D'Aloia v Persons Unknown: A Landmark Judgment on Tracing Crypto Fraud

Enyo Law LLP, 1 Tudor Street, London, EC4Y 0AH

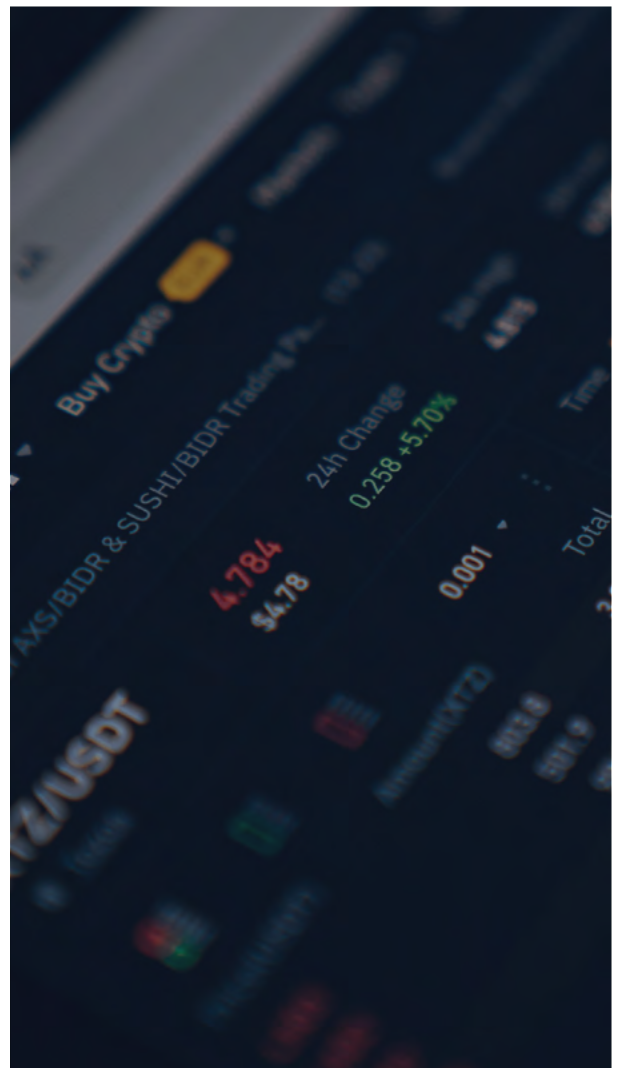
Those following developments in the crypto space will be familiar with *D'Aloia*. In a judgment spanning over 80-pages handed down on 12 September 2024, and the first following a fully contested trial, the High Court of England and Wales dismissed a claim brought by the Claimant, Fabrizio D'Aloia, against Bitkub Online Co Ltd ("**Bitkub**"), a crypto exchange which offers customers custodial digital wallet services for cryptocurrency, including Tether ("**USDT**"). The decision is of importance for victims of crypto fraud – shedding light on how they might legally recover digital assets across various jurisdictions.

Before diving into the detail, we set out below the key points for crypto exchanges and practitioners arising out of the judgment relating to potential liability of exchanges to victims of crypto-fraud and the presentation of pleadings and expert evidence, which was arguably was at the heart of why the claim failed.

Guidance for crypto exchanges

In an effort to recover their assets, it has become normal for victims of crypto fraud to make crypto exchanges defendants to their claims (similar to banks in push payment fraud), particularly so when the victim does not know the true identity of the fraudster(s). For a bank or an exchange to be held liable it must be required to do something it has failed to do or have done something it was not required to do.

In this case, the key argument was whether Bitkub was a constructive trustee in respect of Mr D'Aloia's USDT. If so, Mr D'Aloia might be entitled to the more favourable remedial consequences, which arise from breach of trust. To make that point good, Mr D'Aloia argued that Bitkub had failed to safeguard the assets. However, fundamental to the claim was that the court was unable to trace the USDT to the 82e6 Wallet and therefore Mr D'Aloia was unable to show that Bitkub should hold the USDT within that wallet as a constructive trustee for his benefit. Arguably, had there been better quality expert evidence (explained further below), Mr D'Aloia may have established that Bitkub was a constructive trustee.



Furthermore, in the context of considering whether Bitkub failed to comply with KYC/AML duties and corporate governance duties, the court appeared critical of Bitkub's policies and procedures. Whilst no proper evidence was advanced as to what standard Bitkub was required to meet in order for the court to find a breach of any duty, it did find that Bitkub *"was on notice of suspicious account activity....and failed or failed properly to investigate it"* and therefore was unable to rely on defences premised on good faith.

The judgment gives rise to two key takeaway points relevant to crypto exchanges:

1. If a crypto exchange is put on notice that they

are potentially holding stolen or fraudulently obtained assets, they may be required to ringfence them. Failure to protect the assets that may be subject to a constructive trust could give rise to a liability for breach of trust.

2. A crypto exchange should carefully consider that, as well as ensuring that appropriate KYC and AML policies and procedures are in place and adhered to and monitored, it is imperative that internal systems and controls are in place – particularly for exchanges which manage custodial wallets on behalf of account holders – whereby suspicious transactions are identified and any breaches are flagged and remedied as quickly as possible.

Lessons for practitioners

In addition to crypto exchanges, the judgment makes a number of key findings and observations which should be on the radar of all practitioners in the crypto litigation space:

1. As the first judgment following a full trial:

   1.1 the court's recognition that USDT attracts property rights is a welcomed and landmark finding because (i) previous findings were only made for the purposes of interlocutory applications; and (ii) now victims of crypto-fraud involving USDT are permitted to bring equitable claims to trace or follow those assets.

   1.2 in circumstances where frauds often lead to claims against crypto exchanges increasingly being framed as breach of trust claims, the detailed analysis of the law of constructive trust and complexities involved within tracing and following crypto frauds is useful.

2. Whilst the court found the evidence of both experts *"not to be especially helpful"* [47], Mr D'Aloia's evidence was *"chaotic and, ultimately, contradictory"* [58], and ultimately did not reliably demonstrate any flow of funds into the 82e6 Wallet (defined below), which was *"fatal"* to the claim. This was fundamentally problematic in a case like this where much turned on the experts' work to understand the flow of funds in order to demonstrate that the assets in question were in a particular wallet. To that end, the judgment highlights the significance of having robust expert evidence that is not only clear but also coherent about the basis for a particular methodology used (or not used) in an expert report under CPR 35, as the Court will want to understand why it can rely on a particular methodology used. Part of this involves ensuring that practitioners also understand the technical aspects that underpin cryptocurrency cases so that they are able to stop and scrutinise the evidence, before the court is invited to make a finding.
3. A stark reminder to practitioners of the importance of ensuring that their case is properly pleaded as intended to be argued at trial. One of the purposes of the statements of case is as a *"legal audit"* [383] to ensure that a complete claim is asserted. This simply did not happen in this case, such that the legal link connecting Mr D'Aloia with Bitkub was absent. For this reason, he did not succeed in his breach of trust claim.

The remainder of this article is structured as follows:

- Background to Mr D'Aloia's claim and the alleged fraud
- Key Findings: USDT is property
- Key Findings: Hurdles with tracing the USDT into the 82e6 Wallet
- Mr D'Aloia's claim for unjust enrichment
- Mr D'Aloia's equitable proprietary claim

The background

In an effort to recover their assets, it has become normal for victims of crypto fraud to make crypto exchanges defendants to their claims (similar to banks in push payment fraud), particularly so when the victim does not know the true identity of the fraudster(s). For a bank or an exchange to be held liable it must be required to do something it has failed to do or have done something it was not required to do. By way of summary of the claim:

1. Mr D'Aloia alleged that a fraud was perpetrated on him by the First Defendants - Persons Unknown A - in which he was induced to hand over cryptocurrency and USDT totalling circa £2.5 million.
2. Persons Unknown A then passed that cryptocurrency through a number of blockchain wallets before it was withdrawn as fiat currency by the Seventh Defendants – Persons Unknown B.
3. Polo Digital Assets Inc, the Third Defendant, Gate Technology Corp, the Fourth Defendant, and Bitkub were the cryptocurrency exchanges with whom Persons Unknown B are said to have held their various accounts.[1]

A brief chronology of the fraud alleged is:

Date	Event
May 2021	Ms Hlangpan opened her Bitkub account and was the account holder of the 82e6 Wallet (as defined below).
December 2021	Mr D'Aloia was considering investment opportunities and in particular an investment though a website, https://td-finan.com (the "**td-finan**"). Mr D'Aloia understood this to be associated with TD Ameritrade, a US brokerage. In fact, both were entirely unconnected, and the website was operated by Persons Unknown A.
21 December 2021	Mr D'Aloia opened an online trading account with td-finan.
22 December 2021	Mr D'Aloia transferred cryptocurrency associated with his account.
10 January 2022	Mr D'Aloia transferred 999,987.1 USDT to the 1dDA wallet controlled by Persons Unknown A (the "**1dDA Wallet**").
17 - 21 February 2022	Mr D'Aloia asserted that, on the basis of expert evidence, through a series of 14 Hops, USDT 400,000 arrived in a Bitkub wallet linked to the account of a Ms Hlangpan (the "**82e6 Wallet**"), who withdrew it as fiat currency.
22 - 24 February 2022	The USDT 400,000 was converted into THB 13,684,995.91 and withdrawn.

Key Findings

1. USDT is property

Whilst neither party sought to suggest that USDT could not be property, central to the case were issues of tracing and following of assets, which depended on not just USDT being property, but the nature of the property rights associated with them.

In light of the strong line of authorities in this jurisdiction, including *Tulip Trading v van der Laan* [2023]

[1] Mr D'Aloia's claim against the Second Defendant, Binance Holding Limited had settled and his claim against the Fifth Defendant, Aux CYES Fintech Co Ltd was struck out.

EWCA Civ 83, the court recognised that (a) there is *"broad recognition that it is at least arguable that crypto assets attract property rights"* (b) *"a key aspect of crypto assets is that they are rivalrous"*, namely ownership by one prevents ownership by another; and (c) crypto assets *"exist as something outside the mind of their users"* [112].

Having considered opposing arguments, it will come as no surprise that, in summary, the court's view was that USDT, *"while neither a chose in possession nor a chose in action, it is capable of attracting property rights for the purposes of English law"* and that *"crypto assets have a conceptual existence that is independent of the legal system and of their individual users"*. The rights attached to the USDT itself, rather than the right to control it, for example, the right to use a private key [173].

The status of crypto assets as property has been addressed repeatedly at interlocutory hearings and was at the core of the Law Commission's Report issued in June 2023, which Enyo Law discussed here. In that regard, the court's judgment was consistent with the findings and recommendations made by the Law Commission and reiterates the Law Commission's draft Property (Digital Assets) Bill introduced to the House of Lords on 11 September 2024, which gives effect to the Law Commission's recommendation, namely of a statutory confirmation that a thing will not be deprived of legal status as an object of personal property rights merely by reason of the fact that it is neither a thing in possession nor a thing in action.

2. Was it possible to trace the USDT into the 82e6 Wallet?

Fundamental to Mr D'Aloia's claim was the need to bridge the gap between the 1dDA Wallet into which he paid his USDT and the 82e6 Wallet, from which it left the blockchain universe and re-entered the traditional banking system.

Following versus Tracing

It was accepted that, as a matter of law, tracing and following are different things [176]. As Lord Millett explained in *Foskett v McKeown* [2001] 1 AC 102 at [127B], *"Following is the process of following the same asset as it moves from hand to hand. Tracing is the process of identifying a new asset as the substitute for the old."*

Noteworthy is that, at the outset, Bitkub made the submission that tracing was not open to Mr D'Aloia because the statements of case and Mr D'Aloia's expert evidence referred only to following. This was not accepted by the court for the following reasons:

- First, the concept of tracing formed part of Mr D'Aloia's case [178], as they referred to "*substitutes*" and "*substitute assets*" which Foskett made clear falls within the domain of tracing, not following.
- Second, while the concepts are distinct, the law recognises that sometimes they are used collectively or interchangeably [180] (see Supreme Court in *Byers v Saudi National Bank* [2023] UKSC 51 at [68]).
- Third, the court also found it would be "*odd*" if tracing could be used in a combined sense to include following but following had to be limited to its strict meaning [181].

Ultimately, the court accepted that Mr D'Aloia could advance claims on the basis of tracing.

Further, when considering the legal test for tracing, the court made a number of observations:

- English law still recognises separate regimes for tracing in equity and at common law and *Agip (Africa) Ltd v Jackson* [1991] Ch 547 was binding on the court such that tracing through a mixed fund is not possible at common law [200].

- In considering the treatment of USDT for the purposes of following, the court considered that USDT is better characterised as a persistent thing albeit the evidence before the court was *"thin"* [208], but more consistent with what Tether itself says about its currency in published documents and because USDT maintains a *"distinct identity even in a mixture"* [209]. Therefore, and in line with the Law Commission's report, in principle, the USDT could have been followed, including through different wallets used in the various Hops, even where those wallets contained or subsequently received USDT from other sources. However, as explained further below, there was simply no evidence before the court that allowed the exercise to be undertaken and Mr D'Aloia's expert was not in a position to say with certainty how much, if anything, of any given sum was Mr D'Aloia's USDT [212].

Tracing the USDT

The parties agreed that "First In First Out" ("**FIFO**") - a mechanical exercise, which assumes that the first funds deposited are the first to be withdrawn - was one approach that could be used to trace the USDT: the rule in *Devaynes v Noble; Clayton's Case* (1816) 1 Mer 572. In short, the court's view was that the Mr D'Aloia's expert did not apply FIFO.

In response to the Mr D'Aloia's submission that his expert had undertaken a *"somewhat similar exercise modified on the basis of his own experience and the training he received from Crystal Blockchain"* [217], having reviewed a number of authorities, the court agreed that (a) the rule in Clayton's Case could be displaced where appropriate to do so; and (b) where it was displaced, the parties are not limited to pari passu distribution or the rolling charge [218]. The court also observed that it was open to Mr D'Aloia, at least in the case of a claim involving fraud such as this one, to trace on a basis other than FIFO, pari passu and the rolling charge provided that it *"treated all innocent claimants and potential claimants comparably and was properly evidenced."* [221]

Mr D'Aloia's expert evidence

At the heart of the criticism of Mr D'Aloia's expert evidence was *"whether the methodology used was recognised as a means of tracing in English law."* [223]

In his evidence, the expert accepted that his understanding of FIFO was *"incorrect"*. In summary, Mr D'Aloia's expert's position was that FIFO was never applied, rather it was *"more nuanced"* and whilst the right approach, the *"wrong label"* was used for it [225]. Contrary to Mr D'Aloia's position, the court's view was it is not clear what had in fact been done by way of methodology, although it was clear that the basis stated in the Arrowsgate Report - prepared for the use for trial - for tracing Mr D'Aloia's funds was FIFO.

Less than a week before trial started, Mr D'Aloia attempted to explain the methodology applied in correspondence, namely that the expert (a) did not take account of opening balances or intermediate

incoming transactions (b) ignored outgoing transactions of 1,000 USDT or less (c) looked for the largest outgoing transaction next in time rather than the next in time transaction. Notably, no revised report was filed and the methodology was formally adopted as his evidence in the course of his cross-examination.

Ultimately, the court found that the methodology was described in three different places and in three different, contradictory ways and ultimately *"lacked coherence or a principled basis"* [259] and made a few key observations including:

- First, while Mr D'Aloia made clear that he did not use FIFO, the Arrowsgate Report expressly advanced the rule in *Clayton's Case* as its rationale.
- Second, Mr D'Aloia sought to explain in correspondence how his expert *"usually traces the funds"*, which suggested that other methodologies were used albeit no further information was provided about how the methodologies were selected, contrary to PD 35 paragraph 3.2(6).
- Third, the only justification offered belatedly for the approach adopted was that it was a method taught by TRM Labs and Crystal Blockchain (the blockchain analysis software employed by the expert) and better reflected the practices of organised crime groups. However, it transpired that TRM Labs' approach produced a significantly different figure to that produced using Crystal Blockchain. To that end, it was not clear how two different approaches were both likely to reflect the approach of those behind td-finan.
- Fourth, in breach of PD 35 paragraph 3.2(6), no explanation was provided as to how the different systems, namely TRM Labs and Crystal Blockchain, were selected or preferred.
- Fifth, it was unclear how the funds could have been traced in the way that had been done for Hop 2, which was fundamental to Mr D'Aloia's case against Bitkub.

Hop	From	To	Date	Transfer amounts (USDT)	Amount traced (USDT)
1	Mr D'Aloia	1dDA	10 January 2022, 7:29pm	999,987.1	999,987.1
2	1dDA	dcEO	17 February 2022, 8:22am	326,868	326,868

In summary, the court applied the expert's methodology in its various iterations, but the numbers did not add up. The court's observation was that if Mr D'Aloia could not show that his funds were part of the USDT 326,868 then what happened thereafter was simply irrelevant because somebody else's funds would be traced. Further difficulty arose in applying the methodology to later Hops.

- Sixth, the reliability of the approach and its application was questioned based on the claim against Aux Cayes Fintech being struck out as a result of shifts in the expert's conclusions that meant that the wallet into which Mr D'Aloia's funds had been traced in fact contained none of Mr D'Aloia's USDT. Similarly, in this claim, the amount sought was less than half the original amount, again a result of shifts in the expert's conclusions, which, in light of the lack of transparency in the methodology applied, ultimately casted doubt on the reliability of the expert's conclusions.

The court found that, while FIFO could be disapplied, that did not give the expert *"a free hand."* Understanding the methodology applied and why, in the expert's view, it was reliable, was important. Instead, the expert had explained why FIFO was reliable in circumstances where a different approach had been employed, and the details of the approach were not set out until the eve of trial, and even then, in only broad and contradictory terms that were impossible to apply to the transfers in issue in this case. Accordingly, the court did not accept that Mr D'Aloia's evidence reliably demonstrated any

flow of Mr D'Aloia's funds to the 82e6 Wallet. This was fatal to Mr D'Aloia's claims against Bitkub so far as they relied on tracing.

Unjust enrichment

In considering Mr D'Aloia's claim for unjust enrichment, the court considered the four questions set out in Lord Steyn's speech in *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221 at 227A-B:

1. Had Bitkub benefitted, in the sense of being enriched?

An agent who receives a benefit on behalf of their principal and pays over to the principal the value of that benefit or applies it in accordance with the principal's instructions has a defence to a claim for restitution provided that they acted in good faith and without notice of the claim. This is known as the defence of ministerial receipt. During trial, the decision in *Terna Energy Trading v Revolut Ltd* [2024] EWHC 1419 (Comm) was handed down. The court found the analysis in *Terna Energy Trading* on the question of enrichment *"clear and insightful"* [267] and agreed that there was a logical link between enrichment and the defence of ministerial receipt: namely one can only say the agent has been enriched if he or she has a legal excuse for ignoring an instruction from the principal as to payment elsewhere [66]. In light of this, the court found that mere crediting of Ms Hlangpan's account was not sufficient to establish the defence of ministerial receipt because the credit into the account was provisional and could have been reversed. To that end, the court accepted that Bitkub was enriched by the payment at the point of receipt [267].

2. Was the enrichment at the expense of Mr D'Aloia?

Driven by the decision of the Supreme Court in *Investment Trust Companies v HMRC* [2024] EWHC 1419 (Comm) at [46]-[51], the court found that, as a matter of law, Mr D'Aloia could not trace through a mixed fund in support of his unjust enrichment claim. Also, even where tracing was possible in principle, the court found that Mr D'Aloia had not demonstrated that his funds could be traced to the 82e6 Wallet as a matter of fact [270].

The sham argument

As part of the enrichment analysis, the court was invited to find that the 14 Hops were not true transactions, but a sham. In that regard, the court was referred to the case of *Reflvo v Varsani* [2014] EWCA Civ 360. Noteworthy is also the court's analogy of a sham to the famous Anna Karenina principle: "*All happy families are alike; each unhappy family is unhappy in its own way*" [274]. In summary, the court's view was while legitimate transactions will have many features in common because they follow the law of contract, shams are "*idiosyncratic*" because perpetrators ignore or break legal rules in different ways.

Mr D'Aloia's evidence as to the nature of crypto-currency frauds and the use of multiple hops to conceal the flow of funds was unchallenged, which the Defendant's expert largely agreed with. This was further reflected in the facts: (i) Bitkub accepted that td-finan was a fraud; (ii) once money started to move it did so quickly, passing through some wallets in a matter of seconds, with Hops 2-13 completed in under 24 hours; and (iii) the amounts involved in many of the Hops changed and was consistent with what Mr Moore said about the attempt to disguise the flow of funds.

Whilst the court found that Mr D'Aloia had established a link between Persons Unknown A and Ms Hlangpan in terms of a flow of funds and that Ms Hlangpan was either actively involved in laundering funds or, possibly, was a money mule for Persons Unknown A, Mr D'Aloia had not shown that Ms Hlangpan was the off-ramp for his funds.

Ultimately, the court found that in a "*complex fraud*" like this, in order to demonstrate that Bitkub was enriched with Mr D'Aloia's USDT, it was not enough simply to show that the Hops were shams. It must be shown why the sham transaction was said to contain Mr D'Aloia's funds and not those of another victim (e.g. at Hop 2). As the court did not accept that Mr D'Aloia's expert evidence showed that any of Mr D'Aloia's funds reached the 82e6 Wallet, it could not accept Mr D'Aloia's argument that the transactions were a sham.

3. Was the retention of the enrichment unjust?

Whilst paragraph 37(iv) of the Re-Amended Particulars of Claim asserted Mr D'Aloia had *"been deprived of possession and enjoyment of his USDT and USDC and at the expense of his legal title"*, this was not pursued as an unjust factor. Rather, whilst there was no reference to mistake in the unjust enrichment sections of the pleadings, Mr D'Aloia asserted in his Re-Amended Particulars of Claim that he made the transfers he did because he was misled by td-finan. Mr D'Aloia's evidence on this was not seriously challenged and Bitkub accepted that Mr D'Aloia was a victim of fraud, such that the claim had been made out. In the court's view, whilst it could have been much clearer, that factual allegation was enough to allow Mr D'Aloia to assert mistake [290]. To that end, the court found that Mr D'Aloia had done enough to allege that the payment was made under a mistake and establish that unjust factor.

4. Are there any defences?

Bitkub relied on (a) good faith change of position (b) ministerial receipt, and (c) the alleged impossibility of counter-restitution.

Good faith change of position

At the outset, the court accepted that in line with Lord Goff's justification at page 579F, *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548, which focused on the injustice between the parties (as opposed to the nature of the asset that comprised the enrichment), good faith change of position was applicable in the context of crypto assets as a matter of law.

In that regard, the court considered Mr D'Aloia's pleaded case.

Bitkub's KYC

Bitkub addressed the allegation that it did not seek any KYC in its disclosure by producing the KYC material provided to it. However, the court held that if Mr D'Aloia wanted to criticise the due diligence carried out by Bitkub, he needed to do so by reference to a particular standard. No proper evidence was advanced as to what those standards were under Thai law at the relevant time. Further, the English law rules on money laundering, unless foreign law was specifically pleaded (which it was not), was not developed at all during the course of trial or put to any of the witnesses. The only evidence the court had was factual, which illustrated that Bitkub believed it was compliant with local rules and regulation.

Bitkub's failure to make enquiries

Based on the timing and amount of the withdrawals in Ms Hlangpan's account, the court's view was that Bitkub had, or at least thought it had, multiple good reasons to look into the transactions and there were features of the transaction, that if left unexplained, were indicative of wrongdoing.

Inevitably, the court found that (a) Ms Hlangpan could only act because Bitkub permitted her to do so and (b) Bitkub's explanation that Ms Hlangpan was able to pay away USDT 400,000 because there was an internal approval to exceed daily limits or a system malfunction, to be *"improbable"* [310].

Further, the court disagreed with Bitkub's suggestion that it was impossible for Bitkub to know of the fraud in February 2022 in circumstances where Mr D'Aloia did not realise that he had been a victim

of fraud until June 2022. It was sufficient for Bitkub to have *"good reason"* to believe that the sums received into the 82e6 Wallet were tainted – which it did, based on the evidence before the court.

Ultimately, the court found that the burden of showing good faith for the purpose of the change of position defence was on Bitkub, and Bitkub failed to discharge it.

Ministerial receipt

Bitkub's case was that the receipt of the USDT was balanced by an immediate credit to Ms Hlangpan's account, a credit that she converted to Thai baht and withdrew long before Bitkub was informed of Mr D'Aloia's claim. Two issues were considered by the court: (a) enrichment; and (b) good faith.

On enrichment, the question was whether Bitkub could assert ministerial receipt simply by showing that it had credited the relevant sum of USDT to Ms Hlangpan's account or was it required to show that the sums had been paid to Ms Hlangpan. Inevitably, the debate was whether an agent can rely on the defence of ministerial receipt where it had no notice of the claim when it credited the principal's account or whether, instead, it also needed to be unaware of the claim when it paid the money to the principal. Here, Bitkub's state of knowledge was the same at both points in time: it knew before Ms Hlangpan received the USDT 400,000 that she was receiving sums into her account well in excess of her stated income and that she was breaching her daily withdrawal limits; it did not know about Mr D'Aloia's individual position until after the money was paid away. There was also evidence that Ms Hlangpan's account activity was considered suspicious by Bitkub and would have triggered (a) blocks on her account and (b) alerts to Bitkub personnel and given Bitkub clear rights to suspend Ms Hlangpan's use of her account pending an investigation.

In light of the above, the court's view was that Bitkub could only rely on the defence of ministerial receipt if it was in good faith when it acted (by paying away the funds). Ultimately, Bitkub knew that Ms Hlangpan was exceeding her withdrawal limits, limits which were imposed to address the risk of money laundering; it had the contractual right to suspend further use of the account and the benefit of a waiver of damages from Ms Hlangpan; yet it chose to let her go ahead anyway and has offered no explanation for doing so. It took a risk by allowing Ms Hlangpan to breach policies put in place to counter money-laundering. There was nothing unjust in holding Bitkub liable in such circumstances if Ms Halngpan was, in fact, involved in laundering funds.

Accordingly, the defence of ministerial receipt was not available [328].

Counter-restitution impossible

The court rejected this defence on the basis that it was not at all clear what benefit Bitkub suggested Mr D'Aloia had received, whether from Bitkub or anyone else. Mr D'Aloia was a victim of fraud who had lost money as a consequence. There were no benefits for him to restore.

Equitable Proprietary Claim

In relation to the constructive trust claim, four 'routes' were put forward. The Court did not agree with the Mr D'Aloia that it did not matter which route was adopted since different routes gave rise to different trusts with different trustees that would come into existence at different points in time.

Route 1: The Westdeutsche trust

Westdeutsche Landesbank *Girozentrale v Islington Borough Council* [1996] AC 669 held that where property was obtained by fraud, equity imposes a constructive trust on the fraudulent recipient, such that the fraudulent recipient holds the legal title on constructive trust.

Here, the alleged fraud was perpetrated by Persons Unknown A, so they would be the constructive trustees and the trust arose, if at all, on the dates when Mr D'Aloia paid money over to them.

The court found that the parties behind td-finan never intended to provide Mr D'Aloia with anything – the whole thing was a fraud. On the basis of *Martin J Halley v The Law Society* [2003] EWCA Civ 97, that gave rise to a constructive trust as against Persons Unknown A under the principle set out in Westdeutsche. However, there was a difficulty in Mr D'Aloia's case, part factual: he had not evidenced, whether by way of tracing or otherwise, that his funds flowed to Bitkub; and part legal: the question of how Persons Unknown A's breach of trust in paying away Mr D'Aloia's USDT gave rise to a claim against Bitkub. Having considered the judgment of Lord Burrows and Lord Briggs in *Byers*, the court's view was if the recipient retained the trust property there would be the proprietary claim; otherwise, there would be the knowing receipt claim. Here, the property had been dissipated or destroyed and Mr D'Aloia had elected not to pursue a claim in knowing receipt (and accepted that he was unable to do so). Therefore, the Westdeutsche trust did not apply on the facts of the case.

Route 2: The Angove trust

Applying *Angove's Pty Ltd v Bailey* [2016] UKSC 47, where the intention that led to the transfer was vitiated, again, a constructive trust could arise in principle. Mr D'Aloia submitted that the vitiating factor was that he transferred the assets as a result of a fundamental mistake – he thought he was dealing with a reputable US financial institution when in fact he was dealing with a fraudster.

As explained above, the court's view was that a constructive trust rose in accordance with the principles set out in *Halley* and *Westdeutsche*. However, if the court was wrong on that, a somewhat different constructive trust could, in principle, arise on rescission applying the principles in *Bristol & West Building Society v Mothew* [1998] Ch 1, albeit no such trust was alleged by Mr D'Aloia. Whilst consistent with the general principles in Angove, the court did not regard Angove as giving rise to a separate, *free-standing ground* [351] for finding a constructive trust.

Route 3: The Bitkub retrospective constructive trust

Commencement of proceedings rescinded the contract with td-finan and gave rise to a retrospective imposition of a constructive trust, against the Persons Unknown A. The court's view was Route 3 only arose if it was wrong what about the *Westdeutsche* constructive trust.

Mr D'Aloia's position appeared to be that the trust took effect as if it had been back-dated to the point of transfer on the basis of *Shalson v Russo* [2003] EWHC 1637 (Ch) at [127]. Applying *Mothew*, in principle if there was a contract induced by fraud, the victim of that fraud has a right to rescind it and, on doing so, a constructive trust arose against the fraudster. Bitkub objected to the imposition of a rescission trust on the ground that no such trust had been pleaded (contrary to PD 16 paragraph 8.2) and on the basis that the trust could only arise prospectively from the point of rescission.

As to the pleadings, Mr D'Aloia accepted that the *"statements of case could have been framed more elegantly"* [355]. The court's view was that the trust pleaded was expressly premised on a void contract, not a voidable one. Moreover (a) it was not alleged that the trust needed to be or was back-dated to the time of the fraud; (b) it was said that beneficial title never passed; and (c) there was no mention of the trust being dependent on rescission of the agreement between Mr D'Aloia and td-finan.

In light of this, the court found that, were it pleaded, a constructive trust could arise from the date of rescission, subject to there being identifiable trust property. It could be backdated and, since the basis of the trust would be the rescission of the fraudulently induced agreement, the trustees would be Persons Unknown A not Bitkub. There would be an issue as to how this could affect Bitkub, but it could not arise on the case advanced before the court.

Route 4: The Bitkub failure to act in a commercially reasonable manner constructive trust

Bitkub's failure to act in a commercially reasonable manner in failing to implement adequate KYC and anti-money laundering and failing to monitor Ms Hlangpan's account and to freeze it in light of the suspicious transaction volumes gave rise to a constructive trust. The constructive trustee here was said to be Bitkub; the trust could not have arisen at any time before Bitkub received the USDT 400,000 on 21 February 2022.

The argument advanced was that a constructive trust was imposed on the USDT; Bitkub was the trustee, and the trust arose at the point Bitkub received the funds on 21 February 2022, not before. Mr D'Aloia sought a constructive trust premised on the fact that Bitkub failed to implement its own procedures aimed at combatting money laundering when Ms Hlangpan opened her account. When she received the USDT 400,000, converted it to Thai baht and paid it away it was against the backdrop of her suspicious account usage, of which Bitkub was aware; that is the foundation of the constructive trust advanced at trial.

The court found there were "*insurmountable*" hurdles with this argument: (a) it was not pleaded; (b) the pleaded claim was not that Bitkub's conscience was impacted by its lack of proper diligence; it was not specific to Bitkub at all, because a constructive trust arose against other parties, Bitkub (and the other Exchange Defendants) took subject to that trust; (c) no breach of trust was alleged against Bitkub; (d) Mr D'Aloia's allegations of commercially unacceptable

conduct or unconscionable receipt extended to find any claim were not accepted by the court.

Fundamentally, the court found that Mr D'Aloia had failed to show that Bitkub received any of its funds. Accordingly, even if a trust could have been established, it would not be in favour of Mr D'Aloia.

For further information about crypto disputes, please contact Tim Elliss or Krupa Vekaria.

Tim Elliss
Senior Consultant

t. +44 (0) 20 3837 1619
e. timothy.elliss@enyolaw.com

Krupa Vekaria
Associate

t. +44 (0) 20 3837 1661
e. krupa.vekaria@enyolaw.com

Enyo Law LLP is authorised and regulated by the Solicitors Regulation Authority (548866) and is a limited liability partnership registered in England and Wales with registered number OC356313. A list of members is open to inspection at the registered office, Enyo Law LLP, Fifth Floor, 1 Tudor Street, London, EC4Y 0AH, and any reference to a partner of Enyo Law LLP means a member of Enyo Law LLP. Our professional rules can be found in the SRA Code of Conduct 2011 and the SRA Handbook: www.sra.org.uk