



# A Cryptoasset Update

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**T**here have been a number of recent cases concerning crypto assets, many of which will have an impact on the legal landscape going forward. This article provides an update on the latest cases and industry developments as well as an update on member activity in this specialist area of law.

## Case Updates

**Wang v Darby [2021]** EWHC 3054 (Comm) 17 November 2021

In November 2021, Stephen Houseman QC (sitting as a Deputy Judge of the High Court, London Circuit Commercial Court) handed down judgment in *Wang v Darby* [2021] EWHC 3054 (Comm). This was the first contested hearing in England and Wales dealing with the question of whether a trust existed over cryptocurrency.

Stephen Houseman QC partially granted the Defendant's reverse summary judgment application, striking out the Claimant's proprietary claims relating to (a) the assertion by the Claimant of a trust over 400,000 Tezos transferred to the Defendant under two cryptocurrency swapping contracts and (b) the Claimant's allegations that the Defendant was in breach of trust/fiduciary duty by failing to return the 400,000 Tezos to him.

The 'essential economic reciprocity of the transactions' was fatal to the existence or imposition of any kind of trust over the 400,000 Tezos at [78]. The Claimant was unable to identify a case in which a beneficiary under a trust was 'obliged to transfer...economic value to the trustee in order to obtain the trust property'. Rather a



beneficiary 'has an interest in and right to receive the trust property, not an option to (re-)acquire it for value'. This 'transactional element' was 'inimical to the concept of a trust' at [79].

A trust over the 400,000 Tezos was not necessary to give effect to the parties' legitimate expectations or commercial interests. They would be sufficiently served by the existence of personal rights and obligations at [85].

This analysis was also adopted as regards a Quistclose trust arising over the Tezos at [91].

With respect to the assertion of a constructive trust, the Court held that while a constructive trust can arise when a specifically enforceable contract of sale is concluded, such that beneficial ownership passes to the buyer and the seller is constituted a trustee on behalf of the buyer pending completion, it was impossible to say that the Defendant's conditional obligation to return the 400,000 Tezos after the minimum contractual period would be enforceable by specific performance given the fungible and non-identifiable nature of such digital currency at [92].

Accordingly, the Claimant's proprietary injunction was set aside.

By contrast the breach of fiduciary duty claim was not struck out on the basis that it arose from a claim for equitable compensation and account of profits based on alleged dishonest breach of fiduciary duty independent of the existence of any trust at [97].

The Claimant's application for the continuation of a worldwide freezing order against the Defendant succeeded on the basis of the personal claims made against the Defendant, however, the precise terms of its continuation were to be determined at a subsequent hearing.

One point treated as uncontroversial in *Wang v Darby* was the 'fungibility' of Tezos. It remains to be seen whether all cryptoassets will be treated as fungible. Indeed, one of the distinguishing features of the blockchain is that it is possible to trace individual transactions such that it may be arguable that cryptoassets are not fungible and are uniquely identifiable.

**Sally Jayne Danisz v Persons Unknown and others** [2022] EWHC 280 (QB) 5 January 2022

Mr Justice Lane sitting the Queen's Bench Division, following an ex parte hearing, granted the Claimant, Ms Danisz an interim proprietary injunction, a worldwide freezing order and a banker's trust order against Persons Unknown connected with 'Matic Markets' a suspected cryptocurrency investment scam. Lane J highlighted that there was a 'real risk of dissipation' because Bitcoin could be dissipated 'at the click of a mouse' at [11].

This is a further example of English Court's demonstrating a willingness to protect victims of cryptoasset scams. One point of potential interest in the future is whether the ability to move assets with the 'click of a mouse' is itself evidence of a 'real risk of dissipation' for the purposes of a freezing injunction. Every virtual asset would therefore be captured, which casts the net too widely. It is hoped that further nuance on this matter will be forthcoming in future freezing injunction judgments.

**Mr Dollar Bill v Maxim Vasilvsky, Huobi and others** (unreported) 14 January 2022

Deputy Master Marsh granted the first delivery up order in relation to Bitcoin held in a Huobi wallet held by the First Defendant.

**Tulip Trading Limited v Bitcoin Association for BSV and Others** [2022] EWHC 141 (Ch) 25 January 2022

*Tulip Trading Limited* is a judgment from 26 January 2022 in which Master Clark refused to permit TTL to provide security for costs in Bitcoin. This was because Bitcoin was not deemed to be equal to or better than provision of security by payment into Court or provision of a first class London bank guarantee. It would expose the Defendants to a risk to which they would not be exposed with usual forms of security, namely, a fall in value of Bitcoin which could result in their security being effectively valueless at [44].

**Ion Science and Duncan Johns v Persons Unknown** (unreported) 28 January 2022

Master Cook granted the first final third party debt order in relation to a money judgment in the sum of £2,935,204.30.

**CLM v CLN** [2022] SGHC 46 4 March 2022

The Singapore High Court granted a proprietary injunction and worldwide freezing injunction against Persons Unknown. It also granted ancillary disclosure orders against cryptoasset exchanges. This is the first reported decision from Singapore on this issue.

**Soleymani v Nifty Gateway LLC** [2022] EWHC 773 (Comm) 24 March 2022

Clare Ambrose QC (sitting as a Deputy High Court Judge) gave judgment on one of the first cases concerning the enforceability of an arbitration clause in a consumer contract involving a blockchain based NFT associated with an art work by the artist Beeple titled 'Abundance'. She granted a stay of all parts of the claim under section 9 of the Arbitration Act 1996 and made a declaration that the English Court had no jurisdiction to declare the arbitration clause unfair and not binding on the Claimant on the basis that it was a consumer contract. In reaching her decision the judge referred to her broad discretion under section 9 and the relevance of 'practical considerations' at [86].

The judge's conclusions were heavily fact-based, and ultimately only granted a stay until such questions such as enforceability were decided by the arbitrator. Further judgments on the

substantive issue of enforceability of arbitration clauses in terms of service or contracts involving digital assets directed at consumers in this jurisdiction will be necessary to provide guidance on this issue.

### **Tulip Trading II [2022] EWHC 667 (Ch) 25 March 2022**

On 25 March 2022 Mrs Justice Falk handed down her decision on applications by the 2<sup>nd</sup> to 12<sup>th</sup> and 15<sup>th</sup> and 16<sup>th</sup> Defendants challenging the jurisdiction of the Court in Tulip Trading [2022] EWHC 667 (Ch). The applications were made in response to claims based on breach of fiduciary and tortious duties made against them by TTL – a company incorporated in the Seychelles. Its CEO is Dr Craig Wright who is an Australian citizen who has been resident in England since 2015. None of the defendants were in the jurisdiction but the claims were brought against them as the core developers of four relevant digital asset networks who were obliged to assist the Claimant regaining control and use of its Bitcoin which had been stolen in an earlier hack of Dr Wright’s computer.

TTL’s case was that it was resident in England on the basis that the business was managed and controlled in England, that it was resident throughout the relevant period for the purposes of the dispute during which Dr Wright or his wife acted as CEO and that it had not carried on any business activity in the Seychelles.

Falk J agreed with the Defendants that permission to serve proceedings out of the jurisdiction should not have been granted to the Claimant. Falk J held that there was not a serious issue to be tried on the merits of the Claimant’s claims that the Defendants owed fiduciary duties to the Claimant or that those duties had been breached. Similarly Falk J held that the Claimant had no realistic prospect of establishing that the Defendants owed it a tortious duty of care.

In reaching her conclusion Falk J rejected the Claimant’s reliance on ‘policy considerations’ relating to assisting victims of fraud. She held at [133] that issues of policy cannot provide a foundation for the existence of a duty for which there is no arguable basis under existing law. She also referred at [135] to the Law Commission’s current project on digital assets. Whether the law

should be developed in this area was held to be a matter for the Law Commission and, if appropriate, Parliament.

Falk J indicated that TTL would have succeeded in establishing that its claims fell within gateways 11, 9(a) and 4A of PD6B. In particular, she endorsed Butcher J’s analysis of the situs of cryptoassets in *Ion Science*, being where their owner resides at [158]. However, because of her conclusion on ‘serious issue to be tried’ these observations were merely obiter.

## **OTC Member Updates**

### **Justina Stewart conducted a 2-week trial in the DIFC concerning Bitcoin Fraud**

In November and December 2021 Justina Stewart conducted a 2 week trial in the DIFC concerning a cryptocurrency fraud arising from the use of a Trezor wallet used to store Bitcoin being purchased by an individual from Huobi Mena FZC. Justina represented Huobi which brought claims against an intermediary which took custody of the wallet and failed to safeguard the Bitcoin during the transaction. The claims brought were for breach of contract, breach of a tortious duty of care, breach of fiduciary duty, breach of bailment and breach of regulatory obligations. Closing submissions were made in January 2022. Judgment is awaited.

### **Andrew Spink QC, Helen Pugh and Chloë Bell successful for Defendants to a Worldwide Freezing Injunction in major bitcoin fraud case**

On 3 March 2022 Helen Pugh (representing the Thirteenth Defendant) Andrew Spink QC leading Chloë Bell (representing the Fourteenth Defendant) in *Ellis v Digit Europe Ltd* successfully obtained the withdrawal of worldwide freezing injunctions and claims for fraud against their clients before the return date due to be heard by Mr Justice Jacobs on the same day in the Commercial Court. The claim was brought by a victim of a multi-million pound, complex fraud perpetrated by a web of persons unknown and sham companies purporting to offer bitcoin investment and management services. The hearing is thought to have been one of the first fully contested return dates for injunctions granted following a cryptoasset fraud.

## Other Notable Developments Relating To Cryptoassets

### Law Commission's Recommendations for Electronic Trade Documents and Bills of Lading

On 15 March 2022 the Law Commission published its recommendations for reform for electronic trade documents and bills of lading. This is the first phase of the Law Commission's work on digital assets. The Law Commission has recommended that a trade document in electronic form should be capable of being possessed providing certain criteria are met:

- a) The electronic document should be susceptible to exclusive control to avoid the 'double spending' of the trade documents;
- b) The electronic document should be fully divested on transfer; and
- c) A reliable system should be used to ensure that the criteria are satisfied.

Whilst the Law Commission has recommended that the concept of possession be extended to cover electronic trade documents, it has recognised that this may not be satisfactory for other digital assets. The Law Commission plans to publish a consultation paper with proposals for reform for other digital assets in the summer of 2022.

### Bank of England Financial Policy Committee Views on Systemic Stablecoins

On 24 March 2022 the Bank of England's Financial Policy Committee set out its views on systemic stablecoins. Its view is that a systemic stablecoin issued by a non-bank could meet its expectations (i.e. that the systems meet equivalent standards to those that apply for commercial bank money) provided the Bank applies a regulatory framework that is designed to mitigate the risks to financial stability. The Bank intends to consult on its proposed regulatory model for system stablecoins in 2023.

### FCA Notice to FCA regulated firms with exposure to cryptoassets

On the same day, 24 March 2022, the FCA published a notice 'reminding all regulated firms of their existing obligations when they are interacting with

or exposed to cryptoassets and related services'. In particular the FCA stated that:

- a) Firms are expected to ensure that consumers understand the extent of business that is regulated and that which is unregulated.
- b) Authorised and registered firms are expected to have appropriate systems and controls in place to avoid being misused for financial crime.
- c) Firms subject to the new investment prudential regime have obligations to assess and mitigate the potential for harm to clients, to the markets in which the firm operates and to itself, that could arise from all of their business. This includes cryptoasset businesses.
- d) Where cryptoassets are specified investments (i.e. security tokens), firms carrying out regulated activities involving custody of those assets are likely to be subject to the CASS regime.

### 'VARA' Law in Dubai

The Emirate of Dubai has published a new law that will create the Dubai Virtual Assets Regulatory Authority ('VARA'). Dubai Law No. 4 of 2022 on the Regulation of Virtual Assets in the Emirate of Dubai (Virtual Asset Law) was issued on 11 March 2022. VARA will be an independent entity affiliated to the existing Dubai World Trade Centre Authority. It has been tasked with preparing rules and regulations in respect of virtual assets, proposing legislation in respect of virtual assets and acting as a supervisory authority for virtual asset platforms and for the issuance and offering of virtual assets. Its regulatory scope however, does not include the financial services freezone or the DIFC.

The Virtual Asset Law follows the publication by the Dubai Financial Services Authority of Consultation Paper No. 143 on the Regulation of Cryptoassets in the DIFC.

## Events

**Chloë Bell** was among five barristers who advocated for the importance of significant cryptoasset fraud judgments in the last year at CFAAR's 'Barrister Bash' on 15 March 2022

**Justina Stewart** and **Chloë Bell** will be attending the

Offshore Alert Conference in Miami later this month which will have a particular focus on the recovery of digital assets

**Chloë Bell** is also due to be participating as a panellist in a number of forthcoming events:

- a) On 28 April 2022 she will be a panellist at the TL4 Tech on Fire Conference discussing the latest trends in Cryptocurrency Disputes
- b) On 29 June 2022 she is due to appear on a panel with Dani Haston from Chainalysis and Matt Green from Brandsmiths at the World Litigation Forum in Amsterdam. The panel is entitled 'A pre-action to enforcement analysis of a cryptoasset dispute'
- c) On 30 June 2022 she will participate in the TL4 Crypto in Disputes Conference in London

## More Information

To read more about Outer Temple's Cryptoasset services or any of the barristers mentioned in this article please visit:

<https://www.outertemple.com/expertise/commercial-litigation/fintech/>

Contact **Sam Carter** on +44 (0)203 989 6669 or **Matt Sale** on +44 (0)20 7427 4910 for more information.

Our experienced practice management team will be pleased to provide you with more details of our expertise in this area.

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