

## Does a Blockchain Developer owe Fiduciary Duties?



*While blockchain networks continue to evolve rapidly, the legal framework managing the associated risks is only just emerging. The Court of Appeal has recently considered whether developers of networks that allow crypto-asset trading should owe fiduciary duties towards the asset owners.*

In the last few years crypto-asset trading has grown increasingly in popularity. Whereas the virtues of investing in crypto have been widely publicised, stories of lost funds are becoming more commonplace. Whilst emerging new technologies spark excitement, inevitably the question arises: who is responsible when something goes wrong?

This issue was recently considered in *Tulip Trading Limited v van der Laan and ors* [2023] EWCA Civ 83. In the context of blockchain network software, the Court of Appeal examined how the established legal principles of tortious or fiduciary duties may apply to software developers whose products facilitate the storing and trading of crypto-assets.

### Background

The facts of the case were technically complex. Essentially, Tulip Trading Limited (“Tulip”), a Seychelles company claiming UK residence on the basis of where central management and control was exercised, had lost access to some \$4 billion worth of Bitcoin. The Bitcoin was held at two crypto-wallet addresses, hosted over four blockchain networks which were operated and controlled by the named Defendants (together “the Developers”) - all based outside the UK. To access the assets, Tulip needed the private keys associated with the wallets; these had been lost following a suspected computer hack.

Tulip argued that it would be simple for the Developers to secure the inaccessible Bitcoin by transferring it to a new wallet that Tulip could control. Tulip contended that the Developers should be recognised as a new *ad-hoc* class of fiduciaries; owing duties to safeguard Tulip’s crypto-assets from hacks / theft as they had custody of these on their blockchain networks. Tulip’s position was simple - the Developers have the power to return control of the assets to Tulip, and therefore they should.

Initially, the Business and Property Court allowed an application by the Developers to set aside service outside the jurisdiction, as it decided they owed no fiduciary or tortious duties to Tulip. In reaching its conclusion, the High Court found:-

1. Fundamentally, the defining characteristic of fiduciary duty is the obligation of undivided loyalty. A system change to allow access to assets without a private key would only be in Tulip’s interest, and could potentially disadvantage those with a rival claim to the assets;

2. Bitcoin owners could not realistically be said to have “*entrusted their property to a fluctuating and unidentified body of developers*”; and
3. Although the Developers might have assumed some form of duty, it was doubtful that it would amount to a duty of single-minded loyalty.

## The Court of Appeal - Considering Fiduciary Duties

Permission to Appeal was sought by Tulip on six distinct grounds. The Court of Appeal determined that, of those, only two were pertinent – in particular whether the High Court had been correct to conclude that Tulip had no reasonable prospect of establishing that the claimed fiduciary duties exist.

Lord Justice Birss noted that the debate as to whether the Developers owe a duty in law (on the assumed facts of the Appeal) could focus entirely on the concept of fiduciary duty. Referring predominantly to the judgment in *Mothew*<sup>1</sup>, the Court of Appeal summarised key characteristics of a fiduciary relationship, which include:-

- An undertaking to act for or on behalf of another person;
- There being a relationship of trust and confidence between the putative fiduciary and the principal; and
- The principal is entitled to single-minded loyalty of the fiduciary, who must act in good faith and not place himself in a position where his duties and interests may conflict.

Lord Justice Birss pointed out that “*the reason for spelling this out is because in the present case, in my judgment, the developers are people who it is clearly arguable have undertaken a role which at least bears some relationship to the interests of other people, that is to the owners of Bitcoins*”.

Although this was not sufficient to fix the developers with fiduciary duties, Lord Justice Birss pointed out “*the categories in which fiduciary relationships can be identified are not closed*”. In cases, such as this, where the facts are novel and different from factual circumstances that the Court has previously considered, “*the right response of the common law is not to say that incremental developments cannot reach that far*”.

## The Court of Appeal’s Decision

When looking at the role played by the Developers, the Court recognised the manner in which they exercise control over the software will assist to inform the nature and/or extent of any duties being carried out and, in turn, the impact upon bitcoin owners. The Court of Appeal found it conceivable that the Developers should, at least, have a “negative” legal duty not to act in their own self-interest when acting in their capacity as network developers and, taking that a step further, owe a positive duty to actively fix system bugs when drawn to their attention. However, concluded Lord Justice Birss, it would be a significant step to characterise those as amounting to fiduciary duties.

The Court recognised that crypto-asset owners entrust the storage and existence of their assets to developers of blockchain networks; where only those developers are able to update the networks, including fixing identified bugs and security concerns. When glitches or breaches occur, developers

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<sup>1</sup> Bristol and West Building Society v Mothew [1998] Ch 1

must inevitably make decisions as to whether the coding requires updating. When making and enacting those decisions developers would, the Court of Appeal found, no doubt act in good faith.

In conclusion, Lord Justice Birss noted: *“for Tulip’s case to succeed would involve a significant development of the common law on fiduciary duties”*. Though this is not a simple process, a realistic argument is made for it in his judgement:

1. *“Developers of a given network are a sufficiently well-defined group to be capable of being subject to fiduciary duties”*;
2. *“Objectively, the Developers have undertaken a role which involves making discretionary decisions and exercising power for and on behalf of other people, in relation to property owned by those other people”*;
3. *Crypto-asset owners “having entrusted property into the care of the Developers, they are fiduciaries”*;
4. *“The essence of that duty is single minded loyalty to the users of Bitcoin software. The content of the duties includes a duty not to act in their own self-interest and also involves a duty to act in positive ways in certain circumstances”*; and,
5. That the duty *“may also, realistically, include a duty to act to introduce code so that an owner’s bitcoin can be transferred to safety in the circumstances alleged by Tulip”*.

Allowing the Appeal, the Judge determined *not* that there is a fiduciary duty owed by developers to bitcoin owners, rather a ‘serious issue’ requires to be tried on the facts.

### **CPB Comment**

The judgment is a reminder that the interpretation of well-established legal principles will continue to develop and adjust to technological progress.

The judgment does not go so far as to confirm that network developers owe positive fiduciary duties. In fact, the Court of Appeal emphasises that this would require significant developments to the common law. However, the judgment does provide commentary on how a pathway to such duties may develop in the future. Such developments may accelerate as crypto-asset adoption and digital tokenisation of traditional assets increase, inevitably resulting in more disputes coming before the Courts.

Although crypto-asset trading imposes high risk through volatility, recent events are a timely reminder of the potential custodian risks. It remains to be seen whether fiduciary duties will be imposed upon network developers so as to safeguard investors’ interests across the networks.

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#### **Any questions**

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