LAWTECH UK

UK Jurisdiction Taskforce

Legal Statement

on Digital Assets and English Insolvency Law

Ministry of Justice

LAWTECH UK PANEL

Legal Statement on Digital Assets and English Insolvency Law

Contents

Foreword

by Sir Geoffrey Vos, Master of the Rolls

I am delighted to welcome the UK Jurisdiction Taskforce's (UKJT) *Legal Statement on Digital Assets and English Insolvency Law*.

This is the third Legal Statement issued by the UKJT. The first was its Legal Statement on the Status of Cryptoassets and Smart Contracts published in November 2019. The second was its Legal Statement on the Issuance and Transfer of Digital Securities under English private law. Both have been well received and referred to with approval in court decisions in England & Wales and other common law countries.

One of the most pressing concerns of mainstream investors considering a digital investment strategy is uncertainty surrounding recovery of digital assets within an insolvent estate. The UKJT now publishes its third Legal Statement addressing the way in which English insolvency law applies to digital assets. This third statement has been prepared by a team led by Lawrence Akka KC and David Quest KC, and including Ryan Perkins, Alexander Riddiford, Matthew Kimber, Rory Conway and Hannah Crawford. I congratulate the entire drafting team on their comprehensive analysis.

It is not my role as a judge, nor that of the UKJT or its parent, LawtechUK, to endorse the contents of the Legal Statement. Instead, the UKJT has promoted public and private consultation to ensure that the drafting team were answering the most pressing legal questions with the most expert input.

The Legal Statement concludes, amongst other things, that digital assets fall within the definition of property in the English Insolvency Act 1986, and that proprietary rights can be retained to digital assets held by insolvent estates. A valid statutory demand cannot yet, however, be served in respect of a debt of a digital asset.

Summary

1 Existing English insolvency law is entirely capable of convenient and sensible application to disputes concerning digital assets. Although the issues which arise are technical and fact-specific in nature, they can be resolved by recourse to existing and well-established principles.

2 Digital assets are capable of amounting to property for the purposes of law on insolvency.

3 Insofar as international jurisdiction falls to be determined by reference to COMI (Centre of Main Interests), the English courts will apply the existing and well-established test for the purposes of ascertaining the COMI of a company dealing in digital assets.

4 Digital assets are not yet treated as money in this jurisdiction. This has the consequence that, although they fall within the statutory definition of 'property' for the purposes of the Insolvency Act 1986, a claim to such assets will not (of itself) found a statutory demand.

5 For the same reason, such assets do not amount to foreign currency for the purpose of Rule 14.21 of the Insolvency Rules 2016, which requires an office-holder to convert all debts incurred or payable in a "foreign currency" into pounds sterling, at a single rate for each currency determined by the office-holder, by reference to the exchange rates prevailing on the relevant date.

6 Nevertheless, a claim to digital assets held by a company or bankrupt individual can (in principle) be a claim to recover property. Whether or not it is, in any given instance, depends on the manner in which the assets are held (in particular upon whether the holding arrangements in any given case are as a matter of analysis structured as a trust).

7 Insofar as office-holders decide to liquidate digital assets owned by the insolvent company, the usual obligations apply, including the obligations to exercise their powers in good faith, and to obtain the best price reasonably

obtainable on the sale of property, although of course the volatile nature of digital assets might present particular challenges regarding the fair realisation of value. Office-holders may also, in the exercise of their discretion, determine that assets should not be realised and sold in return for cash, but instead distributed in specie.

8 The law allows for transactions in digital assets at an undervalue to be reversed and for preferential transactions and transactions defrauding creditors to be set aside. Floating charges and property dispositions may be avoided. Whilst it may not be technologically possible for a blockchain transaction to be literally undone, there would be no difficulty in a judge making an order to bring about the same result, for example by ordering a recipient to make an equal and opposite transfer.

9 The interlocutory, investigatory and enforcement powers generally available to insolvency office-holders under English law are available in relation to digital assets. Office-holders may require a wide range of people, such as officers and former officers of a company, and certain employees, to provide information and documents, and they may apply to a judge for an order that relevant private keys be disclosed.

10 There are existing rules which are flexible enough to be applied to allocate any shortfalls in circumstances where digital assets belonging to different persons have been pooled. Although digital assets are created with new technology, they do not require a fundamental change in the longstanding legal analysis of tracing, mixed accounts, and shortfalls, although the technological structure of certain kinds of digital assets may be relevant to that exercise. The rules contained in the FCA's Client Assets Sourcebook are unlikely to apply, since digital assets are not yet money.

Introduction

11 The past few years have seen increased turbulence in the digital asset markets. Recent high-profile collapses of digital asset exchanges, platforms and funds[1] have highlighted the importance of robust insolvency processes to ensure fair and predictable outcomes in respect of this form of investment.

12 However, the courts of England and Wales have not to date had occasion to address in any detail the application of English[2] insolvency law concepts to digital assets. As and when such concepts fall to be applied by the English courts in resolving disputes concerning digital assets, important questions may arise as to the precise manner of their application to this new category of asset.

13 Our view is that English insolvency law as it presently stands is entirely capable of convenient and sensible application to disputes concerning digital assets. We demonstrate that below.

14 This Legal Statement, like those before it,[3] is intended to address areas of perceived legal uncertainty and to provide clarity as to the application of certain aspects of English insolvency law to digital assets.

15 As with previous Legal Statements, this is not intended to be a detailed academic paper or a comprehensive discussion of English law as it relates to digital assets. Instead, our aim again has been to ascertain the questions which are of interest to those involved, and to answer them in an accessible manner, bearing in mind that this technical legal topic has some inevitable complexity. In particular, we have not described general principles of insolvency law in detail.

The Public Consultation

16 So that we could be sure that we were answering the right questions, the UKJT held a public consultation in November 2023.[4] We invited comments on the preliminary list of questions, and views as to whether there were any material issues of concern to stakeholders in relation to digital assets and English insolvency law. We are very grateful to those—academics, lawyers and market participants—who provided a number of detailed responses, all of which we have taken into account. In places, we have reframed the questions slightly as a result.

Scope

17 Our role in producing this Legal Statement has been to focus on the existing law of England and Wales. We have made no comment on how the law should develop in the future.

18 Further, because the law can be highly fact-sensitive, we are unable to deal here with areas where too many potential factual scenarios would need to be considered in or for us to provide any helpful answers. This Legal Statement is not intended to be legal advice, for which readers should consult a lawyer, and nothing in it should be relied upon as being relevant to any particular circumstances.

Structure of this Statement

19 The questions we have answered and our conclusions are set out below, under separate headings. We have provided a number of references in the endnotes for those who would like more detail.

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Legal Statement

1 Property

Are digital assets "property" forming part of the estate of the insolvent company or individual for the purposes of the English insolvency legislation?

20 The UKJT's November 2019 Legal Statement on Cryptoassets and Smart Contracts concluded that digital assets are capable of being "property" as a matter of English and Welsh common law.[12]

21 The courts of England and Wales have adopted and affirmed that reasoning in several cases, including at the Court of Appeal level.[13] Courts worldwide have adopted a similar approach and reasoning.

22 The Insolvency Act 1986, contains its own definition of property. Section 436(1) says:

> *"property" includes money, goods, things in action, land and every description of property wherever situated and also obligations and every description of interest, whether present or future or vested or contingent, arising out of, or incidental to, property*

23 As the Legal Statement on Cryptoassets noted,[14] that definition is very wide indeed. It has been said that "it is hard to think of a wider definition".[15] It is at least as wide, and likely wider, than the common law conception of property: things which the common law might not classify as property may therefore be property for the particular purposes of the Insolvency Act. That is unsurprising—when a person or a company becomes insolvent, it is usually advantageous to the creditors that as many valuable assets as possible be classified as property so that they can be gathered in and liquidated to pay off the debts.

24 Since it is now clear that digital assets are capable of being things to which property rights can relate as a matter of common law, we have no doubt that they fall within the wider definition of property in the Insolvency Act.[16]

2 International Jurisdiction

For international allocation of insolvency jurisdiction based upon location of centre of main interests (COMI), what rules apply to determine where digital assets are controlled and/or administered?

25 The Business and Property Courts in England and Wales very often deal with insolvent debtors, whether individuals or corporate entities, with commercial interests in various countries. Where a petition or application is made to the Court to open insolvency proceedings in respect of such a debtor, the first question the Court needs to ask itself is whether it has jurisdiction to do so at all.

26 In this context, one question which will typically arise is whether the Court has jurisdiction to commence what is known as a comprehensive 'main proceeding' in respect of the debtor (encompassing all assets and all creditors, wherever located), or whether it will have jurisdiction only to commence some form of ancillary proceedings (concerning, for example, only assets located in England and Wales). In the former case, the Courts have established the 'centre of main interests', or "COMI", test, for determining whether the Court has jurisdiction to commence a main proceeding.

27 The COMI test is intended to ensure, in the interests of judicial comity, that the Court will only accept main proceeding insolvency jurisdiction over a particular debtor if the strength of that debtor's connection with England and Wales is sufficiently strong to justify it. It was first developed in the context of the EU Insolvency Regulation (and its predecessors), but is also now applicable in other contexts, notably in the context of applications for the recognition by the English Court of 'foreign representatives' of debtors subject to insolvency proceedings in other jurisdictions under the UNCITRAL Model Law on Cross-Border Insolvency Proceedings.[17] Accordingly, the question addressed below concerns situations where the Court must determine a debtor's COMI, whether that be for the purposes of establishing where main insolvency proceedings should be commenced for the purposes of the Retained Insolvency Regulation,[18] or for the purposes of establishing what constitutes foreign main proceedings for the purposes of the UNCITRAL Model Law, or otherwise.

28 There is a substantial body of EU and English case law addressing the applicable test for the purposes of identifying a debtor's COMI.[19] For present purposes, the relevant principles are as follows:

29 First, unless the contrary is proved, a judge will presume that the country in which a company has its registered office (or, if it does not have one, the country in which it is incorporated), will be its COMI.

30 Second, the Court will consider where the debtor conducts the administration of its interests on a regular basis, that is where the debtor regularly carries on (and can be seen to carry on) its business.

31 Third, the location of a debtor's COMI must be objectively ascertainable by third parties, with the actual subjective knowledge of specific relevant third parties (especially creditors) not excluded from this analysis.

32 Fourth, special consideration is to be given to creditors and their perception of the conduct of the administration of the debtor's affairs.

33 Fifth, there is no principle of immutability; a debtor can shift its COMI.

34 Sixth, by way of qualification to the fifth principle, a debtor's shift of COMI must have a degree of permanence which may, in certain circumstances, require a debtor to inform creditors about it.

35 There are separate questions regarding what is known as the lex situs of digital assets.[20] These questions may be relevant for the purposes of allocating insolvency jurisdiction otherwise than on the basis of COMI, for example for the purposes of establishing the English Court's jurisdiction to open ancillary proceedings on the basis that some of the debtor's assets (including digital assets) are situate in England and Wales. These questions regarding the lex situs of digital assets are beyond the scope of this Legal Statement and we do not address them further here. It is notable, however, that judges in the cases of *Ion Science* and *Fetch AI*[21], have taken the view, based on Professor Dickinson's proposal, that the location of a cryptoasset (in those cases Bitcoin) is the place where the person or company who owned the coin or token is domiciled.[22]

36 Whatever the proper lex situs of a particular class or classes of relevant digital asset may be, the ascertaining of a debtor's COMI is likely to depend primarily on the precise way in which that debtor interacts with the digital asset in question. Where digital assets are controlled or administered is likely to depend on the facts of the debtor's particular

case, in particular on the kind of business in which the debtor is engaged and the way in which it deals with the digital assets.

37 In this regard, some useful guidance can be drawn from the Singapore case of *Zipmex*[23] where the Singapore High Court decided that the same test applied for establishing COMI both under the UNCITRAL Model Law and under section 64 of the (local) Insolvency, Restructuring and Dissolution Act 2018 ("IRDA").

38 *Zipmex* concerned a cryptoasset exchange incorporated in Singapore and a number of its subsidiaries. Some were Singaporean, but others were incorporated in Thailand, Indonesia and Australia. In the end, the most important factor for the Court was that the various entities in the Zipmex group carried out the practical administration of the digital assets they held. The Court had to determine whether the COMI of each of these entities was in Singapore or elsewhere for the purpose of establishing jurisdiction under section 64 IRDA. In particular, the Court considered the following factors in determining the COMI of the various entities to be of particular importance:

39 The location from which control of the cryptoassets was exercised;

40 The location of clients, creditors and employees;

41 The location of the debtors' operations; and

42 The location of dealings with third parties.

43 Most of the Court's analysis in *Zipmex* in relation to COMI focused on the first of these factors, with an emphasis on the practicalities of the mechanics by which cryptoasset deposits were centrally held and administered in Singapore using a hot wallet facility[24] and a ZipUp+ facility. The judge, Abdullah J, said "*The consolidation of assets in the hot wallet hosted by Zipmex Asia in Singapore, from all the entities, lay at the bottom of the business model and operations of the group.* While *not all the creditors may have actually been aware of this, the fact that such consolidation occurred does point to a Singapore centre of gravity.*" He continued: "*Taking a holistic assessment of these various factors, therefore, given the location of the ultimate use of the assets through the hot wallet, the use of the ZipUp+ facility, and the locus of management in Singapore, the COMI for each of the entities was Singapore. Specifically for the Thai entity, the preponderance of the use of the ZipUp+ facility and the hot wallet was significant.*"[25]

44 Abdullah J's analysis illustrates that what is likely to matter most when applying the COMI test in a context involving cryptoassets, is not so much the location of the cryptoassets themselves (which may well be a vexed question where the cryptoasset in question exists on a distributed ledger), but instead the objective perception of the debtor's commercial activities in relation to those cryptoassets (and also, following *East-West Logistics LLP*[26], the actual subjective perception of creditors and other counterparties as to the location of those activities).

45 The *Zipmex* case also illustrates that the nature of the debtor's relationship with the relevant cryptoassets, i.e. the way in which the debtor interacts with those assets, is likely to have a vital bearing on the question of COMI. For this reason different considerations may well apply where the debtor is an exchange (as in *Zipmex* where the location of the exchange's commercial activities made ascertaining COMI relatively straightforward), or a principal holder of cryptoassets (where the location of the debtor's commercial activities may well be more difficult for the Court to discern).

46 In any event, the existing canon of principles for the establishing of COMI, as developed by the English and other Courts, is adequate for the task of determining the COMI of a debtor that has commercial dealings with cryptoassets.

3 Claims to Digital Assets

Is a claim to digital assets held by a company or bankrupt capable of being a claim to recover property? If so, what factors determine whether it is to be so characterised.

47 Where one person—Alice, say—has a claim in respect of a digital asset held by an insolvent company or bankrupt —Bob Ltd, or Bob, say—that may be a claim based on a personal right or a proprietary right. Where such claims are based on personal rights, they will be primarily[27] personal contractual claims to the return of digital assets equivalent to those held. On the insolvency or bankruptcy of the holder of the digital assets, any personal claim to the monetary value of the digital assets would rank as unsecured claims only and would give rise to no priority right of recourse to any specific digital assets or entitlements thereto. However, where such claims are based on property rights, an action or

a proprietary remedy in respect of the asset itself may be available. This is significant in an insolvency or bankruptcy because (in general) if Alice's claim is based on a proprietary right, then she may be able to recover her asset in priority to Bob Ltd or Bob's unsecured creditors. This position has been affirmed by foreign courts in the high-profile insolvencies of Voyager, Celsius and Three Arrows Capital.[28]

48 Since digital assets are capable of being property, we see no difficulty in principle in a person acquiring or retaining a proprietary right in digital assets held by an insolvent company or bankrupt. In general,[29] where a person acquires or retains a proprietary right in digital assets held by a company or bankrupt, those digital assets would not form part of the company or bankrupt's estate and would not be available to meet the claims of its general creditors. The precise nature of the proprietary right will depend on the particular circumstances and arrangements, but in English law, this is most likely to be the case where it is determined that property is held on trust. Cases decided in other common law jurisdictions[30] have now established it is possible for a valid trust to be created over digital assets (including over commingled, unallocated holdings of digital assets) and we consider that to be clearly the better view under English law also.

The three certainties

49 Establishing a trust requires proof of three things: (i) intention by the relevant party (Bob, in our example above) to hold the digital asset on trust; (ii) sufficient identification of the beneficiary of the trust (Alice); and (iii) sufficient identification of the digital assets that are the subject matter of the trust.[31]

The arrangement in question

50 Whether a valid trust is established over digital assets will of course depend on the details of the specific arrangement in question.

51 A distinctive feature of digital assets is that they can be held, administered and controlled using technological or operational methods that are not available for conventional assets, such as by transfer controls built into the blockchain on which the assets are held or via smart contracts. One relatively straightforward example is the use of multiple digital signatures, where different private keys are held by different

interested parties, and all (or some specified combination) are required to authenticate a transfer.

52 The parties to such an arrangement may consider that the technological controls in place offer sufficient protection for their interests, and accordingly the intention to create a trust may be absent, with the result that the relationship between the parties is likely to be purely contractual.

53 In contrast, there are some arrangements which are likely to involve the holding of a digital asset on trust, notwithstanding that technological measures are in place. Centralised digital asset custodians are perhaps the most likely to structure their holding arrangements as trusts. In particular, they are likely to offer holding arrangements under which the custodian maintains full factual control over the digital assets in question. In general, this will be because the custodian itself holds the digital assets in question in a public address, and has control over them by means of the relevant private keys.

54 Such arrangements are often structured or designed to prioritise execution services and typically involve:

- The individually segregated records of each individual client's entitlements to the digital assets held by the exchange on behalf of such clients (i. e. books and records segregation).

- Omnibus wallets (i.e. on-chain addresses) where the digital assets of multiple clients are pooled together for operational efficiency. Such omnibus wallets may also contain a small amount of the exchange's own assets for the purpose of facilitating client transactions (eg to pay transaction fees, to match small client trades that would otherwise not settle, or as a result of the deduction of trading fees meaning a small portion of assets traded are reclassified as the exchange's proprietary assets on a rolling basis).

- A combination, or the option for digital assets to be held by the centralised digital asset custodian in trading wallets which are "hot" wallets that hold private key material on infrastructure that is connected to the internet for fast execution, transfers and settlement and "cold" (offline - slower transfers but more secure) wallet [32] environments to strike an optimal balance between liquidity needs and security. Such arrangements often involve the conduction of regular, eg daily, on-chain rebalancing and

reconciliations in respect of the target small amount of the exchange's proprietary assets contained in client omnibus hot wallets.

- The additional option for premium custody services to institutions that are willing to pay for the additional cyber security and on-chain transparency of holding their assets in a fully segregated wallet with the private key material held in cold storage.

55 However, the existence of such an arrangement, or similar, is not in itself determinative of whether a valid trust exists. Indeed, such an arrangement could be structured either as a purely contractual arrangement under which the legal title transfers to a custodian and no valid trust exists, or, alternatively as a valid trust arrangement. Whether the "three certainties" have been satisfied will determine whether such an arrangement involves a valid trust. A principal evidential factor will be whether an express contractual term between the two parties that includes either an express declaration of trust or similar language clarifying that the custodian holds the assets "for the benefit of the client". However, the Court will need to examine the arrangement in question in detail to determine whether or not a trust exists. A number of foreign courts have had to undertake this exercise in respect of digital assets.[33]

4 A debt for a liquidated sum, or foreign currency?

If a claim to digital assets held by a company or bankrupt is a contractual claim, is it a debt for a liquidated sum so as to be capable of founding a statutory demand or a winding up petition?

Circumstances in which a company may be wound up

56 A creditor to whom a company owes money may apply to the Court to wind up the company by presenting a winding-up petition. There are various circumstances in which a company may be wound up, but under the Insolvency Act 1986, Section 122(f) (*Circumstances in which company may be wound up by the court*), a company may be wound up by the court if, among other things, it is unable to pay its debts. The circumstances in which that is deemed to be the case are defined in section 123 and are:

57 if a formal written demand (known as a 'statutory demand') in the prescribed form is served on the company and the company has failed to pay the sum demanded for a period of three weeks;[34]

58 if the court is satisfied that the company is unable to pay its debts as they fall due (this is known as the "cashflow insolvency test");[35] or

59 if the court is satisfied that the value of the company's assets is less than the amount of its liabilities, taking into account its contingent and prospective liabilities (this is known as the "balance sheet insolvency test").[36]

Statutory demand and winding-up petition

60 If a creditor seeks to rely on the first of these, and presents a winding-up petition based on the failure of a company to pay a sum demanded under a statutory demand, both the statutory demand and the winding-up petition must be founded on a liquidated sum because:

61 According to the relevant part of the Insolvency Act, a winding-up petition "must be in respect of one or more debts owed by the debtor".[37] The debt in question must be "for a liquidated sum payable to the petitioning creditor",[38] must be a debt which the debtor appears either to be unable to pay or to have no reasonable prospect of being able to pay.[39]

62 A debt may be one which the debtor appears either to be unable to pay or to have no reasonable prospect of being able to pay if a valid statutory demand in the prescribed form[40] is served on the company and the company has failed to pay the sum demanded for a period of three weeks. The debt referred to in a statutory demand must also be "for a liquidated sum payable to the petitioning creditor".[41]

A debt for a liquidated sum

63 In short, therefore, a valid statutory demand can only be served, or winding up petition presented, in respect of an amount of digital assets if those digital assets can be said to be a "debt" for a "liquidated sum".

64 A liquidated sum is a sum that that is "pre-ascertained" or "a specific amount which has been fully and finally ascertained", although that allows for calculation in accordance with a contractual formula or mere addition.[42]

65 Although an obligation expressed in a specific quantity of digital assets, is an obligation to pay (or deliver) a specific quantity of the digital assets in question, it is not a debt for a liquidated sum that can be expressed as a "'money sum". The use of the term "debt" in section 267(2)(b) of the Insolvency Act 1986 implies or requires that the obligation in question must be "monetary": section 123(3) specifically refers to the sum demanded under a valid statutory demand in the prescribed form for the purposes of Section 123(1)(a) as a "money sum".

66 An obligation to pay (or deliver) a specific quantity of digital assets does not satisfy that requirement because digital assets cannot be treated as money, at least not yet. In *Miller v Race* Lord Mansfield said that what is treated as money "by the general consent of mankind" is given "the credit and currency of money to all intents and purposes".[43] Digital assets, even where used as a means of payment, do not yet have such credit and currency. The value of digital assets "depends on different structural and social concepts compared to existing fiat currencies"[44] and all digital assets (including stablecoins) fluctuate in value against fiat currencies. The holder of a digital asset has no legal right to exchange that digital asset for any specific fiat currency.[45] Many obligations that specify a certain quantity of digital assets require delivery or repayment of the digital asset in question and cannot be recharacterised as a monetary obligation or a debt for a liquidated sum of money. The "core" legal obligation in respect of a quantity of digital assets "owed" by a company or bankrupt is one of delivery of those digital assets, rather than payment of a monetary sum. An action to enforce such an obligation would therefore be characterised or construed as a claim for unliquidated damages for failure to deliver, rather than as a monetary debt.

A claim provable in liquidation, administration or bankruptcy

67 However, a claim in respect of an obligation to pay (or deliver) a specific quantity of digital assets would nonetheless be provable in a liquidation, administration or bankruptcy. That is because the definition of a "provable debt" under Rule 14.1(3) of The Insolvency (England and Wales) Rules 2016[46] includes all claims by creditors whether ascertained or sounding only in damages; the definition is not limited to a "debt" for a "liquidated sum".[47]

68 The position described above mirrors the position taken in the High Court of Singapore in *Algorand Foundation Ltd v Three Arrows Capital*

Pte Ltd.[48] The Court held that the claimant in question was a "creditor" within s 124(1)(c) of the Singapore Insolvency, Restructuring and Dissolution Act 2018 but that an obligation to re-transfer loaned stablecoins (USDC) could not constitute a monetary debt for the purposes of founding a valid statutory demand under s 125(2)(a) of that Act.

69 The question of whether a digital asset is held on trust will be highly relevant to determining whether, and to what extent, claims in respect of digital assets can be compromised by restructuring procedures under English law.

70 By way of background, the key restructuring procedures are schemes of arrangement under Part 26 of the Companies Act 2006, restructuring plans under Part 26A of the Companies Act 2006, and company voluntary arrangements (CVAs) under Part I of the Insolvency Act 1986. These restructuring procedures represent a significant proportion of the work carried out by insolvency lawyers and judges in England. Such procedures are highly attractive internationally, and are desirable because they provide a flexible way of reducing, discharging or deferring indebtedness owed by the relevant company, subject to certain conditions.

71 For example, in the case of a Part 26 scheme of arrangement, the Court has the power to sanction (i.e. approve) any arrangement proposed by a company with its creditors (or any class of them), provided that the arrangement is approved by a majority in number representing 75% in value of the creditors present and voting at a meeting of each class. The Court has a broad discretion which is exercised in accordance with well-established principles.

72 These restructuring procedures can only be used to compromise the claims of a company's "creditors" (in their capacity as such). The concept of a "creditor" is very broad; it includes the holders of personal pecuniary claims of any description (secured or unsecured, of any ranking).[49]

73 However, the concept of a creditor is not unlimited. In particular, it does not extend to the proprietary rights of a beneficiary of trust property. The result is that a scheme, plan or CVA cannot be used to modify the proprietary rights of a beneficiary of trust property: see *Re Lehman Brothers International (Europe),*[50] in which the Court of Appeal held that a scheme of arrangement proposed by the administrators of Lehman

Brothers to compromise proprietary rights in respect of client assets (held on trust for the relevant clients) fell outside the jurisdictional scope of Part 26 of the Companies Act 2006.

74 For this reason, to the extent that the holder of a digital asset has a personal claim against a custodian thereof, that claim will be capable (at least in principle) of being compromised by a scheme, plan or CVA proposed by the relevant custodian. However, to the extent that a holder of a digital asset has a proprietary claim (for example, under a trust), that proprietary claim is immune from being restructured by a scheme, plan or CVA. This illustrates why the resolution of personal/proprietary debate may be of vital importance in the context of restructuring.

Is a claim to digital assets a claim in a "foreign currency" such that it should be converted to the currency of the insolvency on day one?

Rule 14.21 of the Insolvency Rules 2016

75 For the purposes of making distributions to unsecured creditors, the office-holder (i.e. the liquidator or administrator or bankruptcy trustee) is required to convert all debts incurred or payable in a *"foreign currency"* into pounds sterling, at a single rate for each currency determined by the office-holder, by reference to the exchange rates prevailing on the relevant date.[51]

76 This raises a question as to whether an obligation of the insolvent or individual company to deliver digital assets (being a provable debt) amounts to a debt owed in a *"foreign currency"*.

77 If so, then a creditor with such a claim is no longer exposed to fluctuations in the market for the relevant digital assets, from the relevant date onwards. If not, then (absent the termination of that delivery obligation and its replacement with an obligation denominated in a fiat currency) the debtor will continue during the insolvency to owe an obligation the monetary value of which fluctuates with the market value of the digital assets in question.

78 The question could accordingly be of significant practical importance, including in light of the volatility in the prices of many prevalent digital assets.

"currency"

79 In order for digital assets to be capable of constituting *"foreign currency"* for these purposes, it is of course necessary that they be properly characterised as *"currency"*.

80 We consider the question of whether or not an obligation to deliver digital assets is a debt owed in a *"currency"* to be the same as the question as to whether or such assets amount to 'money'. Further, for the reasons outlined above,[52] we think that digital assets are not (yet) 'money' (or, therefore, *"currency"* for the purposes of Rule 14.21), but that one or more forms of digital assets may become *"currency"* at some point in the future, if and when they are (as a matter of fact) commonly and continuously accepted as a means of exchange or a unit of account.

81 That is not to say, however, that that Rule 14.21 in the meantime has no application at all in respect of an obligation to deliver digital assets. As and when an obligation to deliver digital assets is replaced by an obligation to pay a sum in a fiat currency, whether by operation of any close-out mechanism appearing in the applicable contractual arrangements, or because the contract is brought to an end and replaced by a damages claim (denominated in fiat currency) for failure to deliver the digital assets, the resulting obligation to pay a fiat sum will, if denominated otherwise than in pounds sterling, will fall to be converted into the latter currency pursuant to Rule 14.21.

82 Further, for so long as the obligation to deliver digital assets subsists in that form, there always is a possibility of it being replaced in the future with an obligation to pay a sum in a fiat currency, whether by operation of a contractual close-out mechanism or otherwise. To that extent, for so long as it subsists, the obligation to deliver digital assets reflects a contingent debt denominated in a fiat currency. Insofar as an administrator or liquidator comes to make a distribution to unsecured creditors whilst the underlying delivery obligation remains extant, it will be necessary for that office-holder to estimate the value of the contingent debt to which the delivery obligation in those circumstances gives rise[53] and on that basis include the relevant creditor in the distribution in question.

83 If that contingent debt is denominated in a currency other than sterling (whether because the applicable contractual arrangements contemplate the delivery obligation being replaced with a debt denominated in a non-sterling fiat currency upon a termination event; or because any

damages claim for failure to deliver would be denominated otherwise than in sterling), then the administrator or liquidator will, for the purposes of the distribution in question, then need to convert its estimated value into sterling, using the exchange rate that applied as between those two fiat currencies as of the relevant date, in accordance with Rule 14.21. The office-holder will however, need to update its estimate for the purposes of any subsequent distributions, and then (for those purposes) apply Rule 14.21 to such updated estimate. In this way, the fact that Rule 14.21 does not (yet) apply directly to the obligation to deliver digital assets (as opposed to any contingent debt denominated in a fiat currency to which such delivery obligation may give rise) means that the creditor who is owed digital assets remains exposed to fluctuations in the value of those digital assets, unless and until either the delivery obligation is replaced by an actual monetary claim (whether in debt or damages), or the office-holder makes a final distribution to creditors.

"foreign"

84 As noted above, the conclusion that digital assets are not (yet) *"currency"* is reached by reference to the present degree of acceptance of digital assets as a means of exchange or a unit of account. It accordingly turns on a factual state of affairs that may change over time. If and when one or more forms of digital asset do, as a matter of fact, become sufficiently accepted in society as a means of exchange or a unit of account, so as to be treated in a general sense as 'money', there will be a legitimate basis for those digital assets to be properly characterised "*currency*" for the purposes of Rule 14.21.

85 In that event, a further question arises as to whether digital assets amounting to *"currency"* can be accurately characterised (for the purposes of Rule 14.21) as *"foreign"*. If not, then they would appear still to fall outside of the purview of Rule 14.21.

86 The use of the word *"foreign"* arguably suggests some essential involvement of another state (or at least another jurisdiction) in the promulgation of the currency in question. In circumstances where digital assets are typically not issued by any state (or any organ thereof), as a matter of language it is difficult to characterise them as *"foreign"*.

87 Nonetheless, having regard to that policy objective underlying Rule 14.21, we consider that a broader interpretation of the word *"foreign"* is appropriate. In particular, given that the purpose of Rule 14.21 is to

ensure that the insolvent estate can distributed fairly (i.e. *pari passu*) between creditors, by ensuring that their respective claims can be compared and weighed against one another, we think there is a good argument (based on a purposive construction of Rule 14.21) to the effect that "foreign" should in this context be read as encompassing any non-sterling currency.[54]

88 Support for that interpretation can be found in the rules relating to insolvency set off in administration[55] and liquidation.[56] Those rules expressly adopt the currency conversion provided for by Rule 14.21, for the purposes of bringing non-sterling debts into the set-off account.[57] Instead of referring to *"foreign"* currencies, however, each of them refers to sums *"payable in a currency other than sterling"* – arguably suggesting that the draftsman, in using the word *"foreign"* in Rule 14.21, was intending not to signal some essential involvement of another state, but merely to capture *any* currency *"other than sterling"*.

89 We accordingly consider that, if and when any given digital asset becomes, as a matter of fact, sufficiently accepted within society as a means of exchange or a unit of account as to be considered 'money', it will fall to be treated as *"foreign currency"* for the purposes of Rule 14.21, which will then apply directly to obligations denominated in it.

5 Obligations of office-holders

Are office-holders subject, generally, to any obligations in relation to holding/realisation of volatile digital assets in an English insolvency?

Rules on the holding and realisation of assets

90 English law applies certain rules to different types of office-holders regarding the holding and realisation of an insolvent debtor's assets. A brief summary of the relevant regimes is set out below.

Administration

91 Once appointed, an administrator must take all of the company's property into their custody or control.[58] Their powers in relation to the company's property are broad, including anything "necessary or

expedient for the management of the affairs, business and property of the company".[59]

92 As officers of the court[60] administrators are under a duty to act fairly and honourably.[61] They owe the company a common law duty to exercise reasonable care and skill in the performance of their functions to the standard of an ordinary, reasonably skilled and careful insolvency practitioner.[62]

93 If administrators decide to cause the company to dispose of its assets, they owe duties:

- to obtain the "best price reasonably obtainable", which the circumstances (as the administrators reasonably perceive them to be) permit; this includes taking reasonable care in choosing the time at which to sell the property;[63] in this context, "the best price reasonably obtainable" is synonymous with "a proper price";[64]
- to exercise their powers in good faith, for a proper purpose and rationally; and
- of loyalty, to protect the creditors of the company (the duty to creditors as a whole is merely one to prevent unnecessary harm).[65]

94 Administrators are required to perform their functions in accordance with a statutory hierarchy of purposes[66]. This hierarchy gives primacy to rescuing the company (itself) as a going concern; the next objective is to achieve a better result for creditors as a whole than liquidation. Only if neither of those objectives is reasonably practicable can the administration be used for the third statutory objective, which is to realise assets for distribution to secured or preferential creditors; in pursuing this objective, administrators are required not to "unnecessarily harm" the interests of the company's creditors as a whole.[67] Administrators are also required to perform their functions as quickly and efficiently as is reasonably practicable.[68]

95 Statement of Insolvency Practice 16 provides an additional protective framework in the context of pre-packaged sales in administrations,[69] including requirements to provide creditors with sufficient information such that a reasonable and informed third party would conclude that the pre-packaged sale was appropriate, and that the administrator has acted with due regard for the creditors' interests.

Liquidation

96 Liquidators are also officers of the court[70] (with the exception of voluntary liquidators); accordingly, they too must comply with the duty to act fairly and honourably. They are required to use their own discretion in the management of assets and their distribution among creditors.[71]

97 English law therefore already provides a framework for the exercise of insolvency office-holders' discretion in realising value from an insolvent debtor's estate. The English Court is typically reluctant to interfere with the professional judgment of an insolvency office-holder in this regard.[72]

How should digital assets be realised and distributed?

98 The volatile nature of digital assets presents a particular challenge regarding the fair realisation of value in respect of those assets. The questions facing an insolvency practitioner in relation to realising a digital asset include both the timing and the manner in which the relevant asset should be realised; namely, should the relevant office-holder sell the digital asset in return for its equivalent value in cash, or should a distribution be made in specie i.e. in the native (digital, rather than its equivalent cash or other value) form of the asset? At what point in time should the relevant realisation be made?

99 Whilst these questions are technical and fact-specific in nature, they are not new. For instance, a bankruptcy trustee can effect a distribution of non-cash assets (often known as a distribution *in specie*) with the prior consent of the creditors' committee.[73] Insolvency Rule 14.13[74] also enables administrators and liquidators, with permission, to divide property which "from its peculiar nature or other special circumstances cannot be readily or advantageously sold" among the company's creditors in its existing form (the required permission is that of the creditor committee or, if there is no such committee, the creditors themselves). These principles should enable the division and distribution of digital assets if necessary.

100 Given the complex and volatile nature of digital assets, should an office-holder determine (in their discretion) that the relevant digital assets should be realised and sold in return for cash (rather than *in specie*) to be distributed to the creditors, it may be helpful for the office-holder to consult a third party specialist prior to making any decision in this regard

to assist them in determining the appropriate time and method of realisation and subsequent distribution.

101 Although not within the scope of this Legal Statement, it should also be noted that there is a financial regulatory overlay for office-holders in the exercise of their duties when dealing with digital assets in situations where the insolvent company holds digital assets on behalf of others, for example in a wallet, as a storage provider, on an exchange etc. and it may therefore be an option for office-holder to seek specialist advice in this regard at an early stage depending on the circumstances. This regulatory overlay may require the office-holder to work closely with regulators to ensure that appropriate steps are taken with regard to not only the ever-developing regulatory framework in this area but also the existing regulatory framework in place relating to the orderly return of client assets among other things.

102 Regardless of the office-holders' decisions in respect of the realisation of digital assets, office-holders may be minded to disclose their approach to creditors as soon as reasonably practicable and ideally to obtain creditor consent in advance as appropriate and depending on the circumstances of the case—eg by inclusion in the office-holders' proposals put to creditors.

6 Avoidance of prior transactions

Can you perceive any difficulties in the application of the English insolvency legislation relating to avoidance of prior transactions to pre-insolvency dealings with digital assets? If so, what are they?

103 The Insolvency Act 1986 contains a number of provisions that empower the Courts, on the application of an insolvency office-holder, to unwind or otherwise adjust transactions entered into by the debtor company prior to the commencement of insolvency proceedings ('antecedent transactions'). These powers exist for the protection of the insolvent company's creditors and, in essence, are there to uphold and facilitate the fair and equal (i.e. *pari passu*) distribution of the company's assets to those creditors.

104 Insofar as the insolvent company's assets at any stage included valuable digital assets, it would seem obviously desirable that these legislative

provisions and common law rules should be capable of application to such assets. Our view is that they are.

105 In the subsections that follow, we examine that question by reference to each of the key legislative provisions in the Insolvency Act 1986.

s 238: Transactions at an undervalue

106 An office-holder may apply to court seeking the setting aside of a transaction at an undervalue under section 238 of the Insolvency Act 1986, if, during the run-up to the commencement of formal insolvency proceedings, the company (being unable to pay its debts as the time): (i) made a gift or otherwise entered into a transaction on terms that the company received no consideration; or; (ii) entered into a transaction for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by the company (in either case, a "TUV").

107 If the court concludes that the insolvency company entered into a TUV at a relevant time, it is (subject to exceptions not relevant for present purposes) empowered to make such order as it thinks fit for restoring the position to what it would have been if the company had not entered into that transaction.

108 As can be seen from the above, the provisions of section 238 impose no limitations as to the types of assets that may form the subject of a TUV. The courts have applied the provision to a wide variety of property including, for example, licences [75] debts owed to the insolvent company,[76] and goodwill.[77]

109 We accordingly consider it to be clear that section 238 is capable, in principle, of applying to a transaction the subject matter of which is digital assets.

s 239: Preferences

110 An office-holder may apply to court seeking the setting aside of a "*preference*" under section 239 of the Insolvency Act 1986.

111 A company gives a relevant "*preference*" to a creditor or a surety or guarantor of one of its debts (a "Relevant Person") if, in the run-up to the commencement of formal insolvency proceedings, it (being unable to pay its debts as the time): (i) does anything, or suffers anything to be

done, which has the effect of putting the Relevant Person into a position which, in the event of the company going into insolvent liquidation, will be better than the position he would have been in if that thing had not been done; and (ii) in deciding to do so, is influenced by a desire to prefer the Relevant Person.

112 If the court concludes that the insolvent company has given a relevant preference, it is empowered to make such order as it thinks fit for restoring the position to what it would have been if the company had not done so.

113 As can be seen from the above, like the provisions of section 238 of the Insolvency Act 1986, the provisions of section 239 impose no limitations as to the types of assets that may form the subject of a preference.

114 We accordingly consider it to be clear that section 239 is capable, in principle, of applying to a dealing in digital assets.

s 241: Orders in respect of TUVs and Preferences

115 Section 241 of the Insolvency Act 1986 sets out a non-exhaustive list of the types of order that the court may make in restoring the position to what it would have been if the company had not entered into a TUV or given a preference. Such possible orders include (among others):

116 requiring any property transferred as part of the transaction, or in connection with the giving of the preference, to be vested in the company,

117 requiring any property to be so vested if it represents in any person's hands the application either of the proceeds of sale of property so transferred or of money so transferred,

118 releasing or discharging (in whole or in part) any security given by the company,

119 requiring any person to pay, in respect of benefits received by him from the company, such sums to the office-holder as the court may direct.

120 For reasons explained above, we consider that digital assets are plainly *"property"* within the meaning of the Insolvency Act 1986, such that limbs (a) and (b) above are capable of application to such assets.

121 Given how digital assets are typically transferred on blockchain, if a court were to make an order under either of those limbs, it would nonetheless not be practically possible for the offending transfer actually to be literally undone – once a transfer has been effected, it is immutably reflected throughout the distributed ledger. Nonetheless, we do not think that a court would have any difficulty in making an order that brought about effectively the same result, for instance by ordering the recipient party to make an equal and opposite transfer on the blockchain.

122 Further, we consider that no difficulty arises in this context from the conclusion, reached in the UKJT's November 2019 Legal Statement on Cryptoassets and Smart Contracts, to the effect that the 'transfer' of a digital asset in truth amounts to: (i) the extinguishment (at least as a unit of economic value) of the original digital asset in the hands of the 'transferor'; and (ii) the creation of a brand new such asset in the hands of the 'transferee'.[78] In particular, we think that either:

123 section 241(1)(a) can be interpreted purposively, such that the words *"any property transferred as part of the transaction"* encompasses not just the 'original' digital asset, but also the 'replacement' digital asset that (on this basis) arises in the hands of the 'transferee' upon a transfer; or

124 the 'replacement' digital asset in any event amounts to *"benefits received by [the 'transferee'] from the company"* for the purposes of section 241(1)(d).

s 423: Transactions defrauding creditors

125 A transaction can be set aside under section 423 of the Insolvency Act if the company has entered into a TUV, for the purpose of putting assets beyond the reach of a person who is making or may make a claim against the company, or to otherwise prejudice a person's interests in relation to such a claim.

126 We consider that it is accordingly clear, for the same reasons as given above in relation to section 238 of the Insolvency Act 1986, that section 423 is capable, in principle, of applying to a transaction the subject matter of which is digital assets.

127 Further, section 245 of the Insolvency Act 1986 sets out a non-exhaustive list of the types of order that the court may make in restoring the position

to what it would have been if the company had not entered into a transaction defrauding creditors. The types of orders included in that list include all of those extracted above in the context of the discussion of section 241. Equivalent considerations and conclusions accordingly apply in this context.

s 245: Avoidance of certain floating charges

128 Subject to certain exceptions, a floating charge granted over a company's assets to an unconnected party is invalidated by section 245 of the Insolvency Act if the company is unable to pay its debts at the time of the grant (or becomes so as a result of it) and enters into administration within two years thereafter. Subject to the same exceptions, a floating charge granted over a company's assets to a connected party is invalidated by section 245 if the company enters into administration within twelve months following the grant.

129 Section 245 draws no distinction between the types of asset over which a floating charge within its scope may have been granted. On the assumption that valid security rights, including floating charges, are otherwise capable of being granted over digital assets (which we think they are),[79] we do not see any difficulty in section 245 applying to such security rights where (putting aside the fact that the subject matter of the charge in question includes digital assets) the conditions set out in section 245 are met.

s127: Avoidance of property dispositions

130 Whilst not a provision dealing with antecedent transactions, also worthy of mention in this context are sections 127 and 284 of the Insolvency Act 1986.

131 In the context of a compulsory winding-up, section 127 provides (among other things) for any *"disposition of the company's property"*, made during the period between the 'commencement of the winding-up' (broadly speaking and insofar as relevant for present purposes, the presentation of the winding-up petition or, if earlier, the passing of a resolution for a voluntary winding-up) and the making of the winding up order, to be void unless the court orders otherwise.

132 As appears from the above, in order for the disposition of an asset to be caught by this section, it is necessary that the asset in question: (i) be

"property"; and (ii) belong to the company. For those latter purposes, this means that the property in question must be beneficially owned by the company.[80]

133 As to the former requirement (i. e. that the asset in question be *"property"*), as noted above, we consider that digital assets are plainly *"property"* within the meaning of the Insolvency Act 1986.

134 As to the latter requirement (i. e. that the asset in question beneficially belong to the company), on the facts of any given case, this may raise questions as to the basis on which the insolvency company holds the digital assets in question. For instance, in the case of an insolvent custodian, it may be that assts are held on trust for customers and thus not beneficially by the company.

135 Subject to those points, we think that section 127 is capable of application to digital assets in precisely the same way as it applies to other categories of (tangible or intangible) asset.

136 Section 284 of the Insolvency Act 1986 is a broadly equivalent provision, albeit applicable in the context of personal bankruptcy, as opposed to corporate insolvency. The point has been made that authorities addressing section 127 cannot automatically be transposed to section 284 (as the language of the provisions differs, as do aspects of their respective purposes)[81], but it is clear that the latter provision is conceptually capable of applying to *"property"* belonging to the bankrupt and we consider that dispositions of digital assets are certainly capable of being captured by section 294.

137 In addition to applying to dispositions of "*property*", section 284 also captures (by virtue of section 284(2)) "*a payment (whether in cash or otherwise)*". In *Pettit v Novakovic*[82] HHJ Norris QC said that section 284(2) *"appears to contemplate 'payments in kind'"* (emphasis added), that *"'payment' is the process by which money (*or some acceptable substitute*) passes from one to another"* (emphasis added) and that *"a 'payment' is the money* or value *that is the subject of that process"* (emphasis added). On that basis, we see no reason why a transfer of digital assets in the relevant circumstances should not amount to a "payment" for the purposes of section 284 and thus also be within its scope on that alternative basis, even if (as discussed above) digital assets do not (yet) amount to 'money'.

7 Mixing and shortfalls

If a claim to digital assets held by a custodian company can be a proprietary claim, what mechanisms are available to deal with mixing of the property of various clients and/or a shortfall in an insolvency of an exchange or custodian?

138 Consider the following situation. Charlie is a digital custodian. Alice and Bob are customers of Charlie, and each places 100 bitcoin with him. Charlie subsequently becomes insolvent, and his office-holder discovers that only 50 of the 200 bitcoin remain in Charlie's control. How should they be distributed?

139 There are two general frameworks under English law for dealing with such shortfall situations where assets belonging to different people have been mixed and the assets are 'fungible', that is, of a type that cannot be distinguished once mixed.

140 It is necessary to introduce each of these two frameworks, before turning to consider whether (and, if so, how) each framework might apply to digital assets.

First framework: the rules of tracing under the general law

141 The first framework consists of the rules under the general law known as the "rules of tracing", which have been developed by the courts over many years as a means of analysing claims to assets where the original asset has been sold or transferred or substituted. As a matter of principle, the same rules of tracing should apply in equity (where the relevant assets are held on trust) and at common law (where there is no trust), although that is not the case in all areas of the law.[83]

142 The rules of tracing should provide a fair and principled way of dealing with situations where fungible assets belonging to different people have been mixed but there is a shortfall in the monies or assets available for distribution to the relevant claimants. Most of the rules of tracing are well established at appellate level, which means that there is already a relatively high degree of legal certainty in this area.

143 It is not necessary to set out the rules of tracing in any detail; reference should be made to specialist commentaries.[84] Some of the key rules of

tracing can be illustrated by the following examples (all of which involve money, but could be adapted to any other fungible assets):

(a) Suppose that Charlie, introduced above, holds funds of £1 million on trust for Alice. The trust funds are then wrongfully transferred into the Charlie's own bank account with an existing balance of £1 million, resulting in a mixed account with a total balance of £2 million. Charlie then dissipates £1 million of the funds held in the mixed account (e.g. to repay an unsecured personal loan). In those circumstances, Charlie is treated as having dissipated his own funds before dissipating the trust funds. This means that the remaining balance of £1 million held in the mixed account belongs to Alice (and will not be available to Charlie's creditors in the event of his bankruptcy).

(b) On the other hand, suppose that Charlie uses £1 million in the mixed account to buy a valuable asset (such as shares). Alice may then prefer to "trace" into the shares, which means that the shares will be treated as trust property belonging to her.

(c) Because Charlie is regarded as a wrongdoer, Alice can pursue whichever of those two remedies is better for her.

144 However, the position is more difficult if Charlie holds money for Alice and Bob mixed together in a single account. If there is a shortfall between the total amount of their claims and the balance of the mixed account, then the shortfall should ordinarily be borne proportionately by Alice and Bob.

145 In some cases, it has been suggested that a "first in, first out" rule should apply as between innocent beneficiaries. According to this rule, payments out of a running account (i.e. one that is subject to continual credits and debits) are allocated to payments into the account in chronological order. So if Charlie receives £2m from Alice, then receives £2m from Bob, then spends £3m, the money spent is allocated first to Alice (as "first in") until her contribution is exhausted, and only then to Bob. The result is that the £1m remaining in the account is treated as Bob's. This rule is not always applied, however, if it is fairer for the losses or gains to be borne or shared rateably by A and B. In this regard, it has been held that the "first in, first out" rule will be displaced if another approach is more practical or more consistent with the intention of those contributing to the fund.[85]

Second framework: statutory regimes such as CASS

146 In the UK, investment banks (as well as brokers, custodians and other such firms) are normally subject to special rules for dealing with client money and client assets. These special rules displace the general rules of tracing with a more detailed and bespoke statutory regime.

147 For example, as regards client money, FCA-regulated firms are subject to the rules set out in the Client Assets Sourcebook ("CASS") promulgated by the FCA.[86] This imposes a statutory trust on client money held by the relevant firm and lays down a statutory order of priority (known as a "waterfall") for distributing client money in the event of the firm's insolvency, superseding the rules of tracing that would otherwise apply at common law. The CASS rules were the subject of extensive litigation (up to the Supreme Court) in the Lehman Brothers insolvency.[87]

148 The CASS regime is complicated but it represents a self-contained and very detailed code for dealing with client money and allocating shortfalls between competing clients in the event of the firm's insolvency.

149 In addition, there is a statutory regime for dealing with client assets (not being client money) held by insolvent investment banks: see regulation 12(2) of the Investment Bank Special Administration Regulations 2011, which provides that any shortfall shall "be borne pro rata by all clients for whom the investment bank holds securities of that particular description in that same account in proportion to their beneficial interest in those securities". Again, this statutory regime supersedes the general rules of tracing.

Treatment of digital assets

150 As a matter of principle, it is clear that the general rules of tracing are capable of applying to digital assets. It has often been said that the rules of tracing are capable of being adapted to deal with sophisticated and elaborate dealings in money, securities and other intangible assets,[88] and there is no reason why the same process of adaptation cannot be applied to digital assets. Although digital assets are created with new technology, they do not require a fundamental change in the longstanding legal analysis of tracing, mixed accounts, insolvency shortfalls and so forth. That is particularly true in circumstances where a fraud has been committed and the Court is trying to do justice between

innocent victims (which is the most common context in which the rules of tracing fall to be applied).

151 That said, the analysis is likely to depend on the precise nature of the digital assets in question. For certain digital assets (especially those using UTXOs), the underlying algorithms are themselves based on "first in, first out" allocations, and this might well have an impact on whether it is fair to apply the "first in, first out" rule for the purposes of tracing. (As noted above, the application of the "first in, first out" rule will depend on whether that approach is practical and consistent with the intention of those contributing to the fund.)

152 It remains unclear whether, and to what extent, the special regulatory regimes set out above (including, for example, the CASS regime) are currently applicable, or will in the future be applied, to digital assets. Taking the CASS rules as an example, "client money" is defined as "money of any currency … that a firm receives or holds for, or on behalf of, a client …" It is unlikely that any digital assets will fall within this description, since digital assets do not (yet) constitute any form of currency. The FCA has stated that some digital assets "are likely to be subject to the CASS regime" (not as client money, but as "specified investments"), [89] although the precise regulatory position remains unresolved.

153 There is a similar issue regarding which (if any) digital assets would be treated as "securities" for the purposes of the Investment Bank Special Administration Regulations 2011. These are defined as "financial instruments as defined in regulation 3 of the Financial Collateral Arrangements (No.2) Regulations 2003", which are in turn defined as shares, bonds and other debt instruments tradeable on the capital markets, and derivative securities in respect thereof. Taken at face value, this definition does not apply to any digital assets, although the analysis will (as always) depend on the precise nature of the asset in question.[90]

8 Available procedures

What interlocutory, investigatory or enforcement procedures are available to insolvency office-holders under English law, in order to

get in digital assets or their monetary equivalent for the benefit of the insolvent estate?

154 Office-holders have wide-reaching interlocutory, investigatory and enforcement powers available to them to assist not only in the collection of an insolvent company's property but also to seek information and records relating to such property. These powers are granted to office-holders of a company in administration, administrative receivership, provisional liquidation or liquidation pursuant to sections 234, 235 and 236 of the Insolvency Act 1986. The powers are particularly important as often a company's records may be outdated, deficient or inaccurate. As outlined below, these powers are extensive and should be of practical assistance to office-holders in the investigation, collection and administration of digital assets in the context of a company's insolvency.

s 234: Getting in the company's property

155 This section enables the court to require any person in possession or control of property or records to which the company appears to be entitled to deliver that property to the insolvency office-holders.

156 It also protects the office-holders against potential claims for loss or damage resulting from seizing (or disposing) of property which subsequently transpires not to be property of the company.

s 235: Duty to co-operate with office-holder

157 This section imposes a duty on certain parties to provide such information as may be "reasonably required" by an office-holder to a company in administration, administrative receivership, provisional liquidation or liquidation proceedings.

158 A wide range of people related to the company are subject to this duty, including:

- officers and former officers of the company;
- those who have taken part in the formation of the company at any time within one year before the company entered into insolvency;
- employees and former employees of the company within one year before the company entered into insolvency;

- officers or employees (including former officers and employees within the year prior to the company's entry into insolvency) of another company which is, or within the year prior to the company entering insolvency was, an officer of the company in question; or

- in the case of a company being wound up by the court, any person who has acted as administrator, administrative receiver or liquidator of the company.

159 Office-holders have the power to require such parties to provide "information concerning the company and its promotion, formation, business, dealings, affairs or property". Should the relevant parties not comply with the office-holder's request within a reasonable timescale, the office-holder may apply to court to compel compliance. A person is liable to a fine if they fail to comply with this duty to co-operate without reasonable excuse.[91]

s 236: Inquiry into company's dealings, etc.

160 This section permits the court, on the application of the insolvency office-holder, to require a party to give disclosure, provide an account of dealings, or produce books, papers or records relating to a company in insolvency proceedings.

161 The scope of this section is even broader than section 235; affected parties comprise:

- any officer of the company;

- any person known or suspected to have in his possession any property of the company or supposed to be indebted to the company; or

- any person whom the court thinks capable of giving information concerning the promotion, formation, business, dealings, affairs or property of the company.

162 Where such powers are applied as against persons outside the jurisdiction of the English court, it will be necessary to obtain the permission of the court for service in the relevant country. Where an order is made under section 236 of the Insolvency Act 1986 against a person who is present in England, the court may restrain that person

from leaving the jurisdiction or require that they give security as a condition of leaving the country.

Effectiveness of existing powers

163 The regime set out in sections 234–236 of the Insolvency Act 1986 is extensive and far-reaching and should assist office-holders in seeking to recover digital assets which form part of an insolvent estate. The essential item of information for the office-holder is the private key relating to, and giving control over, a digital asset. The regime enables office-holders to apply to court for an order to compel any person who knows or has access to the private key to disclose it, whether or not that person is an employee or officer of the company.

164 A wallet[92] is likely to be secured using a further password or access code; the disclosure regime is broad enough to permit on office-holder to recover that information too.

165 There are practical impediments to the effective exercise of an office-holder's powers in sections 234–236 given that access to a private key or wallet may be limited to only one individual, who may be in a foreign jurisdiction or whose whereabouts may be unknown. While foreign enforcement of the provisions of the Insolvency Act 1986 is outside the scope of this statement, it is noteworthy as being a practical hurdle to bear in mind when seeking relief pursuant to sections 234–236.

166 It is also noteworthy that existing powers are predicated on the digital assets or information being the property or records "of the company". It is therefore critical for office-holders to identify how, and by whom, the digital asset is held. This may be a challenge, particularly as there is often a question as to whether the digital assets are truly "property" of the insolvent estate or merely held on behalf of others by the insolvent estate (for example if the company acted as a digital asset exchange or custodian). Helpfully, section 234(2) of the Insolvency Act 1986 extends to property or records to which the company "appears to be entitled" i.e. an office-holder does not need to be certain that the digital assets in question are property of the insolvent estate, it is enough that the insolvent estate appears to be "entitled" to it.

167 Similarly, and as outlined above, the digital and global nature of the assets themselves will present practical impediments to investigating and procuring information in respect of them, including from the holders of such information. This may be a challenge, even if such individuals

were compelled by order of the court to provide such information, as it may require extra-territorial relief to be sought and therefore the cooperation of foreign courts in an office-holder's pursuit of information.

168 In respect of these challenging practical hurdles, it would be advisable for office-holders to seek the counsel and assistance at an early stage of those who have expertise in identifying and locating the whereabouts of digital assets including in respect of the individuals with knowledge or possession of the assets in question. This initial practical step will assist office-holders in their subsequent pursuit and enforcement of information relating to the assets of the insolvent estate by reference to the existing statutory regime in place.

Appendices

Appendix 1 - The consultation paper

UK Jurisdiction Taskforce of the LawtechUK Delivery Panel

Public consultation

Digital Assets and English Insolvency Law

UK Jurisdiction Taskforce

17 October 2023

Foreword

by Sir Geoffrey Vos, Master of the Rolls

In November 2018, the UK Jurisdiction Taskforce published its **Legal Statement on the Status of Cryptoassets and Smart Contracts**. The Legal Statement expressed the view that cryptoassets were property and smart contracts were contracts under English law, and has been well received in many jurisdictions.

In April 2021, the UK Jurisdiction Taskforce published its **Digital Dispute Resolution Rules** to be incorporated into on-chain digital relationships and smart contracts. They allow for arbitral or expert dispute resolution in very short periods, for arbitrators to implement decisions directly on-chain using a private key, and for optional anonymity of the parties.

In February 2023, the UK Jurisdiction Taskforce published its **Legal Statement on the issuance and transfer of digital securities under English private law**. This Legal Statement addressed the question of whether equity, debt or other securities can be validly issued and transferred under English law using blockchain systems.

The UK Jurisdiction Taskforce has now turned its attention to the way in which English insolvency law applies to digital assets.[1] We are asking experts and members of the public to provide their input into the questions that the proposed **Legal Statement on Digital Assets and English Insolvency Law** can most usefully answer.

We will be very grateful to receive responses from as many people as possible in the legal, digital and insolvency sectors. The UKJT intends to host a public event to discuss the consultation in November 2023. It will formally close the consultation on Monday 4 December.

It is intended that an expert panel within the UKJT will prepare the Legal Statement for publication thereafter.

The UKJT comprises:-

Sir Geoffrey Vos (Chancellor of the High Court and Chair of the UKJT)

Professor Sarah Green (Law Commissioner for commercial and common law, as an observer)

Richard Hay (Linklaters LLP)

Lawrence Akka KC (Twenty Essex)

David Quest KC (3 Verulam Buildings)

Peter Hunn (Accord Project)

Nicholas Smith (Crypto Policy, Financial Conduct Authority as an observer)

Mary Kyle (City of London Corporation)

Sir Richard Snowden (Lord Justice of Appeal)

Sir Antony Zacaroli (Justice of the High Court)

[1] For present purposes, by 'digital assets' we mean a digital asset, such as a crypto-token or an NFT, that is (under English private law) capable of being the object of personal property rights, but that is neither a thing in action nor a thing in possession. In that sense, we attribute to the term a broadly equivalent meaning to that given to *"digital objects"* in the Law Commissions Final report on Digital Assets (Law Com No 412)

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Consultation on the Digital Assets and English[2] Insolvency Law

1 The UK Jurisdiction Taskforce

The UK Jurisdiction Taskforce (UKJT) is a part of LawtechUK, an industry-led group tasked with supporting the digital transformation of the UK legal services sector and with positioning English law as a law of choice for new technologies.

The UKJT brings together the Judiciary, the Law Commission of England and Wales, the regulators and technology and legal professionals within its membership. The remit of the UKJT is to provide legal certainty for new technologies under English law.

In November 2019, the UKJT published an authoritative legal statement on the legal status of cryptoassets and smart contracts.[3] The legal statement was drafted by a panel of practising lawyers (Lawrence Akka KC, David Quest KC, Matthew Lavy and Sam Goodman) and has since received judicial approval in various jurisdictions. It has been instrumental in providing legal certainty that certain cryptoassets are to be regarded as property under English law and that English law will support legally binding smart contracts. The legal statement was preceded by a public consultation process, which informed the list of questions to be addressed.

The UKJT has also undertaken other work in this area, including publishing a second legal statement (this time addressing issuance and transfer of digital securities under English private law)[4], publishing a set of digital dispute resolution rules (which seeks to enable the rapid resolution of blockchain and crypto legal disputes)[5] and publishing a report on Smarter Contracts.[6]

2 Background to this consultation

Digital transformation has become a top priority for many institutions operating in the financial markets. It is widely recognised that blockchain, DLT and associated technologies offer significant potential in this regard. Institutional investors have increasingly embraced digital assets in their portfolios. The UK, including the UK legal services sector, would benefit considerably if English law and forum were to be a leading choice of law/forum for such arrangements.

At the same time, the past 18 months have seen increased turbulence in the digital asset markets. Recent high-profile collapses of digital asset exchanges, platforms and funds[7] have highlighted the importance of robust insolvency processes to ensure fair and predictable outcomes in respect of this form of investment.

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2 In this consultation paper, references to “English law” should be read as references to the law of England and Wales.

3 Available at <https://lawtechuk.io/explore/cryptoasset-and-smart-contract-statement>

4 Available at <https://ukjt.lawtechuk.io/>

5 Available at <https://resources.lawtechuk.io/files/2.%20UKJT%20Digital%20Disupte%20Rules.pdf>

6 Available at <https://lawtechuk.io/programmes/smarter-contracts>

7 See e.g. Mt. Gox, FTX, Zipmex, Terra, Celsius, Voyager Digital and Three Arrows Capital

Including in light of the collapses referenced above, the application to digital assets of the insolvency regimes of various other jurisdictions has now been tested in the courts of those jurisdictions.

The English courts have thus far not had occasion to address the application of various important English insolvency law concepts to digital assets. English insolvency law is nevertheless on any view capable of coherent application to an extremely broad range of assets.

In order to provide clarity to the market as to the application of English insolvency law to digital assets, the UKJT accordingly sees merit in delivering a further legal statement, (a "**Legal Statement on Digital Assets and English Insolvency Law**").

The aim of this consultation paper is to ensure that the issues addressed in the Legal Statement on Digital Assets and English Insolvency Law are those about which key stakeholders are most concerned.

3 Scope of the Legal Statement on Digital Assets and English Insolvency Law

Following initial exploratory discussions with legal and insolvency practitioners, the UKJT understands that such practitioners would welcome guidance and certainty as to how various aspects of the English insolvency law regime apply to issues involving digital assets.

Further, the UKJT has been advised that greater certainty, in that respect, would potentially assist investors when choosing English law as the governing law for e.g. debt instruments, or selecting England as a forum for pre-insolvency restructuring or a formal insolvency (and, if a formal insolvency, selecting which type of procedure to use).

The purpose of the proposed Legal Statement is accordingly to offer such guidance and promote certainty, by seeking to answer questions relating to the application of English insolvency law principles to digital assets. A draft set of such questions is set out in the Annex to this consultation paper. The purpose of this consultation is to seek input from key stakeholders on this list of questions.

4 Consultation questions

Your input is sought in relation to the following question:

> Are there any material issues of concern to stakeholders in relation to the application of English insolvency law to digital assets, other than those set out in the Annex to this consultation paper?

In your response, you are also invited to comment on the questions in the Annex to this consultation paper (for example, are any of these questions not material, or could they be framed

differently). There is no need to provide an answer to those questions themselves (although you may of course do so if you wish).

5 Consultation process

This consultation will remain open for responses until Monday 4 December. Once this consultation has closed and the results have been considered, it is intended that the Legal Statement on Digital Assets and Insolvency Law will be published in early 2024. It will then be possible to see whether any further steps are necessary or appropriate.

Written responses to the consultation questions should be provided by email to UKJT@justice.gov.uk

The UKJT will also be hosting a virtual consultation event in order to receive feedback on the consultation questions. This will take place on Tuesday 28 November. The UKJT will provide further detail in due course.

Annex
Questions to be addressed in the Legal Statement on Digital Assets and Insolvency

Each of the following questions is posed as a matter of English law:

1 Are digital assets "property" forming part of the estate of the insolvent company or individual for the purposes of the English insolvency legislation?

2 For international allocation of insolvency jurisdiction based upon location of centre of main interests (COMI), what rules apply to determine where digital assets are located and/or administered?

3 Is a claim to digital assets held by a company or bankrupt capable of being a claim to recover property? If so, what factors determine whether it is to be so characterised.

4 If a claim to digital assets held by a company or bankrupt is a monetary claim, is it a claim for a liquidated sum so as to be capable of founding a statutory demand/winding up petition? Is it a claim in a "foreign currency" such that it should be converted to the currency of the insolvency on day one?

5 Are office-holders subject, generally, to any obligations in relation to holding/realisation of volatile digital assets in an English insolvency?

6 Can you perceive any difficulties in the application of the English insolvency legislation relating to avoidance of prior transactions to pre-insolvency dealings with digital assets? If so, what are they?

7 If a claim to digital assets held by a custodian company can be a proprietary claim, what mechanisms are available to deal with mixing of the property of various clients and/or a shortfall in an insolvency of an exchange or custodian?

8 What interlocutory, investigatory or enforcement procedures are available to insolvency office-holders under English law, in order to get in digital assets or their monetary equivalent for the benefit of the insolvent estate?

Appendix 2 - List of respondents to the consultation

LawtechUK and its UK Jurisdiction Taskforce are grateful to the academic experts and industry leaders who have contributed to the Legal Statement on Digital Assets and English Insolvency Law through the public consultation and as expert consultees, including those who have agreed to be named below:

Dr Alisdair MacPherson, Professor Donna McKenzie Skene and Dr Chike Emedosi, Centre for Commercial Law and the Centre for Scots Law, University of Aberdeen

Etay Katz, Ashurst LLP

The City of London Law Society

Crypto Fraud and Asset Recovery Network

Catherine Phillips, Gowling WLG

Celine Buttanshaw, Willkie Farr & Gallagher (UK) LLP

Göker Tataroğlu, Bilkent University Faculty of Law

Gabrielle Ruiz, Tim Lees, Chris Norman, Clifford Chance LLP

Joanna Ford, Irfan Baluch, Cripps

Insolvency Lawyers Association

Julian Turner, Charles Kerrigan, CMS

The International Digital Assets Counsel Association

R3

Notes

[1] including Mt. Gox, FTX, Zipmex, Terra, Celsius, Voyager Digital and Three Arrows Capital.

[2] for brevity, we refer to the law of England and Wales as English law.

[3] Legal Statement on Cryptoassets and Smart Contracts (November 2019), Legal Statement on the Issuance and Transfer of Digital Securities under English Private Law (February 2023), both available at <https://ukjt.lawtechuk.io>.

[4] <https://lawtechuk.io/events/public-consultation-for-the-legal-statement-on-digital-assets-and-english-insolvency-law-28-november-2023/>.

[5] <https://twentyessex.com/people/lawrence-akka/>.

[6] <https://3vb.com/barrister/david-quest-kc/>.

[7] <https://www.linklaters.com/en/find-a-lawyer/rory-conway>.

[8] <https://essexcourt.com/barrister/alexander-riddiford/>.

[9] <https://southsquare.com/barristers/ryan-perkins/>.

[10] <https://www.kirkland.com/lawyers/c/crawford-hannah>.

[11] <https://uk.linkedin.com/in/matthew-kimber-580b599, https://matter-labs.io/>

[12] Strictly, the term 'property'does not describe a thing itself but a legal relationship with a thing: it is a way of describing a power recognised in law as permissibly exercised over the thing: Legal Statement on Cryptoassets (n 3) para 35.

[13] *Tulip Trading v Van Der Laan* [2023] EWCA Civ 83, [2023] 4 WLR 16. There is a helpful list of cases at Law Commission, "*Digital Assets: Final Repor*t", Law Com No 412, para 3.41.

[14] (n 3) paras 108–109.

[15] *Bristol Airport plc v Powdrill* [1990] Ch 744, 759 (Browne-Wilkinson VC); *In re GP Aviation Group International Ltd (in liquidation)* [2013] EWHC 1447 (Ch), [2014] 1 WLR 166 [25] "the definition … is cast in the widest terms".

[16] For an example of the treatment of digital assets as property in this context, see the *Joint Administrators' Final Progress Report for Dooga Ltd (Trading As Cubits) In Administration (No 010642 of 2018)*

<https://www.thegazette.co.uk/company/04430228/filing-history/MzI1MDg4NjM2MmFkaXF6a2N4>.

[17] <https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency>.

[18] i.e. Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast), as now given effect in this jurisdiction by the Insolvency (Amendment) (EU Exit) Regulations 2019.

[19] *Eurofood IFSC Limited* (Case C-341/04) [2006] Ch 508; *Interedil Srl v Fallimento Interedil Srl* [2012] Bus LR 1582; *Shierson v Vlieland-Boddy* [2005] BCC 949; *Re Galapagos SA* [2022] EWHC 1633 (Ch); *East-West Logistics LLP v Melars Group Ltd* [2022] EWCA Civ 1419

[20] In this regard, see in particular the Law Commission's recent work on this topic (<https://lawcom.gov.uk/project/digital-assets-and-etds-in-private-international-law-which-court-which-law/>); also the Legal Statement on Cryptoassets paras 89ff (n 3).

[21] *Ion Science Ltd v Persons Unknown* (unreported) (21.12.2020) and *Fetch.AI Ltd v Persons Unknown* [2021] EWHC 2254 (Comm).

[22] The question of the *lex situs* of digital assets also arose in *Zipmex* (below n 23), where it was argued by the applicants that the companies had a "*substantial connection*" with Singapore for the purposes of establishing jurisdiction under ss 64 and 65 IRDA on the basis that the lex situs of the digital assets in question was Singaporean law. However, these points were not fully argued and were not decided in *Zipmex*.

[23] *Re Zipmex Pte Ltd and other matters* [2022] SGHC 196 <https://www.elitigation.sg/gd/s/2022_SGHC_196>.

[24] Private keys are typically long and unmemorable strings of letters and numbers, and, therefore, for convenience and practicality are usually stored and retrieved using software known as a 'wallet'. Wallets are referred to as 'hot' or 'cold' depending on whether they run online (e.g. on a website) or offline (e.g. on a USB stick or similar dedicated hardware).

[25] (n 23) [18].

[26] (n 19).

[27] As the Law Commission notes, the existence (and breach of) a fiduciary obligation on the part of the holder could entitle users to seek a proprietary remedy (such as disgorgement of profits): Law Commission, "*Digital Assets: Final Report*", Law Com No 412, para 7.26(2).

[28] Celsius Network LLC <https://cases.stretto.com/Celsius/court-docket/>, Voyager Digital Holdings Inc <https://cases.stretto.com/Voyager/court-docket/>

[29] Law Commission, "*Digital Assets: Final Report*", Law Com No 412, para 7.26(1), fn 13.

[30] *Ruscoe v Cryptopia Limited (in liquidation)* [2020] NZHC 728, [2020] 22 ITELR 925 (New Zealand); *Quoine Pte Ltd v B2C2 Ltd* [2020] SGCA(I) 02 (Singapore); *Re GateCoin Ltd (In Liquidation)* [2023] HKCFI 914 (Hong Kong).

[31] e.g. Bridge, Gullifer and ors: *The Law of Personal Property* (3rd Ed, Sweet & Maxwell 2022) para 15–027.

[32] (n 24).

[33] See, in particular: *B2C2 Ltd v Quoine Pte Ltd* [2020] SGCA(I) 02; [2019] SGHC(I) 03 and *Ruscoe v Cryptopia* [2020] NZHC 728, [2020] 22 ITELR 925 (High Court of New Zealand).

[34] Insolvency Act 1986, s 123(1)(a).

[35] Insolvency Act 1986, s 123(1)(e).

[36] Insolvency Act 1986, s 123(2).

[37] Insolvency Act 1986, s 267(1).

[38] Insolvency Act 1986, s 267(2)(b).

[39] Insolvency Act 1986, s 267(2)(c).

[40] Insolvency Act 1986, s 268; The Insolvency (England and Wales) Rules 2016 SI 2016/1024, r 10.1 (*The statutory demand (section 268)*).

[41] Insolvency Act 1986, s 268(1)(a), referring back to s 267(2), which contains cumulative requirements. See also *Standard Chartered Bank v Dorchester LNG* [2016] QB 1 [38].

[42] *Dusoruth v Orca Finance UK Ltd* [2022] EWHC 2346 [123] (ICC Judge Mullen). In addition, "*it does not matter whether the petitioner puts a figure on his claim, even if he can calculate it "down to the last penny". It must be liquidated either because the quantification of the debt is one from which the debtor is not permitted to resile as a matter of admission, acknowledgment or agreement, or because it has been determined as a matter of the court process.*"

[43] *Miller v Race* (1758) 1 Burr 452, 457.

[44] Law Commission, "*Digital Assets: Final Report*", Law Com No 412.

[45] At least in England and Wales and other jurisdictions that have not adopted certain digital assets as legal tender.

[46] (n 40).

[47] See also the definition of "bankruptcy debt" in Insolvency Act 1986, s 382.

[48] HC/CWU 246/2022 (30 March 2023) (General Division of the High Court, Singapore).

[49] *Re T&N Ltd* [2005] EWHC 2870 (Ch), [2006] 1 WLR 1728.

[50] *Re Lehman Brothers* [2009] EWCA Civ 1161, [2010] 1 BCLC 496.

[51] Insolvency Rules 1986, r 14.21.

[52] Para 66.

[53] Insolvency Rules 1986, r 14.14.

[54] See also Mr Justice Antony Zacaroli's October 2019 lecture to the Insolvency Lawyers Association entitled "Crypto-currencies and insolvency": <https://www.ilauk.com/docs/ILA_-_AZ_Talk_Crypto-currencies_and_insolvency.pdf>

[55] Insolvency Rules 2016, r 14.23.

[56] Insolvency Rules 2016, r 14.25.

[57] See, respectively, r 14.24(8)(b)(i) and r 14.25(8)(b)(i) of the Insolvency Rules 2016.

[58] Insolvency Act 1986, Schedule B1, paragraph 67.

[59] Insolvency Act 1986, Schedule B1, paragraph 59(1).

[60] Insolvency Act 1986, Schedule B1, paragraph 5.

[61] *Ex p James* (1873-74) L.R. 9 Ch App 609; *Re One Blackfriars Ltd* [2021] EWHC 684 (Ch) [205].

[62] See eg *Davey v Money* [2018] EWHC 766 (Ch), [2018] Bus LR 1903 [622].

[63] *Re Charnley Davies (No 2)* [1990] BCC 605 [618].

[64] *Michael v Miller* [2004] EWCA Civ 282.

[65] Insolvency Act 1986, Schedule B1 para 3(4).

[66] Insolvency Act 1986, Schedule B1, para 3.

[67] Insolvency Act 1986, Schedule B1, para 3(4)(b).

[68] Insolvency Act 1986, Schedule B1, para 4.

[69] A pre-packaged sale in administration is an arrangement pursuant to which the sale of all or part of a company's business or assets is negotiated with a purchaser prior to the appointment of an administrator, and the sale contract executed on the appointment of the administrator or very shortly thereafter.

[70] Insolvency Act 1986, s 160(1).

[71] Insolvency Act 1986, s 168(4).

[72] *Patley Wood Farm LLP and others v Kicks and another* [2023] EWCA Civ 901.

[73] Insolvency Act 1986, s 326.

[74] Insolvency Rules 2016, r 14.13.

[75] *Singla v Hedman (No 2)* [2010] EWHC 902 (Ch).

[76] *Re Fastfit Station Ltd; Bonney v Barker* [2023] EWHC 496 (Ch).

[77] *Re Sofra Bakery Ltd* [2013] EWHC 1499 (Ch).

[78] See paras 42–48, especially at para 45.

[79] for the reasons given in the UKJT's November 2019 Legal Statement on Cryptoassets and Smart Contracts at paras 100–106.

[80] *Re Branston & Gothard Ltd* [1999] BPIR 466.

[81] *Pettit v Novakovic* [2007] BCC 462.

[82] (n 84).

[83] Goff & Jones, *The Law of Unjust Enrichment* (10th ed, Sweet & Maxwell 2022) para 7-18. This is a consequence of the obiter remarks made by Lord Millet and Lord Steyn in *Foskett v McKeown* [2001] 1 AC 102, where Lord Steyn (at [113]) and Lord Millett (at [128]–[129]) both said that there is now only one set of tracing rules in English law, applicable to common law and equitable claims alike. However, it must be acknowledged that there are cases that point in the contrary direction: see *Tecnimont Arabia Ltd v National Westminster Bank plc* [2023] Bus LR 106 [150] (HHJ Bird sitting as a High Court Judge), where it was common ground that it was impossible to trace through a mixed fund at common law.

[84] See Tucker and ors: *Lewin on Trusts* (20th Ed, Sweet & Maxwell, 2020) Chapter 44.

[85] *National Crime Agency v Robb* [2015] Ch 520 [64]–[65] (Sir Terence Etherton C).

[86] https://www.handbook.fca.org.uk/handbook/CASS/.

[87] *Re Lehman Brothers International (Europe)* [2012] Bus LR 667.

[88] *Federal Republic of Brazil v Durant International Corp* [2016] AC 297 [39] (Lord Toulson).

[89] https://www.fca.org.uk/news/statements/notice-regulated-firms-exposure - cryptoassets.

[90] See also Law Commission, "*Digital Assets: Final Report*", Law Com No 412, para 8.47ff. The conclusion reached by the Law Commission is that crypto-tokens generally do not fall within the scope of the FCAR regime, but that a different answer might conceivably apply to other classes of digital assets.

[91] Insolvency Act 1986, s 235(5).

[92] (n 24).