



RECOGNISING CRYPTOCURRENCIES AS PROPERTY?

CLM v CLN

ADEL ZAID HAMZAH*

As cryptocurrencies continue to take the world by storm, reactions from a legal perspective are to be expected. In *CLM v CLN* [2022] SGHC 46, the Singapore High Court agreed with the emerging Commonwealth view that cryptocurrencies can constitute property. This note explores the possible legal consequences of such a holding and attempts to answer some novel questions that may need to be addressed as technology continues to evolve over time.

I. INTRODUCTION

Cryptocurrencies have taken the world by storm. They are traded over the internet and often reach staggering amounts of monetary value. It therefore comes as little surprise that the question has arisen whether cryptocurrencies can be regarded as property.¹ In the recent High Court decision of *CLM v CLN*,² the Singapore High Court (“HC”) agreed with the widespread view across Commonwealth jurisdictions that cryptocurrencies are capable of attracting proprietary relief. This comment summarises the facts and the decision of the HC and raises some interesting questions for future consideration.

II. FACTS OF *CLM v CLN*

The claimant was a national of the United States of America and owned 109.83 Bitcoin and 1497.54 Ethereum. The total value of these cryptocurrencies reached US\$7,089,894.68. The claimant alleged that his cryptocurrencies were stolen from him by unidentified persons, and thus commenced an action to trace and recover them. In particular, the claimant sought a proprietary injunction prohibiting the unidentified defendants from dealing with, disposing of, or diminishing the value of

* Research Assistant, Singapore Management University, Yong Pung How School of Law. The author would like to thank Prof Saw Cheng Lim for his comments and suggestions on an earlier draft.

¹ See *AA v Persons Unknown* [2019] EWHC 3556 (Comm) [AA]; *Ruscoe v Cryptopia Ltd* [2020] NZHC 728 [Ruscoe]; *Quoine Pte Ltd v B2C2 Ltd* [2020] 2 SLR 20 (CA) [Quoine].

² *CLM v CLN* [2022] SGHC 46.



the stolen cryptocurrencies. The crux of the issue was therefore whether cryptocurrencies are capable of giving rise to proprietary rights, and hence, of being protected via a proprietary injunction.

III. THE HIGH COURT'S DECISION

The HC held for the claimant, finding that cryptocurrencies can give rise to proprietary rights.³ The HC began by referencing the classic definition of a property right in the seminal House of Lords' decision of *National Provincial Bank v Ainsworth*,⁴ which stated that, before something can be admitted to the realm of property, "it must be definable, identifiable by third parties, capable of assumption by third parties, and have some degree of permanence or stability"⁵ ("the *Ainsworth* criteria").

The HC then acknowledged that the question whether cryptocurrencies could be held on trust was canvassed before the Court of Appeal in *Quione Pte Ltd v B2C2 Ltd* ("*Quione*").⁶ In *Quione*, the Court observed that there is much to commend in the view that cryptocurrencies could be assimilated to general concepts of property, although the *Quoine* decision did not ultimately turn on this point.⁷

The HC then cited the New Zealand High Court case of *Ruscoe v Cryptopia Ltd* ("*Ruscoe*"), where it was found that cryptocurrencies could give rise to proprietary interests.⁸ The HC endorsed the New Zealand High Court's view that cryptocurrencies fulfilled all the traditional *Ainsworth* criteria:⁹

- a. First, cryptocurrencies are "definable". To satisfy this criterion, the asset must be capable of isolation from other assets whether of the same type or of other types and thereby identifiable. Cryptocurrencies are computer-readable strings of characters recorded on networks of computers established for the purpose of recording those strings and are sufficiently distinct so that they can be allocated to an account holder on that particular network.
- b. Second, cryptocurrencies are identifiable by third parties. This element requires that the asset must have an owner capable of recognition as such by third parties. An important indicator of this is the owner having the power to exclude others from using or benefiting from the asset. Cryptocurrencies were excludable since the computer software allocates the owner a private key, which is required to record a transfer of the cryptocurrency from one account to another.
- c. Third, cryptocurrencies are "capable of assumption by third parties". This criterion is fulfilled when third parties must respect the rights of the owner of that asset, and when the asset is potentially desirable. Cryptocurrencies

³ *Ibid* at [46].

⁴ *National Provincial Bank v Ainsworth* [1965] AC 1175 (HL, Eng) [*Ainsworth*].

⁵ *Ibid* at 1248.

⁶ *Quoine*, *supra* note 1.

⁷ *CLM v CLN*, *supra* note 2 at [43].

⁸ *Ibid* at [44]–[45].

⁹ *Ibid* at [45].



satisfied this requirement, as evidenced by the fact that they are the subject of active trading markets.

- d. Fourth, and finally, cryptocurrencies possess some degree of permanence or stability. It was noted that this criterion has a low threshold, and that cryptocurrencies are sufficiently stable due to the blockchain methodology used to facilitate them: cryptocurrencies stay fully recognised and in existence unless they are expended through the use of the private key.

Having considered both the extant case law and the above analysis of *Ruscoe*, the HC found that cryptocurrencies satisfied the *Ainsworth* criteria. Seeing as the claimant only needed to show a “serious arguable” case that his stolen cryptocurrencies could be protected via a proprietary injunction, satisfaction of the above criteria was sufficient to discharge his burden.

IV. SOME OBSERVATIONS ON *CLM v CLN*

The decision in *CLM v CLN* is welcomed for several reasons. For one, it has gone some way to clarify the proprietary status of cryptocurrencies in Singapore, a matter which was a big talking point after the Court of Appeal’s observations in *Quione*. Furthermore, the HC’s decision reinforces the Commonwealth school of thought that, before something can be admitted to the realm of property, it must satisfy the criteria in *Ainsworth*.¹⁰ The HC’s reference to *Ruscoe* also provides much needed clarification on how the *Ainsworth* criteria are to be applied moving forward.¹¹

Although the key issue before the HC was whether a proprietary injunction could be granted over cryptocurrencies, it is submitted that recognising cryptocurrencies as property, the necessary pre-condition to achieve this, is a welcome development in the law. As mentioned earlier, cryptocurrencies have become increasingly commercially valuable. As such, admitting cryptocurrencies to the realm of property can *facilitate* their trading for crypto-owners. Looking further afield, it has been recognised that new proprietary rights are in fact “created by commerce”.¹² In finding that transferable floor space fulfilled the traditional *Ainsworth* criteria, Loveday J of the Supreme Court of New South Wales once held: “The reality is that commerce regards transferable floor space as a proprietary right. The courts should do likewise”.¹³ Recognising cryptocurrencies as property is therefore in line with the rationale of extending the existing categories of property.

¹⁰ The *Ainsworth* definition has been criticised on the grounds of its circularity. Commentators have argued that the *Ainsworth* definition is asserting that “property” is “property” because it is “property”, and that “property status and proprietary consequence confuse each other in a deadening embrace of cause and effect”: See Kevin Gray, “Property in Thin Air” (1991) 50 Cambridge LJ 252, at 293; Kelvin F K Low, “Bitcoins as Property: Welcome Clarity?” (2020) 136 Law Q Rev 345.

¹¹ *CLM v CLN*, *supra* note 2 at [45].

¹² *Halwood Corporation Ltd v Chief Commissioner of Stamp Duties* (1994) 33 NSWLR 395 (SC, NSW) [*Halwood*].

¹³ *Ibid* at 403.



What is less clear, however, is whether the trading of cryptocurrencies *should* be facilitated, let alone facilitated through use of common law principles. In China,¹⁴ for instance, the trading of cryptocurrencies is prohibited completely, due to fears that they might facilitate financial crime and pose risks to the domestic financial system.¹⁵ The Monetary Authority of Singapore (“MAS”) has recognised these difficulties as well, “frowning” on cryptocurrencies as an investment asset that puts retail investors at risk.¹⁶ Even assuming that we should facilitate the trading of cryptocurrencies, one may further ask whether it would be better to do so through legislation or regulations as opposed to common law principles. Indeed, the recently drafted *Financial Services and Markets Bill*¹⁷ and the *Payment Services (Amendment) Act 2021*¹⁸ have sought to achieve this.¹⁹

In the author’s view, facilitating the trading of cryptocurrencies may well be better managed through legislative means. Two reasons can be given for this. First, with the resources and expertise that the Legislature has available, a comprehensive system that both regulates and protects crypto-owners is preferable when compared to leaving this issue *solely* to the courts. As mentioned, cryptocurrencies raise a throng of problems such as potential financial crime and investor risk. Second, given the challenges of situating these newly developing digital assets within traditional substantive common law principles, it might be more appropriate for the Legislature to step in and provide greater guidance on the topic. Efforts to tackle these difficulties on the legislative front are not unprecedented. Singapore’s *Penal Code*²⁰ was recently amended to include virtual currencies within the Code’s stipulated definition of “property”.²¹ This change was motivated by the desire to eliminate gaps in the criminal law with respect to virtual currencies.²² In light of the economic, legal, and technical complexities that arise, Parliament (perhaps in consultation with MAS) could assist in delineating the proprietary status of virtual currencies.

¹⁴ Other countries include Egypt, Iraq, Qatar, Morocco, Algeria, Tunisia, Bangladesh. Marco Quiroz-Gutierrez, “Crypto is fully banned in China and 8 other countries” (5 January 2022) *Fortune* <<https://fortune.com/2022/01/04/crypto-banned-china-other-countries/#:~:text=Egypt%2C%20Iraq%2C%20Qatar%2C%20Oman,China%20have%20all%20banned%20cryptocurrency>>.

¹⁵ BBC, “China declares all crypto-currency transactions illegal” (24 September 2021) *BBC* <<https://www.bbc.com/news/technology-58678907>>.

¹⁶ Abigail Ng, “Singapore’s central bank warns against crypto, says retail investors risk ‘significant losses’” (9 November 2021) *CNBC* <<https://www.cnbc.com/2021/11/09/singapore-central-bank-mas-calls-out-crypto-risks-speculative-swings.html>>.

¹⁷ Financial Services and Markets Bill (No 4 of 2022), <<https://sso.agc.gov.sg/Bills-Supp/4-2022/Published/20220214?DocDate=20220214>>.

¹⁸ Payment Services Act 2019 (2020 Rev Ed), as amended by Payment Services (Amendment) Act 2021 (No 1 of 2021).

¹⁹ Jessica Seah, “Is Singapore’s New Crypto Legislation a Double-Edged Sword?” (11 April 2022) *ALM Law* <<https://www.law.com/international-edition/2022/04/11/is-singapores-new-crypto-legislation-a-double-edgedsword/#:~:text=In%20January%2C%20Singapore%20passed%20,for%20crypto%20currencies%2C%20will%20be%20regulated>>.

²⁰ Penal Code 1871 (2020 Rev Ed Sing) [*Penal Code*].

²¹ *Ibid* at s 22.

²² Penal Code Review Committee “Report” (August 2018) *Penal Code Review Committee* <<https://www.google.com.sg/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKewjciMnBpdT4AhUYSwGHVUnChsQFnoECAGQAQ&url=https%3A%2F%2Fwww.reach.gov.sg%2F-%2Fmedia%2Freach%2Fold-reach%2F2018%2Fpublic-consult%2Fmha%2Fannex--pcrcreport.ashx&usg=AOvVaw2SilZfQ5ZLbpWmm-w1VmSP>> at 2.



However, until regulations are in place, crypto-owners probably are right to feel uncomfortable. In circumstances such as those in *CLM v CLN*, the law ought not to stand idle and allow defendants who have stolen highly valuable “commodities” to escape liability. Instead, the law should develop and react appropriately to allow redress for victims. It is therefore submitted that recognising cryptocurrencies as property under the common law is desirable because doing so allows crypto-owners and courts to access the law of property to resolve disputes in a principled and consistent manner. Having a diverse set of rules and principles at the ready becomes all the more important given the recent emergence of hacks on cryptocurrency servers²³ and the spate of legal disputes that have arisen in several jurisdictions.²⁴ The HC’s view that the law of property may attach to cryptocurrencies therefore grants crypto-owners some assurance that the law is there to protect them as they trade on digital markets.

Finding that the law of property attaches to cryptocurrencies does, however, raise some interesting questions for future consideration. The first to consider is this: *Who* is the owner of cryptocurrency? In particular, is the owner of cryptocurrency the person holding the key to the crypto-account, the domain website that facilitates the trading platform (i.e., Bitcoin Inc itself), or the person who has control over the private key? There have been suggestions that “[t]here is no such thing as a Bitcoin. ... If you own Bitcoin, what you actually own is the private cryptographic key to unlock a specific address.”²⁵ Often, there is the tacit assumption that the legal owner of these cryptocurrencies would be the owner of the crypto-account, but there has yet to be any legal or normative justification to ground this perspective: recognising that cryptocurrencies are property does not tell us *which* party can *exercise* these property rights.

As important a role as the concept of “ownership” plays within the realm of property law, it has proven difficult to define.²⁶ Admitting cryptocurrencies to the realm of property brings some of these difficulties to the fore. That said, the author submits that a sensible solution is generally to treat the person who is in *possession* of the private key (provided they assume possession through lawful means) as the owner of the associated crypto-asset.²⁷ This proposition presents two significant advantages. First, it would be consistent with the traditional common law understanding that ownership is *presumed* to follow possession²⁸ and that “possession is

²³ Arjun Kharpal & Ryan Browne, “Hackers return nearly half of the \$600 million they stole in one of the biggest crypto heists” (11 August 2021) *CNBC* <<https://www.cnbc.com/2021/08/11/cryptocurrency-theft-hackers-steal-600-million-in-poly-network-hack.html>>.

²⁴ Remedies or the status of cryptocurrencies have been contested in the following countries: Singapore, the United Kingdom, New Zealand, Japan, Spain, Netherlands, Russia and the EU. See generally, Chiara Zilioli, “Crypto-assets: legal characterisation and challenges under private law” (2020) 46 *Eur L Rev* 251.

²⁵ Adrienne Jeffries, “How to Steal Bitcoin in Three Easy Steps” (19 December 2013) *The Verge* <<http://www.theverge.com/2013/12/19/5183356/how-to-steal-bitcoin-in-three-easy-steps>>.

²⁶ Duncan Sheehan, *The Principles of Personal Property Law* (Oxford: Hart Publishing, 2011) at 4–18 [*Sheehan Personal Property*].

²⁷ See UK Jurisdiction Taskforce, “Legal Statement on Cryptoassets and Smart Contracts” (November 2019) *Tech Nation* <<https://technation.io/news/uk-takes-significant-step-in-legal-certainty-for-smart-contracts-and-cryptocurrencies/>> at [43] [*UK Taskforce Smart Contracts*].

²⁸ *Ramsay v Margrett* [1894] 2 QB 18 (CA, Eng).



prima facie evidence of ownership.”²⁹ This is the position in Singapore.³⁰ Second, as noted by the UK Jurisdiction Taskforce in their report titled “Legal Statement on Cryptoassets and Smart Contracts”, ownership might depend on the precise circumstances of each case.³¹ For example, a person may hold a crypto-key on behalf of another as an employer or client,³² a crypto-asset may have multiple keys,³³ or a person may have obtained a key unlawfully.³⁴ Deciding ownership by reference to who is in legal possession of the key as opposed to a bright-line rule declaring one specific owner would therefore accommodate these potential permutations more appropriately. Granted, courts must first establish who is in possession of the private key of the crypto-account to discern its legal owner, which depends on two issues: first, demonstrating sufficient factual control of the key; and second, the intention to exclude other persons from the key.³⁵

Concerns over who is the “true” owner of a digital asset ensconced within an internet medium can be found in previous decisions. In *Lee Kien Meng v Cintamani Frank*,³⁶ for instance, the HC dealt with a dispute over a Facebook page. In that case, the Appellant sought a declaration that he was the owner/sole administrator of a Facebook page. The court found that, even if Facebook pages were capable of ownership (i.e., that Facebook pages satisfied the traditional *indicia* of property under *Ainsworth*),³⁷ the Appellant did not own “his” Facebook pages. This was because the Appellant had assented to the term that Facebook reserved “the right to reject or remove Pages for any reason”.³⁸ This was strongly suggestive that Facebook Inc, and not the Appellant, was the owner of the page.³⁹

The significance of the preceding authority is that it suggests that regard must be had to the specific terms that cryptocurrency owners’ assent to when creating their trading account to determine the owner of cryptocurrencies. *Lee Kien Meng*, however, concerned a dispute over the very medium, i.e., the Facebook *account* itself. In those circumstances, discerning the owner of the Facebook account through Facebook’s terms and conditions upon account creation was likely appropriate. However, for our purposes, disputing the owner of a *crypto-account* is a very different task from determining the owner of the *keys* that allow one to access or control the cryptocurrencies on the blockchain.

²⁹ Sir Frederick Pollock & Robert Samuel Wright, *An Essay on Possession in the Common Law* (Oxford: Clarendon Press, 1888) at 25.

³⁰ As noted by Steven Chong J (as he then was), “In the normal state of affairs, possession of a chattel is the outward expression of ownership ... there is a presumption that the person in possession is the owner”. *Wong Seng Kwan v PP* [2012] 3 SLR 12 (HC) at [25]–[28].

³¹ *UK Taskforce Smart Contracts*, *supra* note 27.

³² *Ibid.*

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ Michael Bridge, *Personal Property Law*, 4th ed (Oxford: Oxford University Press, 2015), at [2-047] [*Bridge Personal Property*]; *J A Pye (Oxford) Ltd v Graham* [2022] UKHL 30 at [40] [*Graham*]; *Koh Ah Kin v Yat Yuen Hong Co Ltd* [2020] SGHC 252 at [6]–[7] [*Koh Ah Kin*].

³⁶ *Lee Kien Meng v Cintamani Frank* [2015] 3 SLR 1072 (HC) [*Lee Kien Meng*].

³⁷ *Ibid* at [27].

³⁸ *Ibid* at [29].

³⁹ *Ibid* at [30].



What, then, is the relevance of the terms assented to by cryptocurrency owners? There are possibly two aspects of relevance. First, *CLM v CLN* has told us that the second *Ainsworth* criterion, i.e., that the right must be “identifiable by third parties”, will usually be satisfied where the owner has the *power* to exclude others from using or benefiting from the asset.⁴⁰ Therefore, the terms the putative crypto-owners assent to might assume relevance in establishing whether they possess the ability to exclude others for the purposes of the second *Ainsworth* requirement. *CLM v CLN* has close to confirmed this.

More importantly, however, these terms might suggest who the owner of cryptocurrencies are, expressly or otherwise. In what was once described as a “classic essay” on ownership,⁴¹ Professor Honoré argued that there are 11 facets or “standard incidents” of ownership.⁴² In essence, these identified incidents form strong indicia and are common features of legal ownership.⁴³ In the author’s view, if the terms that crypto-owners assent to are drafted in a precise enough way to reflect any of these incidents, they may serve as important indicators as to who the legal owner ought to be. For example, one of Professor Honoré’s incidents of ownership, the right to possess (i.e., the right to exclusive physical control of a thing), was described to be the “foundation on which the whole superstructure of ownership rests.”⁴⁴ Thus, if an agreement contains terms suggesting that Person (A) has the right to exclude others from their private key, this may point strongly towards Person (A) being the legal owner of the cryptocurrencies. That alone, however, may not be conclusive.⁴⁵

Second, not all cryptocurrency agreements clearly state who the owners of the currencies are,⁴⁶ or worse still, may not contain any indicators of ownership.⁴⁷ In such circumstances, as earlier submitted, ownership is best decided by determining who is in possession of the crypto-key, a matter established through both factual control and an intention to exclude.⁴⁸

⁴⁰ *CLM v CLN*, *supra* note 2 at [45(b)].

⁴¹ *Jonathan Yearworth v North Bristol NHS Trust* [2009] EWCA Civ 37 at [28]; Professor Honoré’s essay has also been cited in Singapore: *Lee Kian Meng*, *supra* note 36 at [28].

⁴² For ease of reference, the 11 incidents are: (1) the right to possess; (2) the right to use; (3) the right to manage; (4) the right to income of the thing; (5) the right to the capital; (6) the right to security; (7) the incidents of transmissibility; (8) the incident of absence of term; (9) the prohibition of harmful use; (10) liability to execution; (11) and the incident of residuary. AM Honoré, “Ownership”, in AG Guest, ed, *Oxford Essays in Jurisprudence* (Oxford: Oxford University Press, 1961) at 370 [*Honoré, Ownership*].

⁴³ *Ibid* at 370.

⁴⁴ *Ibid* at 371.

⁴⁵ Professor Honoré writes that “... the listed incidents are not individually necessary, though they may be together sufficient, conditions for the person of inference to be designated ‘owner’ of a particular thing in a given system. As we have seen, the use of ‘owner’ will extend to cases in which not all listed incidents are present.” *Ibid* at 370.

⁴⁶ Under Crypto.com’s Terms and Conditions, the user is the beneficial owner of (or if they are acting as a trustee, the legal owner) of any Digital Asset. See Crypto.com, “Terms and Conditions” <https://crypto.com/document/mco_services>. However, other services such as Ethereum’s terms of use are silent on this. See Ethereum.com, “Terms of Use” <<https://ethereum.org/en/terms-of-use/>>.

⁴⁷ It has been noted that many crypto-asset exchange agreements are poorly drafted. See Kelvin FK Low, “Trusts of cryptoassets” (2020) CUHK Working Paper No 2020-020 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3749040> at 10.

⁴⁸ *Bridge Personal Property*, *supra* note 35 at 33; *Graham*, *supra* note 35 at [40]; *Koh Ah Kin*, *supra* note 35 at [6]–[7].



Under factual control (or possession), previous authorities tell us that this requirement is satisfied with reference to *physical* control of the property or land.⁴⁹ Thus, in *Ahmad Kasim bin Adam v Moona Esmail Tamby Merican s/o Mohamed Ganse*,⁵⁰ the Singapore Court of Appeal referred to documentary evidence of whether a family occupied a house for a period of 12 years to establish factual control.⁵¹ Similarly, in the HC decision of *Koh Ah Kin v Yat Yuen Hong Co Limited*,⁵² reference was made to photographs and documents adduced by the claimant to show how construction work was done on the disputed land and how he planted several rambutan trees on the property.⁵³ As these cases and many others⁵⁴ make clear, the requirement of factual possession is quite literally concerned with factual, and not contractual, control. Therefore, terms assented to by crypto-owners are not strictly relevant in evaluating this requirement. Regard must instead be had to whomever has the appropriate degree of control over the crypto-key.

The terms of an agreement might, however, achieve more significance under the intention to exclude criterion. As described by Mummery LJ at the English Court of Appeal stage of *J A Pye (Oxford) Ltd v Graham*,⁵⁵ an agreement may constitute a contemporaneous and irrefutable record of the parties' common intention regarding possession of the disputed land.⁵⁶ The House of Lords did not overturn this finding and assumed that the Court of Appeal was correct in this respect.⁵⁷ So conceived, the terms assented to by crypto-owners might assume at least *some* significance in discerning who is in possession of the crypto-key, and consequently, the legal ownership of cryptocurrencies.

Assuming one can satisfactorily identify the legal owner of cryptocurrencies, another question that arises is how far and wide a newfound proprietary right in cryptocurrencies may extend. In short, if cryptocurrencies are property, what exactly does this entitle its owner to enforce? To recall, the issue posed before the HC was whether a proprietary injunction can be granted over cryptocurrencies; admitting cryptocurrencies to the realm of property was a necessary condition to achieve this. However, because proprietary rights are recognised as against the whole world,⁵⁸ delineating the precise rights that accrue for crypto-owners becomes crucial looking forward.

To answer this question, regard must be had to first principles. In general, there is no fixed, immutable list of rights that accompany the status of property.⁵⁹

⁴⁹ *Powell v McFarlane* (1979) 38 P & CR 452 at 470–471 [*Powell*]; *Graham*, *supra* note 35 at [41]; *Moulmein Development Pte Ltd v Teo Teck Guan* [1998] 1 SLR(R) 195 (CA) at [14] [*Moulmein Development*].

⁵⁰ [2019] 1 SLR 1185 (CA) [*Ahmad Kasim bin Adam*].

⁵¹ *Ibid* at [46]–[51].

⁵² *Koh Ah Kin*, *supra* note 35.

⁵³ *Ibid* at [12]–[23].

⁵⁴ *Powell*, *supra* note 49 at 470–471; *Graham*, *supra* note 35 at [41]; *Moulmein Development*, *supra* note 49 at [14].

⁵⁵ *Graham*, *ibid*.

⁵⁶ *Ibid* at [50].

⁵⁷ *Ibid* at [57].

⁵⁸ *Ruscoe*, *supra* note 1 at [64], citing *UK Taskforce Smart Contracts*, *supra* note 27 at [35]–[36].

⁵⁹ Kelvin FK Low & Ernie GS Teo, “Bitcoins and other cryptocurrencies as property?” (2017) 9(2) L, Innovation & Technology 235 at 253, citing Craig Rotherham, “Property and Justice” in Matthew H Kramer, ed. *Rights, Wrongs and Responsibilities* (London: Palgrave, 2001) at 148–174.



However, there are *some* rights that are typically considered as “basic features” of property. One such right as argued by leading scholars Henry Smith⁶⁰ and James Penner⁶¹ is the right to exclude.⁶² Under the right to exclude, the owner has the “gatekeeper right” over the property: he may permit or reject potential licensees, lessees, and the like.⁶³

It naturally follows, then, that admitting cryptocurrencies to the realm of property would entail the owner the right to exclude others from particular cryptocurrencies. That is likely not in issue. What is in issue is the more controversial question of what *other* rights may accompany the status of property. Although this point did not meaningfully arise before the HC, the New Zealand High Court in *Ruscoe* considered cognate issues, providing us with a useful starting point.⁶⁴ There it was noted that property law is a justifiable basis for the recovery of cryptocurrencies and their value if they are stolen or transferred by fraud: they allow cryptocurrencies to be the subject matter of a trust and a proprietary right of security; and cryptocurrencies can be recognised as part of a deceased person’s estate.⁶⁵ Recognising cryptocurrencies as property is also particularly important where insolvency claims are concerned: secured creditors or trust beneficiaries may wish to enforce their claim in property over unsecured creditors *pari passu* as against an insolvent cryptocurrency-holder.⁶⁶ In the final analysis, the content of property law depends much on the type of article involved,⁶⁷ and allowing *all* conceivable proprietary rights to attach to cryptocurrencies may prove to be too much. It is suggested, therefore, that whether a specific proprietary right can or should attach to cryptocurrencies is a question that should be approached by the courts on a case-by-case basis.⁶⁸ The technical nature and complexities associated with cryptocurrencies should be taken into account in reaching a decision.

What other proprietary interests or remedies flow from finding that cryptocurrencies are property? We may have to wait and see. The present author hopes, much like other commentators,⁶⁹ that a full discussion of the normative justifications for, and the legal ramifications of recognising, cryptocurrencies as property is undertaken when the courts re-visit these vexed issues.⁷⁰

⁶⁰ Henry Smith, “Property as the Law of Things” (2012) Harv L Rev 1691 at 1710 [*Smith Property*].

⁶¹ James Penner, *The Idea of Property in Law* (Oxford: Oxford University Press, 1997) at 68–104.

⁶² *Sheehan Personal Property*, *supra* note 26 at 4–18.

⁶³ *Smith Property*, *supra* note 60 at 1710.

⁶⁴ *Ruscoe*, *supra* note 1 at [64]–[69].

⁶⁵ *Ibid* at [63], citing Sarah Green, “Cryptocurrencies in the Common Law of Property” in David Fox & Sarah Green, eds. *Cryptocurrencies in Public and Private Law* (Oxford: Oxford University Press, 2019) at 141 [Green, “Cryptocurrencies”].

⁶⁶ Green, “Cryptocurrencies”, *ibid*.

⁶⁷ Lyria Bennet Moses, “The Applicability of Property Law in New Contexts: From Cells to Cyberspace” (2008) 30(4) Sydney L Rev 639 at 660.

⁶⁸ As noted by Coulson LJ in *Begum v Maran (UK) Ltd* [2021] EWCA Civ 326 at [23], citing *Barrett v Enfield DC* [2001] 2 AC 550 (HL, UK): “Decisions as to novel points of law should be based on actual findings of fact.”

⁶⁹ See *eg* Ronan R Condon, “Bit-property” (2020) 79(2) Cambridge LJ 224 at 227 [Condon, “Bit-property”].

⁷⁰ Indeed, in *Tulip Trading Ltd v Bitcoin Association for BSV and others* [2022] EWHC 667 (Ch), the English High Court appeared to take the position that bitcoins could be the subject of tortious or



This leaves one final, awkward question hanging in the air. In today's context, it has become almost impossible not to discuss cryptocurrencies alongside a new principal contender in the digital asset industry: Non-Fungible Tokens ("NFTs").⁷¹ NFTs are digital assets that are built upon a blockchain, and much like cryptocurrencies, are freely traded and highly valuable.⁷² They serve as evidence of ownership of virtual assets, and the rights that come with NFTs vary. As non-fungible assets, NFTs are unique and cannot be interchanged in the same way that cryptocurrencies are on the market.

Thefts of NFTs have become increasingly common.⁷³ In April 2022, for instance, the official Instagram account of an NFT collection, the well-known Bored Ape Yacht Club, was hacked.⁷⁴ An estimated GBP2.4 million in value was taken during a mass theft. The hacker reportedly placed a phishing link leading the Instagram account's followers to a fake website where their NFTs were stolen. Much like cryptocurrencies, the impetus for recognising NFTs as property is thus clear: NFT-owners should not be left without redress where defendants pilfer their extremely valuable commodities.

Can NFTs be recognised as property to protect their owners from such misconduct? Yes, say both the English⁷⁵ and Singapore High Court.⁷⁶ No, caution other commentators.⁷⁷ As Professor Kelvin Low astutely observes, the concept of NFT ownership is legally meaningless insofar as it relates to the art itself,⁷⁸ as NFTs do not embody any of the different perspectives that ground ownership within the law.⁷⁹ So too observe Moringiello and Odinet: under the exclusionary rights theory, NFT users lack any kind of meaningful right to exclude others as some platforms simply retain the right to remove any user content at their discretion.⁸⁰

fiduciary duties. However, the court ultimately found that, on the facts of the case, no duties had arisen between the parties.

⁷¹ Pratin Vallabhaeni, "The Rise of NFTs – Opportunities and Legal Issues" (20 April 2021) *White & Case* <<https://www.whitecase.com/publications/alert/rise-nfts-opportunities-and-legal-issues>>.

⁷² Ryan Browne, "Trading in NFTs spiked 21,000% to more than \$17 billion in 2021, report says" (10 March 2022) *CNBC* <<https://www.cnbc.com/2022/03/10/trading-in-nfts-spiked-21000percent-to-top-17-billion-in-2021-report.html>>.

⁷³ NFTs have already become the subject of mass hacking and phishing, causing NFT users to lose their tokens. See Jessica Bursztynsky, "NFT marketplace OpenSea is investigating a phishing hack" (20 February 2022) *CNBC* <<https://www.cnbc.com/2022/02/20/nft-marketplace-opensea-is-investigating-a-phishing-hack.html>>.

⁷⁴ "Hacking of Bored Ape Yacht Club's Instagram Leads to \$3 Million (£2.4 Million) NFT Theft" (27 April 2022) *Art Law & More* <<https://artlawandmore.com/2022/04/27/hacking-of-bored-ape-yacht-clubs-instagram-leads-to-3-million-2-4-million-nft-theft/>>.

⁷⁵ David Attlee, "UK Court recognizes NFTs as 'private property' – What now?" (15 May 2022) *Coin Telegraph* <<https://cointelegraph.com/news/uk-court-recognizes-nfts-as-private-property-what-now>>.

⁷⁶ Dominic Low, "Singapore High Court blocks potential sale and transfer of rare NFT" (20 May 2022) *The Straits Times* <<https://www.straitstimes.com/tech/tech-news/singapore-high-court-blocks-potential-sale-and-transfer-of-rare-nft>>.

⁷⁷ Kelvin FK Low, "The Emperor's New Art: Cryptomania, Art & Property" (forthcoming) [Low, "Emperor"]; Juliet M Moringiello & Christopher K Odinet, "The Property Law of Tokens" *Fla L Rev* (forthcoming, 2022) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3928901> at 45 [Moringiello & Odinet, "Law of Tokens"].

⁷⁸ Low, "Emperor", *ibid*.

⁷⁹ *Ibid*.

⁸⁰ Moringiello & Odinet, "Law of Tokens", *supra* note 77 at 45.



Leaving these difficulties aside, what we know from *CLM v CLN*, *Ruscoe*, and *AA v Persons Unknown*⁸¹ is that whether a right can be admitted to the realm of property is an issue that will eventually turn on whether that right satisfies the traditional *Ainsworth* criteria. NFTs arguably fulfil these requirements.⁸² First, NFTs are definable. The requirement of definability is satisfied when the asset is capable of being isolated from other assets. NFTs, by their very nature, are meant to be unique; their value is often analogised to that of “trading cards”.⁸³ Second, NFTs are also identifiable by third parties. Similar to cryptocurrencies, NFTs are typically accessed through a log-in key to the owner’s account, and hence, owners can exclude others from trading their tokens. The third requirement, that the asset be capable of assumption by third parties, is likely fulfilled as well. Much like cryptocurrencies, NFTs are the subject of active trading markets. Finally, NFTs possess a degree of permanence or stability. This element has a low threshold,⁸⁴ and much like cryptocurrencies, NFTs stay in existence until otherwise deleted.

If the *Ainsworth* criteria are any indication about when something can be admitted to the realm of property, NFTs likely have a strong case to constitute property. However, much like cryptocurrencies, the real controversy lies in ascertaining *who* (if any) the legal owners of these NFTs are and the *extent* to which such proprietary interests reach. It will, therefore, be exciting to see how these issues develop in the future.

V. CONCLUSION

The question of whether cryptocurrencies are property remains hotly contested in many jurisdictions. If anything, the matter only highlights the difficulties that judges face when attempting to situate newly developing digital assets within traditional, substantive common law principles.⁸⁵ While *CLM v CLN* has acknowledged that cryptocurrencies can attain proprietary status, this Note has raised some interesting questions for future consideration. Indeed, *CLM v CLN* is unlikely to be Singapore’s last word on the matter. It bears reminding that the claimant only needed to show that there was a “serious arguable case”, and, perhaps more fundamentally, the HC’s decision is subject to appeal. If the matter is sent to the Court of Appeal, either in this case or otherwise, it will be interesting to see how the Court handles the fascinating issues discussed above.

⁸¹ *AA*, *supra* note 1.

⁸² See generally, Janaki Tampi, “Non-fungible tokens for trustees” (2021) 5 PCB 205 at 207.

⁸³ “What are the legal issues around NFTs?” (14 October 2021) *Osborne Clarke* <<https://www.osborne-clarke.com/insights/what-are-legal-issues-around-nfts>>.

⁸⁴ *CLM v CLN*, *supra* note 2 at [45].

⁸⁵ Condon, “Bit-property”, *supra* note 69 at 226.

