CIVIL RECOVERY OF CRYPTOASSETS UNDER POCA: A NEW STATUTORY FOOTING

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On 22 September 2022, the UK Government unveiled the Economic Crime and Corporate Transparency Bill ("**the Bill**"). One of the main functions of the Bill is to make amendments to the Proceeds of Crime Act 2022 ("**POCA**") to better enable law enforcement authorities to achieve the civil recovery of cryptoassets under Part V of POCA.

The current status of cryptoassets under POCA

Prior to the Bill, the status of cryptoassets within POCA's civil recovery regime has been uncertain. It is now reasonably well-established that Bitcoin constitutes "property" as a matter of English law (e.g. ***AA v Persons Unknown*** **[2020] 4 WLR 35**, [55]-[61]). This would presumably extend to many other cryptoassets with the same characteristics.

In the POCA sphere, this was also the conclusion of Fordham J in ***DPP v Briedis*** **[2021] EWHC 3155 (Admin)** where the judge remarked that "*cryptocurrency, as cryptoassets, fall within the wide definition of "property" in section 316(4)(c)* [POCA] *("other intangible…property"), especially when viewed in the light of the purpose of these statutory powers*" ([10]). The judge went on to support this conclusion by observing that "[i]*t would be a serious lacuna if cryptoassets fell outside the reach of this statutory scheme*".

In ***Briedis***, the DPP sought, and obtained, a property freezing order ("**PFO**") under s.245A POCA against a basket of properties including money, watches, a car, and "*cryptocurrencies of different types*" ([9]). While the PFO was not opposed, and so any arguments – for example, concerning whether different cryptocurrencies were properly captured by the statutory definition of "property" in s.316(4) of POCA – were not fully ventilated, ***Briedis*** does at least demonstrate that cryptocurrencies are subject to the PFO regime in Part V of POCA in principle.

By contrast, the status of cryptocurrencies under the account freezing order ("**AFO**") regime under Part V Chapter 3B of POCA has been significantly less clear. Under s.303Z1 POCA, an AFO may only be sought against "*money*" held by a "*relevant financial institution*". These definitions appear to impose two bars to an AFO application as against cryptoassets:

- Although "*money*" does not have its own definition in Chapter 3B, s.303Z1(5) POCA suggests that it will be "*all or part of the credit balance of the account*" and s.303Z1(1) suggests that it must be held in an account. These descriptions appear inconsistent with the characteristics of cryptoassets, and the manner in which they are frequently held. Although it only applies to s.303Z35(1)(a) (i.e. the proposed definition of "*cryptoasset exchange provider*") it is noteworthy that the definition of "*money*" in the proposed s.303Z35(2) expressly excludes cryptoassets.
- A "*relevant financial institution*" is defined in s. 303Z1(5A) POCA as a bank, a building society, an electronic money institution or a payment institution. By contrast, there are many entities which an individual or company might use as a cryptocurrency custodian which would not meet this definition e.g. because they do not have authorisation to accept deposits for the purposes of Part 4 of the Financial Services and Markets Act 2000.

The Bill: key provisions

The amendments to the Bill introduce four new chapters, Chapters 3C to 3F, within Part V of POCA, respectively entitled: "*Forfeiture of cryptoassets*"; "*Forfeiture of cryptoassets: crypto wallets*"; "*Forfeiture of cryptoassets following detention or freezing order"*; and "*Conversion of cryptoassets*".

Chapter 3 of POCA otherwise concerns summary proceedings in the magistrates' court as against cash, listed assets, and money held in accounts. The insertion of the new cryptocurrency chapters within Chapter 3 thus significantly extends this summary procedure, with some specific modifications for cryptoassets.

- **Chapter 3E** sets out the forfeiture provisions which are tailored specifically to cryptoassets, which mirror closely the provisions of Chapters 3, Chapter 3A and Chapter 3B.
- **Chapter 3F** gives enforcement authorities wide powers to convert cryptoassets into money (including, by application, those which are only subject to a freezing order, and which have not yet been forfeited) to safeguard against fluctuations in market value.
- **Chapter 3C** broadly concerns searches, and the seizure and detention of "*crypto-asset related items*". These are defined by s.303Z21(2) as "*an item of property that is, or that contains or gives access to information that is, likely to assist in the seizure under this Part of cryptoassets…*". This is a very broad definition, which arguably extends to just about any piece of property which assists discovery of the prospective respondent's "seed phrase" or wallet details, including computers, mobile phones, files and records.
- Section 303Z29 ("*Seizure of cryptoassets*"), gives the enforcement officer authority to seize "*cryptoassets*" on the basis that there are "*reasonable grounds for suspecting that the property is recoverable*". This power includes the possibility of the transfer of the cryptoasset into a law enforcement wallet (s.303Z29(2)).
- Accordingly, Chapter 3C contemplates using powers of physical search and seizure in order to recover cryptocurrency held in a "decentralised" way, which can then be forfeited by application to the magistrates' court under s.303Z41 under a very similar procedure to that which already operates in Chapters 3, 3A and 3B in Part V of POCA.
- Conversely, **Chapter 3D** targets cryptocurrency held by a third-party custodian, such as a crypto-exchange or a bank. Section 303Z36 introduces an application for a freezing order against a crypto wallet held by a "*UK-connected cryptoasset service provider*", if there are "*reasonable grounds for suspecting*" that the cryptoassets in that wallet are either recoverable property, or intended for use in unlawful conduct.
- The definition of "*UK-connected cryptoasset service provider*" in s.303Z36(8) is, again, broad. Among other criteria, merely acting in the course of a business carried on by the cryptoasset service provider in the UK would be sufficient to provide the necessary UK connection (s.303Z36(8)(a)). This raises the issue as to whether a foreign-incorporated company providing exchange services for UK customers would fall within this definition, thereby potentially exposing their account holders to civil recovery applications under s.303Z36 and s.303Z41. Even if it would fall within the definition, the effectiveness of any such orders would clearly depend on the authority's ability to secure local enforcement under the laws of the country in which the business is located.

Evaluation of civil recovery of cryptoassets post-Bill

The insertion of Chapter 3D effectively resolves the previous shortcomings of the account freezing and forfeiture regime in Chapter 3 regarding cryptoassets. Assuming that there are no unexpected difficulties in the passage of the Bill, it now seems unlikely that a UK court will have to strain the existing provisions to bring cryptocurrency within the AFO regime.

There are, however, some drawbacks to the proposed amendments, and the use of the AFO regime:

- Chapter 3D provides no assistance against "decentralised" wallets i.e. a wallet not managed or maintained by a third party provider or institution.
- While Chapter 3C provides a mechanism which can target cryptoassets held in decentralised wallets, that mechanism is limited to seizing items designed to enable the transfer of the cryptoassets into the custody of law enforcement. The efficacy of such powers may be limited where sophisticated cryptocurrency operators are not in physical possession of any items which provide access to their decentralised wallets. If there are no items that can be seized under Chapter 3C to facilitate recovery, then there may be a lacuna in the freezing and recovery of decentralised wallets.
- The AFO regime is designed to be a summary procedure heard in the magistrates' court, akin to a complaint (Magistrates Courts (Freezing and Forfeiture of Money in Bank and Building Society Accounts) Rules 2017, r.16(2)). This procedure does not involve the lengthier and more evidence-intensive process commonly featured in High Court applications and trials for PFOs and civil recovery orders under Part V Chapter 2 of POCA.

In such circumstances, the PFO regime under Part V Chapter 2 of POCA may be the only other tool available to law enforcement agencies. As noted above, while the status of cryptoassets has not specifically been addressed by the proposed amendments in Chapter 2, the court has shown significant flexibility in accommodating cryptocurrencies in the PFO regime.

Indeed, the English courts are becoming increasingly nimble when it comes to the treatment of respondents who are only digitally-identifiable. For example, in ***D'Aloia v Persons Unknown*** **[2022] EWHC 1723 (Ch)**, the court permitted service to be effected by way of NFT "airdrop" to a decentralised wallet. It may be that law enforcement agencies could use similar methods in serving PFO proceedings (and orders) against cryptoassets held in decentralised wallets, and ultimately obtain a civil recovery order against those cryptoassets, provided that the enforcement of that order (possibly overseas) could be effective.

In summary, the Bill introduces an array of innovative powers for law enforcement agencies to secure the civil recovery of cryptoassets. Its terms appear to overcome many of the prior issues faced by the recovery of cryptoassets held in custodial wallets under the AFO regime.

There remain, however, some limitations regarding decentralised wallets and the use of the AFO regime in all cryptocurrency cases. It is therefore likely that the powers under Chapter V Part 2 of POCA will still remain a key part of enforcement authorities' armoury in the fight against the use of cryptoassets to disguise, launder, or transfer the proceeds of crime.

4 STONE BUILDINGS

ABOUT THE AUTHORS:

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Year of Call (2008), (to be appointed KC 2023)

Alexander has a litigation-focussed commercial Chancery practice, with a significant emphasis on high value disputes in England & Wales and offshore. His work encompasses all aspects of commercial litigation and arbitration, civil fraud, company law, insolvency, and actions under the Proceeds of Crime Act 2002 (POCA).

Consistently ranked as a leading junior in the legal directories, Alexander is recommended in seven practice areas across the 2023 editions (including POCA work and civil fraud), being described as "*a brilliant advocate*", "extremely *quick on his feet and immaculately prepared*", "*incisive* in his *cross-examination*" and "*a dream* to work with". He was shortlisted for Financial Crime Junior of the Year at the Legal500 Bar Awards 2022.

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Josh is building a broad commercial chancery practice across the full spectrum of work done by Chambers. He is equally comfortable being instructed as sole counsel or as a junior member of a counsel team. As sole counsel, he has appeared in the High Court, and various County Courts and Magistrates' Courts. He has cross-examination experience. His recent reported cases include ***Asher & Others v Jaywing plc*** **[2022] EWHC 893 (Ch)** (earnout payment under share sale and purchase agreement) and ***Re Preferred Management Ltd*** **[2021] EWHC 2953 (Ch)** (preliminary issue trial of an unfair prejudice petition).

Josh has substantial experience of matters arising under the Proceeds of Crime Act 2002. He has successfully made applications on behalf of the National Crime Agency and Thames Valley Police under Part V of that Act. Past cases include cash forfeiture applications under s. 298, account forfeiture applications under s. 303Z14, and applications to extend the moratorium period under s. 336.