Service of process by NFT 'airdrop' – the future of 'digital asset litigation'?

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Introduction

In this article we will consider the implications of the recently handed down judgment of the High Court of Justice in England and Wales in the case of *D'Aloia and Person Unknown and Others*.[1] Whilst cases decided in the United Kingdom do not have direct effect in the Cayman Islands or in the British Virgin Islands ("**BVI**"), such jurisprudence is persuasive authority and there are also a number of factors that make this case of particular interest to both the Cayman Islands and the BVI.

The case relates to proceedings being brought by Mr. Fabrizio D'Aloia (the "**Claimant**") in respect of a fraud in relation to his cryptocurrency investments. Whilst one of the defendants is incorporated in the Cayman Islands, of greater significance as noted in our recent article here, the Cayman Islands is the preferred jurisdiction for crypto open-ended funds with an estimated 49% market share. The BVI also has a material presence in this sector with an estimated 13% market share. Therefore, the judgment in this case (particularly as regards accepted means of service) could prove to be a significant development for both the Cayman Islands and the BVI.

[1] [2022] EWHC 1723 (Ch)

Background

The Claimant sought injunctive relief in the form of an interim freezing order and disclosure orders from the High Court against a number of defendants as part of his attempts to recover cryptocurrencies which had been taken from him fraudulently. The Claimant was the victim of a scam which induced him to transfer approximately 2.1M USDT and approximately 230,000 USDC from his personal wallets.

The Claimant believed that the website 'www.tda-finan.com' (the "**Website**") (which is no longer available) was affiliated with TD Ameritrade (which is a regulated entity in the United States) due to the deliberate misuse of a corporate logo which was designed to make the Website appear legitimate. As a result of this deception, the Claimant deposited USDT and USDC into a number of digital wallets associated with the Website and also purported to make certain trades through his account. So as to prolong the appearance of legitimacy, the Claimant's account appeared to reflect those trades.

In February 2022, the Claimant's open trades on the Website were abruptly closed without any input from him. The Claimant naturally became suspicious and unsuccessfully attempted to withdraw funds from his account. The Claimant's account was then blocked, and after a number of exchanges by email with a representative of the Website, it became apparent to the Claimant that he had been defrauded.

The Claimant instructed counsel and engaged an 'intelligence investigator' in an attempt to recover his assets. The investigators were able to trace, approximately, 2.175M of USDT and USDC to a number of addresses maintained with a number of large crypto-exchanges (all of which were named as defendants to the case) (the "**Crypto-Exchanges**").

The relief sought

The Claimant sought to bring the following claims:

1. a claim of fraudulent misrepresentation, deceit, unlawful means conspiracy and unjust enrichment against those who had operated the Website; and
2. a claim in constructive trust against both those who had operated the Website and each of the Crypto-Exchanges, given they control the exchanges into which the misappropriated cryptocurrency had been transferred.

In order to proceed with these claims, the Court had to consider whether the freezing order and disclosure order should be granted, and if they should, whether the Claimant's application to serve

notice of proceedings outside of England and Wales (with English law being the governing law of the claim) using an alternative method of service, should be permitted.

Whilst the location of the fraudsters was unknown (albeit there was some evidence to suggest they were based in Hong Kong), the Crypto-Exchanges were located in the Cayman Islands, Panama, the Seychelles and Thailand.

The Court's findings

The Court was satisfied that there was a serious issued to be tried in England and Wales on the basis that; (i) the misrepresentations regarding the Website were made to the Claimant in England and (ii) that (applying the principle in *Ion Science Limited & Duncan John v. Persons Unknown, Binance Holdings Limited, Payment Ventures Limited*[2]) the *lex situs* of the crypto assets that were the subject of the fraud is the country where the rightful owner is domiciled (in this case England). Finally, the Court concluded that the governing law of the claim was also English law on the basis that the loss sustained by the Claimant took place in England.

The Court also concurred that the Claimant had a *prima facie* case against each of the Crypto-Exchanges as constructive trustees as they had control of the exchanges to which the missing assets had been traced by the Claimant's investigator.

The Court conceded that damages would not have been an adequate alternative remedy for the Claimant, because awarding damages would not prevent the further dissipation of the Client's assets. Mr. Justice Trower noted that the "balance of convenience" came down "firmly" in favour of granting the relief sought.

On the topic of disclosure orders against the Crypto-Exchanges, the Court made the requested orders having considered that the disclosure of the information sought had a "real prospect" of helping the Claimant recover his crypto-assets and also noting that the order should be granted notwithstanding any duty of confidentiality owed by the Crypto-Exchanges to any third parties.

The Court then considered the means by which notice of the orders made would be served on the fraudsters. Counsel for the Claimant had requested service by email and also by NFT in the form of an airdrop into the accounts associated with the Website, into which the Claimant first deposited his crypto-assets. The Judge, Mr. Justice Trower, was bold in his assertion that there

[2] (unreported) [2020] (Comm.)

"*could be no objection*" to the request, noting that service by this means would "*embed the service in the blockchain*" and would only enhance the prospect of the fraudsters being made aware of the Court orders and the proceedings more generally. However, Mr. Justice Trower did observe that it was important that service was also made by email and that he might not have been content to order alternative service solely by NFT.

Conclusion

The decisions in this case are to be welcomed as they only serve to enhance the prospects of recovery of lost assets for victims of fraud. The willingness of the Court to embrace the benefits of blockchain technology to serve notice on those who seek to hide behind its anonymity should be applauded and we can only hope that the Court will continue along this trajectory.

Indeed, as fraudulent activities in respect of cryptocurrencies and other digital assets are on the rise, the frequency of such applications will likely only increase and it is surely only a matter of time before crypto businesses established in the Cayman Islands are dealing with such matters on a regular basis.

The case also serves as a warning to those who operate crypto exchanges that the Courts are more than willing to entertain claims based on constructive trust where the misappropriated assets are traced to accounts hosted by them. One can only hope that this will spur these organisations into action to take all necessary steps to combat fraudulent activities, such as freezing the accounts into which misappropriated assets are transferred on receipt of notice.

This publication is not intended to be a substitute for specific legal advice or a legal opinion. For specific advice on Digital asset litigation, please contact your usual Loeb Smith attorney or :

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