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PUBLICATION

Involved in a cryptocurrency dispute? Powerful civil remedies available to Ontario individuals

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The rapid growth of cryptocurrency technology and investment has certainly given rise to novel legal issues that Ontario courts need to tackle. In recent years, Ontario courts have seen an increasing number of cases involving cryptocurrency. Amongst the released decisions in this area of the law, two extraordinary remedies, the *Anton Piller* order and the *Mareva* injunction, were granted to the plaintiffs in two recent decisions. An *Anton Piller* order authorizes the immediate search of premises and computers and seizure of relevant documents before the case proceeds. A *Mareva* injunction immediately freezes a defendant's assets pending a later determination of liability on the part of the defendant. These two decisions dealing with cryptocurrency show that Ontario courts are not hesitant to grant rare, yet powerful, interim relief in proper cases where the legal tests have been satisfied.

The *Anton Piller* Order

In *Cicada 137 LLC v. Medjedovic*, 2021 ONSC 8581, the court granted the *Anton Piller* order sought by the plaintiff without notice to the defendant in relation to the cryptocurrency theft allegedly committed by the defendant.

The plaintiff was a decentralized financial platform that held cryptocurrency tokens for a group of investors of Indexed Finance, a public ledger where transaction details were stored. The defendant was a 19-year old math prodigy with a master's degree in mathematics from the University of Waterloo. The plaintiff claimed that the defendant took $15 million in cryptocurrency tokens and stored them in a wallet under his control by hacking into the source code of Indexed Finance. The defendant asserted the defence of "Code is Law", an untested theory that it is lawful to exploit the vulnerability of the programming code to take possession of another person's cryptocurrency. On this theory, the defendant denied that he had done anything improper.

The court granted an interim preservation order rather than the more rare *Mareva* injunction to freeze the cryptocurrency. The plaintiff claimed an ownership interest in the allegedly stolen

digital tokens and did not seek to freeze the defendant's other assets. In addition to freezing the cryptocurrency, the court concluded that the test for an *Anton Piller* order was also met, such that documents and passwords could be located and seized/preserved pending trial.

In *Celanese Canada Inc. v. Murray Demolition Corp.*, 2006 SCC 36, the Supreme Court of Canada set out the four-part test for an *Anton Piller* order. First, the plaintiff must demonstrate a strong case on its face. Second, the damage to the plaintiff of the defendant's alleged misconduct, potential or actual, must be very serious. Third, there must be convincing evidence that the defendant has in its possession incriminating documents or things. Finally, it must be shown that there is a real possibility that the defendant may destroy such material before the discovery process.

The court in *Cicada 137 LLC* held that the plaintiff had established a strong case that the defendant took $15 million in digital assets and had them stored in an electronic wallet that he controlled. The defendant took a very substantial amount of value. In addition, the court found that the defendant was likely to hide the password, most likely on a computer or stored on a memory device, and that it was also reasonable to expect that the defendant may hide or destroy the evidence. This was because of his prior conduct of concealing his planning, transactions and identity in carrying out the electronic theft by using numerous different anonymous usernames and addresses. The court concluded that a search and seizure under independent supervision was necessary to find the password and to prevent the destruction of evidence.

In its reasoning, the court made the following important comments: "This is a very serious matter for which an *Anton Piller* order is justified. A very substantial amount of value has been taken. Moreover, the plaintiff's expert provides evidence about the magnitude of hacking of digital assets to date. As this new form of investing and commerce grows, it is fundamentally important to the stability of the economy and the online market place that the integrity of these assets be maintained. The investing and transacting public need assurance that the law applies to protect their rights. Despite what some might think, the law applies to the internet as it does to all relations among people, governments, and others." These comments demonstrate the court's willingness to extend legal protection to investors who have suffered damages as a result of the electronic theft of digital assets, such as cryptocurrency.

The *Mareva* Injunction

In *Li et. al. v. Barber et. al.*, 2022 ONSC 1176, the plaintiffs successfully obtained a *Mareva* injunction without notice to the defendant organizers of the "Freedom Convoy", preventing them from dissipating and removing the cryptocurrency they had fundraised.

The plaintiffs were residents, employees and business owners in downtown Ottawa, who claimed damages on the basis of the torts of private and public nuisance against organizers, supporters and participants in the "Freedom Convey", which had blockaded downtown Ottawa for over three weeks.

The plaintiffs sought the *Mareva* injunction without notice to freeze the assets of the defendants. The three-part test for the *Mareva* injunction is as follows: first, the plaintiff must show he or she has an apparently strong case against the defendant; second, the defendant has assets in the jurisdiction; and third, there is a serious risk the defendant will dissipate those assets or remove them from the jurisdiction if the order is not granted.

The court concluded that the first branch of the test was satisfied. There was a strong case for establishing liability in nuisance, in that the plaintiffs had endured a substantial interference with their rights. In particular, the residents had endured constant and significant interference with the activities of daily living. The business owners had endured interference with the ability to carry on business and suffered loss of revenue. The employees had suffered loss or reduction of employment and loss of income.

The court held that the funds, whether they were in the form of currency or cryptocurrency, were legally in the possession of the defendants. In fact, the defendants had purposely placed the funds outside the control of any fundraising platform and had been promoting the use of the cryptocurrency such as bitcoin under the mistaken belief that it was untraceable and could not be seized by a court or other legal authority. The court clarified that digital funds are not immune from execution and seizure to satisfy a debt. They can be seized and used to satisfy a debt just like money in a bank account, provided the owner of the account or the bank in question are within the court's reach (ie. present in Ontario). Many digital institutions, including cryptocurrency exchanges, are within the jurisdiction of the court or are located in jurisdictions where Ontario judgments and orders can be enforced. The defendants in this case are subject to the jurisdiction of the court because they were present in Ontario. The court therefore had the power to stop them from cashing or transferring assets, including cryptocurrency. Accordingly, the second part of the test for a *Mareva* injunction was also satisfied.

The court found that the evidence of the expert investigator demonstrated that steps had been taken by the defendants to break up, move and distribute funds. Moreover, there was evidence about the plans to distribute funds as soon as possible, in part to benefit the individual protestors, but also to avoid any enforcement activity. The third branch of the test was therefore also met, as the distribution of the funds was imminent and was for the very purpose of dissipating them so that they could not be frozen or seized. In light of the evidence presented by the plaintiffs, the court granted the *Mareva* injunction.

Key Considerations

Ontario private litigants involved in cryptocurrency disputes have two powerful civil remedies available to them in the form of *Anton Piller* orders and the *Mareva* injunctions. Illegal activities associated with cryptocurrency have, no doubt, become more prevalent as a result of the rise in popularity of cryptocurrencies. It will be interesting to see what impact the recent precipitous drop in the value of cryptocurrencies and the bankruptcy of a prominent crypto-exchange, FTX, will have on cryptocurrency litigation. Overall, we expect the number of reported cryptocurrency cases to increase significantly in the coming years.

The Blaneys commercial litigation team has recently been involved in a case dealing with cryptocurrency fraud. The plaintiffs were deceived into paying close to C$1.5 million to the organizers of a fraudulent investment platform, who then converted the funds into Bitcoins which were delivered into a deposit address controlled by the organizers. Blaneys brought a motion without notice before the Ontario Superior Court of Justice and successfully obtained a *Mareva* injunction, restraining the defendants from dissipating their assets. Blaneys continues to work with counsel in other jurisdictions to try to enforce the *Mareva* injunction in those jurisdictions. That is a difficult and complex process, particularly given that many of the corporate defendants are registered overseas, with very few of them having any presence in Canada.

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