Is crypto property? A simple question with a complex answer

Overview

1. The Law Commission published a report in July 2024 titled "*Digital assets as personal property*". It proposed a draft Bill to recognise cryptocurrency and cryptoassets ('*crypto'*, for brevity) as property. This Bill is 'the Property (Digital Assets etc.) Bill', which was introduced in the House of Lords on 11th September 2024.[1]

2. Political developments show the Report was well-timed. The Chief Executive of Binance hailed the re-election of Donald Trump as heralding a new "golden era" for crypto. That turn of phrase was apt; after all, bitcoin surged in value by some 1,900% in Trump's first term and has substantially increased since his re-election.

3. Little wonder that the legislature and courts also now take a keen interest in crypto. The difficulty is that crypto is unlike any 'traditional' type of property. Some doubt whether it qualifies as 'property' at all. This uncertainty is what the Law Commission sought to address.

4. This article will summarise the key points arising from the Law Commission Report. It will then summarise practical examples from the courts where the issue of crypto as property has arisen.

What is 'property'? A summary of law and jurisprudence as it stands

5. This is a question that does not arise in most criminal or civil cases involving fraud or the misappropriation of property. It is worth recapping the basic principles of 'property'. Strictly speaking, 'property' as a legal concept does not mean a thing itself. It describes the legal *relationship* between a person and a thing (or '*chose'*). A thing is 'property' because someone could have rights over it. Some things qualify as property, others cannot do so.

6. One may ask why it matters whether crypto, or any other thing, is definable as property. The answer is it matters because it affects the extent to which courts can rule on rights exercised over that thing. If crypto is 'property' then it can be the subject of claims, orders, and judgments. As just one example, a liquidator appointed under the Insolvency Act 1986 must apply the property of a company to satisfy its debts. If crypto qualifies as 'property' then it becomes relevant to that duty.

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[1] The long title of the Bill is "A Bill to make provision about the types of things that are capable of being objects of personal property rights."

7. With regards to crypto, the Law Commission recognised that the legislature had already taken steps to recognise it as a form of property. The Economic Crime and Corporate Transparency Act 2023 ('ECCTA') extended confiscation and forfeiture powers to cover crypto.[2] In criminal confiscation proceedings, crypto (predominantly bitcoin) frequently features and can certainly be comprised in the benefit figure or available amount. It is treated similarly to any other currency, with the exchange rate at the time of the order being applicable.

8. A consultee to the Law Commission Report, however, observed that the extension made by ECCTA had been done "*for the very specific purpose of confiscation. In contrast, the draft Bill has a much more general scope and effect*" [§3.76].

9. Before setting out the draft Bill, the Law Commission Report summarised some of the qualities that a thing must have to qualify as property. In this regard, it cited the judgment of Lord Wilberforce in *National Provincial Bank v Ainsworth* [1965] AC 1175, §§1247 – 1248. The Law Commission itself suggested other qualities like 'excludability' and 'value' [§2.21].

10. The Law Commission Report also referred to the judgment of Fry LJ in the older authority *Colonial Bank v Whinney* (1886) 11 App. Cas. 426. Fry LJ divided things into two categories: "*[a]ll personal things are either in possession or in action. The law knows no tertium quid [third thing] between the two.*" The Law Commission suggested that this bifurcation "*is almost certainly no longer correct*". Be that as it may, Fry LJ defined the two traditional categories of property:

    a. **Things in possession**: Capable of possession and usually tangible, moveable, and visible. They can be voluntarily given to someone else or taken without consent (*e.g.* by theft). Possession gives the holder a right enforceable against the world. Examples include gold or a car.

    b. **Things in action:** Capable only of enjoyment through legal claim or litigation by the holder. The thing itself cannot be physically enjoyed or taken without consent, or without a legal process. Debts, bank accounts, or contractual rights are examples.

11. Recent judgments have developed jurisprudence with regards to the status of crypto as property. In *AA v Persons Unknown* [2019] EWHC 3556 (Comm) Bryan

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[2] Schedules 8 and 9 of Economic Crime and Corporate Transparency Act 2023 amended Parts 2 and 5 of PoCA by adding specific provisions relating to cryptoassets and related items (*e.g.* s.47C(5A) & (5B), s.84A) and extended the civil forfeiture powers in Chapter 3 to cryptoassets (see Chapters 3C through F).

J held that crypto was neither a thing in action nor a thing in possession.[3] Nevertheless, 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*" (at [58]). Crypto is property because, among other reasons, it is "*definable*", "*identifiable by third parties*", and has "*some degree of permanence*" (at [59]). Birss LJ similarly commented (obiter) in *Tulip Trading v Van Der Laan* [2023] EWCA Civ 83 that "*a cryptoasset such as bitcoin is property*".[4] See also the recent decision of Mr Richard Farnhill, sitting as a deputy High Court judge, in *D'Aloia v Persons Unknown and others* [2024] EWHC 2342 (Ch), especially at [104] and [173].

12. The Law Commission Report recognised that the common law has advanced to a point where it does essentially recognise crypto as property [§3.86]. The Law Commission nevertheless expressed a preference for providing a statutory footing for the status of crypto as property. The question was no longer whether crypto qualified as property (clearly it does). The real "*question is **how** [crypto] should be analysed and categorised*" as property [§2.40, emphasis added].

13. The Law Commission summarised the benefits of a statutory footing for recognising crypto as property. Such formalisation would clarify the status of crypto in future litigation. It would put beyond dispute that crypto could, for example, be made subject to a proprietary freezing injunctions ('PFO'), or be treated as part of a bankrupt's estate. Generally, statutory recognition of crypto would advertise the capability of English courts to rule on disputes over digital assets [§1.14; §4.3].

Legislation proposed by the Law Commission

14. With the benefits of a statutory footing in mind, the Law Commission proposed a draft Bill in these terms:

> **1 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—

[3] The factual background to *AA v Persons Unknown* was that a specialist company had tracked bitcoin paid as a ransom in response to a malware attack. The judge granted a proprietary injunction and required the exchange to provide information in relation to an account held by a defendant. Similarly, in In *Ion Science Ltd v Persons Unknown and others* (unreported, 21 December 2020) the Commercial Court granted a worldwide freezing order, a proprietary injunction and a Bankers Trust order against two cryptocurrency exchanges requiring them to preserve the Bitcoin (or its traceable proceeds) and to disclose specified information about the accounts in order to identify alleged fraudsters.

[4] Birss LJ provides a concise analysis of how crypto works at [21]-[23] of his judgment in the *Tulip Trading* case.

(a) a thing in possession, nor

(b) a thing in action.

15. In effect, a thing will fall into this new ‘third category’ of property if two criteria are met: (1) it is functionally analogous to things that attract property rights and is itself capable of attracting such rights (in terms of existing indicia of property); and (2) is not comfortably either a thing in possession or in action [§3.32]. Digital assets are likely to meet these criteria.

16. The Law Commission clarified that the wide wording of the proposed legislation would not include all digital assets. Some such assets could not qualify as property. A non-exhaustive list of examples including ‘Word’ documents, private keys, email accounts, certain in-game assets, and domain names [§2.25; §3.64].

17. The Law Commission commented that such legislation would dispel “*lingering doubt over the existence of a third category of property capable of accommodating the unique nature of digital assets*” [§1.15]. It would leave the exact development of the law to the courts on a case-by-case basis. This is reasonable given the fast-moving nature of crypto; the digital assets of today could may become obsolete tomorrow [§3.27].

18. This concern also explained the “*technology neutral*” wording of the Bill, which avoided naming any specific digital assets [§3.67]. The Bill “*would not be a silver bullet but rather a nudge to push the law along a particular path, through incremental developments*” [§3.16]. The common law will play a key role in building on the foundation provided by the draft Bill.

Control of crypto: the role of freezing and restraint orders

19. The use of crypto for fraud and money laundering is only likely to grow. Whether crypto is property is highly relevant to how it is controlled through freezing and restraint orders. Such orders are themselves ever more important at a time when an estimated $22.2 billion was laundered globally through cryptocurrencies over 2023.

20. Crypto is often used for ransomware payments following a cyberattack since it provides a layer of anonymity that can frustrate law enforcement. The anonymity of crypto also makes it attractive to those seeking to evade sanctions. The lack of centralised oversight allows for anonymity and complicates tracing.

21. In response, applicants for freezing or restraint orders often use specialist companies to assist with tracing. Evidence given by such companies has already been relied on by the English courts; they are becoming more adept at on-chain forensic research as part of the tracing process. Despite these advances, peer-to-peer transactions remain inherently difficult to trace.

22. Whatever the precise status of crypto as 'property' at common law, for the purposes of the Proceeds of Crime Act 2002 ('PoCA') , the courts have treated it as a species of property for the purposes of s.84 (part 2) and s.308 (Part 5).[5] Moreover, Parliament has made specific provision for crypto as a species of realisable/recoverable property in both Part 2 and Part 5 of PoCA: *see* Footnote 2, above.

23. The court In *Briedis* [2021] EWHC 3155 (Admin) (a civil recovery case) Fordham J observed at [10] that:

> "I am satisfied that cryptocurrency, as cryptoassets, fall within the wide definition of "property" in section 316(4)(c) ("other intangible … property"), especially when viewed in the light of the purpose of these statutory powers. It would be a serious lacuna if cryptoassets fell outside the reach of this statutory scheme. In support of their inclusion, Mr Rainsbury helpfully showed me AA v Persons Unknown where cryptoassets (Bitcoin) were held to constitute "property" at common law. Particularly helpful is §58 of that judgment, a passage citing §83 of a Legal Statement of the UK Jurisdictional Task Force, referring to "other intangible property" and §61 of the judgment, adopting that Statement."

24. This reasoning was followed by Cutts J in granting a PFO in *DPP v Zhang & Another* (unreported, 6th November 2024).

25. *Briedis* and *Zhang* were applications for interim orders but in *DPP v Surin* [2025] EWHC 10 (KB) Mould J relied on *Briedis* when granting summary judgment on a civil recovery claim over bitcoin held in a Coinbase account. The correctness of this approach is unassailable; it is inconceivable that PoCA does not authorise enforcement authorities to restrain and recover cryptoassets.

Practical challenges arising from gaining control of crypto as property

26. Whilst all of us will be familiar with the process required to authorise bank or credit transactions, the use of crypto is alien to the majority.

27. As background, the authorisation of a crypto payment typically requires the creditor to 'sign' the payment by using a 'private key'. The private key is a cryptographic password that enables a person to operate a specific cryptocurrency account. The act of 'signing' proves that a party in possession of the private key has authorised the transaction. The encryption method for private keys usually uses the 'Advanced Encryption Standard' ('AES') as part of crypto wallet software.

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5 In R. Stevens, "*Crypto is not property*" (2023) 139 LQR 615 at 627, Professor Stevens commented (citing *Briedis*): "*Cryptoassets are not property, unless the purpose of a statute requires them to be treated as such*"; the statutory purpose of PoCA was just such an example.

28. Whoever has the private key may authorise the transfer of the corresponding crypto. As such, the person who has the private key is the *de facto* owner/controller of the corresponding crypto. It follows that the main security risk to crypto as property is twofold: (1) a bad actor stealing or otherwise obtaining the private key; or (2) the owner/controller simply losing the private key. A recent example of the latter scenario is provided by *Howells v Newport City Council* [2025] EWHC 22 (Ch). Among other observations, HHJ Keyser KC noted that the owner of an intangible cryptoasset (*e.g*. bitcoin) may differ from the owner of the tangible asset on which it is stored (*e.g*. a hard drive) [22 – 23]. The judge compared the hard drive to a piece of paper on which a code is written; possession of the piece of paper on which the information is stored does not equate to ownership of the information [24].

29. These complexities show how hard it is for the authorities (or indeed anyone) to secure crypto through a freezing or restraint order. There are two core reasons for this.

30. First, seizing a cryptowallet does not mean the crypto therein is secure. A party can only be sure the crypto is secure if it has the corresponding private key. If the private key is held by someone else, then the crypto can only be transferred to another account with the cooperation of that person. The courts could use disclosure orders or contempt proceedings to 'encourage' cooperation but this remains a serious limitation, especially in circumstances involving fraud.

31. Second, assuming crypto is held on some third-party exchange (*e.g.* Coinbase or Binance), the restraint or freezing order may be served on the exchange, who must then not allow the crypto to be transferred. This does, however, rely on the exchange respecting the effect of any such order and an acceptance that the particular exchange on whom it is served accepting that it holds the account.

32. *Surin* offers an example of how the cooperation of an exchange may be secured. The defendant had an account with Coinbase (in Kenya), which was served with a copy of a PFO made under s.245A POCA. In addition, the judge made a production order under s.345 POCA, requiring the production by Coinbase of the ledgers and details of other transactions that could identify the assets of the defendant.

33. The problem is that crypto is part of a decentralised system in which cooperation cannot be guaranteed in the same way as it can with the banking system. The authorities are seeking to impose greater regulation on crypto exchanges but this process remains a work in progress. For now, some exchanges still hold only limited identifying information about customers. Binance, for example, offers customers the option of creating a "basic" account that permits some transactions without requiring Know Your Customer information.

Conclusion

34. Crypto remain a confusing and alien concept for many. This article has, however, explained two things that should now be beyond doubt:

    a. First, crypto is ‘property’ for the purposes of criminal and civil litigation. The proposed Bill from the Law Commission promises statutory recognition of a truth already universally acknowledged by the courts.

    b. Second, the real challenge is practical, not definitional – how to secure and realise crypto under PoCA, not whether it is possible to do so as a matter of law. Crypto is defined by anonymity, lack of regulation, technical complexity, intangibility, and speed. These characteristics pose profound challenges to any litigant seeking to enforce their rights over crypto as property.

35. This article opened with reference to Donald Trump, whose utterances show just how swift the pace of change can be. In 2021, he described crypto as a “*scam against the dollar*”. Three years later, he promised to make the United States the “*crypto capital of the planet*”. No-one can predict what his views will be in another three years. Readers would be well-advised to keep a close eye on how the fast-changing law of crypto evolves over the turbulent coming years.