

WHY WE NEED TO CALM DOWN ABOUT CRYPTO: A FINANCIAL REMEDY BARRISTER'S PERSPECTIVE

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I love that my job grows with me, bringing new challenges and learning. Time has also brought perspective on the warp and weft of various panics over the years: Brexit and foreign property and managing remote working in the pandemic come to mind. A current issue causing a stubborn fear and loathing is digital currency. My feeling is: don't panic. Digital assets may have more unusual structural features, new terms, raise issues of disclosure, jurisdiction, enforcement and valuation, but we have seen all of these issues before. Maybe we have not seen them in this confluence, all in one class of assets, but we have tools for them individually. In mid-2022 judges dealing with complex financial remedy cases had training from crypto specialists: it could be time for us to do the same. I remember the first time I had a case with a significant Lloyds syndicate holding. I had to sit down and do some proper homework, but the dust eventually settled.

Have we turned away from crypto cases, worried it is all too new and difficult? It is an asset structured like no other but we have time to learn about it and we have tools to manage the issues it presents. It is not about to overwhelm us. On a macro level, the digital asset market has managed to evade much regulatory oversight, but Governments prefer their financial markets to be regulated⁽¹⁾. On a micro level, most individuals do not have the financial capacity to lose 40% of their assets in a year to market fluctuation. Some individuals crave the anonymity of trading crypto, but many are anxious about a system which has no real safety net. Only 6% of Brits are said to own any crypto currency at all⁽²⁾. There are still very few cases then, where digital assets are such a high percentage of the marital wealth that they cannot be offset or shared.



The point of this article is not to tell you about cryptocurrency but to consider some of the regular issues it presents and the tools we use when dealing with them:

Type of Asset: In November 2019 the UK Jurisdictional Taskforce (not to be confused with the joint 'Cryptoasset Taskforce'), published a paper called 'Legal statement of cryptoassets and smart contracts', in which they concluded that 'cryptoassets possess all the characteristics of property' and this was approved in *AA v Persons Unknown* (2019) EWHC 3556 (Comm) by Bryan J. Crypto is therefore just property and can be subject to an order for sale, with division of the net proceeds or transferred into a wallet in the name of the other party.

Disclosure: You need to know what currencies/tokens are held and how much. The evidence of the fiat (original) currency purchase which bought the digital currency is helpful and have a good stock of questionnaire questions in your templates.

Most owners hold custodial funds, where the currency is traded by a third party or exchange who also holds the trading documents. In the UK we have Know Your Customer (KYC) compliance⁽³⁾ for central regulated exchanges so the owner is identifiable.

Non-custodial funds are held only by the individual, so can pose more disclosure challenges. *In personam* orders may be needed (see below). The best guesstimates are that <25% of Bitcoin will never be recovered as the private keys have been lost, so it may be true that a party cannot access the asset, if it was bought a long time ago.



(1) Binance has just agreed to pay the Commodity Futures Trading Commission in the USA \$2.7bn for not protecting against money laundering and lawsuits are picking up over the pond

(2) Finder.com survey November 2023

(3) Since January 2020, firms carrying on cryptoasset activity in the United Kingdom have had to comply with the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (SI 2017/692).

(4) <https://coinstats.app> and similar sites give you values for various assets

Once you have the public key details you can look at the trading record, amounts and transactions through the blockchain by using sites like www.blockchair.com or www.blockchain.com/explorer. Remember this is all anonymous, however: the public key and blockchain does not itself disclose who is the owner of the currency, but it is like the statement once you have identified the account owner.

If disclosure remains inadequate, you may be able to ask a Court at trial to make a determination on the extent of undisclosed assets cf cases such as *Moher v Moher* (2019) EWCA Civ 1482.

Value Volatility: Stable coins are pegged to something like a fiat currency (e.g. the US dollar), but these can still vary markedly in value over a year and Bitcoin fell by about 40% in late 2022.

There are various options for valuation:

- (i) an expert report;
- (ii) look on-line for the traded value⁽⁴⁾
- (iii) I had an arbitrator take an average value over the previous year;
- (iv) if there is a strong trajectory for the currency you might weight several annual averages, like an EBITDA in a share valuation.

Crypto-assets may be good candidates for *Wells v Wells* (2002) EWCA Civ 476, (2002) 2 FLR 97 sharing; where the Court had no confidence in the true value of shares in a company and so the answer was share them.

These are not copper-bottomed assets.

Liquidity: Some assets are probably untradeable or have no market for sale. You may well share them in case it revitalises, take a view or give it to the children, just in case.

Tax: An individual investor will pay CGT on gains (top rate 20%, as for shares) although income/tokens from mining is taxed as income (top rate 45%). Gains in assets held by a company are taxed as profit, so corporation tax (19% <\$250K). Fees are expenses which can be set off against profit. Any losses can be offset against all profits, not just crypto profits, in that same tax year or rolled over to future years. The client may need tax advice.



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Securing assets and Enforcement: You also have a raft of *in personam* orders you can employ for disclosure or enforcement purposes. You can seek orders to freeze monies worldwide⁽⁵⁾, restrain a party from leaving the jurisdiction and seize their passport.

To preserve the asset, you can have digital currency transferred into the parties joint names, use a joint signature wallet or a jointly held password/private key. Both parties could give undertakings.

The currency might be traded or held overseas. However, in *Tulip v Van der Laan* (2023) EWCA Civ 83; (2023) 4 WLR 16 the Court determined that the *lex situs* of the property is where the company or individual who is the owner resides (not has their domicile).

Service: There have been civil cases in this jurisdiction⁽⁶⁾ where service has been effected on anonymous holders through the blockchain but you are going to know the identity of the parties in your case.

So don't panic, read up on digital assets, marvel at how the mind(s) of Nakamoto came up with the idea for a "Peer-To-Peer Electronic cash system", and carry on using tools you have now for the issues it presents. "All shall be well and all shall be well and all manner of thing shall be well".⁽⁷⁾

(5) And example of one in the civil jurisdiction is *Vorotyntseva v Money-4 Limited* (trading as Nebeus.Com) (2018) EWHC EWHC 2596 (Ch) or *Fetch.AI Ltd & Anor v Persons Unknown* (2021) EWHC 2254 (Comm).

(6) Such as *D'Aloia v Persons Unknown & Others* (2022) EWHC 1723 (Ch)