[2023] EWHC 799 (Ch)

IN THE HIGH COURT OF JUSTICE **Claim No. BL-2022-001711**
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)
B E T W E E N :

Date: 5 April 2023

Before :

James Pickering KC
(sitting as a Deputy High Court Judge)

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Between :

(1) DANIEL CARLOS SCENNA
(2) HOST GROWTH INC (a company registered in Ontario) **Claimants**

And

(1) PERSONS UNKNOWN USING THE IDENTITY "NANCY CHEN"
(2) PERSONS UNKNOWN USING THE IDENTITY "VERA"
(3) PION MARKET LTD (a company incorporated in England)
(4) QS TRADING LTD (a company incorporated in Hong Kong)
(5) WIN FY PTY LTD (a company incorporated in Australia)
(6) TECO INDUSTRIAL PTY LTD (a company incorporated in Australia)
(7) AUSTRALIA AND NEW ZEALAND BANKING GROUP LTD
(a company incorporated in Australia)
(8) WESTPAC BANKING CORPORATION (a company incorporated in Australia)
(9) DAH SING BANK LTD (a company incorporated in Hong Kong) **Defendants**

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Celso De Azevedo (instructed by **Giambrone & Partners LLP)** for the **Claimants**
Edward Harrison (instructed by **Farrer & Co LLP)** for the **Seventh Defendant**
Edward Levey KC (instructed by **Herbert Smith Freehills LLP**) for the **Eighth Defendant**

Hearing date: 27 January 2023

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APPROVED JUDGMENT

James Pickering KC (sitting as a Deputy High Court Judge):

PART I: INTRODUCTION
PART II: THE BACKGROUND
PART III: THE CONTINUATION APPLICATION
PART IV: THE DISCLOSURE ORDER APPLICATIONS
PART V: THE JURISDICTION APPLICATIONS
PART VI: THE COSTS APPLICATION
PART VII: CONCLUSION

PART I: INTRODUCTION

1. The Claimants are the victims of an alleged fraud. The First to Third Defendants are the alleged fraudsters. The Fourth to Sixth Defendants are the recipients of the allegedly stolen monies (and thought to be connected to the fraudsters). The Seventh to Ninth Defendants are the banks (two of which are incorporated in Australia, the other in Hong Kong) at which the Fourth to Sixth Defendants hold their respective accounts.

2. On 6 October 2022, the Claimants applied to me for *ex parte* relief. In relation to the First to Third Defendants, I granted worldwide freezing orders (both proprietary and non-proprietary). In relation to the Fourth to Sixth Defendants, I also granted worldwide freezing orders (again, both proprietary and non-proprietary). In relation to

the Seventh to Ninth Defendant banks, I refused to grant worldwide freezing orders; I did, however, make certain disclosure orders against them.

3. As part of that order, I also required an undertaking that the Claimants would issue a Claim Form in relation to the underlying substantive claim. Pursuant to that undertaking, the Claimants subsequently issued and served a claim form together with Particulars of Claim. By those documents, substantive relief was sought against not only the First to Sixth Defendants but also the Seventh to Ninth Defendant banks.

4. Now, several months later, the matter has returned to me to determine the following matters:

(1) the return date of the Claimants' application for the continuation of the worldwide freezing orders as against the First to Sixth Defendants ("**the Continuation Application**");

(2) the applications of the Seventh and Eighth Defendant banks challenging the grant of the disclosure orders ("**the Disclosure Order Applications**");

(3) the applications of the Seventh and Eighth Defendant banks challenging the jurisdiction of the English court in respect of the substantive claim ("**the Jurisdiction Applications**"); and

(4) a short point regarding costs ("**the Costs Application**").

PART II: THE BACKGROUND

5. As stated above, the Claimants are the victims of an alleged fraud. The First Claimant is resident in Canada and the Second Claimant is his company, an Ontario registered entity.

6. As also stated above, the First to Third Defendants are the alleged fraudsters. Pursuant to the alleged fraud, between March and April 2022 the First to Third Defendants

persuaded the Claimants to make various payments (totalling around US$2.9 million) to:

(1) an account in the name of the Fourth Defendant held at the Ninth Defendant bank in Hong Kong;

(2) an account in the name of the Fifth Defendant held at the Seventh Defendant bank in Australia; and

(3) an account in the name of the Sixth Defendant held at the Eighth Defendant bank, also in Australia.

7. In May 2022, the Claimants first suspected that they might have been defrauded. In June 2022, their suspicious were confirmed.

8. On 6 October 2022, the Claimants applied to me for interim relief. As stated above, while I was prepared to grant worldwide freezing orders against the First to Sixth Defendants, I was not prepared to do so against the Seventh to Ninth Defendant banks. I did, however, make disclosure orders against them requiring them to provide in relation to the relevant bank account in each case:

> "(1) the transaction history starting from the respective dates of transfer of the Relevant Sums onwards to the date of service of this Order, including:
>
> > (i) the deposit history;
> > (ii) the withdrawal history;
> > (iii) the access logs;
> > (iv) the approved devices; and
> > (v) know-you-client information relating to the respective bank and/or online account holders (including name, address, email addresses, and any other contact details available).
>
> (2) the final balance, meaning the balance on the date of service of this Order…"

9. On about 10 October 2022, the Claimants issued an application to continue the freezing order as against the First to Sixth Defendants – in other words, the Continuation Application.

10. On about 14 October 2022, the Claimants served a Claim Form and Particulars of Claim. As set out above, the defendants to the substantive claim were not only the First to Sixth Defendants but also the Seventh to Ninth Defendant banks.

11. On 28 October 2022, the Claimants renewed their application for proprietary interim injunctive relief as against the Seventh to Ninth Defendant banks. Subsequently, however, that application was withdrawn. It is the costs arising out of this withdrawal which are the subject of the Costs Application.

12. On 10 November 2022, the Seventh and Eighth Defendant banks ("**the Banks**") each issued applications seeking to challenge the disclosure orders made against them – in other words, the Disclosure Order Applications.

13. On 6 December 2022, the Banks each issued further applications, this time seeking to challenge the jurisdiction of the English court in respect of the substantive claim – in other words, the Jurisdiction Applications.

14. In due course, each of the Continuation Application, the Disclosure Order Applications, the Jurisdiction Applications and the Costs Application were listed to be heard before me as part of the present hearing.

PART III: THE CONTINUATION APPLICATION

15. At the *ex parte* hearing on 6 October 2022, I was satisfied that, in relation to the First to Sixth Defendants, the various requirements for worldwide freezing order relief (both proprietary and non-proprietary) were made out. Since making that order, there has been a complete lack of engagement on the part of the First to Sixth Defendants – no correspondence has been entered into, no evidence has been filed, and none of them appears before me today. In these circumstances, and having reviewed both the

evidence which was before me at the *ex parte* hearing and the further evidence which has been filed for today, I remain satisfied that those requirements continue to be met.

16. Accordingly, and as indicated by me during the course of the hearing, I will continue the worldwide freezing order relief as against the First to Sixth Defendants. The precise terms of the order can be finalised in due course but I indicate here that I will be sympathetic to any drafting points raised by the Banks to avoid any ambiguity in the *Baltic* proviso which currently appears in paragraph 26 of the order of 6 October 2022.

PART IV: THE DISCLOSURE ORDER APPLICATIONS

Approach

17. By the Disclosure Order Applications, the Banks seek to challenge the disclosure orders which I made as part of the *ex parte* order of 6 October 2022.

18. Having heard submissions from all counsel, it seems to me that there are 2 approaches open to me.

19. The first is that I simply consider whether I ought to discharge the disclosure order (in so far as it relates to the Banks) pursuant to paragraphs 2 and 18 of the *ex parte* order which, in the usual way, entitles anyone served with or notified of the order to apply to vary or discharge it. Given that disclosure order relief is effectively final relief, on this basis I simply need to make a final determination as to whether the disclosure order I made should stay in place or whether I should discharge it.

20. The alternative approach is to focus on the permission to serve the disclosure order out of the jurisdiction contained in paragraph 15 of the *ex parte* order. On this basis, I need to consider whether the well-established requirements for an order for service out have been met and, if they have not, set aside that part of the order accordingly.

21. I will consider both approaches in turn.

Should I simply discharge the disclosure order?

22. In general, the five criteria for making a disclosure order for what is commonly known as ***Bankers Trust*** relief[1] are set out in ***Kyriakou v Christie Manson and Woods Ltd*** [2017] EWHC 487 (QB) as follows:

(1) there must be good grounds for concluding that the property in respect of which disclosure is sought belongs to the applicant;

(2) there must be a real prospect that the information sought will lead to the location or preservation of the relevant property;

(3) the order should not be wider than necessary;

(4) the interests of the applicant in getting the disclosure must be balanced against the detriment to the respondent; and

(5) appropriate undertakings must be given in respect of the use of the disclosed information and/or documents.

23. There is no dispute that criteria one to three and five are met (or could be by an appropriately worded order). The real issue, as if often the case, is with the fourth criterion – the balancing exercise which needs to be undertaken in relation to, on the one hand, the interests of the applicant seeking disclosure and, on the other hand, the potential prejudice and detriment to the respondent bank.

24. Importantly, however, where the respondent to the application is a foreign bank, additional and special considerations apply. As Hoffman J stated in ***Mackinnon v Donaldson, Lufkin & Jenrette Corp*** [1986] Ch 482:

> "In principle and on authority it seems to me that the court should not, save in exceptional circumstances, impose such a requirement upon a foreigner, and, in particular, upon a foreign bank. The principle is that a state should refrain from

[1] Deriving from the judgment of Lord Denning in ***Bankers Trust v Shapira*** [1980] 1 WLR 1274

> demanding obedience to its sovereign authority by foreigners in respect of their conduct outside the jurisdiction… (493G)
>
> The need to exercise the court's jurisdiction with due regard to the sovereignty of others is particularly important in the case of banks. Banks are in a special position because their documents are concerned not only with their own business but with that of their customers. They will owe their customers a duty of confidence regulated by the law of the country where the account is kept… (494B-D)
>
> International law generally recognises the right of a state to regulate the conduct of its own nationals even outside its jurisdiction, provided that this does not involve disobedience to the local law. But banks, as I have already said, are in a special position. The nature of banking business is such that if an English court invokes its jurisdiction even over an English bank in respect of an account at a branch abroad, there is a strong likelihood of conflict with the bank's duties to its customer under the local law. It is therefore not surprising that any bank, whether English or foreign, should as a general rule be entitled to the protection of an order of the foreign court before it is required to disclose documents kept at a branch or head office abroad… (496)
>
> It seems to me that in a case like this, where alternative legitimate procedures are available, an infringement of sovereignty can seldom be justified except perhaps on the grounds of urgent necessity… (499F)"

25. In short, therefore, where a disclosure order is sought against a foreign bank, although regard should still be taken of the ***Kyriakou*** criteria, because of the strong likelihood that compliance with such an order would put the bank at risk of being in breach of local laws or regulations, ultimately an order should be granted only in exceptional circumstances.

26. With this in mind, in the present case the Banks, through their respective counsel, submit, in broad terms, as follows:

(1) Compliance with the disclosure order would put them in breach of Australian law. Keeping the disclosure order in place would therefore expose them, so the Banks say, to potentially severe financial and reputational damage in Australia.

(2) There is nothing to stop the Claimants from applying to the Australian courts where a similar procedure for disclosure relief is available. Indeed, the Banks have both confirmed that if the Claimants were to make such an application to the Australian courts, neither would oppose the making of a disclosure order and (unsurprisingly) both would comply with any such order made. Discharging the English disclosure order, so the Banks say, would therefore not cause the Claimants any real prejudice – they could simply apply for the equivalent relief in Australia.

(3) Given the above, the only potential exceptional circumstance which would justify the keeping of the disclosure order was if this was a "hot pursuit" case. This, however, is not such a case; on the contrary, so the Banks say, there has been considerable delay on the Claimants' part.

(a) Would compliance with the disclosure order put the Banks in breach of Australian law?

27. As to whether or not compliance with the disclosure order would put the Banks in breach of Australian law, I have had the benefit of expert evidence from both sides. For the Banks, it was suggested that a breach could arise in two ways.

28. First, under the common law there exists an implied contractual duty of confidentiality: ***Tournier v National Provincial and Union Bank of England*** [1924] 1 KB 461. Compliance with the disclosure order, so the Banks say, would put them in breach of that duty.

29. The ***Tournier*** duty, however, is subject to certain exceptions. These include where a bank is compelled by law to disclose the relevant information. The Claimants' expert therefore suggests that the disclosure order which I made on 6 October 2002 is sufficient to put the Banks within this exception. The Banks' expert, however, disagrees stating that this exception can only arise where the bank is compelled to

disclose by way of a *local* law or a *local* court order (i.e. an Australian law or order) and therefore does not cover the position where such compulsion is by way of a *foreign* court order (such as an English disclosure order as in the present case).

30. Having carefully considered the expert evidence and the submissions, on this point I prefer the position taken by the Banks. First, there is no dispute that the disclosure order which I made could not be recognised or enforced in Australia. It would therefore be slightly curious if an Australian bank could avoid liability for breach of the ***Tournier*** principle in Australia by saying that it was compelled to do so by an order of a foreign court which could never be recognised or enforced in Australia. Second, there is clear commonwealth authority which supports the proposition that the "compelled by law" exception does not apply to foreign law and/or foreign court orders: see ***XY & Z v B*** [1983] 2 Lloyds Rep 548 (an English case); and ***FDC Co Ltd v The Chase Manhattan Bank NA*** [1990] 1 HKLR 277 (Hong Kong). Although there is as yet no Australian authority directly on point, the textbook commentary in ***Neate & Godfrey: Bank Confidentiality*** suggests that the Australian courts would be likely to adopt a similar approach too.

31. The second way a breach of Australian law could potentially arise, so submit the Banks, is by way of a breach of the Privacy Act 1988 ("**PA 1988**") - an Australian statute which requires certain entities (including banks) not to act or engage in a practice that breaches an "Australian Privacy Principle". It is common ground between the experts that compliance with the disclosure order would *prima facie* result in a breach of the PA 1988. Again, the difference between the experts is the application (or otherwise) of an exception contained in section 6(2)(b) which permits disclosure where it is "required or authorised by or under an Australian law or a court/tribunal order" with "court/tribunal order" elsewhere being defined as referring to orders issued by the "Commonwealth of Australia". I note the Claimants' expert's contentions as to these provisions but, with respect, they are somewhat difficult to follow and in any event do not persuade me that the clear language of the PA 1988 means anything other than what it says – in other words, that the exception will only apply where the requirement is by an Australian law or court order but not a foreign one (such as the disclosure order in the present case).

32. In short, therefore, if the disclosure order were to remain in place, it seems to me that the Banks would (or there is at the very least a real risk that the Banks would) be in breach of not only the ***Tournier*** duty at common law but also of the PA 1988. This is of course a significant factor to be taken into account in the balancing exercise which I have to undertake.

(b) Availability of an alternative procedure

33. As stated above, it is common ground that the Australian courts have powers to grant disclosure orders similar to those granted in England. As also stated above, the Banks have confirmed that if the Claimants were to make an application for such an order to the Australian courts, neither would oppose and both would comply with any order made.

34. This being the case, I asked counsel for the Claimants why, instead of pursuing hard fought relief by way of the current English disclosure order, an application had not been made to the Australian court for equivalent (and unopposed) relief there. I was told that the Claimants were reluctant to have proceedings afoot in two jurisdictions (England and Australia) and possibly, if the Ninth Defendant bank were to belatedly engage, a third too (Hong Kong).

35. I can well understand this reluctance to avoid instructing multiple legal advisors in multiple jurisdictions and why the Claimants therefore have a clear preference to have all matters dealt with within a single set of proceedings. I am far from persuaded, however, that it provides an answer where the alternative is to expose a respondent bank to some form of liability, although ultimately this is again a matter for the balancing exercise which I have to undertake.

(c) Hot pursuit

36. The final point raised on behalf of the Banks is that there has not been the sort of "hot pursuit" (to use the expression used by Hoffman J in ***Mackinnon***) which would justify making a disclosure order against a foreign bank. On the contrary, the Banks criticise the Claimants, accusing them of "significant" delay given the gap between

the fraud (in March/April 2022), the discovery of the fraud (in June 2022), and the issuing of the present proceedings (in October 2022).

37. As to this, I do not think that the Claimants can fairly be criticised for delay. The fraud is a complex high value fraud taking place across a number of different jurisdictions. It is therefore understandable that the Claimants would wish to exercise some caution before launching into litigation. Having said that, while I do not find there to have been any material delay, nor do I think that this is a case of hot pursuit – at best the pursuit can described as "luke warm".

38. With this in mind, it is important to remember how hot pursuit fits into the analysis which I have to undertake. Indeed, as counsel for the Claimants correctly reminded me, hot pursuit is not a strict requirement of the ***Bankers Trust***/disclosure order jurisdiction: ***Global Energy Horizons Corp v Gray*** [2014] EWHC 2925 (Ch); see also ***Civil Fraud: Law, Practice & Procedure (Grant & Mumford)*** at 29-119. In short, the fact that an applicant for such relief fails to show hot pursuit is not fatal to its application.

39. Instead, its relevance comes about in this way. In the context of a jurisdiction where a disclosure order will only be made against a foreign bank in exceptional circumstances, one example of where exceptional circumstances might arise is where there is an urgent necessity. Indeed, where there is such an urgent necessity (as for example was the position in the original ***Bankers Trust*** case) "the infringement of sovereignty" (which the making of a disclosure order against a foreign bank necessarily involves) may be "excused by a commercial equivalent of hot pursuit"[2].

40. In short, therefore, where hot pursuit can be shown, it is a factor which is to be taken into account in the overall balancing exercise and, in an appropriate case, may tip the balance in favour of the making of a disclosure order. Where, on the other hand, such hot pursuit cannot be shown, while it is not fatal to an applicant's application, nor does it help it; it will have to find some other reason to show why, exceptionally, such an order should be made against a foreign bank.

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[2] ***Mackinnon*** at 498H

(d) The balancing exercise

41. As stated above, the process I have to undertake is a balancing exercise (in accordance with the fourth criterion of ***Kyriakou***) but with the added gloss that given that the application is made against foreign banks such an order should only be made in exceptional circumstances (as per ***Mackinnon***).

42. In that balancing exercise, two matters stand out. First, if the disclosure order stays in place, there is, as I have found, a real risk that the Banks will be in breach of Australian law and thereby be exposed to financial and/or reputational damage. Counsel for the Claimants is correct to remind me that, as was said (in a different context) in ***Bank Mellat v HM Treasury*** [2019] EWCA Civ 449, any threat of a sanction abroad against the disclosing party must not be "more illusory than real" but in the present case, given my findings above, I am satisfied that the threat is indeed real rather than illusory. The short point is that, if the disclosure stays in place, there is a real risk that the Banks will suffer significant prejudice and detriment.

43. The other stand out matter is the fact that there is an alternative (and broadly equivalent) remedy in Australia which the Banks have indicated they would not oppose and with which they would comply. As stated above, while I understand why the Claimants would prefer to have proceedings open in only one jurisdiction, the reality is that if I were to discharge the disclosure order, the Claimants are not without a remedy – they can simply apply for (and would probably be granted) the same relief in Australia. In short, therefore, while the discharge of the disclosure order might cause the Claimants some added inconvenience and increased costs, it would not cause them to suffer any irremediable damage in their pursuit of the underlying fraudsters.

44. Against the above, I have also considered whether there are any exceptional circumstances (aside from hot pursuit which I have found not to be applicable to the present case) which might justify the making (or in this case, the keeping) of the

disclosure order. In particular, I have considered ***LMN v Bitflyer*** [2022] EWHC 2954 (Comm) where Butcher J found that the approach in ***Mackinnon*** was inapplicable in that case and went on to make a disclosure order against a number of foreign crypto-exchanges. Importantly, however, in that case it was not known where the relevant documents were located such that the applicants did not know in which jurisdiction to apply. In such circumstances, so the judge found, it would be "impractical and contrary to the interests of justice to require a victim of fraud to make speculative applications in different jurisdictions". The present case, however, is very different – it is known that the information is in Australia, it is known that there is (as I have found) a very real risk that compliance with the order would breach Australian law, and it is known that the Australian courts offer a similar remedy which would probably be granted.

45. All in all, therefore, it seems to me that in the present case there are no exceptional circumstances (whether hot pursuit as in the ***Bankers Trust*** case itself, the need to avoid speculative applications as in ***LMN***, or otherwise) to justify a departure from the general rule that a disclosure order should not be made against a foreign bank. On the contrary, so it seems to me, the balancing exercise comes down clearly in favour of discharging that order.

<u>Should I set aside the permission to serve out the disclosure order?</u>

46. The alternative approach open to me is to consider whether the requirements for an order for permission to serve out the disclosure order have been met and, if they have not, set aside that part of the order accordingly.

47. The test for permission to serve out of the jurisdiction is well established. As summarised by Lords Collins in ***Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd*** [2011] UKPC 7; [2012] 1 WLR 1804 at [71]:

(1) there must be a good arguable case that the claim falls within one of the relevant jurisdictional gateways;

(2) there must be a serious issue to be tried on the merits; and

(3) in all the circumstances, England must be clearly or distinctly the most appropriate forum.

48. As to gateways, while there had been a conflict in recent authorities as to whether a gateway for service out exists in the case of ***Norwich Pharmacal*** and ***Bankers Trust*** orders (in other words, disclosure orders), this dispute was overtaken by the new PD6B which came into effect on 1 October 2022 (and therefore just a few days before I made the ex parte order) which at PD3.1(25) provides for a new gateway specifically directed at such disclosure orders. Accordingly, there is no issue that this limb of the ***Altimo*** test is satisfied.

49. As to whether there is a serious issue to be tried, for the reasons given in the previous section of this judgment, it seems to me that there is no such serious issue. Given the risk that the disclosure order will expose the Banks to liability, the availability of an alternative remedy in Australia, together with the lack of any exceptional circumstances, it is plain, in my judgment, that the disclosure application has no merit. On this basis, therefore, it seems to me that the permission to serve out which I granted as part of the *ex parte* order should be set aside.

50. For completeness, however, I go on to consider whether England is clearly or distinctly the most appropriate forum. In short, it is not. The proceedings concern the disclosure by an Australian bank of information in Australia where a key issue is the application of Australian law (and in particular the ***Tournier*** principle and the operation of the PA 1988). On no basis, so it seems to me, can it be said that England is clearly or distinctly the most appropriate forum. On this basis too, therefore, I would set aside the permission to serve out previously granted.

Conclusion

51. In conclusion, therefore, whichever approach I adopt the outcome is, in effect, the same. In short, for the reasons given above, I will discharge the disclosure order and/or set aside the permission to serve out previously granted.

PART V: THE JURISDICTION APPLICATIONS

52. By the Jurisdiction Applications, the Banks challenge the jurisdiction of the English court in respect of the substantive claim against them. Here, there is no doubt that the ***Altimo*** requirements have to be met – in other words, for the claim to be allowed to continue I need to be satisfied that there is a good arguable case that the claim falls within one of the relevant jurisdictional gateways, there must be a serious issue to be tried on the merits and, in all the circumstances, England must be clearly or distinctly the most appropriate forum.

Gateway

53. The jurisdictional gateways are of course set out in paragraph 3.1 of CPR PD6B. Of these, the Claimants rely on gateways (3), (5), (15), (16) and (25). The Banks accept that gateway (3) applies but dispute the applicability of the others. Having considered the matter, I agree with the Banks – I do not see how gateways (5), (15), (16) and (25) have any application to the present case. Little turns on this, however, because, as stated above, the Banks (correctly) accept that gateway (3) does apply.

Serious issue

54. The substantive claim as against the Banks is set out in paragraphs 25 to 28 of the Particulars of Claim. In short, they set out three causes of action as follows:

(1) an equitable proprietary claim;

(2) a claim in unconscionable/knowing receipt; and

(3) a claim in unjust enrichment.

(a) The equitable proprietary claim

55. The first claim made by the Claimants against the Banks is a proprietary claim. In short, it is pleaded that the Claimants have “an equitable proprietary interest” in the

relevant sums and that the Banks continue to hold the relevant monies "on constructive trust for the Claimants' benefit".

56. According to the Banks, there are a number of difficulties with this claim. The most fundamental, however, is that when a bank receives money from a customer (and in the absence of the bank being implicated in the fraud), it does so as a *bona fide* purchaser for value. It gives value and receives good title to the money. So where there is a fraud and money is paid into the bank account of a fraudster, any proprietary claim lies only against the account holder and not the bank (and moreover that proprietary claim would be in respect of the debt owed by the bank to the account holder): ***Foskett v McKeown*** [2001] 1 AC 102 at 127B-128C.

57. In the present case, there is no suggestion that the Banks were in any way implicated in the fraud itself. The furthest the Particulars of Claim go is to plead that the Banks acted "unconscionably" and had "actual and/or constructive knowledge" that the relevant monies paid into the relevant bank accounts were subject to a constructive trust. Neither of the above pleas, however, was particularised in any way and nor was any evidence led in relation to the same. Indeed, in oral submissions counsel for the Claimants frankly accepted that there was nothing further which could be pleaded at this stage – in other words, the Claimants are simply hoping that something further would turn up on disclosure.

58. This being the case, it seems to me that there is no proper basis for suggesting that the Banks would be treated as anything other than *bona fide* purchasers for value in the usual way. From this it must follow that, for the reasons given above, there can be no serious issue that proprietary claims lie against the Banks.

(b) The claim in unconscionable/knowing receipt

59. The Claimants' second claim against the Banks is for unconscionable or knowing receipt. Again, the Banks raise a number of issues, the most fundamental of which (once again) being that, as stated above, there is no basis for suggesting other than that the Banks received good title to the monies as *bona fide* purchaser for value – something which, as the law currently stands, is fatal to a knowing receipt claim.

Indeed, as was said by the Court of Appeal in ***Byers v Saudi National Bank*** [2022] 4 WLR 22 at [79]:

> "In short, a continuing proprietary interest in the relevant property is required for a knowing receipt claim to be possible. A defendant cannot be liable for knowing receipt if he took the property free of any interest of the claimant…"

60. It is true that the above case is now subject to an appeal to the Supreme Court but I have to apply the law as it is. Further and in any event, as set out above there is absolutely no basis for the Claimants making out the "knowing" or "unconscionable" element of a knowing receipt claim such that, once again, so it seems to me, it cannot be said that there is a serious issue for trial here either.

(c) The claim in unjust enrichment

61. The final claim made by the Claimants against the Banks is for unjust enrichment. As is well established, there are four essential requirements for such a claim, namely, (1) has the defendant been enriched, (2) was the enrichment at the claimant's expense, (3) was the enrichment unjust and (4) are there any defences available to the defendant?

62. Here, however, it seems to me that the Claimants fall at the first hurdle. It is well established that when a bank receives monies from a customer, although there is a notional increase in the bank's assets, there was an immediate corresponding liability assumed by the bank to the customer. As was stated in ***Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners*** [2021] UKSC 31 at [172]:

> "The point is also recognised in judicial authority. In ***Jeremy Stone Consultants Ltd v National Westminster Bank plc*** [2013] EWHC 208 (Ch) Sales J addressed a claim to recover from the defendant bank money which it was induced by a third party to pay into a company's bank accounts when the company, unbeknown to the claimants, was part of the third party's fraudulent Ponzi scheme. One of the claims against the bank was for restitution of the moneys in those accounts on the basis of NatWest's unjust enrichment as a result of the moneys having been paid on the basis of a mistake. Sales J rejected the claim based on unjust enrichment on two grounds. First, he held that the defendant bank had not been enriched. He stated (para 242):

> "it is true that when the claimants paid sums to NatWest for the account of SEWL, NatWest received those sums and added them to its stock of assets as moneys to which it was beneficially entitled. However, the increase in its assets was matched by an immediate balancing liability, in the form of the debt which NatWest owed SEWL reflected in the increase in SEWL's bank balance as a result of the payments."

He held that the claimants' unjust enrichment claim properly lay against the company, whose assets were increased by the payments into its bank accounts…"

63. Further and in any event, a second difficulty faces the Claimants in relation to the fourth element of a claim for unjust enrichment, namely, the availability of any defences. Indeed, the same paragraph from ***Test Claimants*** continues:

> "Secondly, even if there had been enrichment, he held that the bank had a defence of good faith change of position and a defence of ministerial receipt, because it had a contractual obligation to pay out the sums in SEWL's account in accordance with its customer's instructions and had done so."

64. In the present case, precisely the same thing happened – long before the present proceedings were issued (or indeed before the Banks became aware of the alleged fraud), the monies had been withdrawn at the request of the relevant customer. For this reason too, so it seems to me, it cannot be said that a serious issue exists in relation to the unjust enrichment claim.

<u>Forum</u>

65. As for forum, it is of course for the Claimants to show that England is clearly or distinctly the most appropriate forum.

66. As to this, the high point of the Claimants' argument is that the Third Defendant is an English company with the principal fraudsters holding themselves out as being employed by that company. The difficulty, however, is that the Claimants are from Canada and the only active Defendants are in Australia and in Hong Kong. The

reality, of course, is that no one really knows where the fraudster defendants are in fact based although this is perhaps academic given that they have not engaged to date and no doubt have no intention of doing so going forward.

67. In short, if the matter were to go to trial, the witnesses would no doubt primarily come from Canada and Australia. Nor is it clear as to the law of which jurisdiction would apply. In circumstances where the burden is on the Claimants to show that England is not just an appropriate forum but clearly or distinctly the most appropriate forum, it has, in my judgment, failed to do so.

Conclusion

68. For these reasons, namely, that there is not a serious issue for trial and nor is England clearly or distinctly the most appropriate forum, I will set aside the service of the Claim Form on the Banks on the basis that the court does not have (or should not exercise any) jurisdiction in relation to the claim.

PART VI: THE COSTS APPLICATION

69. As explained above, at the *ex parte* hearing I had refused to grant worldwide freezing order relief as against the Seventh to Ninth Defendant banks. On 28 October 2022, however, the Claimants renewed their application for the same relief as against those same parties.

70. Subsequently, that application was withdrawn. The Claimants say that by then they had received appropriate assurances from the Banks and that as a result there was no need for them to proceed with their applications. The Banks, on the other hand, say that there was no material change of circumstances to justify renewing the application which, as a result, amounted to an abuse of process such that they should have their costs.

71. In my judgment, the renewal of the application was not an abuse. It is true that I dismissed the application when it was first made to me in relation to the Banks on 6

October 2022. That, however, was at the *ex parte* stage and did not in itself preclude a further application being made.

72. Having said that, the Claimants did renew the application, thereby causing the Banks to incur costs, and then subsequently withdrew it. Moreover, they did so unilaterally and therefore without agreeing any terms with the Banks. There may or may not have been good reasons for the Claimants withdrawing the renewed application but by analogy with the procedure for discontinuance of claims, it seems to me that they ought to pay the relevant costs. This is all the more so since, given my findings above, if the matter had proceeded to a hearing, I would inevitably have dismissed it with costs in any event.

PART VII: CONCLUSION

73. In conclusion, therefore:

(1) I will continue the worldwide freezing order relief as against the First to Sixth Defendants.

(2) I will discharge the disclosure order insofar as it relates to the Banks; alternatively, I will set aside the order permitting to serve out in relation to the same.

(3) I will set aside the service of the Claim Form on the Banks on the basis that the court does not have (or should not exercise any) jurisdiction in relation to the claim.

74. I conclude by expressing my gratitude to all counsel and their respective instructing solicitors.