

Cryptocurrencies and the Irish Courts

The rise in the use and trading of cryptocurrencies continues apace. Unsurprisingly, this has led to their consideration by the courts. Here, we look at the trends emerging from recent High Court decisions.

Given their novel intangible form, cryptocurrencies have given rise to some uncertainty as to their legal characteristics, in particular whether they could be considered as 'property' or 'assets'. Therefore, disputes in the area will be inevitable, at least until the Courts provide more certainty. The Irish Courts, like the Courts in other jurisdictions, have to date taken a practical approach to ensure that traditional legal remedies, such as injunctions and disclosure orders, can be adapted to meet the needs of the growing significance of cryptocurrency in the commercial sphere.

At the time of writing, the total market capitalisation of cryptocurrencies is estimated to be \$2 trillion. In an Irish context, research published by the Competition and Consumer Protection Commission (CCPC) last month found that one in 10 Irish investors hold cryptocurrencies, with that figure increasing to one in four among those aged 25 - 34.

This popularity comes in spite of previous warnings about the risks of cryptocurrencies from the Central Bank of Ireland and the European supervisory authorities, including the European Securities and Markets Authority. Cryptocurrencies are not recognised as legal tender in Ireland. Furthermore, while Irish transposing legislation giving effect to the EU Fifth Anti-Money Laundering Directive has recently extended anti-money laundering and countering the financing of terrorism rules to virtual asset service providers (including

cryptocurrency and digital wallet providers), there is currently no other overarching Irish regulation which specifically deals with the regulation of cryptocurrencies or blockchain technology.

There is currently a proposal at EU level to introduce a new regulation on Markets in Crypto-Assets (MICA) which will introduce a new licensing regime and harmonised regulatory rules, including investor protection and conduct of business rules, for crypto-assets. Regulation of crypto-assets is, therefore, an evolving area, with more detailed consideration of that issue being outside the scope of this update.

Enforcement of Judgments

The High Court has proven willing to apply enforcement remedies to cryptocurrencies.

In *Trafalgar Developments Limited v Mazepin* [2019] IEHC 7, the Commercial Court granted judgment in default of appearance against two defendants, a company registered in the British Virgin Islands and a Russian citizen, in connection with a dispute over the ownership of a company reported to be one of the largest producers of ammonia in Russia. In particular, the defendants were alleged to have been co-conspirators in a corporate "raider attack" which was intended to divest the plaintiffs of their shares in the Russian company.

Having found that there was a significant risk of dissipation of assets in frustration of the judgments, the court also granted worldwide *Mareva* type (freezing) orders and disclosure orders requiring the two defendants to disclose on affidavit all cryptocurrency wallets in which they held a direct or indirect legal or beneficial

interest, as well as worldwide *Mareva* type orders in respect of their assets, which, it appears, extended to cryptocurrency wallets.

Tracing the Proceeds of Stolen Bitcoin

Earlier this year in *Williams v Coinbase Europe Ltd* (High Court, unreported), the High Court reportedly granted an order directing Coinbase, a digital currency platform, to provide information to a US-based businessman in relation to an unknown account holder who was alleged to be in receipt of stolen Bitcoin. Known as a *Norwich Pharmacal* order, this is an order requiring the disclosure of specific information in relation to the identity of a wrongdoer by a third party.

The application was made by the US-based businessman as part of efforts to trace approximately \$1.8 million in Bitcoin which was stolen from his cryptocurrency wallet. With the assistance of a specialist cryptographic tracing firm, he was in a position to trace some of the Bitcoin, approximately \$160,000, to an account held by an unknown person with Coinbase, a company registered in Ireland.

However, the identity of the account holder remained unknown and, while Coinbase consented to the orders sought, Coinbase could not, for reasons of contract and data protection, provide such details unless it was ordered by a court to do so. The High Court ultimately granted orders directing Coinbase to provide information that would assist in identifying the unknown account holder.

The approach of the Irish courts in this regard is broadly consistent with that of the courts of England and Wales where there have been a number of judicial decisions involving the grant of freezing and *Norwich Pharmacal* orders relating to cryptocurrencies which have been expressly recognised as property. The position in the UK is further supported by the issue of a legal statement in 2019 by the UK Jurisdiction Taskforce of the LawTech Delivery Panel, led

by the Chancellor of the High Court of England and Wales, which recognised that crypto-assets should be treated in principle as property.

Freezing Cryptocurrencies as the Proceeds of Crime

The Irish courts have, on a number of occasions since 2015, granted orders freezing cryptocurrencies, including Bitcoin and Ethereum, on foot of applications by the Criminal Assets Bureau (CAB), a statutory body tasked with investigating the suspected proceeds of crime. Such orders have included the seizure of Ethereum (reportedly the first of its kind by any law enforcement agency in the world), and a single seizure of €53 million in Bitcoin in 2019.

In the first reported decision of the superior courts in this area, the High Court in *Criminal Assets Bureau v Mannion* [2018] IEHC 729, granted an order freezing a digital wallet containing Ethereum under the Proceeds of Crime Act 1996.

Although the judgment does not discuss the legal status of such currencies, it is clear that the High Court was satisfied to treat the Ethereum currency as "property" when granting the freezing order, at least for the purposes of the Proceeds of Crime Act 1996.

Conclusion

Although the status of cryptocurrencies as a form of property may not yet have been rigorously analysed, the Irish decisions to date suggest an implicit, but clear willingness to recognise cryptocurrencies as a form of property or an asset which in turn can be subjected to traditional legal remedies.

Together with the willingness of the courts to grant disclosure and freezing orders, this will be of some comfort to both holders of cryptocurrencies, who may be the subject of a fraud and are seeking to recover a quantity of cryptocurrency, and parties seeking to enforce

a judgment where there is a suspicion that the debtor may hold significant amounts in cryptocurrencies.

For further information, please get in touch with your usual Maples Group contact or any of the persons listed below.

Dublin

Kyle Nolan

+353 1 619 2733

kyle.nolan@maples.com

Kevin Harnett

+353 1 619 2036

kevin.harnett@maples.com

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