

Deciphering crypto part 2—AA victory for common sense? (AA v Persons Unknown)

03/06/2020

Corporate Crime analysis: In the second part in a legal series on cryptocurrencies, Will Glover and Angharad Hughes, barristers, at 3 Temple Gardens, continue their series of articles in the developing area of cryptocurrency regulation by analysing the High Court decision in *AA v Persons Unknown*, the effect of the finding in that case that crypto assets are property, observations for exchange providers as well as the impact on the bigger picture.

The full title of what has become known as *AA v Persons Unknown* is a forecast of its enigmatic issues: *AA v Persons Unknown Who Demanded Bitcoin on 10th and 11th October 2019, Persons Unknown Who Own/Control Specified Bitcoin, iFINEX trading as Bitfinex, BFXWW Inc trading as Bitfinex* [2019] EWHC 3556 (Comm). Three of the five parties' identities are elusive. AA is an anonymised English insurance company whose, undoubtedly embarrassed, Canadian customer's computer systems were hacked. Their hackers, the first and second defendants, 'persons unknown who demanded Bitcoin and/or those who own Bitcoin', had demanded a ransom be paid in Bitcoin (US\$950,000). The ransom was paid (109.25 Bitcoins). Unsurprisingly, AA wanted to know who the hackers were in order to recover the extorted Bitcoins. Chainalysis Inc, a blockchain investigations firm, tracked down the owner of 96 of the Bitcoins to an exchange known as Bitfinex (operated by the 3rd and 4th Defendants). AA then applied for several orders in order to obtain that information and affect alternative service by email outside the jurisdiction; Bitfinex being based in the British Virgin Islands (BVI).

What was the issue?

The range of orders sought in the case was refined to an application for a proprietary injunction. The issue at the application's core was whether crypto assets are property in law. In the usual way, this required a saunter back to the principles established in such cases as *Colonial Bank v Whinney* (1886) 11 App Cas 426 and a reminder of the four criteria of Lord Wilberforce's definition of property in *National Provincial Bank v Ainsworth* [1965] AC 1175. The real question being: was the court constrained to deciding whether crypto assets are a chose in action or chose in possession, the traditional types of property according to *Colonial Bank*, or was it entitled to find that the common law is not constrained from considering intangible assets, such as crypto assets, as property in law.

Crypto assets are property

Bryan J concluded that crypto assets such as Bitcoin are property at [59]:

'...I consider that a crypto asset such as Bitcoin are property. They meet the four criteria set out in Lord Wilberforce's classic definition of property in *National Provincial Bank v Ainsworth* [1965] AC 1175 as being definable, identifiable by third parties, capable in their nature of assumption by third parties, and having some degree of permanence.'

In so finding he adopted the pre-packed analysis found in the legal statement of the UK Jurisdictional Task Force, 'Legal statement on cryptoassets and smart contracts', chaired by Sir Geoffrey Vos, Chancellor of the High Court. While there are no current appellate decisions on these issues, this report carries significant weight. It is perhaps also worth pausing to note that Bryan J went on to say at para [61]: 'I am satisfied at least to the level required for the purposes of this application for interim relief that Bitcoins constitute property'. This might be said to amount to a potential interim qualification of the proprietary status of crypto assets. Whether anyone has taken this point remains to be seen.

It should be noted that *Vorotyntseva v Money-4 Limited, trading as Nebeus.com* [2018] EWHC 2596 (Ch), *Liam David Robertson v Persons Unknown* (unreported 15th July 2019) and the Singaporean High Court case *B2C2 Ltd v Quoine Pte Ltd* [2019] SGHC (I) 03 (not reported by Lexis[®]Nexis) also provided support for Bryan J's ruling.

The effect of the finding

The court was then able to make an order to give effect to the proprietary injunction. The court ordered that the exchange provider trading as Bitfinex (operated by the 3rd and 4th defendants), had to provide the identity and address of 'persons unknown' (1st and 2nd defendants), and any associated information that Bitfinex may have in relation to 'persons unknown'.

Observations for exchange providers

AA highlights the serious risks faced by exchange providers. A restitutionary claim or a constructive trust may arise in a third party's favour, such as an exchange provider, where, as was put on behalf of the insurer in this case, the exchange provider Bitfinex found themselves to be the holder of someone else's (the insured's) property. It is also interesting to note that all parties were anonymised or unknown except for Bitfinex. The ultimate wrongdoers have so far avoided the searchlight by virtue of their inherently shrouded approach, the insured and insurer were protected by the court, while the exchange provider was exposed to reputational damage. The legal duties notwithstanding, this case underlines the commercial good sense in exchange providers conducting thorough KYC checks when taking on new customers.

The bigger picture

While the decision that crypto assets are property appears to be a victory for common sense, there is a larger central issue drawn out by the result of AA. Should law abiding private wealth holders be entitled to the privacy anticipated by owning crypto currency? Should the ability to establish, or attempt to establish, ultimate beneficial ownership of crypto assets only be limited to those scenarios where the test for making a proprietary injunction is met? Or has English law already developed beyond this restriction? Join us for the rest of the series when we will look at these issues in more detail.

Will Glover is a barrister at 3 Temple Gardens. He has been instructed on matters relating to serious fraud, corruption and corporate offending. His recent instructions include defence work at the pre-charge stage of an SFO investigation, as well as trials involving the alleged mis-selling of alternative investment products and a high value counterfeit currency conspiracy.

Angharad Hughes is a barrister at 3 Temple Gardens. She came to the Bar with experience in financial and complex crime, civil recovery and fraud obtained at a top-tier firm. She was recently instructed to assist a team bringing a private prosecution on behalf of a corporate entity. She is also the founder of Griffin-LAW a pro-bono project advancing social mobility at the Bar.

[Back to top](#)

-  LexisNexis®
- About LexisNexis
- Privacy Policy
- Cookies Policy
- Terms & Conditions
- Help
- Contact us
- Copyright ©2020 LexisNexis. All rights reserved.

-  RELX Group™

