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Cryptoassets Are Property and Can Be the Subject of a Trust — But Can They Be Enforced Against?

In a recent landmark decision, the General Division of the High Court of Singapore in *ByBit Fintech Ltd v Ho Kai Xin and ors* [2023] SGHC 199 held that cryptoassets are property such that a wrongdoer can be found to be holding cryptoassets on constructive trust for a claimant.

In this update, we examine the salient features of the decision, including developments in Singapore law leading up to its conclusions, discuss the key types of trusts that can arise in respect of cryptoassets, and outline issues relating to enforcement of court orders concerning cryptoassets.

Cryptoassets Are Property and Can Be the Subject of a Trust — But Can They Be Enforced Against?

In a landmark decision, the General Division of the High Court of Singapore (**High Court**) in *ByBit Fintech Ltd v Ho Kai Xin and ors* [2023] SGHC 199 (***ByBit***) decided (after in-depth analysis) that cryptoassets are property such that a wrongdoer can be found to be holding the cryptoassets on constructive trust for a claimant.

Our Comments

Prior to the *ByBit* decision, the Singapore courts (and the courts in many other jurisdictions) had granted interlocutory injunctions or reliefs on an interim basis; this only required a finding that there was "*a serious question to be tried*" or "*a good arguable case*" that cryptoassets are property, without requiring a conclusive decision on this issue.

With the *ByBit* decision, the law is one step closer to providing definitive answers as to how cryptoassets should be categorised and treated in the eyes of the law. However, cryptoassets and their technological advancements continue to give rise to interesting legal issues concerning their nature and how they can be custodied, which have significant impact on how orders issued by the courts can be effectively and realistically enforced.

In this article, we examine:

(a) Developments in Singapore law in concluding that cryptoassets are a type of property in the eyes of the law;

(b) The types of trusts that can arise in respect of cryptoassets; and

(c) Issues on enforcement of court orders concerning cryptoassets.

For a discussion on other aspects of legal proceedings concerning cryptoassets and crypto fraud, including how to commence and serve proceedings on an unknown defendant, and the types of injunctions and disclosure orders that can be obtained, please refer to our **March 2022 Special Update** titled "Fraud and Asset Recovery: Cryptoassets".

Background

In *ByBit*, the namesake company remunerated its employees with traditional currency, cryptocurrency, or a mix of both. It engaged a Singapore company to handle its payroll. The first Defendant, Ho Kai Xin (**Ms Ho**), was an employee of this Singapore company, and she was responsible for processing ByBit's payroll.

On 7 September 2022, ByBit discovered eight unusual cryptocurrency payments involving the transfer of 4,209.720 United State Dollars Tether (**USDT**) to four crypto addresses (**USDT Assets**), for which Ms

Ho was unable to provide a satisfactory explanation. After investigations, ByBit uncovered further suspicious activities:[1]

(a) While Ms Ho sought to characterise the transactions as inadvertent mistakes or technical errors, one of the supposed recipients of the payments (a ByBit employee) informed ByBit that he had always only been remunerated in traditional currency and did not know who the owner of his supposed crypto address (**Address 1**) was.

(b) ByBit's internal investigations revealed that Ms Ho had sent herself a work email containing Address 1. Ms Ho also sent, from her personal email to her work email address, an email containing all four crypto addresses. These emails were deleted and had to be recovered by ByBit.

(c) ByBit also discovered that Ms Ho had caused $117,238.46 to be paid into her personal bank account. It was not disputed by the parties that Ms Ho held this sum on trust for ByBit.

Ms Ho fully accepted that the USDT Assets belonged to ByBit. However, she asserted that the wallets associated with the USDT Assets (which contained the private keys used to access and authorise transfers to the four crypto addresses) were owned by her maternal cousin, Mr Jason Teo (**Jason**), and that she did not have access to them.[2]

ByBit, unsatisfied with this explanation, sought further disclosure orders against Ms Ho and other third parties. It discovered that Ms Ho had made several substantial purchases, including a freehold apartment with her husband, a brand-new car, and several Louis Vuitton products.[3] Ms Ho initially denied ownership of those items but subsequently sought to explain that she had made money from crypto trading despite having previously claimed that her crypto trading account was unused / not accessible.[4]

ByBit also obtained disclosure from the service provider of the wallet associated with Address 1, which revealed that Ms Ho was its owner. It included details such as her identity card and self-portrait, both of which had been provided by Ms Ho during the account registration process.[5] Transaction records also showed that USDTs had been transferred from the other crypto addresses to Address 1, suggesting that Ms Ho also owned the other wallets associated with those crypto addresses.

ByBit then sought summary judgment against Ms Ho, submitting (among other things) that:

(a) The USDT Assets are property capable of being held on trust; and

1 *ByBit* at [9]-[12].

2 *ByBit* at [14].

3 *ByBit* at [16].

4 *ByBit* at [16].

5 *ByBit* at [25].

(b) Ms Ho held the USDT Assets as a constructive trustee (Ms Ho either acquired the USDT Assets by fraud thereby giving rise to an *institutional* constructive trust and/or a *remedial* constructive trust) or, alternatively, that she had been unjustly enriched by the same sum.

The High Court's Decision

Finding in favour of ByBit, the High Court granted summary judgment against Ms Ho and awarded ByBit costs and disbursements.

Issue 1: Whether cryptoassets are property

The High Court found that cryptoassets, such as the USDT Assets, are property.

In our **March 2022 Special Update**, we explained that the uncertainty underlying the question whether cryptoassets constitute property boils down to the fact that the law has long recognised principally two categories of property: (a) a "chose in possession" (referring to physical assets, which cryptoassets are not[6]); and (b) a "chose in action".[7]

We also explained that, unlike monies deposited in a bank, where the bank account holder has a clear "chose of action" (in that the bank account holder can take action against the bank to enforce rights against monies deposited), cryptoassets reside on blockchain (being pockets of data replicated across the network) which may be decentralised with no particular issuer. Strictly speaking, therefore, there is no specific person against whom an action can be taken to enforce rights in cryptoassets.

The High Court in *ByBit* considered that there are strong reasons for cryptoassets to be considered property such that it would be legally possible to hold them on trust:

(a) First, cryptocurrency has generally been recognised as property in the Rules of Court 2021 (**Rules of Court**) which came into force in 1 April 2022. In particular, Order 22 rule 1(1) of the Rules of Court, dealing with enforcement of judgment and orders, defines "moveable property" to include "*cryptocurrency or other digital currency*".[8]

(b) Second, cryptoassets can be defined and identified by humans, such that they can be traded and can hold value. This in itself would satisfy the often-cited *dictum* on the test of what can constitute property; there must be a right or interest that is "*definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability*".[9]

6 *ByBit* at [31].

7 *Colonial Bank v Whinney* (1885) 30 Ch D 261.

8 *ByBit* at [30].

9 *ByBit* at [33] quoting Lord Wilberforce in *National Provincial Bank v Ainsworth* [1965] 1 AC 1175 at 1248.

The High Court in *ByBit* then found that cryptoassets such as USDT can be classified in the category of things in action (or "choses in action"). This is because, while things in action originated as rights enforceable by action against persons, the High Court found that their scope expanded over time to include documents of title to incorporeal rights of property and even copyrights. This diversity therefore suggests that the category of "choses in action" is "*broad, flexible and not closed*".[10]

In finding that a holder of a cryptoasset has a right of property recognisable by the law as a chose in action and so enforceable in court, the High Court acknowledged that there was an element of circularity in that the right to enforce in court is what makes cryptoassets choses in action. However, the High Court pointed out that "*this type of reasoning is not strikingly different from how the law approaches other social constructs, such as money*" and that what is treated as money "*by the general consent of mankind*" is given "*the credit and currency of money to all intents and purposes*" (i.e., the societal value of money). The High Court did not, however, go so far as to state that cryptoassets have achieved the level of consent associated with the societal value of money.

We should highlight that, as discussed in our **May 2023 CaseWatch** titled "Crypto Debt Not Money Debt For Purposes of Statutory Demand, Singapore High Court Rules", the High Court in *Algorand Foundation Ltd v Three Arrows Capital Pte Ltd* (HC/CWU 246/2022) (***Algorand Foundation***) found that a debt denominated in stablecoin is not a money debt capable of forming the subject matter of a statutory demand under section 125(2)(a) of the Insolvency, Restructuring and Dissolution Act 2018, and that the state theory of money (instead of the societal view of money) should be preferred in the context of insolvency. Thus, while the High Court in *ByBit* considered cryptoassets such as stablecoins to potentially have similar qualities to money for the purposes of attracting proprietary remedies, the decision of the High Court in *Algorand Foundation* suggests that they cannot be treated in exactly the same manner as state-issued fiat currency, i.e., a claim for cryptoassets may be treated as a claim for property that can sound in (traditional) monetary damages in the event of a failure to deliver up, but not a liquidated claim in and of itself.

It should be noted that, in support of its submissions that USDT could be classified as a chose in action, ByBit also relied on the current terms of service for USDT (governed by the law of the British Virgin Islands (**BVI**)) which provides for a contractual right of redemption (i.e., 1 USDT can be exchanged for 1 US Dollar) that is typically associated with reserve-backed stablecoins. ByBit submitted a legal opinion from a BVI lawyer opining that a holder of USDT is a "verified customer" of Tether Limited (**Tether**), the issuer of USDT, who has a contractual right of redemption which can be enforced against Tether.

It is not clear from the judgment who a "verified customer" can be. The term is not defined in Tether's terms of service[11] but would presumably apply only to direct customers of Tether who create a "Digital Tokens Wallet" directly with Tether (and are thus bound by the terms of service). These direct customers deposit fiat currency with Tether in exchange for USDT (or other variants such as EUDT) which are directly issued by Tether. These direct customers are typically crypto-exchanges (or larger institutions) who then further distribute USDT to their customers. Some (but not all) of these crypto-

[10] *ByBit* at [35].

[11] The terms of service may be viewed here.

exchanges may also vest in their customers a right of redemption by allowing their customers to withdraw 1 US Dollar (in fiat) from their accounts with the exchange for each USDT token they hold with the exchange.

While the High Court considered that this contractual right of redemption is an added feature of USDT (which would not apply to other cryptoassets that are not stablecoins) that made it "*look more like traditionally recognised [choses] in action*", this right of redemption is not a necessary feature for a cryptoasset to be classed as a chose in action. It is also unclear whether this aspect of stablecoins would influence how they are treated by the Singapore courts in the future. For example, while courts in other jurisdictions have considered the jurisdictional location of a cryptoasset to be the location of the holder of the relevant private keys, the jurisdictional location of a traditional contractual chose in action (such as a right of redemption) has typically been pegged to the location of the obligor.

High Court's approach in *ByBit* vs UK Law Commission's Report on Digital Assets

On 28 June 2023, the Law Commission of England and Wales (**UK Law Commission**) published a report titled "Digital assets: Final report" (**UK Law Commission's Report**), containing recommendations for reform and development of the law relating to digital assets, including cryptoassets.[12]

The UK Law Commission took a different view from that of the High Court in *ByBit*. While the UK Law Commission acknowledged that "*it would be possible for courts to recognise the category of things in action as a wider, residual category of things encompassing everything that is not a thing in possession*"[13], it was of the view that it is: (a) not clear how this would be practical or helpful for the development of the law; and (b) not obvious why, if this was desirable, it would not have been the approach already adopted.[14] The UK Law Commission also opined that such an approach would "*risk[] diluting or confusing the defining features of things in action*".[15]

The UK Law Commission thus recommended that the law should be "*free to develop, where appropriate, legal principles specific to* ***[a] third category [of] things***" (emphasis added), such as digital objects.[16] In other words, instead of expanding "choses in action" to include things falling outside "choses in possession", this third category of property would be developed by the common law to include choses that fall outside "choses in action" and "choses in possession". This distinction appears to be more of form than substance as it would function practically as a catch-all category, which is presently dealt with by an expansion of the definition of "choses in action".

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12 Accessible here. This was presented to Parliament pursuant to section 3(2) of the Law Commissions Act 1965.

13 UK Law Commission's Report at [3.35].

14 UK Law Commission's Report at [3.36].

15 It is of note that the UK Law Commission's view is contrary to that of the UK Jurisdiction Taskforce in November 2019 in the "Legal Statement on cryptoassets and smart contracts", which adopted a similar analysis to the High Court in *ByBit*: *The LawTech Delivery Panel*, "Legal statement on cryptoassets and smart contracts" at [70]-[77], [83], accessible here.

16 UK Law Commission's Report at [3.49].

Issue 2: Whether the USDT Assets were held by Ms Ho as constructive trustee

The High Court found on the balance of probabilities that Ms Ho's purported cousin, Jason, was a fabrication as Ms Ho failed to submit evidence supporting his existence and her version of events was "*inherently implausible*". Her luxury spending spree was also suspicious. Conversely, ByBit had direct evidence that Ms Ho owned Address 1.

ByBit initially only contended that a *remedial* constructive trust had arisen over the stolen assets. It later amended its claim to include the alternative argument premised on *institutional* constructive trust.[17]

Given the High Court's findings, it held that an *institutional* constructive trust arose over the stolen assets at the time of the theft, and that the remedy was tracing in equity. The High Court opined that such a trust would operate even if the stolen USDT Assets were mixed with other USDT balances. Ms Ho was therefore ordered (among other things) to:

(a) Pay a sum equivalent to the value of the USDT Assets in wallets 3 and 4;

(b) Transfer all sums remaining in wallet 1 to ByBit up to the value of USDT Assets that were transferred to wallets 1 and 2; and

(c) As to the shortfall in (b) above, give an account and pay to ByBit all sums found to be due to ByBit on the taking of the account. A tracing order was granted for ByBit to trace and recover the assets or the proceeds.[18]

Finally, the High Court declined to deal with the alternative bases of *remedial* constructive trust and unjust enrichment.

Types of Trusts That May Arise

As cryptoassets are property, they are capable of being held on trust. Being able to rely on a trust (i.e., that the cryptoassets in another's possession is being held on trust for the claimant) is important, as it directly determines the ownership of the disputed property in favour of the claimant.

Institutional **constructive trust vs** ***remedial*** **constructive trust**

While unconscionability is a necessary (but not in itself a sufficient) condition for a constructive trust to arise,[19] there are crucial differences between an *institutional* constructive trust and a *remedial* constructive trust.

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17 *ByBit* at [19].

18 The precise reasons for the different remedies sought and granted are unclear, but this might have been due to the fact that Ms Ho had transacted the USDT Assets, even in breach of a freezing order, and the fact that the wallets were of a different nature (i.e., the wallet associated with Address 3 was a self-custodial wallet, whereas the rest were custodial wallets): *ByBit* at [26]-[27].

19 *Zaiton bte Adom v Nafsiah bte Wagiman and ors* [2023] 3 SLR 533 (SGHC) (***Zaiton***) at [104].

As explained by the High Court in another decision[20]:

> In an institutional constructive trust, the trust arises by **operation of law** from the date of the circumstances which give rise to it: the function of the court is merely to declare that such trust has arisen in the past. A remedial constructive trust is a judicial **remedy** giving rise to an enforceable equitable obligation, and this lies at the discretion of the court.
>
> (Emphasis added)

The specific categories of unconscionability which equity recognises as being capable of giving rise to an *institutional* constructive trust include (among other things) fraud and a profit in breach of fiduciary duty.[21] An *institutional* constructive trust arises in real time and the claimant does not need to resort to a court of equity. In other words, the defendant would hold rights in the property on an *institutional* constructive trust for the claimant once the requirements of the specific category of unconscionability are satisfied.[22] An *institutional* constructive trust also arises independently of the parties' intention.[23]

On the other hand, *remedial* constructive trust is an equitable relief, which lies at the discretion of the court. The High Court in another recent decision went further and expressed reservations as to whether the *remedial* constructive trust forms, or should form, part of Singapore law.[24] This is because, unlike the *institutional* constructive trust which arises by operation of law, the *remedial* constitutional trust allows the court to create and destroy property rights by decree, which "*undermines the policy imperative for rights in property to be stable and for the law to allocate and alter those rights only in a manner which is transparent, consistent and predictable*".[25]

What type of trust can a claimant rely on?

In view of the state of the law as discussed above, should there be fraud, a claimant should try to show that an *institutional* constructive trust in respect of the stolen cryptoassets has arisen. This operates based on the facts, does not depend on the court's discretion and is inherently a stronger relief (as compared with a *remedial* constructive trust).

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20 *Philip Antony Jeyaretnam and anor v Kulandaivelu Malayaperumal and ors* [2020] 3 SLR 738 (SGHC) at [11].

21 *Zaiton* at [107]. The other non-exhaustive categories are: the retention of property acquired as a result of a crime causing death, the retention of property by a vendor after the vendor had entered into a specifically enforceable contract to sell the property, the changing of a will by the survivor of two persons who had entered into a contract to execute wills in a common form, the acquisition of land expressly subject to the interests of a third party and the assertion of full entitlement to property after a common intention to share property had been formed (also known as a "common intention constructive trust").

22 *Zaiton* at [110].

23 *Zaiton* at [111].

24 *Zaiton* at [145].

25 *Zaiton* at [145]. This is a notable departure from the Court of Appeal's *obiter* comments that the power to impose a *remedial* constructive trust is part of Singapore law (*Wee Chiaw Sek Anna v Ng Li-Ann Genevieve (sole executrix of the estate of Ng Hock Seng, deceased) and anor* [2013] 3 SLR 801 at [182]) and must be developed incrementally (at [175]).

Where there is no fraud involved, one may consider whether an express trust has been created. Under Singapore law, three certainties are required for the creation of an express trust:

> **Certainty of intention** requires proof that a trust was intended by the settlor. While no particular form of expression is necessary, there must be clear evidence of an intention to create a trust. Next, the trust must **define with sufficient certainty the assets** which are to be held on trust and the interest that the beneficiary is to take in them. Finally, **certainty of objects** requires clarity as to the intended beneficiaries so it is possible to ascertain those who have standing to enforce the trustee's duties under the trust.[26]
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> (Emphasis added)

In cases involving cryptoassets which originate from disputes with / insolvencies of crypto exchanges, certainty of intention is reflected from:

(a) **The terms and conditions governing the relationship between the customer and the exchange:** For example, in *Ruscoe v Cryptopia Ltd (In Liquidation)* [2020] NZHC 728 (***Cryptopia***), where an express trust was found to exist, the terms and conditions provided that customer deposits were held on trust by the exchange. Clauses that provide for rights of ownership (such as the ability to pledge, hypothecate or lend) that can be exercised by the exchange, as observed in *In re Celsius Network LLC*, 647 BR 631 (Bkrtcy SDNY 2023), indicate the absence of a trust. Further, in *Quoine Pte Ltd v B2C2 Ltd* [2020] 2 SLR 2020, terms expressly stating that the exchange did not take client fund safety measures (such as depositing client assets in a trust account) and that it would not be able to return customer assets in the event of bankruptcy were found to militate against the existence of a trust.

(b) **The behaviour of the exchange**: For example, in many cases (such as in the latest Futures Exchange (**FTX**) bankruptcy or *Re Gatecoin Limited (in liquidation)* [2023] HKCFI 941 (***Re Gatecoin***)), the lack of segregation and the exchange's use of customer assets as though they belonged to the exchange (e.g., trading the assets in the absence of customer instructions) reflected a lack of intention to create a trust. Additionally, how the exchange treats the assets for the purposes of financial reporting is also relevant. In *Re Gatecoin*, the exchange included customer assets in its financial statements for FY2016 and FY2017, whereas in *Cryptopia*, the exchange did not incorporate customer assets when filing its financial accounts and tax returns.

In respect of the certainty of subject matter (i.e., defining and identifying with sufficient certainty the assets subject to the trust), segregation is key. Speaking extra-judicially during the Keynote address at the Singapore Trustees' Association Conference 2022, the High Court Judge in *ByBit* observed that, in the case of express trusts, the segregation of cryptoassets was necessary to establish certainty of subject-matter.

[26] *Cheng Ao v Yong Njo Siong* [2023] SGHC 22 at [35].

In this regard, he observed that one approach for segregation would be segregation by separate public addresses for each customer — which then runs into the issue that such an arrangement would be impractical and inefficient for an exchange managing thousands of accounts. However, he also noted that "*the practical difficulty of segregation by separate public addresses does not mean that alternatives such as the use of wallets to store the public-private key combination in fact achieves the requisite segregation, if the law were focused on identifying the specific crypto-coin or fraction of crypto-coin subject to the trust*". Thus, even if an exchange maintains an omnibus wallet that stores accurately the aggregate sum of all of its customers' assets, the mixing of such customer assets may possibly mean lack of segregation and, consequently, lack of certainty of subject matter.

However, it should also be noted that, in *Cryptopia*, the exchange did not segregate customer assets. Rather, it maintained several omnibus accounts and wallets for different types of cryptoassets where both its assets and its customers' assets were pooled. On the other hand, the exchange maintained an internal database which accurately recorded the transactions carried out on the exchange and each account holder's account balances. This was sufficient for the New Zealand High Court to find that an express trust existed. As to this, the High Court Judge noted in his Keynote address that it may be "*the unspoken premise of Cryptopia, that the crypto coins in the digital wallet were held by the exchange in tenancy in common on behalf of all the account holders in proportion to their equitable interests as recorded in Cryptopia's ledgers*", and that what was established in *Cryptopia* "*may not be one that can be applied routinely to holdings by trustee custodians for multiple trusts and the beneficiaries of those different trusts*".

Thus, while cases such as *ByBit* which involve trusts arising from fraud may allow for tracing even if the stolen assets were mixed with other cryptoassets, a high standard of segregation may be required if parties were to seek to consensually establish an express trust. At present, the gold standard (but less commonly utilised due to efficiency / cost concerns) would likely be the maintenance of different wallets for each individual customer. As we move away from that, it is unclear whether the use of omnibus accounts / wallets with clear and accurate records would suffice for the purposes of recognising an express trust, especially if there are multiple types of express trusts and beneficiaries (e.g., different types of customer accounts).

The existence of an express trust – as contrasted with a contractual relationship between a customer and custodian – typically only becomes significant when all is not going well, particularly in the case of an insolvency. However, parties who become cryptoasset holders during good times tend to not address their minds to this distinction at the time the custodian arrangement is established. This has led to disappointment for many since the plummet of cryptoasset prices in the second quarter of 2022 (e.g., FTX users who are now unsecured creditors, even though the terms provided for no transfer of ownership from the customer to the exchange). In an insolvency context, there will be much scrutiny of the use of trust language in the relevant contractual documentation as well as the degree of separation of cryptoassets from all other assets of the custodian and its other customers, to determine whether there is sufficient ringfencing through the establishment of an express trust.

Enforcement Issues

Obtaining the court order or judgment is usually the first half of the battle won in each cryptoasset dispute. As the High Court pointed out in *ByBit*, while the Rules of Court recognise cryptocurrency and digital currency as a form of moveable property against which judgments and orders can be enforced, the Rules of Court do not specify a precise method for carrying out such an enforcement order.[27]

The High Court in *ByBit*, however, observed in passing that "*the procedures for serving a notice of seizure on the persons or entities having possession or control of moveable property or on the persons or entities which register the ownership of intangible moveable property are logically extendable to cryptocurrency and other digital currency*".[28]

While that is correct, it should be noted that executing these procedures against cryptoassets present a unique set of challenges.

First, unlike traditional property where it is relatively easier to find out the identity of the persons or entities having possession or control of the moveable property in question – and on whom a "notice of seizure" can be served – this is a considerable challenge when it comes to cryptoassets. In the virtual world, anonymity is rife. It is common (much more so in instances involving scammers and fraudsters) for online users to utilise technology to mask their true identity and use false information to prevent themselves from being tracked. At times, even the defendant might not know the true identity of the wallet or address that he / she had transferred the cryptoasset to, much less the claimant.

Second, cryptoassets, unlike most other traditional moveable property, are easy to split and/or mix, making tracing potentially even more costly and complex. In terms of splitting, one Bitcoin can, for instance, be divided up to eight decimal places (0.00000001) and potentially even smaller units in the future.[29] One stolen Bitcoin can therefore be split and sent to multiple addresses making tracing their destinations an elaborate and involved exercise. Crypto mixers (or crypto tumblers) have also been used to mix cryptoassets with other users to create combinations with multiple transactions to make tracing the source and destination even more complicated. Before the crypto mixer Tornado Cash was sanctioned by the US Department of Treasury's Office of Foreign Assets Control in August 2022, it had mixed some USD 7 billion in cryptocurrency since 2019.[30]

Third, the cryptoassets may be residing with a *bona fide* purchaser for value without notice. While decentralised cryptoassets are recorded on the public blockchain ledger which due diligence can be easily conducted on, it is not easy for a *bona fide* purchaser to spot whether a cryptoasset is stolen property as the ledger does not (quite obviously) distinguish between legitimate and fraudulent transactions. Under common law, a *bona fide* purchaser for value of a property without notice of existing

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27 *ByBit* at [30].

28 *ByBit* at [30].

29 See the Frequently Asked Questions on Bitcoin.org's website under "*Won't the finite amount of bitcoins be a limitation?*", accessible here.

30 US Treasury Sanctions Notorious Virtual Currency Mixer Tornado Cash dated 8 August 2022, accessible here.

prior claims to the title would take good title to the property, even if the property was obtained by the seller fraudulently.[31]

A claimant should therefore consider tracing the assets prior to commencing proceedings to obtain as much information as possible and seek an interim injunction at an early stage to freeze the assets to prevent further movement. Otherwise, they may have to continue the tracing journey even after obtaining the court order or judgment, which increases the risk of non-recovery. Such an injunction may seek to restrain further sale or dealings with a particular cryptoasset in question.

That was the case in *Janesh s/o Rajkumar v Unknown Person ("CHEFPIERRE")* [2022] SGHC 264 (***Chefpierre***), where the High Court granted a proprietary injunction prohibiting an unknown person defendant[32] who went by the pseudonym "chefpierre.eth", from "*in any way dealing with the Bored Ape NFT*" until after trial. Even then, defendants may face practical challenges in enforcing such an injunction.

In *Chefpierre*, the defendant had listed the Bored Ape non-fungible token (**NFT**) for sale on OpenSea, an online NFT marketplace. It is fortunate in that case that OpenSea, which is based in the US, was cooperative and eventually froze the NFT's sale in around May 2022.[33] Not all third-party platforms may be as cooperative, and claimants may have to take further formal actions in the countries where these platforms are based to enforce such injunctions or consider and adopt other strategies to pressure the platforms to voluntarily comply with such orders.

Further, even if the first NFT marketplace does comply with the injunction and freezes the sale, claimants need to be aware that the unknown person defendant may turn to other online NFT marketplaces to sell the NFT in question. In that case, the claimant would have to ensure that the injunction obtained is sufficiently broad in scope to cover such a scenario, and monitor multiple marketplaces to arrest any attempt of sale of the NFT as quickly as possible.

Concluding Observations

Thus, while the decision in *ByBit* assists claimants and victims of fraud as it confirms that cryptoassets are property and can be subject of a constructive trust, it is still important for claimants to think ahead, have enforcement strategies in place and ensure that they seek appropriate and adequate orders in time from the court.

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31 On this note, in *Jahangir Piroozzadeh v Persons Unknown and ors* [2023] EWHC 1024 (Ch), the English High Court initially granted an *ex parte* injunction against Binance Holdings Limited (**Binance**), which the claimant alleged was a constructive trustee of the stolen cryptoassets as the unknown fraudsters had deposited them at addresses at Binance. Binance managed to discharge the injunction by (among other things) arguing that the claimant had not met its full and frank disclosure obligations in seeking the *ex parte* injunction, as it had failed to explain that Binance could potentially raise the defence that it was a *bona fide* purchase for value of the stolen cryptoassets deposited.

32 For further discussion on how to commence an action and obtain orders / injunctions against persons unknown, please see our March 2022 Special Update.

33 See article titled "OpenSea Suspends Sale of Bored Ape NFT As A Result of Legal Case In Singapore", accessible here.

It would be too late, and a waste of time and resources, for claimants to obtain a court order only to realise at the enforcement stage that amendments or further orders are required due to the unique set of challenges brought about by cryptoassets.

If you would like information and/or assistance on the above or any other area of law, you may wish to contact the Partner at WongPartnership whom you normally work with or any of the following Partners:

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OTHER UPDATES

DATE	TITLE
7 August 2023	CCCS Conducts Public Consultation on Draft Environmental Sustainability Collaboration Guidance Note
25 July 2023	Singapore's Acquisition Financing: Trends and Developments
21 July 2023	Data Protection Quarterly Updates (April – June 2023)
6 July 2023	China's Regulations for Filing-based Administration of Overseas Securities Offerings and Listings by Domestic Companies: Impact on Listed Companies 中国境内企业境外发行证券和上市的备案管理规则：对已上市公司的影响
30 June 2023	Records of Arbitrators' Deliberations to be Produced Only in Very Rarest of Cases, Singapore International Commercial Court Rules

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