

## Crypto-assets as property: Cayman litigators' tools to assist in their tracing and recovery

Insights - 14/02/2020

Adopting the analysis of the United Kingdom Jurisdictional Task Force (UKJT) on the proprietary status of crypto currencies, a recent decision of the English High Court, *AA v Persons Unknown*, [1] has found that crypto assets such as Bitcoin are "property" and therefore capable of being the subject of a proprietary injunction or freezing order. This finding will be of interest to anybody using Bitcoin as a form of payment or to carry value.

Coming to this conclusion, the court considered that crypto assets meet the four criteria of the classic definition of property set out by Lord Wilberforce in *National Provincial Bank v Ainsworth* [1965] 1 AC 1175 as being definable, identifiable by third parties, capable in their nature of assumption by third parties, and having some degree of permanence. [2]

Importantly for litigators in the crypto space, this decision supports the view as expressed by the UKJT [3] that the common law is capable of stretching traditional definitions and concepts to adapt to new business practices and that, notwithstanding the traditional definition of property in English law which recognises no forms of property other than choses in possession and choses in action, there appears to be no conceptual difficulty in treating intangible things as property even if they may not be choses in action. [4] Effectively, the court approved the UKJT's view that crypto assets constitute a third kind of property.

### Impact on Cayman?

While a first instance decision not yet subject to appellate consideration, and recognising that the analysis in the UKJT Legal statement is not a statement of the law, there is no reason why the Cayman courts would approach the development of the legal concept of "property" any less purposefully. If so, from our perspective as Cayman litigators, our view is that litigants in the Cayman islands would have access to the full range of litigation tools when dealing with misapplication of crypto assets as they would with respect to any other form of property.

Cayman is a highly sophisticated legal jurisdiction and the Cayman courts have traditionally taken a robust approach in providing effective interim and final remedies in support of domestic and cross-jurisdictional commercial litigation including constructive trust and restitutionary claims, all of which are likely to be highly relevant to crypto asset litigation.

These tools in the Cayman litigator's armoury include a wide variety of injunctive relief in the form of proprietary injunctions and freezing orders granted both in support of domestic proceedings and, where appropriate, ancillary to, and in aid of, foreign proceedings for the purposes of facilitating a foreign court that has primary jurisdiction over the proceedings.

As explained by the court in *AA v Persons Unknown*, in addition to a proprietary injunction, ancillary relief in the form of disclosure orders for the provision of information are particularly apposite in the crypto space, where the rapid speed at which crypto assets are moved, makes it crucial to trace and establish location as quickly and accurately as possible. These ancillary disclosure orders are routinely sought and granted in conjunction with injunctive relief in the Cayman Islands. In appropriate circumstances, pre-action Norwich Pharmacal orders and Bankers Books orders are also available in the Cayman Islands but, for reasons touched upon in *AA v Persons Unknown* there remains some uncertainty as to the availability of this type of relief where it would require service of proceedings out of the jurisdiction and the courts continue to grapple with the novel issues related to crypto currencies in this regard. It was also interesting that the English court expressed its willingness to hear applications in cyber extortion cases in private, on the basis that the publicity may negatively impact on the claimant's ability to subsequently make recoveries, by tipping off the wrongdoers and enabling them to dissipate assets. Our view is that the Cayman court would be very likely to take the same approach in appropriate circumstances.

In addition to the above relief, the Cayman courts have the power to appoint receivers to take control and preserve property pending trial, including the appointment of receivers in aid of foreign proceedings and by way of equitable execution of judgments. There are also many suitably qualified financial services professionals who have the know-how and skills to take on these appointments and achieve excellent results.

A wide variety of final remedies are available to the Cayman court. As well as damages and declaratory relief, those litigating over lost or misapplied crypto assets would be able to apply for restitution of property in circumstances of unjust enrichment. Where property has been misapplied in breach of trust or fiduciary duties, the Cayman court has shown itself to be robust in permitting claimants to trace and recover the property or its traceable proceeds from the trustee/fiduciary and third parties.

The Cayman Islands has also developed the Foundation Company, a unique financial structuring option which, as a hybrid vehicle, combines the traditional and innovative features of both Company law and trusts law. Foundation companies are being increasingly used as vehicles outside private wealth structures, and in commercial transactions and crypto offerings. Therefore in

litigation involving both crypto assets and foundation companies, which we expect to emerge as this industry grows, the Cayman court will be able to draw upon well-developed and commonly applied principles from these fields to deliver justice in the cases which come before it.

In conclusion, despite the inherent complexities in the crypto space (and where there undoubtedly remain novel and multifaceted legal issues yet to be resolved), when disputes arise, Cayman has a robust and highly capable legal services industry equipped with the necessary litigation tools to meet the challenge posed.

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[1] *AA v Persons Unknown* [2019] EWHC 3556

[2] *AA v Persons Unknown* [2019] EWHC 3556 [59] See also a similar conclusion in *B2C2 Limited v Quoine PTC Limited* [2019] SHNC (1) 03 [142], *Vorotyntseva v Money-4 Limited t/a Nebeus.com* [2018] EWHC 2598(Ch) and *Liam David Robertson v Persons Unknown* (unreported 15 July 2019)

[3] See paragraph 77 of the UKJT Legal Statement on Crypto assets and Smart Contracts. 11 November 2019

[4] *Ibid* at paragraph 83: in light of 20th century statutes which define property in terms that assume that intangible property is not limited to things in action, for example, Patents Act 1977 which describes a Patent as "personal property (without being a thing in action)".

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