



## JONOTHAN GOULD

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*Jonathan is a civil litigator experienced in dealing with a range of complex issues, with a particular focus on insolvency and fraud. He has dealt with a broad range of matters including insolvency, asset-tracing and judgment enforcement, working closely with government agencies, multinational professional services firms and insolvency practitioners. He also has experience of regulatory prosecution and has personally conducted jury trials and other criminal hearings.*



## ANASTASIA TROPSHA

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*Anastasia is a trainee solicitor in the team, who helps with a wide range of complex dispute resolution matters with a focus on international commercial litigation and interim injunctive relief. As a native Russian speaker, Anastasia has been heavily involved in claims on behalf of individual and institutional clients from Russia and the CIS.*

### **Chancery Division Rules Bitcoin Too Volatile for a Proprietary Freezing Injunction**

#### **Summary**

In a recent Chancery Division judgment<sup>1</sup> involving a Bitcoin sale gone wrong, Mr Justice Vos has discharged a freezing injunction over Bitcoin held in the Defendant's wallet on the basis: (1) given the volatility of Bitcoin's value the injunction created a significant risk of loss to the Defendant, which could not be met by an effective undertaking in damages; and (2) although the Claimants advanced claims for a proprietary remedy, damages remained an adequate remedy.

The judgment is another useful development in the building jurisprudence around cryptocurrency fraud and highlights the protections available to individuals who unwittingly find themselves involved in or accused of cyber-fraud.

#### **Background**

The Claimants, Marian Toma and David True, had sold and transferred Bitcoin to an account held by the Defendant. However, payment of the sale proceeds was reversed, leaving the Claimants without either the Bitcoin or the proceeds. The Defendant purchaser, Ciaran Murray, claimed that he had been hacked and some fraud had taken place. In order to preserve the value of their claim for the Bitcoin in the Defendant's online wallet, the Claimants had obtained a without notice interim freezing order with proprietary provisions restricting the Defendant's ability to deal with the Bitcoin pending resolution of their claim. At the return date, Vos J heard the Claimants' application to continue this injunction.

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<sup>1</sup> *Toma and True v Murray* [2020] 7 WLUK 448

The Defendant submitted that the balance of convenience lay in setting aside the injunction as damages would be an adequate remedy for the claim and there was little to no risk of default as he owned an unencumbered property in Dublin. He also argued the freeze on the Bitcoin wallet created a significant risk of loss as the value of Bitcoin was highly volatile and the Defendant would not be able to mitigate any losses by moving the value of the Bitcoin into other assets. The Claimants also conceded they would be unable to satisfy a cross-undertaking in damages. They nevertheless asserted that the adequacy of damages as a remedy was of limited significance in a proprietary tracing claim.

### **Judgment**

Vos J considered and applied fundamental *American Cyanamid*<sup>2</sup> principles on freezing injunctions and the recent judgment in *AA v Persons Unknown*<sup>3</sup>. Vos J accepted that there was a serious issue to be tried but queried where the balance of convenience lay in light of (1) the efficacy of damages as an adequate remedy; (2) the giving and effectiveness of a cross-undertaking in damages; and (3) the merits of the claim.

The Court held as a matter of principle that a proprietary remedy claim would not inevitably ground a proprietary injunction. The Court accepted the Defendant's evidence as to his ability to satisfy an award of damages, and the significant risk of loss flowing from the freeze on the Bitcoin wallet (which could not be effectively met by an undertaking in damages). In the circumstances, the balance of convenience therefore lay in discharging the freezing injunction. The judgment effectively converted the Claimants' claim for a proprietary remedy (i.e. the return of the Bitcoin) into a claim for damages for the value of the Bitcoin sold to the Defendant.

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<sup>2</sup> *American Cyanamid Co (No 1) v Ethicon Ltd* [1975] UKHL 1

<sup>3</sup> *AA v Persons Unknown* [2019] EWHC 3556 (Comm)