IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
(ChD)
NEUTRAL CITATION NUMBER [2022] EWHC 1723 (Ch)

Heard in Private

Case No. BL-2022-001008

The Rolls Building
7 Rolls Buildings
Fetter Lane
London
EC4A 1NL

Friday, 24th June 2022

Before:

THE HONOURABLE MR JUSTICE TROWER

B E T W E E N:

D'ALOIA

and

PERSON UNKNOWN & OTHERS

MS R MULDOON (instructed by Giambrone & Partners) appeared on behalf of the Claimant
NO APPEARANCE by or on behalf of the Defendants

JUDGMENT
(Approved)

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MR JUSTICE TROWER:

1. This is an application by Mr Fabrizio D'Aloia for interim injunctive relief, and disclosure, and ancillary orders against a number of defendants, arising out of what he alleges to be the fraudulent misappropriation of cryptocurrency in the form of approximately 2.1 million USDT, and 230,000 USDC by persons unknown, between 22 December 2021 and 31 May 2022.
2. The evidence in support of the application supports the claimant's case that he has been the victim of a scam to induce him to transfer USDT and USDC from his Coinbase and Crypto.com wallets to persons unknown, being behind a website with the name "www.tda-finan.com". There is evidence, including evidence relating to the misuse of a logo, that this website sought to represent that it is connected, in some way, with a legitimate US-regulated business, called TD Ameritrade. It is not. The "tda-finan" website, and an email address with which the claimant communicated during the course of what he will doubtless regard as his disastrous investment, are registered in Hong Kong, and have nothing to do with TD Ameritrade itself.
3. I do not need to explain in any detail the circumstances in which the claimant came to transfer the amount of cryptocurrency to the account that was opened at tda-finan. It is explained in some detail in the claimant's own affidavit, and is summarised in the helpful skeleton argument that has been put before me by Ms Muldoon. In short, the claimant made numerous deposits of USDT and USDC into two named wallets, the addresses for which were recorded on the web platform associated with tda-finan. Believing that tda-finan had custody of his USDT and USDC, the claimant traded using the facilities that were provided by tda-finan. The interface that the claimant had with the tda-finan platform reflected those trades, and the returns and losses to which those trades appeared to give rise.
4. At the very beginning of February 2022, the claimant's open trades were closed, and he, thereafter, took steps to try and discover what had happened, and to test the system by submitting a withdrawal request from his trading account. The submission of the withdrawal request, which, as I understand it, was the first occasion on which he had sought to do so, led to his account being blocked. After that had occurred, the claimant had a number of email communications with an email address, "tda@58mal.com", in consequence of which he was induced to make further deposits for various reasons, which, on the face of it, can now be seen to have been fraudulent, or fraudulently expressed.
5. By the end of May 2022, it had become apparent to the claimant that he was a victim of fraudulent activity, and, in those circumstances, he approached a firm of solicitors, Giambrone & Partners, who have experience in litigation of this sort. This was the culmination of attempts by the claimant to realise his investments without any success, and, I should say that the evidence is, at this stage, that the account that he had with tda-finan now records that the value of his investments are zero.
6. As part of the process of trying to identify what has happened, the claimant has instructed an intelligence investigator, Mitmark, which has now produced a report, and I formally give permission for that report to be adduced in evidence for the purposes of this application. That report is dated 22 June, and it concludes that it is highly likely that those behind tda-finan.com have been using it as a way of imitating a well-known brokerage in order to "con" unsuspecting investors such as the claimant out of the funds that they wish to invest.
7. More significantly, for present purposes, the investigators have been able to establish that some 2.175 million of USDT and USDC has been transferred to a number of private addresses and exchanges, operated by, or under the control of the second to seventh defendants, although I will come back shortly to a point in relation to the third defendant. The major part of what

has been transferred has found itself into one or more wallets, held with Binance, of which, the second defendant would appear to be the principal holding company. Other amounts are held in wallets with four other exchanges which are operated, on the evidence, by the fourth to seventh defendants.

8. Against that background, I have to consider whether there is a serious issue to be tried in relation to the claims which the claimant seeks to commence, against the first defendant, who are persons unknown; those behind the website, which I have explained; and the second to seventh defendants who are said to be the controllers of or the operators of the exchanges.

9. The claim against the first defendant that is advanced is in fraudulent misrepresentation and deceit, unlawful means conspiracy, and unjust enrichment. It is said that in consequence of the deceit that was practiced on the claimant by the persons unknown, they have misappropriated from him the sums of USDT and USDC that I have already identified. I agree, and accept the submission that the evidence of the claimant as to what occurred, satisfies the necessary test as to a serious issue to be tried.

10. I should also add that the misrepresentations that were made to the claimant were made to him in England, and, it seems to me that there is a good arguable case that the asset that was misappropriated as a result of the misrepresentation is an English asset. The reason for this is that anyway to the good arguable case standard, the *lex situs* of a crypto asset is the place where the person who owns it is domiciled; a point that was discussed by Butcher J, in *Ion Science Limited & Duncan John v Persons Unknown, Binance Holdings Limited, Payment Ventures Limited* (unreported) [2020] (Comm), at paragraph 13. The evidence is that the claimant was at all material times domiciled in England, and, as such, the USDT and USDC of which he was deprived by the fraudulent misrepresentation of the first defendant, i.e., the persons unknown, was located in England.

11. In my view, it also follows from this, that there is a good arguable case not only that the *situs* of the asset is England but also that the claim is governed by English law because the damage occurred in England when the English asset was misappropriated from the claimants. It follows that English law is likely to be the governing law by application of Article 4.1 of the Rome II Convention.

12. It is also said that the claimant has a claim in constructive trust, not just against the first defendant but also, such as to give rise to proprietary rights, as against the second to seventh defendant, being those who control or hold the exchanges into which (according to the report produced by Mitmark) it is possible trace the relevant crypto assets. I am satisfied, for present purposes, subject to one issue which arises in relation to the third defendant, that there is a good arguable case to that effect.

13. Insofar as the evidence in relation to the third defendant is concerned, I am not satisfied that there is sufficient evidence to demonstrate that Binance Markets Limited, the English Company, has any sufficient control over the wallets which appear to be Binance wallets, to put itself, arguably, into a position of being a trustee, whether constructive trustee or otherwise in respect of the contents of those wallets. That is not to say; and I stress this point; that the claimant may not establish that that is the case in due course, but the evidence, at present, is not sufficient for those purposes.

14. I am, however, satisfied on the basis of what I have been shown, there is a serious issue to be tried that Binance Holdings Limited, which appears to be the holding company of the Binance Group, is able to control the relevant Binance wallets, whether directly or through its corporate status within the group. It is likely that when it is notified of this injunction and therefore of the claims that are made by the claimant in respect of the monies in those Binance wallets, that it will thereby come under the duties of a constructive trustee for the claimant in respect of those crypto assets.

15. Against that background, having described the causes of action that are sought to be advanced (and I shall come on to the *Bankers Trust* relief a little later), and having concluded that they give rise to serious issues to be tried, I have to consider two questions: the first is whether or not I should grant permission to serve out of the jurisdiction against the defendants in respect of whom the substantive relief is sought. The second is whether or not I should grant the injunctive relief that is sought.
16. Insofar as the first is concerned, it is necessary for the Court to consider whether it is appropriate to grant permission to serve out of the jurisdiction, because, if it does not, in circumstances in which all of the proposed defendants, with the exception of the third, are likely to be out of the jurisdiction, the Court has no jurisdiction to grant the injunctive relief. When I say that all of the defendants appear to be outside the jurisdiction, the evidence is relatively clear that the second, and fourth to seventh defendants are outside the jurisdiction in Panama, Cayman Islands, Seychelles and Thailand. The claimant has no idea where the first defendant of defendants (the persons unknown behind the website) are located, but the chances are that they are outside the jurisdiction, and there is some small evidence that they may be domiciled in Hong Kong.
17. Insofar as the third defendant is concerned, they would appear to be domiciled in England and Wales, but, as I am not satisfied that substantive relief is appropriate against them at this stage. It follows that their domicile within this jurisdiction is not a matter which directly arises as relevant on the applications for permission to serve out.
18. The questions on an application for permission to serve out are, first of all, whether or not there is a serious issue to be tried, and, as I have explained, I am satisfied, on the evidence that there is. The second question is whether there are any gateways under Practice Direction 6B which justify the Court granting permission to serve out of the jurisdiction. The third consideration for the Court is whether, in all the circumstances there is a sufficient connection to this jurisdiction to justify the grant of relief. Insofar as the third is concerned, England has to be, and clearly so, the most appropriate jurisdiction in which the proceedings should be brought.
19. Insofar as that third question is concerned, which I will deal with first, I am satisfied that is the case. The claimant is domiciled in this jurisdiction. The fraud was practiced upon him in this jurisdiction, and the assets concerned are located in this jurisdiction.
20. Insofar as the gateways are concerned, a number of alternatives are advanced by Ms Muldoon in her skeleton argument. Insofar as service on the first defendant is concerned, she relies, first of all, on gateway 9, on the grounds that this is a claim in tort, where damage has been or will be sustained, resulting from an act committed, or likely to be committed within the jurisdiction, or damage was sustained or will be sustained within the jurisdiction. I am satisfied, to the good arguable test standard that gateway 9 applies in this case, for the simple reason that, similar as it is to the question that arises in relation to the *situs* of the cryptocurrency, there is a good arguable case that the damage will be sustained in this jurisdiction. This is where the cryptocurrency was held immediately before the misrepresentations, and deceit was practiced upon the claimant.
21. In that sense, for present purposes, it is not necessary for me to consider gateways 11, 16, and 4A. I do not propose to take up further time this morning on considering the alternative gateways, apart from to say this:
22. I think that there is a good arguable case that gateway 15 (that is the constructive trust gateway), is available as against the persons unknown. I think that it is quite likely that gateway 11 ("The claim relates wholly or principally to property within the jurisdiction") is also available. Although the property which represents the property of the claimant's is no longer within the jurisdiction, the property that was originally his was here at the time of the

misappropriation. In my view there is a good arguable case that this gateway is satisfied as well.

23. Insofar as gateway 16 is concerned; "A claim is made for restitution where the claim is governed by the law of England and Wales"; that gives rise to some slightly more complex considerations. The claim in restitution is a claim, essentially, for unjust enrichment. It is not entirely clear to me where the enrichment would have occurred, and I do not think it is necessary to go into detail on whether or not there is a good arguable case in relation to that head of relief.
24. Insofar as service out of the jurisdiction on the exchange defendants is concerned, I am satisfied that the principal gateway which is available so far as the claim against them is concerned is that a claim is made against them as constructive trustees or as trustees of a resulting trust, where the claim arises out of "…acts committed or events occurring within the jurisdiction, or relates to assets within the jurisdiction". The reason I am satisfied of that is that the acts committed or events occurring within the jurisdiction are the acts or events that underpinned the coming into existence of the constructive trust. For this purpose the critical event that occurred within the jurisdiction, was the transfer by the claimant (then in the jurisdiction) of the crypto asset that was located in the jurisdiction into an account held on the website platform.
25. Therefore, I am satisfied that there is a gateway that arises that justifies service out, as against the exchange defendants. It may well be that there are other gateways as well. Again, sitting in the interim applications court on an urgent application of this sort where I am only hearing one side of the argument, I am not going to analyse all the other gateways, apart from to say that, if this matter is substantively argued in due course, it may be the case that the claimant will wish to develop further arguments in relation to other gateways, depending on the way in which any defence is put, by one or more of the defendants.
26. Accordingly, in all the circumstances, I am satisfied that it is appropriate to grant permission to serve out of the jurisdiction on those defendants against whom the application for permission to serve out of the jurisdiction is sought.
27. Insofar as the injunctive relief itself is concerned, I am satisfied, for the reasons that I have already indicated that there is a serious issue to be tried against the persons unknown in relation to the substantive relief. I am also satisfied that there is a serious issue to be tried in relation to declaratory relief in respect of the constructive trust against all of the other defendants, apart from defendant three, of which I am not satisfied that there is sufficient evidence to demonstrate a serious issue to be tried at this stage.
28. Against that background, I have to consider whether damages would be an adequate remedy. In my judgment, it is plain that they would not. This is the kind of situation in which, in the absence of relief restraining disposition of an asset that, on the face of it, continues to belong to the claimant, any remedy that the claimant would then have left available to him will be rendered worthless.
29. As to balance of convenience, in my judgment, the balance comes firmly down in favour of the grant of relief. I should add that, in accordance with the usual practice, the claimant will give a cross-undertaking in damages, and I have seen sufficient evidence to satisfy me that he is good for the money, anyway to the extent of any reasonably anticipatable claim that might be made against him as a result of the grant of this relief. In reaching that conclusion I take into account the fact that, on the face of it, the order will not have immediate impact on any of the defendants such as to give rise to a claim for damages. All that is being sought is freezing relief in respect of crypto assets held in wallets.
30. I then move on to the *Bankers Trust* disclosure relief that is sought. The first question for me on this aspect of the application is whether there are good grounds for concluding that the

cryptocurrency belongs to the applicant. I am satisfied that the cryptocurrency held in the relevant wallets belongs to the applicant for the reasons I have already given.

31. The second question is whether there is a real prospect that the information sought will lead to the preservation of the asset. In my judgment, there is a real prospect that that will occur, because it will assist the claimant in identifying the persons unknown.
32. The third question I have to consider is whether the form of relief that is actually sought is appropriate and proportionate, being no wider than necessary in all the circumstances. I am satisfied that it is.
33. The fourth question is a balancing exercise which requires me to balance the position as between the applicant who has been deprived of his assets, and the respondents to the application. In my judgment, in circumstances in which the applicant is going to pay the reasonable costs incurred by the exchanges in providing the information, that balance comes down in favour of the grant of some form of disclosure relief.
34. The final, and important question is the impact that the disclosure sought will have on any duties of confidentiality that may be owed to third parties in respect of the information sought. Given that the information sought is information that relates to the disclosure of necessary information where there is a good arguable case; serious issue to be tried; on the question of whether or not the claimant has been defrauded by what looks like a relatively straightforward claim in deceit, I am satisfied that the balance comes down in favour of the grant of the relief sought, notwithstanding the duties of confidentiality that may be owed to third parties. For those reasons, I think that it is appropriate to grant *Bankers Trust* relief in this case.
35. I am also asked to make an order for service of the *Bankers Trust* order out of the jurisdiction, and by alternative means. Insofar as service out of the jurisdiction is concerned, the circumstances in which it is appropriate for a *Bankers Trust* relief claim to be served out of the jurisdiction are dealt with by Butcher J in *Ion Science* and HHJ Pelling QC in *Fetch.Ai v Persons Unknown and Others* [2021] EWHC 2254 (Comm). They both considered the decision of Teare J in the case *of AB Bank Limited v Abu Dhabi Commercial Bank PJSC* [2016] EWHC 2082, where Teare J concluded that the Court had no jurisdiction to give permission to serve out in respect of a claim for *Norwich Pharmacal* relief, and they both distinguished *AB Bank* in the case of a *Bankers Trust* order, where, what was described as "hot pursuit" was being carried out.
36. On a without notice application of this sort, I do not propose to consider such conflict as there may be from the decision reached by Teare J and the decision reached by Butcher J, but I am satisfied that the right thing to do is to follow the decision of Butcher J, not least because he is a judge of coordinate jurisdiction, and considered that it was appropriate to distinguish between the *Bankers Trust* jurisdiction and the *Norwich Pharmacal* jurisdiction. I should, however, stress that this is only a without notice application, and it always remains open to any of the defendants to argue, at an *inter partes* hearing that the Court does not have the jurisdiction which is sought to be exercised.
37. I should go on to consider, having satisfied myself that the Court has jurisdiction to give permission whether it is appropriate for that relief to be granted; and I think I have already indicated that it is.
38. I then move on to the application for service by an alternative method or at an alternative place on the first defendant. The application for service by alternative means on the first defendant is sought, both in relation to service by email, and, also, service by what is called the "non-fungible token", which is a form of airdrop into the tda-finan wallets in respect of which the claimant first made his transfer to those behind the tda-finan website.
39. Ms Muldoon says that this is a novel form of service, and has explained to me that its advantage is that, in serving by Non-Fungible Token (NFT) the claimant will, what she

described as "embrace the Blockchain technology", because the effect of the service by NFT will be that the drop of the documents by this means into the system, will embed the service in the blockchain. I may not have expressed that very happily but that is the essence of what Ms Muldoon said. There can be no objection to it; rather it is likely to lead to a greater prospect of those who are behind the tda-finan website being put on notice of the making of this order, and the commencement of these proceedings.

40. I am satisfied that, in this particular case, it is appropriate for service to be effected by NFT in addition to service by email. I think that the difficulties that would otherwise arise and the complexities in relation to service on the first defendant mean that good reason has been shown I do not think it is appropriate, nor, indeed did Ms Muldoon ask me, to make an order for service by alternative means in circumstances in which it would be sufficient, without serving by email as well. However, I am content to make an order for service by alternative means by those two additional routes. I am also satisfied that there is good reason for service on the exchange defendants to be by the alternative means on the face of the order.

41. Therefore, for those reasons, I am satisfied that this is a case in which the relief sought, both against the persons unknown, and as against the exchange defendants in respect of the substantive causes of action, and in respect of the disclosure orders is justified, and should be granted. The only exception to that is that I will not grant substantive relief; freezing relief; against Finance Markets Limited, because I am not satisfied that it has any role in the control or holding of the relevant Binance wallet.

End of Judgment.

Transcript of a recording by Ubiqus
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This transcript has been approved by the judge.