

# REMEDIES AVAILABLE IN CAYMAN FOR VICTIMS OF CRYPTOCURRENCY FRAUD



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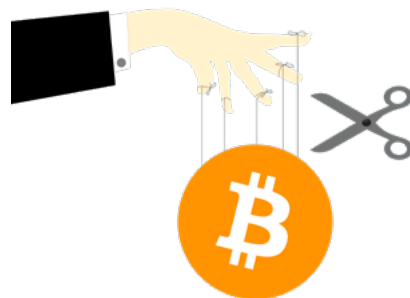
Cryptocurrencies, non-fungible tokens (“NFTs”), and utility tokens (collectively referred to as a “crypto asset” or “crypto assets”) remain widely held and retain significant value, despite the recent volatility in cryptocurrency markets. It is anticipated that the use and management of digital assets will only continue to rise. In fact, some countries and businesses are now accepting payment of goods and services in cryptocurrency, in some cases as a means of withstanding the current inflationary period. However, the nature of crypto assets makes them attractive for fraudulent and other unlawful uses because they can be held and transferred anonymously. As the use of crypto assets becomes more mainstream, it is inevitable that crypto asset crimes and related litigation will increase<sup>1</sup>.

The Cayman Islands court are well equipped to address crypto asset related claims. There are several traditional litigation tools available in the Cayman Islands court to claimants of crypto asset

crimes and the courts are commercially attuned and willing to adapt the mechanisms available to combat fraud and enhance asset tracing. However, whilst there is existing legislative framework pertaining to the conduct of virtual assets business and the registration of persons providing virtual asset services<sup>2</sup> in the Cayman Islands, the body of local case authorities relating to crypto assets is developing.

Fortunately, an advantage of the legal system in the Cayman Islands is that it is based on the English common law on the doctrine of precedent, with the Judicial Committee of the Privy Council (“Privy Council”) in the United Kingdom as the highest court of appeal. In recent years the English courts have considered some key and novel legal issues relating to cryptocurrencies. In the absence of relevant Cayman Islands binding authority, a Cayman Islands court will treat relevant decisions of the superior courts of record of England and Wales, and decisions of the Privy Council, as persuasive authority.

***As such, when considering applications relating to crypto assets, it is anticipated that the Cayman court will take the same pragmatic and sensible approach taken in England and Wales.***



The Cayman Islands court may be willing to grant restraint and freezing orders relating to crypto assets, including in aid of foreign proceedings.

<sup>1</sup> American blockchain analysis firm, Chainalysis, reported that as of 12 October 2022, the year 2022 was likely to be a record year for crypto hacks with the total value hacked exceeding US\$3 billion.

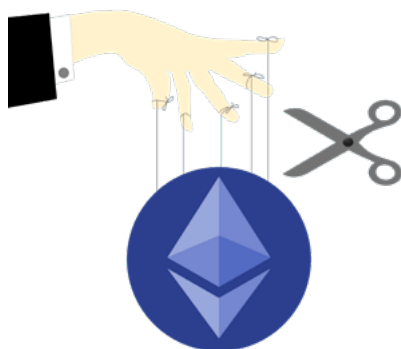
<sup>2</sup> Virtual Asset (Service Providers) Act (2022 Revision).

Worldwide freezing orders and proprietary injunctive relief against unknown fraudsters are also available. A claimant may apply for a freezing order in respect of cryptocurrency for the purpose of enforcing a judgment obtained against a defendant and it may be appropriate in some circumstances to grant a preservation order to obtain information about what assets were held, how, and where, so that claimants could decide what steps are to be taken to enforce the judgment in complicated circumstances. This is of particular assistance in claims involving crypto assets because the assets are intangible, and the field is unregulated.

Traditionally, property could not be a chose in possession or a chose in action. However, as found in the legal statement on crypto assets and smart contracts published by the UK Jurisdictional Task Force, while a crypto asset might not be a thing in action on a narrow definition of the term, that does not mean it could not be treated as property. Crypto assets are property - they are definable, identifiable by third parties, capable of assumption by third parties and have some degree of permanence (*AA v Persons Unknown* [2019] EWHC 3556 (Comm)).

To satisfy the Cayman court that it is appropriate to grant an injunction restraining the dissipation of crypto assets, the claimant must show there is a serious issue to be tried as between the claimant and persons unknown, damages would not be an adequate remedy for the claimant, and the claimant can readily provide a cross-undertaking to meet any potential liability. Additionally, the balance of

convenience must favour the granting of an injunction in that there must be a real risk that the crypto asset would be transferred in a way that would make it practically very difficult or even impossible to be traced and retrieved.



It may also be possible to serve proceedings out of the jurisdiction to the extent that the persons unknown are out of the jurisdiction. Again, it must be shown that there is a serious issue to be tried between the claimant and the persons unknown; the cause of action available to the claimant passed through one of the gateways provide in Order 11 rule 1(1) in the Cayman Islands Grand Court Rules 1995 ("GCR"); and the property obtained by fraud was impressed with a constructive trust (crypto assets removed from a claimants account are effectively held by the persons unknown on a constructive trust). It must also be shown that on balance, the Cayman Islands is the appropriate forum for the claim.

The Cayman court may also find it appropriate to direct service by alternative means including service via the transfer of a NFT on the blockchain<sup>3</sup>.

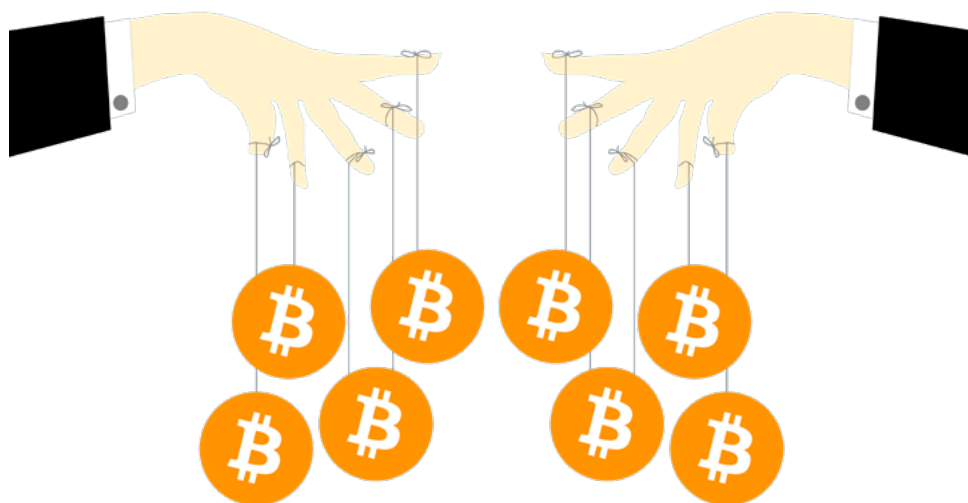
For example, where a claimant alleges that persons unknown have stolen NFTs from his crypto asset account, the court may find it appropriate to grant an injunction to be served outside the jurisdiction by alternative means, to restrain the dissipation of the NFTs. In *D'Aloia v Binance Holdings & Others* [2022] EWHC 1723 (Ch), a case involving a claim for fraudulent misappropriation of cryptocurrency, the English court permitted service by airdrop of documents into the digital wallets in respect of which the claimant had transferred the cryptocurrency, thereby embedding service in the blockchain and making it more likely that the defendants would be put on notice of the proceedings.

Bankers Trust and Norwich Pharmacal Orders may also be available, enabling claimants to trace or identify the persons unknown who control the accounts to which the NFTs have been transferred and to receive information from third parties, including cryptocurrency exchanges and entities located outside or within the Cayman Islands<sup>4</sup>.

### ***The Cayman Islands court is likely to take a pragmatic and adaptable approach to claims involving crypto assets.***

Victims will have at their disposal an arsenal of powerful tools to gather vital information to facilitate claims against wrongdoers relating to crypto asset fraud schemes and other offenses including rug-pulls, Ponzi schemes and crypto hacks. The Cayman Islands court regularly hears complex and multijurisdictional disputes and will be adaptable to the needs of litigants of crypto asset related fraud, including assisting foreign crypto asset recovery efforts.

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<sup>3</sup> In *The Matter of Bridge Global Absolute Return Fund (SPC)* (FSD 51 of 2022 (IKJ)) (Unreported, 10 May 2022), the Cayman court demonstrated its pragmatic approach to procedural issues such as substituted service and service out of the jurisdiction. In granting an order for substituted service by email, the Cayman court reiterated the findings of *Mangatal J in Bush v. Baines* that "The purpose of service of proceedings is to bring the proceedings to the notice of the defendant. It is not about playing technical games..."

<sup>4</sup> In *Mr Dollar Bill Limited v Persons Unknown* [2021] EWHC 2718 the English court granted Bankers Trust and Norwich Pharmacal orders requiring cryptocurrency exchanges located outside of England and Wales to assist in determining what happened to the claimant's Bitcoin.