



Legal Insights

An overview of remedies in British Virgin Islands crypto asset disputes

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Introduction

The rapid development of the digital assets space and Web 3.0 ecosystem over the last 10 years has meant that courts around the world have been faced with an ever-increasing number of disputes in this space. This includes the courts in the British Virgin Islands (“BVI”). The cases before the BVI courts have varied in terms of the parties and stakeholders involved and the nature of the dispute (such as breach of fiduciary duties or fraud), as well as the remedy sought. This Legal Analysis provides an overview of the legal status of crypto assets and some of the remedies which are available in BVI disputes concerning them.

Definition of crypto assets as property

Historically, the BVI courts (adopting well-established English common law principles) recognised two classes of property:

- 1) A chose in possession (i.e. something tangible which can be physically possessed by the owner, such as a valuable painting); and
- 2) A chose in action (i.e. an intangible right or claim which is legally enforceable, such as a right to enforce and receive payment for a debt owed).

All digital assets are neither tangible property (which can be possessed) nor are they an asset that can give rise to a right that is enforceable. Notwithstanding this, the English High Court in *AA v Persons Unknown and Others*¹ (“**AA Case**”) provided much needed clarity on the legal status of Bitcoin (and indeed other cryptocurrencies). In the *AA Case*, there had been a hack where the hacker (first defendant) demanded a ransom (in the form of Bitcoins) in exchange for decrypting software needed to re-access the hacked data and systems. US\$950,000 in Bitcoins was paid to the hacker. A tracing investigation was undertaken which revealed that a substantial proportion of the Bitcoins had been transferred to a specific wallet or address linked to an exchange known as Bitfinex (operated by the third and fourth defendants). The claimant sought a proprietary injunction. The dilemma before the court was that the claimant would only be entitled to a proprietary injunction *if* Bitcoin was in fact a property. Justice Bryan held (at paragraph 61): “*I am satisfied for the purpose of granting an interim injunction in the form of an interim proprietary injunction that crypto currencies are a form of property capable of being the subject of a proprietary injunction.*” This finding is significant because it includes cryptocurrencies as a whole (and not just Bitcoin). The judgment also endorsed the view of the UK Jurisdictional Taskforce’s Statement which stated that crypto assets are to be treated, in principle, as property under English law.

¹ [2019] EWHC 3556 (Comm)

English law is highly persuasive authority in the BVI. The AA Case was cited in the BVI case of Philip Smith and Jason Kardachi in their capacity as joint liquidators of Torque Group Holdings Limited (in liquidation) v Torque Group Holdings Limited (in liquidation)² (“**Torque Case**”). Wallbank J. in the Torque Case stated (at paragraph 25) that “...it is a reasonable conclusion that crypto assets are to be considered as assets for the purposes of liquidation.”

Remedies

In light of the above, the AA Case and Torque Case demonstrate that both the English courts and the BVI courts are flexible and have taken a more liberal view when defining crypto assets as property. Defining crypto assets is not simply a matter of academic discussion. It is of practical importance for at least two reasons:

- 1) Traditional asset tracing tools which are applied in accordance with established legal principles will, in principle, be available to the victims of any crypto wrongdoing or misappropriation (similar to wrongdoing concerning traditional asset classes); and
- 2) If crypto assets are seen as property in the eyes of the court (which they are), then the remedies which are available to claimants will be based on established proprietary rights.

Worldwide freezing order

Justice Jack in the BVI case of ChainSwap Limited v Persons Unknown³ (“**ChainSwap**”) re-affirmed that cryptocurrencies are a form of property. In ChainSwap, the claimant was a BVI company which provided a service that allowed cryptocurrency tokens to be transferred between different blockchains (known as a cross-chain bridge). Vulnerabilities in the claimant’s computer programmes were exploited by unknown hackers on two occasions (approximately a week apart). As a result of the two hacks against the claimant’s cross-chain bridge, the hackers were able to misappropriate assets from:

- 1) private users that had authorised their wallets to interact with the bridge; and
- 2) projects issuing digital tokens that had used the bridge to offer cross-chain operability on their tokens.

Some of the misappropriated assets were exchanged for stablecoins. The hackers had sought to obfuscate the origin of the stolen tokens by using Tornado Cash, a decentralised cryptocurrency tumbler. The tokens that were misappropriated following the hacking incidents were not owned by the claimant. The claimant did not seek a proprietary injunction in this matter since it was not asserting any proprietary right in the digital assets. The claimant sought, *among other things*, a worldwide freezing order against persons unknown (being those allegedly responsible for cybercrime consisting of the theft of the digital assets). Justice Jack (at paragraph 16) had no difficulty in granting a freezing order as there was “*an obvious risk of dissipation if no freezing order is granted.*”

Proprietary injunction

The English case of Fetch.AI v Persons Unknown (1) Binance Holdings Ltd⁴ saw the court order, *among other things*, a proprietary injunction and a worldwide freezing order. Hackers had obtained access to accounts which were maintained by the first claimant (first applicant) with Binance, within which were held various cryptocurrencies (including Tether and Bitcoin). The assets were then fraudulently transferred into third-party accounts at a massive undervalue, which had incurred losses of over US\$2.6 million. Judge Pelling QC (at paragraph 9), in granting the orders sought, stated that “*I am satisfied that the assets credited*

² BVIHC (COM) 0031 OF 2021

³ BVIHC (COM) 2022/0031

⁴ [2021] EWHC 2254 (Comm)

to the first applicant's accounts on the Binance Exchange are to be regarded as property...They are...a chose in action, and a chose in action, as a matter of English law, is generally regarded as property." This demonstrates that crypto assets are a chose in action and that the English courts will grant proprietary remedies to victims of crypto asset fraud.

Norwich Pharmacal order

In recent cases which have involved cryptocurrency fraud, the courts have been willing to grant the claimant's application for disclosure orders, including Norwich Pharmacal orders ("**NPO**") and Bankers Trust orders.

An NPO is a court order which seeks disclosure of documents or information against a third party which has been innocently mixed up in wrongdoing in order to assist in bringing legal proceedings against the wrongdoers or seek redress for the wrong. The BVI court's jurisdiction to grant a NPO is well-established – they "*are an every-day feature of the legal and corporate service landscape in the BVI.*"⁵ The requirements for granting an NPO are:

- 1) a wrong must have been carried out (or arguably carried out) by an ultimate wrongdoer;
- 2) there must be the need for an order to enable action / legitimate redress to be brought against the ultimate wrongdoer; and
- 3) the person against whom the order is sought must:
 - a) be mixed up in so as to have enabled the wrongdoing; and
 - b) be able (or likely to be able) to provide the information necessary to enable the ultimate wrongdoer to be sued.

Bankers Trust order

A Bankers Trust order is a court order against a bank (or another financial institution) which holds misappropriated funds (or through which such funds have been passed through). They compel the entity subject to the order to disclose information which concerns third party bank accounts and are therefore a useful tool to assist the claimant to trace misappropriated assets and protect them from dissipation. This is notwithstanding the fact that the order may be contrary to what would otherwise be confidential customer information.

Certain requirements need to be satisfied in order for a Bankers Trust order to be granted. This includes there being a real prospect that the information which is sought will lead to the location or preservation of the assets as well as the applicant's interests in obtaining the order being balanced against the possible detriment to the respondent in complying with the order.

It should be noted that there is some overlap between an NPO and a Bankers Trust order (although the two remain distinct from each other). The former assists in identifying wrongdoers (or evidence of the wrongdoing) whilst the latter is used to protect the claimant's proprietary interest. Many recent cases which involve digital assets have seen both NPOs and Bankers Trust orders being sought. The court has been ready to find that the respondent crypto exchange is required to give disclosure to the claimant. For example, in the English case of *Mr Dollar Bill Ltd v Persons Unknown And Others*⁶, the claimant had been the victim of an alleged cryptocurrency fraud. To assist in tracing the missing Bitcoins, an NPO and a Bankers Trust order against two cryptocurrency exchanges were granted. The claimant was also granted a proprietary injunction to prevent further dissipation of the Bitcoins.

⁵ *CIF v DLG and GIY* BVIHCM2023/0050 at [21]

⁶ [2021] EWHC 2718 (Ch)

[Third party debt order](#)

A third-party debt order (“**TPDO**”) is a method of enforcement which enables a judgment creditor to recover sums a party owes them directly from third parties who hold monies on the party’s behalf, including, for example, a bank.

The English High Court in the case of *Ion Science Ltd v Persons Unknown*⁷ (“**Ion Science**”) granted what is thought to be the first TPDO in proceedings arising from cryptocurrency fraud relating to a cryptocurrency initial coin offering. The claimants claimed that they had been induced by unknown persons to invest significant sums in what they understood to be real cryptocurrency products. The claimants sought to recover the misappropriated sums, which had been transferred to certain accounts held by the two cryptocurrency exchanges, Binance and Kraken (“**Crypto Exchanges**”). The claimants successfully applied for, *among other things*:

- 1) a worldwide freezing order against the persons unknown who had committed the fraud; and
- 2) disclosure orders pursuant to the Bankers Trust jurisdiction and/or English Civil Procedure Rules r 25.1(g)⁸ against the Crypto Exchanges (the “**Disclosure Orders**”).

Following a tracing investigation which used the information which arose from the Disclosure Orders, it emerged that an entity named Mirriam Corp LP (“**Mirriam Corp**”) was the owner of the now-frozen account which had been used to execute the fraud. Information which was obtained indicated that Mirriam Corp’s account retained both cryptocurrency and cash. The claimants subsequently claimed against Mirriam Corp, seeking the recovery of the misappropriated sums. Mirriam Corp failed to respond to the claim. The claimants successfully sought a TPDO to enforce their judgment debt.

Ion Science means that, similar to other more traditional classes of assets, crypto assets are now capable of being traced and enforced against.

Conclusion

The cases and remedies set out above have demonstrated the pragmatic and flexible approach which the common law courts have taken. Existing legal principles have been applied to the digital asset space in order to tackle the increasingly frequent cybercrime involving digital assets and to grant the appropriate (combination of) remedies. The courts have generally permitted the claimant(s) to commence action against the unidentified fraudsters/hackers (as “persons unknown”) and grant freezing and disclosure orders in their favour to assist in securing and recovering (to the extent possible) the proceeds of the fraud.

Further Assistance

This publication is not intended to be a substitute for specific legal advice or a legal opinion. If you require further advice relating to the matters discussed in this Legal Insight, please contact us. We would be delighted to assist.

⁷ [2020] EWHC 3688 (Comm)

⁸ English Civil Procedure Rules r 25.1(g) states that interim remedies include “an order directing a party to provide information about relevant property or assets, including their location, which are or may be the subject of an application for a freezing injunction.”

E: gary.smith@loebsmith.com

E: robert.farrell@loebsmith.com

E: edmond.fung@loebsmith.com

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