

Insights

## COURTS AT THE FOREFRONT OF INNOVATION

### US AND UK APPROACHES TO SERVICE AND ENFORCEMENT IN DIGITAL ASSET FRAUD CASES

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Fraud involving digital assets, specifically cryptocurrency, is rapidly increasing on both sides of the Atlantic. In the UK, the value of reported crypto-fraud increased [41% between 2022/2023 reaching a record £306m](#), whilst in the US, crypto-fraud losses totalled \$3.94 billion over the past year – [an increase of 53% compared to 2022](#).

Recent developments in both the UK and US courts have demonstrated a robust approach to assisting victims of crypto-fraud recover their assets, often creating innovative legal solutions for service and enforcement.

Here we explore some of these legal solutions, analysing the similarities in recent decisions in the US and UK, and providing consideration of the future landscape in this constantly evolving legal environment.

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The courts in both the US and UK have been proactive in adapting procedural tools and making orders which allow for the technological nuances of digital assets, and often in circumstances where the identity of the defendant is difficult to determine.

### SERVICE BY NFT

In UK cases, where conventional service processes have proved to be inadequate to bring proceedings, orders or judgments to the attention of the defendants quickly enough to prevent dissipation of assets, the court has permitted service by alternative methods – including by non-fungible tokens (NFTs).

In the cases of *D'Aloia v Persons Unknown [2022]* and *Jones v Persons Unknown [2022]*, the English court granted permission for alternative service out of the jurisdiction by NFT airdrop into the cryptocurrency wallets into which the claimant was said to have transferred their assets (in addition to service by the more usual postal and email routes). The court held that this novel method of

service would embed service in the blockchain, and as such there was a greater likelihood of those behind the fraud being put on notice of the proceedings against them.

For the first time in the courts of England and Wales, in *Osbourne v Persons Unknown* [2023], the High Court permitted service of proceedings solely by NFT. The court considered the practical implications of service in this way. Effective service on the blockchain meant that the proceedings would be accessible to the public (subject to redactions to protect personal data).

The US courts have similarly been open to facilitating service by new technology. In *LCX AG v John Doe Nos. 1-25 (Dkt.No., 154644/2022)*, the Supreme Court of the State of New York permitted service of a claim form via blockchain. The court specified that a special-purpose service token should be airdropped to the wallet into which the claimant had held their cryptocurrency. The service token had to contain a hyperlink to a website on which a copy of the order had to be published. Effectively, clicking on the link would be deemed by the court to be accepting service of the process.

## JURISDICTIONAL GATEWAYS

Historically, the courts of England and Wales hesitated to extend relief in the form of third party disclosure orders (such as Norwich Pharmacal orders and Bankers Trust orders) outside of the jurisdiction.

However, in October 2022, a new jurisdictional gateway pursuant to Practice Direction 6B was introduced to resolve some of the procedural and jurisdictional issues that victims of cryptocurrency fraud faced when bringing claims in England and Wales. The new gateway enabled applications for permission for service out of the jurisdiction of a claim for disclosure of information regarding (i) the true identity of a potential defendant or (ii) what has become of the claimant's property, to support proceedings.

*LMN v Bitflyer & Ors* [2022] was the first reported case in England and Wales in which the claimant relied on the new gateway in its application to serve out of the jurisdiction.

In *Osbourne*, the English courts had to assess the application of existing gateways in the context of crypto-fraud claims. In this case the claimant was able to benefit from gateway 15(c) on the basis of a constructive trust governed by English law being created when the hackers transferred the NFTs from the wallets located in England. Consequently the question of whether the recipients became constructive trustees when they received the trust property was also governed by English law despite their whereabouts being unknown, establishing English court jurisdiction under the gateway. Unless and until we can be certain that other gateways can assist, a constructive trust argument will need to run in such crypto-fraud cases against persons unknown.

## DELIVERY UP AND ENFORCEMENT

Crypto cases have also inevitably led the courts to consider novel ways of dealing with delivery up and enforcement against persons unknown.

There are significant challenges to victims in bringing claims against unidentifiable and anonymous fraudsters, as demonstrated by the case of *Tippawan Boonyaem v Persons Unknown [2023]*. The court in this case permitted interim worldwide proprietary and non-proprietary freezing orders against all defendants, and granted summary judgment in respect of persons who operated and/or owned the wallet address to which the claimant's funds had been sent and were being held. However, it refused to continue the injunctions or grant summary judgment against those defendants who were unknown and unidentifiable on grounds that such judgment would be unenforceable.

More recently, the courts of England and Wales ruled that a judgment for non-proprietary relief can be made against unidentifiable cryptocurrency defrauders. In *Mooij v Persons Unknown [2024]* the judge considered the Supreme Court case<sup>[1]</sup> relied upon in *Boonyaem*, where jurisdiction could not be established over the relevant "persons unknown" as they could not be served: since the court in *Mooij* had ordered alternative service by NFT airdrop, the judge declined to follow *Boonyaem*, and held that jurisdiction was established by the alternative service directed by the court, allowing the court to grant summary judgment.

Although digital assets cannot be seized in the same way as physical assets can, the US and English courts have proved themselves willing to adopt innovative ways of preserving those digital assets found to be fraudulently held.

In *Jones*, the court concluded that an exchange controlling a wallet holding stolen Bitcoin was a constructive trustee of those assets. The court ordered that the claimant was entitled to an order for delivery up of his Bitcoin, and extended the freezing and proprietary injunction post-judgment until the Bitcoin had been returned.

The US courts have also found that stolen cryptocurrency was held under a constructive trust: in *Bowen v Li [1:23-cv-20399]*, the US district court for the Southern District of Florida consequently ordered the funds contained within the wallets to be transferred to the claimant.

In the more recent UK case of *Joseph Keen Shing Law v Persons Unknown & Huobi Global Limited [2023]*, a proprietary claim was not available. Nevertheless, the court provided a personal remedy: satisfied that the cryptocurrency account held by the defendants (overseas) contained the proceeds of the fraud, the court granted judgment (in default). The court considered that the account was plainly controlled by the defendants responsible for the fraud, and to enable the claimant to enforce the judgment, the court ordered that the funds held in the account offshore be converted to fiat currency and transferred to the jurisdiction of England and Wales and paid into the Court Funds office.

Traditional protections have not however been discarded by the courts: in *Law*, a cross undertaking in damages was still required from the claimants to protect the defendants should they have been deprived wrongfully of assets that were rightfully theirs.

## **FUTURE DEVELOPMENTS?**

The courts on both sides of the Atlantic are proving willing to adopt innovative ways of facilitating claims in a space where traditional methods would prove ineffective. In so doing, the courts in the US and the UK have embraced their role of ensuring effective justice - albeit whilst maintaining protections for defendants - and appear to acknowledge that it is only by developing the law and the tools at their disposal that the courts can maintain the integrity of the legal system. We are likely to see this trend continuing with increased crypto-fraud claims both in the UK and the US.

What is patently clear from the cases to date is that the courts in both the US and in England and Wales are predisposed to considering different methods of ensuring that digital asset fraud is effectively addressed: it is up to those assisting clients in this sphere to continue to be a part of that process and not to shy away from suggesting ways in which the tools available to the courts can be adapted to address the world of digital assets and the blockchain.

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[1] *Cameron v Liverpool Victoria Insurance Co Ltd* [2019] UKSC 6

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