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Get-rich-quick scams are nothing new; where there is money to be made, there are bad actors seeking to take advantage of others for personal gain. Research published by Chainalysis states that throughout 2021, USD\$3.2 billion in cryptocurrency was stolen from investors; 516% more than 2020¹. Lawyers and accountants are increasingly approached by investors who have fallen victim to these frauds.

At first glance the characteristics of crypto-related fraud appear unique, particularly in an industry laden with jargon and buzzwords. In reality, crypto-related fraud often resembles traditional investment scams, such as Ponzi schemes, where large volumes of investors lacking an understanding of the investment place a high degree of trust in the advice of bad actors.



The fallout

In the absence of third-party funding, particularly for lower-value claims, many victims of fraud have insufficient

resources to fund professionals to recover or mitigate their loss, and the costs of recovery greatly exceed the value of their loss. The vulnerability of individual victims in this space, and their desire for redress, is something that regulators and courts worldwide continue to grapple with.

An existing remedy that is only relatively recently being used to combat fraud in this space is the power to wind up companies in the public interest.



Public interest winding ups

The Insolvency Act 1986 grants the Secretary of State (SoS) the power to present a winding up petition because it is expedient in the public interest to do so².

It is not just the SoS that can present a petition, despite being neither a director nor creditor of the company.

New powers contained in the Finance Act 2022 allow HMRC to wind up companies promoting tax avoidance schemes³. The Financial Conduct Authority (FCA) too has the power to present a petition to court for the winding up of a company⁴. The FCA can petition for the winding up of a company if it is carrying on a regulated activity without the authority to do so.

Where a company may be operating an investment scam, and the FCA considers it constitutes regulated activity, the FCA may seek a winding up order having considered all the circumstances. Dubious investment companies are often subject to public interest petitions.

Some examples include:

- A wine investment company which took in millions from investors using only a fraction to buy wine;
- A property investment company which took millions from investors and used most of it to pay its directors;
- Art investment companies which fraudulently took more than £500,000 from investors;
- Companies which took in more than £25 million from investors for parking spaces.

The SoS has recently made use of this power against two companies

1 Chainalysis, (6 January 2022), 'Crypto Crime Trends for 2022: Illicit Transaction Activity Reaches All-Time High in Value, All-Time Low in Share of All Cryptocurrency Activity', Chainalysis website, accessed on 27 October 2022, available at <https://blog.chainalysis.com/reports/2022-crypto-crime-report-introduction/>

2 s.124A Insolvency Act 1986.

3 s.85 Finance Act 2022.

4 s.367 Financial Services and Markets Act 2000.

involved in the misuse of Bounce Back Loans and unexplained large payments suspected of being connected to cryptocurrency scams⁵.



What can victims do?

Both Action Fraud and the FCA have issued warnings to consumers about the rising number of cryptoassets investment scams.

Victims of such scams can complain to the SoS, with such complaints then being reviewed by the Insolvency Service's Companies Investigations (CI) department. CI is responsible for investigating companies and their directors, and whether they are, or have been in the past, trading contrary to the public interest. If CI decides to investigate further, it may appoint an inspector. The court may also make such an order⁶.

There are wide powers available to the Insolvency Service and its inspectors and investigators, such as:

- The power to direct the company, or any other person, to produce information or documents⁷; and
- The power to enter and remain at premises believed to be used (whether wholly or in part) for company business⁸. It is an offence for a person to intentionally obstruct an inspector or investigator exercising this power⁹.

The inspector will then report on the company's affairs. Based on the inspector's report, the Insolvency Service may petition for a winding up on the grounds of public interest¹⁰. This is one of several ways in which the Insolvency Service may commence such proceedings.

Before a court will make such an order, it must be satisfied it is just and equitable to wind the company up. The onus is on the SoS to persuade the court as such¹¹. If so satisfied, the court will make the order, appointing the Official Receiver (OR) as Liquidator to seek to recover and realise the assets of the company for the benefit of its creditors.

It is not necessary for the company's business to involve illegality. The company can still be wound up if its business is 'inherently objectionable' because its activities are contrary to a clearly identified public interest.

An example of this is where a legitimate company trades at the expense of HMRC by failing to pay VAT or PAYE.

Where there is a clear case of a company's business engaging in a scheme to deliberately defraud customers, the court will usually not hesitate in making a winding up order, even if the company discontinued its offending activity once it came under scrutiny¹².

Furthermore, the court has power to wind-up such a company even if it is a foreign, unregistered one, provided it has a real or sufficient connection with England¹³. This 'connection' is typically characterised by the company carrying on its business in England and/or marketing and selling its goods or services to members of the public in England.

In circumstances where specific skills are required, the OR will consider a private sector appointment. Creditors are also able to requisition the appointment of a private sector insolvency practitioner if specific criteria are met. The nature of cryptoassets mean these scams are not restricted

by physical boundaries: they are multi-jurisdictional and dissipation or movement of assets is a real risk. There is therefore a key role for those in the private sector who possess the necessary skills, resource and training to pursue bad actors in this space.



Conclusion

These are welcome developments in the ongoing efforts of regulators to combat fraud in this space. With HMRC, the SoS and the FCA all having public interest wind up capabilities, we expect to see more activity in this area in 2023.

Indeed, as we write this article, the Insolvency Service has publicised the public interest winding up of a company promising investors returns of up to 200% on cryptocurrency investments¹⁴.



5 UK Government, 26 August 2022, 'Suspected cryptocurrency scam company shut down', UK Government website, accessed on 27 October 2022, available at: <https://www.gov.uk/government/news/suspected-cryptocurrency-scam-company-shut-down>

6 ss.432(1)-(2) Companies Act 1985

7 s.447(2)-(3) Companies Act 1985.

8 s.453A Companies Act 1985

9 s.453A(5) Companies Act 1985

10 s.124A(1)(a) Insolvency Act 1986

11 Secretary of State for Business, Innovation and Skills v PAG Management Services Ltd [2015] EWHC 2404 (Ch) at 5c per Norris J

12 Secretary of State for Business, Innovation and Skills v PGMRS Limited [2010] EWHC 2864

13 Re Titan International Inc. [1998] 1 BCLC 102 at 107 per Gibson LJ

14 UK Government, 27 October 2022, 'Cryptocurrency trading firm shut down after scamming investors', UK Government Website, accessed on 29 October 2022, available at: <https://www.gov.uk/government/news/cryptocurrency-trading-firm-shut-down-after-scamming-investors>