

# Crypto fraud: an evolving legal landscape

Simon Davison, Michael Goodwin QC & Tom Davies investigate the growing problem of crypto fraud



## IN BRIEF

► Recent regulatory and legal responses to the challenges provided in cryptocurrency related fraud.

There is considerable appetite to expand the regulatory perimeter beyond the, largely anti-money laundering (AML) focused, oversight which currently exists. On 24 March 2022, the Bank of England's Financial Policy Committee (FPC) set out how, in their view, 'as cryptoassets and DeFi [decentralised finance based on similar ledger-based technology to cryptocurrencies] grow and develop, enhanced regulatory and law enforcement frameworks are needed, both domestically and at a global level'.

The FPC's report goes much further than the government's current proposals around the promotion of cryptoassets. The Bank indicated an intention to subsume crypto technologies which perform an 'equivalent economic function' to those in the traditional financial sector within existing regulatory arrangements; emphasising the need to 'ensure an equivalent regulatory outcome'. This is a significant development which, when implemented, will have far-reaching implications for consumers and crypto-focused companies alike.

## Response at common law

Cryptoassets are arguably neither choses in possession; nor are they choses in action because they do not embody any right capable of being enforced by action (*AA v Persons Unknown* [2020] 2 All ER (Comm) 704, [2019] EWHC 3556 (Comm), [2020] 4 WLR 35 at [55]; *Colonial Bank v Whinney* (1885) 30 Ch D 261). An issue therefore arises as to whether cryptoassets may be the subject of proprietary injunctions. Although the Law Commission is currently consulting on the topic, the common law has been forced to grapple with this issue.

In *AA v Persons Unknown*, the claimant paid a ransom in Bitcoin and subsequently sought a Bankers Trust order, as well as proprietary injunctions to identify the perpetrators and freeze their assets. The

court adopted the 'Legal Statement' by the UK Jurisdiction Task Force (UKJT), which argued that English law was not limited to the two categories of property identified above. The court determined that 'crypto assets such as Bitcoin are property' and are 'capable of being the subject of a proprietary injunction'.

Furthermore, in *Ion Science v Persons Unknown* (Unreported, Commercial Court, 21 December 2020), Butcher J was satisfied that there was 'a serious issue to be tried that cryptoassets such as bitcoin are property within the common law definition of that term'.

However, some uncertainty was injected into the position in the case of *Fetch.ai Ltd v Persons Unknown* [2021] EWHC 2254 (Comm). HHJ Pelling, in finding the cryptocurrency transferred in that fraud was 'property' under English law, stated that cryptoassets were choses in action. It is respectfully submitted however that this is at odds with what was found in *AA*, and that the preferable view is that cryptocurrencies are a form of property recognised at common law which can be the subject of a proprietary claim or application. *AA* has since been cited by Fordham J in *DPP v Briedis and Reskajs* [2021] EWHC 3155 (Admin) at [10], and again more recently by Lane J in *Danisz v Persons Unknown* [2022] All ER (D) 107 (Jan), [2022] EWHC 280 (QB) at [13].

## Criminal perspective

The Theft Act 1968, Proceeds of Crime Act 2002 (POCA 2002), and Fraud Act 2006 all define property as including things in action and 'other intangible property'. Indeed, this fact formed part of the basis of the UKJT's decision adopted in *AA*. If there had been any doubt that cryptocurrency fell within the ambit of these Acts, *AA* has put the matter beyond doubt. Moreover, in the context of POCA 2002, Fordham J recently remarked that 'it would be a serious lacuna if cryptoassets fell outside the reach of this statutory scheme'. Such reticence to exclude cryptoassets from the criminal law sphere on the basis of the common law difficulties discussed above, appears recently to have

been echoed by the Court of Appeal in *R v Hunter* [2022] 1 Cr App R 13 at [98].

## Identifying perpetrators

Once suspect details are identified, then 'real world' asset tracing can be conducted by expert investigators. This can include investigating and recovering stolen crypto assets by conducting complex blockchain analysis to track and trace the funds, identifying properties, company holdings, and a whole host of other potentially enforceable assets.

The courts have readily applied the Bankers Trust and Norwich Pharmacal jurisdictions to identify crypto-fraudsters. In *Ion Science* the court accepted the argument that in a Bankers Trust order application the true identity of the alleged perpetrators of the fraud may never be known, the claimant would be left without any effective remedy, and that there was a real prospect that the exchanges against whom the order was made would lead to the location and preservation of the claimant's property. In *Fetch.ai*, the court adopted the same approach, also granting a Norwich Pharmacal order as the exchange in that case operated in the UK.

## Immediate future

It is expected that the common law landscape will continue to develop enabling the increased recovery of cryptoassets, as the regulatory framework continues to materialise over coming months. Criminal prosecutions and confiscation proceedings featuring cryptoassets have already taken place, and will increase in number. Private prosecutions relating specifically to cryptocurrency fraud are likely to start coming before the courts as private investigations increase in numbers and assets are recovered for those seeking public justice and wanting to deter fraudsters from attacking exchanges and individuals. **NLJ**

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