

THE CONTINUING EXPANSE OF CRYPTO LAWS



SERVICE BY NFT AIRDROP AND CONSTRUCTIVE TRUST CLAIMS AGAINST CRYPTO EXCHANGES

Authored by: Simon Jerrum and Tom Serafin - HFW

The English Court has recently, for the first time, allowed a claimant to serve proceedings out of the jurisdiction by “airdropping” a non-fungible token (NFT) on the blockchain.¹ The Court also held that the claimant had a good arguable case for a claim in constructive trust against the crypto exchanges that held or controlled the digital wallets into which the misappropriated cryptocurrency was transferred.

D’Aloia v Persons Unknown & Ors

Fabrizio D’Aloia, a successful gaming application developer, was induced into transferring 2.1 million USDT and 230,000 USDC to persons unknown operating a sham online brokerage platform, believing it to be genuine. The cryptocurrency was transferred to two digital wallets over the course of five months. However, when Mr D’Aloia submitted a withdrawal request, his account was blocked. He then exchanged communications with a certain email address to seek to unblock his account, but the result of these communications was that Mr D’Aloia was again induced into making further deposits to the wallets. Some months later, with his account recording a value of zero, it became apparent to Mr D’Aloia

that he had been a victim of fraud. He therefore engaged experts to trace his misappropriated cryptocurrency, who established that some of the cryptocurrency had been transferred to several private wallets controlled by various crypto asset exchanges.



The Issues

Mr D’Aloia issued an ex parte application for urgent interim injunctive relief, disclosure and ancillary orders against both the persons unknown (to whom the cryptocurrency was initially transferred) and also the exchanges in control of the digital wallets to which his cryptocurrency was subsequently transferred.

The claim against persons unknown was founded on fraudulent misrepresentation and deceit, unlawful means conspiracy, unjust enrichment and constructive trust. The claim against the exchanges was premised on constructive trust (i.e. that the exchanges held the assets in the digital wallets on behalf of Mr D’Aloia as beneficiary).

Mr D’Aloia, having no knowledge as to the real identities or whereabouts of the alleged fraudsters, sought to have the proceedings served on the persons unknown by email and also by NFT airdrop into the digital wallets into which he had initially transferred his cryptocurrency. Mr D’Aloia also sought to have the exchanges served by email.

Decision

Mr Justice Trower held that the causes of action advanced by the claimant against persons unknown gave rise to a “serious issue to be tried” so as to permit service out of the jurisdiction. The learned Judge also highlighted that the misrepresentations made to Mr D’Aloia were made in England (where he resided) and there was a good arguable case that the misappropriated cryptocurrency was an English asset

¹ D’Aloia v Persons Unknown & Ors [2022] EWHC 1723 (Ch).



because of previous authority to the effect that the *lex situs* of a crypto asset is the place where the person who owns it is domiciled.² The court was also satisfied that there was a sufficient connection with England and that there were applicable gateways under Practice Direction 6B of the Civil Procedure Rules to justify the granting of permission to serve out of the jurisdiction.

The Court therefore permitted service to be effected out of the jurisdiction. The Court granted permission for the claimant to serve the claim both by email and, in the case of persons unknown, also by way of an NFT “airdrop” into the digital wallets concerned. This is the first time such a form of alternative service was permitted by the English Court, although it has previously been permitted in the United States.

Trower J also held there was a good arguable case that the exchanges in control of the digital wallets to which Mr D’Aloia’s cryptocurrency was transferred held those assets as constructive trustees for and on behalf of Mr D’Aloia.

As to the question of whether the Court should grant the injunctive relief sought (i.e. a freezing injunction in respect of crypto assets held in the wallets) Trower J considered that damages would not be an adequate remedy. He had already held that there was a serious issue to be tried, and the balance of convenience was held to fall firmly in favour of Mr D’Aloia obtaining the relief sought.

The Court also granted the disclosure orders sought pursuant to the Bankers Trust jurisdiction on the basis there were good grounds that the cryptocurrency held in the relevant wallets belonged to Mr D’Aloia and there was a real prospect the information sought would lead to the identification of the persons unknown. The relief sought was no wider than necessary, and the balance of interests between Mr D’Aloia and the exchanges fell in favour of Mr D’Aloia in circumstances where he would pay the exchanges’ reasonable costs that

would be incurred in their providing the information sought. The balance was in favour of Mr D’Aloia notwithstanding the duties of confidentiality that may be owed to third parties by the exchanges.

Key Takeaways

Whilst the judgment in this case followed an *ex parte* hearing, the decision is significant for several reasons.

First, it illustrates the English Courts’ increased willingness to adapt the existing law to achieve practical solutions for claimants facing service out issues.

However, it should be noted that Trower J also ordered service by email, and indicated he would have been unwilling to order service by NFT alone. It remains to be seen whether this will be permitted in future where no email address is available. It may be that this is also restricted to cases concerning crypto assets, unless it can be shown that service in this way would bring the claim to the attention of the applicable defendant.

Second, it gives judicial support to a constructive trust claim against the crypto exchanges themselves (in a similar way to a claim against a bank which might hold misappropriated funds on constructive trust).

For exchanges this means taking information requests seriously and putting in place mechanisms to ring-fence misappropriated assets to avoid dissipation and the risk of being found liable for breach of trust. It also means that exchanges are far more likely to respond to requests by potential claimants for assistance in providing information about accounts involved in potential frauds.

Finally, it illustrates the importance of acting quickly.

The Court relied heavily on Mr D’Aloia’s expert report to satisfy itself that his cryptocurrency was capable of being traced and that the exchanges had control over the digital wallets containing it. By acting quickly, Mr D’Aloia was also more likely to be able to trace the currency and determine where it was being held, and therefore obtain tangible relief in the form of a freezing order over the relevant cryptocurrency.

L



2 Following *Ion Science Limited & Duncan John v Persons Unknown, Binance Holdings Limited, Payment Ventures Limited* (unreported) [2020] (Comm).