

Case Comment

**DOCTRINAL ISSUES IN RECOVERING NFTS THAT  
HAVE BEEN WRONGFULLY TAKEN AWAY**

*Janesh s/o Rajkumar v Unknown Person (“CHEFPIERRE”)*  
[2023] 3 SLR 1191

[2023] SAL Prac 14

Seeking legal redress in respect of rights relating to non-fungible tokens (“NFTs”) that have been wrongfully taken away from a victim poses a multitude of problems, in part due to the underlying nature of blockchain technology. Two of these characteristics are decentralisation and anonymity which make it difficult to ascertain the perpetrator who typically goes by a pseudonym. Furthermore, this is exacerbated by doctrinal issues such as whether NFTs can give rise to property rights capable of legal protection as well as the various terms and conditions adopted by different NFT platforms which attach to the NFTs. The Singapore High Court (General Division) had to deal with interlocutory injunction applications to recover NFTs and cryptocurrency assets that have been wrongfully taken away from victims in *CLM v CLN* [2022] 5 SLR 273 and *Janesh s/o Rajkumar v Unknown Person (“CHEFPIERRE”)* [2023] 3 SLR 1191. Apart from a case summary of the latter case, this article seeks to highlight some of the doctrinal issues that can arise where the protection of NFTs is concerned, as well as some of the *forum conveniens* and enforcement issues associated with recovering NFTs that have been wrongfully taken away.

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## I. Introduction

1 The most expensive reported non-fungible token (“NFT”) sale on record is the work of digital artist, Beeple, entitled “The First 5,000 Days” which was sold at Christie’s for US\$69.3m in March 2021. Thus, it is no surprise that with the hype surrounding NFTs, there is also a corresponding rise in the number of NFTs that have been stolen or wrongfully taken away. It was reported by blockchain research firm Elliptic in August 2022 that NFTs worth US\$100m had been stolen in the preceding one-year period.<sup>2</sup>

2 On 21 October 2022, the Singapore High Court (General Division) published the grounds for its decision in *Janesh s/o Rajkumar v Unknown Person (“CHEFPIERRE”)*<sup>3</sup> (“*Rajkumar v Chefpierre*”) where it issued an interlocutory injunction against an unknown party (only known by a pseudonym “chefpierre.eth”, hereinafter referred to as “Chefpierre”) in May 2022, preventing Chefpierre from dealing with the NFT that had been wrongfully

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1 The author is grateful to Chua Ying-Hong of the Attorney-General’s Chambers for her kind invitation to speak on legal implications of dealings in NFTs to public service legal officers on 6 January 2023. A part of the content from that talk served as an inspiration for this paper. The author is also grateful to the Editor, Lam Chung Nian of WongPartnership LLP, for his insightful comments. All errors remain the author’s own.

2 Elizabeth Howcroft, “NFTs Worth \$100 Million Stolen in Past Year, Elliptic Says”, *Reuters* (25 August 2022) <<https://www.reuters.com/technology/nfts-worth-100-million-stolen-past-year-elliptic-says-2022-08-24/>> (accessed 26 June 2023).

3 [2023] 3 SLR 1191.

transferred to him.<sup>4</sup> The injunction granted was said to be the first in Asia to relate to an NFT.<sup>5</sup>

3 Briefly, NFTs are predominantly based on the Ethereum blockchain technology. Each NFT is a token representing ownership or other legal interests relating to an asset, usually a digital asset, although they are marketed as capable of granting ownership of real-world assets as well. This ownership record can be found on the blockchain, while the digital asset itself is stored or referenced on a non-cryptographically secured, separate server owned by a host platform. An example of the latter would be the InterPlanetary File System. The NFT is a tokenisation of the rights that might be derived from the underlying asset. Collectibles and art NFTs appear to be the most popular categories of NFTs.<sup>6</sup>

## II. Brief facts

4 The brief facts of *Rajkumar v Chefpierre* are as follows. The claimant, Janesh s/o Rajkumar (“Rajkumar”) owned an NFT issued by the Bored Ape Yacht Club, part of an NFT collection built on the Ethereum blockchain consisting of 10,000 unique NFTs.<sup>7</sup> Rajkumar often entered into loan agreements with other users of an online NFT lending marketplace<sup>8</sup> to borrow cryptocurrencies using NFTs as collateral. As the Bored Ape NFT was precious to Rajkumar, he would generally only deal with reputable lenders

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4 Ben Chester Cheong, “Landmark Court Decisions Help Recover Stolen NFTs, but Enforcement Bumps Remain”, *The Straits Times* (6 December 2022) <<https://www.straitstimes.com/tech/tech-news/landmark-court-decisions-help-recover-stolen-nfts-but-enforcement-bumps-remain>> (accessed 26 June 2023).

5 Charlene Goh, “High Court Affirms NFTs as a Form of ‘Property’, Says it Has Jurisdiction Over Blockchain Disputes Involving S’pore Party”, *Today Online* (21 October 2022) <<https://www.todayonline.com/singapore/bored-ape-yacht-club-nft-blockchain-property-2025711>> (accessed 28 June 2023).

6 Ben Chester Cheong, “Application of Blockchain-enabled Technology: Regulating Non-fungible Tokens (NFTs) in Singapore”, *Singapore Law Gazette* (January 2022) <<https://lawgazette.com.sg/feature/application-of-blockchain-enabled-technology-nfts>> (accessed 26 June 2023).

7 *Janesh s/o Rajkumar v Unknown Person (“CHEFPIERRE”)* [2023] 3 SLR 1191 at [6].

8 The online marketplace is NFTfi.com.

who were highly ranked by the NFTfi.com ranking system.<sup>9</sup> Further, for every loan arrangement that Rajkumar used the Bored Ape NFT as collateral, he would specify, amongst other terms, that the lender should never use the “foreclose” option without allowing Rajkumar reasonable opportunities to make full repayment of the loan.<sup>10</sup>

5 In January 2022, Rajkumar contacted the defendant, Chefpierre, to discuss the possibility of obtaining a loan. Under the loan arrangement, Rajkumar secured assurance from Chefpierre that the Bored Ape NFT would not be “foreclosed”. After entering into the loan agreement and subsequently successfully paying off the loan, Rajkumar entered another loan arrangement with Chefpierre on 19 March 2022 (the “19 March Loan”).<sup>11</sup>

6 On 17 April 2022, Rajkumar informed Chefpierre that he needed a short extension of time to repay the 19 March Loan. Chefpierre initially agreed to the extension and reassured Rajkumar that the Bored Ape NFT would be returned to him once the loan was repaid in full. However, Chefpierre later changed his mind and informed Rajkumar that he would use the “foreclose” option on the NFTfi platform if the full sum was not fully repaid by 21 April 2022.<sup>12</sup> When Rajkumar was unable to find sufficient funds to repay the 19 March Loan, Chefpierre exercised the “foreclose” option and the Bored Ape NFT was subsequently transferred to Chefpierre’s cryptocurrency wallet.<sup>13</sup>

7 Devastated by his loss of the Bored Ape NFT, Rajkumar made an injunction application to recover the NFT. On 13 May 2022, the Singapore High Court (General Division) allowed the

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9 *Janesh s/o Rajkumar v Unknown Person (“CHEFPIERRE”)* [2023] 3 SLR 1191 at [11].

10 *Janesh s/o Rajkumar v Unknown Person (“CHEFPIERRE”)* [2023] 3 SLR 1191 at [11(c)].

11 *Janesh s/o Rajkumar v Unknown Person (“CHEFPIERRE”)* [2023] 3 SLR 1191 at [16]. See also “Bored Ape Yacht Club #2162” at <<https://opensea.io/assets/ethereum/0xbc4ca0eda7647a8ab7c2061c2e118a18a936f13d/2162>> (accessed 26 June 2023).

12 *Janesh s/o Rajkumar v Unknown Person (“CHEFPIERRE”)* [2023] 3 SLR 1191 at [18]–[20].

13 *Janesh s/o Rajkumar v Unknown Person (“CHEFPIERRE”)* [2023] 3 SLR 1191 at [21].

injunction application and issued the grounds for its decision on 21 October 2022 to explain why the injunction was granted.<sup>14</sup> In his decision, Lee Seiu Kin J held that based on the available facts, the Singapore court was the appropriate forum to hear the application. This was notwithstanding the decentralised nature of blockchain that could pose difficulties when it came to establishing jurisdiction. The primary connecting factor was the fact that Rajkumar was in Singapore and carried on his business here.<sup>15</sup>

8 In addition, Lee J held that the present case has demonstrated that it was perfectly possible for a person to conclude a contract with someone online where the parties to the contract have concealed their true identities using pseudonyms. Hence, even though the identity of Chefpierre was unknown, Lee J's view was that the Singapore court had the jurisdiction to grant the interim relief sought by Rajkumar.<sup>16</sup>

9 Lee J also held that NFTs can be regarded as property. He considered that the classic definition of a property right in the English case of *National Provincial Bank Ltd v Ainsworth*<sup>17</sup> (“Ainsworth”) could be applied to determine if crypto assets (such as NFTs) were property.<sup>18</sup>

(a) Lee J held that the first requirement was fulfilled as metadata was central to an NFT and it was this metadata which distinguishes one NFT from another.<sup>19</sup>

(b) Second, where NFTs were concerned, the presumptive owner would be whoever controlled the wallet which was linked to the NFT. Excludability was

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14 *Janesh s/o Rajkumar v Unknown Person (“CHEFPIERRE”)* [2023] 3 SLR 1191 at [26].

15 *Janesh s/o Rajkumar v Unknown Person (“CHEFPIERRE”)* [2023] 3 SLR 1191 at [27].

16 *Janesh s/o Rajkumar v Unknown Person (“CHEFPIERRE”)* [2023] 3 SLR 1191 at [38]–[42].

17 [1965] AC 1175.

18 *Janesh s/o Rajkumar v Unknown Person (“CHEFPIERRE”)* [2023] 3 SLR 1191 at [62].

19 *Janesh s/o Rajkumar v Unknown Person (“CHEFPIERRE”)* [2023] 3 SLR 1191 at [69].

achieved as one was unable to deal with the NFT without the owner's private key.<sup>20</sup>

(c) Third, that third parties must respect the rights of the owner in that asset and that the asset must be potentially desirable. Lee J was of the view that these requirements were met: the nature of the blockchain technology gave the owner the exclusive ability to transfer the NFT to another party, which underscored the "right" of the owner; and such NFTs were clearly the subject of active trading in the markets.<sup>21</sup>

(d) Last, the right and in turn, the asset, must have some degree of permanence or stability. Lee J's view was that the Bored Ape NFT had as much permanence and stability as money in bank accounts (money in bank accounts nowadays exist mainly in the form of ledger entries and not cold hard cash).<sup>22</sup>

### III. A third category of property

10 Much ink has been spilled in *Rajkumar v Chefpierre* over the "tertium quid" argument.<sup>23</sup> The tertium quid argument is made up of two parts, first, English law has traditionally only recognised two kinds of property, *ie*, choses in possession and choses in action.<sup>24</sup> Second, since crypto assets cannot fall within either category, they cannot be considered property at all.<sup>25</sup> Another option is to create a third category of personal property.

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20 *Janesh s/o Rajkumar v Unknown Person ("CHEFPIERRE")* [2023] 3 SLR 1191 at [70].

21 *Janesh s/o Rajkumar v Unknown Person ("CHEFPIERRE")* [2023] 3 SLR 1191 at [71].

22 *Janesh s/o Rajkumar v Unknown Person ("CHEFPIERRE")* [2023] 3 SLR 1191 at [72].

23 See Timothy Chan & Kelvin F K Low, "DeFi Common Sense: Crypto-backed Lending in *Janesh s/o Rajkumar v Unknown Person ("CHEFPIERRE")*" (2023) 86(5) *Modern Law Review* 1278 <<https://doi.org/10.1111/1468-2230.12804>> (accessed 26 June 2023).

24 *Janesh s/o Rajkumar v Unknown Person ("CHEFPIERRE")* [2023] 3 SLR 1191 at [60]; see also *AA v Persons Unknown* [2020] 4 WLR 35; [2019] EWHC 3556 (Comm) at [55].

25 *Janesh s/o Rajkumar v Unknown Person ("CHEFPIERRE")* [2023] 3 SLR 1191 at [60].

At present, there is no court in the common law world that has ruled that there is a third category of personal property. But the common law courts have ruled that certain things, having satisfied the test in *Ainsworth*, are property though they are neither choses in action nor choses in possession. For example, the English High Court in *AA v Persons Unknown*<sup>26</sup> ruled that Bitcoin was neither a chose in possession nor a chose in action but could nevertheless be regarded as property under English law.<sup>27</sup> Indeed, Chan and Low have noticed that while there is a growing consensus that crypto assets should be treated as property, there is no positive reason for that conclusion.<sup>28</sup>

11 Possession as traditionally understood is only possible for a tangible object such as a chattel. Singapore law currently recognises the concept of possession to encompass choses in action that are recorded in documents. A possible solution is to extend the concept of possession to intangibles such as NFTs. Many instances of possession are legal fictions rather than accurate descriptions of the factual circumstances.

12 Where NFTs are concerned, legislation could be passed to recognise NFTs as documentary intangibles. In *Rajkumar v Chefpierre*, it was not really the digital ape that was taken away. It was the token representing the graphic. Legal concepts have developed to recognise that a single thing can be configured to represent rights, such as property rights, in something else.<sup>29</sup>

13 For example, the bill of lading is a transport document issued by a carrier to a shipper covering the carriage of goods by sea. It is a document of title, meaning the carrier must deliver the goods to the proper person as defined by the bill.<sup>30</sup> Moringiello

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26 [2020] 4 WLR 35.

27 *AA v Persons Unknown* [2020] 4 WLR 35; [2019] EWHC 3556 (Comm) at [59].

28 Timothy Chan & Kelvin F K Low, “DeFi Common Sense: Crypto-backed Lending in *Janesh s/o Rajkumar v Unknown Person (‘CHEFPIERRE’)*” (2023) 86(5) *Modern Law Review* 1278 <<https://doi.org/10.1111/1468-2230.12804>> (accessed 26 June 2023).

29 Juliet M Moringiello & Christopher K Odinet, “The Property Law of Tokens” (2022) 74 *Florida Law Review* 607 at 615.

30 Mark Shope, “The Bill of Lading on the Blockchain: An Analysis of its Compatibility with International Rules on Commercial Transactions” (2021) 22 *Minnesota Journal of Law, Science & Technology* 163 at 165–166.

and Odinet have argued that the bill of lading is a token for the goods which the law gives legal recognition.<sup>31</sup> Shope, on the other hand, has identified the shortcomings of the paper bills of lading, claiming that it is susceptible to fraud and theft, hence he suggests that blockchain technology could be a solution to paper bills of lading.<sup>32</sup> However, Moringiello and Odinet have noted that NFTs do not *per se* actually embody property rights in a reference asset, as the NFT creates no “legal link” and there is “no actual, current law” that would give NFT that “tethering effect”.<sup>33</sup> However, this is debatable because the link could be formed in contract law depending on the terms of the issuance of the NFT.

14 There are many different iterations of the terms governing NFTs of different platforms. One version is that NFTs have been issued granting only a licence to the underlying asset. The NFT itself would be “owned” by the purchaser, subject to the terms of the issuance, but it is a separate issue what rights the token would represent *vis-à-vis* the referenced asset.<sup>34</sup> In the Bored Ape Yacht Club NFT, the developer suggests that the owner of an NFT owns not only the NFT but the reference asset. For example, the first paragraph of the “Ownership” section of the Bored Ape Yacht Club Terms and Conditions states that the buyer “[owns] the underlying Bored Ape, the Art, completely”.<sup>35</sup> The subsequent paragraphs appear to take away some of that “complete” ownership by stating that the developer, Yuga Labs, grants the buyer an “unlimited, worldwide license to use,

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31 Juliet M Moringiello & Christopher K Odinet, “The Property Law of Tokens” (2022) 74 Florida Law Review 607 at 624.

32 Mark Shope, “The Bill of Lading on the Blockchain: An Analysis of its Compatibility with International Rules on Commercial Transactions” (2021) 22 Minnesota Journal of Law, Science & Technology 163 at 166–167.

33 Juliet M Moringiello & Christopher K Odinet, “The Property Law of Tokens” (2022) 74 Florida Law Review 607 at 642.

34 Ben Chester Cheong, “Application of Blockchain-enabled Technology: Regulating Non-fungible Tokens (NFTs) in Singapore”, *Singapore Law Gazette* (January 2022) <<https://lawgazette.com.sg/feature/application-of-blockchain-enabled-technology-nfts>> (accessed 26 June 2023).

35 Bored Ape Yacht Club, “Terms & Conditions” <<https://boredapeyachtclub.com/#/terms>> (accessed 28 June 2023) at para i.



copy, and display the Art” for a variety of purposes.<sup>36</sup> Assuming that the Yuga Labs intended to transfer ownership of the Art completely to the current holder of the NFT, it is unclear how it can still license the Art from a property law perspective. The language is admittedly convoluted, and it is open to discussion whether the transfer intent was in relation to the token distinct from an outright assignment of the intellectual property rights in the artwork, which is a separate layer of rights. Moringiello and Odinet have argued that traditional property concepts do not support the idea that NFTs currently offered to the public are true tokens, and thus cannot facilitate the transfer of any asset.<sup>37</sup> Indeed, apart from judicial recognition at the interlocutory stage that NFTs can be recognised as property, the legal mechanism needs to be developed to recognise that NFTs can be “tethered” to the underlying asset.

15 In July 2023, the Law Commission of England and Wales had suggested the creation of a new third category of personal property as part of a reform of the law relating to digital assets.<sup>38</sup> It can also be observed that some of the Singapore statutes appear to expand the concept of property beyond choses in action and choses in possession. This can be gleaned from the definition of property used in the relevant statutes.<sup>39</sup> In each of these statutes, property is defined as “money and all other property, movable or immovable, including things in action and other *intangible or incorporeal property*” [emphasis added]. The inclusion of these words suggests that there are types of intangible or incorporeal property that are not choses in action, for example, NFTs. However, it is worth noting that in the context of a sale of a physical artwork, it is also not necessarily the case

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36 Bored Ape Yacht Club, “Terms & Conditions” <<https://boredapeyachtclub.com/#/terms>> (accessed 28 June 2023) at paras ii and iii.

37 Juliet M Moringiello & Christopher K Odinet, “The Property Law of Tokens” (2022) 74 Florida Law Review 607 at 670.

38 United Kingdom Law Commission, *Digital Assets: Final Report* (Law Com No 412, 27 June 2023) at paras 2.45–2.54.

39 Penal Code 1871 (2020 Rev Ed) s 22; Protection from Online Falsehoods and Manipulation Act 2019 (2020 Rev Ed) s 38(4); Foreign Interference (Countermeasures) Act 2021 (Act 28 of 2021) s 40(4); Organised Crime Act 2015 (2020 Rev Ed) s 2(1); Criminal Procedure Code 2010 (2020 Rev Ed) s 2(1); Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act 1992 (2020 Rev Ed) s 2(1).

that the copyright in the work is automatically transferred to the purchaser of the artwork. This must occur through assignment of the intellectual property rights in that physical artwork.<sup>40</sup>

#### IV. *Forum conveniens*

16 The traditional understanding of the test for *forum conveniens* may not be appropriate where digital assets are concerned due to the borderless nature of such transactions. At common law, the appropriate forum is the one in which the case may most suitably be tried for the interests of all the parties and the ends of justice. The doctrine of *forum conveniens* has an impact not only in deciding on the appropriate forum to hear the dispute but more fundamentally, it also decides whether service outside jurisdiction can be granted. If a foreign defendant disputes that Singapore is the appropriate forum, the foreign defendant would typically oppose the action with an application to set aside the service and in the alternative, to stay the proceedings in favour of another forum.<sup>41</sup>

17 NFTs are intangible assets and are not physically “stored” anywhere. NFTs exist on the blockchain, and this is a public ledger distributed across a network of computers around the world. Even the digital wallet used to hold the digital asset is recorded on the public ledger. The English High Court in *Ion Science Ltd v Persons Unknown (unreported)* held that the *lex situs* of a digital asset is the place where the person or company who owned it is domiciled, thereby allowing the court to hear, try and

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40 Ben Chester Cheong, “Application of Blockchain-enabled Technology: Regulating Non-fungible Tokens (NFTs) in Singapore”, *Singapore Law Gazette* (January 2022) <<https://lawgazette.com.sg/feature/application-of-blockchain-enabled-technology-nfts>> (accessed 26 June 2023).

41 See, eg, *MAN Diesel & Turbo SE v IM Skaugen SE* [2019] SGCA 80 at [1].

grant orders in that case.<sup>42</sup> In *Rajkumar v Chefpierre*, the Singapore High Court appeared to take a similar approach.<sup>43</sup>

18 Furthermore, the defendant may be outside of the jurisdiction. In order to serve proceedings outside of the jurisdiction, the court must consider whether the Singapore or foreign courts are the most appropriate forum. In *CLM v CLN*,<sup>44</sup> the Singapore High Court allowed substituted service through the fraudster's e-mail address, which the claimants in that case had.<sup>45</sup> The High Court in *Rajkumar v Chefpierre* extended this approach by allowing Rajkumar to serve court papers on Chefpierre through Twitter and other chat platforms (eg, Discord), as well as the messaging function of Chefpierre's cryptocurrency wallet.

19 Given the pseudonymous nature of blockchain transactions, allowing service through social media or internet messaging platforms is a practical solution. Furthermore, cryptocurrency wallets could be used as a medium for service. In *D'Aloia v Persons Unknown*,<sup>46</sup> the victim of a crypto asset scam brought a claim against persons unknown in the English High Court. The court allowed service of injunctions through an airdrop of an NFT containing the court papers into the wallets of these persons unknown.<sup>47</sup> It is quite likely that a Singapore court might adopt a similar approach in a future dispute involving service of court proceedings on a pseudonymous transaction.

20 In *Jones v Persons Unknown*,<sup>48</sup> an NFT with a link to a website that contained the court order was airdropped into a digital wallet accessible by the fraudsters. As Huobi controlled the digital wallet containing the fraudulently obtained Bitcoins,

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42 *Ion Science Ltd v Persons Unknown* (21 December 2020) (Commercial Court). See also Gerard Quek & Daniel Ling, "Navigating the Labyrinth: Cryptocurrency Enforcement", *Singapore Law Gazette* (October 2022) <<https://lawgazette.com.sg/feature/navigating-the-labyrinth-cryptocurrency-enforcement/>> (accessed 25 June 2023).

43 *Janesh s/o Rajkumar v Unknown Person ("CHEFPIERRE")* [2023] 3 SLR 1191 at [27]–[30].

44 [2022] 5 SLR 273.

45 *CLM v CLN* [2022] 5 SLR 273 at [80]–[81].

46 [2022] EWHC 1723.

47 *D'Aloia v Persons Unknown* [2022] EWHC 1723 at [38]–[40].

48 [2022] EWHC 2543 (Comm).

it accepted the court order and subsequently arranged for the Bitcoins to be returned to the victim. This is the difference between a custodial exchange and a non-custodial exchange. A custodial exchange may be more likely to comply with a court-issued order than the owner and may also have information as to the real identity of the underlying owner.<sup>49</sup>

21 A custodial marketplace is one where the marketplace is the host and acts as the custodian during the purchase process. In a custodial marketplace, the marketplace transfers the NFT to the new owner once the trade occurs. A custodial marketplace also manages the user's crypto wallet. It has control over all the NFTs users store in the wallet and the private key. The Binance NFT marketplace is one example of a custodial marketplace. The marketplace could freeze a user's account if necessary.<sup>50</sup>

22 A non-custodial marketplace is decentralised. Users make trades directly with other users from their wallets. A non-custodial marketplace does not have access to a user's private key. Non-custodial marketplaces create a private connection directly between users, creators or sellers, and uphold autonomy and the anonymity of users. Non-custodial platforms use smart contracts to enable any NFT transaction. An example of a non-custodial marketplace is OpenSea.<sup>51</sup> While OpenSea does appear to have restricted trade in relation to the Bored Ape NFT in *Rajkumar v Chefpiere*,<sup>52</sup> OpenSea has said that it does not take custody of NFTs, so this may leave open the question of whether

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49 See Mohammad Musharraf, "Custodial vs Non-custodial Wallets", *MoonPay* (5 July 2023) <<https://www.moonpay.com/learn/blockchain/custodial-vs-non-custodial-wallets>> (accessed 28 June 2023).

50 John Pattison, "What's the Difference Between a Custodial and Non-custodial Marketplace", *Anterdit* (20 July 2022) <<https://anterdit.com/our-insights/whats-the-difference-between-a-custodial-and-non-custodial-marketplace>> (accessed 28 June 2023).

51 John Pattison, "What's the Difference between a Custodial and non-Custodial Marketplace", *Anterdit* (20 July 2022) <<https://anterdit.com/our-insights/whats-the-difference-between-a-custodial-and-non-custodial-marketplace>> (accessed 28 June 2023).

52 OpenSea, Bored Ape Yacht Club NFT #2162 <<https://opensea.io/assets/ethereum/0xbc4ca0eda7647a8ab7c2061c2e118a18a936f13d/2162>> (accessed 3 July 2023).

the NFT may be transferred to other wallets on the blockchain using other platforms.<sup>53</sup>

23 Custodial wallets or marketplaces make recovery of stolen NFTs easier, since customers records are kept. These intermediaries also have access to a user's private keys and can be called upon to transfer the assets pursuant to a court order. However, if non-custodial wallets or marketplaces are used, it will be almost impossible to identify the perpetrator due to the decentralised and anonymous nature of blockchain technology. If one can identify the perpetrator, at least a search order of his premises can be ordered, and the private keys can be searched for. In *CLM v CLN*, these keys (which were stolen) were written on paper and kept in a physical safe.<sup>54</sup>

24 Fraudsters may also try to hide stolen assets by mixing potentially identifiable crypto assets with other funds (using a service such as Tornado Cash).<sup>55</sup> The evolution of blockchain forensics may reach a stage where crypto mixing may no longer be helpful to cyber thieves. In an interview with Forkast News, Benjamin Sauter, partner of US law firm Kobre & Kim, shared how they recovered US\$32m worth of lost crypto assets:<sup>56</sup>

(a) NFTs would need to be traced through forensic techniques to exchanges and other points of intersection where know-your-customer ("KYC") checks are conducted and where assets are exchanged for other types of assets. This will provide opportunities to recover the asset.

(b) Once the funds land at an exchange, and if the exchange has conducted KYC checks and retains the ability

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53 OpenSea Help Centre, "Why is My NFT Marked for Suspicious Activity" <<https://support.opensea.io/hc/en-us/articles/4409456298515-Why-is-my-NFT-marked-for-suspicious-activity->> (accessed 3 July 2023).

54 *CLM v CLN* [2022] 5 SLR 273 at [17]-[20].

55 Jason Nelson, "What Are Coin Mixers and How Do They Work?", *Decrypt* (13 August 2022) <<https://decrypt.co/resources/what-are-coin-mixers-tornado-cash-how-do-they-work>> (accessed 28 June 2023).

56 Angie Lau, "How Crypto Forensics Traced \$32 Million Worth of 'Lost' Bitcoin", *Forkast News* (5 February 2021) <<https://forkast.news/video-audio/crypto-forensics-trace-bitcoin-criminals-doga/>> (accessed 28 June 2023).

to freeze those accounts to respond to court orders, then it would be possible to direct it to freeze and ultimately turn over those assets. So even though from one transaction to the next, it may not be possible to know who is behind a particular wallet address, information may be gained by tracing it from wallet to wallet until it hits a known entity or a known person.

(c) Companies out there sell proprietary software (eg, CipherTrace and Chainalysis) that will indicate who is behind known wallets or clusters of wallets. So, if the exchanges have accurate KYC checks on their account holders, then it is possible to learn the identity of that person who controls that wallet from the exchange itself or from other businesses that operate in that space.

(d) KYC checks enable governments and victims of fraud to use the blockchain while connecting it to the real world. Law enforcement agencies in many cases have become very sophisticated at it – seizing hardware servers and cold storage wallets and using their ability to find private keys and take into their control Bitcoin and other digital assets that could be accessed through those private keys.<sup>57</sup>

25 Another problem posed by crypto assets is whether courts can grant injunctions against a crypto asset fraudster known only by a pseudonym when it has no control to issue committal proceedings against the defendant for non-compliance.

26 This jurisdiction to grant injunctions against persons unknown was applied in the cryptocurrency context against unknown fraudsters in the Malaysian case of *Zschimmer & Schwarz GmbH & Co KG Chemische Fabriken v Persons Unknown*.<sup>58</sup> It granted a *Spartacus order* against the unknown defendants. This required the persons unknown to identify themselves and to provide an address for service, or face committal proceedings. The *Spartacus*

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57 Angie Lau, “How Crypto Forensics Traced \$32 Million Worth of ‘Lost’ Bitcoin”, *Forkast News* (5 February 2021) <<https://forkast.news/video-audio/crypto-forensics-trace-bitcoin-criminals-dooga/>> (accessed 28 June 2023).

58 [2021] 7 MLJ 178.

order may be of limited practical utility if the fraudster chooses to ignore it.

27 The Singapore High Court in both *CLM v CLN* and *Rajkumar v Chefpierre* held that it had jurisdiction to grant interim orders against persons unknown, if the description used was sufficiently certain as to identify both those who are included and those who are not. In that case, the unknown persons were described by their connection to the fraud.<sup>59</sup>

28 However, it may be worthwhile for claimants to consider naming foreign NFT marketplaces and exchanges (especially custodial exchanges) as nominal defendants in order to obtain information through ancillary disclosure orders. In *CLM v CLN*, ancillary disclosure orders were sought against two exchanges.<sup>60</sup> They had been named as nominal defendants in that suit. The High Court held that it had the power to grant interlocutory relief when “it appears to the court to be just or convenient”<sup>61</sup> and granted the ancillary disclosure orders sought.<sup>62</sup>

## V. Conclusion

29 With the Singapore High Court decisions of *CLM v CLN* as well as *Rajkumar v Chefpierre*, it seems to set the stage that NFTs can be considered as property for the purposes of interim asset protection. The concept of property is also relevant in criminal law, for example, whether an NFT is something that can be stolen.<sup>63</sup> Furthermore, the concept of property is relevant in civil and criminal procedure law in deciding whether theft or fraud is the right cause of action and the type of remedies available.<sup>64</sup>

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59 *CLM v CLN* [2022] 5 SLR 273 at [32]–[34]; *Janesh s/o Rajkumar v Unknown Person (“CHEFPIERRE”)* [2023] 3 SLR 1191 at [39]–[40].

60 *CLM v CLN* [2022] 5 SLR 273 at [57]–[60].

61 *CLM v CLN* [2022] 5 SLR 273 at [59].

62 *CLM v CLN* [2022] 5 SLR 273 at [58].

63 Jason Allen, *Cryptoassets and Property Law: Singapore Edition* (Asian Business Law Institute & Singapore Academy of Law, 2022) at p 43.

64 Jason Allen, *Cryptoassets and Property Law: Singapore Edition* (Asian Business Law Institute & Singapore Academy of Law, 2022) at p 43.

30 It is argued that the law should actively protect new asset classes. Perhaps a solution may be gleaned from China. China had banned crypto trading and mining in 2021. However, it has allowed NFTs but banned people from speculating and trading them. Instead of NFTs, it uses the term “digital collectible”.<sup>65</sup> Most Chinese NFT platforms are built on consortium blockchains or Blockchain-as-a-Service infrastructure, giving companies and organisations authority to govern the platform. This is in direct contrast to popular global NFT platforms, which are built on public blockchains, meaning that they are permissionless, allow anyone to join, and are decentralized in nature.<sup>66</sup> Having said that, it is worth noting that NFTs can have legal terms attached to them, through terms and conditions prescribed by the developer or seller.

31 An important difference between NFTs issued in China and the international market is that Chinese digital collectible platforms require users to register with their real-name identification to comply with the law. On the other hand, the international NFT market mainly comprises anonymous users.<sup>67</sup> Anonymity may affect the practical ability to enforce any judgment, even as anonymity *per se* may not necessarily affect the imposition of substantive obligations to a token.

32 For example, the multiple problems associated with anonymous users can be avoided if regulation makes it mandatory for users dealing on centralised marketplaces and exchanges to

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65 Coco Feng, “China to Launch National Exchange for Trading NFT-like Digital Assets Despite Cryptocurrency Bans”, *South China Morning Post* (30 December 2022) <<https://www.scmp.com/tech/policy/article/3205050/china-launch-national-exchange-trading-nft-digital-assets-despite-cryptocurrency-bans>> (accessed 28 June 2023).

66 Joy Wu, “China’s NFT Market: Who Are the Major Players, and What Makes Them Different?”, *TechNode* (15 March 2022) <<https://technode.com/2022/03/15/chinas-nft-market-who-are-the-major-players-and-what-makes-them-different/>> (accessed 28 June 2023).

67 Joy Wu, “China’s NFT Market: Who Are the Major Players, and What Makes Them Different?”, *TechNode* (15 March 2022) <<https://technode.com/2022/03/15/chinas-nft-market-who-are-the-major-players-and-what-makes-them-different/>> (accessed 28 June 2023).



register with genuine identification.<sup>68</sup> In this regard, the Chinese courts have also taken a proactive approach in combating infringing works by holding NFT marketplaces responsible for allowing a user to create an NFT from stolen artwork. Apart from being fined, the NFT platform was ordered to stop the NFT from being circulated by sending it to an “eater address”.<sup>69</sup> An eater address is a cryptocurrency wallet address that does not have a private key, and so cannot be used for transactions.

33 Perhaps, greater regulation and imposing a mandatory KYC requirement on NFT marketplaces and exchanges would help to stem the problems associated with the recovery of NFTs that have been wrongfully taken away. In this regard, the Monetary Authority of Singapore has announced new measures in July 2023 to ring-fence customers’ digital payment tokens, which may possibly also apply to payment tokens linked NFT issuances, which is a first step towards reigning the unruly horse.<sup>70</sup>

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68 See generally Ben Chester Cheong, “Avatars in the Metaverse: Potential Legal Issues and Remedies” (2022) 3(2) *International Cybersecurity Law Review* 467 at 472.

69 Xinmei Shen and Yaling Jiang, “China’s First Court Ruling on NFT Art Theft Holds Marketplace Accountable”, *South China Morning Post* (25 April 2022) <<https://www.scmp.com/tech/tech-trends/article/3175457/chinas-first-court-ruling-nft-art-theft-holds-marketplace>> (accessed 28 June 2023).

70 See Claire Huang, “Singapore to Have New Measures to Ring-Fence Customers’ Crypto Assets: MAS”, *The Straits Times* (3 July 2023) <<https://www.straitstimes.com/business/singapore-to-have-new-measures-to-ringfence-customers-crypto-assets-mas>> (accessed 3 July 2023).