NORTON ROSE FULBRIGHT

Blockchain Law

Will England accept that digital assets are 'property'?

New York Law Journal

November 26, 2024 | By **Robert A. Schwinger**

To American lawyers it has been fairly obvious that digital assets are "property" for legal purposes, but the English have not been so sure. In fact, England has been so not sure that recently it felt compelled to introduce legislation to help resolve the point. And yet even then, this proposed legislation would not actually confirm that digital assets constitute "property," but rather just provide that it is not out of the question that they might.

Why have these two common law countries taken such different paths on such a seemingly basic question? What is going on in England?

The United States experience

In the United States, it has been treated almost as a given from the earliest days of cryptocurrency and other digital assets that they amount to a form of property. For example, as early as 2014, the Internal Revenue Service took the position that "[f]or federal tax purposes, virtual currency is treated as property." The IRS further stated that "[g]eneral tax principles applicable to property transactions apply to transactions using virtual currency." Notice 2014-21, 2014-16 I.R.B.

Early U.S. judicial decisions likewise viewed cryptocurrency as being property. See generally R. Schwinger, "Property and Contract in the Digital World," N.Y.L.J. (Mar. 16, 2020). In fact, one such case looked to the IRS's position to rule that stolen bitcoin is in fact a "property" loss under an insurance policy. *Kimmelman v. Wayne Ins. Grp.*, 2018 WL 7252940 (Ohio Ct. Com. Pl. Sept. 25, 2018). Various U.S. courts likewise have held that cryptocurrency can be the subject of claims for conversion. See generally R. Schwinger, "Ancient Torts and Modern Assets," N.Y.L.J. (Jan. 22, 2024).

Some states have enacted statutes clarifying the "property" status of virtual assets to more specifically identify them as "intangible personal property." See Nev. Rev. Stat. §361.228 (2019) (listing "virtual currencies" as "intangible personal property" exempt from taxation under Nevada law); Wyo. Stat. Ann. §34-29-102 (2021) (classifying "digital consumer assets," "digital securities," and "virtual currency" as "intangible personal property"). Idaho's 2022 Digital Assets Act states that "[d]igital assets are intangible personal property." Idaho Code Ann. §28-5304 (2022).

Robert A. Schwinger is a partner with Norton Rose Fulbright US. Sarah Perlin Gaffney, an associate in the firm's commercial litigation group, assisted in the preparation of this column.

England starts to struggle with the issue

Curiously, this issue that seemed so straightforward and obvious in the United States proved to be far more complicated under English law, where a good deal of academic and regulatory commentary began addressing the question of the "property" status of digital assets.

Some early English cases were willing to treat cryptocurrency as "property" at least in the context of preliminary requests in litigation for asset freezing and asset preservation orders. In *Vorotyntseva v. Money-4 Ltd (t/a Nebeus.Com) and others*, [2018] EWHC 2596 (Ch), for example, the court granted a freezing order over cryptocurrency at risk of dissipation, stating simply that there was not "any suggestion that cryptocurrency cannot be a form of property."

A similar well-known but unpublished ruling in *Robertson v. Persons Unknown*, CL-2019-000444, unreported (Engl. Comm. Ct. July 15, 2019), granted an asset preservation order over cryptocurrency. The court agreed that digital assets could be property, relying in part on the Singapore International Commercial Court's decision in *B2C2 Ltd v. Quoine Pte Ltd*, [2019] SGHC(I) 03 (Sing. Int'l Comm. Ct.), aff'd in part, rev'd in part on other grounds sub nom. *Quoine Pte Ltd v. B2C2 Ltd*, [2020] SGCA(I) 02 (Sing. Ct. App.), which after much analysis had held that Bitcoin was personal property that can be the subject of a trust.

Seeking greater clarity from a task force

Despite such cases, English legal authorities took the view that there was a legal and commercial need for greater certainty in this area. In 2019, the United Kingdom Jurisdiction Taskforce (UKJT), a task force established by the UK's LawTech Delivery Panel, was called upon for guidance. The UKJT ultimately issued its Legal Statement on Cryptoassets and Smart Contracts ("UKJT Statement") on Nov. 18, 2019, the first of several reports and statements in this area.

In a May 2019 "consultation paper" that preceded the UKJT Statement (see UKJT Statement, Appendix 1, Annex 1), the UKJT stated: "Many aspects of the status of cryptoassets as a matter of English private law are considered by some to be unclear. In particular, notwithstanding that a significant amount of work has been undertaken in relation to a number of these issues by various academic, professional and public bodies, it is understood to be of general concern to the market that an authoritative response be given to the questions of whether, and, if so, the circumstances in which, a cryptoasset may be characterised under English law as property."

The UKJT Statement asked directly: "Why does it matter if a cryptoasset is capable of being property?" It gave several answers: "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."

The difficulty English law faces when it comes to cryptoassets, said the UKJT Statement, arises "because it has been said that the law recognises as property only things in action and things in possession but not anything else," citing the decision in *Colonial Bank v. Whinney*, [1885] 30 Ch. D. 261 (Fry, L.J.) ("All personal things are either in possession or in action. The law knows no *tertium quid* between the two.").

As explained in the UKJT Statement, the term "things in possession" refers to "tangible" items capable of being "possessed." This requires "physical control of tangible objects." Thus, said the UKJT Statement, "[i]t is not enough that the private key gives practical control" over a digital asset.

The UKJT Statement also noted that the term "thing in action" likewise presents difficulties in regard to cryptoassets, because that term "is generally used to mean a right of property that can be enforced by court litigation, or action, such as a debt or contractual right." While "a cryptoasset may be linked to legal rights external

to the system, and . . . there may be rights against intermediaries, . . . in many systems the cryptoasset does not itself embody any right capable of being enforced by action."

These principles could then lead to the argument "that if a cryptoassets is neither a thing in possession nor a thing in action then it cannot be property at all." But the UKJT Statement noted some countervailing considerations. It noted that the term "thing in action" has in fact "been used more broadly as a kind of 'catch-all' to refer to any property that is not a thing in possession," and for which term "a precise and comprehensive definition . . . is elusive."

It also suggested that to read *Colonial Bank* as limiting "property" to just two rigidly confined categories "requires reading far more into [the judge's] statement than he could have intended," adding "[o]ne must also be cautious in seeking to apply a 19th century decision to a kind of asset that could not then have been imagined."

The UKJT Statement stated that in fact "[t]here is no general or comprehensive definition of property in statute or case law." However, it did also note "an important and authoritative description of the necessary characteristics of property" that was offered in *National Provincial Bank v. Ainsworth*, [1965] AC 1175. Under that decision, said the UKJT Statement, that for something to qualify as "property, "it must be *definable, identifiable by third parties*, capable in its nature of assumption by third parties, and have some degree of *permanence or stability*."

Using these factors as a guide, the UKJT Statement concluded "that cryptoassets possess all the characteristics of property set out in the authorities," and that therefore "cryptoassets are therefore to be treated in principle as property." While "the courts have historically been reluctant to treat information in itself (as opposed to the medium in which it is recorded) as property," the UKJT Statement took the view that such assets should not be "disqualified from being property on the ground that they constitute information," although stating that "a private key is not in itself to be treated as property because it is information."

AA v. Persons Unknown

However thoughtful and well-considered the UKJT Statement may have been, it did not constitute binding law. Thus, the same issue of the property status of digital assets arose in *AA v. Persons Unknown*, [2019] EWHC 3556 (Comm), shortly after the UKJT Statement was issued.

The anonymous plaintiff in this case sought to recover a ransomware payment it had made in Bitcoin, and sought a freezing injunction as to the Bitcoin held in accounts of the unknown defendants to which its payment had been traced. In deciding whether to issue such relief, the court was thus faced with the question of "whether or not in fact the Bitcoins" at issue in the case constituted "property at all."

The court noted that, "[p]rima facie there is a difficulty in treating Bitcoins and other crypto currencies as a form of property: they are neither chose in possession nor are they chose in action," citing the "difficulty" posed by how "English law traditionally views property" under *Colonial Bank v. Whinney*. "On that analysis Bitcoins and other crypto currencies could not be classified as a form of property."

But the court then looked to the just-published UKJT Statement. While noting that it was "not in fact a statement of the law," the court found it "relevant to consider" as "it is a detailed and careful consideration" and its "analysis as to the proprietary status of crypto currencies is compelling."

The court ultimately agreed with the UKJT Statement, holding that "it is fallacious to proceed on the basis that the English law of property recognises no forms of property other than choses in possession and choses in action." The court noted that cryptoassets "meet the four criteria" of "property" identified in *National Provincial Bank*. It also pointed to the earlier rulings in *Vorotyntseva and Robertson* to further support its holding. It thus concluded "for the purpose of granting an interim injunction in the form of an interim proprietary injunction . . . crypto currencies are a form of property capable of being the subject of a proprietary injunction."

The Law Commission steps in

While these early developments may have seemed promising, apparently the English legal community did not see them as sufficient to settle matters. In 2020, England's Ministry of Justice enlisted the Law Commission to examine English law on digital assets and make recommendations for reform to ensure that English law could accommodate digital assets and allow the possibilities of this technology to flourish. This led to a multi-year project in response, in which the Law Commission would issue a number of reports and recommendations.

On July 28, 2022, the Law Commission issued its Digital Assets Consultation Paper, a massive 549-page document addressing a wide range of areas. It covered not just digital assets and crypto-tokens but also such things as domain names, e-mail accounts, digital files and carbon emission trading schemes, among others.

Similar to the UKJT Statement, the Consultation Paper acknowledged that digital assets do not squarely fit within the two traditional categories of personal property noted in *Colonial Bank v. Whinney*. The Law Commission noted that "recent case law . . . suggests that the law is moving towards the recognition of a third category of personal property, distinct from both things in possession and things in action," but added that "the position remains uncertain."

The Law Commission therefore "provisionally propose[d] law reform to remove that lingering uncertainty," agreeing with the conclusion of the UKJT Statement that "*Colonial Bank v. Whinney* is not good authority for limiting the scope of the categories of personal property generally." Rather, "it is now appropriate for the law of England and Wales to recognise that certain digital assets fall within a third category of personal property" that is "distinct from both things in possession and things in action" but nevertheless "clearly constitute 'property' for various legal purposes."

Disdain for the American approach

In reaching its conclusions, the Consultation Paper took a look at how U.S. courts have dealt with the "property" status of digital assets. But the Law Commission took a rather dismissive view of what it considered a lack of analytical rigor in the American approach: "While US case law has repeatedly affirmed that crypto-tokens can attract property rights, this finding has often taken place in the context of a specific statutory definition or right of action. In other words, the US courts have tended not to ask fundamental but abstract questions as to the nature of personal property rights with respect to crypto-tokens. Instead, they generally focus on more functional questions, such as whether crypto-tokens can be the subject matter of a specific cause of action or remedy or whether they trigger a specific regulatory perimeter." (Quotations and footnotes omitted).

The Law Commission derided this process as "backwalking from a specific issue into a fundamental one," but it "recognise[d] that the approach brings the value of pragmatism and inductive reasoning from real-world experience." (Quotations and footnotes omitted). While noting that "these cases suggest that the US courts are comfortable in treating new things as capable of attracting property rights," the Law Commission objected that "there is little uniform, general legal theory to support this."

Instead, the Law Commission expressed the desirability of having a "general legal categorisation of 'digital assets' within US legal theory." It added: "Such principles-based clarity is perhaps particularly helpful in a jurisdiction in which legal precedent is developed through a combination of fragmented, state-by-state statutory reform, common-law precedent and policy-led regulatory enforcement decisions and settlement negotiations."

Implementing the English solution

In June 2023, the Law Commission issued its Final Report: Digital Assets, a 304-page report in which, despite its length (and indeed the length of its predecessor Digital Assets Consultation Paper), the Law Commission "ma[de] very few recommendations for law reform" because ultimately it "conclude[d] that the common law of England and Wales is, in general, sufficiently flexible, and already able, to accommodate digital assets." The Law Commission thus suggested that "any law reform should be through further common law development where possible" and "recommend[ed] targeted statutory law reform only to confirm and support the existing common law position, or where common law development is not realistically possible."

Therefore, the Final Report recommended "legislation" that "will confirm and support the existing common law position" that, "although some digital assets are not easy to place within traditional categories of things to which personal property rights can relate, this does not prevent them from being capable of attracting personal property rights." Rather than "define in statute the hard boundaries" of a "third category of things," the Law Commission instead "conclude[d] that the common law is the better vehicle for determining those things that properly can (and should) be objects of personal property rights and which fall within the third category," which it dubbed "third category things."

The 'Property (Digital Assets etc) Bill'

Accordingly, at the request of the Ministry of Justice, the Law Commission drafted a bill that would put the Law Commission's recommendation into effect. A draft "Property (Digital Assets etc) Bill," 2024 HL Bill 31 ("Bill"), was presented to the House of Lords on Sept. 11, 2024. This operative provision of this very short Bill stated simply: "Objects of personal property rights: A thing (including a thing that is digital or electronic in nature) is not prevented from being the object of personal property rights merely because it is neither— (a) a thing in possession, nor (b) a thing in action."

The Bill notably does not affirmatively state that any particular kind of digital asset legally qualifies as "property." Rather, as set forth in the accompanying Explanatory Notes for the Bill, 2024 HL Bill 31-EN, by refusing to "confirm the status of any particular type of thing (including a crypto-tokens) as the object of personal property rights," the Bill leaves such matters "to development by the common law," since "[p]ersonal property rights are traditionally creatures of common law," which "allow[s] for a highly nuanced and flexible approach which is not possible to achieve in statute." The Bill "is intended only as means of 'unlocking' the development of the common law by removing the uncertainty stemming from *Colonial Bank v. Whinney*."

Back to the English courts: *D'Aloia v. Persons Unknown*

Only a day after the Law Commission unveiled its draft of the Bill, the High Court, in *D'Aloia v. Persons Unknown*, [2024] EWHC 2342 (Ch), looked to the draft Bill to support its holding that the Tether stablecoin USDT should qualify as "property" under English law.

The plaintiff in *D'Aloia* sought return of certain USDT that he alleged had been fraudulently misappropriated by a cryptocurrency exchange. The court pointed to previous cases, such as *AA v. Persons Unknown*, and *Tulip Trading v. Van Der Laan*, [2023] EWCA Civ 83 (which had cited *AA* to hold in passing that "a cryptoasset such as bitcoin is property"), as well as to the discussions in the UKJT Statement and the Law Commission's Digital Assets Final Report, to support the conclusion that digital assets can constitute "property" under English law.

The court acknowledged that ideally "the question of whether to recognise property rights attaching to crypto-assets is better left to Parliament." Observing that digital assets "give rise to a range of considerations ranging from money laundering to climate change," the court acknowledged concerns that "courts lack the institutional competence" to make decisions about their "property" status.

But the court stated: "If I were to conclude that . . . USDT should not be considered to be property because there are public policy concerns that I am not well placed to consider, I would not be maintaining the status quo until Parliament acts. I would be making a positive finding that . . . [the claimant] had no property that I was prepared to recognise. And I would be doing so on the basis that there may be concerns of a type that, if they existed, [have been argued that] I would lack the institutional competence to consider."

Moreover, the court noted there was no guarantee Parliament would ever address these concerns. It cited the Bill itself in illustration, noting that the Bill "does not seek to say whether crypto-assets, or certain classes of them, are property" but merely "clarifies that something can be property that is neither a chose in action nor a chose in possession." Thus, even if enacted, the Bill would simply hand the issue back to the courts.

Faced with these circumstances, the court ultimately held that "USDT, while neither a chose in possession nor a chose in action, is capable of attracting property rights for the purposes of English law."

Conclusion

Looking at where things now stand, the ultimate lesson of this complicated and still not completed English saga of trying to resolve a very basic legal issue as to digital assets may prove to be irony.

After issuing hundreds of pages of reports on the issue, and decrying the United States for simply addressing this issue through case-by-case common law adjudications without any overarching analytic framework, England now seeks to endorse proceeding on this issue through case-by-case common law adjudications, in the way illustrated in *D'Aloia* and the digital asset cases that came before it.

What's more, England now seeks to formalize proceeding in this way by passing a bill that will authorize its courts to dispense with the kind of *Colonial Bank v. Whinney* analytic framework that its Law Commission previously decried the United States for not having.

In short, what's old is new. It apparently turns out that, on reflection, "pragmatism and inductive reasoning from real-world experience," as the Law Commission's Digital Assets Consultation Paper characterized the American approach to digital assets, might not be so bad after all.