Client Alert | Commercial Litigation

Recovering the ransom: High Court confirms Bitcoin status as property

February 2020

Authors: Steven Baker, Jenna Rennie, Gwen Wackwitz

The High Court has determined that Bitcoin (and other similar cryptocurrencies) can be considered property under English law, and could be the subject of a proprietary injunction. The Court granted the injunction to assist an insurance company to recover Bitcoin that it had transferred in order to satisfy a malware ransom demand.

Background

In *AA v Persons Unknown,*[1] the High Court has considered whether Bitcoin could be considered as property for the purposes of granting a proprietary injunction over Bitcoin. The Bitcoin in question was paid as part of a ransom following a cyberattack on a Canadian insurance company (the "**Company**"). The attack prevented the Company from accessing its IT systems that had been encrypted with malware. In order to regain access to the company's IT systems, the hacker(s) demanded that the Company transfer 109.25 Bitcoins (equivalent to USD 950,000) to a specified account in exchange for the decryption software.

The Company was insured against certain cyber-related incidents by an English insurance company (the "**Insurer**"). After the ransom had been paid, the Insurer hired consultants who tracked the Bitcoin payments to a specific address linked to the cryptoasset exchange Bitfinex. While some had been dissipated, 96 Bitcoins remained in the account. The Insurer therefore sought a proprietary injunction to recover the Bitcoins.

The decision is significant not only for its conclusion that Bitcoin could be considered property under English law, but also due to the fact that in reaching its conclusion, the Court gave considerable weight to the recent UK Jurisdictional Task Force ("**UKJT**") Legal Statement on Cryptoassets and Smart Contracts, published in November 2019 (see update here).

Decision

In order to grant the proprietary injunction, the fundamental question for the Court to consider was whether cryptoassets constituted a form of property capable of being the subject of such an injunction. While this issue has already been considered in two recent cases (with the Court treating cryptocurrencies as property in granting a worldwide freezing order[2] and an asset preservation order[3]), the Court had not previously considered the issue in depth.

---

[1] AA v Persons Unknown who demanded Bitcoin on 10th and 11th October 2019 and others [2019] EWHC 3556 (Comm)

[2] Vorotyntseva v Money-4 Limited [2018] EWHC 2596 (CH)

[3] Robertson v Persons Unknown (unreported)

As a starting point, Bryan J noted that, "*prima facie there is a difficulty in treating Bitcoin and other cryptocurrencies as a form of property*" as English case law traditionally identifies property in two distinct categories. These include:

- a 'thing in possession' (i.e. capable of being possessed in a tangible sense); or
- a 'thing in action' (i.e. a right capable of being enforced by an action).

Bryan J determined that cryptocurrencies cannot be 'things in possession' as due to their virtual nature, they are intangible and cannot be possessed, nor can they be defined as 'things in action' as they do not embody any right capable of being enforced by action.[4] In seeking to resolve this difficulty, Bryan J referred to the UKJT's detailed analysis of the Court's treatment of novel kinds of intangible assets (including patents and EU carbon emissions allowance) and concluded that while a cryptoasset might not be a 'thing in action' on a narrow definition, that did not mean it could not be treated as property.

Bryan J concluded that the UKJT's analysis was "*compelling*" and should be adopted by the Court.[5] Further, as the Bitcoin met the four criteria set out in *National Provincial Bank v Ainsworth*[6] (being definable, identifiable by third parties, capable in its nature of assumption by third parties, and having some degree of permanence), it was capable of being considered property. Bryan J therefore also applied the same reasoning as the landmark ruling in *B2C2 v Quoine* by the Singapore International Commercial Court (see update here), which was one of the first decisions to apply contractual principles and trust law to a cryptocurrency trading case.

Accordingly, as the Court considered that all other requirements for a proprietary injunction were met (i.e. serious issue to be tried, balance of convenience in favour of granting relief, and damages not being an adequate remedy), Bryan J granted the injunction sought. The Court also ordered the controllers of the Bitfinex exchange to provide information regarding the identity and addresses of the hackers to ensure that the proprietary injunction could be properly policed. The Court further recognised the difficulties inherent in seeking to recover Bitcoin given its ease of transfer and, accordingly, the urgency of the application. It therefore authorised alternative service, including by email.

Comment

This decision is significant as it provides detailed judicial reasoning for defining cryptoassets as property in a developing area of law. While the characteristics of cryptoassets can vary, this decision indicates that the English Courts are likely to find that established, tradeable cryptocurrencies can be treated as property. The decision therefore provides greater certainty to stakeholders in cryptoassets.

This judgment is also noteworthy for the Court's decision to allow the case to be heard in private. In reaching this decision, the Court noted the importance of the principle of open justice as stated in *Cape Intermediate Holdings Ltd v Dring* [2019] UKSC 38 (see update here), but held that "*publicity would defeat the object of the hearing*", as it would "*potentially tip off the persons unknown to enable them to dissipate the Bitcoins*".[7] Bryan J also determined that the Company's and the Insurer's identity could be anonymised to prevent the possibilities of copycat cyberattacks.

---

[4] [2019] EWHC 3556, para 55

[5] [2019] EWHC 3556, paras. 57 and 59

[6] [1965] 1 AC 1175

[7] [2019] EWHC 3556, para 30

White & Case LLP
5 Old Broad Street
London EC2N 1DW
United Kingdom

T +44 20 7532 1000

In this publication, White & Case means the international legal practice comprising White & Case LLP, a New York State registered limited liability partnership, White & Case LLP, a limited liability partnership incorporated under English law and all other affiliated partnerships, companies and entities.

This publication is prepared for the general information of our clients and other interested persons. It is not, and does not attempt to be, comprehensive in nature. Due to the general nature of its content, it should not be regarded as legal advice.

© 2020 White & Case LLP