

Albert Monichino, Cryptocurrency and Interim Court Relief: *Chen v Blockchain Global Ltd*, *CLM v CLN* and *Fetch.ai Ltd v Binance* (2022) 50 *Australian Business Law Review* 205.

This article explores three recent cases where the common law courts have given interim relief when things have gone wrong in the largely unregulated cryptocurrency sphere: *Chen v Blockchain Global Ltd* [2022] VSC 92 ('Chen'); *CLM v CLN* [2022] SGHC 46 ('CLM'); and *Fetch.ai Ltd v Binance* [2021] EWHC 2254 ('Fetch.ai').

The article analyses these cases to draw nine insights about cryptocurrency's nature and form, issues of jurisdiction and venue, which contracts typically arise in cryptocurrency trading, which causes of action and relief are available for misappropriation of cryptocurrency assets, and the use of disclosure orders to assist in recovery.

(1) Nature and form of cryptocurrency

Blockchain is a decentralised system of ledgers in a network of computers which tracks the creation and transfer of cryptocurrency. A blockchain is not maintained by any central authority but instead resides in thousands of computers around the world, connected over the internet running the same software, and thereby creating a network.

Bitcoin ('BTC') and Ethereum ('ETH') are blockchains which provide a permanent digital record of every transaction associated with that cryptocurrency. All transactions are transparent and traceable.

The holder possesses cryptocurrency in a wallet (similar to a bank account), along with a public BTC address (similar to a bank account number) and one or more private cryptographic keys (like a password which can't be changed).

Both the public address and the private key is needed to transfer BTC out of the address. While the address is public, the identity of the address holder is not.

Singaporean, English, Canadian and New Zealand authority suggests that cryptocurrency is a recognised form of common law property right, but it is less clear whether it can be held on trust. In *Quoine Pty Ltd v B2C2 Ltd* [2020] 2 SLR 20, 66-68 [141]-[145] ('*Quoine*'), the Singapore Court of Appeal held that even if BTC is 'property' capable of being the subject of a trust, on the facts of that case there was no certainty of intention to create a trust.

(2) Jurisdiction and venue

Fetch.ai suggests that the place where the person or company who owns the cryptocurrency is domiciled determines where it is located as a matter of law. Determining the jurisdiction in which a recovery action should be brought will depend on where the claimant does business or is domiciled, and where they suffered loss.

(3) Types of contracts which typically arise

Quoine suggests that there are commonly three kinds of contracts involved in cryptocurrency trading: contracts relating to use of the cryptocurrency platform itself, contractual arrangements for financing margin trades, and trading contracts which come into existence once a trade is concluded.

(4) Key issues

The transaction history of cryptocurrency is traceable given blockchain technology. However, recovery actions are difficult or even impossible because of the difficulties ascertaining the identity of the person(s) behind the wallets into which misappropriated cryptocurrency assets are deposited.

(5) Typical causes of action and relief

Fetch.ai suggests that the most common causes of action are breach of confidence giving rise to a claim for damages or an account of profits, unjust enrichment and an equitable proprietary claim based upon constructive trust in respect of assets removed from the claimant dishonestly. One further possibility is the personal remedy of an action in knowing receipt, provided that the defendant's unconscionable knowledge of the claimant's interest can be proved.

(6) Whether proprietary injunctions may be sought against *unidentified* wrongdoers

Such injunctions are not accepted in Australia – but in both *CLM* and *Fetch.ai*, interim injunctions were granted against the alleged wrongdoers as a class of unidentified persons.

(7) Disclosure orders

Norwich Pharmacal orders – generally used for innocent parties mixed up in wrongdoing – and *Bankers Trust* orders – generally made against a person who has 'handled' the misappropriated funds – can be made by a court exercising its equitable jurisdiction. These types of orders are vital in fraud litigation. Both are available in the Australian jurisdiction, but are seldom used given the availability of ancillary orders in the Court Rules.

(8) Timing

A victim must move with 'extreme haste', and consider seeking disclosure orders concurrently with the institution of proceedings seeking substantive relief rather than follow the conventional practice of seeking these orders prior to commencing proceedings.

(9) Service

A claimant should consider early on whether leave needs to be sought to serve proceedings (against either the alleged wrongdoers or a cryptocurrency exchange) out of the jurisdiction, and whether service should be made by means other than personal service.