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Pre-trial Remedies in Blockchain and Cryptocurrency-related Litigation: Mareva injunctions and Anton Piller Orders

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Blockchain technology and cryptocurrencies pose unique issues for investors pursuing legal remedies in the aftermath of an alleged fraud, misappropriation of funds, or corporate malfeasance. In recent years, investors have brought actions for fraudulent sale of cryptocurrencies, both as initial coin offerings and on the secondary market; misappropriation of cryptocurrencies from exchanges and cryptocurrency wallets; and embezzlement and data manipulation by officers of cryptocurrency exchanges. These actions are likely to increase as blockchain technologies and cryptocurrencies penetrate the market, and especially as regulators bring new rules to bear on actors and entities in this new market space.

A litigant pursuing a fraud action always runs the risk of winning a hollow judgment. A skilled fraudster is not likely to make its assets available to creditors or to turn over evidence that will help unmask the fraud.

In Ontario, Mareva injunctions and Anton Piller orders are two powerful tools that allow litigants to freeze a defendant's assets before trial, which can take years in the case of complex commercial actions, and to seize and preserve evidence.

Mareva Injunctions and Anton Piller Orders Are Powerful Tools to be Used Cautiously

A Mareva injunction allows a litigant to freeze a defendant's assets before trial and often includes compulsory asset disclosure terms that can help the litigant find assets and uncover fraud. An Anton Piller order is effectively a civil search warrant, and allows a litigant to enter onto a defendant's premises and seize and preserve evidence in circumstances where there is a risk that the defendant will destroy or conceal it.

Mareva injunctions and Anton Piller orders are exceptional remedies and should be pursued with caution. Such orders are most effective when obtained *ex parte*, without notice to the defendants. Litigants seeking *ex parte* orders must meet a high burden. That burden is especially high in the Mareva context, where asset freezes can have devastating consequences on the business and personal affairs of a defendant. A litigant seeking a Mareva injunction must: fully and fairly disclose all facts and law; establish a strong prima facie case of fraud; establish a real risk of dissipation of assets; give grounds for believing there are assets in the jurisdiction; and give an undertaking as to damages if the order turns out to have been improperly granted.

Courts are similarly cautious about granting Anton Piller orders. An Anton Piller order is a highly intrusive measure, requiring a defendant to allow a plaintiff's representatives to enter its

premises to seize evidence. It can be highly prejudicial and cause significant loss. A litigant seeking an Anton Piller Order must demonstrate, among other things, a strong *prima facie* case; the seriousness of damage from the defendant's alleged misconduct; that the defendant has incriminating documents or things; and a real possibility that relevant evidence will be destroyed or made to disappear. The litigant must also give an undertaking as to damages.

These tools have been available to Ontario litigants since the 1980s and are common enough that Ontario's busiest commercial court, the Ontario Superior Court of Justice's Commercial List, has provided model orders for both. Litigants should be guided by the model orders, as they generally reflect the courts' current practice. It is also important to bear in mind, however, that the model Mareva and Anton Piller orders and the law supporting them were developed before the advent of blockchain technology or cryptocurrencies. Investors wanting to apply these tools in blockchain or cryptocurrency-related litigation should consider issues that are unique to those contexts.

Mareva Injunctions

In most circumstances, a litigant will be able to identify potential defendants, if not their locations. The issue is usually finding the assets. Blockchain and cryptocurrency technology help defendants not only hide assets but also more easily hide their identities and location.

In the blockchain context, there may be no information available to identify defendants or their locations. It is not uncommon for information on the principals, directors, or founders of a blockchain company, its location, and banks where invested funds are held to be unknown. By design, there is no central authority that collects cryptocurrency user information, although such information may be obtainable through cryptocurrency exchanges. In contrast to money held in traditional bank accounts, cryptocurrencies are generally not held by a central authority on which a litigant may serve freezing orders for cryptocurrencies. Cryptocurrency users are also anonymous. There are no names behind wallet addresses.

A Mareva injunction can help litigants fill some of the information gaps. Mareva orders generally include compulsory asset disclosure terms. A Mareva order specific to the blockchain context could mirror normal Mareva order terms governing traditional financial institutions by requiring the defendant to disclose cryptocurrency wallet details and trading accounts that are under their control as well as the identities of anyone to whom they have sent digital currencies *prima facie* implicated in the impugned transactions. A United States federal court granted such an order in *Brian Paige v. Bitconnect International PLC, et al*. in which an investor brought a class action against a cryptocurrency exchange and lending platform, alleging that it was a Ponzi scheme.

The compulsory asset disclosure terms of a normal Mareva order often will expose a defendant to examination on that disclosure. In the blockchain context, terms requiring persons with information on the locations and identities of defendants and their business transactions and assets to attend examinations under oath can help investors pursue their claims. An order

containing such terms was granted by a United States federal court in *Greene v. MtGox Inc. et al*. In that case, an investor brought a class action against a Japan-based bitcoin exchange that lost bitcoins worth hundreds of millions of dollars, and its CEO, alleging fraud and false representations about the security and availability of bitcoins stored with the exchange. The Court ordered that the plaintiff could examine any person, whether or not a party, to discover the nature, location, status, and extent of the assets of the defendants and related companies; documents reflecting their business transactions; where they conducted business; and their locations.

It should be noted that the scope of discovery is broader in the United States than in Canada and litigants in U.S. courts generally have broader rights to examine under oath any parties who may have knowledge of facts that relate to a lawsuit. Litigants in Ontario could possibly obtain similarly expansive relief by seeking both a Mareva and a Norwich order. Norwich orders allow pre-action discovery of third parties to identify and locate suspected wrongdoers. In recent years, Ontario litigants have obtained Norwich orders against internet service providers and technology companies to disclose information such as an internet protocol address related to website postings and emails. To obtain a Norwich order, a litigant must demonstrate that, among other things, the discovery sought is necessary to permit a prospective action to proceed, it has a *bona fide* claim, the involvement of the third party in the complained acts, and the third party is the only source of the information. The third party may need to be indemnified for costs and damages related to complying with the order.

Anton Piller Orders

If there is a risk a defendant will destroy or conceal electronic evidence material to a blockchain or cryptocurrency-related action, investor plaintiffs may seek an Anton Piller order to seize and preserve a defendant's servers, hard drives, computers, and electronic records. In preserving this evidence, important information as to improper conduct and potential secreting of assets or material transactions may be available for use in proceedings where otherwise it would be lost.

Executing an Anton Piller order requires safeguards to protect a defendant's rights. It is not meant to be a fishing expedition that gives the plaintiff a litigation advantage. The defendant or its representatives should be given a reasonable time to consult with counsel prior to permitting entry to the premises. The scope of the order should be limited to seizing what is identified in the order and necessary. The search should be carried out by individuals named in the order and in the presence of the defendant or the defendant's representatives. A detailed list of all evidence seized should be verified by the defendant. The order should also appoint an independent supervising lawyer to ensure the integrity of the process. The independent lawyer should supervise the search for and seizure of evidence, protect against the disclosure of defendants' privileged materials, and provide a report to the court detailing the execution of the order including who was present and what evidence was seized.

Extraterritorial considerations

In recent years, courts have adapted the Mareva injunction to suit the growth of global finance and commerce. The advent of worldwide Mareva injunctions, in particular, has been useful to Ontario litigants pursuing frauds across national borders. The scope and enforceability of Mareva injunctions in other jurisdictions must be considered carefully in the blockchain context, especially because blockchain and cryptocurrency technologies are global phenomena.

To start, there can be no guarantee that a worldwide Mareva injunction obtained in Ontario will be enforceable in other jurisdictions. Cryptocurrency transactions occur worldwide and many blockchain and cryptocurrency-related companies and exchanges are headquartered and operate outside Ontario. Even if a Mareva injunction order can be enforced in another jurisdiction, it may take time and require the commencement of proceedings in that jurisdiction. There are also likely to be differences in how those courts adapt Mareva injunctions to blockchain technology and cryptocurrency as governments decide how these technologies will be regulated and courts develop the law surrounding them.

Extraterritorial Anton Piller orders are rare, in part because they involve the intrusion on a foreign country's sovereignty. Apart from the inherent difficulty of carrying out a search in a foreign country, Ontario courts will be cautious to respect national sovereignty. An Ontario litigant should generally seek relief from the local court having jurisdiction over the property, in consultation with local counsel.

Conclusion

Blockchain and cryptocurrency technology may be used to allow fraudsters to hide assets as well as their identities and their locations. The courts will undoubtedly need to develop tools to face novel challenges blockchain technology and cryptocurrencies pose to investors pursuing fraud claims. Although they were developed long before the advent of these new technologies, with careful consideration Mareva injunctions and Anton Piller orders are readily-adaptable to these new contexts. Before asking the court to invent new tools to apply to new and unfamiliar contexts, litigants should first consider these powerful and well-established pre-trial remedies.

Lawyers at Rueters LLP have experience in obtaining and setting aside injunctions and other pre-trial remedies. For further information, contact Sam Wu (sam.wu@ruetersllp.com, 416-869-2207).

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