

DISPUTE RESOLUTION ALERT

29 AUGUST 2023



INCORPORATING
KIETI LAW LLP, KENYA

IN THIS ISSUE

Crypto fraud: Judge grants service, through NFTs, on unknown defendants

Cryptocurrency is yet another revolutionary invention in the online world. However, with innovation comes uncertainties, particularly in the legal field. This innovation requires us, like it, to redefine the parameters set in the past in the name of advancement. For litigation this means having to find new boundaries for elements like jurisdiction and service.



FOR MORE
INSIGHT INTO
OUR EXPERTISE
AND SERVICES

Crypto fraud: Judge grants service, through NFTs, on unknown defendants

Cryptocurrency is yet another revolutionary invention in the online world. However, with innovation comes uncertainties, particularly in the legal field. This innovation requires us, like it, to redefine the parameters set in the past in the name of advancement. For litigation this means having to find new boundaries for elements like jurisdiction and service.

This is particularly true where the defendants are unknown to the complainant, as is often the case with instances of crypto forms of digital fraud. Issues of jurisdiction over and service on unknown defendants was recently tackled in the High Court of England and Wales in the case of *D'Aloia v Persons Unknown* [2022] EWHC 1723 (Ch), where (i) an order for disclosure and substituted service was sought against, *inter alia*, certain unknown persons; and (ii) alternative service was requested via non-fungible tokens (NFTs). A NFT involves airdropping documents into a cryptocurrency wallet. This case is one of the first, if not the first, instances where courts have permitted service through a NFT, and at the same time granted permission to litigate and serve on as yet unidentified entities. In terms of online and digital fraud this is a welcome development where the identity of defendants are often unknown.

Mr D'Aloia discovered that his cryptocurrency, worth USDT 2,100,000 (approximately R36,205,470) and USDC 230,000 (approximately R3,972,327), had been misappropriated by unknown persons under the guise of a well-known online brokerage. Investors were encouraged to deposit cryptocurrency into wallets for trading purposes. While D'Aloia was able to trade on the platform, when he tried to make a withdrawal from the platform he was immediately blocked from his account. Later investigations revealed that his account was later cleared of all its currency, which had likely been transferred to wallets held at Binance Market Limited (Binance), an English company also dealing in cryptocurrency exchanges. What the investigation did not reveal was the true identity of the entity which defrauded D'Aloia. This notwithstanding, D'Aloia turned to the English courts for help.



Crypto fraud: Judge grants service, through NFTs, on unknown defendants

CONTINUED

His crypto wallet scammers were likely located in Hong Kong, but without sufficient evidence to prove exactly where they were or who they were, service and jurisdiction became a concern in the recovery of his cryptocurrency. D'Aloia approached the High Court for an interim freezing injunction to prevent the defendants, including Binance, from disposing of his misappropriated assets. In addition to the freezing injunction, he also sought a disclosure order against Binance to compel it to provide him with the necessary information to trace his crypto assets.

The court held that despite the fact that the unknown persons were likely in Hong Kong (based on a tracing report), it could exercise jurisdiction over the claim as the cryptocurrency was held in England, where D'Aloia was domiciled and where the damage occurred. While the court cleared Binance of any wrongdoing based in the evidence before it, it did hold

that the applicant also had a claim against Binance in its capacity as the constructive trustee of the cryptocurrency because it controlled and operated the exchanges which D'Aloia's cryptocurrency could be traced through. The constructive trust came into effect by way of the transfer of the cryptocurrency occurring in England and the cryptocurrency exchanges operating as trustees holding the stolen cryptocurrency for the benefit of the victims of cryptocurrency fraud. Interestingly, the court also held that a claim for damages, a possible and less invasive alternative to a freezing injunction, was not an appropriate remedy as it would in no way assist in preventing the disposal of the cryptocurrency.

The injunction preventing the disposal of D'Aloia's cryptocurrency was granted, together with the application for disclosure to help D'Aloia identify the unknown defrauders. The balance

of convenience weighed in favour of disclosure, as the benefits of disclosure outweighed the duty of confidentiality owed to third parties and D'Aloia had the means to pay an unlikely successful damages claim flowing from the injunction.

That left the question of service of the judgment and further proceedings on unknown persons, who were likely based outside of England. In this instance the court allowed for the use of the defrauders' own technology platform for service purposes and granted permission for service to occur by way of (i) NFT airdrop to the unknown persons – the airdrop would be made to the "wallets" where the cryptocurrency had originally been deposited into; and (ii) by email – using the email addresses which had been used to engage with D'Aloia when he originally reported the fact that he had been blocked from the exchange platform.

Crypto fraud: Judge grants service, through NFTs, on unknown defendants

CONTINUED

Email service has been permitted for a relatively long time now. However, allowing for NFT service is a significant advancement as it provides relief in an instance where victims of cryptocurrency fraud would have previously been unable to effect service and/or enforce their order against unknown defendants. Delivery of documents by NFT also ensures verified receipt, making it an ideal form of service. This judgment paves the way for the use of NFTs and similar technology in other legal proceedings where the whereabouts of one of the parties is unknown. However, given that this form of service is not standard, claimants will still have to apply to court for permission to use it.

The court's finding that the cryptocurrency exchanges are to be regarded as constructive trustees is also significant as, should the exchanges act contrary to the order, they will be liable for breach of trust, necessitating cryptocurrency exchanges to take additional steps to protect cryptocurrency that is the subject of a legal dispute. These steps afford the crypto consumer greater protection. In South Africa, where the cryptocurrency industry remains largely unregulated, this trailblazing decision by the High Court of England and Wales potentially paves the way for South African courts to apply similar decision-making.

**Belinda Scriba, Paige Winfield
and Gaby Wesson**



Cliffe Dekker Hofmeyr

2023 RESULTS

Chambers Global 2022 - 2023 ranked our Dispute Resolution practice in **Band 2: Dispute Resolution**.

Chambers Global 2018–2023 ranked us in **Band 2** for Restructuring/Insolvency.

Tim Fletcher ranked by **Chambers Global 2022 - 2023** in **Band 2: Dispute Resolution**.

Clive Rumsey ranked by **Chambers Global 2019 - 2023** in **Band 4: Dispute Resolution**.

Tobie Jordaan ranked by **Chambers Global 2022 - 2023** in **Band 4: Restructuring/Insolvency**.

Lucinde Rhodie ranked by **Chambers Global 2023** in **Band 4: Dispute Resolution**.

Jackwell Feris ranked by **Chambers Global 2023** as an upcoming dispute resolution lawyer.

Kylene Weyers ranked by **Chambers Global 2023** as an upcoming restructuring/insolvency lawyer.

OUR TEAM

For more information about our Dispute Resolution practice and services in South Africa and Kenya, please contact:



Rishaban Moodley

Practice Head & Director:
Dispute Resolution
Sector Head:
Gambling & Regulatory Compliance
T +27 (0)11 562 1666
E rishaban.moodley@cdhlegal.com



Tim Fletcher

Chairperson
Director: Dispute Resolution
T +27 (0)11 562 1061
E tim.fletcher@cdhlegal.com

Timothy Baker

Director:
Dispute Resolution
T +27 (0)21 481 6308
E timothy.baker@cdhlegal.com

Eugene Bester

Director:
Dispute Resolution
T +27 (0)11 562 1173
E eugene.bester@cdhlegal.com

Neha Dhana

Director:
Dispute Resolution
T +27 (0)11 562 1267
E neha.dhana@cdhlegal.com

Claudette Dutilleux

Director:
Dispute Resolution
T +27 (0)11 562 1073
E claudette.dutilleux@cdhlegal.com

Jackwell Feris

Sector Head:
Industrials, Manufacturing & Trade
Director: Dispute Resolution
T +27 (0)11 562 1825
E jackwell.feris@cdhlegal.com

Thabile Fuhrmann

Joint Sector Head:
Government & State-Owned Entities
Director: Dispute Resolution
T +27 (0)11 562 1331
E thabile.fuhrmann@cdhlegal.com

Tiffany Gray

Director:
Dispute Resolution
T +27 (0)11 562 1388
E tiffany.jegels@cdhlegal.com

Anja Hofmeyr

Director:
Dispute Resolution
T +27 (0)11 562 1129
E anja.hofmeyr@cdhlegal.com

Tendai Jangara

Director:
Dispute Resolution
T +27 (0)11 562 1136
E tendai.jangara@cdhlegal.com

Tobie Jordaan

Sector Head:
Business Rescue, Restructuring & Insolvency
Director: Dispute Resolution
T +27 (0)11 562 1356
E tobie.jordaan@cdhlegal.com

Corné Lewis

Director:
Dispute Resolution
T +27 (0)11 562 1042
E corne.lewis@cdhlegal.com

Vincent Manko

Director:
Dispute Resolution
T +27 (0)11 562 1660
E vincent.manko@cdhlegal.com

Richard Marcus

Director:
Dispute Resolution
T +27 (0)21 481 6396
E richard.marcus@cdhlegal.com

Burton Meyer

Director:
Dispute Resolution
T +27 (0)11 562 1056
E burton.meyer@cdhlegal.com

Mongezi Mpahlwa

Director:
Dispute Resolution
T +27 (0)11 562 1476
E mongezi.mpahlwa@cdhlegal.com

Kgosi Nkaiseng

Director:
Dispute Resolution
T +27 (0)11 562 1864
E kgosi.nkaiseng@cdhlegal.com

Desmond Odhiambo

Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E desmond.odhiambo@cdhlegal.com

Lucinde Rhoodie

Director:
Dispute Resolution
T +27 (0)21 405 6080
E lucinde.rhodie@cdhlegal.com

Clive Rumsey

Sector Head: Construction & Engineering
Director: Dispute Resolution
T +27 (0)11 562 1924
E clive.rumsey@cdhlegal.com

Belinda Scriba

Director:
Dispute Resolution
T +27 (0)21 405 6139
E belinda.scriba@cdhlegal.com

Tim Smit

Director:
Dispute Resolution
T +27 (0)11 562 1085
E tim.smit@cdhlegal.com

Roxanne Webster

Director:
Dispute Resolution
T +27 (0)11 562 1867
E roxanne.webster@cdhlegal.com

Kylene Weyers

Director:
Dispute Resolution
T +27 (0)11 562 1118
E kylene.weyers@cdhlegal.com

Joe Whittle

Director:
Dispute Resolution
T +27 (0)11 562 1138
E joe.whittle@cdhlegal.com

Krevaria Pillay

Senior Associate:
Dispute Resolution
T +27 (0)11 562 1317
E krevaria.pillay@cdhlegal.com

Roy Barendse

Executive Consultant:
Dispute Resolution
T +27 (0)21 405 6177
E roy.barendse@cdhlegal.com

BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

PLEASE NOTE

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa.

Dx 154 Randburg and Dx 42 Johannesburg.

T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.

T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

NAIROBI

Merchant Square, 3rd floor, Block D, Riverside Drive, Nairobi, Kenya. P.O. Box 22602-00505, Nairobi, Kenya.

T +254 731 086 649 | +254 204 409 918 | +254 710 560 114

E cdhkenya@cdhlegal.com

STELLENBOSCH

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.

T +27 (0)21 481 6400 E cdh Stellenbosch@cdhlegal.com

©2023 12595/AUG