

## Deciphering crypto part 4 (asset recovery and crypto currencies) relevant orders

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Corporate Crime analysis: In this, the penultimate piece in the series, Will Glover and Angharad Hughes provide a practical aide memoire for the types of orders, both criminal and civil, that may be sought in respect of crypto assets in the courts of England and Wales.

### Crypto assets as property under Proceeds of Crime Act 2002 (POCA 2002)

'That's my crypto!'

Crypto assets have already been found to fall within the definition of property for the purposes of POCA 2002, s 74. As have they in respect of the definition of 'realisable property' for the purposes of POCA 2002, s 83; even before the decision in *AA v Persons Unknown* [2019] EWHC 3556 (Comm) (discussed in part 2 in this series in News Analysis: Deciphering crypto part 2—AA victory for common sense? (*AA v Persons Unknown*)), seen by many as the pioneer case in finding that crypto assets were property in an interlocutory High Court decision. Part 1 in this series touches on these examples, see News Analysis: Deciphering crypto Part 1—an introduction to the issues.

### Part 2 of POCA 2002

#### Confiscation

Crypto assets have already been made the subject of confiscation orders (see Deciphering crypto Part 1—an introduction to the issues). For a short and simplified explanation: where the usual provisions are satisfied, and crypto assets are found to represent the defendant's realisable property, they may be made subject to a confiscation order under POCA 2002, s 6.

#### Seizure and restraint of crypto assets

Crypto assets may be seized under POCA 2002, s 41A or 47C. The ability to seize crypto assets will usually depend on the ability to obtain the private key. The Irish 'Fishing Rod Case' (*DPP v Collins*, February 2020, not reported by LexisNexis<sup>®</sup>) provides a salutary reminder of knowing where the key is: a defendant hid the key for his crypto assets in a fishing box which was thrown away by his landlord while he was in custody. The crypto assets are estimated to be worth £45m. While the digital wallets have been seized by the Irish state, without the private key, the assets are unobtainable.

As with confiscation orders, crypto assets are realisable property for the purposes of restraint; they are susceptible to restraint orders if one of the five conditions in POCA 2002, s 40 is met. Restraint orders may also capture crypto assets transferred to a respondent after the order is made.

In order to avoid dissipation of assets, a proactive approach should be taken at the restraint stage by inviting the court to exercise its wide-ranging powers under POCA 2002, s 41(7). For example, at the point of restraint in *R v Teresko (Sergejs)* (not reported by LexisNexis<sup>®</sup>) (see Deciphering crypto Part 1—an introduction to the issues), the respondent was required to transfer the cryptocurrency into a police wallet which was converted into sterling.

#### Hidden assets and tainted gifts

In confiscation proceedings, a court may make an order which includes hidden assets. Thus crypto assets may be captured by a confiscation order which includes an amount for hidden assets, even if they are not known to the court making the order. Depending on when purchased and if passed to others, crypto assets may also amount to tainted gifts for the purposes of POCA 2002, s 77.

#### Third party rights

If two individuals hold the private key to a crypto asset, there may be some novel arguments to raise over third-party interests in the asset under POCA 2002, s 10A.

## **POCA 2002, Pt 8—investigations**

Potential weapons in the investigator's arsenal include: production orders (POCA 2002, s 345), customer information orders (POCA 2002, s 363), disclosure orders (POCA 2002, s 357) and account monitoring orders (POCA 2002, s 370)

Material and information relating to crypto assets may be sought by officers by obtaining these orders. This will depend on multiple factors including in some instances whether the crypto provider in question is a 'financial institution' which seems unlikely for the foreseeable future.

### **Unexplained wealth orders (UWOs)**

UWOs are made under POCA 2002, s 362A. Interim freezing orders can be made under POCA 2002, s 362J; if considered necessary to avoid the risk of recovery under a UWO being frustrated.

UWOs are unlikely to be the weapon of first choice against illicit crypto assets; crypto is less readily identifiable than flash cars and expensive properties. Since a UWO application requires a description of the property and the suspected owner, extensive investigation would be required to find out to what and whom the application refers. In addition, authorities will be somewhat battle weary from their recent pursuit of UWOs: at the time of writing, the National Crime Agency (NCA) faces a costs application in the princely sum of £1.5m following its forlorn hope in appealing the High Court decision to refuse an application for UWOs in respect of Nurali Aliyev, the grandson of former Kazakh president Nursultan Nazarbayev (see High Court quashes unexplained wealth order against ex-Kazakh president's family).

## **POCA 2002, Pt 5—civil recovery**

Part 5 sets out the means by which civil recovery of property obtained through unlawful conduct (POCA 2002, s 241) may be sought by the authorities (eg the NCA). The main points to note are as follows:

### **Civil recovery orders**

Civil recovery of assets obtained through unlawful conduct, as defined by POCA 2002, s 241, may be ordered under POCA 2002, s 266. These orders relate to property and not the individual. Illicit crypto assets are therefore likely to be caught by these provisions.

### **Property freezing orders (POCA 2002, s 245A)**

A freezing order may be made in respect of property which is susceptible to recovery under POCA 2002, Pt 5. These orders prevent persons from dealing with the property. Exceptions can be made for certain purposes under POCA 2002, s 245C (eg reasonable legal fees).

### **Account freezing orders**

For the time being, crypto exchange and wallet providers are unlikely to have authorisation to accept deposits for the purposes of part 4 of the Financial Services and Markets Act 2000. They will therefore not meet the definition of 'bank' under POCA 2002, s 303Z7. Only banks and building societies are caught by the account freezing and forfeiture provisions.

## **Other civil orders and remedies**

### **Proprietary injunctions and freezing injunctions**

The High Court has already made a proprietary injunction together with a freezing injunction in respect of both Bitcoin and Ethereum in *Vorotyntseva v Money-4 Limited t/a Nebeus.Com, Sergey Romanovskiy, Konstantin Zaripov* [2018] EWHC 2596 (Ch). This application was heard in September 2018 but not published until November 2019. Notice was given at the last minute but the respondents to the application were represented. The applicant, Mrs Vorotyntseva, was concerned that crypto assets she had transferred to Money-4 Ltd had dissipated. Ultimately Birss J was not satisfied that the patchy evidence provided by the respondents allayed the concerns raised by the applicant. He was satisfied that there was a real risk of dissipation and granted a freezing order. For detailed analysis of this decision, see News Analysis: To freeze or not to freeze—cryptocurrency as property? (*Vorotyntseva v Money-4 Ltd*).

Also see Deciphering crypto part 2—AA victory for common sense? (*AA v Persons Unknown*) where we looked at *AA v Persons Unknown* [2019] EWHC 3556 (Comm) in detail. A proprietary injunction was granted and crypto exchange provider, Bitfinex, was ordered to provide the details of ownership of certain crypto assets traced by

Chainalysis. In *AA* a number of orders were sought, including a freezing injunction. The court felt that, in light of the extraterritorial considerations, the most appropriate order in the circumstances was a proprietary injunction.

### Asset preservation orders

In *Robertson v Persons Unknown*, 16th July 2019 (Commercial Court judgment not currently available on LexisNexis®), a freezing injunction was sought. Moulder J was not satisfied that the 'balance of convenience' or 'risk of dissipation of assets' tests were met. She therefore made an asset preservation order (APO) preventing any dealings with them; which does not require satisfaction of those tests and was considered more appropriate in this case where the identity of the respondent owners of the coins was unknown. See further, News Analyses: A Bitcoin first? Stewarts obtains asset preservation order over cryptocurrency (*Robertson v Persons Unknown*) and also Coinbase settles bitcoin asset freeze dispute (*Robertson v Persons Unknown*)

### Bankers trust orders and Norwich Pharmacal orders

As with proprietary injunctions, in the right circumstances these orders can be used in order to ascertain the ownership of an asset. Bankers trust orders are often required before financial institutions can reveal the owner of an account: one was granted in respect of the second defendant in *Robertson v Persons Unknown*. *Norwich Pharmacal* orders are used to obtain information from a third party to assist in identifying as yet unknown entities against whom a claim may be brought. As with bankers trust orders, they are usually sought in crypto cases to 'pierce the veil' of pseudonymity in respect of crypto asset ownership.

### Conclusion

With asset recovery in general, and crypto in particular: assets may be dissipated more quickly than orders are granted. The key for success is speed of enforcement and the effect of sanctions for non-compliance. Applicants will almost invariably need the assistance of tracing companies such as Chainalysis to help with the frustrating process of locating the crypto in order to know in which direction any order should face. These authors also predict tremendous frustration and litigation surrounding the issue of seizure of private keys in order to gain access to crypto. In the final part of the series we will look at the developing situation for crypto in foreign jurisdictions and the ability of UK orders to be enforced overseas.

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