

Insights

CATCH ME IF YOU CAN: HOW THE ENGLISH COURTS ARE ADAPTING TO REMAIN AN EFFECTIVE JURISDICTION TO COMBAT CRYPTO FRAUD

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SUMMARY

The English courts have sought to lead the way in adjudicating crypto-related disputes and other technological matters in an international context. Recent decisions have demonstrated the English courts' willingness to assist victims of crypto theft, and the ability of the English legal system to adapt in order to remain an effective jurisdiction for cases involving crypto fraud.

In particular, recent decisions have established that:

1. Software developers may owe a **fiduciary duty** to owners of crypto;
2. **New jurisdictional gateways** are effective to expand the English courts' jurisdiction to allow claimants to secure information orders against non-parties based overseas; and
3. **Service out** of the jurisdiction may be permitted where there is a theft of crypto assets originally located in England but subsequently transferred abroad.

HOW THE COURTS HAVE BEEN APPROACHING THINGS

The Court of Appeal recently decided that there was a serious issue to be tried as to whether software developers owe a fiduciary duty to owners of crypto where the owner of billions of dollars worth of bitcoin lost its private keys through a hack. Significantly, the Court of Appeal conceded that such an extension to the concept of fiduciary duties would be a significant and not just an incremental development of the law but took the view that where circumstances change so significantly, the law cannot stand still. The question now is whether the developers will let this go to trial with the risk of a precedent being set.

The Commercial Court is also playing its part. It has readily employed new service gateway 25 to facilitate service of a claimant's application for information orders out of the jurisdiction. A crypto

currency exchange was hacked and millions of dollars worth of cryptocurrency transferred from its systems. A limited number of recipient addresses could be identified which were operated by other cryptocurrency exchanges. The claimant sought an order against the defendant exchanges requiring them to disclose information which would assist it to further trace the cryptocurrency: permission to serve out of the jurisdiction was required and sought.

The court was satisfied that there was a serious issue to be tried on the merits and a good arguable case that the claim fell within the new gateway allowing service out of applications or claims seeking the true identity of a defendant or potential defendant or what has become of the property of the claimant or applicant. This is the first time that the English courts have used the new gateway, introduced in October 2022, for the purpose of assisting claimants in these circumstances and preventing the need for victims of fraud (but particularly crypto fraud) to make speculative (likely expensive and certainly uncertain) applications in different jurisdictions to seek to try to locate, preserve and recover stolen assets.

The High Court has also recently considered the question of whether the claimant could serve a claim form and other documents out of jurisdiction on persons unknown in the case of a crypto-fraud. The defendants were those in possession or control of NFTs which were misappropriated from the English-domiciled claimant and then transferred through a number of wallets after their misappropriation.

The focus of the judgment was on jurisdiction. In circumstances where the claimant did not know either the identity or the location of the person(s) possessing or controlling the NFTs, jurisdiction could only be established by service of the claim form out of the jurisdiction on persons unknown. The judge was satisfied that (1) there was a serious issue to be tried and (2) that the English courts were the most appropriate forum for the dispute; however, the question as to whether there was a good arguable case that the claim fell within one of the gateways was less straightforward.

The claimant's primary submission was that two NFTs constituted property or assets located in the jurisdiction because the claimant was domiciled in the jurisdiction, and therefore gateways (11) and (15)(b) applied.

Regarding gateway 11, the judge considered that there was a good arguable case that the NFTs were within the jurisdiction when they were held in the claimant's wallet, on the basis that the claimant herself was in the jurisdiction, so that the subject-matter of the claim related wholly or principally to property within the jurisdiction. However, the NFTs had since been transferred multiple times, and it could not be assumed that these transfers took place within the jurisdiction. Accordingly, gateway 11 did not apply.

The court was still however able to come to the victim's aid. When considering gateway 15 (applicable where a claim is made against a defendant as a constructive trustee where the claim arose out of acts committed within the jurisdiction, related to assets within the jurisdiction or was

governed by English law), the judge considered that it was '*strongly arguable*' that a trust arose when the original hackers transferred the NFTs out of the claimant's wallet. At that point, the property was within the jurisdiction, and as such was governed by English law. Consequently, the question of whether persons unknown became constructive trustees when they received the NFTs was governed by English law (even though the recipients were out of the jurisdiction and even though the transfers to them may have been made out of the jurisdiction). Gateway 15 therefore applied.

Accordingly, even when subsequent acts complained of occur outside the jurisdiction, the courts have continued to think outside the box to assist victims, here employing the constructive trust to establish the basis for asserting the jurisdiction of the English courts over the entirety of the alleged fraud.

WHERE ARE WE?

We are of course at the beginning of what will inevitably be a substantial body of law surrounding such things as cryptocurrency, blockchain and digital contracts. These cases are however early evidence of the flexible and dynamic ways in which the English courts can and will apply the law to assist victims of fraud in the worlds of cryptocurrency and blockchain.

This is clearly an area where lawyers practising civil fraud need to be equally versatile in the questions they ask of the English courts to aid the victims of crypto fraud. A space to watch!

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