KEY POINTS

- The impact of s 53(1)(c) of the Law of Property Act 1925 (LPA) appears to have been overlooked in cases where cryptocurrencies have been found to be held on express trust for multiple co-owners.
- Section 53(1)(c) requires a disposition of an equitable interest under a subsisting trust to be in writing and signed by a person disposing of it or his agent or by will.
- It is difficult to see how any interest in a fraction of an undifferentiated, unidentifiable unit of cryptocurrency can be held as "property" without there being some kind of tenancy in common.

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Virtual property as trust assets and investments

Following a number of recent decisions, it now seems reasonably settled that digital assets such as cryptocurrencies will as a matter of law be regarded as "property". One consequence is that cryptocurrencies can be the subject of a trust and may be held as investments. However, the unique features of digital assets give rise to a number of problems on which there is little authoritative guidance. The impact of s 53(1)(c) of the Law of Property Act 1925 (LPA), in particular, appears to have been overlooked in cases where cryptocurrencies have been found to be held on express trust for multiple co-owners.

DIGITAL ASSETS AS PROPERTY

Some sceptics argue that cryptocurrencies are akin to a pyramid scheme, citing Dogecoin as an example of a cryptocurrency that was explicitly started as a joke.[1] On the other hand, only four months after that article was published, El Salvador became the first country to adopt Bitcoin as legal tender.[2]

The courts have so far taken the view, consistently with the view of most commentators, that cryptocurrencies are, or at least can be, a form of property.[3] In a number of cases, freezing orders have been granted: for example, it was held in *AA v Persons Unknown* [2020] 4 WLR 35 that a cryptocurrency may be the subject of a proprietary injunction.

Settlors, advisers, and investment managers, as well as academics, have for some time been considering the potential as well as the problems of investing in digital assets.[4] But there remains uncertainty as to the precise legal nature of the property rights associated with such assets: there are a number of questions, both theoretical and practical, that have yet to be worked out.

Because there is no centralised issuer of the cryptocurrency unit, it is very difficult to identify, in legal terms, where the asset is, or to define exactly what it is that the purchaser actually "has". Access to, and control of, a unit or part of a unit of cryptocurrency is commonly dependent on the holder having a unique string of computer code that operates as a "private key", which may be stored in a digital "wallet", either on a computer or on a special kind of USB memory stick. But the key is not itself the asset. The asset is a sequence of computer code to which all the computers that participate in the particular cryptocurrency have access, and which all the other participants recognise as having a value that they are willing to trade. They accord it value not because it is underwritten by any tangible assets or any authority, but because the technology that it is a part of is trusted as being sufficiently robust and reliable.

A CHOSE BY ANY OTHER NAME

Traditionally it has been thought that all personal property must be either a "chose in possession" or a "chose in action". The dictum of Fry LJ in *Colonial Bank v Whinney* (1885) 30 Ch. D. 261 has been widely quoted:

> "… all personal things are either in possession or in action. The law knows no *tertium quid* between the two."

Yet cryptocurrencies are neither things in possession (as they are intangible), nor are they things in action (as there is no-one against whom a right can be asserted). This did not prevent Bryan J in *AA v Persons Unknown* [2020] 4 WLR 35 from concluding that:

> "… I consider that crypto assets such as Bitcoin are property."

The definition of property that has been adopted as the starting-point for almost every examination of the question is the statement by Lord Wilberforce in *National Provincial Bank v Ainsworth* [1965] 1 AC 1175:

> "… before a right or an interest can be admitted into the category of property, or of a right affecting property, it must be definable, identifiable by third parties, capable in its nature of assumption by their parties and have some degree of permanence or stability."

But this definition is not exhaustive: milk quotas and emissions allowances have been held to be property, although they do not fall within this definition: *Swift v Dairywise Farms Ltd* [2000] 1 WLR 177; *Armstrong DLW GmbH v Winnington Networks Ltd* [2013] Ch 156).

The *Ainsworth* definition was applied in the Singapore case, *B2C2 v Quoine* [2019] SGHC(I) 03. The defendant, Quoine, was a currency exchange platform. A series of overnight trades were executed by an electronic trading algorithm operated by Quoine. These trades resulted in a contract between computers (with no human intervention) at a price approximately 250 times the then going market rate, producing a windfall for the claimant, B2C2, of about US$30m. The following day, Quoine purported to reverse the contract on the grounds of mistake. B2C2 sued for breach of contract and/or breach of trust.

At first instance the judge upheld both claims. He declined to order specific performance, and instead made an order for damages to be assessed. The Singapore Court of Appeal upheld the decision with regard to breach of contract, but held that no trust could have arisen "even assuming that the BTC could be the subject of a trust" because there was no certainty of intention to create a trust: *Quoine Pte Ltd v B2C2 Ltd* [2020] SGCA(I) 02.

At first instance, *B2C2 v Quoine* dealt only briefly with the question whether bitcoin was a form of property. The judge simply said that cryptocurrencies met all the requirements laid down in *Ainsworth*; it was unnecessary to analyse this further as Quoine accepted that they may be treated as property "in a generic sense". The judge left open "the precise nature of the property right". Quoine raised the issue on appeal, but again there was no detailed analysis. The Court of Appeal said:

> "There may be much to commend the view that cryptocurrencies should be capable of assimilation into the general concepts of property. There are, however, difficult questions as to the type of property that is involved. It is not necessary for us to come to a final position on this question in the present case. This is because even if BTC were to be regarded as a species of property which is capable of being the subject of a trust, we are satisfied that B2C2's breach of trust claim would fail because, contrary to what the Judge found, we consider that there was no certainty of intention to create a trust."

Similarly, in what appears to be the earliest English cryptocurrency case, there was no "suggestion that cryptocurrency cannot be a form of property or that party amenable to the court's jurisdiction cannot be enjoined from dealing in or disposing of it": *Vorotyntseva v Money-4 Limited t/a Nebeus.com & Ors* [2018] EWHC 2596(Ch).

Two earlier cases had previously come before the Supreme Court of British Columbia. The first, *Shair.Com Global Digital Services Ltd v Arnold* [2018] BCSC 1512, was an application for a preservation order and a Mareva injunction. Without any analysis, the judge held that the plaintiff had a "proprietary interest in the property in issue", namely a laptop computer "and in any digital currencies purchased by the defendant flowing from the plaintiff's initial purchase of $18,500 investment in Bitcoin".

In the second, *Copytrack Pte Ltd v Wall* [2018] BCSC 1709, the plaintiff had mistakenly transferred 530 Ether Tokens (worth about $495,000) to the defendant in place of an equal number of CPY Tokens (worth only $780). The plaintiff claimed the return of the tokens, based on the premise that they were "goods". The judge held that they were not, although there was insufficient evidence to decide how they should properly be characterised. He nevertheless gave summary judgment, holding that the plaintiff was entitled to have the tokens returned.

The most detailed judicial consideration to date of the legal nature of cryptocurrencies was in *Ruscoe & Moore v Cryptopia Limited (in liquidation)* [2020] NZHC 728, in the High Court of New Zealand. Cryptopia was a cryptocurrency exchange whose servers were hacked; cryptocurrencies of various denominations were stolen, valued at around NZ$30m. Shortly afterwards, Cryptopia went into voluntary liquidation, whereupon the liquidators sought the directions of the court as to (*inter alia*) the legal status of the digital assets still held by them. In particular, they asked whether the various cryptocurrencies constituted "property" as defined in s 2 of the Companies Act 1993 (CA); and whether any or all of them were held on trust for the account holders.

The judge concluded that all of the various cryptocurrencies under consideration were "property" within the definition outlined in s 2 of the CA "and also probably more generally" – adding that they were also capable of forming the subject matter of a trust. The more difficult question, which I will turn to next, was whether, on the facts of that case, a trust had indeed been created; and if so, over what assets.

CO-OWNERSHIP: BENEFICIAL SHARES IN FRACTIONS OF CRYPTOCURRENCY UNITS

The value of cryptocurrencies can fluctuate wildly, but at the present rate (25 November 2021) one bitcoin is worth over £43,000. However, transactions are generally conducted not in whole units, but in shares or fractions of a unit, or in non-integer multiples of a unit. Moreover, bitcoins are not individually identifiable: unlike banknotes, they do not have a unique serial number. It is thus possible to own, say, 0.25% of a bitcoin, but to be unable to say *which* bitcoin it is 0.25% of. I will return to this point later.

The abstract nature of a quantity of cryptocurrency has given rise to the question whether such a share can satisfy the requirement that the subject-matter of a trust must be identified with sufficient certainty. This question arose in the *Cryptopia* case, where there were insufficient assets to satisfy both Cryptopia's account holders and its creditors, giving rise to a problem of priorities.

The cryptocurrencies allocated to individual account holders were not segregated into separate "wallets", nor were they separated from Cryptopia's own cyptocurrency holdings. The account holders argued that their individual accounts were held in trust, while the creditors argued that there was no trust, relying in particular on *Re Goldcorp Exchange Limited (in receivership)* [1995] 1 AC 74. That case concerned unallocated gold bullion. The Privy Council held that a proportion of a fluctuating stock of gold was insufficiently identifiable to constitute the subject-matter of a trust. It would have been possible for a vendor to declare itself trustee of the whole of its current stock in proportion to the relevant shares; but that would have inhibited dealings with it and therefore cannot have been what was intended. A similar result was reached in *Re London Wine Co (Shippers) Ltd* [1986] PCC 121.

The judge in *Cryptopia* decided that:

> "On the question whether any or all of these digital assets are held on trust from accountholders, the answer is yes, they are *all* held by way of express trusts." (emphasis in the original).

He distinguished *Goldcorp* on the ground that *Goldcorp* was a Sale of Goods case concerning tangible property, whereas

Cryptopia concerned intangible assets.

It is not obvious that this is a satisfactory distinction. Neuberger J nevertheless adopted the same argument in *Re Harvard Securities Ltd* [1998] BCC 567 (while saying that he was "not particularly convinced by the distinction") to distinguish between *Goldcorp* and *Hunter v Moss* [1994] 1 WLR 452, in which the English Court of Appeal had held that a declaration by the defendant that he would "henceforth hold five percent of the [issued shares in the company] either for, or in trust for, the plaintiff" was a valid declaration of trust.

The fact mentioned above, that bitcoins are not individually identifiable, creates another difficulty. Not only is the holder of an amount of bitcoin unable to point to his share; he cannot even point to anything identifiable of which his share is a part. And if he is a beneficial co-owner of a measurable fraction of an unidentifiable bitcoin, who are the other co-owners? In this respect, the analogy with cases such as *Re Harvard Securities*, where there was a valid declaration of trust over a proportionate share of an identifiable block of registered shares, breaks down.

In the most recent decision, *Wang v Derby* [2021] EWHC 3054 (Comm), it was common ground between the parties that the "entirely fungible character and non-identifiable status" of cryptocurrency did not prevent it from being the subject matter of a trust. It is not clear why this concession was made, and the point remains problematic.

DISPOSITIONS OF AN INTEREST UNDER A TRUST: LPA 1925 s 53(1)(C)

The finding that the cryptocurrencies in *Cryptopia* were held on express trusts invites the question: how could they be transferred? Section 53(1)(c) of the LPA 1925 requires a disposition of an equitable interest under a subsisting trust to be in writing and signed by the person disposing of it or his agent, or by will. New Zealand has an identical provision: Law of Property Act 1952, s 49A(3), inserted by the Law of Property Amendment Act 1980.

The requirement of a signature might be satisfied by a digital signature, but what of the requirement that the disposition is "in writing"? This problem was not addressed in *Cryptopia*. Indeed, it is difficult to see how any interest in a fraction of an undifferentiated, unidentifiable unit of cryptocurrency can be held as "property" without there being some kind of tenancy in common. But unless the cryptocurrencies are held by an exchange, as they were in *Cryptopia*, there is no obvious candidate to be the trustee.

The present state of the authorities on the requirement of certainty of subject matter in relation to shares of intangible assets is unsatisfactory. *Hunter v Moss* is criticised in *Underhill & Hayton* (19th edn., (2017), [8.17] et seq.) but the editors of *Lewin* on *Trusts* consider the validity of that case to be clearly established (while also noting that its reasoning has been rejected in Australia): paras 3-006/007. It may well be that the conclusions reached in *Cryptopia* and *Re Harvard Securities* are right, but the reasoning is difficult to reconcile with general principles.

JURISDICTION AND *LEX SITUS*

The *situs* of choses in action is often problematic: as the editors of *Dicey, Morris & Collins* (para 22-025) point out, "something with no physical existence can hardly have a location in space; nevertheless, the courts have evolved rules under which a situs is ascribed to choses in action of different kinds in order to apply legal rules originally developed for tangible property". Examples include debts, letters of credit, judgment debts, negotiable instruments, interests in the estates of deceased persons, and shares in companies.

The identification of the *situs* of a cryptocurrency was considered in the most recent English case, *Ion Science Limited v Persons Unknown* (Unreported) 21 December 2020, in which Butcher J granted a proprietary injunction and a worldwide freezing order over digital assets, namely "the bitcoin or traceable proceeds thereof". There was no decided case that had addressed the question of *situs*. Butcher J concluded that the *lex situs* of a cryptocurrency was the place where the person or company who owns it is domiciled, following the analysis of Professor Andrew Dickinson in 'Cryptocurrencies and the Conflict of Laws', in *Cryptocurrencies in Public and Private Law*.

It is unlikely that this will be the final word on the difficult problem of *situs* in relation to cryptocurrencies. How would the rule operate in a case where the ownership of the cryptocurrency is disputed by claimants in different jurisdictions? The decision in *Ion Science* was interlocutory and contained no discussion beyond the reference to Professor Dickinson's chapter, which proposes an analogy with goodwill.

Butcher J also had to identify the proper forum "… in the case of a persons unknown claim it is obviously difficult to identify another forum, but here in addition to that simple point that the claimants are domiciled in England and Wales, the relevant funds were transferred from England and Wales, *the relevant bitcoin are or certainly were located in England and Wales* and also the documents are in English and the witnesses are based in England, at least on the claimants' side. For all of those reasons, I am satisfied for the purposes of this application that it has been shown that England is the proper forum for the trial of the claimants' claims" (emphasis added).

Although the result is eminently sensible and practical, the statement that "the relevant bitcoin are or certainly were located in England and Wales" is surely open to question: in what sense can bitcoin be said to be "located" anywhere?

TAXATION

Despite an early suggestion that buying and selling cryptocurrencies might be regarded as so speculative as to amount to gambling, and therefore be non-taxable, HMRC's internal Cryptoassets Manual (Manual) now makes it clear that Capital Gains Tax is likely to apply:

> "In the vast majority of cases, individuals hold cryptoassets as a personal investment, usually for capital appreciation or to make particular purchases. They will be liable to pay Capital Gains Tax when they dispose of their cryptoassets."

It thus appears that HMRC is untroubled by any metaphysical doubts about whether or not cryptocurrencies are or are not "property";

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they are plainly "assets" for the purposes of s 1 of the Capital Gains Tax Act 1979.

The Manual also states that individuals will be liable to pay Income Tax and National Insurance contributions on cryptoassets that they receive from their employers (as a form of non-cash payment) or from "mining, transaction confirmation or airdrops". The Manual says nothing, however, about the payment of Income Tax on interest on cryptocurrency holdings. This may be because bitcoin does not generate any income, but it is notable that it is possible to earn interest on other forms of cryptocurrency, such as, for example, Ethereum. It is unlikely that this apparent lacuna will enable trusts to earn investment income free of tax, but trustees and other institutional investors will have to consider how such income is to be reported.

CAN TRUSTEES INVEST IN CRYPTOCURRENCIES, AND IF SO, SHOULD THEY?

Section 4(3)(b) of the Trustee Act 2000 requires trustees to have regard to the standard investment criteria, including "the need for diversification of investments of the trust, in so far as is appropriate to the circumstances of the trust". This is framed as a duty to consider diversification, not a duty to diversify as such. Nevertheless, the question arises:

> "Should trustees invest in cryptocurrencies, or at least consider doing so?"

Cryptocurrencies are currently too volatile and speculative to be regarded as a sound, or even plausible, trust investment. But it is not difficult to envisage a future, possibly not too distant, in which a trust, particularly one of sufficient size, could reasonably consider including at least an element of exposure to a potentially valuable investment. Of course, risk must be balanced against security, but there is no reason why a trust should not include a very high-risk investment in a balanced portfolio. And if and when central banks start to issue digital currencies (see the next section below), the investment landscape will look very different.

Trustees not only have a duty to consider diversification of investments, but also to balance the interests of income and capital beneficiaries. To the extent that some cryptocurrencies offer the potential only of capital growth, with no income, that would militate against adopting them as an investment. But there now exist opportunities to generate income as well as capital from at least some forms of cryptocurrencies.

It is therefore suggested that, although the time has not yet arrived, trustees should start to keep a careful eye on developments in this area. In the case of trustees of UHNWI (Ultra High Net Worth Individuals) settlements in particular, there may be opportunities to make significant gains from relatively modest investments.

CENTRAL BANK DIGITAL CURRENCIES?

The next development is quite likely to be the creation of government-backed digital currencies. In March 2020 the Bank of England issued a Discussion Paper to consider Central Bank Digital Currency[5] and on 19 April 2021 the Treasury announced that it was setting up a taskforce to consider this possibility. A similar project is under consideration in the US.

It is not clear whether such official digital currencies would be based on DLT or some other technology. The Discussion Paper states:

> "Although [CBDC] is often associated with Distributed Ledge Technology … we do not presume [CBDC] must be built using DLT. Most existing payment systems are run on centralised technology stacks, and there is no reason [CBDC] could not also be built in this way. However, DTL includes a number of potentially highly useful innovations, which can potentially be adopted independently of each other, allowing us to use the specific features of DLT which are most relevant and appropriate, without using DLT in its entirety."

If such official cryptocurrencies were to become a (virtual) reality, it would be surprising if this did not have an impact on the perceived respectability of cryptocurrencies generally. In those circumstances, it would surely not be long before trustees start to consider them as a part of a balanced investment portfolio.

CONCLUSION

One of the strengths of the common law is its ability to adapt to new ideas and changing commercial realities. Just as *Salomon v Salomon* [1897] AC 22 recognised the legal reality of artificial corporate "persons", so the recognition of imaginary "virtual money" is potentially transformative. The law relating to cryptocurrencies is developing rapidly, but it is suggested that it is struggling to accommodate some of their unique features. The authorities are not wholly consistent, and they leave a number of questions unanswered. It may be that legislation will ultimately be needed to give a coherent structure to the law of what is, in effect, an entirely new kind of property: a Law of Virtual Property Act? In the meanwhile, trustees need to be thinking about the novel and interesting challenges they present. ■

1 'Dogecoin gives away the crypto game', Jemima Kelly, *Financial Times*, 11 May 2021.
2 *The Times*, 4 September 2021.
3 See, for example, *Bridge, Gullifer, Low & McMeel on The Law of Personal Property* (2018) 2nd edn., 7-028.
4 See, for example, *The 'New' New Property: Dealing with Digital Assets on Death*, Conway & Grattan, In H Conway, & R Hickey (Eds.), *Modern Studies in Property Law*, Volume 9 (1st ed., pp 99-115), Hart Publishing, Oxford.
5 Central Bank Digital Currency: Opportunities, challenges and design.

Further Reading:

- Does *situs* actually matter in disputes involving bitcoin? (2021) 4 JIBFL 269.
- Intermediated cryptos: what your exchange-hosted wallet really holds (2020) 8 JIBFL 540.
- LexisPSL: Banking & Finance: Cryptoassets and custody: the elephant in the room.