

Cryptocurrency – Is It Property? (Part IV)

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In the recent case of *AA v Persons Unknown* [2019] EWHC 3556, the Commercial Court adopted the analysis of the UK Jurisdiction Taskforce (Taskforce) on the proprietary status of cryptocurrency. Whilst not the first decision to consider the proprietary status of cryptoassets, it is noteworthy as the first judicial endorsement of the Taskforce's conclusions. Agreeing with the Taskforce, the Court held that cryptocurrency constitutes property under English law and can be the subject of a proprietary injunction. The Court granted an injunction to assist in the recovery of Bitcoin that had been paid to satisfy a malware ransom demand.

Facts

In October 2019, a Canadian insurer (CI) was the victim of a malware ransom demand; the insurer's systems were encrypted by hackers who demanded the equivalent of US\$ 1.2m in Bitcoin in exchange for the decryption tool. The insurer was itself insured by an English insurer (EI) which, in light of the importance of the systems that had been encrypted, agreed to pay the equivalent of US\$ 950,000 in Bitcoin in exchange for the decryption tool.

EI subsequently conducted an investigation which determined the identity of the recipient of the Bitcoin, following which it applied for a proprietary injunction over the Bitcoin to recover the ransom payment.

The application was heard by Bryan J in private because publicity would likely alert those in possession of the Bitcoin which may lead to them dissipating it. Bryan J also permitted the identity of the English and Canadian insurers to be anonymised given the risk of possible further attacks in the event they were named.

Judgment

The key question to be determined was whether the Bitcoin paid by way of ransom constituted property under English law. In arriving at his decision, Bryan J considered at length the detailed analysis of the proprietary status of cryptoassets undertaken by the Taskforce. He concluded that such analysis was "*compelling*" and should therefore be adopted by the Court. He found that cryptoassets such as Bitcoin constitute property capable of being the subject of a proprietary injunction. Crucially, Bryan J noted that, as the Taskforce had concluded, Bitcoin meet the four criteria set out in Lord Wilberforce's seminal definition of property in *National Provincial Bank v Ainsworth* [1965] 1 AC 1175 (as set out in our previous Perspectives article).

Having reached this conclusion, the judge then considered the *American Cyanamid* principles that apply to a proprietary injunction, namely that:

1. there must be a serious issue to be tried
2. if there is a serious issue to be tried, the court must consider whether the balance of convenience lies in granting the relief sought.

Having previously accepted that cryptoassets constitute property capable of being the subject of a proprietary injunction, and applying the principles referred to above, Bryan J concluded that:

1. there was at least a serious issue to be tried against all four defendants
2. damages were not an adequate remedy in circumstances where the Bitcoin could be dissipated and the English insurer has a strong claim over them
3. the balance of convenience justified granting the relief.

Comment

This is a significant decision in this fast-developing area of the law. The now clear judicial recognition of cryptocurrency and other cryptoassets as being capable of constituting property is likely to have far-reaching implications including paving the way for cryptoassets to be regarded as mainstream alongside more traditional asset classes.

Owners of cryptoassets will gain comfort from the fact that the English law of property will apply to the day-to-day use and transfer of such assets. In addition, in the event of a hack or other criminal event, the Courts can be used to trace and recover cryptoassets.

Whilst the decentralised and anonymised nature of cryptoassets may still present practical obstacles to legal intervention, it is now clear that the English courts are keen to ensure that cryptoassets do not fall outside the law and may be willing to allow for some flexibility to assist claimants, as demonstrated by the Court's willingness to hear the application in private and protect the names of the parties.