

# Cryptoassets and fraud – remedies available from English courts

England and Wales · 24.06.2021

In *ION Science Ltd v Persons Unknown and others*<sup>[1]</sup>, the English Commercial Court added to a string of recent judgments which offer effective remedies for dealing with frauds and thefts related to cryptoassets. The judgment further reinforces that cryptoassets can be treated as “property” under English law and is a good example of remedies available but there is a need to act swiftly in the face of adversity.

The case involved an alleged initial coin offering (“ICO”) fraud in which the alleged perpetrators were persons unknown to the applicants. The Commercial Court granted the applicants a proprietary injunction, a Worldwide Freezing order (“WFO”) and ancillary disclosure against persons unknown, and for the first time provided guidance as to the “*lex situs*” of cryptoassets. Further, the applicants were granted a Bankers Trust order (“BTO”), which could be served out of the jurisdiction on two cryptocurrency exchanges and used to obtain confidential information from the crypto-exchanges.

The decision appears to recognise the difficulties for victims of cryptocurrency fraud in recovering their stolen or misappropriated assets. It is also an example of how English case law is evolving to tackle the inevitable increase in cryptocurrency fraud in light of its booming popularity and limited global regulation.

## Background to the decision

The applicants alleged that they had been induced by the first respondent, who were person(s) unknown to the applicants (the “First Respondent”) to make an investment of £577,002 which equated at the time to 64.35 bitcoin, in two ICOs. An ICO is a method of raising funds through investments in exchange for cryptocurrency or tokens, akin to an initial public offering (“IPO”).

The applicants also alleged that they had been fraudulently induced to pay additional funds by the First Respondent in the form of commission payments to receive alleged profits from the initial investment which were never received.

When perpetrating the said fraud, the First Respondent described themselves as being connected to a supposed Swiss entity called Neo Capital. The applicants alleged that Neo Capital did not exist as a company and that they had been contacted by the Swiss authorities who had cautioned them that Neo Capital had been operating without authorisation from the Swiss regulators. Through expert evidence, it transpired that a significant amount of the applicant’s cryptoassets had been transferred to two cryptocurrency exchanges.

In an attempt to recover their allegedly stolen assets and to uncover the identity of the First Respondent, the applicants sought the following relief from the court in an urgent *ex parte* application:

1. A propriety injunction, a WFO and ancillary disclosure against persons unknown (i.e. the First Respondent).
2. An order for disclosure against the cryptocurrency exchanges out of the jurisdiction in the form of a BTO and/or pursuant to 25.1(g) of the Civil Procedure Rules (“CPR”).
3. Permission from the court for serving out of the jurisdiction.

The court granted the applicants each of the orders sought. The decision is significant in the battle against cryptocurrency fraud in a number of aspects.

## Cryptocurrency as “property”

The Commercial Court held that there was a serious issue to be tried that cryptocurrency could be treated as “property” under English law. This follows the position taken in recent English cases and, most notably, in the case of *AA v Persons Unknown*<sup>[2]</sup> (commented on [here](#)). This case followed guidance set out by the UK Jurisdiction Task Force in its ‘Legal Statement on Cryptoassets and Smart Contracts’, and held that “a crypto asset such as Bitcoin are property”, such that they are capable of being the subject of an injunction (which effectively restricts a defendant from any dealings with the assets specified in the injunction order). Please also see [here](#) for our previous LawNow

on injunctions and cryptocurrencies.

## Orders against persons unknown and lex situs of cryptocurrency

Before the court granted the applicants orders against persons unknown (i.e. against the First Respondent), it first had to consider whether the orders could be served out of the jurisdiction, as the First Respondent could be domiciled outside of England.

The court granted the applicants permission to serve out of the jurisdiction on the basis that the necessary tests had been met. Notably, the court considered that there was a serious issue to be tried that English law applied to the applicants' claim on the basis that England was where the damage had occurred. In coming to its decision, the court considered that the *lex situs* of cryptocurrency was where the person or company who owns the assets is located. As there is no decided authority on this point, the court followed the legal commentary in this regard set out by Professor Andrew Dickinson in 'Cryptocurrencies in Public and Private Law.'<sup>[3]</sup>

Once jurisdiction had been established, the court proceeded to grant the applicants a proprietary injunction against the First Respondent, again being satisfied that the necessary tests had been met. Namely, it was found that there was a serious issue to be tried, that the balance of convenience was in favour of granting the proprietary injunction given that there was a *prima facie* case of wrongdoing and that it was just and convenient to do so on the basis that it did appear that the applicants had been victims of a significant fraud.

The court also granted the applicants a WFO and an ancillary disclosure order against persons unknown, on the basis it had jurisdiction and that there was a serious issue to be tried. Further, the court found that there was a real risk that the assets (i.e. the cryptocurrency which had been transferred to the cryptocurrency exchanges) could be easily dissipated on the facts of this case.

## Banker's Trust Order

The applicants were also granted a BTO to obtain disclosure from two cryptocurrency exchanges located out of the jurisdiction, in the US and the Cayman Islands. A BTO is an order which can be made against a bank or other organisation where there is a clear-cut case of fraud and where it is likely to assist with tracing the stolen assets. It helps with obtaining confidential information that can assist with uncovering the identity of the fraudsters and/or location of the assets.

The BTO was sought on the basis that the cryptocurrency exchanges had processed the transfer of the cryptoassets and as a mechanism to find out who the alleged fraudsters were and the location of the alleged stolen assets. The court granted the BTO on the basis that it was satisfied that the cryptoassets belonged to the applicants and that there was a real prospect that the order could help obtain information which could assist with their recovery.

Further, the court permitted the applicants to serve the BTO on the cryptocurrency exchanges out of the jurisdiction, on the basis that the cryptoassets could be easily dissipated and that relief is often needed urgently for applicants in a proprietary claim in order to protect their proprietary rights.

This decision could be significant in assisting victims of cryptocurrency fraud with recovering stolen assets in the future, but it will continue to be important to act swiftly.

## Further guidance on injunctions against persons unknown

Further clarity on the granting of proprietary injunctions against persons unknown was provided by the High Court in the case of *London Borough of Barking and Dagenham v Persons Unknown*<sup>[4]</sup>, which will be significant for cases involving cryptocurrency fraud, as the perpetrator's identity will often be unknown and victims will be seeking injunctions against unknown defendants.

The court in *London Borough of Barking and Dagenham* considered various issues which had arisen where local authorities had been granted injunctions against persons unknown to prevent travelling communities from occupying areas and breaching planning permission. The court took the opportunity to provide guidance for applicants of injunctions against persons unknown and set out the "safeguards" that should be followed. It was also made clear by the court in all claims against persons unknown that the principles in the leading case of *Canada Goose UK Retail Ltd and another v Persons unknown*<sup>[5]</sup> apply.

The key "safeguards" as outlined by the court included:

- that the "persons unknown" must be described with sufficient certainty to identify who the defendants are

and by reference to the unlawful conduct;

- that the “persons unknown” must be people who have not been identified at the time when the proceedings are commenced and must be people who have not been identified but are capable of being identified; and
- any application for permission to serve a claim on “persons unknown” must show that the proposed method of service could reasonably be expected to bring the proceedings to the attention to all of those “persons unknown”.

## Looking to the future

The decision in *ION Science Ltd v Persons Unknown and others* could be an important step forward for victims of cryptocurrency fraud.

Not only did the court consider that cryptoassets are “property” and capable of being subject to a proprietary injunction, the court also gave guidance as to the *lex situs* of cryptoassets and made available effective remedies from the English court in order to assist recovery of cryptoassets.

---

[<sup>1</sup>] (unreported, 21 December 2020).

[<sup>2</sup>] [2019] EWHC 3556.

[<sup>3</sup>] David Fox and Sarah Green, ‘Cryptocurrencies in Public and Private Law.’ (OUP Oxford, 2019).

[<sup>4</sup>] [2021] EWHC 1201 (QB).

[<sup>5</sup>] [2020] EWCA Civ 303.

## KEY CONTACTS

---



**Kushal Gandhi**

Partner, London  
Solicitor Advocate



**Vanessa Whitman**

Partner, London  
Solicitor Advocate



**Sophie Gallacher**

Associate, London

