

Persons unknown: How the BVI Court is assisting victims of digital asset fraud

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We have recently seen positive examples of the BVI and English Courts showing flexibility and innovation to help protect victims of digital asset fraud.

The Eastern Caribbean Supreme Court (**ECSC**) delivered its novel judgment in the case of **AQF v (1) XIO, (2) VQF and (3) CGN** on 23 November 2023, highlighting interesting developments in the BVI. At the ex parte hearing, the BVI Court:

1. ordered interim mandatory injunctive relief against non-cause of action defendants; and
2. permitted service by alternative means on a person unknown outside of the jurisdiction by way of non-fungible token (**NFT**) airdrop to their digital wallet.

Background

The Applicant, a Dubai resident businessman who provides broker services for gold bullion transactions, intended to transfer over 3 million USD of cryptocurrency in return for approximately 50kg of gold bullion.

However, whilst transferring the cryptocurrency, the Applicant became victim to an address poisoning (zero-value transfer scam) where the scammer produced a near identical wallet address to give the impression that the transaction was being made to the legitimate wallet.

The Applicant reported the scam to police in Dubai almost immediately, and instructed a blockchain investigations specialist to trace the stolen funds. The cryptocurrency had been transferred into three different wallets within 24 hours. The Applicant successfully applied to the Singapore Court against Persons Unknown to freeze the cryptocurrency and for disclosure orders against the exchanges, who were ordered to provide the wallet balances, KYC information and transaction details.

The cryptocurrency was issued and centrally controlled in the BVI and, therefore, with the Singapore Court's permission to commence proceedings, the Applicant applied to the BVI Court for (i) a freezing injunction up to the value of the claim, and (ii) a mandatory injunction to restrict the transfer or disposal of the cryptocurrency.

Mandatory injunctive relief against non-cause of action defendants

Notwithstanding that there was no substantive claim being brought in the BVI against the Second and Third Respondents, the Applicant was granted, amongst other relief, a mandatory injunction against them to prevent the transfer or disposal of the cryptocurrency. The second and third respondents were the issuers of cryptocurrency on the Ethereum and TRON networks.

Recent case law (including the Privy Council decision in **Broad Idea International Ltd v Convoy Collateral**) and the BVI Supreme Court Act (as amended) provides the Court with jurisdiction to grant interim relief in relation to foreign proceedings against non-cause of action defendants.

The applicable principles for interim mandatory injunctions are summarised as:

1. the general principle is to take the course which involves the least risk of injustice if it turns out to be "wrong";
2. the court should keep in mind that ordering a positive step to be taken may involve an increased risk of injustice for the defendant if the decision turns out to be "wrong";
3. it is legitimate to consider whether the court does feel a "high degree of assurance" that the claimant will succeed at trial; and
4. even where the court does not feel this high level of assurance there are still exceptional cases in which it is correct to grant an interim mandatory injunction because that course involves the least risk of injustice.

The ECSC Civil Procedure Rules (Revised Edition) 2023 (the 2023 CPR)

The 2023 CPR introduced key practice changes to the jurisdiction from 31 July 2023, including in relation to service out of the jurisdiction. This has simplified the way in which foreign defendants located outside the BVI can be served with "court process" (as defined). The change has been welcomed as a natural progression by practitioners in the BVI, as a popular offshore jurisdiction which often involves proceedings filed against foreign defendants.

Previously, a party was required to seek the Court's permission, often on an ex parte basis, before it could serve proceedings on a foreign defendant located outside the BVI.

In accordance with the 2023 CPR, the applicant can self-certify that (i) they have a good cause of action, (ii) an available gateway under the 2023 CPR applies, including mandatory or prohibitory injunctions, (iii) the court is the appropriate forum for the trial, and (iv) the proposed method does not infringe the law of that foreign state. If the requirements are met, court process can be served out of the jurisdiction without advance permission. However, service can still be challenged by the defendant or set aside by the court if, for example, the claimant incorrectly certified that the claim was one in which advance permission of the court was not required.

Service out of the jurisdiction and by alternative means

In this case, the Applicant sought to serve out of the jurisdiction and by an alternative method with permission of the BVI Court.

Therefore, the Applicant needed to show that there was "good reason" for the Court to approve service by alternative means. For example, a good reason may be that there is difficulty identifying, locating or serving the defendant. Here, the First Respondent was unknown and unidentified (save for their digital wallet addresses) to the Applicant.

The Court considered the decision of Trower J in **D'Aloia v (1) Persons Unknown (2) Binance Holdings Limited and others** in 2022 in which the English Court permitted service of court proceedings by an NFT, described as "a form of airdrop into the tda-finan wallets in respect of which the claimant first made his transfer to those behind the tda-finan website" and by email. Mangatal J considered the analysis of Trower J to be "logical" and permitted service by email and NFT airdrop.

Summary

The case of AQF v (1) XIO, (2) VQF and (3) CGN is an example of the BVI Court demonstrating its ability to be flexible and reactive to modern technological advancements. This is a positive step for victims of digital asset fraud, allowing immediate action to be taken even when the identities and location of the respondents are unknown, and we hope to see further examples of this flexibility in the near future.