

Key Tools in Crypto Asset Tracing and Recovery: a BVI and Cayman Islands Perspective

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The Cayman Islands and the British Virgin Islands continue to be key jurisdictions in the global rise of the digital asset industry. They are the two most popular locations for crypto funds to domicile,¹ while also being home to a growing number of cryptocurrency exchanges, and are among the top jurisdictions globally for initial coin offerings (“ICOs”) and decentralised autonomous organisations (“DAOs”). The Courts in both jurisdictions will inevitably have to grapple with the unfortunate surge in cases of fraud and misappropriation of digital assets, and will need to adapt existing legal tools to facilitate the effective tracing and recovery of such assets. This article examines how the Courts in both jurisdictions have dealt with these key tools, as well as their anticipated future approach based on existing jurisprudence.

Injunctions against Persons Unknown

The victims of cryptocurrency fraud are generally unaware of the identity of the perpetrators and as such injunctions against persons unknown have assumed particular prominence in this sphere. The English Courts have shown a strong willingness to grant both freezing orders and proprietary injunctions against persons unknown in cases of crypto fraud, but have been careful to ensure that the category or categories of persons are clearly defined and are not overly broad.²

The BVI Court has already had occasion to follow suit and it is likely that the Cayman Islands Court would also grant similar relief should such a case arise.

Freezing Injunctions

A freezing order (also referred to as a Mareva injunction) prevents the respondent against whom it is made from disposing of or otherwise dealing with specified assets to which a Claimant may have recourse in the satisfaction of judgment, pending the outcome of the substantive proceedings. In order to obtain a freezing order, the applicant must establish that: there is a good arguable case against the respondent on the merits of the substantive claim; there is a real risk of dissipation of assets if the freezing order is not granted; and it is just and convenient in all of the circumstances for the injunction to be granted.

In the May 2022 decision of *ChainSwap Limited v Persons Unknown*³ the BVI Commercial Court granted, inter alia, a worldwide freezing order against ‘persons unknown’ being those allegedly responsible for the theft of digital assets. In *ChainSwap*, the defendants were identified by reference to their ownership of certain digital wallets that were alleged to have been used by the defendants to receive and dissipate stolen tokens.

ChainSwap, a BVI company, provided a service that allowed cryptocurrency tokens to be transferred between different blockchains, known as a cross-chain bridge. Unknown hackers were able to alter the code on ChainSwap’s bridge smart contract in order to: (i) cause all tokens transferred to the bridge to be re-directed to a private digital wallet owned by the hackers and (ii) cause an unlimited amount of new tokens to be ‘minted’ or created and thereafter directed into the hackers’ private digital wallets.

While the misappropriated tokens were not owned by ChainSwap, it alleged that it suffered loss due to (i) reputational damage and (ii) compensation which it paid to its users who were affected by the hacks. Worldwide freezing injunctions were granted against the

¹ 4th Annual Global Crypto Hedge Fund Report 2022, PwC, AIMA, CoinShares and Elwood.

² See *AA v Persons Unknown* [2019] EWHC 3556 (Comm); *Ion Science Limited v Persons Unknown* (unreported, 21 December 2020); *Fetch ai.Ltd v Persons Unknown* [2021] EWHC 2254 (Comm).

³ BVIHC (COM) 2022/0031 (unreported; 4 May 2022), Jack J.

respondents pending the determination of ChainSwap's claim, upon the Court being satisfied that there was an "obvious risk of dissipation".

In respect of the Cayman Islands, the Court has not yet had occasion to consider an application for freezing order relief in a case of crypto fraud. However, the Court's jurisdiction to grant such relief in general is robust and well-established.

The Cayman Islands Court has also established that it has the jurisdiction to grant injunctions against persons unknown. In *Ernst & Young Limited v Tibbetts and Persons Unknown*,⁴ the Grand Court of the Cayman Islands granted an injunction prohibiting an unknown person (identifiable only by a pseudonym and an email address) from disseminating confidential information. In so ordering, the Court held that although proceeding against unnamed persons was technically in breach of the specific provisions of the Grand Court Rules, the overriding objective of enabling the Court to deal with cases justly allowed it to approve the departure from the normal rules of pleading.

The flexible and forward thinking approach of the Cayman Court in *Ernst & Young v Tibbetts* augurs well for its future handling of crypto fraud cases against unknown perpetrators.

Proprietary Injunctions

In circumstances where the claimant has a proprietary claim to the assets in question, a proprietary injunction in order to preserve such assets may be obtained if the following criteria are met:

- there is a serious issue to be tried,
- damages would not be an adequate remedy,
- the balance of convenience lies in favour of the applicant, and
- in all the circumstances it is just and convenient to grant the injunction.

Importantly, the BVI Court has expressly recognized cryptocurrency as a form of property,⁵ following the English Court's decision in *AA v Persons Unknown; Re Bitcoin*.⁶ Proprietary injunctions may therefore also be available to claimants in appropriate cases. In an *obiter* comment in *ChainSwap*, Justice Jack noted that had ChainSwap been able to establish an arguable case that the stolen tokens were its property, it could have been granted a proprietary injunction.

It is expected that the Cayman Islands Court will also follow suit in recognizing cryptocurrency as property. The English Court's decision in *AA v Persons Unknown* will likely be highly persuasive, given that the Court's decision was expressly informed by the UK Jurisdictional Task Force's legal statement on crypto assets and smart contracts (chaired by Sir Geoffrey Vos), which considered the proprietary status of such assets in great detail.

Letters of request to foreign authorities

Another form of relief granted in *ChainSwap* was the issuance by the BVI Commercial Court of a letter of request to a foreign authority seeking assistance.

ChainSwap had identified that one of the alleged hackers' wallet interacted with a centralised cryptocurrency exchange located in Croatia which the Court held (by its terms of service) should possess 'know your client' information relating to the owner of the wallet, including the owner's name and address. On that basis, Justice Jack signed a letter of request addressed to the Croatian Courts in order to ascertain the wallet owner's identity.

Depending on the procedural rules of the relevant foreign jurisdiction, and whether it is party to the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (the "Hague Evidence Convention"), it may also be open to the Cayman Court to issue letters of request to foreign courts for assistance in appropriate cases. The Cayman Court has in turn regularly honoured letters of request received from foreign courts pursuant to the Evidence (Proceedings in Other Jurisdictions) Cayman Islands Order 1978 (the "Order"). The Order extends sections of the UK Evidence (Proceedings in Other Jurisdictions) Act 1975 to the Cayman Islands and gives statutory effect to the Hague Evidence Convention.

Norwich Pharmacal relief and Bankers Trust orders

Norwich Pharmacal orders ("NPOs") and Bankers Trust Orders ("BTOs") are key tools in obtaining information in crypto fraud cases and more generally.

NPOs may be used to obtain information from a third party who may be mixed up in the wrongdoing of another (whether innocently or otherwise) and who possesses information which the litigant needs to pursue a claim against the wrongdoers. The threshold criteria to

⁴ 2015 (1) CILR 151.

⁵ *Philip Smith and Jason Kardachi (in their capacity as Joint Liquidators) v Torque Group Holdings Ltd* [2021] ECSCJ No 626 (Wallbank J).

⁶ [2019] EWHC 3556 (Comm), [2020] 4 WLR 35.

be fulfilled for obtaining NPOs are (i) a good arguable case that a wrong has been committed against the applicant and (ii) the respondent became mixed up in the wrongdoing. The Court will consider as a discretionary factor whether the information is necessary to establish that a wrong has been committed or to identify the wrongdoers. BTOs may be obtained against third parties, such as financial institutions, in instances where there is a *prima facie* case of fraud or breach of trust, and information is required to preserve assets which are the subject of a proprietary claim. This remedy is not available where the applicant has no proprietary interest in the assets in question.

The jurisdiction of both the BVI and Cayman Islands Courts to grant these orders is well established and has continued to evolve with sophisticated jurisprudence on these forms of relief in both jurisdictions. With the increasing number of cryptocurrency exchanges incorporated in both jurisdictions, as well as the presence of other digital asset service providers, it is only a matter of time before BTOs and NPOs are sought against these service providers for their customer information. In fact, such orders have already been sought against cryptocurrency exchanges located in the Cayman Islands (albeit in the context of applications brought before the English courts). In *Fetch ai.Ltd v Persons Unknown*,⁷ the English High Court granted a BTO against the Cayman domiciled cryptocurrency exchange Binance Holdings Limited. The Court was satisfied that the entity would hold personal information on its customers which would assist in the location and preservation of assets.⁸

Conclusion

The speed with which digital assets may be misappropriated, and the complexity of tools employed by often unidentified fraudsters, will continue to present unique challenges to Courts in fashioning appropriate interim remedies. Fortunately, the efficacy of existing tools, coupled with the Courts' demonstrated willingness to adapt, signal that both the BVI and the Cayman Islands are well poised to tackle this challenge.

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⁷ [2021] EWHC 2254 (Comm).

⁸ See also *Ion Science Limited v Persons Unknown* (unreported, 21 December 2020) where a BTO was also ordered by the English High Court against Binance Holdings Limited in the context of an alleged cryptocurrency ICO fraud.