

Heads or Tails: Structuring for Bankruptcy Remoteness in Digital Assets, the view from the BVI

Rosalind Nicholson, Partner, Walkers, British Virgin Islands

Synopsis

'Bankruptcy remoteness' in the digital asset context means structuring the relationship so that if an exchange, custodian, broker or similar service provider becomes insolvent, client digital assets – or the client's identifiable share of a pool – fall outside the provider's insolvent estate and are not available for distribution to the provider's unsecured creditors. The legal analysis is familiar. It simply applies established rules of property, trust, agency and insolvency priority to a technologically novel class of asset.

This article revisits the core legal building blocks: digital assets as property, and the critical distinction between proprietary and personal claims. It then tests those principles against the realities of how platforms actually operate: omnibus wallets, private-key custody, internal ledgering, reconciliation, and contractual allocation of risk.

The starting point is the BVI Commercial Court's short but practically significant guidance in *Philip Smith and Jason Kardachi (as joint liquidators) v Torque Group Holdings Ltd (in liquidation)*¹ ('Torque'), then draws comparative lessons from *Ruscoe and another v Cryptopia Ltd (in liq)*² ('Cryptopia') (New Zealand) and *Quoine Pte Ltd v B2C2 Ltd*³ ('Quoine') (Singapore), and from the more recent insolvency decisions in *Re Taylor, Joshua James and another (Official Receiver, non-party)*⁴ ('Egonex') (Singapore) and the two *Gatecoin* decisions in Hong Kong.⁵ These decisions illustrate a common theme: the terms in force, the custody mechanics and the operational reality will often determine whether customers have proprietary rights or merely personal claims.

Four propositions emerge. First, digital assets are now generally treated by common-law courts as capable

of being property. Secondly, that conclusion does not by itself determine whether a customer has a proprietary claim in an insolvency. Thirdly, where assets are pooled or held through omnibus wallets, the question is whether the contractual and operational structure gives the customer an identifiable proprietary interest in the relevant asset or pool. Fourthly, the practical success of bankruptcy-remoteness structuring depends on consistency between the terms, custody mechanics, ledgering, accounting treatment, reconciliation and control of private keys.

Digital assets as 'property' and as insolvency 'assets'

The gateway to bankruptcy remoteness is the property status of an asset. If a digital asset is capable of being property, it is capable of being the subject of proprietary rights, including trust rights and security interests. In general, such rights will prevail over the claims of unsecured creditors.

Two points now sit on relatively firm common-law footing: First, as a matter of English private law, the UK Jurisdiction Taskforce ('UKJT') concluded in 2019⁶ that digital assets are, in principle, to be treated as property and are not disqualified merely because they are intangible, cryptographically authenticated, recorded on a distributed ledger, decentralised, or governed by consensus rules.

Secondly, in insolvency contexts, statutory definitions of 'property' or 'asset' are typically expansive and readily accommodate digital assets. The 2024 UKJT insolvency statement proceeds on the basis that digital assets fall within the Insolvency Act 1986 definition of

Notes

- 1 *Philip Smith and Jason Kardachi (as joint liquidators) v Torque Group Holdings Ltd (in liquidation)*, BVIHC (COM) 0031 of 2021, Wallbank J (Ag), 2 July 2021.
- 2 *Ruscoe and another v Cryptopia Ltd (in liq)* [2020] NZHC 728 (Gendall J).
- 3 *Quoine Pte Ltd v B2C2 Ltd* [2020] SGCA(I) 2 (Sundares Menon CJ, Andrew Phang Boon Leong JA, Judith Prakash JA, Robert Shenton French IJ and Jonathan Mance IJ).
- 4 *Re Taylor, Joshua James and another (Official Receiver, non-party)* [2025] SGHC 104.
- 5 *Re Gatecoin Ltd (in liquidation)* [2023] HKCFI 914; *Re Gatecoin Ltd (in liquidation)* [2025] HKCFI 493.
- 6 UK Jurisdiction Taskforce, 'Legal Statement on Cryptoassets and Smart Contracts' (November 2019) paras 15–17, 28–32, 35–37, 86(b), 107–109.

‘property’ and that existing insolvency doctrine is capable of ‘convenient and sensible’ application to disputes involving digital assets.⁷

The BVI position is consistent with that approach. In *Torque*, Wallbank J (Ag) treated digital assets as ‘assets’ and ‘property’ for the purposes of the BVI Insolvency Act 2003, noting both the width of the statutory definition of ‘asset’ and the office-holder’s duty to take possession of, protect and realise the company’s assets.⁸ For BVI insolvency practice, the significance of *Torque* lies not merely in the recognition of digital assets as property, but in the Court’s willingness to engage pragmatically with the factual architecture through which those assets were held and controlled.

Elsewhere in the common-law world, courts have done the same to the point that the real issue in an insolvency context at least is now generally not whether a digital asset is to be classified as property, but whether the particular customer has a proprietary claim to identifiable property, including an identifiable share of a pool.

Proprietary versus personal claims: the distinction which matters

This reflects the fact that in the insolvency context, the decisive dividing line is between proprietary and personal claims. A personal claim is a claim in debt or damages. It ranks, absent security, as an unsecured debt and is subject to the collective insolvency regime, including *pari passu* distribution and restructuring compromises. By contrast, a proprietary claim – for example, as beneficiary under a trust, as co-owner of a pool, or because title never passed to the platform – ordinarily falls outside the insolvent estate and is therefore immune from distribution amongst creditors and will entitle the claimant to return of the property or an identifiable share of it in priority to any unsecured creditors.

It is this question which provides the difficulty, and the interest, where the platform or custodian is insolvent. Digital assets are held and transferred by reference to protocol rules and cryptographic control. Yet most mainstream market activity is mediated by centralised actors who warehouse assets in pooled on-chain wallets while maintaining individual entitlements in internal records.

Insolvency forces a translation of that operational model into familiar legal categories. Proprietary claims keep property out of the estate. Personal claims ordinarily rank as unsecured. The 2024 UKJT statement puts this distinction at the centre of digital asset insolvency analysis, framing the issue in conventional trust terms – including the three certainties – while recognising that custodial arrangements commonly involve omnibus wallets combined with books-and-records segregation.⁹

The cases which have examined this issue thus far seem to show two points. First, omnibus on-chain, pooled holding is not necessarily inconsistent with proprietary segregation. The question is whether the customer’s entitlement is sufficiently certain and whether the arrangement, considered as a whole, evinces an intention to create or preserve proprietary rights in the claimant rather than a debtor-creditor relationship. Secondly, the platform’s technical and documentary architecture must support a conclusion that the digital assets were held beneficially for the customer. The inquiry is intensely fact-sensitive and requires careful analysis of custody design, record-keeping, accounting treatment, contractual allocation of risk, restrictions on reuse and control of private keys.

Torque: wallet taxonomy, key control and the evidential use of private keys

Torque illustrates the importance which the BVI Court will give to the factual matrix within which digital assets are held. The case involved an application by joint liquidators for sanction under the BVI Insolvency Act in the liquidation of an online crypto trading platform. The liquidators had secured the company’s exchange account and identified a number of operational ‘wallet types’ within it – distinguished by function and control – including ‘User Trading Wallets’ and ‘User Personal Wallets’, a ‘wallet taxonomy’. The liquidators proposed different treatment for each wallet type by reference to control (including private-key access).¹⁰

The liquidators’ analysis, accepted by the Court for the purposes of sanction, treated assets in User Trading Wallets as assets of the company, leaving customers with corresponding contractual claims. By contrast, assets in User Personal Wallets were treated as falling outside the insolvent estate, on the basis that legal and

Notes

- 7 UK Jurisdiction Taskforce, ‘Legal Statement on Digital Assets and English Insolvency Law’ (23 May 2024), Summary paras 1–10 and ss 1–7.
- 8 *Torque* at [21]–[26].
- 9 See generally the UKJT 2024 statement, especially the sections addressing claims to digital assets, trust analysis and the three certainties.
- 10 *Torque* at [9]–[12].

beneficial ownership had never been transferred from users to the company.¹¹

Central to the BVI Court's analysis was knowledge and control of the private key. The Court treated that as a strong indicator of ownership, guided by the UKJT proposition that the person with knowledge of a private key will, absent circumstances pointing to a contrary conclusion, generally be considered the owner.¹²

Two points follow from this decision: first, key control is not, and should not be treated as, a freestanding rule of property law. It is purely evidence. The legal question remains where beneficial ownership lies, to be determined by the application of orthodox legal principles applied against the contractual and factual matrix. But control of the key will often be a powerful fact, because it shows who can actually move the asset on-chain.

Secondly, *Torque* offers a practical warning. Bankruptcy remoteness is easiest to defend where the documentation and operational reality are aligned. The contract must provide, if that is the intended result, that digital assets are held for the client – for example as custodian, trustee or agent – and the platform's design must make that true – by preventing unilateral dealing by the provider and by maintaining segregation or records that allow prompt identification and return.

Torque is also a reminder that BVI courts may proceed pragmatically on applications for sanction where the matter is not finally determinative of third-party rights. The Court expressly left open the possibility of interested parties advancing a different analysis in subsequent proceedings.

Comparative case studies: *Cryptopia*, *Quoine*, *Eqonex* and *Gatecoin*

The comparative authorities are useful for BVI purposes not because they create a special law of digital assets, but because they apply established common-law principles to recurring insolvency problems. In a BVI liquidation, the same questions are likely to be decisive: what did the contractual documents say; how were assets actually held; what did the books and records show; who controlled the private keys; and does the structure as operated support proprietary protection or only a personal claim?

Cryptopia: pooling and ledgering are not fatal to a trust

Cryptopia operated a cryptocurrency exchange in New Zealand. It entered liquidation after a substantial

hack. The liquidators sought directions as to whether cryptocurrencies held by the company were property and whether they were held on trust for account holders. Gendall J answered both questions in favour of customers. He held that cryptocurrencies were a form of property and were capable of being held on trust.¹³

On the critical question whether the digital assets were in fact held on trust, the Court approached the issue through the application of conventional legal principles of trust law and looked to find the three certainties necessary to create a trust: certainty of intention, certainty of subject matter and certainty of object.

In April 2024 the UKJT revised the 'Legal Statement on Digital Assets and English Insolvency Law' (the 'UKJT Revised Statement'). In the Revised Statement, the UKJT emphasise that a principal evidential factor in any consideration directed to establishing whether a trust has been created will be an express contractual term between the 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.

As appears from the Judgment, the accounts of customers on the Cryptopia exchange, were held in hot wallets used for trading, with one hot wallet for each cryptocurrency, and separate cold wallets for each user's holding of a particular currency. When trades occurred between users, ledger balances changed but on-chain wallet balances did not. Cryptopia, rather than its customers, held the private keys. However, its financial accounts did not treat customer cryptocurrency as its own assets, save for amounts clearly held on its own account.

The contractual language also mattered. The terms referred to customers' 'coin balances', described ledger entries in the customers' names, and appointed Cryptopia as 'your agent' for transactions in digital assets. Taken with the operational and accounting evidence, the Court was satisfied that the company did not intend to trade in the digital assets on its own account but held them for customers.

With respect to certainty of subject matter, the *Cryptopia* decision is significant: the Court held that it is not determinative against the existence of a trust that digital assets of one party are mixed with the digital assets of another party in a single pool. The Court relied on the fact that the crypto assets were clearly identifiable and recorded in the company's database records: this the Court considered provided sufficient certainty of the subject matter of the trust. On this basis, the Court determined that the exchange held the cryptocurrency pools on trust for account holders, with separate trusts

Notes

11 *Torque* at [10]–[12], [27]–[32].

12 UKJT 2019 statement para. 86; cited in *Torque* at [27]–[32].

13 *Cryptopia* at [69], [108]–[128], [140]–[187].

organised by cryptocurrency type and rateable loss sharing within each pool in the event of shortfall.

Cryptopia is therefore powerful authority for the proposition that pooling is not necessarily incompatible with trust analysis. Digital assets of multiple customers may be mixed in a single pool without defeating certainty of subject matter, provided the assets and customers' respective entitlements are sufficiently identified by reliable records. The Court treated the exchange holdings as pooled trusts by currency type, with rateable loss sharing within the affected pool in the event of shortfall.

Quoine: segregation alone is not enough

Quoine supplies the corrective. It was not an insolvency case, but rather a claim by a user of a cryptocurrency exchange for breach of contract and breach of trust. The Singapore Court of Appeal declined to uphold the trust analysis on the facts, while leaving open the wider question whether cryptocurrencies are property capable of being held on trust.¹⁴

The importance of the case lies in the Court's rejection of the trust claim. Again, the Court approached the issue through a conventional analysis of the 'three certainties' required to create a trust. At first instance, the Singapore International Commercial Court had regarded Quoine's separation of cryptocurrencies into different accounts as a decisive indicator of an intention to create a trust. The Court of Appeal disagreed. Segregation may be necessary, or at least consistent with a trust, but it is not in itself sufficient to establish a proprietary interest. What is required is evidence of the requisite certainty of intention. On the facts, that was absent. The Court also found that the manner in which digital assets were actually stored in the cold wallet suggested that there was no true segregation, which further militated against the trust analysis.

Quoine therefore emphasises that not every exchange relationship is custodial in the trust sense. Segregation at user-interface or account level may still be consistent with a debtor-creditor relationship if the documents do not evince an intention to create proprietary rights, or if the operational model involves the platform assuming beneficial ownership and promising only an equivalent return.

Egonex: no trust but retained customer title

In *Egonex*¹⁵ the Singapore High Court dismissed the liquidators' application for directions that would have permitted them to treat unclaimed cryptocurrencies

and related fiat proceeds as held on trust for customers and to distribute them under a proposed plan. The Court held that no express, resulting or Quistclose trust arose over the cryptocurrencies. Instead, customers retained both legal and beneficial title, with the consequence that the assets had to be returned to them and the liquidators could not distribute as trustees or take an indemnity from 'trust assets'.

On the express trust analysis, the Court treated the case as turning on the three certainties and found the claim failed primarily for want of certainty of intention. Although the terms of service stated that digital assets in the wallet were 'custodial assets' held 'for your benefit', and permitted shared blockchain addresses, and referred to books-and-records segregation, the Court was doubtful that this language amounted to a declaration of trust. Custody terminology could be consistent with a range of relationships and does not, without more, demonstrate an intention to create fiduciary obligations. Critically, the Terms also contained strong anti-trust indicators and an express provision disclaiming any fiduciary or equitable duties was treated by the Court as fundamentally inconsistent with trustee-type obligations and therefore as militating against an intention to create a trust.

The Court also rejected a series of additional arguments said to support a trust. Restrictions on Egonex's ability to deal with customer assets, such as processing transactions only on instructions, were treated as commercially sensible controls but did not imply a trust. The existence of a third-party custodian did not answer the anterior question whether Egonex itself held on trust for customers. Nor was Egonex's balance-sheet classification of assets as 'exchange client funds' probative of trust intention because the relevant intention must be that of the settlor (the customers), not the company. Nor was 'segregation' including individual wallet or account structures, enough: segregation may be necessary, but it is not a sufficient indicator of a trust. Time-limited account-closing regime (permitting access for withdrawals for up to 90 days and then contemplating account closure/other handling) was also treated as inconsistent with continuing trustee obligations. Taken together, these factors reinforced the Court's conclusion that intention was, at best, equivocal and insufficient to establish an express trust.

Egonex illustrates the fact that the absence of a trust will not invariably mean that customers are left with unsecured claims. Rather, it illustrates an alternative, namely that if, on the proper construction of the terms and operating model, title never passed to the platform at all, the customer may still be entitled to the return of the asset because it remained the customer's property throughout.

Notes

¹⁴ *Quoine* at [5]–[7] and the Court of Appeal's analysis of the failed trust claim.

¹⁵ *Re Taylor, Joshua James and another* (Official Receiver, non-party) [2025] SGHC 104.

Gatecoin: the primacy of terms

Gatecoin Limited was a Hong Kong-incorporated cryptocurrency exchange which operated an online trading platform from 2015 until it was wound up in March 2019. In the liquidation, the liquidators recovered pooled fiat held with payment service providers and more than 50 types of cryptocurrency held in Gatecoin-controlled wallets. They sought the Court's directions as to how those currencies should be characterised and allocated as between Gatecoin and its customers, in circumstances where Gatecoin had used omnibus on-chain wallets, recorded customer entitlements on an internal exchange ledger, and operated under a succession of different customer terms ('T&Cs') over time.¹⁶

The Court accepted that cryptocurrency constitutes property under Hong Kong law and is capable of being held on trust, drawing on the UKJT analysis and comparative common-law authorities including *Cryptopia*.

The trust issue itself turned on orthodox principles, in particular focusing on certainty of intention assessed objectively from the parties' bargain and the surrounding matrix.

The earlier versions of the T&Cs contained express trust architecture: Gatecoin would maintain an exchange ledger to track users' 'ownership'; digital assets would be held in pooled digital wallets in which the user had a 'beneficial ownership interest'; Gatecoin would act as custodian holding digital assets 'in trust'; fiat balances would not be treated as general assets; and accretions would be credited to the user's account. These terms also repeatedly referred to 'your Digital Assets'. Customers who had agreed to those T&Cs and had not subsequently agreed to the 2018 T&Cs were found to have proprietary claims over their cryptocurrencies.

By contrast, the 2018 T&Cs, which superseded the earlier T&Cs, pointed firmly away from a trust. The express trust language was removed. Gatecoin disclaimed acting in any fiduciary capacity. The exchange ledger was described as corresponding to pooled or omnibus accounts. Gatecoin, not customers, was positioned to retain the benefit of forks and airdrops, which the Court treated as consistent with Gatecoin being the beneficial owner. Closure, suspension and unclaimed-fund mechanics treated fiat and crypto in the same way and authorised Gatecoin to deal with residual balances.

The Court regarded the operational and accounting reality as corroborative of the absence of a trust under the 2018 terms. Customer deposits were swept into commingled 'mother wallets'; Gatecoin could deploy pooled assets for its own purposes, including proprietary trading; there was no requirement to maintain on-chain segregation or an equivalent reserve matching

ledger balances; and Gatecoin's audited accounts treated cryptocurrencies as Gatecoin's assets with customer deposits as liabilities. Although pooled or fungible assets can, in principle, satisfy certainty of subject matter and objects, the absence of intention under the 2018 T&Cs meant that most customers were left with non-proprietary contractual claims, subject to the position of any true non-consenting customers.

That latter issue was addressed in the subsequent decision in the same liquidation.¹⁷ In that case, the Court addressed claims by non-consenting customers, that is, customers who claimed that they had never accepted the 2018 T&Cs and therefore retained a proprietary claim. The Court held that each of these customers was to be treated as a beneficial tenant-in-common with others similarly placed in the relevant pool of cryptocurrency, pro rata to the total account balance. Where there was no shortfall, Gatecoin, through its liquidators, was required to return to each customer the pro rata quantity of that cryptocurrency, net of an appropriate deduction for liquidation expenses. Where there was a shortfall, the Court held that the proper method was a pro rata allocation of the available pool, reflecting the customers' pooled, undivided interests as tenants in common.

Cryptopia, Quoine, Egonex and Gatecoin as a spectrum

Taken together, *Cryptopia*, *Quoine*, *Egonex* and *Gatecoin* frame the spectrum. At one end, express trust language, consistent conduct, reliable records and supportive accounting treatment can establish proprietary segregation even with pooled wallets. At the other, a trust cannot be assumed and will not be inferred where intention and/or the structure do not support it. *Egonex* adds an important further point: in some structures, the better analysis may be that title never passed from the customer who retained the proprietary interest throughout.

Commingling, shortfalls and the allocation of losses

Even where proprietary rights are established, insolvency often reveals a shortfall. Hacks, misappropriation, operational failure and poor key management may mean that the pool is smaller than the sum of customer entitlements. The question then becomes how the shortfall is allocated among those with proprietary interests.

Notes

¹⁶ *Re Gatecoin Ltd (in liquidation)* [2023] HKCFI 914.

¹⁷ *Re Gatecoin Ltd (in liquidation)* [2025] HKCFI 493.

The 2024 UKJT statement proceeds on the basis that established tracing and mixed-fund principles are sufficiently flexible to address pooled digital assets, with pro rata sharing between innocent beneficiaries often being the principled outcome in shortfall cases.

Cryptopia supplies a worked example. There, the Court treated exchange holdings as pooled trusts by currency type and required losses from the hack to be borne rateably within the affected currency pools. The Gatecoin case similarly proceeded on the basis that, where customers have proprietary rights in a pool, they participate as beneficial co-owners in the relevant pooled holdings and share any shortfall pro rata within that pool.

Drafting and structuring: what strengthens or weakens bankruptcy remoteness

The authorities thus far yield several practical drafting and structuring lessons.

- First, document intention with precision. If a trust or custody model is intended, say so expressly. Identify the trust or custody property, including pooled holdings where relevant; identify the beneficiaries; and specify the mechanics by which entitlements are recorded, reconciled and enforced.
- Secondly, state clearly whether title passes. If the structure is one of retained client title, the documents should say so and the operating model should support it. If the structure involves title transfer, that should also be made explicit. Ambiguity is dangerous because it invites insolvency litigation at precisely the point when certainty is most valuable.
- Thirdly, align the legal characterisation with operational reality. Where feasible, custody architecture should evidence segregation in substance: dedicated addresses for premium custody, or, where omnibus wallets are used, robust and auditable books-and-records segregation, coupled with regular reconciliation, and controls consistent with holding for others.
- Fourthly, address reuse and rehypothecation directly. Yield, lending, margin and staking products commonly involve lending, staking, pledging, deploying or otherwise using customer assets for the platform's own account. Such features are harder to reconcile with a continuing beneficial interest in specific assets or a pool unless the documents and mechanics create a clearly defined proprietary substitute. The greater the platform's freedom to use assets as working inventory, the more likely the relationship is to be analysed as debtor-creditor.
- Fifthly, allocate shortfall risk from the outset. If pooling is used, specify how gains, losses and

shortfalls are allocated, whether pro rata within asset pools or otherwise. Address how recoveries (including from hacks, or misappropriation, forks, airdrops, staking rewards and other accretions) are to be treated.

- Sixthly, build against the possibility of insolvency. Provide for portability and return, including credible key-release or transfer mechanics. Include audit and information rights. Maintain records that enable entitlements to be identified and verified without reliance on discretionary or opaque internal processes.
- Finally, ensure consistency across the entire structure. A useful checklist includes: an express declaration of trust or custody language if intended; a clear statement whether title passes or remains with the customer; identification of the relevant property or pool; beneficiary identification through books and records; reconciliation obligations; restrictions on reuse and proprietary trading; treatment of forks, airdrops and staking rewards; shortfall allocation; insolvency return mechanics; key-control and transfer mechanics; and accounting treatment consistent with the legal analysis.

None of these is conceptually novel. Their practical importance in the digital asset context lies in the risk that an arrangement will be characterised as creating personal rights only. Where documents assert 'custody' but the platform's practices involve commingling, unilateral dealing or reuse without a coherent segregation and reconciliation framework, a court is more likely to analyse the relationship as debtor-creditor, leaving customers with merely personal claims ranking *pari passu* with other unsecured creditors in the insolvency.

Conclusion

What is becoming clear is that the emerging common-law approach is evolutionary rather than revolutionary. Courts have not created a special law for digital assets; instead they have applied established rules of property, trust, agency, contract and insolvency priority to a novel asset class.

The practical question in any case remains one of characterisation: whether, on a proper construction of the contractual arrangements and the evidence of operational reality, the customer's position is properly to be analysed as proprietary – whether by trust, co-ownership, agency, retained title or analogous custody analysis – or merely personal. But the cases demonstrate that labels are not enough. 'Custody', 'segregation' and 'wallet balance' are not conclusions; they are facts to be tested against the contract and the platform's actual operating model. The drafting and structuring

imperative is therefore clear: bankruptcy remoteness is most defensible where the documents, ledger, accounting treatment, custody architecture and key-control mechanics all support the same proprietary analysis.

Where that alignment is absent, insolvency may reveal that what might have appeared to be a proprietary holding was, in law and fact, no more than an unsecured claim.