

New Legal Status of Cryptocurrencies under English Law

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Litigation

Recent developments have clarified the previously uncertain status of cryptocurrencies under English law. Two key court decisions and guidance released by the UK Jurisdiction Taskforce (UKJT) have determined that cryptocurrencies can be treated as property. This will have an impact on many areas of legal practice, as well as on clients working with cryptocurrencies in the technology and financial spheres, and those assessing their susceptibility to cybercrime.

What is ‘property’?

Although there is no comprehensive legal definition of ‘property’, the accepted approach consists of three elements. For something to be ‘property’, it must be: (1) definable; (2) identifiable, and therefore capable of assumption by third parties; and (3) have some degree of permanence or stability.

What are the issues with recognising cryptocurrencies as ‘property’?

The features of cryptocurrencies have given rise to a debate about their legal status. Cryptocurrencies are intangible, as they exist only within their electronic payment system. They require authentication by a digital signature in order to be transferred. Each transaction is entered onto a digital ledger—such as a blockchain—which can be decentralised and distributed across the network, so that no single user has responsibility for maintaining the ledger. The rules that govern transactions are established by consensus of the participants, and these rules are self-enforcing: only transactions that are compliant with these rules are accepted as valid.

How are cryptocurrencies ‘property’?

The inherent characteristics of cryptocurrencies mean that they do not easily fall within the legal definition of ‘property’. Although the first two elements of the definition can be quite easily satisfied by cryptocurrencies, the third element is potentially problematic for cryptocurrencies to fulfil. However, significantly, the UKJT’s statement has now clarified the position. Taking each of the three elements of the definition in turn:

1. Cryptocurrencies are ‘definable’ within their electronic payment system, and are identifiable to the person who owns them.
2. The cryptographic authentication process provides the requisite ‘control’ for the requirement that property must be ‘identifiable’.

3. Cryptocurrencies are as permanent as other financial assets, which exist until they are, for example, exercised or repaid. The UKJT statement recognises that the ‘stability’ requirement raises questions; this is pertinent in light of the volatility of Bitcoin in recent years. The UKJT is of the view that cryptocurrencies are sufficiently stable, at least within commercial systems with a significant number of participants and an established set of rules. While the UKJT’s statement is not binding on the English courts, it shows a move towards greater recognition, and potentially regulation, of cryptocurrencies.

What is the significance of recognising cryptocurrencies as ‘property’ ?

The ability of cryptocurrency to be defined as property is crucial, because proprietary rights are (in principle) recognised against the whole world. This is particularly important when seeking to recover stolen cryptocurrency, as these assets can now be treated in the same way as stolen money or other assets. This issue was considered in two recent English judgments.

In the first, *Robertson v Persons Unknown* (Unreported, 2019), Robertson’s intended investment of 100 bitcoins was misdirected by hackers, who had hacked the email account of the firm in which Robertson was investing. 80 bitcoins had been sent to a ‘wallet’ held by a leading cryptocurrency exchange. Robertson sought an Asset Preservation Order (APO) to prevent the hackers from spending or transferring the 80 bitcoins, as well as an order to permit the exchange to reveal the identity of the wallet owner.

Both orders were granted. The judge agreed that there was a serious issue in the proprietary claim Robertson had over the bitcoins, and prevented any dealings with the bitcoins. Importantly, this is all that is needed for an APO. Robertson initially applied for a broader freezing order, but the anonymity of the “persons unknown” and the lack of evidence as to their intentions meant that the higher bar for granting a broader order was not achieved.

In the second case, *AA v Persons Unknown & Ors, Re Bitcoin [2019] EWHC 3556 (Comm)*, a company’s computer systems were hacked and encrypted. The hackers demanded a ransom of \$950,000 in bitcoins, which was paid by the company’s insurer. The insurer then sought an order preventing the bitcoins from being further moved by the hackers. On the basis of the UKJT’s statement, and the decision in *Robertson*, the court decided that the bitcoins could be treated as property and therefore could be subject to such an order. Accordingly, the court granted the order sought by the insurer.

Practical implications for owners of cryptocurrencies

These two recent court decisions and the UKJT’s statement demonstrate that traditional legal definitions can be adapted by the English courts to encompass new concepts and business practices. These developments offer valuable clarity to clients in the crypto space over the treatment of cryptocurrencies by the English courts.

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These developments also provide reassurance to clients dealing with the misapplication of cryptocurrencies, including crypto-related thefts and hacks, as holders of cryptocurrencies now have enforceable rights over these assets. Owners of cryptocurrencies will now be able to use the same tools as they would for any other type of assets when seeking action from the courts for claims, such as orders to freeze the assets. Ancillary relief, in the form of disclosure orders for the provision of identification information, is particularly relevant in the crypto space: assets can be moved rapidly, making it essential to trace their location as quickly as possible. Such relief should now be available to owners of cryptocurrencies in the same way as for owners of other forms of property under English law.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our Litigation practice:

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