



## Tulip Trading: Canary in the Coalmine?

By William Moody and Weishi Yang

**The Court of Appeal has opened the door to cryptoasset holders to assert fiduciary duties owed to them by developers. In this alerter, William Moody and Weishi Yang consider how that sits with other efforts to fit cryptoassets into the existing common law framework for property. The decision may impact the broader crypto industry, notably on developers' responsibilities, but be a boon for asset recovery and victims of hacks or fraud.**

### Background

1. In mid-February, the Court of Appeal came to a significant decision in the case of *Tulip Trading Ltd v Van der Laan and Ors* [2023] EWCA Civ 83, finding that developers of Bitcoin networks may owe fiduciary duties to Bitcoin owners. This is the first time that such duties have been considered in this context, following a High Court summary judgment in this matter late last year, and the ruling may have a significant impact on the development of a comprehensive common law framework surrounding cryptoassets.
2. The case's origins lie in a hack: Tulip Trading Ltd, a company of Dr Craig Wright, the purported inventor of Bitcoin and purported face behind the mysterious Satoshi Nakamoto name, claimed that access to its Bitcoin was lost following a hack on the computer of its CEO. The dollar value of the hack was expressed as at about \$4 billion. Being cryptocurrencies, the hacker deleted the private key (the secret code to gain access to the crypto), such

that Tulip Trading was locked out of its own wallet. There is, naturally, no bank to phone up and say that you have been the victim of a scam.

### **Judgment**

3. Tulip Trading brought a claim against the developers for declarations that it owned the Bitcoin and that the developers owed it fiduciary or tortious duties which required them to assist in regaining control of the Bitcoin. The High Court (Mr Justice Falk) dismissed the claim on a summary judgment application, but the Court of Appeal has now overturned that decision, finding that there is a serious issue to be tried such that the matter should be heard at trial.
4. The Court held that it is arguable that the developers have taken on a fiduciary role to Bitcoin owners. The developers control the source code and have the practical ability to prevent anyone else from updating the code in the event of a software bug. This control of access to the source code suggests authority and discretionary decision making, both of which are features of fiduciary duties. The Court noted that the developers may owe a duty to act in the owners' interests, which involves abnegation of the developer's self-interest.
5. The ruling will have a significant impact on the regulation of digital assets. The government has launched a consultation on the future financial services regulatory regime for cryptoassets and has expressed a desire for the UK to become a leader in this field. This case therefore cannot be understood in a vacuum.

### **Wider context**

6. There are broadly two approaches to the legal treatment of digital assets. The first approach is to assimilate digital assets into existing legal frameworks. In the legislative sphere, there are at least two Bills which take this approach. [The Financial Services and Markets Bill \(currently in the reporting stage in the House of Lords\)](#) proposes to amend the Financial Services and Markets Act 2000 to refer to ‘cryptoassets’ and thus bring certain qualifying digital assets into the scope of existing financial services regulation. [The Electronic Trade Documents Bill \(currently in its first reading in the House of Commons\)](#) seeks to make electronic versions of certain trade documents (such as bills of exchange and promissory notes) possessable and therefore subject to the same legal regime as their equivalent paper versions.
7. The second (and far more ambitious) approach is to create bespoke legal regimes for digital assets. [In the Law Commission’s consultation paper on digital assets published in July 2022](#), the Commission considered that neither of the existing and well-established common law categories of personal property (things in possession and things in action) could sufficiently accommodate digital assets. The Commission therefore provisionally proposed the explicit recognition of a third category of personal property, named ‘data objects’, which would allow for a nuanced consideration of the unique features of digital assets and other emerging property rights.
8. Lord Justice Birss recognised that if Tulip Trading’s case were to succeed, it would “*involve a significant development of the common law of fiduciary duties*” (at [86]). It is still to be seen whether the existing law on fiduciary duties can accommodate the rapidly evolving landscape of digital assets, or whether such a development would instead require the creation of a bespoke legal regime.

### Concluding thoughts

9. The significance of the Court of Appeal's decision should not be understated. The Defendants' position in Tulip Trading was that Bitcoin functions within a decentralised model and therefore the developers (insofar as they were involved in the software development for the networks) were part of a large and shifting group of contributors. In finding against the Defendants' position on the High Court's dismissal by summary judgment, the Court of Appeal placed significant weight on the possibility that the decentralised governance of Bitcoin was actually "*a myth*" (at [91]). While Tulip Trading's case is technically limited to Bitcoin, Bitcoin is arguably one of the most decentralised digital assets, and thus the outcome of this case may impact the vast majority of digital asset developers.
  
10. Should the High Court on remittance find a fiduciary duty of developers, it may make it easier for victims of digital asset hacks and fraud to recover their assets, but it will also have a significant impact on developers who may now be subject to fiduciary duties. It may make developers look like banks: raising an important question as to whether anybody in the space, indeed, wants that.

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