ARTICLE

HOW TO FREEZE A CRYPTOCURRENCY

INTRODUCTION

1. The use of cryptocurrencies by fraudsters is becoming increasingly common. Cryptocurrencies are therefore very likely to become the subject of civil fraud litigation. This article considers how litigants can obtain the "nuclear weapon" of the worldwide freezing order ("**WFO**") against cryptocurrencies. Three key questions arise:

    (1) Can you freeze a cryptocurrency?
    (2) If so, how do you freeze a cryptocurrency?
    (3) How can you trace a cryptocurrency?

2. In November 2019, the UK Jurisdiction Taskforce ("**UKJT**") produced a Legal Statement on Cryptoassets and Smart Contracts. The UKJT is spearheaded by Sir Geoffrey Vos, but the Legal Statement was drafted by a team of counsel, and Sir Geoffrey Vos noted that "*it is not in my role as judge, nor that of the UKJT or its parent, the UK's LawTech Delivery Panel, to endorse the contents of the Legal Statement*". It follows that the Legal Statement provides an authoritative, but certainly not binding, analysis.

CAN YOU FREEZE A CRYPTOCURRENCY?

3. The short answer is yes. In **Vorotyntseva v Money-4 Limited t/a Nebeus.Com** [2018] EWHC 2596 (Ch), Birss J granted a WFO in respect of a substantial quantity of Bitcoin and Ethereum (worth c. £1.5 million in traditional currency). Moulder J also granted an asset preservation order over cryptocurrencies in **Robertson v Persons Unknown**, (unreported, 15 July 2019), although she adjourned the application for a WFO. As such, there is first instance authority that cryptocurrencies can be frozen. The orders in both cases can be obtained by getting in touch with the authors of this article.

4. But cryptocurrencies can only be frozen if they are treated as property. In the **Vorotyntseva** judgment, cryptocurrencies were treated as property by Birss J, but only because there was no

suggestion that they could not be a form of property. That was the extent of the analysis. There is no transcript of the judgment in **Robertson**, so no relevant analysis can be derived from that case.

5. There is however a much richer academic debate about whether cryptocurrencies constitute 'property' capable of being frozen. This 'academic' debate is of practical relevance for two reasons: (1) on an ex parte application, it should be ventilated in the interests of full and frank disclosure; and (2) this issue is ripe for consideration by the Court of Appeal.

6. The difficulty with treating cryptoassets as property is as follows. Property is traditionally viewed as being of only two kinds: things in possession, and things in action. In **Colonial Bank v Whinney** (1885) 30 (Ch) D. 261, Fry LJ said "*All personal things are either in possession or action. The law knows no tertium quid [third thing] between the two*". Cryptoassets cannot be things in possession because they are virtual, they cannot be possessed. Nor do they fit easily into the category of things in action, because cryptocurrencies do not embody any right capable of being enforced by action.

7. However, the Legal Statement suggests that cryptoassets do constitute property. The key to its analysis is that although they are neither things in possession nor things in action in the traditional sense, the English law of property (including the decision in **Colonial Bank**) is not limited to these two categories. It relies on two decisions which have treated novel kinds of intangible assets as property, **Dairy Swift v Dairywise Farms Ltd** [2000] 1 WLR (where a milk quota was held to be the subject of a trust), and **Armstrong v Winnington** [2012] EWHC 10; [2013] Ch 156 (where an EU carbon emissions allowance was the subject of a tracing claim). It also considered that cryptoassets satisfy the four criteria of certainty, exclusivity, control and assignability of Lord Wilberforce's classic definition of property in **National Provincial Bank v Ainsworth** [1965] 1 AC 1175.

8. Sir Geoffrey Vos, speaking extra-judicially in May 2019, has also expressed qualified support for the view that cryptocurrencies are property. [1] He agreed with the decision of the Singapore International Commercial Court in **B2C2 Ltd v Quoine Pte Ltd** [2019] SGHC(I) 03, in which it was held that that cryptocurrencies fulfilled Lord Wilberforce's definition so as to amount to property.

[1] Joint Northern Chancery Bar Association and University of Liverpool Lecture, 2 May 2019, 'Cryptoassets as property: how can English law boost the confidence of would-be parties to smart legal contracts?', Sir Geoffrey Vos

9. As such, there is an increasing body of material that regards cryptoassets as property capable of being frozen. However, a degree of uncertainty will remain until the point is determined at appellate level.

HOW DO YOU FREEZE A CRYPTOCURRENCY?

10. There are also practical questions about WFOs over cryptocurrencies, the first of which is on whom should it be served (in addition to the defendant)? Cryptocurrency accounts do not take the same form as ordinary bank accounts because cryptocurrencies are decentralised and held across the distributive ledger, so there is no bank on whom to serve. However, it appears that a WFO can be served on coin exchanges. This was the case in **Robertson**, where it was served on Coinbase UK Limited. As for enforcement, cryptocurrencies cannot be enforced by way of charging order, third party debt order, attachment of earnings, or through bailiffs. However, our view is that they could be enforced by way of an equitable execution receiver

11. Practical questions also arise as to the form of disclosure that should be sought. The standard form WFO requires a Respondent to give the "*value, location and details of all such assets*", but this presents problems for cryptocurrencies. The nature of distributive ledger technology is that cryptocurrencies are not located in one place. Our view is that a WFO over cryptocurrency should ask for details of **(1)** the number of coins held; **(2)** the account in which the coins are held; **(3)** the transaction code/hash by which the coins were acquired; **(4)** how the coins are held (i.e. whether through a coin exchange or other third party); **(5)** if anyone else has the private key to the coins. However, the prospects of obtaining an order for disclosure of the private key would be very low as it would be akin to an order to disclose a PIN code.

12. An applicant will also need to give serious consideration to its cross-undertaking in damages. Cryptocurrencies are notoriously volatile, and the undertaking in damages may therefore expose an applicant to a substantial liability in the event that the injunction was wrongly granted. Defendants may want to apply for fortification of the undertaking in order to properly protect their position.

HOW TO TRACE CRYPTOCURRENCIES?

13. Tracing cryptocurrencies should be possible given the supposedly transparent nature of the systems involved. The permissionless blockchain system means that anyone can get a copy of every transaction of that particular cryptocurrency ever by downloading the blockchain. Because the blockchain is big, it would actually be inadvisable to download it in its entirety, but there are "block explorers" by which you can obtain information about cryptocurrency addresses and transactions. For example, Bitref.com notes that:

> *BitRef will help you view the current balance of any Bitcoin address. You need only a device with the Internet and a valid Bitcoin address string. This is a safe service because it uses only public data; there is no need for login and password. The tool shows the last 50 transactions for every address (or combination of addresses). It shows the date, amount and current balance for every transaction. You can also check the number of confirmations by keeping the mouse pointer over each transaction.*

14. This means that applicant should be able to trace cryptocurrencies from one address to another in permissionless systems, although the position will of course be different in permissioned ones.

15. There is also the further legal question as to which law governs the tracing exercise. It would be difficult to use the *lex situs*, because cryptocurrencies are maintained on the decentralized ledger. Perhaps it would be the *lex fori*, on the basis that tracing is a process. Alternatively, it could be the law of the underlying transaction, or the law governing the underlying fiduciary relation that allows you to trace. The Financial Markets Law Committee has suggested that the "*elective situs should be the starting point for any analysis of a conflicts of law approach to virtual tokens*". The "*elective situs*" is the system of law chosen by network participants of the DLT system, provision for which could be included in the terms of accession to the system.[2] The Legal Statement was more equivocal on this point. It noted that "*It is very difficult to say which rules would be used*", and instead that the issue would need to be resolved by legislation.

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November 2019

[2] Financial Markets Law Committee, FinTech: Issues of Legal Complexity, June 2018, pp.75