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The Approach of the Irish Courts to Cryptocurrency and What Lies Ahead: Part 1

Over the past decade the world has seen the influence of cryptocurrencies such as Bitcoin and Ethereum grow year on year. In line with this, Irish investment in cryptocurrency has increased, with a significant amount of the Irish population, owning, or having previously owned some form of cryptocurrency.

As a result, litigation involving cryptocurrencies is increasing. We look, in this first article of a four-part series, at the way in which the Irish High Court has handled such cases to date by adapting traditional legal remedies, such as injunctions and disclosure orders, to assist cryptocurrency holders who are seeking to recover stolen cryptocurrency.

Freezing Cryptocurrency

In *Trafalgar Developments Limited v Mazepin [2019] IEHC 7*, the Commercial Court granted judgment in default of appearance against two defendants in a dispute relating to an alleged corporate *"raider attack"* of a Russian company with the intent of wrongfully divesting the plaintiffs of their shares in the company. The company in question is reported to be one of the largest producers of ammonia in Russia.

As the court feared that there was a significant risk of the defendants dissipating their assets in frustration of the judgment, it granted a worldwide *Mareva-type* injunction, freezing their assets. Importantly, this order extended to include the defendants' cryptocurrency wallets.

The court also granted ancillary disclosure orders requiring the defendants to disclose on affidavit all cryptocurrency wallets in which they had a direct or indirect legal or beneficial interest.

It is clear from the decision to grant these freezing and disclosure orders that the court is willing to include crypto-assets within the domain of these reliefs. For further information on any of the issues discussed in this article please contact:



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This approach is consistent with that of the courts of England and Wales, which have also granted similar reliefs. In doing so, they expressly recognised cryptocurrencies as property.

Cryptocurrency recognised as Property?

In AA v Persons Unknown & Ors, Re Bitcoin [2019] EWHC 3556 (Comm), a pharmaceutical company's computer system was hacked and encrypted. The unknown hacker demanded \$1.2 million in Bitcoin in exchange for the decryption software. After the pharmaceutical company paid the ransom, its insurance company took steps to recover the money. Various proceedings were issued, including proceedings seeking a proprietary injunction over the Bitcoin, which had been traced to a particular Bitcoin wallet. As proprietary injunctions can only be granted over property, the court had to consider whether Bitcoin constitutes property.

The English High Court found that crypto-assets satisfy the four classic criteria of property as established by Lord Wilberforce in *National Provincial Bank v Ainsworth* [1965] 1 AC 1175, i.e., that they are definable, identifiable by third parties, capable in their nature of assumption by third parties, and have some degree of permanence. Having accepted that crypto-assets constituted property and that all other requirements for a proprietary injunction had been met, the court granted the injunction.

The above position in the UK is further supported by the publication of a <u>legal statement</u> in 2019 by the UK Jurisdiction Taskforce of the LawTech Delivery Panel, which recognised that crypto-assets have *"all of the indicia of property"*. The fact that crypto-assets are intangible, use cryptographic authentication and distributed transaction ledgers, are decentralised, and operate on the basis of rules by consensus as opposed to legal rules, does not *"disqualify them from being property"*, with the statement concluding that crypto-assets *"are, as a matter of English legal principle to be treated as property"*.

Conclusion

The significance of cryptocurrency being recognised as property is that it provides scope for traditional legal and equitable remedies, typically used for asset-tracing and recovery purposes, to be availed of in the context of misappropriated crypto-assets. Possibilities include orders for the recovery of stolen crypto-assets from criminal offenders and the utilisation of tracing facilities to assist with the identification and retrieval of crypto-assets using various equitable remedies, such as constructive trusts and equitable charges.

As such, a recognition of cryptocurrency as property may serve to provide a degree of protection for cryptocurrency investors and strengthen its use in the financial services market.

It remains to be seen whether the Irish courts will follow suit in expressly recognising cryptocurrency as property, however, their decisions to date, some more of which are discussed in future articles in this series, lead us to believe that this is a real possibility.

If you require advice in relation to the matters covered in this article, please contact a member of our Commercial Litigation Team.

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