No duty owed by bitcoin networks to assist a bitcoin owner in recovering access to its assets

In a fascinating recent judgment on bitcoin, Falk J has refused permission to serve proceedings out of the jurisdiction on four digital asset networks. Her judgment examines the relationship between the networks and their users.

Dr Craig Wright claims that he is "Satoshi Nakamoto", the inventor of bitcoin, and that TTL, a Seychelles company whose shares are held on trust for his family, holds bitcoin worth more than USD 3 billion. According to Dr Wright (whose evidence was disputed by the networks but found by the court to get over the hurdle of showing a serious issue to be tried), hackers have stolen the password protected files containing the "private keys" which give access to the bitcoin. Dr Wright wanted the defendant networks to help TTL regain access to its assets by writing and implementing a software patch, which he said would be easy to do. However, the court found that the networks did not owe TTL either a fiduciary duty or a duty in tort to assist it in recovering control of its assets.

The judge drew on the explanation of the various concepts set out in the *Legal Statement on Cryptoassets and Smart Contracts* published by the UK Jurisdiction Taskforce in November 2019. Transactions in digital assets are recorded on a database known as a blockchain, which does not show the identity of the parties to the transaction. Instead, the assets are shown as held at a digital address, to which there are both public and private keys. Knowledge of the private keys enables dealing in the assets.

Dr Wright kept the private keys for TTL's bitcoin in encrypted, password protected files on his home computer system in England (but nowhere else). The password was stored in a digital password safe, which was stored in the cloud. In February 2020, he discovered that the password protected files had been taken by hackers. He reported the hack to police, but the perpetrators have not been identified.

Dr Wright caused TTL to bring proceedings against the defendants, claiming that they control four digital asset networks by virtue of their ability to decide the software to be applied by the networks. TTL (through Dr Wright) said that it would be a simple matter for the defendants to write and implement a software patch which would enable TTL to regain control of its assets. This would obviously require the defendants to take positive steps, not simply to refrain from action.

The defendants disputed their alleged control of the networks, arguing that they were part of a large and shifting group of contributing developers, and that any changes which they sought to implement would not be followed by bitcoin miners, leading to a "fork" in the networks.

TTL relied on Gateways 9, 11 and 4A of the jurisdiction gateways in Practice Direction 6B, founding its claim on the allegation that the networks owe their users fiduciary duties and/or tortious duties of care. Gateway 9 permits claims in where

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(inter alia) damage is sustained in the jurisdiction. Gateway 11 permits claims where the subject matter of the claim relates wholly or principally to property within the jurisdiction. Gateway 4A permits "further" claims which arise out of the same or closely connected facts as existing claims.

Fiduciary duties

TTL argued that while the defendants did not fall within the existing recognised categories of fiduciaries (such as principal and agent), the particular facts and circumstances justified the imposition of fiduciary duties on the defendants. TTL relied in particular on the alleged significant imbalance of power between the defendants as alleged controllers of the networks and the users. TTL accepted that any such duties must be owed to all users, even though they are *"by definition an anonymous and fluctuating class with whom the Defendants have no direct communication and certainly no contractual relationship".*

The judge found that the alleged imbalance of power, while often a feature of fiduciary relationships, was not a sufficient condition for the existence of the alleged duty. This was not a situation where it was alleged that the Defendants had introduced new features to the software for their own benefit and to the potential detriment of users, where the judge thought it was conceivable that some form of duty might arise. Users might, for example, have expectations about the security of the network and the anonymity of users which would give them a right to complain about software changes which compromised these.

However, the facts alleged did not support the allegation that the defendants must be taken to have undertaken a duty to act for another so as to give rise to a relationship of trust and confidence. Developers are a fluctuating body: it could not realistically be argued that they owe continuing obligations to carry on as developers. Further, the duty alleged was a positive duty to alter the software for the benefit of a particular user, TTL, not a duty to make a systematic change for the benefit of all users. Other users might have legitimate cause for complaint about the change, and the defendants could not be protected against such complaints. *"There must be a real risk that acceding to TTL's demands would not be consistent with a duty of single-minded loyalty owed to other users."* This, said the judge, was a strong indication that the pleaded facts could not amount to a breach of fiduciary duty.

Duty of care in tort

The alleged loss suffered by TTL was purely economic, and therefore no duty of care could arise at common law in the absence of a special relationship. The Supreme Court has indicated that when determining whether a duty arises, the court should proceed incrementally by analogy with established categories of liability.

TTL argued that the law should recognise that a duty is owed to the owners of digital assets by developers who are able to assist them to regain control of their assets. TTL said that the defendants had voluntarily assumed responsibility to perform the necessary task by their control of the networks.

The court definitively rejected the existence of the alleged duty. A factor of particular relevance was that the claim was essentially based on omissions. TTL's complaint was not that the defendants had had any involvement with the hack or had done anything to increase the risk of harm, but that they had failed to alter the system following the hack to enable TTL to regain control of its bitcoin.

But the law does not generally impose a duty to protect others from harm, save in exceptional cases where the defendant is in a position of control over the third parties. Here the defendants had no control over the hackers, and even if it could be said that they owed a duty not to harm the interests of users, that duty did not extend as far as requiring them to take positive steps to implement software changes.

The alleged duty would also be open-ended and owed to an unlimited class of users, potentially exposing the defendants to massive liabilities against which it was not obvious that they could insure. By contrast, owners of digital assets were able to take certain steps to protect their private keys by storing them in different locations and possibly by insurance. Considerations of fairness, justice and reasonableness thus weighed against the recognition of the duty. While accepting that important issues were raised about the recourse available to bitcoin owners if private keys are lost, the judge said *"it cannot be the case that the fact that the matters raised are controversial or difficult is sufficient of itself to justify the grant of permission if it is apparent that there is no serious issue to be tried under*

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existing law". She referred to the Law Commission's current project on digital assets, which will consider how legal remedies or actions can protect digital assets, and said that it was for the Law Commission or Parliament to consider these issues.

Application of the Part 6B Gateways

Having found that TTL had no seriously arguable case on the merits, the judge refused permission for service out of the jurisdiction. However, she went on to consider whether the gateways would have permitted service if she had reached a different view on the merits, and her obiter views are of great value and interest on these novel and difficult issues.

The judge found that there was a good arguable case that TTL's bitcoin assets were located in the jurisdiction for the purposes of Gateway 11. She accepted TTL's argument that its assets were located in its place of residence, being the place where its central management and control is exercised, rather than in its place of domicile. Although TTL was a Seychelles company, it was controlled in England by Dr Wright and could thus be said to be "resident" there.

The judge cited the view expressed in Professor Andrew Dickinson's work *Cryptocurrencies in Public and Private Law* (2019) that the value of cryptocurrencies depends on the expectation that the consensus rules underpinning the system will not be altered fundamentally so as to deprive participants of their association with particular units and the power to deal with them, and that such benefits could be characterised as a species of intellectual property in the same way as goodwill. That analysis points to the relevant choice of law as being:

"the law of the country where the participant resides or carries on business at the relevant time, or if the participant resides or carries on business in more than one place at that time, by the law of the place of residence or business of the participant with which the participation that is the object of the transaction is most closely connected."

The judge also found that there was a good arguable case that damage had been, or would be, sustained in the jurisdiction for the purposes of Gateway 9(a). TTL's loss of control over its assets would be felt in England, as the place where its activities were controlled by Dr Wright. *"In reality, based on the available evidence, it is hard to see that it could be said to sustain damage anywhere else."*

As to Gateway 4A, the judge considered that if the tort claims fell within Gateway 9(a), the fiduciary duty claims (for which there is no specific Gateway) would fall within Gateway 4A. In any event, given that both fiduciary and tort claims in this case rested on the allegation of a voluntary assumption of responsibility by the defendants, the fiduciary duty claims could be characterised as tort claims in substance and would thus also fall within Gateway 9(a).

Forum

The primary connecting factors relied upon as showing that England was clearly the appropriate forum for trial were the residence in England of TTL and of Dr Wright as its agent and primary witness, as well as the argument that TTL's assets are located in the jurisdiction. These satisfied the judge that England would have been the appropriate forum, had TTL been able to make out a good arguable case on the merits. The defendants were based in a number of different jurisdictions, so there was no other obviously appropriate jurisdiction.

Conclusion

Given the novelty and interest of the issues raised by this case, it is assumed that permission to appeal will be sought and granted. The judge's analysis as to whether the circumstances give rise to either fiduciary or tortious duties is orthodox and solidly founded on a consideration of the authorities. There is particular interest in her (admittedly obiter and provisional) conclusion that the choice of law rule which governs questions of ownership in cryptocurrencies is the law of the place where the user of the network is resident or carries on business.

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