

Case Comment

**CRYPTO ASSETS ARE PROPERTY, SPECIFICALLY,  
CHOSSES IN ACTION, THAT ARE CAPABLE OF BEING  
HELD ON TRUST**

*ByBit Fintech Ltd v Ho Kai Xin* [2023] SGHC 199

[2024] SAL Prac 2

This article examines the decision of *ByBit Fintech Ltd v Ho Kai Xin* [2023] SGHC 199 where a summary judgment was obtained against the defendant for a breach of her employment contract and abuse of her position to unjustly enrich herself. This decision is the first time a common law court has declared that cryptocurrency is property capable of being held on trust, and its nature is that of a chose in action. This article also examines potential implications that may arise from this decision.

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1 The first author previously published a paper in 2023, Ben Chester Cheong, “Doctrinal Issues in Recovering NFTs That Have Been Wrongly Taken Away” [2023] SAL Prac 14. This paper is the second part of the doctrinal analysis on the legal nature of cryptocurrency. The first and second authors are grateful to the Editor, Lam Chung Nian of WongPartnership LLP for all his helpful and insightful comments to improve this article. All errors remain the authors’ own.

## I. Introduction

1 Since Bitcoin was first conceived in 2009 and grew exponentially,<sup>2</sup> its “success” gave rise to hundreds of alternative cryptocurrencies such as Ethereum, Litecoin and stablecoins, amongst others. Their gradual adoption posed the legal world with interesting questions. This article examines one such question: Are they considered property and if so, what kind?

2 Prior to the decision of *ByBit Fintech Ltd v Ho Kai Xin*<sup>3</sup> (“*ByBit Fintech*”), common law courts have granted interlocutory injunctions over crypto assets.<sup>4</sup> The courts acknowledged that there was at least “a serious question to be tried” or “a good arguable case” that they are property, and thus capable of being the subject of interlocutory relief. In this regard, the courts were not required to decide on complex legal or factual questions at the interlocutory stage.<sup>5</sup>

3 Much ink has been spilt over the legal nature of crypto assets. Eventually in *ByBit Fintech*, Philip Jeyaretnam J was faced with this issue and had the opportunity to address whether crypto assets could form the subject matter of a trust. Briefly, the primary relief sought by *ByBit Fintech Ltd* (“*ByBit*”) was a declaration that *Ho Kai Xin* (“*Ms Ho*”) held stolen fiat and cryptocurrency on trust for *ByBit*. *ByBit* accordingly sought an order for the return of the same or its traceable proceeds or for payment of a sum equivalent in value.<sup>6</sup>

4 After an in-depth analysis, Jeyaretnam J decided that crypto assets are indeed property, specifically, choses in action, capable of being held on trust, marking the first time a common

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2 See Kelvin F K Low & Ernie G S Teo, “Bitcoins and Other Cryptocurrencies as Property?” (2017) 9(2) *Law, Innovation and Technology* 235 for a more detailed history on Bitcoin.

3 [2023] SGHC 199.

4 See, eg, *Zi Wang v Graham Darby* [2021] EWHC 3053 (Comm); *Lavinia Deborah Osbourne v Persons Unknown* [2022] EWHC 1021; *CLM v CLN* [2022] 5 SLR 273 and *Janesh s/o Rajkumar v Unknown Person (“CHEFPIERRE”)* [2023] 3 SLR 1191.

5 *CLM v CLN* [2022] 5 SLR 273 at [39] and [46], citing *Bouvier, Yves Charles Edgar v Accent Delight International Ltd* [2015] 5 SLR 558 at [151].

6 *ByBit Fintech Ltd v Ho Kai Xin* [2023] SGHC 199 at [2].

law court has expressly made such a ruling. It is submitted that the trend of recent cases around the world pointed in the direction that cryptocurrency is regarded as property, and Jeyaretnam J's decision should not come as much of a surprise.

5 There are three parts to this article – Part I is this introduction; Part II gives a brief background of the case; and Part III is the commentary.

## **II. *ByBit Fintech Ltd v Ho Kai Xin* [2023] SGHC 199**

### **A. *Background facts***

6 The claimant, ByBit, is a Seychellois company that owns a namesake cryptocurrency exchange and pays its employees in fiat currency, cryptocurrency, or a mixture of both. ByBit had engaged WeChain Fintech Pte Ltd (“WeChain”), a Singapore-incorporated company, to handle the remuneration of its employees.<sup>7</sup>

7 The defendant, Ms Ho, worked for WeChain and oversaw the payroll processing of ByBit's employees. Her duties included maintaining Microsoft Excel spreadsheets which tracked the fiat and cryptocurrency payments due to ByBit's employees each month (respectively, the “Fiat Excel Files” and “Crypto Excel Files”). The Crypto Excel Files contained “Addresses” designated by ByBit's employees for the receipt of cryptocurrency payments. ByBit's employees regularly changed their designated Address and did so by communicating a new Address to Ms Ho, who would then update the Crypto Excel Files. At all times, she had exclusive access to the Crypto Excel Files, save that they would be submitted to her direct superior for approval each month.<sup>8</sup>

8 On 7 September 2022, ByBit discovered eight cryptocurrency payments involving 4,209,720 United States Dollars Tether (“USDT”) were made into four Addresses (“Four Addresses”) between May and August 2022 (the “Anomalous

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7 *ByBit Fintech Ltd v Ho Kai Xin* [2023] SGHC 199 at [7].

8 *ByBit Fintech Ltd v Ho Kai Xin* [2023] SGHC 199 at [7]–[8].

Transactions”). Ms Ho initially attributed the Anomalous Transactions to inadvertent mistakes or technical errors. She suggested the same when further questioned about why payments to different employees were made to one Address, Address 1.<sup>9</sup>

9 Dissatisfied with Ms Ho’s explanation, ByBit conducted its internal investigations. First, ByBit contacted one of the supposed recipients in which 1,300,000 USDT was paid to Address 1 in his name. The employee denied designating an Address or knew who owned Address 1 as he was only ever paid in fiat currency. Second, Ms Ho had prior knowledge of the Four Addresses as her work e-mail received e-mails from her personal e-mail on 19 May and 2 August 2022, containing the Four Addresses. These e-mails were deleted and needed to be recovered. Third, Ms Ho had caused \$117,238.46 to be paid into her bank account in May 2022.<sup>10</sup>

10 Now suspicious, ByBit conducted two interviews with Ms Ho. ByBit presented the findings of its investigations to Ms Ho at the second interview on 4 October 2022. Ms Ho claimed that she had no access to the Wallets associated with the Four Addresses because they belonged to her maternal cousin. Further, she possessed closed-circuit surveillance footage recording him carrying out the Anomalous Transactions in her house. Ms Ho admitted to being involved in her cousin’s scheme three months before the interview, but she insisted that a police report be made. She however refused to sign an acknowledgment on a one-page statement recording what transpired. Thereafter, she ceased contact with ByBit and WeChain and refused to attend follow-up interviews.<sup>11</sup>

11 By 12 October 2022, ByBit had obtained a worldwide freezing order against Ms Ho and a proprietary injunction in respect of the cryptocurrency in the Four Addresses and the fiat in Ms Ho’s bank account. Interestingly, Ms Ho fully accepted that the USDT belonged to ByBit. She maintained that the

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9 *ByBit Fintech Ltd v Ho Kai Xin* [2023] SGHC 199 at [9]–[10].

10 *ByBit Fintech Ltd v Ho Kai Xin* [2023] SGHC 199 at [11]–[12].

11 *ByBit Fintech Ltd v Ho Kai Xin* [2023] SGHC 199 at [13].

Wallets associated with the Four Addresses belonged to Jason Teo (“Jason”), her maternal cousin, and she had no access to them. When Jason visited her house, she asked Jason to assist in checking the Crypto Excel Files. It was only when ByBit drew her attention to the Anomalous Transactions that she realised Jason had stolen the USDT without her knowledge. Despite repeated requests, Jason refused to return the stolen USDT. However, *she* had deleted the text conversation with Jason and the closed-circuit surveillance footage had been automatically deleted.<sup>12</sup>

12 ByBit, dissatisfied with Ms Ho’s disclosure, sought additional disclosure against Ms Ho and other third parties including her father and husband. It discovered that Ms Ho had engaged in suspicious luxury spending sprees, including a freehold penthouse apartment, a brand-new car, and several Louis Vuitton items. Curiously, Ms Ho denied ownership of those purchases and later explained that she purchased them with money earned from cryptocurrency trading despite previously claiming that her trading accounts were inaccessible.<sup>13</sup>

13 Furthermore, ByBit obtained disclosure from the service provider of the Wallet associated with Address 1. It revealed that Ms Ho was the owner and included details such as her identity card and self-portrait which were provided during the registration process. Transaction records also revealed that USDT had been transferred from Addresses 2 and 3 to Address 1, suggesting that Ms Ho likely owned the other Wallets associated with the Four Addresses.<sup>14</sup>

14 ByBit submitted, amongst other things, that Ms Ho held the cryptocurrencies and fiat as constructive trustee as she had acquired them by fraud, thereby giving rise to an institutional constructive trust. Accordingly, ByBit prayed that the court should grant a tracing order as Ms Ho had transacted in breach of the freezing order.<sup>15</sup>

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12 *ByBit Fintech Ltd v Ho Kai Xin* [2023] SGHC 199 at [14]–[15].

13 *ByBit Fintech Ltd v Ho Kai Xin* [2023] SGHC 199 at [16].

14 *ByBit Fintech Ltd v Ho Kai Xin* [2023] SGHC 199 at [25].

15 *ByBit Fintech Ltd v Ho Kai Xin* [2023] SGHC 199 at [27].

## **B. Crypto assets are property**

15 To determine whether the crypto assets were held on the trust, Jeyaretnam J first recognised that cryptocurrency is a form of property capable of being identified and segregated. That is because cryptocurrencies have not only been transferred for value but also appeared on company balance sheets as the accounting profession has developed standards for valuing and reporting them.<sup>16</sup> Jeyaretnam J also relied on the Monetary Authority of Singapore’s recent consultation paper<sup>17</sup> which proposed amendments to implement segregation and custody requirements for digital payment tokens. These amendments reflected the possibility of identifying and segregating digital assets and supported the view that they could be held on trust.<sup>18</sup>

16 There were also strong reasons for cryptocurrency to be regarded as property. First, cryptocurrency has been statutorily recognised as a form of property. Under O 22 r 1(1) of the Rules of Court 2021 (“ROC 2021”), which deals with the enforcement of judgments and orders, it defines “movable property” to include, *inter alia*, “cryptocurrency and other digital currency”.<sup>19</sup> Second, crypto assets are capable of being defined and identified by humans, such that they can be traded and hold value. Jeyaretnam J recognised that crypto assets do not have a fixed physical identity but manifest themselves in the physical world albeit in a way that humans are unable to perceive. Referring to Low’s article, the right of the holder of the private key is “properly conceptualised as a narrow right to have the UTXO locked to a holder’s public address on a blockchain”.<sup>20</sup> While the physical manifestation of bits and bytes is not permanent and changes with every transaction, Jeyaretnam J analogised it with “how we give a name to a river even though the water contained

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16 *ByBit Fintech Ltd v Ho Kai Xin* [2023] SGHC 199 at [29].

17 Monetary Authority of Singapore, “Response to Public Consultation on Proposed Regulatory Measures for Digital Payment Token Services” (3 July 2023).

18 *ByBit Fintech Ltd v Ho Kai Xin* [2023] SGHC 199 at [29].

19 *ByBit Fintech Ltd v Ho Kai Xin* [2023] SGHC 199 at [30].

20 Kelvin F K Low, “Trusts of Cryptoassets” (2021) 34(4) *Trust Law International* 191.

within its banks is constantly changing”.<sup>21</sup> This description satisfies the oft-cited *dictum* on what constitutes a property:<sup>22</sup> that 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.

### **C. Cryptocurrencies are choses in action**

17 Jeyaretnam J further held cryptocurrency can be classified as choses in action. While choses in action originated as rights enforceable by action against persons, its scope has expanded over time to include title documents to incorporeal rights of property, and ultimately incorporeal rights such as copyright.<sup>23</sup> This diversity suggests that choses in action are “broad, flexible, and not closed”, and in turn justifies Fry LJ’s oft-cited dictum in *Colonial Bank v Whinney*:<sup>24</sup> “All personal things are either in possession or action. The law knows no *tertium quid* between the two.”<sup>25</sup> Jeyaretnam further acknowledged that there was an element of circularity in that the right to enforce in court is what makes it choses in action. This is however not different from how the law approaches other social constructs such as money,<sup>26</sup> and what is treated as money “by the general consent of mankind”<sup>27</sup> is given “the credit and currency of money to all intents and purposes”.<sup>28</sup>

18 In this regard, ByBit relied on the terms of services for USDT which provides for a contractual right of redemption. In other words, a “verified customer” of Tether Ltd (“Tether”) has a contractual right of redemption which can be enforced against Tether. However, Jeyaretnam J considered it an additional chose

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21 *ByBit Fintech Ltd v Ho Kai Xin* [2023] SGHC 199 at [31].

22 *ByBit Fintech Ltd v Ho Kai Xin* [2023] SGHC 199 at [33], citing Lord Wilberforce in *National Provincial Bank v Ainsworth* [1965] 1 AC 1175 at 1248.

23 *ByBit Fintech Ltd v Ho Kai Xin* [2023] SGHC 199 at [34], citing W.S Holdsworth, “The History of the Treatment of ‘Choses’ in Action by the Common Law” (1920) 33(8) *Harvard Law Review* 997–998.

24 (1885) 30 Ch D 261.

25 *ByBit Fintech Ltd v Ho Kai Xin* [2023] SGHC 199 at [35], referring to Fry LJ in *Colonial Bank v Whinney* (1885) 30 Ch D 261 at 285.

26 *ByBit Fintech Ltd v Ho Kai Xin* [2023] SGHC199 at [36].

27 Lord Mansfield in *Miller v Race* (1758) 1 Burr 452 at 457.

28 Lord Mansfield in *Miller v Race* (1758) 1 Burr 452 at 457.

in action, but its presence is not necessary to conclude that the right represented by USDT is itself a chose in action.<sup>29</sup>

### III. Commentary

19 The authors observed that the first part of Jeyaretnam J's decision is not dissimilar from prior decisions granting interlocutory injunctions over cryptocurrencies. In England, Bryan J in *AA v Persons Unknown*<sup>30</sup> held that Bitcoin meets the criteria set out in *National Provincial Bank v Ainsworth*<sup>31</sup> (“*Ainsworth*”) when considering whether Bitcoin is property capable of being subject to a proprietary injunction. This rationale was followed by the court in *Zi Wang v Graham Darby*.<sup>32</sup> In Singapore, Simon Thorley IJ in *B2C2 Ltd v Quoine Pte Ltd*<sup>33</sup> recognised that cryptocurrencies do have the fundamental characteristic of intangible property as being an identifiable thing of value, and they fulfil the definition of property right in *Ainsworth*.<sup>34</sup> On appeal, the Court of Appeal (“CA”),<sup>35</sup> referring to the UK Jurisdiction Taskforce’s “Legal Statement on Cryptoassets and Smart Contracts”, considered that (a) cryptocurrencies have all the indicia of property; (b) their novel feature, *ie*, they might not be classifiable either as choses in possession or in action, does not disqualify them from being property; and (c) hence, they could be treated in principle as property. While the CA opined that there may be much to commend that cryptocurrencies should be capable of assimilation into the general concepts of property, the CA did not have to decide the legal nature of cryptocurrency because there was no intention to create a trust and B2C2's breach of trust claim would fail.<sup>36</sup> Likewise, Lee Seiu Kin J in *Janesh s/o Rajkumar v Unknown Person (“CHEFPIERRE”)*<sup>37</sup> (“*Janesh*”) relied

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29 *ByBit Fintech Ltd v Ho Kai Xin* [2023] SGHC 199 at [38]–[39].

30 [2020] 4 WLR 35.

31 [1965] 1 AC 1175.

32 [2021] EWHC 3054 (Comm).

33 [2019] 4 SLR 17.

34 *B2C2 Ltd v Quoine Pte Ltd* [2019] 4 SLR 17 at [142].

35 *Quoine Pte Ltd v B2C2 Ltd* [2020] 2 SLR 20 at [143].

36 *Quoine Pte Ltd v B2C2 Ltd* [2020] 2 SLR 20 at [144].

37 [2023] 3 SLR 1191.



on the very same *Ainsworth* criteria and held that non-fungible tokens can be regarded as property.<sup>38</sup>

20 In the recent case of *Re Gatecoin Ltd*,<sup>39</sup> Linda J agreed with the New Zealand decision of *Ruscoe v Cryptopia*<sup>40</sup> where Gendall J concluded that cryptocurrency fulfilled the *Ainsworth* criteria: (a) it is definable as the public key associated to a wallet is readily identifiable, sufficiently distinct and capable of being uniquely allocated to individual account holder; (b) it is identifiable by third parties in that only the private key's holder can access and transfer the cryptocurrency from one wallet to another; (c) it is capable of assumption by third parties in that it is subject to active trading markets where the owner's right in it are respected and potentially desirable to third parties such that they want themselves to obtain ownership of it; and (d) it has some degree of permanence or stability as the cryptocurrency's life history is available on the blockchain.<sup>41</sup> Interestingly, Linda J stopped short of considering whether cryptocurrencies are regarded as choses in action.

21 It is further submitted that it was perhaps unnecessary for Jeyaretnam J in *ByBit Fintech* to further consider the issue of whether cryptocurrencies are choses in action or a novel type of property for them to be capable of being held on trust. It is the authors' view that since the subject crypto assets were found to be "property", given the facts of the case, an institutional constructive trust would nonetheless have arisen since Ms Ho had acquired the USDT by fraud,<sup>42</sup> without the need to decide the real nature of cryptocurrency.

22 In addition, it is apposite to note that, on 28 June 2023, the Law Commission of the UK published a report "Digital Assets:

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38 *Janesh s/o Rajkumar v Unknown Person ("CHEFPIERRE")* [2023] 3 SLR 1191 at [69]–[72]; see also, Ben Chester Cheong, "Doctrinal Issues in Recovering NFTs That Have Been Wrongly Taken Away" [2023] SAL Prac 14 for a more comprehensive analysis on the case.

39 [2023] HKCFI 914 at [57]–[59].

40 [2020] 2 NZLR 809.

41 *Ruscoe v Cryptopia Ltd* [2020] 2 NZLR 809 at [105]–[118].

42 *ByBit Fintech Ltd v Ho Kai Xin* [2023] SGHC 199 at [44].

Final Report”<sup>43</sup> recommending reforms of the law relating to digital assets. The Law Commission of the UK had a different view from that of Jeyaretnam J in *ByBit Fintech*. Although it acknowledged that while it was possible to recognise choses in action as “a wider, residual category of things encompassing everything that is not a chose in possession”, it is (a) unclear how it would be practical for the development of the law; (b) if this approach was indeed desirable, why it would not already have been the approach adopted by the courts; and (c) such approach would risk diluting or confusing the defining features of choses in action. In its conclusion, the Law Commission of the UK recommended that instead of expanding choses in action to include things such as cryptocurrency which fell outside of choses in possession, the law should be “free to develop, where appropriate, legal principles specific to [a] third category of things”. Hence, it would be interesting to see if the Singapore Court of Appeal would, soon, be faced with such an argument and adopt the recommendations of the Law Commission of the UK. On the other hand, the recommendations may create additional uncertainty as the law relating to a third category of property would be in its infant stage.

23 That being said, the landmark decision of *ByBit Fintech* provides welcome clarity that the holder of cryptocurrencies has a legally enforceable property right recognised as a chose in action which provides for greater legal protection to cryptocurrency owners. The corollary is that crypto assets can be held on trust, whether express or implied. As seen in *ByBit Fintech*, this would also allow for tracing, which is a vital step in obtaining other remedies.

24 In *ByBit Fintech*, Ms Ho stole \$5.6m worth of crypto and used the funds to purchase a \$3.7m penthouse. “Following” and “tracing” are both exercises in locating assets, which are or may be taken to represent an asset belonging to claimants

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43 United Kingdom Law Commission, *Digital Assets: Final Report* (Law Com No 412, 27 June 2023) <<https://s3-eu-west-2.amazonaws.com/cloud-platform-e218f50a4812967ba1215eaece923f/uploads/sites/30/2023/06/Final-digital-assets-report-FOR-WEBSITE-2.pdf>> (accessed 22 November 2023).

**Crypto Assets are Property, Specifically, Choses in Action,  
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and to which they assert ownership. Following and tracing are proprietary remedies. This is why it is important for crypto assets to be deemed capable of giving rise to proprietary rights. The case of *Boscawen v Bajwa*<sup>44</sup> establishes that tracing is a procedure rather than a solution. As such, there are two necessary steps: first, determining the specific property to trace into; and second, identifying the most appropriate remedy to pursue against said property. The court may order compensation,<sup>45</sup> restore property by returning it to its original owner,<sup>46</sup> place them in resulting trust<sup>47</sup> or constructive trust,<sup>48</sup> or impose a charge.<sup>49</sup>

25 “Following” is a procedure that involves tracing the movement of an asset as it changes hands between individuals. Therefore, even if a trustee violates their fiduciary duty by transferring trust property to another party, this does not negate its status as trust property. The asset can still be “followed” and claimed by the beneficiary with a valid proprietary right. Lord Millett has described the notion of following as “the process of following the same asset as it moves from hand to hand”.<sup>50</sup> The act of “tracing” involves identifying a replacement asset for the original one. For instance, if money is used to buy a car, it is possible to trace the origin of the car back to that money. In this case, the claimant aims to establish ownership over a substitute property, which could be in the form of proceeds from a sale or a combination involving the original property. Additionally, they may have an opportunity to benefit from any increase in value of the property. If there is negligence or a breach of duty on the part of the trustee, the claimant may wish to claim for the notional value of the asset (or what was owed with interest) rather than the market value on judgment, if say for instance, that the crypto asset has significantly plunged in value or the market for the crypto asset has collapsed during the trusteeship period.<sup>51</sup>

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44 [1996] 1 WLR 328.

45 *Target Holdings Ltd v Redferns* [1995] UKHL 10.

46 *Foskett v McKeown* [2001] 1 AC 102.

47 *El Ajou v Dollar Land Holdings plc* [1993] EWCA Civ 4.

48 *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] UKHL 12.

49 *Vaughan v Barlow Clowes International Ltd* [1991] EWCA Civ 11.

50 *Foskett v McKeown* [2001] 1 AC 102 at 127.

51 See generally, Tang Hang Wu, “Trustees’ Investment Duties and Cryptoassets” (2020) 26(2) *Trusts and Trustees* 183.

26 When a person can prove that a breach of fiduciary duty resulted in the transfer of property, they have the option to use equitable tracing. This enables them to trace through mixed funds and claim any increase in value from assets purchased with those funds. It seems that common law tracing also provides this option.<sup>52</sup> Additionally, equity allows for money to be traced through electronic fund transfers, which is not possible under common law.<sup>53</sup> In order for an equitable tracing claim to be valid, it is essential that there is a pre-existing fiduciary relationship. The claimant must have had some form of equitable interest in the original property or there should have been a fiduciary relationship between the person who transferred the property and the claimant (such as acting as a trustee). The penthouse remained in the hands of Ms Ho, and she used the property for her own use. In this case, where an asset has been bought by the trustee in breach of trust, then the beneficiaries may elect to accept the asset as trust property or take a lien (*ie*, a right to take possession of property until one is paid what one is owed) over the property against the trustee. In *Re Oatway*,<sup>54</sup> the beneficiaries were able to elect to have the valuable shares subsumed into the trust as opposed to simply taking rights over money. This is useful for the victim because if the purchased asset goes up, they could elect to take the property that has increased in value if it can be proven that it was bought entirely with stolen funds.

27 Custodial services to manage and protect crypto assets on behalf of the owner, such as custodial wallet services, are commonplace. *ByBit Fintech* provides a clearer basis for an express trust to be established when the parties explicitly agree on the trust relationship and terms. The custody service would be the trustee, taking a fiduciary role in protecting and managing the crypto assets for the client, the settlor. In this situation, an explicit agreement generally outlines the custodian's responsibilities and any applicable limitations.

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52 *Trustee of FC Jones and Son v Jones* [1996] EWCA Civ 1324.

53 *Agip (Africa) Limited v Jackson* [1991] Ch 547.

54 [1903] 2 Ch 356.

28 An implied trust, which can further be subdivided into “resulting” or “constructive” trust, may come into play in the absence of an explicit agreement. A resulting trust may occur if a trustee unjustly enriches themselves using the client’s assets, leading the court to imply a trust to ensure the client’s interests are protected. A constructive trust, on the other hand, could be imposed by the court when there is a breach of fiduciary duty, safeguarding the client’s rights. Regardless, the primary objective is to segregate and identify the assets of each client clearly. Regulations may require separation of client assets or full disclosure about custody operations. Above all, the custodian under English law is expected to clearly distinguish client assets from its assets, especially in the event of financial instability or insolvency.

29 While the notional holder of a cryptocurrency will always be clear, even if it is the trustee as legal owner, the nature of cryptocurrency poses several problems in the administration of the trust. Its value is highly volatile and drastic fluctuations can complicate their management, especially when valuing for tax purposes or distributions.<sup>55</sup> First, the ability to invest will depend on the terms of trust and whether such investments are permitted. Second, the trustee will be held to a standard of care as what an ordinary prudent person would adopt for the benefit of other persons he or she would be morally bound to provide. In this context, and given its volatile nature, it is unlikely to be settled law that trustees may assume that cryptocurrencies are an investible asset class, short of an express direction of the settlor. On this basis, quite apart from the situation where there has been overnight devaluation, the decision to invest in cryptocurrencies may itself be challenged even if the overnight devaluation may not have been foreseeable.

30 Related to this is whether there is a breach of custodial managerial duty if the trustee, exercising his power of investment

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55 See, for example, Ben Chester Cheong, “Application of Blockchain-enabled Technology: Regulating Non-fungible Tokens (NFTs) in Singapore”, *Singapore Law Gazette* (January 2022) and Vincent Ooi, “Tax Challenges in Debt Financing Involving Digital Tokens” (2022) 17(4) *Capital Markets Law Journal* 564.

expressly permitted in the trust deed, had invested the trust moneys with his best efforts but significant overnight devaluation occurred. Even if investments into cryptocurrencies have been expressly authorised by the settlor, the trustee's duty of care under s 3A of the Trustees Act 1967<sup>56</sup> would require the trustee to optimise the return on investments.<sup>57</sup> However, a significant overnight devaluation of the particular cryptocurrency *per se* may not necessarily mean that the trustee had failed to observe his statutory duty of care.<sup>58</sup> If the investment into cryptocurrency has been expressly authorised by the settlor, it may be too exacting a standard of care to hold the trustee responsible for the losses stemming from the overnight devaluation, given the inherent volatility of cryptocurrencies, much like trading in other financial products.

31 Furthermore, if investments into cryptocurrencies had been expressly authorised by the settlor, it is likely that standard exemption clauses in the trust deed would exonerate the trustee from these cryptocurrency losses if these investments were made in good faith.<sup>59</sup> Having said that, even if the investment into cryptocurrencies had been expressly authorised by the settlor, if the trustee made an investment into a new coin without adequate research or reasonable caution, for example, the investment decision into a particular cryptocurrency is based on market hype, such as an internet personality announcing that he is putting his life savings into a particular cryptocurrency and the trustee decides to invest in it on the basis that the internet personality is a famous individual, then this could be a *prima facie* breach of the trustee's duty of care.

32 Third, to have control over the cryptocurrencies, the trustee must have access to the crypto-wallet's private key. If the private key is lost, recovering the cryptocurrencies can be

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56 2020 Rev Ed.

57 Trustees Act 1967 (2020 Rev Ed) ss 4–6.

58 See generally, Tan Yock Lin, "Legal Constraints to Total Return Investment by Trustees" (2020) 32 SAcLJ 249; Rebecca Lee & Man Yip, "Exclusion of Duty and the Irreducible Core Content of Trusteeship: A Re-assessment" (2020) 10 Journal of Equity 131.

59 Tang Hang Wu, "Trustees' Investment Duties and Cryptoassets" (2020) 26(2) Trusts and Trustees 183.

impossible. Further, cryptocurrencies are prone to hacking and theft. If the private key is stolen, it would give the thief access to the assets.<sup>60</sup> In such a situation, the trustee may potentially breach his custodial stewardship to preserve the trust assets. Thus, maintaining adequate security measures to safeguard these assets is a significant practical concern for trustees.<sup>61</sup> The absence of a central authority overseeing cryptocurrencies can be a significant issue where post-judgment enforcement and recovery is concerned, due to the pseudonymous, and potentially anonymous, nature of cryptocurrency wallet owners. For cross-border trusts, there are additional challenges such as differences in regulation between jurisdictions, problems with post-judgment enforcement and recovery,<sup>62</sup> and the lack of a unified approach.

33 Fourth, many cryptocurrencies have not been around for a long time, and their longevity is uncertain. This can pose problems for long-term trusts. Lastly, one of the features of cryptocurrencies is the potential for anonymous transactions. This anonymity could make it difficult for a trustee to track and control the trust's assets.<sup>63</sup> Although *ByBit Fintech* recognises crypto assets as a form of property that can be held in trust, it is a rapidly evolving area with potential for future changes in legal stance which can impact the administration of a trust. As the law currently stands, Bitcoin, Ether and stablecoins can be classed as property with certainty. For other cryptocurrencies where the rights of the holder are less clearly defined, it may well be the case that a future court may decide that it may not be recognised as property, or that it could be a mere contractual obligation that does not have a proprietary interest. The consequences of such a decision would be that there will be no proprietary remedies for a victim to avail themselves of, such as tracing and following.

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60 Ben Chester Cheong, "Doctrinal Issues in Recovering NFTs That Have Been Wrongly Taken Away" [2023] SAL Prac 14 at para 23.

61 Ben Chester Cheong, "Doctrinal Issues in Recovering NFTs That Have Been Wrongly Taken Away" [2023] SAL Prac 14 at paras 21–24.

62 See Timothy Chan & Kelvin FK Low, "Post-Scam Crypto Recovery: Final Clarity or Deceptive Simplicity?" (2023) 139 Law Quarterly Review 379.

63 Ben Chester Cheong, "Application of Blockchain-enabled Technology: Regulating Non-fungible Tokens (NFTs) in Singapore", *Singapore Law Gazette* (January 2022).

Even as cryptocurrency may now be recognised as representing a property interest, the material question remains what the cryptocurrency holding substantively represents, which in turn depends on the issuer definition and the validity of the legal structures (if any) established to give effect to that definition.

34 There are also other lingering issues such as enforcement issues. While Jeyaretnam J observed in passing that the ROC 2021 does not specify a precise method for carrying out enforcement, and opined that serving a notice of seizure on persons having possession or control of movable property (O 22 r 6(4)(b)) or on the persons who register the ownership of intangible movable property (O 22 r 6(4)(g)) are logically extendable to cryptocurrency.<sup>64</sup> As seen in *Janesh*, where the wrongdoer is unknown, enforcement of such an order may have a significant challenge.<sup>65</sup> What then if the stolen cryptocurrency comes to be held by a *bona fide* purchaser for value without notice? It is submitted that he cannot hide behind the mere fact that ledger entries do not distinguish between a legitimately obtained crypto asset or one obtained fraudulently.<sup>66</sup> Instead, the question is whether his state of knowledge made it unconscionable for him to retain the crypto asset.<sup>67</sup>

35 In conclusion, this ruling offers significant insights into the legal standing of cryptocurrencies under Singapore law, mirroring similar developments in other common-law countries.<sup>68</sup> The recognition of well-known cryptocurrencies as property carries several noteworthy consequences, including their validity for legitimate and enforceable transfers, potential considerations for securing them as collateral, and establishing

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64 *ByBit Fintech Ltd v Ho Kai Xin* [2023] SGHC199 at [30].

65 Ben Chester Cheong, “Doctrinal Issues in Recovering NFTs That Have Been Wrongly Taken Away” [2023] SAL Prac 14.

66 Dann Carr, “Cryptocurrencies as Property in Civilian and Mixed Systems” in *Cryptocurrencies in Public and Private Law* (David Fox & Sarah Green eds) (Oxford University Press, 2019) at p 186.

67 *George Raymond Zage III v Ho Chi Kwong* [2010] 2 SLR 589 at [23], on knowing receipt.

68 Pinar Caglayan Aksoy, “The Applicability of Property Law Rules for Crypto Assets: Considerations From Civil Law and Common Law Perspectives” (2023) 15(1) Law, Innovation and Technology 185.



**Crypto Assets are Property, Specifically, Choses in Action,  
that are Capable of Being Held on Trust**

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a means to trace them in instances involving breaches of trust or fraudulent activities. Supporters of cryptocurrency are likely to appreciate this ruling, as it demonstrates how the courts are constantly developing the law to grapple with unique challenges brought about by the intangible nature of this emerging form of asset.<sup>69</sup>

36 This can be seen as part of the broader trend of recognising cryptocurrencies in other areas of the law. For example, in *VOW v VOV*,<sup>70</sup> crypto assets in custodial wallets amounted to matrimonial assets that could be divided. In *Re Babel Holding Ltd*<sup>71</sup> which involved cryptocurrency restructuring, Aedit Abdullah J granted the sealing applications to safeguard the identity of the applicants' creditors, in order to prevent these creditors from suffering a negative market reaction to news of their exposure to the Babel Finance Group.<sup>72</sup> Next, in *Rio Christofle v Tan Chun Chuen Malcolm*,<sup>73</sup> Lee Seiu Kin J, referring to the object of the Payment Services Act 2019<sup>74</sup> and s 2(1) of the same, held that s 5 does not expressly<sup>75</sup> or impliedly<sup>76</sup> prohibit contracts relating to the sale and purchase of cryptocurrency.

37 As seen from the examples, the fast-developing nature means that various areas of law involving cryptocurrencies can only continue to grow. Undoubtedly, the courts would eventually have to face many issues surrounding the nature of cryptocurrencies and on enforcement. At least for now, a

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69 See generally, Ben Chester Cheong & Joshua Chan, "Cryptocurrency Lender Allowed Extended Creditor Protection in Singapore – Implications of the Decision on Separate Legal Entity, Sealing Applications, Scheme of Arrangement, and Future of Debt Repayment" (2024) 45(1) Company Lawyer 3–9.

70 [2023] SGHF 9.

71 [2023] 5 SLR 900.

72 *Re Babel Holding Ltd* [2023] 5 SLR 900 at [10]–[11]. For a detailed analysis of this case, see Ben Chester Cheong & Joshua Chan, "Cryptocurrency Lender Allowed Extended Creditor Protection in Singapore – Implications of the Decision on Separate Legal Entity, Sealing Applications, Scheme of Arrangement, and Future of Debt Repayment" (2024) 45(1) Company Lawyer 3–9.

73 [2023] 5 SLR 684.

74 2020 Rev Ed.

75 *Rio Christofle v Tan Chun Chuen Malcom* [2023] 5 SLR 684 at [53].

76 *Rio Christofle v Tan Chun Chuen Malcom* [2023] 5 SLR 684 at [55]–[59].

common law court has conclusively declared cryptocurrencies are choses in action.<sup>77</sup> What remains to be seen is whether other jurisdictions or even appellate decisions in Singapore would follow Jeyaretnam J's bold decision.

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77 For a quick summary of doctrinal issues in this area, see Ben Chester Cheong, "Doctrinal Issues in Recovering NFTs That Have Been Wrongly Taken Away" [2023] SAL Prac 14; Timothy Chan & Kelvin FK Low, "DeFi Common Sense: Crypto-backed Lending in *Janesh s/o Rajkumar v Unknown Person ('CHEFPIERRE')*" (2023) 86(5) *Modern Law Review* 1278.