



IP ITeasers 049:

Service gateways in crypto fraud claims

In the continuing saga of *Osbourne v Persons Unknown* [2023] EWHC 39 (KB), the claimant is seeking to recover two NFTs which were stolen from her crypto wallet, and which are of personal value to her although relatively low value in financial terms. In March 2022, HHJ Pelling QC granted an interim injunction against the unknown thieves and a Banker's Trust information order against the exchange on the basis that there was a good arguable case that crypto assets are "property" and that they are located in the place where their owner has control over the assets through the private key.

The Claimant has recently returned to court for permission to add equitable proprietary claims against further defendants, which gave Lavender J the opportunity to consider the terms of some of the gateways for permission to serve proceedings out of the jurisdiction.

First, while Gateway 11 of Practice Direction 6B allows service where the claim relates to property in the jurisdiction, and Gateway 15(b) allows service where there is a constructive trust claim which relates to assets in the jurisdiction, it is undecided whether the assets must still be in the jurisdiction at the time of the service application. This could cause problems where the thief now in control of the assets is outside the jurisdiction.

Second, while Gateway 15(a) permits service of a constructive trust claim arising out of acts committed or events occurring within the jurisdiction, it is unclear whether this extends beyond the acts of the original thief in stealing the assets to subsequent transfers outside the jurisdiction.

Third, despite the absence of authority on the point, the judge considered it “strongly arguable” that the constructive trust which arose when the hackers stole assets located in England was governed by the law of England and Wales, and thus within Gateway 15(c).

This case shows the continuing dynamism of the common law in adapting existing principles to new claim situations arising out of modern technology. Crypto caselaw is currently the source of much new judicial law making, most of it unfortunately on interim applications, leaving the arguments yet to be tested to the trial standard.