HENDERSON CHAMBERS

Alerter

Commercial

30 October 2024

Tracing Things: Crypto As Property – *D'Aloia v Persons Unknown Category A & Ors* [2024] EWHC 2342 (Ch)

Jack Castle & Weishi Yang

The High Court has held, following trial, that cryptocurrency is property that can be followed into the hands of third parties. This significant judgment, confirming a number of previous decisions at the interlocutory stage, also aligns with the clarification provided by Clause 1 of the Property (Digital Assets etc) Bill, introduced on 11 September 2024.

BACKGROUND

1. The Claimant, Mr D'Aloia, alleged that he was the victim of a cryptocurrency scam. As part of said scam, Mr D'Aloia was allegedly induced to hand over cryptocurrency in the form of Circle and Tether ("**USDT**") totalling around £2.5 million into a wallet allegedly owned by the First Defendants.

2. After a number of hops between different wallets, the USDT 400,000 ended up in an wallet held with Bitkub (the Sixth Defendant), linked to the account

of a Ms Hlangpan (the "**82e6 Wallet**"). Of this, it was said that USDT 42,291 was either the USDT belonging to Mr D'Aloia or their traceable proceeds.[1]

3. Mr Richard Farnhill, sitting as a Deputy Judge of the Chancery Division, was tasked with determining, amongst other issues, whether Mr D'Aloia was able to follow the USDT into Ms Hlangpan's account. In order to consider this issue, Judge Farnhill had to first decide whether USDT could attract property rights. The claim failed on its facts, so the analysis is technically obiter, but Judge Farnhill's judgment in *D'Aloia* contains several key findings which elucidate the place which cryptoassets hold within the taxonomy of English personal property law, and are likely to be followed.

JUDGMENT

4. Judge Farnhill held that USDT were capable of attracting property rights under English law.[2] The Judge's analysis was based on the well-known test formulated by Lord Wilberforce in *National and Provincial Bank v Ainsworth* [1965] 1 AC 65:

> *"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 third parties, and have some degree of permanence or stability."*[3]

5. Judge Farnhill held that the following key takeaways from the existing authorities on cryptoassets were:

   a. There was a strong line of authority in England and Wales that cryptoassets attracted property rights, citing the well-known cases of *AA*

[1] D'Aloia at [79].
[2] *Ibid* at [173].
[3] *Ibid* at [153(iv)].

v Persons Unknown [2019] EWHC 3556 (Comm) and *Tulip Trading v Van Der Laan* [2023] EWCA Civ 83.[4] Both *AA* and *Tulip Trading* were decisions relating to bitcoin; however, the *'Tether: Fiat currencies on the Bitcoin blockchain'* paper ("**Tether White Paper**") made clear that USDT operated in much the same way as bitcoin, and therefore meant that USDT would likely also satisfy the *Ainsworth* criteria.[5]

b. As per Birss LJ's judgment in *Tulip Trading*, cryptoassets are 'rivalrous', meaning that their ownership by one person prevents ownership by another.[6]

c. Cryptoassets have a conceptual existence that is independent both of their legal system and of their individual users.[7]

6. Judge Farnhill held that *"the starting point is the test in National and Provincial Bank v Ainsworth; that will also, often, be the end point."*[8] As USDT met the test in *Ainsworth*, the Judge held that USDT were property.[9]

7. As to the type of property, Judge Farnhill held that USDT were neither chose in action nor chose in possession.[10] This was because USDT did not confer a Hohfeldian claim-right (i.e. a right that could be vindicated through legal proceedings[11]), power, privilege or immunity. However, USDT did confer a clear and well-founded *"expectation"* that, due to the cryptographic security of the blockchain, transactions involving USDT would be honoured. Thus, USDT should be conceptualised a composite thing, consisting of the data and its transactional functionalities:

[4] *Ibid* at [108] to [112].
[5] *Ibid* at [154].
[6] *Ibid* at [112].
[7] *Ibid* at [112] to [115].
[8] *Ibid* at [153(iv)].
[9] *Ibid* at [154].
[10] *Ibid* at [173].
[11] *Ibid* at [153(i)].

> *"The combination of both data and transactional functionalities in my view satisifies what is required [...] to give the "expectation" [...] that the transaction will be honoured sufficient form to attract property rights. [...] the property is not merely the data but the combination of the data and the transactional functionalities related to it."*[12]

8. Although a composite thing, Judge Farnhill also preferred the analysis of Birss LJ in *Tulip Trading* and the Law Commission Report, Law Com No 412 "Digital Assets: Final Report" (the "**Final Report**") that crypto-tokens exist independently of the rights and claims associated with them and are used independently of whether they give rights to rights of action.[13] The Judge concluded that the USDT was property in and of itself, rather than a function of the right to control it by (for example) the right to use the right private key.[14]

9. Mr D'Aloia's claim involved following the USDT into a mixed fund. Judge Farnhill found that, at common law, a chose in action could not be followed. However, as USDT was neither a chose in action nor a chose in possession, this was not determinative of whether USDT could be followed.[15] Thus, Judge Farnhill was required to consider whether, for the purposes of following, USDT more closely resembled a chose in action or a chose in possession.

10. Judge Farnhill noted that there were two potential different characterisations of what happens to a cryptoasset when it is transferred:

[12] *Ibid* at [158] to [159].
[13] *Ibid* at [165].
[14] *Ibid* at [173].
[15] *Ibid* at [203].

a. The 'extinction/creation' analysis posited that the existing token was destroyed and a new token was created, and therefore potentially could only be traced, but not followed; whereas

b. The 'persistent thing' analysis posited that the token was a notional unit of quantity that was capable of being tracked, and therefore potentially could be both traced and followed.[16]

11. Judge Farnhill preferred the analysis of USDT as a persistent thing. The Tether White Paper provided that only Tether Ltd had the ability to destroy USDT, that USDT could be tracked, and that the USDT transactional history was publicly auditable. The transactional functionalities of USDT, which formed part of the identity of USDT, did not change on transfer. In addition, USDT maintained a distinct identity, even in a mixed fund. USDT were therefore more like a chose in possession than a chose in action.[17]

12. Judge Farnhill therefore held that, in principle, USDT could be followed into a mixed fund. However, on the facts of this case, it was not possible to follow USDT into the mixed fund, as there was no evidence available for the Judge to undertake such an exercise.[18] Mr D'Aloia failed to show that his USDT ever arrived in the 82e6 Wallet. Although there was a constructive trust over Mr D'Aloia's funds in the hands of the First Defendants, the USDT 400,000 received by Bitkub had been paid away and there was no claim pleaded against Bitkub for knowing receipt.[19]

[16] *Ibid* at [204].
[17] *Ibid* at [205] to [209].
[18] *Ibid* at [212].
[19] *Ibid* at [382], [383]. Judge Farnhill was clear that trial counsel were not responsible for this deficiency (at [27]).

SIGNIFICANCE

13. *D'Aloia* is the first decision to find, at trial, that certain cryptoassets are property. While a decision on USDT, its reasoning is not limited to USDT. Judge Farnhill's reasoning indicates the approach in general to be taken by courts when faced with any potential asset which may be capable of attracting property rights under English law, though will be most useful when dealing with intangible or digital things. As Judge Farnhill acknowledges at multiple points throughout his judgment, this same analysis is applicable to other cryptoassets, such as bitcoin.[20]

14. Judge Farnhill placed significant reliance on the Law Commission's Final Report. The Law Commission's draft Bill, 'Property (Digital Assets etc) Bill', was introduced to Parliament shortly before Judge Farnhill's decision was handed down, and similarly allows for a digital or electronic thing to be characterised as property, even if it is not a chose in possession or chose in action. *D'Aloia* is consistent with the Bill,[21] which itself was intended to confirm and support the existing common law position.[22] This welcome clarification will be applicable beyond the crypto world, for example to conceptualise social media accounts and obtain injunctions for their return if hacked.

15. *D'Aloia* also demonstrates the complexity of dealing with an asset that is neither a chose in action nor a chose in possession. Judge Farnhill was required to analyse the unique properties of USDT to determine whether they could be followed into a mixed fund, as the existing rules only distinguish between a chose in action and a chose in possession. Thus, the

[20] *Ibid* at [132], [154] and [164].
[21] *Ibid* at [153(iii)].
[22] Final Report at [2.3].

characterisation of cryptoassets as property remains fertile ground for the courts to consider what legal consequences will attach to such a characterisation.

16. The full judgment can be found here.

Jack Castle
Weishi Yang
30 October 2024