IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURT
OF ENGLAND & WALES
COMMERCIAL COURT (QBD)
[2021] EWHC 3352 (Comm)

No. LM-2021-000239

Rolls Building
Fetter Lane
London, EC4A 1NL

Wednesday, 27 October 2021

Before:

HIS HONOUR JUDGE PELLING QC
(Sitting as a Judge of the High Court)
(**In Private**)

B E T W E E N :

XY Applicant/Claimant

-and-

(1) PERSONS UNKNOWN

(being the individuals or companies who obtained access to the First Applicant's USDT accounts on or about 30.8.2021 and carried out the transactions on or about 30.8.2021 as a result of which the crypto currencies held in those accounts were transferred to other accounts ("Transferred Assets"))

(2) PERSONS UNKNOWN

(Being the individuals or companies who own or control the accounts into which the Transferred Assets were transferred other than purchasers for full value)

(3) BINANCE HOLDINGS LIMITED

(a company registered in the Cayman Islands)

Respondent/DefendantS

J U D G M E N T

A P P E A R A N C E S

MR A. MAGUIRE (instructed by Keystone Law) appeared on behalf of the Applicant.

THE RESPONDENTS did not attend and were not represented.

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JUDGE PELLING:

1 This is an application made without notice for four heads of relief being, first of all, permission to serve these proceedings out of the jurisdiction; secondly, for alternative service on each of the respondents to the application; thirdly, for worldwide freezing relief against the first respondent and, fourthly, an application for a proprietary freezing order against the second respondent and for bankers' trust relief against the second respondent as well.

2 This claim arises out of a crypto currency fraud. The circumstances in which the fraud arose are set out in the draft affidavit of the claimant and it really comes to this; the claimant maintains that she was induced by fraudulent misrepresentation sent to her via social media into investing in, investing in cryptocurrency by opening a Binance account and purchasing US dollar denominated tethers at a cost of £83,515 by an unknown fraudster. That fraudster induced her thereafter to transfer the tethers purchased to a website called www.diexchange.net which was said to be but in fact was not a trading platform. This resulted in the assets credited to the diexchange.net account being apparently removed by the fraudsters, by transfer from that account to a destination unknown, with the result that the claimant has lost the whole of the assets representing her investment. Against that factual background, the claimant seeks without notice the relief that I have identified.

3 Before turning to each of the heads of relief that arise, there is a procedural point which needs to be addressed. The first respondent is described as being "persons unknown." Persons unknown is undefined in either the claim form or any of the other documentation which has been filed in respect of this claim. I drew to counsel's attention at the outset that this was contrary to the case law which established the circumstances in which use of the "persons unknown" mechanism was permitted as a mechanism for commencing proceedings against those whose identities were and could not reasonably have been known to a claimant at the time when proceedings were commenced and injunctions sought.

4 That case law has not been included in the authorities bundle but my recollection of those authorities in summary is that they require, if a persons unknown category of defendant or respondent is to be added, that the persons unknown are defined with such precision as to enable any individual to know whether that person comes within the scope of persons unknown or not, a requirement which is particularly necessary where relief is being sought which, if not complied with, is likely to be enforceable by court orders including imprisonment and unlimited fines.

5 In response to this point, Mr Maguire, counsel for the claimant, drew my attention to para.5 of my decision in *Fetch.AI Limited v Persons Unknown* and indicated that he was content to adopt the definition identified in that paragraph. With logical alterations to that formulation, I agree that that is the appropriate course. That particular formulation identified the first respondent in that case, also a cryptocurrency fraud claim, as being:

> "The individuals or companies who obtain access to the first applicant's accounts on the Binance exchange and carried out the transactions on ... as a result of which USDT ... held in those accounts were transferred to other accounts and (b) own or control the accounts into which the USD ... or the traceable proceeds thereof are to be found."

6 That formulation, as it seems to me, is satisfactory in the circumstances of this case as long as the dates of the impugned transactions are inserted into the definition and as long as sub-

para.(b) makes clear that the USD there referred to is the USD that is referred to in (a) and which is claimed by the claimant to be her property.

7 With that procedural issue set to one side I now turn to the substance of the applications. The first issue which arises on the facts as I have described them is whether and if so on what basis I should permit service of these proceedings out of the jurisdiction. The evidence suggests that the persons unknown may live or be based in the People's Republic of China. However, it may be that only the servers that utilised by those who perpetrated the fraud are based there and the truth of the matter is that the claimant has no knowledge whatsoever as to who the persons behind the fraud she alleges are or where they are located in the world. In those circumstances, Mr Maguire submits that I should proceed as I proceeded in other cases and as other judges have proceeded in other cases of this type by granting precautionary permission to serve proceedings out of the jurisdiction.

8 That necessarily begs the question of whether or not on the facts as disclosed the court would have jurisdiction under one or more of the gateways identified in Practice Direction 6(b) attached to CPR Part 6. It is submitted, and I accept that it is realistically arguable for the purposes of this exercise, that gateways 5 and 9 at least, and possibly also that which is concerned with constructive and resulting trusts, are engaged on the facts of this case. I reach that conclusion because the causes of action that are relied upon by the claimant and which turn on the evidence that she has given are clearly realistically arguable and include the tort of deceit. England is the proper place to litigate the claim in the circumstances that have happened because the claimant is ordinarily resident in England and Wales and, as such, the loss has been suffered in England and Wales, not least because it is now well established to be at least realistically arguable that the situs of crypto assets owned by someone ordinarily resident in England and Wales is itself England and Wales. That leads to the conclusion that wherever in the world the misrepresentations were made from, wherever the cryptocurrency was transferred from and to, the real loss was suffered in England Wales. Similar considerations apply to the alternative claim of unjust enrichment for the reasons identified in para.23 of Mr Maguire's skeleton and more particularly identified in my judgment in *Fetch.AI* and by Butcher J, I think, also in his judgment in *Ion Science*. The other basis upon which service out can be sought is on the basis that the assets are assets which are subject to a resulting or constructive trust in favour of the claimant. Therefore, and in those circumstances I am prepared to grant permission to serve out by reference to each of the gateways upon which reliance is placed.

9 The next issue which arises is whether or not I should give permission to serve these proceedings out of the jurisdiction by alternative means. So far as that is concerned, dealing with each of the respondents in turn, as I have explained, the first respondent is not known to the claimant and, therefore, the address at which service could be effected by conventional means is inevitably unknown to her. In those circumstances, the only basis on which there is any realistic prospect of serving these proceedings on the persons unknown is by using electronic means. The skeleton and evidence deals with service by email at addresses which are known to the claimant and I accept that that is an appropriate means of service.

10 Secondly, and orally, Mr Maguire suggested that I should also give permission to serve by alternative means using the WhatsApp mechanism which many of the communications which constituted the fraud-- the fraudulent misrepresentations passed through. I accept that that is a correct submission to make as well because once one is satisfied that there is a good reason for ordering alternative service, the only question which then arises is whether or not the methods of service identified are ones which in practice can be relied upon to bring these

proceedings and any order I make to the attention of the appropriate respondent. I am satisfied that the emails and the WhatsApp mechanism which Mr Maguire relies upon are the only realistic routes through to the first respondent.

11 I have considered, as I have ordered in previous cases, whether or not alternative service by serving the second respondent for onward transmission of the papers to the first respondent is appropriate. However, at this stage, whilst as I have explained I am satisfied to the level of realistic arguability that there are accounts maintained by the second respondent that are controlled by the first respondent, that is not certainly so and, therefore, it may create unnecessary expense, complexity and delay if I direct alternative service using that mechanism at this stage.

12 However, on the return date, if it should emerge that the second respondent does indeed have accounts controlled by the first respondent and it has proved impossible to serve the first respondent by either of the means I have so far indicated, then it will be appropriate at that point to consider obtaining a further alternative service order by reference to service on the first respondent via the second respondent.

13 So far as the second respondent is concerned, it is based in the Cayman Isles. The Cayman Isles is a Hague Convention country, so I am told, and in those circumstances different issues are engaged. Generally speaking, where a country is a Hague Convention country, the court should permit service only in accordance with the Hague Convention since it is only by adopting that approach that the Convention obligations of all the parties to the Convention are acknowledged. However, the case law has now clearly established an exception where special reasons exist for ordering service by an alternative means. In a series of cases decided in the Commercial Court in the last 18 months, it has been accepted by many judges, including, I have to say me when sitting in the Commercial Court, that a special reason for authorising service by an alternative means in a Hague Convention country is that injunctive relief or mandatory orders are being granted and the special reasons lie in the need to draw the making of that order to the early attention of the respondent to it, not least because the orders that are sought in this case are orders which the court will enforce by coercive measures including the committal of individuals and financial penalties against corporate defendants. In those circumstances and if and to the extent I grant orders against the second respondent, I am satisfied that alternative service is the appropriate way to proceed.

14 The next issue that I have to decide, therefore, concerns whether or not I should now grant a freezing order as against the first respondent. The test for the grant of a freezing order is now well established and it is perhaps almost trite to say that, first, the court must be satisfied that the claimant has at least a realistically arguable cause of action available to the respondent; secondly, that there are real grounds for supposing that the respondent will dissipate assets in order to defeat judgments of the court unless made the subject of a freezing order and finally the court must also be satisfied in the round that it is fair, just and reasonable to grant the freezing order sought.

15 As to whether or not there is a realistic cause of action available to the, I have already addressed that at length and I need to say no more about it. The more difficult issue concerns whether or not there is a real risk of dissipation in the sense that I have identified. So far as that is concerned, the mere fact that the claim is one formulated by reference to allegations of dishonesty of itself does not justify the making of a freezing order. The court has to be satisfied, if reliance is placed on the circumstances of the claim itself, that the

dishonesty relied upon does not merely demonstrate dishonesty in relation to the causes of action but is dishonesty from which a risk of dissipation can properly be inferred.

16 In the circumstances of this case, I am satisfied that there is a plain risk of dissipation for at least the following reasons. First, the way in which this fraud has taken place from first to last has involved electronic machinery of various sorts. It is axiomatic that cryptocurrencies are electronic in nature, that the means by which they are moved, stored and traded are all electronic in nature and that, therefore, these are assets which are acutely vulnerable to being moved with great speed and ease.

17 Secondly, the circumstances surrounding the alleged fraud, if correct, demonstrate that the persons unknown respondent is adept at using these electronic means for the purposes of moving funds to which that person is not entitled as the persons unknown perceive their best interests to be. That of itself is a proper basis for inferring a risk of dissipation once it becomes known to the persons unknown that these proceedings have been started.

18 If one adds into that the fact that there is no clarity at all on where the persons unknown are operating from, nor any evidence as yet as to the identity of those persons, in my judgment, the requirement for a freezing injunction by reference to a risk of dissipation has plainly been made out - (see also my remarks on this issue in *Fetch* and Butcher J's remarks to similar effect in *Ion Science*.

19 The remaining question, however, is whether it is fair, just or reasonable that I should grant this injunction. There are two factors which are relevant to consider in the circumstances of this case. The first and unusual one is that the claimant is not in a position to offer a cross-undertaking in damages. The basis upon which that submission is made is that the claimant's entire life savings were swallowed up in the investment which turned out to be the fraud the subject of these proceedings. She just does not have the capital available to which in all conscience she could give the cross-undertaking in damages that has any particular value. She can, I think, give a cross-undertaking in damages, it is just that it has no value.

20 There are two issues in play and the first is whether I should grant the injunction without taking a cross-undertaking at all and the second is whether I should accept a cross-undertaking in damages whilst recognising that its value is very limited on the evidence that is available. Although I will hear counsel in more detail about this point after completing this judgment, my recollection of the authorities in this area do not suggest that it is appropriate simply to waive the requirement for a cross-undertaking in circumstances such as these. Rather, a cross-undertaking must be given but that the cross-undertaking but in accepting it the court recognises that its value is or may be limited or of no value because there are no presently held assets to back it up.

21 If and to the extent that these submissions amount to no more than disclosure of the fact that there are no assets at present available to the claimant to meet any order that might be made on the cross-undertaking, then I have no difficulty in proceeding. If and to the extent it is suggested that I should not ask for a cross-undertaking at all, then that requires further brief submissions.

22 The other issue which arises concerns delay. There is undoubtedly a period of delay in the circumstances of this case. The timespan relevant to this claim has been summarised in the draft affidavit in support of the claim. In summary various payments were made in a date range between 22 and 30 August which have been lost to her. The claimant's evidence is

that by around 30 or 31 August, she was aware that the diexchange.net website was no longer active and that when she discussed this with the person who it turns out was the fraudster, he told her that there was a new website to which reference could be made butas the claimant then puts it at para.21 of her draft affidavit:

> "The new website together with my account being locked and diexchange.net requesting further funds alerted me to the possibility that this was a fraud."

The evidence goes on to say that there was then a gap of about a week until 6 September 2021 when the claimant first instructed her solicitors.

23 The current date is 27 October 2021 and thus a period of around six weeks has elapsed since the date when the claimant first instructed her solicitors and a period of around two months since it first became apparent to her that she had been or may have been the victim of fraud. This is a long period to lapse in relation to what is described as a "hot pursuit" fraud claim.

24 It is submitted on behalf of the claimant that these time lapses are in the nature of things are about the same as what had happened in other cases concerning similar frauds and that in all conscience it is difficult for the court to expect solicitors to move towards an application in court in relation to something like this from a standing start in much less than the time in fact they have taken. Having regard to the nature of the pre-instruction enquiries that a solicitor is obliged to undertake prior to accepting instructions, I accept that this is at least realistically arguably so and, therefore, I leave that out of account. In any event it is not a proper inference to be drawn from the delay that has occurred that there is no risk of dissipation or that the claimant does not in truth believe there is a real risk of dissipation.

25 The final issue that arises under the fair, just and reasonable head concerns futility. One of the consequences of the lapse that has occurred in combination with the nature of the contact that has been maintained or was maintained at the end of August between the claimant and the person who turned out to be on her case a fraudster, is that the fraudster is likely to have moved assets in a way which means that the orders sought in this case are likely to achieve little or nothing.

26 Again, whilst I fully accept the principle that a court will not act by granting orders which are futile, by the same token on the facts as they are currently known I cannot safely conclude that that would be the outcome if I were to grant the orders. It may well be that the fraudsters maintain other accounts with the second respondent and that the effect of obtaining an order against the first respondent which is supplied to the second respondent is that the second respondent will freeze any additional accounts maintained by the fraudsters if and to the extent the orders sought against the second respondent do not have that effect. In those circumstances I am prepared to grant the worldwide freezing order sought.

27 The next question is whether or not I should grant proprietary relief against the second respondent. The order that has been drafted is in effect a freezing order in a proprietary form and purports to freeze all the assets of the second respondent save and except where they exceed £200,000. This is an order which is so wide-ranging and would potentially have such a dire effect on the affairs of the respondent that it is obviously in excess of what is reasonable and proportionate and that is before considering the fact that there is no valuable cross-undertaking with which to protect the respondent from damage to its business as a result of the injunction being granted in the form sought.

28 In those circumstances counsel accepted that the order that should be granted against the second respondent was a much more constrained order by which the respondent was restrained from removing from England and Wales any of the applicant's assets, being sums credited to the relevant accounts or the traceable proceeds thereof, contained in the various accounts referred to in para.2.3(i) and (ii) of the draft order.

29 Whilst I am prepared to grant an order on that basis, that is to say one which restrains the second respondent from disposing of any assets credited to any of the three accounts identified, I am not prepared to make any wider or other relief against the second respondent. Whilst the claimant has a claim in knowing assistance and/or knowing receipt against the second respondent, that does not justify, as it seems to me at the moment, the granting of a freezing order which freezes its assets generally and indeed Mr Maguire made it clear that that was not the intention.

30 In those circumstances the only other issue which arises is whether I should grant a bankers' trust relief against the second respondent. So far as that is concerned, as I indicated, the second respondent is registered in the Cayman Isles and the position, therefore, is that *Norwich Pharmacal* relief at least arguably not available against the second respondent - see *AB Bank Ltd Offshore Banking Unit v Abu Dhabi Commercial Bank PJSC* [2016] EWHC 2082 Comm; [2017] 1 WLR 810 at 29-31).

31 An attempt was made in the *Ion Science* case to persuade Butcher J that *AB Bank* was wrongly decided, but he declined to resolve that issue on an application to set aside service out of the jurisdiction and in those circumstances it is plain that I should not attempt to resolve that issue either, particularly not on a without notice application of this sort, a point which I made in the *Fetch.AI* case and which is accepted by Mr Maguire.

32 Therefore, the only order that can be made on the current state of the case law is an order in the bankers' trust format and so far as that is concerned, the starting point is to ask whether or not the claimant has at least a realistically arguable proprietary claim against assets that have been held or are held by the second respondent.

33 So far as that is concerned, it is important to note that this case is not one where it is suggested that a voidable contract was induced by fraud which was then rescinded at a later date where difficult issues can sometimes arise but, rather, that this is a case where assets were, as Mr Maguire put it, in effect stolen; that is to say, removed without the licence or consent of the claimant or even her knowledge until after the event. In those circumstances, I am satisfied that it is at least realistically arguable that the claimant has a proprietary claim in relation to those assets - see the reasoning in *Westdeutsche Landesbank Girozentrale v Islington Borough Council* [1996] AC 669 at 716 per Lord Browne-Wilkinson, which I followed in *Fetch.AI* and Butcher J followed in the earlier case of *A v A.*

34 In those circumstances, the question which then arises is whether or not I should grant the bankers' trust order sought. I am satisfied that the various criteria that are required to be satisfied for the grant of an order is made out in the circumstances of this case. The property that the claimant seeks to recover is undoubtedly her property on her case. Secondly, the requested disclosure of documents and information supports her-- is to support her proprietary claim by enabling tracing to take place and the information, if provided, is information which on the face of it at least realistically arguably may lead to the location or preservation of those assets. Thirdly, and for reasons I have already identified, the claimant is embarking on a tracing exercise against the second respondent because she claims a constructive trust in the assets which she is endeavouring to trace.

35 If and to the extent that there are no assets in the custody of the second respondent but, nonetheless, they passed through wallets maintained by it, then there is no reason why the information should not be ordered, applying the bankers' trust principles, even if the only claim that is maintainable substantively by the claimant against the second respondent in those circumstances, albeit an action for equitable compensation either for knowing assistance or knowing receipt.

36 So far as the cross-undertaking is concerned, I have already addressed that to the extent that it is necessary and in those circumstances I am satisfied that there should be a bankers' trust type order made as well.

37 The final issue concerns these proceedings. The value of this claim or the sterling equivalent of the value of this claim is significantly under £100,000. This is a claim which ought to have been started in the County Court at Central London though I understand there may have been practical difficulties in doing that. Once the injunction has been granted and a return date fixed, there is no obvious reason why these proceedings should not be transferred to the court that they should have been started in in the first place and, therefore, subject to any further submissions that are made by Mr Maguire, I propose to include within the order an order directing that these proceedings be transferred forthwith to the county court at Central London with the intention that the return date takes place before a judge of that court.

38 In those circumstances and subject to the further submissions that I invite concerning the cross-undertaking in damages, I am prepared to grant the relief sought in the terms I have identified.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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This transcript has been approved by the Judge.