryptocurrency exchange platform. This is the first known occasion on which issues of this type concerning cryptocurrency have been before the courts in New Zealand. It is of particular interest to note that the New Zealand High Court reached a different conclusion on the trust issue from the Singapore Court of Appeal. Here, we provide a short overview of the central aspects of the decision and more in-depth analysis will be provided in a subsequent blog post to be published shortly.

*Ruscoe and Moore v Cryptopia Limited (in liquidation)*

[2020] NZHC 728

In early 2019, Cryptopia, a cryptocurrency exchange operated from New Zealand, fell victim to a security breach by which hackers managed to siphon NZ$30 million worth of cryptocurrency from the exchange. Cryptopia attempted to re-open two months later but went into liquidation in May 2019 as a result of its name having been tarnished by the security breach.

The liquidators (Grant Thornton) asked the judge to rule on a number of issues in relation to the status of the cryptocurrencies for the purposes of their administration of the liquidation estate. The judge explained that “effectively, the tussle which is before the Court is one between the creditors of Cryptopia on the one hand and the account holders who have invested in the various digital assets (“the account holders”) on the other.”

He held that all of the cryptocurrencies held by the liquidators constituted property both at common law and as defined in section 2 of the New Zealand Companies Act.

“I reach the conclusion that the cryptocurrencies here situated in Cryptopia’s exchange are a species of intangible personal property and clearly an identifiable thing of value. Without question they are capable of being the subject matter of a trust.”

Distinguishing the Singapore Court of Appeal decision in *B2C2 Ltd v Quoine*, the judge held that the factual arrangements in *Quoine* were quite different from the facts in *Cryptopia*. The judge relied on the following:

- Unlike Cryptopia, Quoine was a major market-maker, who was actively placing buy and sell orders on the system. Further, Quoine loaned cryptocurrencies to other market-makers and engaged in futures trading, which were not activities Cryptopia engaged in.
- Customers of Quoine were involved in certain transactions as market-makers and not investors, whereas Cryptopia’s customers did not engage in such transactions.
- Cryptopia’s terms and conditions contained express trust provisions, whereas Quione’s did not.

Thus, the High Court of New Zealand found that a trust came into existence each time Cryptopia came to hold a currency for an account-holder. Further, the Court held that a single trust was created for each type of cryptocurrency with the beneficiaries being all account-holders holding currency of the relevant type. In other words, the account-holders who held cryptocurrency A were co-beneficiaries of the same cryptocurrency A trust; the account holders who held cryptocurrency B were co-beneficiaries of the same cryptocurrency B trust and so on.

Another interesting question arose as to the consequences of the liquidators being unable to identify account-holders (i.e. beneficiaries) and what should happen to digital assets held in an account if the account-holder could not be identified. The Court held that the cryptocurrencies fell to be dealt with pursuant to section 76 of the Trustee Act. Section 76 provides the machinery for ascertaining the existence or whereabouts of unknown or missing beneficiaries. In particular, under section 76 the court is given broad powers to approve a distribution of trust assets even if beneficiaries cannot be traced. Once the trustees obtain and comply with such directions as given by the court, they are protected against personal liability.

Losses suffered as a result of the theft of cryptocurrencies were to be borne *pari passu* by the account-holders who had held that particular type of stolen cryptocurrency at the time of the theft. Similarly, to the extent that the liquidators recovered stolen cryptocurrency from third parties, the judge held that recovered assets should be held for the benefit of the beneficiaries of the relevant cryptocurrency trust and be dealt with *pro rata* within each specific cryptocurrency trust according to the amounts recovered as assessed against the amounts stolen (disregarding any amounts of the relevant cryptocurrency which had been procured by the account-holder after the date of the theft).

A full copy of the judgment can be accessed here: [link](#)
CANADA

Whilst only a summary judgment decision, Copytrack Pte Ltd v Wall is one of the first judicial considerations in Canada of digital currencies, and what remedies, if any, would apply to a defendant’s improper dealing with these kinds of assets. This relatively early decision in 2018, while not going so far as to find cryptocurrencies could be subject to traditional proprietary claims, could provide some foundation for future litigants in Canada to argue: (a) that cryptocurrencies are a type of property (as has now been established in other common law jurisdictions); and (b) that they are subject to legislation such as the various provincial Personal Property Security Acts (“PPSA”).

Copytrack Pte Ltd v Wall, 2018 BCSC 1709

In the 2018 Copytrack summary judgment decision, the British Columbia Supreme Court ordered that over CA$400,000 of cryptocurrency could be traced and recovered from “whatsoever hands the Ether Tokens may currently be held”. The Ether Tokens had been sent to the defendant in error and they were not returned when demand was made. It was not disputed that the cryptocurrency tokens were the property of Copytrack. On a summary judgment basis, the Court concluded that the defendant had no proprietary claim to the tokens and ordered that the plaintiffs were entitled to trace and recover the tokens received by the defendant.

In addition, Copytrack argued that the Ether Tokens should be subject to claims in conversion and detinue on the grounds that a “broad range of things” (such as funds, shares, customer lists, accounts receivable, crops and mineral interests) could be subject to such claims, even though they were not strictly “goods”. Relying on the decision in Li v Li, 2017 BCSC 1312, in which the same court followed a line of cases that found funds could be subject to a claim of conversion, Copytrack submitted that the Ether Tokens could be subject to property law claims as they shared the following characteristics with traditional forms of property:

- Capable of being possessed, stored, transferred, lost and stolen.
- Held by the defendant in his wallet at the time the conversion and wrongful detention began.
- Specifically identifiable and had been traced to other wallets in which they were being held at the time.
- Could be used as a medium of exchange, a store of value, and a unit of account, like funds or currency.

The Court did not determine whether cryptocurrencies are a “good” that could found a claim in conversion and/or detinue. The Court held back from making such a determination, observing that this was “a complex and as of yet undecided question that is not suitable for determination by way of a summary judgment application”.

However, whilst it did not go so far as to rule on whether cryptocurrencies could be subject to property law claims, the Court found that “in the circumstances, it would be both unreasonable and unjust to deny Copytrack a remedy”. As a consequence, the Court ordered that Copytrack was entitled to trace and recover the wrongfully transferred tokens received by the defendant from whoever held those tokens, even if a third party.

A full copy of the judgment can be found here: link

CONCLUSION

This is an emerging and exciting area of law which is pushing the boundaries of what is recognised as property in common law jurisdictions. Whilst new, carefully crafted legislation is necessary to provide a more holistic legal framework for, and regulation of, cryptoassets, the flexibility of the common law has been able to provide answers to key questions about the nature of cryptocurrencies in the current legislative void.

In a forthcoming article, we will examine the approach of the civil law jurisdictions to cryptocurrencies as property and the remedies available to claimants.
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