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Cryptic Clarity – Cryptoassets as a thing in possession, a thing in action, or a different thing altogether?

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This update considers the status of cryptoassets as 'property' and the remedies available in disputes relating to cryptoassets in the British Virgin Islands.

Introduction

Whilst the BVI is world renowned for its modern, flexible and efficient company and insolvency legislation, it is yet to establish a regulatory framework for cryptoassets. The BVI court has, for now, been left to grapple with the difficult legal questions that cryptoassets are raising within its jurisdiction.

The BVI legal system is based on English common law, with an internationally renowned and highly respected specialist commercial court with an ultimate right of appeal to the Judicial Committee of the Privy Council. English case law is persuasive in the BVI, meaning the approach of the English courts to issues relating to cryptoassets is of significance.

This update briefly explores one of the main issues which the courts have been required to consider - the extent to which cryptoassets can be defined as property. Outlined below are a number of cases on the topic, exploring the status of various cryptoassets.

Cryptoassets – a thing in possession, a thing in action or a different thing altogether?

The BVI court (adopting well-established principles of English law) has traditionally recognised two classes of property:

(a) a thing in possession (anything tangible which can be possessed); and

(b) a thing in action (a legally enforceable right).

The problem is that cryptoassets (or indeed, digital assets as a category) are neither a tangible thing capable of possession (such as a car), nor a thing that necessarily gives rise to a legally enforceable right (unlike, for example, a cash balance at a bank or money due on a bond).

This was an issue considered by the English court in *AA v Persons Unknown* [2019] EWHC 3556 (Comm), where a company sought a proprietary injunction, seeking to recover Bitcoin it had paid out to hackers as ransom. The court faced a conundrum - the company was only entitled to a proprietary injunction if Bitcoin was in fact a property.

Ultimately, Justice Bryan reached the decision that '*crypto currencies are a form of property capable of being the subject of a proprietary injunction*'. It is of note that this finding referred to cryptocurrencies as a whole and not just Bitcoin.

In reaching his finding, Justice Bryan placed weight on the analysis set out in the UK Jurisdictional Taskforce's legal statement on Cryptoassets and Smart Contracts (which, whilst having no judicial force, Justice Bryan found persuasive). The Taskforce had concluded that, whilst a cryptoasset '*might not be a*

thing in action on the narrower definition of that term', that '*does not in itself mean that it cannot be treated as property*'.

The BVI court has recently cited *AA v Persons Unknown* as authority that cryptoassets should be treated as 'assets or property' for the purposes of liquidation of a company in its jurisdiction (see *Philip Smith and Jason Kardachi (in their capacity as joint liquidators) v Torque Group Holdings Limited* [2021] BVIHC (COM) 0031).

Thus, there are clear indicators that both the English and BVI courts are prepared to be flexible when defining cryptoassets as property. Recent examples are set out below.

Ethereum

In *Elena Vorotyntseva v Money-4 Limited t/a Nebeus.Com, Sergey Romanovskiy, Konstantin Zaripov* [2018] EWHC 2596 (Ch) the claimant sought an interim freezing order against the first defendant company (Nebeus.com) and its directors, the second and third defendants.

The claimant had deposited a substantial quantity of Bitcoin and Ethereum cryptocurrency in Nebeus.com (the value being £1.5 million). The purpose of the transaction was to test Nebeus.com's trading platform.

The claimant later became concerned that the Bitcoin and Ethereum had been dissipated.

An ex parte application at very short notice for an interim freezing order was successful, pending a return hearing in which the defendants would be afforded proper notice to make submissions.

As to the matter of whether Ethereum is property, Justice Birss held at paragraph 13 of the judgment:

> '*...the Bitcoin and the Ethereum currency is ultimately said to belong to the claimant...nor is there any suggestion that cryptocurrency cannot be a form of property or that a party amenable to the court's jurisdiction cannot be enjoined from dealing in or disposing of it. I am satisfied that the court can make such an order...*'.

NFTs

In *Lavinia Deborah Osbourne v (1) Persons Unknown and (2) Ozone Networks Incorporated* [2022] EWHC 1021 (Comm), the claimant made various *ex parte* applications (including for restraining orders, Bankers Trust orders and permission to serve out of the jurisdiction and by alternative means) following the alleged theft of a number of her non-fungible tokens (**NFTs**).

In order to grant the restraining order, the court had to be satisfied that there was at least '*a realistically arguable case*' that NFTs were to be treated as property as a matter of English law.

Judge Pelling QC was so satisfied, whilst noting that there '*is clearly going to be an issue at some stage*' as to whether that was in fact the case, as opposed to it being only '*realistically arguable*'.

Tezos

In *Wang v Darby* [2022] WTLR 327, the claimant and defendant cryptocurrency traders entered into two contracts by which the claimant transferred two separate parcels of 200,000 Tezos to the defendant's digital wallet, in return for 13 and 17 Bitcoin, on terms that there would be a reciprocal restoration of the same amounts of each currency upon or after an agreed period of two years.

After a falling out between the parties and the defendant's refusal to return 400,000 Tezos, the claimant applied for, *inter alia*, an asset-freezing order and a proprietary injunction, based on the non-return of 400,000 Tezos. The claimant submitted that the 400,000 Tezos and their traceable proceeds were held on trust for him by the defendant.

Whilst an asset-freezing order and proprietary injunction order were granted at a first hearing, the proprietary injunction order was later set aside on the basis that no trust was found. However, neither party contested the assumption that Tezos was property that could be the subject of a trust under English law.

Further, Stephen Houseman QC (sitting as deputy High Court Judge), helpfully commented '*...if there were serious controversy as to whether cryptocurrency constitutes property under English law, that submission may have more force. But that juridical substratum is common ground*.' (our emphasis added)

Tether, BNB and FET

In *Fetch.AI v Persons Unknown (1) Binance Holdings Ltd* [2021] EWHC 2254 (Comm) unknown hackers were able to obtain access to accounts maintained by the claimant, within which were held various cryptocurrencies, including Tether (a stablecoin tethered to the value of the dollar), BNB, Bitcoin and FET. The assets were fraudulently transferred into third-party accounts at massive undervalue, incurring losses in excess of US$2.6 million.

The Court ordered a proprietary injunction and worldwide freezing order, with Judge Pelling QC finding:

> '*I am satisfied that the assets credited to the first applicant's accounts on the Binance Exchange are to be regarded as property for the purposes of English law. They are, to put it no higher for present purposes, a chose in action, and a chose in action, as a matter of English law, is generally regarded as property*'.

The express determination that the cryptoassets were a chose (or thing) in action is a very clear indication that the English courts will afford victims of cryptoasset fraud access to proprietary remedies.

Proprietary remedies

The definition of cryptoassets as property is of more than academic importance. If cryptoassets are property, then the potential scope of remedies available to claimants in disputes over cryptoasset ownership (including upon the insolvency of any business hosting, exchanging, or trading cryptoassets) will be based on well-established proprietary rights.

The cases above have provided examples of proprietary injunctions and worldwide freezing orders[1] being successfully awarded.

Other examples of proprietary remedies being awarded in the cryptoasset sphere include:

Asset preservation order and a Bankers Trust order

In *Liam David Robertson v Persons Unknown* (unreported, 15 July 2019), the claimant was one of the largest cryptocurrency traders in the world. He became the victim of a 'spear phishing' attack and his intended investment of 100 Bitcoin (at the time worth approximately £1.2 million) was misdirected to the fraudsters.

80 of the 100 Bitcoin the claimant had transferred were later located in a Coinbase wallet. The claimant applied for an asset preservation order to secure those Bitcoin and a Bankers Trust order, permitting Coinbase to reveal the identity of the individual who controlled the wallet.

Justice Moulder made both an asset preservation order preventing any dealings of the 80 Bitcoin and a Bankers Trust order, enabling Coinbase to disclose information relating to the owner of the wallet.

Norwich Pharmacal relief and a Bankers Trust order

In *Mr Dollar Bill Ltd v Persons Unknown And Others* [2021] EWHC 2718 (Ch), the claimant had converted £105,000 into Bitcoin and held it in a BitTrust trading account. The value of the Bitcoin reached in excess of £1 million and the claimant sought to withdraw it. The requests were denied and it later emerged (following tracing reports commissioned by the claimant) that the Bitcoin had been transferred across various wallets.

The claimant issued an application and was successfully granted a proprietary injunction, preventing further dissipation of the Bitcoin. The claimant was also granted Norwich Pharmacal relief and a Bankers Trust order, to assist in the tracing exercise against the unknown persons who had dissipated the Bitcoin.

Third party debt order

In *Ion Science Ltd v Persons Unknown* (unreported, 21 December 2020) the claimants had been victims of an initial coin offering (ICO) fraud, as part of which they had been induced by unknown persons to invest Bitcoin into sham cryptocurrency projects. The claimants sought to recover the misappropriated sums, which they had located in accounts held by the Binance and Kraken cryptocurrency exchanges.

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[1] In the case of *Elena Vorotyntseva v Money-4 Limited t/a Nebeus.Com, Sergey Romanovskiy, Konstantin Zaripov* [2018] EWHC 2596 (Ch), incidentally, it was found that a proprietary freezing order could only prohibit the disposal of the relevant quantities of Bitcoin or Ethereum (ie the property itself) but should not seek to prevent disposal of the combined sterling equivalent (ie the value of the property).

The claimants successfully applied for a proprietary injunction, a worldwide freezing order and an ancillary disclosure order against the persons unknown who had committed the fraud, as well as Bankers Trust disclosure orders.

Following a tracing exercise using information arising from the disclosure orders, it emerged that a Scottish entity named Mirriam Corp LP was the owner of the now-frozen account which had been used to execute the fraud. Information obtained from the disclosure order indicated that Mirriam Corp's account retained both cryptocurrency and cash.

The claimants brought a claim against Mirriam Corp for recovery of the misappropriated sums. Mirriam Corp failed to respond and the claimants were successfully awarded a third-party debt order in order to enforce their judgment debt.

Summary

Mourant has a wealth of knowledge and experience in dealing with cryptoassets and is well versed on how to use the BVI Commercial Court's procedures and remedies to obtain the best results for clients facing losses in or disputes over cryptoassets. For further information please use the contact details set out below.

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