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ARTICLE

Crypto Disputes: An Offshore Perspective

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Synopsis

The British Virgin Islands ('BVI') and the Cayman Islands have become the jurisdictions of choice for many developers and entrepreneurs when incorporating cryptocurrency exchanges, structuring cryptoasset funds or blockchain enterprises. As such, when a user has an issue with their account (e.g. their trade is not honoured or their account is frozen) or their cryptoassets are misappropriated there is a high probability that an exchange or entity located in the BVI or Cayman will be somewhere in the mix.

This article discusses the legal remedies that may be available in the BVI and/or the Cayman Islands in the event that crypto-related proceedings have been or will be commenced in these jurisdictions.

For the purposes of this article, we have excluded from our analysis crypto-related insolvencies, of which there are many, especially of late, varying in size and complexity.

Introduction

The growth of blockchain technology over the last decade has been staggering. Emerging in 2008, partly in response to the Great Financial Crisis, Bitcoin and other cryptocurrencies were initially developed and intended to give people greater control over their finances, by removing the intermediates (usually traditional banks) and storing the currency on a public distributed ledger, that is, a decentralised blockchain.

After a somewhat slow and narrow adoption of cryptocurrencies and blockchain technology, the recent explosion in all things crypto (from banking, trading, insurance, intellectual property rights and so on to personal information custody and the interactions between governments and citizens) has meant that, traditionally, the law and regulation has had to play catch-up. However, over the last few years, that has changed and the legal world is increasingly adapting to blockchain technologies and a steady stream of case law has emerged which explains how the law applies to, and can be used to govern, cryptocurrencies.

There has been a sharp increase in crypto disputes involving companies and exchanges incorporated in the BVI and the Cayman Islands. The nature of the disputes often fall into one of the following four categories:

1. Stolen cryptoassets, often by 'persons unknown', where the cryptoassets are moved to or through an exchange-hosted wallet provided by an exchange incorporated in the BVI or Cayman Islands;
2. Algorithmic trading claims, that is, where an offshore exchange reverses or refuses to honour a trade, often citing 'unilateral mistake' as justification;
3. Frozen wallets or trading accounts managed by offshore exchanges or funds; and
4. Partnership disputes, where the relationship between the individuals involved in a blockchain project structured through offshore entities breaks down.

The law

In the absence of local legislation or case law, the BVI and Cayman Islands courts will look to decisions of the English courts for guidance and authority. Decisions of the English Court of Appeal and UK Supreme Court (whilst not binding in the Cayman Islands or the BVI) will be highly persuasive, as will decisions of the Privy Council on appeals originating from other Commonwealth jurisdictions.[1] Accordingly, and in light of what is currently a limited body of case law in the BVI and Cayman Islands in comparison to England, this article focuses on key developments in English law with respect to cryptoassets and how these have been or are likely to be applied in the BVI and Cayman Islands.

Notes

1 As the President of the Cayman Islands Court of Appeal observed in *Miller v R* [1998] CILR 161 at 164 'a decision of the English Court of Appeal [and a fortiori, the House of Lords/UK Supreme Court], while not formally binding upon this court automatically, is necessarily one of great persuasive authority, especially where it is unanimous and is directed towards a doctrine of the common law'.

The basic principles

How crypto is held

Cryptoassets can be held in three mains ways: (i) centralised exchanges (least secure); (ii) software wallets (somewhat secure); and (iii) hardware wallets (most secure).

As already noted, cryptocurrencies are designed to be decentralised in nature and without intermediaries. Nevertheless, the majority of people choose to hold their cryptoassets on a centralised exchange which often facilitates trading, staking, earning crypto 'interest' or other services. While the use of centralised exchanges might give the user the feel of a traditional bank or broker, the reality is often very different and the rights and obligations between an exchange and a customer can vary significantly from what one might expect in a traditional banking relationship. For example, exchanges frequently co-mingle clients' cryptoassets, hold them in non-segregated accounts, exclude by contract the creation of a trust relationship, loan assets out without notice or authorisation, or otherwise treat cryptoassets differently than one might expect assets to be treated by a fiduciary. Additionally, the respective rights and obligations can change over time (often significantly) when an exchange updates its terms and conditions.

With software and hardware wallets, the onus is on the user to safeguard the private keys and cryptoassets. While this somewhat mitigates the risks associated with exchanges (which could include hacking, mismanagement of cryptoassets or becoming insolvent), it does make the wallets vulnerable to more traditional risks such as theft, loss, or partners/directors going rogue with the 'keys to the kingdom'.

Cryptoassets as property

Common law traditionally identifies two forms of property:

1. Things in possession (physical items); and
2. Things in action (a right which is capable of being enforced).

Strictly speaking, cryptocurrency does not fall into either of these categories. However, a legal statement published in 2019 by the UK Jurisdictional Taskforce on cryptoassets and smart contracts the ('UKJT Statement') stated that a strict interpretation would be unsuitable and that there were strong grounds on which cryptocurrencies should be recognised as property.

Subsequently, in the landmark decision of *AA v Persons Unknown*[2] it was confirmed, following consideration of the UKJT Statement, that cryptocurrencies should be treated as property. In coming to this conclusion, Mr Justice Bryan referred to Lord Wilberforce's definition of property in *National Provincial Bank v Ainsworth*,[3] which had stated that the four criteria for an object to be defined as property included being 'definable, identifiable by third parties, capable in their nature of assumption by third parties and having some degree of permanence' [59]. The High Court was thereafter satisfied that cryptoassets, such as Bitcoin, do indeed meet this definition of property.

This principle has similarly been accepted in the BVI following the decision in *Torque Group Holdings Limited (In Liquidation) v Torque Group Holdings Limited (In Liquidation)*[4] where cryptoassets were held to constitute property for the purposes of a liquidation under the BVI Insolvency Act 2003 (as amended).

More recently, in the English case of *Lavinia Deborah Osbourne v Persons Unknown and Ozone Networks Incorporated*[5] the High Court also concluded that there is 'at least a realistically arguable case that [non-fungible] tokens are to be treated as property as a matter of English law.'

Once recognised as property, the usual legal remedies are available where appropriate (as further discussed below), including:

1. Freezing injunctions;
2. Proprietary injunctions;
3. Disclosure orders in support of injunctions; and
4. Norwich Pharmacal relief.

Crypto as a trust asset?

The question as to whether cryptocurrencies can be held on trust has also arisen in case law over the past few years. English, Singaporean and New Zealand authority have confirmed that they can be. In the English case of *Wang v Darby*[6] the High Court considered for the first time whether cryptocurrencies could be held on trust for the purposes of establishing a proprietary right over those assets. On the particular facts of the case, it was held that no form of trust arose. Nevertheless, this case demonstrated the High Court's willingness to apply the principles of trust law to a proprietary claim over cryptoassets in an appropriate case.

Notes

2 [2019] EWHC 3556 (Comm).
3 [1965] AC 1175.
4 BVIHC (COM) 0031 of 2021.
5 [2022] EWHC 1021 (Comm) at [13].
6 [2021] EWHC 3054 (Comm).

Similarly, in *B2C2 Ltd v Quoine Pte Ltd*[7] the Singapore International Commercial Court was required to determine whether cryptocurrency might be treated as property which may be held on trust. In this case, Quoine Pte Ltd was prepared to assume that cryptocurrency satisfied that criterion. Justice Thorley confirmed, albeit obiter that this was indeed the correct approach as:

> 'Cryptocurrencies are not legal tender in the sense of being a regulated currency issued by a government but do have the fundamental characteristic of intangible property as being an identifiable thing of value.'

In the New Zealand case of *Ruscoe v Cryptopia Ltd (In Liquidation)*,[8] the New Zealand High Court also held that cryptocurrency is a digital asset capable of ownership, so is property, and is therefore in turn capable of being held on trust.

In the recent case of *Gary Jones v Persons Unknown and others*,[9] the English High Court imposed a constructive trust between a crypto exchange and a victim of a crypto fraud and made an order for the delivery up of the relevant Bitcoin hosted on the exchange.

Crypto mixers

It is also probably helpful at this stage, having established cryptocurrencies as property, to consider crypto mixers. Mixers are where the cryptocurrencies of many users are blended together thereby obfuscating the origins and owner(s) thereof. Probably one of the most well-known cryptocurrency mixers is Tornado Cash. Tornado Cash facilitates transactions without determining their origin, or providing clarity around the destination or counterparties. The idea behind mixers is that they provide increased privacy to transaction participants.

The BVI case of *ChainSwap v Persons Unknown*[10] is the first instance of the BVI Commercial Court granting a freezing order over assets held by persons unknown in relation to a crypto-fraud. In this case, ChainSwap, a BVI incorporated entity that provides a service that allows cryptocurrency tokens to be transferred between different blockchains, known as a cross-chain bridge, was the subject of two hacks in July 2021: the first hack allowed fraudsters to divert cryptocurrency from recipient wallets to private wallets that they controlled and the second hack allowed the fraudsters to effectively mint unlimited new tokens and redirect these to their private wallets.

The consequence of the hacks carried out against ChainSwap's cross-chain bridge was that hackers were able to misappropriate assets from: (i) private users that had authorised their wallets to interact with the bridge (pursuant to the first hack); and (ii) projects issuing digital tokens that had used the bridge to offer cross-chain operability on their tokens (pursuant to the second hack).

The hackers then traded, exchanged or otherwise dissipated some of the stolen tokens. One method used by the hackers to attempt to obfuscate the dissipation of the tokens was by using a mixer or 'tumbler' service. The BVI court was ultimately satisfied that ChainSwap had established a good arguable case that it had identified the destination wallet for the transactions which were mixed through the tumbler service. A link between this wallet and an exchange in Croatia was then identified, which led to the BVI Court signing a letter of request addressed to the Croatian Courts for any available KYC in relation to the wallet.

The judgment noted that although ChainSwap did not seek a proprietary injunction, since it was not asserting a proprietary right in the digital assets, had it been able to establish an arguable case that the stolen tokens were its property then that is a form of relief which this Court would have been able to grant (following its own findings in *Philip Smith v Torque Group Holdings Ltd*[11] that cryptocurrencies are a form of property).

This decision builds on the BVI's mature and pragmatic approach to crypto disputes and demonstrates the Court's willingness to assist those who may have been the victim of fraud.

As regards the future of mixers, on 8 August 2022, the US Department of the Treasury's Office of Foreign Assets Control ('OFAC') announced economic sanctions against Tornado Cash. According to OFAC, Tornado Cash has been used to launder more than US$7 billion since its inception in 2019. Sanctioning a technology (which has had legitimate uses) is novel, and rather it is usually specific individuals or entities who are sanctioned. It will be interesting to see how long Tornado Cash remains subject to these sanctions, and indeed whether similar or the same sanctions are levied in other jurisdictions.

Types of claim

Stolen cryptoassets

Given the relative ease of transferring cryptocurrencies (deriving from their decentralised nature and often single point of control), the tracing, freezing and recovery

Notes

7 [2019] SGHC(I) 3.
8 [2020] NZHC 728.
9 [2022] EWHC 2543 (Comm).
10 BVIHC (COM) 2022/0031.
11 BVIHC (COM) 0031 of 2021.

of cryptoassets is often a race against time. The first step is usually an 'on chain analysis' to identify the last known or current location of the cryptoassets. The second step is to identify those persons against whom any order might be sought. Often, by virtue of the nature of crypto, the identities of the wrongdoers is unknown. However, in such a case, it is now well-established law in the UK and other jurisdictions that claims against 'persons unknown' are not procedurally barred and are, in fact, becoming more common, particularly in relation to crypto disputes.

In *Ion Science Ltd v Persons Unknown*,[12] the English High Court granted a proprietary injunction, worldwide freezing order and ancillary disclosure order against persons unknown, alongside a Bankers Trust order against the parent companies of two cryptocurrency exchanges. Another important point in this case, which had not been previously considered in the case law, was that the English High Court concluded that the lex situs of a crypto asset is the place where the person or company who owns it is domiciled.

In the recent Singapore case of *CLM v CLN & Ors*,[13] the Singapore High Court held that it has the jurisdiction to grant interim orders against persons unknown provided that the description of such persons unknown is sufficiently certain as to identify both those who are included and those who are not.

Claims against persons unknown have also been litigated offshore. For example, in the BVI case of *ChainSwap v Persons Unknown*, the Commercial Division of the BVI High Court granted a worldwide freezing order against persons unknown in relation to an alleged crypto fraud, thereby following the position adopted in similar decisions in English and other Commonwealth countries. ChainSwap is considered further below in the context of asset tracing and disclosure orders.

Last year, in *D'Aloia v Persons Unknown and Ors*,[14] the English High Court granted an order permitting the service of proceedings on persons unknown via a non-fungible token ('NFT') on a blockchain. This was the first instance of an English court allowing service by means of distributed ledger technology and has set a key precedent for victims of crypto fraud which allows them to use this novel technology to bring claims against persons unknown.

Service via NFT was further expanded in the case of *Gary Jones*,[15] where the English High Court permitted the service of the summary judgment to be made by NFT, widening the use of such methods beyond the service of originating proceedings.

In the case of stolen cryptoassets, identifying the wrongdoer is a perennial problem which gives rise to issues of service on the defendant. In such cases, the BVI and Cayman Islands courts respectively follow the English practice of listing 'persons unknown' as the defendant and granting substituted service, as appropriate.

Algorithmic trading claims (e.g. unilateral mistake)

There has been an increase in claims against exchanges involving the reversal or refusal to honour a trade made via a smart contract should certain conditions occur. In many cases, an exchange will freeze or lock the user out of their account while they intervene or reverse the trade (see further below regarding freezing accounts).

As an example, consider an exchange client setting a low Bitcoin:Ether order (i.e. 1 BTC:2 ETH), perhaps to take advantage of any flash crash or long term anticipation of value change. If the exchange accepts the order (in effect making a market between its users, one holding the bitcoin, the other holding the ether), one would expect the exchange to fill the order it had facilitated once the prices moved as contemplated. However, if a hack of the relevant exchange or error in the platform's coding (perhaps caused by an update) occurred which caused the value of the relevant crypto to drop to a level significantly outside of what could be called usual trading, will the exchange honour the trade? In the significant case of *B2C2 Ltd v Quoine Pte Ltd*[16] (discussed further below) and in many cases which do not make it court,[17] the answer has been 'no'. Whether an exchange will be permitted to refuse or reverse the trade will often depend on the terms of the contract between the exchange and the user and any equitable principles, if they apply in the relevant jurisdiction (most of the familiar English principles of equity are applicable in the BVI and Cayman). Exchanges often require users to accept their terms and conditions in order to use the platform and these terms may contain clauses which are often widely drafted and may limit the obligation of the exchange to honour trades for reasons which may include the size of an order, market conditions, a violation of any applicable laws and regulations related to the order, hacking, error, and risk considerations. Additionally, the terms are likely to include governing law and jurisdiction clauses, which often reflect the location of incorporation of the company operating the exchange (i.e. BVI or Cayman). The terms may also be periodically updated and, in many cases, unilaterally with little or no notice to the user, who is often deemed

Notes

12 Comm, CL-2020-000840, 21 December 2020 (unreported).
13 [2022] SGHC 46.
14 [2022] EWHC 1723 (Ch).
15 [2022] EWHC 2543 (Comm).
16 [2019] SGHC(I) 3.
17 Often because of a lack of funding to bring proceedings or terms and conditions which purport to allow such a refusal.

to have accepted the updated terms by continuing to use the platform.

The Singapore International Commercial Court grappled with many of these issues in the algorithmic cryptocurrency case of *B2C2 Ltd v Quoine Pte Ltd.*[18] In this significant judgment, Justice Simon Thorley applied well-established contractual principles and considered the doctrine of mistake in the context of cryptocurrency trading and automated contracts which have been entered through computer programming. In this case, the Singapore High Court had to decide, inter alia, how knowledge is to be determined for the purposes of establishing mistake where contracts are entered into on an automated basis by a computer (and not by a human).

In conducting its analysis, the court noted that:

> '[195] The doctrine of unilateral mistake is well developed in circumstances where the error is a human error and the nature of the error and the knowledge or lack of it is directly ascertainable from the humans involved....
>
> ... [205] In the circumstances of this case, I have concluded that the relevant mistake must be a mistake by the person on whose behalf the computer placed the order in question as to the terms on which the computer was programmed to form a Trading contract in relation to that order. This mistake will have to be in existence at the date of the contract in question but may have been formed at an earlier date. The existence of a relevant mistake will be a question of fact in each case.'

However, ultimately it was held that when the law is faced with a dispute that a contract made by and between two programmed computer systems acting otherwise without human intervention is void or voidable for mistake, it is necessary to have regard to the mindset of the individual who wrote the programme actually when it was written (and not later when contracts were entered into). As such, the court concluded that, in this instance, Quoine had failed to establish a mistake that would make the contracts for the crypto trades void.

The Singapore High Court also noted (albeit obiter) that, had there been a clause in the contract which would have allowed Quione to reverse the trade, the same was not sufficiently brought to B2C2's attention (and so could not be incorporated).

In light of this decision, the inclusion of clauses which allow the reversal of trades is now common in many BVI and Cayman Islands exchanges and this will therefore make it more difficult for claimants to hold exchanges to trades which fell outside usual market conditions or were caused by error/hacking.

Frozen trading accounts

It is possible that crypto accounts may be frozen for a number of reasons, for example where there is suspicious activity or where there are multiple claims to ownership.

Suspicious activity can include any form of illicit activity that is detected in the smart contract, such as using an inflation bug to mint and transfer tokens to an address the wrongdoer controls.

The relatively recent Hong Kong case of *Yan Yu Ying v Leung Wing Hei*[19] concerned a debate over the ownership in relation to a private key. The key principle that was illustrated in this case was one that is already used in the crypto-sphere, being 'not your keys, not your crypto'. Here, the Defendant had the recovery seed (which can be used to derive the private keys), and therefore controlled the Bitcoins that the plaintiff had transferred to a wallet, which the plaintiff thought belonged to her. Ultimately, the Hong Kong Court of First Instance was not satisfied that a *Mareva* injunction freezing the defendant's assets should be granted, but it did hold that the plaintiff had established the lower threshold of a serious issue to be tried for the granting of a proprietary injunction.

Whilst there is little further reported case law on this subject matter at present, it is anticipated that the courts in the BVI and Cayman Islands are likely to be asked what would what be sufficient indicia of ownership as more of these matters proceed to litigation. Whilst this Hong Kong decision is useful guidance, having lawyers and representatives who are familiar with the various novel terminologies involved will be extremely helpful in establishing the key issues and thereby the resolution of these types of matters.

Partnership disputes

It is often the case that new crypto ventures are not papered well at the outset and the rights between any partners and/or companies can be poorly documented or even non-existent. Of course, whether those involved are partners, contractors, employees or otherwise will affect their respective rights and duties.

There are also some unique challenges in these types of crypto matters, for example, where there are rogue partners or employees who have the private key or seed phrase to a crypto wallet and may be in a position to cause immense damage simply by stealing cryptoassets or breaking smart contracts. In these circumstances, it will be key to quickly identify and consider the possible avenues for redress, including:

Notes

18 [2019] SGHC(I) 3.
19 [2022] HKCFI 1660.

1. What remedies might be available, for example, looking to obtain an injunction (as detailed above). It is important to note here that there may also be issues regarding service out if cross-jurisdictional considerations were to apply; and/or
2. How control may be regained, namely by ensuring the destruction of the wrongly obtained seed phrase. The primary issue here is how this would be confirmed, for example if the seed phrase has been memorised. It might be that appropriate undertakings are sought to mitigate any risk in this regard, but again there would be uncertainty as to how compliance would be strictly monitored.

Investigative tools

Both the BVI and Cayman Courts have shown a robustness in granting orders directed at identifying a wrongdoer and securing documents which may assist in tracing assets which have been the subject of wrongdoing or fraud ('Disclosure Orders').

So-called *Norwich Pharmacal*[20] and *Bankers Trust*[21] orders developed originally as English equitable remedies to assist a claimant in identifying the wrongdoer or tracing assets.

In light of its equitable nature, if the respondent to a *Norwich Pharmacal* order and the information sought were outside of the jurisdiction of the English court, the English courts would, in all but the most exceptional cases, not grant the order being cautious not to impose its jurisdiction over foreign third parties, and the assistance of local courts would therefore have to be sought. In contrast, the English courts more readily granted *Bankers Trust* orders out of the jurisdiction, for example in crypto-fraud cases 'in hot pursuit'.[22]

The difference in approach between granting a *Norwich Pharmacal* or *Bankers Trust* order was becoming increasingly difficult to justify and changes to court rules were needed, particularly in respect of crypto matters. Such was the view of the Master of the Rolls, Sir Geoffrey Vos, who noted that:

> '…in the world of crypto fraud, there are no national barriers and unlawfully obtained cryptoassets can be difficult to trace. It is that obstacle that has impeded many sets of proceedings aimed at tracing the proceeds of crypto fraud. Under current case law, third party disclosure applications cannot easily be served outside the jurisdiction, even if one can serve out orders requiring a third party to disclose documents relating to the account of someone who can be shown to be prima facie responsible for a fraud. I hope that developments in the court's rules will make this fine distinction less significant and will make it generally easier to litigate issues that arise in relation to on-chain transactions and the tracing of cryptoassets.'[23]

In response to the above, and as proposed by a sub-committee established by the Master of the Rolls to look at the position, amendments to Practice Direction 6B of the English Civil Procedure Rules which came into effect on 1 October 2022 provided a new gateway for the service out of *Norwich Pharmacal* and *Bankers Trust* orders. This new gateway permits service out applications against non-parties for the provision of information regarding the true identity of a defendant or potential defendant and/or what has become of the claimant's property where the information in question is required for the purposes of proceedings which have been, or are to be, brought in England.

These amendments are already being utilised and/or applied in English crypto cases: on 29 November 2022, Mr Justice Butcher handed down judgment in *LMN v Bitflyer Holdings Inc. and others*,[24] which is the first successful *Bankers Trust* application against overseas cryptocurrency exchanges based on the new gateway for service out of the jurisdiction.

The approach of the BVI and Cayman Islands courts to Disclosure Orders has traditionally been more accommodating than the pre-amendment position in England. In the Cayman Islands, the Court of Appeal found that the courts have jurisdiction to grant a *Norwich Pharmacal* order in support of potential proceedings before a foreign court, even where alternative statutory remedies may be available.[25] Similarly, in the BVI, following an ex parte application for *Norwich Pharmacal* relief, the Commercial Division of the High

Notes

20 A court order for the disclosure of documents or information against a third party (which has been innocently mixed up in wrongdoing) which may identify the 'wrongdoers' and thereby assist the applicant in bringing legal proceedings against those individuals. *Norwich Pharmacal Co. & Others v Customs and Excise Commissioners* [1974] AC 133.

21 A court order against a bank (other financial institution, including brokers, crypto exchanges etc) to disclose the state of, and documents and correspondence relating to, the account of a customer who was, on the face of it, guilty of fraud to allow the applicant to trace their misappropriated funds or assets. *Bankers Trust Company v Shapira and others* [1980] 1 WLR 1274.

22 Per *Ion Sciences Ltd. v Persons Unknown and others* (unreported), 21 December 2020 (Comm, CL-2020-000840) at [21] and *Fetch.AI Limited and Fetch.AI Foundation Pte Ltd. v Persons Unknown & others* [2021] EWHC 2254 (Comm).

23 *Contracts, just smarter. Seizing the opportunity of smarter contracts*. Lawtech UK. Launch of Smarter Contracts report, The View, Royal College of Surgeons, and Online – Thursday 24 February 2022 at [9]. https://www.judiciary.uk/wp-content/uploads/2022/02/Speech-MR-to-Smarter-Contracts-Report-Launch-Lawtech-UK-UKJT-Blockchain-Smart-Contracts.pdf.

24 [2022] EWHC 2954 (Comm).

25 *Essar Global Fund Limited and Essar Capital Limited v ArcelorMittal USA LLC*, unreported, 3 May 2021.

Court confirmed the availability of this relief in support of foreign proceedings.[26] Following the amendments, which bring England much more in line with the BVI and Cayman approach, it is to be expected that the BVI and Cayman Islands courts will continue to be willing to assist victims of theft and fraud in a crypto-context where victims seek information to aid recovery of misappropriated cryptoassets.

Protective relief

Mareva injunctions (freezing injunctions)

A freezing injunction is an order preventing the disposal of assets by the respondent. Typically, a freezing injunction is sought to preserve assets until a judgment can be obtained or satisfied. Under BVI and Cayman Islands law, the courts have a discretion to grant a freezing order in connection with underlying proceedings brought in that jurisdiction (whether issued or contemplated) or in relation to proceedings which have been or are to be commenced in a foreign court, which are capable of giving rise to a judgment that may be enforced in the BVI or Cayman Islands.

In all cases, the applicant must have a good arguable case against the respondent and it must be just and convenient to make the order, which includes satisfying the Court i) that damages would not be an adequate remedy for the applicant; ii) consideration as to whether any losses caused to the respondent could be compensated by damages or protected by an undertaking (which may be fortified); and iii) the applicant satisfying the court that there is a real, objective risk of the respondent dissipating its assets in an attempt to prevent satisfaction of a future judgment.[27]

The BVI and Cayman courts apply an objective test to the concern around dissipation of assets and will take into account all of the circumstances (including considering the effect of the respondent's actions, not the respondent's intent). Generally, it will be insufficient to rely on an allegation of dishonesty and fraud alone as proof of dissipation of assets, although such evidence will be considered.

In *CLM v CLN & Ors*[28] (discussed above), the Singapore High Court held that the cryptocurrency wallets concerned were new or appeared to have been created 'solely for the purposes of frustrating the tracing and recovering efforts' and that the risk of dissipation 'is heightened by the nature of the cryptocurrency.' In light of this, the Singapore High Court was of the view that the injunction should indeed be granted.

Proprietary injunctions

Proprietary injunctions are considered to be a far less intrusive remedy than freezing injunctions as they only attach to named assets which arguably belong to the claimant, as opposed to restraining the defendant's assets generally.

The familiar principles of propriety injunctions will apply in the BVI and Cayman Islands as they do in the English courts. Perhaps most notably in this area are the factors that the court will consider in deciding whether to grant a proprietary injunction following the decision in *American Cyanamid v Ethicon,*[29] namely whether:

1. there is a serious issue to be tried on the merits;
2. damages would be an adequate remedy in place of granting the injunction;
3. the balance of convenience is in favour of granting an injunction; and
4. there are any other special factors that would weigh towards granting the injunction.

In addition, it is also worth recalling the decision in *Westdeutsche Landesbank Girozentrale v Islington LBC*[30] in respect of when a resulting trust arises such that a proprietary interest can be established. In that case, one of the questions was whether there could be an equitable proprietary claim in the form of a resulting trust where money has been paid under a contract which is ultra vires and therefore void ab initio. The Appellate Committee of the House of Lords (the predecessor to the Supreme Court of the United Kingdom) held that a trust relationship is established either where there is intention, or presumed intention, by the parties such to give effect to the common interests of the parties.

Both these principles in relation to proprietary injunctions have been cited with approval by the courts in the BVI and Cayman Islands and therefore in cases involving cryptocurrencies, the same principles will likely be followed accordingly.[31]

Notes

26 *K&S v Z&Z* BVIHCM(COM) 2020/0016.

27 See further *Broad Idea International Ltd v Convoy Collateral Ltd* [2021] UKPC 24, a recent case, where a majority of the Privy Council (on appeal from the BVI) re-examined and restated, obiter, the juridical basis of freezing injunctions and this included a consideration of the nature of the interest meriting protection.

28 [2022] SGHC 46.

29 [1975] 1 All ER 504.

30 [1996] A.C. 669.

31 See *Chisholm v Smith* [2013] 2 CILR 32; *EChina Cash Inc. v EChina Cash (BVI) Ltd, Light Year Partners LLC and Elliot Friedman* VG 2009 HC 6; and *Re MerchantBridge Managers Incorporated* [2012] 1 CILR 120.

Conclusion

It is evident that there has been a recent increase in crypto related cases being litigated in the BVI and Cayman Islands, and other Commonwealth jurisdictions. Whilst certain principles, such as cryptocurrencies and cryptoassets being treated as property, are now well-established law, there is still a lot of scope for further development in the jurisprudence in this area, particularly in the absence of specific legislation. With the advent of more crypto disputes in the offshore jurisdictions, it is expected that more helpful clarification with respect to crypto terminology will be forthcoming which will assist in the proper identification and/or determination of the issues in question.

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