

Tracking Hackers: Court Considers Crypto Fraud

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In what must be considered a reassuring judgment for those who might suffer from a hack or theft involving cryptocurrencies or digital assets, the English Commercial Court (the **Court**) has recently shown that it is willing and able to provide a remedy in connection with fraud involving cryptocurrencies, even in circumstances where the identity of the fraudsters is unknown and the relevant entities who may know the identity of the fraudsters are located outside of the court's jurisdiction.

[Fetch.ai Ltd v Persons Unknown Category A \[2021\] EWHC 2254 \(Comm\)](#)

In the decision of *Fetch.ai Ltd v Persons Unknown Category A* [2021] EWHC 2254 (Comm), the Court imposed a proprietary injunction and a worldwide freezing order against "persons unknown" (i.e. the fraudsters) who had accessed the claimants' trading accounts held on the Binance cryptocurrency exchange and transferred the claimants' to third-party accounts, resulting in losses to the claimants in excess of US\$2.6 million.

The claimants brought the application without notice against the fraudsters, and the two entities operating the exchange, Binance Markets Limited (an English company) and Binance Holdings Limited (a Cayman Islands company). The judge, His Honour Judge Pelling QC, accepted that the claimants appeared to have reasonably arguable claims against the fraudsters based upon breach of confidence and unjust

enrichment, and for a constructive trust over the stolen funds, and was prepared to issue the proprietary injunction and worldwide freezing order against the unknown fraudsters on this basis. For the uninitiated, the effect of the injunction and freezing order is to prevent third parties in possession of the stolen funds from dealing with them as if they were their own, on the basis that the funds were properly the claimants.

In reaching this decision, the Judge accepted that cryptocurrencies are to be regarded as property and are (at least) a chose in action (i.e. a personal right over the assets). The Judge also expressed his view that the governing law applicable to cryptocurrencies would be the law of the place where the person or entity who owns the funds is domiciled (which, in this case, was England).

In addition to seeking the injunctions against the fraudsters, the claimants applied for disclosure orders, under the *Bankers Trust and Norwich Pharmacal* principles, against the Binance entities to discover the identity of the fraudsters. In cases such as this, a claimant can seek orders from the Court requiring third parties who have become involved or mixed up in the alleged wrongdoing to disclose documents or information to the claimant to allow the claimant to identify the proper defendant to the claim or to obtain information necessary to bring the claim. These types of disclosure orders can be an effective tool for those who may have suffered from a hack or theft but who otherwise lack the information necessary to track down the stolen assets.

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The Court granted the disclosure orders sought, stating that it would be “*entirely unrea*” to suppose that the Binance entities would not possess information that would lead to the location or preservation of the misappropriated assets. The judgment noted that the Binance entities’ terms and conditions envisaged that its customers’ personal data may be shared with regulatory agents or law enforcement agencies, suggesting that there was no absolute contractual right of confidentiality.

The Court expressed some reservations as to whether a disclosure order could be served out of the jurisdiction on the Cayman Islands Binance entity, as an earlier English High Court decision in *AB Bank Limited v Abu Dhabi Commercial Bank PJSC* had decided that a Norwich Pharmacal order cannot be served outside the jurisdiction.

However, the Judge proceeded to issue a Bankers Trust order against the Cayman Islands entity, following the English High Court decision in *Ion Science v Persons Unknown* which had previously held that such an order can in principle be served out of the jurisdiction.

Comment

As the crypto space sees increased and widespread adoption, particularly in the form of retail investors, the frequency of hacks and other types of nefarious conduct is likely to increase. Investors should therefore put in place appropriate safeguards and precautions to mitigate the risk of losing their hard earned assets. In this regard, minimising balances held on exchanges (through the use of ‘cold storage’) and limiting use to reputable centralised exchanges¹ are likely to be sensible baseline precautions to take. However, when a breach occurs, judgments like *Fetch* demonstrate that all is not lost for those who fall victim to these sorts of attacks, even involving cases of fraud with unknown fraudsters spanning multiple jurisdictions. In that worst case scenario, swift legal action is likely to be critical if the assets are to be recovered.

¹ Noting that the recourse that might be available in connection with a loss of assets in using a decentralized exchange is likely to be much more limited.



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