UPDATE

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# Service of Freezing Injunction on BVI Cryptocurrency Issuers by a Nonfungible Token

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On Nov. 23, 2023 Justice Ingrid Mangatal *ex parte* order for service by alternative means in *AQF v. Xio, VQF CGN*[1] by ordering service on the first defendant (an unknown individual)via a nonfungible token (NFT) airdrop to their digital wallet address pursuant to the new Eastern Caribbean Supreme Court Civil Procedure Rules (CPR).[2] This is a novel approach in alternative methods of service in the British Virgin Islands (BVI).

## Background

The applicant was a businessman who provides broker services for gold bullion transactions. He was the owner of US$3,065,100.06 worth of cryptocurrency, which was held in two digital wallets under his control. He sought to purchase 50,265.5 grams of gold bullion by a company known as X Limited(buyer) from a company known as Y Limited (seller). He intended to transfer the cryptocurrency as part of the transaction. The agreement was that the applicant would advance the purchase price, then be reimbursed by X Limited. Unfortunately, the applicant became the victim of an "address-poisoning" scam, also referred to as a zero-value transfer scam. It involves the scammer producing a wallet address that looks nearly identical to the wallet that is known to the victim. The victim honestly believed that a payment was being made to a *bona fide* wallet, but the funds were instead transferred to the scammer's address. In this case, on July 3, 2023, the applicant sent US$3,065,100.06 worth of cryptocurrency to the scammer's wallet, instead of sending the sums to the seller's wallet (the "defrauded assets"). Following the transfer of the defrauded assets, the seller informed the applicant that payment was not received. The applicant expeditiously filed a police report with the Dubai (United Arab Emirates) police on July 6, 2023, and instructed a blockchain investigations specialist to trace the defrauded assets. Investigations confirmed that the cryptocurrency had been transferred three times to various wallets within 24 hours of the scam. The applicant commenced proceedings in the High Court of the Republic of Singapore against persons unknown for a proprietary injunction, and for disclosure orders against the exchanges through which some of the defrauded assets had been transmitted (the "Singapore proceedings"). A worldwide injunction was issued by the Singapore Court on July 26, 2023, against the first respondents, prohibiting them from dealing with their assets up to the value of US$3,065,100.06. The applicant then sought disclosure in the Singapore Court. With the information obtained from the disclosure order, the applicant obtained permission from the Singapore Court to commence proceedings in the BVI on the basis that the relevant cryptocurrency was issued and centrally controlled by the second and third respondents, both incorporated in the BVI.

## The BVI Applications

The applicant applied *ex parte* on an urgent basis for a freezing injunction against the first respondents, who were identified as persons unknown by reference to their digital wallets. The second and third respondents were in the business of issuing cryptocurrency on the Ethereum and TRON networks, which

[1] *AQF v. Xio, VQF, CGN* BVIHC(COM) 2023/0239.

[2] Revised Edition 2023.

are publicly available ledgers (blockchains) and provide a digital record of every transaction. As the issuer, the second and third respondents could annotate the relevant cryptocurrency held in any wallet at any particular time, which effectively disables the coin and freezes it. The applicant sought against the second and third respondents (against whom no substantive wrongdoing or involvement in the scam was alleged) a mandatory interim injunction to prevent the transfer or disposal of the defrauded assets, and an ancillary disclosure order to provide any information relating to the wallets and the ownership of the wallets. In addition, the applicant applied for an order for service out of the jurisdiction by way of alternative service of the application papers by NFT airdrop to the digital wallets of the first respondents. The court noted, "It is now well established that cryptocurrency is property and that the Court is entitled to grant injunctive relief in relation to it if appropriate." Justice Mangatal noted that freezing orders had been granted in relation to cryptocurrency,[3] including as against persons unknown.[4]

## Service Out of the Jurisdiction by Alternative Means

The applicant first had to satisfy the court that he was entitled to serve the first respondents out of the jurisdiction. The new CPR Rule 7.6 requires a claimant to self-certify the following: (1) they have a good cause of action; (2) they can confirm the relevant gateway on which they rely; (3) the court is the appropriate forum for the trial; and (4) the proposed method of service does not infringe on the law of that foreign state. This can be contrasted with the previous position regarding service out of the jurisdiction, which required a separate application to be made.

Where service cannot be affected on a defendant for "good reason," the claimant may apply for an order that the court process may be served by an alternative method specified by the court. English case law states that the "good reason" test is a general one that is not confined to specific and limited categories, but remains the test for whether alternative service should be permitted.[5] In the Hague Service Convention or other bilaterial service-treaty cases, "good reason" means "exceptional circumstances," and mere delay or expenses in serving in accordance with the treaty cannot — without more — constitute "exceptional circumstances."[6]

In *Cecil and others v. Bayat and others*, Lord Justice Stanley Burnton stated, "Service by alternative means may be justified by facts specific to the defendant, as where there are grounds for believing that he has or will seek to avoid personal service where that is the only method permitted by the foreign law, or by facts relating to the proceedings, as where an injunction has been obtained without notice, or where an urgent application on notice for injunctive relief is required to be made after the issue of proceedings."[7] The BVI Court in *AQF v. Xio, VQF, CGN* noted that some previous examples of "good reason" have been that the claimant has difficulty identifying the defendant (service on persons unknown); the claimant is unable to ascertain the defendant's current address; or the defendant has attempted to evade service. In this case, the factors that led the judge to conclude that there was good reason for service out of the jurisdiction included the following:

- The first respondents were persons unknown and therefore could not be identified save for their digital wallet addresses, which meant that the applicant did not have any definitive address at which it could attempt to serve the first respondents;
- The applicant obtained an order for service out of the jurisdiction and service of the cause papers in the Singapore proceedings by substituted means to serve the first respondents by email, by file transfer to any of the text-message platforms or applications, and/or accounts associated with wallet addresses, which meant that the means of substitutive service did not infringe on the laws of Singapore; and
- The applicant attempted service of the application papers on the first respondents to no avail, and therefore service by alternative means was justified based on the facts of the present case.

The BVI court considered that the English Courts had recently permitted service by an NFT where there would be difficulties with serving persons unknown where nothing else is known other than a digital wallet

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[3] *Vorotyntseva v. Money-4 Ltd*. [2018] EWHC 2596 (Ch)342.

[4] *AA v. Persons Unknown* [2019] EWHC 3556 2.

[5] *Team Y & R Holdings Hong Kong Ltd and others v. Ghossoub and Cavendish Square Holding BV and another v. Ghossoub* [2017] EWHC 2401 (Comm)

[6] *Marashen v. Kenvett* [2017] EWHC 1706 (Ch).

[7] [2011] 1 WLR 3086 at ¶ 68.

address: Paragraphs 38-40 of *D'Aloia v. Persons Unknown and Binance Holdings Limited and Others* adjudicated on this novel mode of service, stating:

I then move on to the application for service by an alternative method or at an alternative place on the first defendant. The application for service by alternative means on the first defendant is sought, both in relation to service by email, and, also, service by what is called the [NFT], which is a form of airdrop into the tda-finan wallets in respect of which the claimant first made his transfer to those behind the tda-finan website....

Ms. Muldoon says that this is a novel form of service, and has explained to me that its advantage is that, in serving by ... NFT ... the claimant will ... "embrace the Blockchain technology," because the effect of the service by NFT will be that the drop of the documents by this means into the system will embed the service in the blockchain. I may not have expressed that very happily but that is the essence of what Ms. Muldoon said. There can be no objection to it; rather it is likely to lead to a greater prospect of those who are behind the tda-finan website being put on notice of the making of this order, and the commencement of these proceedings.... I am satisfied that, in this particular case, it is appropriate for service to be [a]ffected by NFT in addition to service by email. I think that the difficulties that would otherwise arise and the complexities in relation to service on the first defendant mean that good reason has been shown; I do not think it is appropriate, nor, indeed, did Ms. Muldoon ask me, to make an order for service by alternative means in circumstances in which it would be sufficient, without serving by email as well. However, I am content to make an order for service by alternative means by those two additional routes. I am also satisfied that there is good reason for service on the exchange defendants to be by the alternative means on the face of the order.[8]

## Comments

The novelty of this judgment was that the court allowed alternative service of the freezing order out of the jurisdiction on a BVI cryptocurrency issuer via its NFT. With the continued growth of cryptocurrencies, scammers will likely find increasingly innovative ways to crypto-scam. The BVI court's decision in *AQF v. Xio, VQF, CGN* is helpful for applicants in situations where the cryptoassets are transferred to and from multiple wallets where it is nearly impossible to identify the owners of the digital wallets.

This judgment highlights the robust nature of the CPR and the BVI court's willingness and ability to adapt to the ever-changing landscape of litigation. Claimants in this jurisdiction can now be rest assured that there is already established precedent in the BVI, which they can rely on should they find themselves in a similar situation. While this judgment is welcomed and celebrated for its novelty, claimants are reminded that the requirements under CPR Rule 7 (service out of the jurisdiction) must still be satisfied in full before the court will be willing to make an order permitting service by alternative means.

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[8] [2022] EWHC 1723 (Ch) at ¶¶ 38-40.

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