

WELCOME





FINANCIAL SERVICES UPDATE

CLAIMS FOR RECOVERY OF CASH AND CRYPTOASSETS
AND SCOPE FOR REGULATORY REFORM

- Nigel Brahams, Collyer Bristow
Digital Assets: The changing UK regulatory landscape
- Racheal Muldoon, Maitland Chambers
Cryptoassets: An Introduction to Civil Recovery
- Robin Henry, Collyer Bristow
FTX in bankruptcy: How far will the ripples spread?
- Q & A



DIGITAL ASSETS **THE CHANGING UK** **REGULATORY** **LANDSCAPE**

NIGEL BRAHAMS, PARTNER

UK REGULATION – THE BASICS

COLLYER BRISTOW

- **Regulatory Perimeter** - separates regulated & unregulated FS activities
- **Financial Services & Markets Act 2000 (“FSMA”)** (as amended)
- FSMA (Regulated Activities) Order 2001/544 (“**RAO**”) lists:
 - **Investments** – i.e. units in collective investment schemes, debt, securities, derivatives etc.
 - **Activities** – i.e. arranging, dealing, advising on regulated financial investments, financial promotions or operating a collective investment scheme or AIF
- Section 19 FSMA “general prohibition”:

“No person may carry on a regulated activity in the United Kingdom, or purport to do so, unless he is – an authorised person; or an exempt person”

- Section 21 FSMA – **financial promotions** inviting people to engage in investment must come from or be endorsed by an authorised person

UK REGULATION OF CRYPTO – WHERE ARE WE NOW?

GOLLYER BRISTOW

- **April 2018** – *“Although we do not consider cryptocurrencies to be currencies or commodities for regulatory purposes, [firms] conducting regulated activities in cryptocurrency derivatives must comply with all applicable rules in the FCA’s handbook”*
- **November 2019** – FCA Policy Statement PS 19/22 and Perimeter Guidance
- **January 2020** – Extension of Money Laundering Regime to capture activities in cryptoassets

FCA POLICY STATEMENT PS 19/22 & PERIMETER GUIDANCE

GOLLYER BRISTOW

- PS 19/22 Sets out more detail on the different types of cryptoassets and their interactions with the existing regulatory perimeter
- *“Given the complexity of many tokens, it is not always easy to determine whether a token is a specified investment”*
- **Exchange Tokens** – means of exchange, i.e. Bitcoin, ETC Litecoin etc. Most activities currently unregulated
- **Utility Tokens** – redeemed for platform or service access
 - Not always regulated but may meet definition of e-money or units in a Collective Investment Scheme in some circumstances
 - Stablecoins – increasingly active category of utility token. Sometimes regulated if they have characteristics consistent with regulated investments
 - Some bordering on E-Money
- **Security Tokens** – specified investments under the RAO - typically have characteristics similar to shares, debentures or units in a collective investment scheme and regulated as per conventional investments, i.e. bonds and shares

MONEY LAUNDERING – APPLICATION TO CRYPTO

COLLYER BRISTOW

- Money Laundering Regulations 2019 inserted new Reg 14(A) into the Money Laundering, Terrorist Financing and Transfer of Funds Regulations 2017 (“**MLR**”).
- Since January 2020, according to MLR 56(1), AML/CTF FCA registration regime has been in place for businesses undertaking activities of:
 - **cryptoasset exchange, or**
 - **custody wallet services**
- First UK definition of cryptoasset: *“a cryptographically secured digital representation of value or contractual rights that uses a form of distributed ledger technology and can be transferred, stored or traded electronically”*

UK REGULATION OF CRYPTO – WHERE ARE WE HEADING?

COLLYER BRISTOW

- **August 2022** – FCA Policy Statement **PS 22/10** – Extension of Financial Promotions regime to cover cryptoassets
- **February 2023** – HM Treasury Future Financial Services Regulatory Regime for Cryptoassets - **Consultation And Call For Evidence**



EXTENSION TO FINANCIAL PROMOTIONS REGIME (1)

COLLYER BRISTOW

- What is a Financial Promotion? - Any **Invitation** or **Inducement** to engage in **Investment Activity** in the course of business
- **Any form of communication** is capable of being a financial promotion including adverts in print, TV/radio broadcasts, emails, telephone calls, websites and social media posts
- Section 21 of FSMA restricts a person from communicating a financial promotion unless:
 - They are an **authorised person** (with Part 4A FSMA permissions); or
 - The promotion has been **approved by an authorised person** (with Part 4A FSMA permissions); or
 - An **exemption** in the Financial Promotion Order applies
- If the promotion is communicated or approved by an authorised person, FCA Handbook rules apply (i.e. *“fair clear and not misleading”*)
- FCA concerned about promotions of cryptoassets

EXTENSION TO FINANCIAL PROMOTIONS REGIME (2)

GOLLYER BRISTOW

- Cryptoassets, currently outside scope of the financial promotions regime (unless specified investments) to be brought into regime
- **Qualifying cryptoasset**: *“any cryptographically secured digital representation of value or contractual rights which is fungible and transferable.”*
- Excludes NFTs – not fungible. Different definition to MLR
- **Cryptoassets** to be categorised as ‘**restricted mass market investments**’
- Mass-marketing of cryptoassets to retail investors will be permitted subject to amended rules
- Personalised risk warning **pop-up for first time** before DOFP can be made. Possible *“take 2 minutes to learn”*
- **24-hour cooling off period** for **first time investors**
- Expected to come into force later this year depending on legislative process

HM TREASURY CONSULTATION FEBRUARY 2023

GOLLYER BRISTOW

- HM Treasury Future Financial Services Regulatory Regime for Cryptoassets – most ambitious governmental intervention yet:
 - *“The government’s firm ambition is for the UK to be home to the most open, well-regulated, and technologically advanced capital markets in the world. Ongoing turbulence in cryptoasset markets has highlighted that risk, with the high-profile collapse of firms like FTX having widespread implications for global cryptoasset markets and investors. Effective regulation will create the conditions for cryptoasset service providers to thrive in the UK, and give people and businesses the confidence to invest with an understanding of the often high risks involved”*
- Consultation closes on 30th April 2023
- Proposal to introduce changes in two phases
- **Phase 1** - Financial Services and Markets Bill 2022 (FS&M Bill) will introduce regulation of **fiat-backed stablecoins** used for payments. Also, range of specific amendments to Electronic Money Regulations (EMRs) and Payment Services Regulations 2017 (PSRs)
- **Phase 2** - Expansion of FSMA and RAO to add cryptoassets to list of “**specified investments**” within mainstream financial regulation

HM TREASURY CONSULTATION

FEBRUARY 2023 – PHASE 1

GOLLYER BRISTOW

- FS&M Bill definition of “**cryptoasset**” means any cryptographically secured digital representation of value or contractual rights that:
 - a) can be transferred, stored or traded electronically, and
 - b) that uses technology supporting the recording or storage of data (which may include distributed ledger technology)
- Different to MLR or FPR definition but closer to MICA (EU)
- FS&M Bill is expected to bring activities such as the issuance and custody of fiat-backed stablecoins and DSAs into the regulatory perimeter
- “**fiat-backed stablecoins**” are expected to include stablecoins that seek to maintain a stabilised value of the cryptoasset by reference to, and which may include the holding of, one or more specified fiat currencies
- **Digital settlement assets (DSAs)** – new category of digital asset - a digital representation of value or rights, whether or not cryptographically secured that **a)** can be used for the settlement of payment obligations, **b)** can be transferred, stored or traded electronically, and **c)** uses technology supporting the recording or storage of data (including DLT)

HM TREASURY CONSULTATION FEBRUARY 2023 – PHASE 2

COLLYER BRISTOW

- Issuance of cryptoassets to an exchange or trading venue
- Public Offer of cryptoassets
- Operating a cryptoasset exchange
- Dealing in cryptoassets as agent or principal
- Arranging (bringing about) deals in cryptoassets
- Making arrangements with a view to transactions in cryptoassets
- Operating a cryptoasset lending platform
- But if the cryptoasset is already a specified investment then existing regulation already applies



Cryptoassets: An Introduction to Civil Recovery

Racheal Muldoon, Maitland Chambers



- Increasing reports of cryptoasset 'fraud'
- Illicit transaction volume rose for the second consecutive year, hitting an all-time high of \$20.6 billion: *The 2023 Crypto Crime Report (Chainalysis)*
- Federal Trade Commission reported that \$1bn in crypto was lost to fraud in 2021: *ftc.gov*



CRYPTOASSETS

- Digital assets
- Exist on the Blockchain
- Held in digital wallets
- Private key required to transact

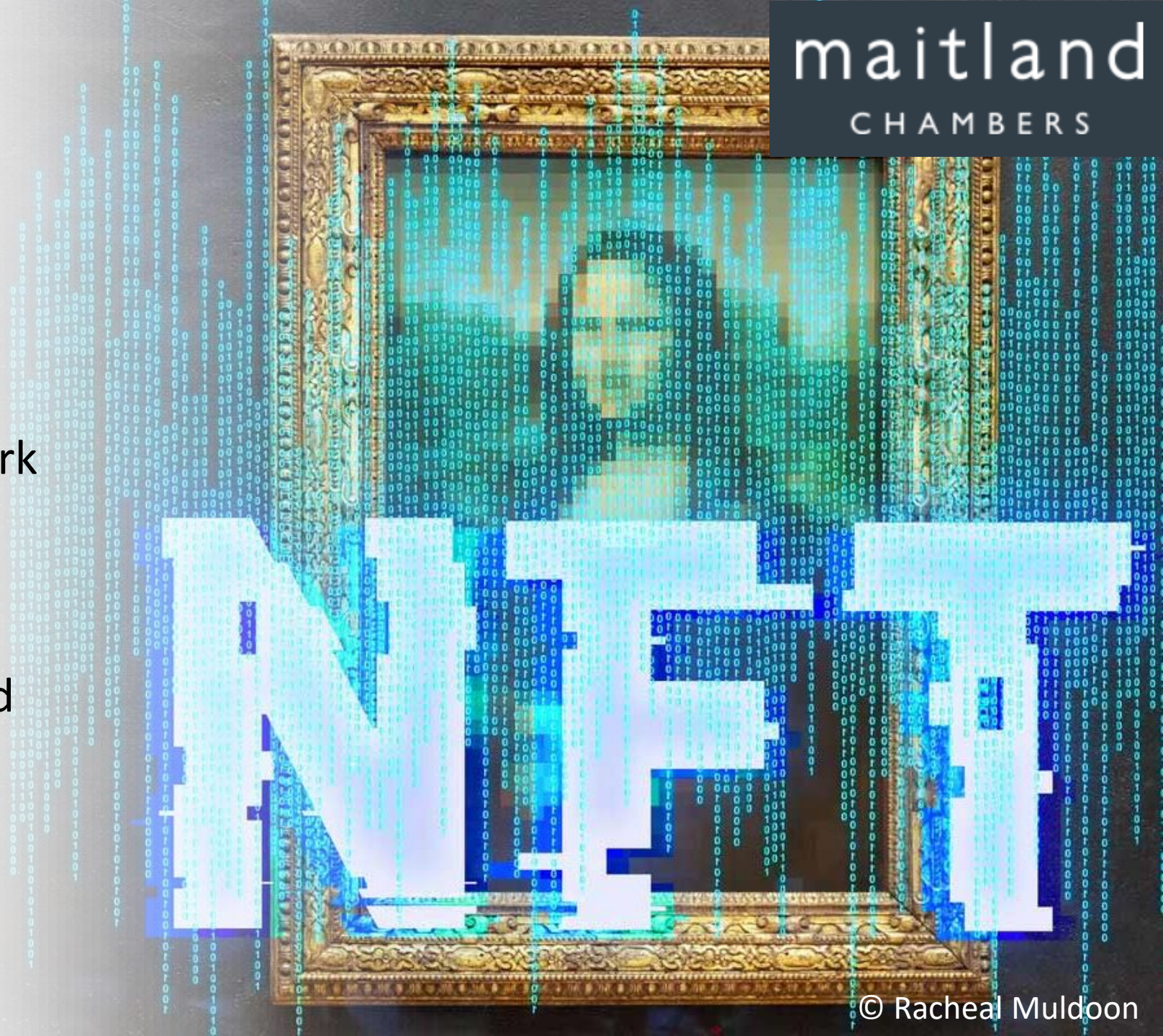
CRYPTOCURRENCY

- Type of cryptoasset
- Digital currency
- Exist on the Blockchain
- Decentralised
- Crypto exchanges



NFTs

- Type of cryptoasset
- NOT:
 - a digital monkey artwork
 - a PDF; or
 - 'digital receipt'
- Unique assets
- Utility – package rights and obligations
- Cryptoasset marketplaces



SMART CONTRACTS

- Piece of self executing code
- Execute upon certain predefined conditions being met
- No need for an intermediary
- Oracles enable access to 'off chain' data
- Govern what happens with the cryptoasset

```

mirror_mod = modifier_ob.
set mirror object to mirror
mirror_mod.mirror_object

operation == "MIRROR_X":
mirror_mod.use_x = True
mirror_mod.use_y = False
mirror_mod.use_z = False
operation == "MIRROR_Y":
mirror_mod.use_x = False
mirror_mod.use_y = True
mirror_mod.use_z = False
operation == "MIRROR_Z":
mirror_mod.use_x = False
mirror_mod.use_y = False
mirror_mod.use_z = True

selection at the end -add
mirror_ob.select= 1
modifier_ob.select=1
context.scene.objects.active
("Selected" + str(modifier_ob.
mirror_ob.select = 0
= bpy.context.selected_object
data.objects[one.name].select

print("please select exactly

-- OPERATOR CLASSES --

types.Operator):
on X mirror to the selected
object.mirror_mirror_x"
mirror X"

context):
context.active_object is not

```


LEGAL STATUS OF CRYPTOCURRENCY

AA v Persons Unknown [2019]
EWHC 3556 (Comm)

- Payment of Bitcoin ransom by insurer
- Cryptocurrency is legal property capable of forming the subject matter of an injunction: per Mr Justice Bryan

CIVIL RECOVERY OF CRYPTOASSETS

- **Step 1:** Instruct intelligence and tracing expert
- **Step 2:** Secure interim orders
 - Proprietary injunction; and/or
 - Freezing Order/ Worldwide Freezing Order; and/or
 - Ancillary or standalone disclosure orders
- **Step 3:** Identify the persons unknown
- **Step 4:** Seek settlement prior to or after the return date
- **Step 5:** Seek final injunction and order for delivery up
- **Step 6:** Enforcement



RISKS

- Sophistication of the fraud
 - No identifiable cryptocurrency – follow/trace
 - Use of mixers
 - Jurisdictional challenges
- Cost undertakings - ‘reasonable’ cost of compliance with orders
- Enforcement – international legal landscape changing

D'Aloia v Persons Unknown and Others [2022] EWHC 1723 (Ch)

- Fraud – stablecoins
- Interim injunction and disclosure orders
- Restitution
- Equitable claim: constructive trustee liability of exchanges
- Permission serve out by NFT

LEGAL STATUS OF NFTs

- Lack of clarity following *AA v Persons Unknown* whether an NFT was legal property (i.e. the token)
- Is the token property , distinct from the underlying asset, capable of being the subject matter of an injunction?



Osbourne v (1) Persons Unknown (2) OpenSea [2022] EWHC 1021 (Comm)

- NFT theft
- Interim injunction and disclosure orders
- Proprietary status – ‘good arguable case’
- Constructive trustee liability

REACH

- Jurisdiction: decentralised virtual currencies do not belong to any centralised government institution or central bank
- *Situs: ION Science v Persons Unknown* - domicile, bank accounts & devices

What does the future hold?



1) Class Actions

- Former CMA chair filed first UK crypto competition class action claim last year seeking £9.9 billion in damages from four exchanges
- Crypto insolvencies: claims in wake of collapse of cryptocurrency exchanges
- Inevitable consumer rights-based challenges against cryptocurrency exchanges and marketplaces
- Intellectual property claims - cryptoasset products (e.g. Rothschild)

2) ENHANCED REGULATION

- 1 Feb 2023: HM Treasury published its consultation and call for evidence on the future financial services regulatory regime for cryptoassets
- Follows April 2022 HM Treasury Consultation on bringing stablecoins within regulatory perimeter

3) LEGISLATIVE CHANGES

- Law Commission's Consultation on Digital Assets closed on 4 Nov and proposes a third class of private property 'data objects'
- Economic Crime and Corporate Transparency Bill - committee stage HL
- Further amendments needed, for example in the SGA 1979 cryptoassets not characterised as goods

rmuldoon@maitlandchambers.com





FTX IN BANKRUPTCY HOW FAR WILL THE RIPPLES SPREAD?

ROBIN HENRY, PARTNER

- Why has FTX been seen as such a big deal?
- What claims may arise and what legal issues are involved?
- What does it say about the future of crypto and the need for regulation?
- Is crypto a systemic risk for the global financial system?

v. Steph Curry



65. Defendant Stephen Curry had his own nationwide ad campaign pushing the Deceptive FTX Platform, known as the “#notanexpert” campaign.²⁶ Throughout the ad, Curry repeatedly denies being cast as an expert in cryptocurrency, culminating in his statement that “I’m not an expert, *and I don’t need to be*. With FTX I have everything I need to buy, sell, and trade crypto safely.”²⁷

66. The purpose of Curry being an ambassador is to expand the reach of the crypto firm and “tout the viability of cryptocurrency to new audiences around the world,” FTX said in a press release.²⁸ In other words, to drive adoption of the Deceptive FTX Platform and to facilitate the sales of unregistered YBAs to unsuspecting and unwitting retail consumers.

FTX BANKRUPTCY

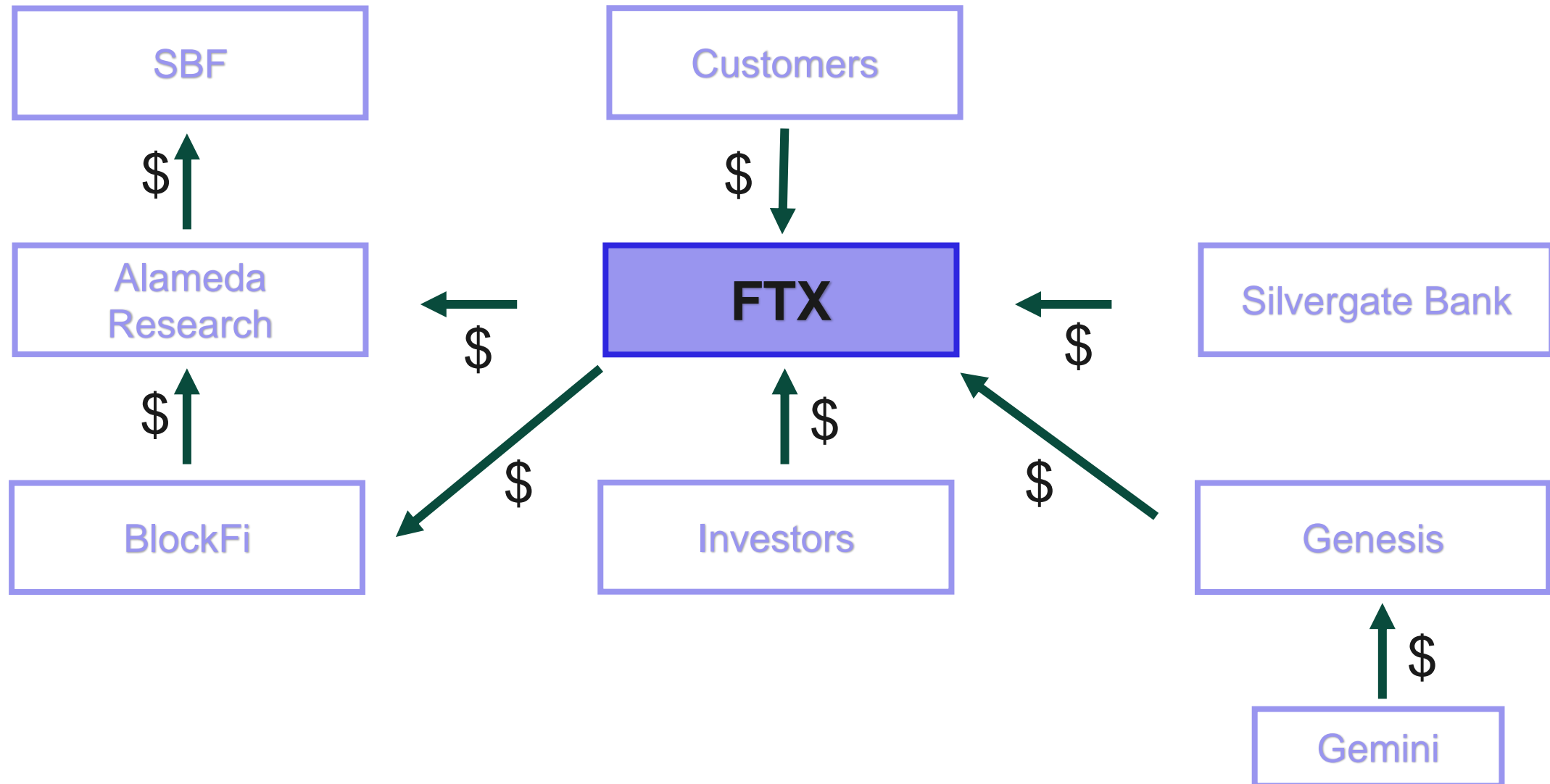
GOLLYER BRISTOW

- Second biggest crypto exchange (valued at \$32bn)
- Reasons for collapse
- Massive corporate governance failings uncovered



COLLAPSE OF FTX ECOSYSTEM

COLLYER BRISTOW



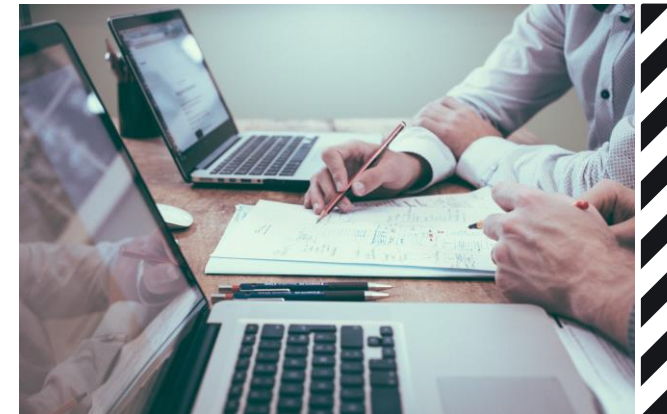
POTENTIAL CLAIMS

GOLLYER BRISTOW

Actions:

- By the insolvency office holders to claw back assets
- By customers claiming assets held in trust
- By purchasers of FTT tokens
- Against auditors
- Against investment advisers for recommending FTX
- Against funds which provided assets to or invested in FTX without due diligence

- Are customers unsecured creditors or do they have a higher priority?
- Are the withdrawal of funds immediately prior to the bankruptcy subject to clawback?
- How will digital assets be classified in an insolvency?
- How will assets and claims be valued?



NEED FOR MORE REGULATION

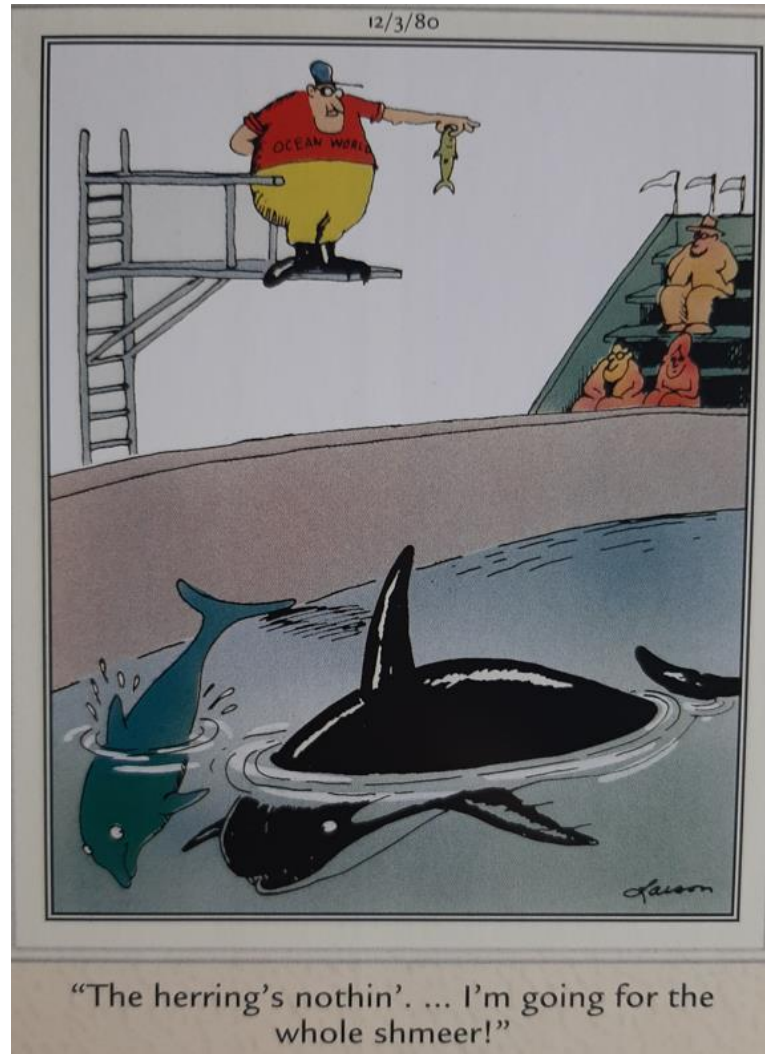
GOLLYER BRISTOW

- Lack of regulation increased risks for customers
 - Weak auditing
 - Use of foreign jurisdictions
 - Weak money laundering rules
 - No customer deposit insurance
 - Volatility of crypto currencies
 - Spurious protection of decentralised finance
- UK plans
- US actions



FUTURE CONCERNS

COLLYER BRISTOW



FUTURE CONCERNS

GOLLYER BRISTOW

- Could it cause another 2008 crash?
- What about Binance? The world's largest crypto exchange





NIGEL BRAHAMS

PARTNER

HEAD OF FINANCIAL SERVICES

nigel.brahams@collyerbristow.com

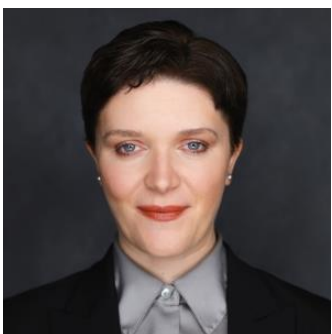


ROBIN HENRY

PARTNER

HEAD OF DISPUTE RESOLUTION SERVICES

robin.henry@collyerbristow.com



RACHEAL MULDOON

BARRISTER

MAITLAND CHAMBERS

rmuldoon@maitlanchambers.com

COLLYERBRISTOW.COM



@COLLYER_BRISTOW



@COLLYER-BRISTOW-LLP

COLLYER BRISTOW

PROUDLY ASSOCIATED WITH

The Courtauld

Collyer Bristow LLP is a limited liability partnership registered in England under number OC318532, registered office St Martin's Court, 10 Paternoster Row, London, EC4M 7EJ and is regulated by the Solicitors Regulation Authority under number 441900. Any reference to a partner means a member of the LLP or an employee with equivalent standing and qualifications. A list of the members is available for inspection at the above address.

The content of this document is provided for general information only and does not constitute legal or other professional advice. Appropriate legal or other professional opinion should be taken before taking or omitting to take any action in respect of any specific problem. Collyer Bristow LLP accepts no liability for any loss or damage which may arise from reliance on information contained in this document.