Case No: LM-2021-000083
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IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
LONDON CIRCUIT COMMERCIAL COURT (QBD)

Royal Courts of Justice
Strand
London WC2A 2LL

Monday, 26 April 2021

BEFORE:

HIS HONOUR JUDGE PELLING, QC

BETWEEN:

(1) LUBIN BETANCOURT REYES
(2) CUSTODIAL MANAGEMENT SOLUTIONS LIMITED

Claimants

- and -

(1-3) PERSONS UNKNOWN
(4) TETHER HOLDINGS LIMITED
(5) BINANCE HOLDINGS LIMITED

Defendants

MS C BELL appeared on behalf of the Claimants

The Defendants did not appear and were not represented

JUDGMENT
(APPROVED)

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(Official Shorthand Writers to the Court)

JUDGE PELLING QC:

1. This is an application for wide-ranging, without-notice relief consisting of:

> (a) an application as against the first respondent to the application for a worldwide freezing order coupled with ancillary disclosure;
>
> (b) proprietary injunction against the second and third respondents on the basis that they are knowing recipients of the proceeds of fraud;
>
> (c) a disclosure order under either the *Bankers Trust* jurisdiction and/or the *Norwich Pharmacal* jurisdiction against the fourth and fifth defendants (whose role in all of this I come to in just a moment) coupled with applications for permission to serve out of the jurisdiction and permission to serve by an alternative means.

2. I premise my further remarks by noting that the total value of this claim is $109,395, which is a very small sum of money to use as justification for obtaining worldwide freezing orders in particular but, to a lesser extent, the proprietary injunctions that are sought as well.

3. I start with the facts, which are relatively straightforward. This case is concerned with a cryptocurrency known as US Dollar Tethers. This is a cryptocurrency the value of which is fixed to the value of the dollar so that 1 US Dollar Tether is worth 1 US dollar and always is. It is not like Bitcoin the value of which fluctuates according to market demands. This is significant because US Dollar Tethers are a convenient means by which cross-frontier transactions can be funded without the need to go through some of the bureaucratic steps required if a payment is to be made in US dollars.

4. The circumstances leading to this claim are a relatively straightforward phishing fraud which arose in the following basic circumstances. The claimant attempted to make a payment of $105,458 for services to a counterparty in Manila in the Philippines. For that purpose, the claimant had to enter the destination wallet for the payment into the

electronic account facilities that were available to him on a platform operated by Binance Holdings Limited (the fifth defendant). The fourth defendant, Tether Holdings Limited, is referred to in the evidence as being the minter of the currency.

5. What appears to have happened on the claimant's case is that he entered the destination wallet by its relevant address. This all being an electronic operation, the relevant address consists of a lengthy line of upper and lowercase letters and numerals. Before the claimant came to click on the send button in order to transfer the Tether currency from his wallet to the intended recipient's wallet, a malware program on his computer appears to have had the effect of more or less instantaneously substituting an almost exact replica of the Binance Holdings platform Page but inserting into the destination box a different lengthy list of upper and lowercase letters and numerals. By this means and unknown or unappreciated by the claimant at the time, when he clicked to send the Tethers thinking they were going to his counterparty in the Philippines, they went to what are known in these proceedings as "wallet 1", a wallet operated by the phishing fraudster.

6. The evidence that is currently available suggests that the proceeds were not merely the $105,000-odd which the claimant wished to sent his counterparty in the Philippines but, in effect, the whole of his account was transferred away. What then happened is that the Tethers transferred to wallet 1 were then divided with some being sent to what is known in these proceedings as "wallet 2" and the remainder to "wallet 3".

7. Following the discovery by the claimant of the fraud and through various technical steps that I need not take up time describing, he was able to ascertain that his assets are to be found in what are referred to in these proceedings as "wallet 2" and "wallet 3". In those circumstances, he seeks in these proceedings a worldwide freezing order against those persons unknown operating wallet 1, who are the primary fraudsters, and he seeks a proprietary injunction freezing what is contained in wallets 2 and 3 on the basis that those who operate wallets 2 and 3 were knowing receivers or knowing assisters in the movement of fraudulently-obtained money.

8. Against that background, it is necessary to start with the question of whether or not permission should be given to serve these proceedings out of the jurisdiction on any

one of defendants 1 to 3 (the first defendant being, as I have said, the primary fraudsters and operators of wallet 1 and the second and third defendants being the operators respectively of wallet 2 and wallet 3). The causes of action that are available are different in each case.

9. The reason why permission is required to serve these proceedings out of the jurisdiction is because it is entirely unknown to the claimant whether the persons unknown constituting the first, second or third defendants are located abroad or not. Given the nature of what has happened, it is at least likely, and perhaps more than likely, that the individuals concerned are located outside England and Wales. In those circumstances, the claimants apply first for permission to serve any proceedings out of the jurisdiction if and to the extent that is necessary. In my judgment, that is a correct way to proceed.

10. The test which is to be applied in deciding whether to give permission to serve out in these circumstances is a tripartite test requiring the claimant to demonstrate:

> (1) that there is a good arguable case falling within one of the gateways set out in paragraph 3.1 of Practice Direction 6B within the Civil Procedure Rules;
>
> (2) that there is a serious issue to be tried on the merits of the claim; and
>
> (3) that, in all the circumstances, England is clearly or distinctly the appropriate forum.

11. Taking the third of those first, in the circumstances of this case, it is entirely impossible to carry out a balancing exercise in order to ascertain whether England is the appropriate forum or not because each of the various defendants are persons unknown. All that can be said is that the claimant is resident in the United Kingdom, he operates his business from England and the losses appear to have been sustained in England as a result. In those circumstances, I am satisfied that, if the other two tests are made out,

then the **forum conveniens** requirement is (for the purposes of this application at least) also made out.

12. The question, therefore, is whether there is a good arguable case and it is necessary to consider each of the defendants in turn. So far as the first defendant is concerned, the first cause of action suggested is a claim in conversion. In my judgment, that does not pass the relevant test. In *Your Response Ltd v Datateam Business Media Ltd* [2015] QB 41, which followed the earlier House of Lords decision in *OBG Ltd & Ors v Allan & Ors* [2007] UKHL 21, it was held that rights such as debts, copyright and other choses in action could not be possessed for the purposes of the tort of conversion. In those circumstances, as it seems to me conversion is not a tenable basis for maintaining a claim against the first defendant, notwithstanding the suggestion that the law should be reformed so as to permit such claims to be made, as counsel for the claimant says in her written submissions, "*The proposed claimants cannot ignore the authority of Your Response Ltd.*"

13. Therefore, it is necessary, if this hurdle is to be satisfied in relation to the first defendant, to look elsewhere. I am satisfied that there are two causes of action which pass the test that is applicable on the issue that I am now considering. The first is a claim in deceit. Deceit is effectively a fraudulent misrepresentation claim which requires a claimant to demonstrate a false representation known or believed to be false at the time it is made which is intended to be (and is) acted upon by the claimant to his, her or its detriment.

14. The way in which the claim is put by the claimants is to suggest that their false representation consisted in the malware creating almost instantaneously in front of the claimant a false reproduction of the Binance platform screens and, within that falsely-represented trading platform, to create a false (that is to say unintended by the claimant) electronic address to which money was to be sent, which the claimant acted upon by clicking the transmit button.

15. It cannot be pretended that this is a straightforward claim, nor can it be pretended that it is not one where various arguments could plainly be advanced on behalf of the defendants on the merits. But that, of course, is not the test. As I have already

indicted, the test is simply whether or not there is a good arguable case in relation to the relevant cause of action and I am satisfied that there is for the reasons I have given.

16. The other cause of action which is available to the claimant against the first defendant is unjust enrichment. Unjust enrichment would arise in precisely the circumstances where the claim against the second and third defendants would encounter difficulties. If the first defendant has passed on the assets belonging to the claimant in circumstances where the second and third defendants are **bona fide** purchasers for value without notice of the fraud, then it is possible (to put it no higher) that the chain of causation which would enable the claimant to recover his assets on a remedial constructive trust or resulting trust basis would fail. However, in those circumstances, it would necessarily follow that consideration would have been given by the second and third defendants to the first defendant for the transfer of the assets and, to that extent, the first defendant would undoubtedly be unjustly enriched, applying the test which applies to that cause of action.

17. In those circumstances, I am satisfied that the claimant has two causes of action which satisfy the first test I have to apply in this area, namely deceit and unjust enrichment.

18. The next question is what, if any, causes of action are available as against the second and third defendants. As I have already said, that depends fairly critically on whether or not the second and third defendants were **bona fide** purchasers for value without notice of the assets concerned. On the assumption that they were not and that therefore they were receivers of property belonging to the claimant with the relevant level of knowledge, then they would be fairly easily held to be the holders of the assets on constructive trust for the claimant, and that is a cause of action which is plainly available to the claimant on the assumption that they are not **bona fide** purchasers.

19. On the material that is available, it is difficult to see on what basis the second and third defendants could have acquired these assets legitimately and therefore I am satisfied that the first test that applies in this area is satisfied in relation to them as well.

20. The second question is whether there is a serious issue to be tried on the merits of the claim. I have outlined at some length already the nature of the claim and there is, in

my judgment, a sufficiently serious issue to be tried as between the claimant on the one hand and the first, second and third defendants on the other to justify permitting service out.

21. The next question that arises, therefore, is whether or not one or more of the gateways required to be satisfied on a good arguable case basis has been made out. I am satisfied that, for the claims as against the first defendant, gateway 9 is the appropriate one to refer to because, in respect of both deceit and unjust enrichment, on the basis that the claimant is habitually resident in and conducts his business from England and that is where the loss caused by the events to which I have referred was suffered.

22. There is one point which is drawn to my attention which I mention although, in my judgment, it makes no real difference in the circumstances. At the time when the transaction took place, the claimant was on holiday in Spain and was carrying out the transaction from his laptop there. In my judgment, that is in effect immaterial to the issues that arise because he is, as I have already said, habitually resident in England, conducts his business from England and was at the time present in Spain only on Holiday. The fact that he has remained there for COVID-related reasons is nothing to the point, either, because, but for the COVID-related issues, he would have returned.

23. That, then, disposes of the first, second and third defendants so far as service out is concerned. The remaining question is whether or not service out as against the fourth and fifth defendants can be directed. So far as that is concerned, in a moment I will turn to the applications which are made against the fourth and fifth defendants, although, as I have said, they are for *Bankers Trust* and *Norwich Pharmacal* relief. I am satisfied that, if and to the extent such orders are ones which it is appropriate for me to make as against the fourth and fifth defendants, there would be ample jurisdiction to serve the fourth and fifth defendants out of the jurisdiction by reference to the necessary or proper party gateway since the claims as against the fourth and fifth defendants arise only as a result of what has happened so far as the first, second and third defendants are concerned in relation to the claimant. No authority has been drawn to my attention that suggests the relief sought precludes permitting service out of the jurisdiction.

24. In those circumstances, the next question which has to be asked is whether or not the relevant injunction should be granted at all. So far as the second and third respondents are concerned, as I indicated in the course of the argument, there is really little difficulty in granting the injunction sought against the second and third respondents. What is sought is a proprietary injunction which is designed to freeze the Tether coins currently in each of wallets 2 and 3 over until trial or further order (or, in this particular context, until a return date).

25. On that basis and on the basis of the evidence to which I have referred earlier in this judgment, it is plain that there is a serious issue to be tried as to whether or not the second and third defendants hold the assets contained in wallets 2 and 3 on constructive (or alternatively resulting) trust for the claimant and therefore the first hurdle in relation to a proprietary order of the sort being required is satisfied.

26. The next question is whether or not damages would be an adequate remedy so far as the applicant is concerned. On the current state of the evidence, the answer to that is plainly no since absolutely nothing is known, by definition, concerning any one of the second or third defendants or the circumstances in which they acquired his cryptocurrency. Therefore, damages would not be an adequate remedy.

27. The next question is whether the applicants have provided an adequate cross-undertaking in damages because, if the respondents can adequately be compensated under that provision, then that points towards the grounds of an injunction. An unlimited cross-undertaking in damages is not offered. What has been offered is an undertaking up to the full value of the sum in question. I am satisfied that that is an appropriate response in the circumstances of this case and I am satisfied on the evidence contained in the claimant's witness statement that that is an exposure that he is well able to finance.

28. The applicant would be prejudiced if the injunction is not granted because, as things presently stand, Tether Holdings have frozen the claimant's cryptocurrency on a temporary basis but have made it clear that, unless an order is obtained from the court, then that freezing position will be released. Does it maintain the status quo? Yes, it

does because the assets were transferred in effect **in specie** and all that the order is doing is to preserve that which has been taken illegitimately from the claimant.

29. The next question, which is a much more difficult one, is whether or not any order should be made against the first defendant. The first defendant is a person or persons unknown but, by the same token, is plainly the person or persons who have been responsible for inflicting loss on the claimant. In addition, the claim as against the first defendant is of particular and practical importance if it should turn out that the second and third respondents are **bona fide** purchasers for value without notice of the assets concerned, in which case the only claim that the claimant would have to recover the loss that he has suffered would be by bringing a claim against the first respondent.

30. The first question which then arises, therefore, is whether there is a good arguable case so far as the underlying cause of action is concerned. For the reasons I have already identified, I am satisfied that that requirement is made out. The threshold is not a high one but is more than satisfied by evidence which demonstrates to the requisite standard that the claimant is entitled to have permission to serve these proceedings out of the jurisdiction.

31. So far as the existence of assets are concerned, it is simply not possible to say at this stage whether the individual has any assets because he may have assets in wallet 1 other than those which had been transferred to wallets 2 and 3 or he may not and he may have assets other than that which is contained in wallet 1 but, until an order has been served and information obtained, one can take that debate no further.

32. The third question that arises is whether or not a risk of dissipation has been demonstrated. So far as that is concerned, the authorities in relation to freezing orders make it abundantly clear that inferences of a real risk of dissipation should not be drawn from the primary facts giving rise to the cause of action unless it can be said that those primary facts justify the further inference of a risk of dissipation. In other words, merely because it is alleged against a respondent that he has been a dishonest party to fraudulent activity does not lead necessarily to the conclusion that there is a risk of dissipation.

33. All of that said, in the circumstances of this case, I am satisfied that the evidence does demonstrate such a risk because of the way in which these various wallets have been manipulated and funds have been transferred at speed from wallet 1 to wallets 2 and 3. There is no real doubt that, had Tether not acted as it did, there is a real prospect of those in control of wallets 2 and 3 dissipating the sums further into other wallets so as to make the task of recovery all the more difficult. In my judgment, this requirement is satisfied as well.

34. In those circumstances, the only question which remains is whether or not it is just and convenient to grant an order at all. This is much more difficult because of the very small amounts of money that are at stake. I am just about satisfied that it would be appropriate to grant a freezing order in all the circumstances and in particular because if such an order is not granted the claimant is likely to suffer greater difficulty in recovering what has been in effect stolen than would otherwise be the case. However as things presently stand it is not possible to identify the country or countries in which the first to third defendants are to be found. In those circumstances, it may well be that the appropriate course is simply to stand over the freezing order application until the further information sought from the fourth and fifth defendants is available. I will hear counsel further on that because it may be that it is possible to restrict the scope of the freezing order so as to eliminate this particular problem.

35. Turning now to the *Bankers Trust* and *Norwich Pharmacal* applications, I have already dealt with the issue concerning service out. It necessarily means that, in taking that decision, I have followed the reasoning of HHJ Waksman QC (as he then was) in *CMOC Sales & Marketing Ltd v Persons Unknown & Ors* [2018] EWHC 2230 (Comm). I have not felt it necessary to consider further the approach adopted by Teare J in *AB Bank Ltd v Abu Dhabi Commercial Bank PJSC* [2016] EWHC 2082 (Comm).

36. The question which therefore arises is whether or not the requirements for *Bankers Trust* and/or *Norwich Pharmacal* relief have been made out in the circumstances of this case. Turning first to *Bankers Trust*, the test is a four-part test. The first question is whether there is good ground for thinking that the property that the claimant seeks to

recover is the claimant's property. On the evidence that is available, which I have summarised earlier in this judgment, there can be no real doubt that that is so.

37. The second question is whether the claimant is seeking disclosure of documents and information to support a proprietary claim to trace assets and there is a real prospect that the information might well lead to the location or preservation of those assets. It is clear on the evidence, particularly the expert evidence for which I gave permission at the outset of this hearing, that both the fourth and fifth defendants will have information concerning the identity and probably present whereabouts of those controlling each of the relevant wallets.

38. There is no doubt that the claimant is embarking on a tracing exercise, at any rate in relation to those assets held in the name of the second and third defendants in wallets 2 and 3, because the exclusive basis on which the claims made against those individuals is advanced is on the basis of a constructive trust or, alternatively, a resulting trust in favour of the claimant. This is the language and the area of tracing and therefore that particular requirement is satisfied as well.

39. An undertaking in damages has been offered by the claimant, as has an undertaking to pay the expenses to which the fourth and fifth defendants will be put in complying with the order. An undertaking has also been offered that the documents will be used solely for the purpose of following and tracing the sums removed via wallet 1 to wallets 2 and 3. In those circumstances, I am satisfied that it would be appropriate for that order to be made.

40. So far as *Norwich Pharmacal* is concerned, that is a tripartite test. The first question is whether a wrong has been carried out by the ultimate wrongdoer. In this context, the primary focus is on the first defendant, although also on the second and third defendants to the extent that they were not **bona fide** purchasers for value without notice. It is plain on the evidence that that is a test which is satisfied to the seriously arguable level.

41. Secondly, there must be a need for an order to enable action to be brought against the ultimate wrongdoer. The key point in all this (that is to say both the application for

Norwich Pharmacal relief and for *Bankers Trust* relief) is to identify who the individuals are that control wallets 1, 2 and 3 and their address or current whereabouts. There can be no sensible doubt that, if and to the extent anyone knows who that is, it will be the fourth and fifth defendants who are the ones who, by definition, must have extended facilities to those controlling wallets 1, 2 and 3 to enable this fraud to take place.

42. Finally, the court must be satisfied that the person against whom the order is sought (that is to say the fourth and fifth defendant) were innocently mixed up in or facilitated the wrongdoing. So far as that is concerned, as I have already explained, they provided both the platform and other facilities necessary to enable this fraud to take place and, in my judgment, therefore, the mixing-up test is satisfied and there can be no real doubt that each of them can provide at least some information concerning the persons unknown because it is difficult to see how either Tether or Binance could operate without having that information to hand.

43. The final question which has to be addressed is service. This breaks down again into the first to third defendants on the one hand and the fourth and fifth defendants on the other. I have already indicated that it is appropriate to give permission to serve out in relation to the fifth defendant, which is a company incorporated in the Cayman Islands with no presence in the English jurisdiction. So far as Tether Holdings Limited is concerned, it is a company incorporated in the BVI but has a branch in London and therefore can be served at its London branch.

44. So far as the first, second and third defendants are concerned, that is more difficult. However, as I have already indicated, it is likely that either the fourth and/or fifth defendants will have the contact details in relation to all of (or at least some of) the first, second and third defendants because they could hardly operate on the basis of extending facilities to the first, second and third defendants without having information concerning their names, whereabouts and means of communication.

45. In those circumstances, what I propose to do is to make an alternative service order by which the first, second and third defendants are to be served by sending the proceedings for them and each of them to the fourth and fifth defendants, coupled with

an order that the fourth and fifth defendants use best endeavours to pass that material on to the first, second and third defendants to the extent that information concerning their names and last known addresses are available to them.

46. The only other basis on which I need concern myself about service out is, I think, in relation to email addresses for the fifth defendant and I am content to authorise that as well, subject to this point: that English law will not permit service by an alternative means if the law of the country where the person is to be served positively forbids service by a means other than that which is sanctioned by local law. In those circumstances, there will have to be a qualification in the order which makes clear that the alternative service that I am permitting is permitted only to the extent that it is not forbidden by relevant local law.

47. With that qualification and subject to the point I have made concerning the freezing order, I am prepared to make the orders sought.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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This transcript has been approved by the Judge