IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
LONDON CIRCUIT COMMERCIAL COURT (QBD)

No.CL-2021-000419

Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Thursday, 15 July 2021

Neutral Citation Number: [2021] EWHC 2254 (Comm)

Before:

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

(**In Private**)

B E T W E E N :

(1) FETCH.AI LIMITED
(a company incorporated in England and Wales)

(2) FETCH.AI FOUNDATION PTE LTD
(a company incorporated in Singapore)

Applicants / Claimants in an Intended Action

-and-

(1) PERSONS UNKNOWN CATEGORY A
(2) PERSONS UNKNOWN CATEGORY B
(3) PERSONS UNKNOWN CATEGORY C
(4) BINANCE HOLDINGS LIMITED
(a company registered in the Cayman Islands)
(5) BINANCE MARKETS LIMITED.
(a company incorporated in the United Kingdom)

Respondents / Defendants in an Intended Action

MS J. DAVIES (instructed by Rahman Ravelli) appeared on behalf of the Applicants/Claimants.

THE RESPONDENTS/DEFENDANT did not appear and were not represented.

J U D G M E N T

(Transcript prepared from Microsoft TEAMs recording)

JUDGE PELLING:

1 This is a without notice application brought by two claimants, Fetch.ai Limited (an English registered company) and Fetch.ai Foundation PTE Limited (a Singapore registered entity). As the claim was formulated down to the start of this hearing, three respondents were identified, being: a category of persons unknown defined as set out in the various draft orders, applications and the like, which I need not take up time describing at this stage; secondly, Binance Holdings Limited (a Cayman registered entity); and, thirdly, Binance Markets Limited (an English registered company).

2 The application is for: a proprietary injunction, worldwide freezing order and ancillary information disclosure against the first respondent, the persons unknown; a disclosure order, either in *Bankers Trust* and/or pursuant to CPR 25.1(g) and/or using the *Norwich Pharmacal* jurisdiction, against the third respondent; and an order using the *Bankers Trust* jurisdiction and/or CPR rule 25.1(g) as against the second respondent. In addition, permission is sought to serve the proceedings out of the jurisdiction on the first respondent (the persons unknown) since at this stage it cannot be known whether those persons are in or outside the jurisdiction of England and Wales and against Binance Holdings Limited, who, as I have explained, are not registered in, and apparently have no presence in, the jurisdiction of England and Wales.

3 The circumstances which lead to the making of this application are set out in some detail in the first affidavit of Mr Rahman in support of this application and also summarised in the skeleton argument filed in support of this application as well. In essence, what is alleged to have happened is a fraud in which persons unknown were able to obtain access to accounts maintained by the first claimant/applicant with Binance, within which were held various cryptocurrencies referred to in these proceedings respectively as: USDT, which is a

cryptocurrency tethered to the value of the dollar; BNB; BTC; and FET, amongst others. The way in which these particular accounts are operated is, in effect, as trading accounts so that it is possible to buy and sell cryptocurrencies using the accounts concerned with counterparties who at all material times remain blind to the person operating the account in the position of the first applicant. What is alleged to have happened is that the persons unknown obtained access to the accounts maintained by the first applicant with Binance and were able then to trade the crypto assets credited to the account by adopting massive undervalues for the products traded, with the result that, in the aggregate, losses totaling in excess of US$2.6 million were sustained over a very short period by the simple expedient of trading assets belonging to the first claimant at massive undervalues, moving the assets out of the accounts of the claimant to third-party accounts (inferentially operated by or on behalf of those carrying out the fraud) with the result that significant loss in the sum I mentioned has been inflicted upon the claimant as a result of the assets being removed at an undervalue. In those circumstances, what is sought are a proprietary order which is designed to freeze either the assets which were removed from the first claimant's account (if and to the extent they remain identifiable in the recipient account) and/or to restrain third parties in possession of the traceable proceeds of those assets from dealing with them as if they were their own. In addition, and because this is a claim which is brought both with personal causes of action and proprietary causes of action, a worldwide freezing order is sought against those who were knowingly involved in the fraud for the purposes of freezing their assets worldwide, in order to ensure to the best that can be achieved that the claimant is able to freeze assets, which will enable any judgment of the court to have real effect.

4 I do not propose to say anything more about the nature of the fraud. The details relating to how it was practiced are details which are not critically important to the present application. It is necessary only to say that, in a table exhibited to Mr Rahman's affidavit in support of the

application, each of the relevant transactions which are said together to constitute the fraud are set out and it is readily apparent from simply reading across the lines of the table how the fraud operated, in effect, by, apparently, selling assets at below their then offer value and market price and thereby causing, effectively, a diminution in value of the sums which the claimant should have had in its account.

5 The first issue which arises, therefore, concerns the parties against whom the orders are to be sought. The original formulation of the first respondent was to identify the persons unknown as:

> "being the individuals or companies who: (a) obtained access to the First Applicant's accounts...on the Binance Exchange and carried out the transactions on 7 June 2021 as a result of which USDT, BNB, BTC and FET held in those accounts were transferred to other accounts; and (b) own or control the accounts into which USDT, BNB, BTC, FET or the traceable proceeds thereof are to be found."

6 It occurred to me on the pre-reading of the papers ahead of this application that that definition was too wide ranging, having regard to the fact that relief was sought which not merely sought to freeze either the virtual currency that had been removed from the claimant's accounts or its traceable proceeds, but sought worldwide freezing orders against those who, at least potentially, were innocent in the sense of not knowing or having reason to believe, or reasonable grounds to believe, that assets belonging to the claimant had been credited to their account. This was a factor that the claimant drew to my attention as part of its full and frank disclosure and fair presentation obligations and is something which, in my judgment, requires that the persons unknown be broken down to the three categories discussed in the course of the argument, being: those who were involved in the fraud against whom it is appropriate to seek both heads of relief (subject to the points I am going to mention in a moment); secondly, a class designed to capture those who have received assets, I think, without having paid a full price for them, or something of that nature; and, third, and most importantly, those who fall within the category of innocent receivers.

7 In those circumstances, counsel having taken instructions, in principle, is agreeable to the three categories of persons unknown being identified in the orders that follow and I need say no more about it. But it does mean that careful focus has to be maintained on what relief is being sought as against each of the categories of persons unknown. It is necessary also to make sure, in relation to the third category, which is my principal concern on an application of this sort, that it is defined in a way which makes clear that those innocent receivers, who have no reasonable grounds for thinking that what has appeared in their account belongs to the claimant, will not find him, her or themselves in breach of the order as a result. That has been catered for by a qualification which is designed to restrict the scope of the proprietary relief available in respect of the third class to those assets which the third categories of persons unknown either knew, or ought reasonably to have known, belong to the claimant or did not belong to them.

8 The next issue which arises concerns the causes of action which are available and whether, and if so to what extent, those claims are maintainable against any respondents who are based out of the jurisdiction. So far as that is concerned, I am satisfied to the standard required for present purposes that the claimant has reasonably arguable claims based upon breach of confidence, unjust enrichment and is entitled also to maintain an equitable proprietary claim based upon constructive trust in respect of assets which have been removed from it dishonestly and without its licence or consent. It is necessary for me to consider each of those now in order to be satisfied, at least to the relevant level, that those are causes of action which are not only available but which are capable of being advanced against respondents based out of the jurisdiction.

9 So far as the first of those is concerned (breach of confidence), I am entirely satisfied that there is a realistically arguable claim available to the claimants based on breach of confidence.

First of all, I am satisfied that the assets credited to the first applicant's accounts on the Binance Exchange are to be regarded as property for the purposes of English law. They are, to put it no higher for present purposes, a *chose in action*, and a *chose in action*, as a matter of English law, is generally regarded as property. That is an important consideration when considering claims against those located out of the jurisdiction as I explain below.

10 It is next necessary to consider the role of the private key, which is the means by which someone is able to trade assets nominally credited to a Binance Exchange account. So far as that is concerned, the private key is some code that is needed in order to operate the account. It is perfectly clear that the key was confidential information because it was supplied to the applicant for the purpose of enabling the applicant to operate its own account. In those circumstances, I am satisfied to the standard necessary on an application of this sort that the first respondents (that is to say those who were actually involved in prosecuting the fraud) obtained access to confidential information and manipulated the accounts belonging to the company in breach of the duty of confidence which necessarily attached in the circumstances. The point which is made is that normally what is sought is an injunction in relation to a breach of confidence claim. However, that is not the only remedy available. Damages are available and accounts of profits are available. In those circumstances, it seems to me this is a perfectly arguable cause of action available to the claimants.

11 The next question is whether, and if so to what extent, this is a claim which is maintainable as a matter of English law in England, having regard to the potentially cross-frontier issues which arise in relation to trading of this nature. Counsel drew my attention inevitably to the Rome II Convention for the purposes of demonstrating that the causes of action with which I am concerned come within its scope as justiciable in accordance with English law. It was submitted that the breach of confidence action is one which comes within the scope of

Rome II, Chapter II, Article 4.1. It was suggested in the course of the argument that this was so because the principles in Article 6 applied, which incorporates by reference back the principles identified in Article 4.1. It was said in support of that proposition that there was authority to be found to support that proposition in the decision of the Court of Appeal in *Shenzhen Senior Technology Material Company Limited v Celgard, LLC* [2020] EWCA (Civ) 1293; [2021] FSR 1. In my judgment, that is a mistaken submission, although it does not matter materially for present purposes. The reason I consider it to be mistaken is this. That case was concerned with injunctive relief by which Celgard had sought to restrain the defendant from placing its rival lithium-ion battery separators on the market in the UK or importing them into the UK on the basis that the defendant had obtained access to the claimant's intellectual property in relation to its product; and, thus, what the defendant in that case was seeking to do was not merely a breach of confidence in equity, but was also contrary to reg.3.1 of The Trade Secrets (Enforcement, etc) Regulations 2018, which, together with laws concerning the breach of confidence, constitutes the UK's implementation of the European Parliament and Council Directive 2016/943 ("The Trade Secrets Directive"). It was in that context that, under the heading "Applicable Law". The Court of Appeal said this:

> "51. ...It is also common ground that the non-contractual obligation on which the claims are based arises out of an act of unfair competition within the meaning of Article 6 of the Regulation; and that Article 6(2) applies because Celgard's claims are concerned with an act of unfair competition affecting exclusively the interests of a specific competitor, namely [the claimant]."

In such circumstances, Article 6(2) provided that Article 4 would apply. In my judgment, that is not authority for the general proposition that all claims formulated in breach of confidence come within the scope of Article 6 of Rome II. The subheading under Article 6 is "Unfair competition and acts restricting free competition." In the recitals that appear at the start of the regulation, at para.21, Article 6 is referred to as being:

> "... not an exception to the general rule in Article 4(1) but rather a clarification of it. In matters of unfair competition, the conflict-of-law

> rule should protect competitors, consumers and the general public and ensure that the market economy functions properly. The connection of the law of the country where competitive relations or the collective interests of consumers are, or are likely to be, affected generally satisfies those objectives."

12 In those circumstances, that recital, together with Article 6 (read as a whole) and in the context of Rome II (when read as a whole) makes it clear that what Article 6 is concerned with is anti-competitive practices and anti-competitive conduct. I fully accept, as the Court of Appeal held, that that is capable of including the sort of conduct with which the Court of Appeal was concerned in *Celgard*, but that does not, as I say, lead to the conclusion that all breach of confidence cases are capable of coming within Article 6. Some will where they involve unfair competition and acts restricting free competition, but many others will not.

13 That then leads to the question of what, if any, part of Rome II applies or could apply in those circumstances. I am satisfied to the standard required for the purposes of an application of this sort that the sort of conduct which is referred it in these proceedings as being a breach of confidence is capable of coming within the scope of Article 4.1, being "a tort/delict", and that England would be the proper place in which to litigate such a claim, and according to English law, because that would be

> "the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the direct consequences of that event occur."

14 As would be apparent from that formulation, the first question which arises and the one which is decisive for present purposes, is where a cryptocurrency is to be regarded as being located for the purposes of the issues I am now concerned with. So far as that is concerned, it was submitted on behalf of the claimant that these were property. I agree for the reasons I gave earlier. It was submitted that it was property located in England because that was, in essence, the country where the owners of the assets concerned were located. In that regard, I adopt,

with respect, the conclusions reached by Butcher J in *Ion Science v Persons Unknown* (unreported) (21 December 2020) in which, at para.13, the judge said this:

> "...*lex situs* of a cryptoasset is the place where the person or company who owns it is domiciled. That is an analysis which is supported by Professor Andrew Dickinson in his book **Cryptocurrencies in Public and Private Law** at para.5.108. There is apparently no decided case in relation to the *lex situs* for a cryptoasset. Nevertheless, I am satisfied that there is at least a serious issue to be tried that that is the correct analysis."

What was said in the textbook to which Butcher J referred was this:

> "5.109 That analogy with goodwill supports the submission that the benefits accruing to a person who is a participant in a cryptocurrency system such as Bitcoin or Ripple (i) are a species of intangible property in the English conflict of laws, which (ii) arises from the participation of an individual or entity in the cryptocurrency system, and (iii) is appropriately governed by the law of the place of residence or business of the participant with which that participation is most closely connected. Rather than deciding a fictional *situs*, the choice of law rule can be more straightforwardly, and appropriately, expressed in the terms that the proprietary effects outside the cryptocurrency system of a transaction relating to cryptocurrency shall in general be governed by the law of the country where the participant resides or carries on business at the relevant time or, if the participant resides or carries on business in more than one place at that time, by the law of the place of residence or business of the participant with which the participation that is the object of the transaction is most closely connected."

With that in mind, there is no real doubt that England is the place where the first claimant operated and held its assets. So far as that is concerned, the principle which applies is that which was identified in *Adams v Cape Industries* and summarised as proposition 1 under the heading "General principle derived from the authorities relating to presence", which says this:

> "The English courts will be likely to treat a trading corporation incorporated under the law of one country ('an overseas corporation') as present within the jurisdiction of the courts of another country only if either (i) it has established and maintained at its own expense (whether as owner or lessee) a fixed place of business of its own in the other country and for more than a minimal period of time has carried on its own business at or from such premises by its servants or agents...; or (ii) a representative of the overseas corporation has for more than a minimal period of time been carrying on *the overseas corporation's*

> end business in the other country at or from some fixed place of business."

But the problem or potential problem that arises in the circumstances of this case is there is some material from which it might be suggested that the first applicant operated as agent for the second applicant (a Singapore entity). It is not suggested, however, that the Singapore entity has any particular presence anywhere or operates otherwise than through the agency of the first applicant. The credible alternatives, therefore, are either that the first applicant has at all material times traded on its own behalf, using its own assets, is an English registered corporation carrying on business in England and, therefore, satisfies the requirement identified in Article 4 of Rome II; or, alternatively, operates as agent for the second applicant in circumstances where the second applicant has no fixed place of business and all its business is being conducted in England by the first applicant. By either of these routes England is the appropriate place for the resolution of that dispute.

15 The other claims which can be made are, relatively speaking, more straightforward than that. The first alternative is an equitable proprietary claim based on the relatively simple proposition that, when property is obtained by fraud, equity imposes a constructive trust on the fraudulent recipient, with the result that the fraudulent recipient holds the legal title on constructive trust for the loser: see, in that regard, *Westdeutsche Landesbank Girozentrale v London Borough of Islington* [1996] AC 668 and the authorities referred to in the skeleton which followed this analysis. In those circumstances, I am satisfied to the level of reasonable arguability that, too, is an issue where the English court would have jurisdiction by operation of the Rome II Regulation, either applying Article 3 or Article 10, or possibly Article 11. The final cause of action on which the claimants rely is "unjust enrichment", which plainly comes within the scope of Article 10 of the Rome Convention.

16 In those circumstances, I am satisfied to the level of reasonable arguability that these causes of action are available to the claimants and are justiciable in England. I am satisfied that there is a serious issue to be tried by reason of the evidence contained in the two affidavits sworn in support of the application. I do not propose on a judgment given on a without notice application to go through that at any great length. The evidence there satisfies me that the relevant test has been satisfied.

17 The next question I have to ask myself, since there is an application for permission to serve the unknown defendants out of the jurisdiction, is whether or not the requirements of English procedural law in relation to the service of proceedings out of the jurisdiction are satisfied in relation to these causes of action. As is now well known, that requires consideration of three questions, being: first, does each claim raise a serious issue to be tried on the merits (an issue which I have already commented on and need say no more about); secondly, whether there is a good arguable case that the claim falls within one of the gateways identified in the Part 6B Practice Direction; and, thirdly, whether or not England and Wales is the proper place in which to bring the claim.

18 So far as the third of these issues is concerned, I am satisfied, if otherwise a good arguable case is demonstrated that the claim falls within one of the gateways identified in the Part 6B Practice Direction, that England and Wales is the proper place in which to bring the claim. For all the reason identified by counsel in the course of her submissions, but which include the fact that the claimant's business has been carried on exclusively in England and Wales, the property the subject of the dispute, namely, the cryptocurrencies, are to be treated, as a matter of English law, as located in England for the reasons that I have identified and the losses caused by the allegedly fraudulent scheme were suffered here as a consequence.

19 The question which then arises, therefore, is whether any of three causes of action that have been identified pass through any of the gateways identified in the Part 6B Practice Direction. So far as that is concerned, a number of different gateways are relied upon and I need comment only on some of them. In relation to the breach of confidence cause of action, reliance is placed upon gateway 21, which refers to a claim for breach of confidence where detriment was suffered, or will be suffered, within the jurisdiction. I am entirely satisfied that the detriment suffered by the claimant has been suffered within the jurisdiction for the reasons I have already identified, that is to say the damage has been suffered within this jurisdiction because the assets of which the applicants have been deprived were property located in England.

20 I am also satisfied to the level required for an application of this sort that gateway 11 potentially will also apply. That gateway applies where:

> "the subject matter of the claim relates wholly or principally to property within the jurisdiction, provided that nothing under this paragraph shall render justiciable the title to or right to possession of immovable property outside England and Wales."

We are not concerned here with immovable property at all but with movable property. We are concerned with property which is wholly or principally within the jurisdiction, for the reasons that I have identified, and, therefore, the subject matter of the claim is one which concerns property within the jurisdiction. Therefore, as it seems to me, it is at least realistically arguable that gateway 11 applies as well.

21 Moving then to the unjust enrichment claim, gateway 16 provides:

> "A claim is made for restitution where... the enrichment is obtained within the jurisdiction; or (c) the claim is governed by the law of England and Wales."

The enrichment is enrichment which was obtained by the fraudsters obtaining, by the manner I have described, the assets which were located in England. In my judgment, therefore, the enrichment that they obtained was obtained within the jurisdiction of England and Wales, or at any rate it is realistically arguable that that is so. It is equally plain, for the reasons I have identified earlier, that the claim is governed by the law of England and Wales and, therefore, on that alternative basis, the unjust enrichment claim comes within gateway 16. For what it is worth, sub-paragraph (a) of gateway 16 refers to acts committed within the jurisdiction. It might be argued that the removal of assets located in England is an act committed within the jurisdiction, but it is unnecessary for me to go that far having regard to the effect of sub-paragraphs (b) and (c) which are disjunctive.

22 The final question is the position in relation to the proprietary claim. So far as that is concerned, gateway 15 applies where:

> "A claim is made against the defendant as constructive trustee, or as trustee 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."

23 The test for whether assets are within the jurisdiction, for the purpose of deciding whether a claim relates to such assets, must focus on where the assets were located before the justiciable act occurred. As I have already explained now on a number of occasions, it is at least realistically arguable that the cryptocurrency with which these proceedings are concerned was located at all material times in England and Wales and, thus, the constructive trust to which I referred earlier was one which related to assets within the jurisdiction within the meaning of gateway 15. That leads to the conclusion that it is realistically arguable that that gateway is satisfied in relation to the proprietary equitable claim. In addition, and in any event, gateway 4A is to this effect and will apply where:

> "A claim is made against the defendant in reliance on one or more of paragraphs (2), (6) to (16), (19) or (21) and a further claim is made against the same defendant which arises out of the same or closely connected fact."

To the extent that any one of three causes of action does not satisfy any of the gates to which I have referred, it is perfectly plain that at least the proprietary claim would come within the scope of gateway 11 and the claim for breach of confidence, for what it is worth, within claim 21 as well. As long as either of those is correct, then the effect of gateway 4A would be to let all other claims through.

24 Taking a step back, therefore, and asking myself the question that I am required to ask in this context, namely whether or not the claimant has demonstrated that there is a good arguable case that the claim falls within one of the gateways identified in the practice direction, I am plainly satisfied that it has done so for the reasons that I have identified. That, therefore, takes care of the claim against those responsible for the fraud. As I have explained, those are currently person unknown and any order which I make against them will be broken down as between the various categories of persons unknown that I alluded to at the beginning of this judgment.

25 There are two questions which remain. The first is whether or not orders should be made against the second and/or the third respondents for either *Bankers Trust* or *Norwich Pharmacal* relief; and, secondly, whether or not an order should be made which is made against all three defendants at this stage, or whether more appropriate course is to require either the second or third respondent to provide the information required before proceedings are commenced against the alleged wrongdoers.

26 I turn to the first question, which is whether or not, in principle, orders under either the *Bankers Trust* or *Norwich Pharmacal* jurisdictions should be made. As I have already said,

the second and third respondents are respectively Binance Holdings Limited and Binance Markets Limited. Binance Holdings Limited is registered in the Cayman Islands. The material generated by the Binance Group concerning which entities conduct what business is remarkably opaque. I do not propose to take up time in this already over-lengthy judgment explaining precisely why that is so. It is sufficient to say, as does Mr Rahman in para.26 of his witness statement, that there is sufficient material online that suggests that Holdings, which is, as I have said, a Cayman entity, is the main parent company within the Binance Group. Mr Rahman sets out a number of reasons why collectively that conclusion is justified, including: that, in 2018, the Binance trademarks were registered in the name of Holdings; that, in 2018, the Financial Times reported that Binance had moved its corporate registration to the Cayman Islands; and that, in February 2020, an article was published which suggested that Binance Holdings was registered in 2017 in the Cayman Islands. That and the other factors there identified by Mr Rahman lead me to conclude that it is probable on the information available, or at least realistically arguable, that Holdings is the ultimate holding company for the Binance Group.

27 The position so far as the third respondent is concerned is much less clear and, in particular, my attention was drawn to a "tweet" conversation concerning the role of the third respondent that took place earlier this month in fact, on 8 July 2021, in which, amongst other things, those responsible for controlling Binance remarked that:

> "We are aware of recent reports about an FCA UK notice in relation to Binance Markets Limited (the third respondent). BML is a separate legal entity and does not offer any products or services via the binance.com website."

It is, thus, at least possible that the accounts belonging to the applicants were not administered or controlled by the third respondent but by either the second respondent or another company within the group. In those circumstances, as it seems to me, the submission which is made by

Ms Davies on behalf of the claimant is a good one, but the best chance of obtaining the information that is needed in order to enable the claimant to advance its claim is likely to come from the second respondent.

28 In those circumstances, the first question which arises is whether or not the court has jurisdiction to make a *Bankers Trust* order (because a *Norwich Pharmacal* order is not sought as against the second respondent for reasons that I am about to explain) against an entity that is outside England and Wales. So far as that is concerned, there is a conflict of authority on this question so far as English law is concerned. In *AB Bank Limited, Off-shore Banking Unit v Abu Dhabi Commercial Bank PJSC* [2016] EWHC 2082 (Comm), [2017] 1 WLR 810, Teare J was concerned with an application by the defendant in those proceedings to set aside a *Norwich Pharmacal* order by reference to the question whether the court had jurisdiction to permit service of a claim for such an order out of the jurisdiction under one of the jurisdictional gateways identified in the 6B Practice Direction. The conclusion which Teare J reached, on a contested application in which both parties were represented, was that an order for the disclosure of information from a third party mixed up in another's wrongdoings was not an interim order in the sense identified in para.3.1(5) of the Part 6B Practice Direction and was, in fact, final relief sought by the claimant against the respondent to such an application. On that basis, para.3.1(5) did not apply. The judgment went slightly further than that, as it seems to me, because, whilst Teare J addressed the effect of para.3.1(5) in para.10, he went rather wider than that, I think, in the subsequent paragraphs of the judgment, and, in particular, considered the impact of the necessary or proper party provision under para.3.1(3) of the 6B Practice Direction. His conclusion, in short, was that, by whichever route was available, an application for *Norwich Pharmacal* relief could not be obtained against an entity based out of the jurisdiction.

29 Ms Davies, in the course of her submissions, made perfectly clear that the claimant does not accept that analysis as a correct one and relies on other authorities where a different position was taken. In particular, I have taken again to the decision of Butcher J in *Ion Science v Persons Unknown* (*ibid*.), a case I referred to earlier. In relation to this issue and having referred expressly to *AB Bank Limited* in para.20 of his judgment on an application in many ways similar to this, he held, at para.21, and in the face of a submission that *AB Bank* was wrongly decided, as follows:

> "I am not going on this interim application in circumstances where I have only heard one side of the argument to express a view as to whether the case of *AB Bank Ltd* is correctly decided. It seems to me that it is distinguishable on the basis that it related to *Norwich Pharmacal* orders, whereas what is here sought is a *Bankers Trust* order and on the basis that in *MacKinnon v Donaldson, Lufkin and Jenrette Securities Corporation* [1986] Ch 482 what was envisaged was that a *Bankers Trust* order might be one where there can be service out of the jurisdiction in exceptional circumstances and that those exceptional circumstances might include cases of hot pursuit. That is this type of case. As I say, I consider that there is a good arguable case that there is a head of jurisdiction under the necessary or proper party gateway. I should also say that it seems to me that there is a good arguable case that the *Bankers Trust* case can be said to relate wholly or principally to property within the jurisdiction on the basis of the argument which I have already identified, which is that the bitcoin are or were here and that the *lex situs* is where the owner resides or is domiciled. Accordingly, I consider there is a basis on which jurisdiction can be established."

30 I am satisfied that on an application of this sort, which, like that before Butcher J, was made without notice, I should adopt the course he identifies. As it seems to me, there are serious issues to be considered as to whether or not the distinction between a *Norwich Pharmacal* order and a *Bankers Trust* order can be maintained and there are also serious arguments to be considered as to whether or not any of the gateways that are identified can, on proper analysis, apply to an order of the sort I am here concerned with. However, if the second respondent is dissatisfied with any order I make against it, it will be open to the second respondent to apply to discharge that order and to argue before the judge hearing that application all points relevant

to the issue that arises. It would be wrong of me not to follow what Butcher J has said because judges of concurrent jurisdiction are required to follow each other unless satisfied that the earlier judgment is plainly wrong. Whatever I might think about some of arguments which will be available to a respondent, it would be quite wrong of me to conclude, and I do not conclude, that Butcher J was plainly wrong, particularly having regard to the test that he (and, for that matter, me on this application) have to apply. Applying that test and by reference to the arguments that Butcher J identified, I am satisfied that a *Bankers Trust* order can, in principle, be served out of the jurisdiction by reference to one of the gateways that he identified. However, having regard to Teare J's decision, it would be wrong for me to consider making a *Norwich Pharmacal* order against the second respondent, and I do not do so, applying that authority.

31 In those circumstances, the question I have to ask myself is whether the five criteria that have to be satisfied before a *Bankers Trust* order can be made are satisfied in the circumstances of this case. Those five criteria were summarised in *Kryiakou v Christie's* [2017] EWHC 487 (QB) by Warby J at paras.4 to 15. I take each of those in turn for the purposes of considering whether those requirements are satisfied in the circumstances of this case.

32 Firstly, there must be good grounds for concluding that the money or assets about which information is sought belonged to the claimant. There is no real doubt about that for the reasons that I have endeavored to explain and for the reasons which are summarised in the evidence in support of the application. This was cryptocurrency in the first and/or second applicant's account with the second and/or third respondents.

33 The second question is whether there is a real prospect that the information sought will lead to the location or preservation of such assets. I am satisfied that that is so essentially for the following reasons: first, it is entirely unreal to suppose that such information will not be

available to the second or third respondent in relation to its customers; secondly, and perhaps more importantly, the terms under which the second and/or third respondent operate make clear, at section (f), under the heading "Personal Data", that there will be personal data maintained by the respondent in relation to its customers. Therefore, and in those circumstances, I am satisfied that there is a real prospect that, if an order is made requiring the second respondent to supply the information about those who control the account to which the claimant's assets were transferred, that will lead to the location and preservation of such of those assets as have been removed from that account and passed on or converted so as to become traceable assets.

34 The third requirement is that the order should, as far as possible, be directed at uncovering the particular assets which are to be traced and that the order should not be wider than is necessary in the circumstances. Ms Davies submitted in the course of her submissions this was essentially a drafting point. I agree and it will be something which I will have to return to when considering the form of the order sought.

35 The fourth requirement is that the interest of the claimant is obtaining the order have to be balanced against the possible detriment to the respondents in complying with the order. There are two factors which, in my judgment, lead firmly to the making of an order in *Bankers Trust* terms against the second respondent. The first is that there is very strong evidence, as things currently stand, of a significant fraud by which the claimants were deprived of their assets. That is a powerful consideration in looking at the balancing exercise that has to be carried out between the interests of the respondents, on the one hand, and the interests of the claimant, on the other.

36 Secondly, in relation to personal data, the terms on which the second and third respondents operate contemplate that personal data may be disclosed to a number of others, including

"your transaction counterparty" and, more particularly for present purposes, "regulatory agents or law enforcement agencies to comply with the laws or regulations formulated by government authorities." This suggests that there is no absolute contractual right of confidentiality and, in those circumstances, all those who trade on the respondents' terms are aware that there is at least a risk of personal data being revealed, particularly when made by courts of competent jurisdiction.

37 The third factor which causes me to conclude that this requirement is satisfied in the circumstances of this case is that the order can properly be formulated as far as possible to focus on those who are directly involved in perpetrating the fraud, whilst at the same time seeking, as far as possible, to protect the interests of third parties concerned. I have already endeavored to apply that principle by breaking up the original persons unknown classes into three separate classes. But, in the end, if otherwise innocent parties, however innocently, have been become involved in a fraud by others, then it is an unfortunate aspect of that unintentional involvement that there may have to be some limited interference with their right of confidentiality for the purposes of enabling a victim to recover what has been lost.

38 The fifth consideration was whether or not the claimant undertakes to meet the expenses of the respondent in complying with the order and compensate the respondent in damages if loss is suffered as a result of compliance. That engages an issue which Ms Davies dealt with right at the end of her submissions concerning the value of an undertaking offered by the first applicant. The accounts which have been filed with the evidence in support of this application demonstrate that, net of all liabilities, the assets of the first applicant exceed £150 million sterling. There is, therefore, no reason to think that the claimant would not be able to meet the expenses that this particular requirement of the *Bankers Trust* jurisdiction requires. It is perfectly true to say that the valuation of assets depends upon the valuation of cryptocurrency held by the first applicant at the date of the relevant balance sheet, but I was told in the course

of the submissions made by Ms Davies that there would be no material alteration since the date of the balance sheet exhibited and she supplied me with some information from that document; and it would require a massive change in the value to be attributed to the cryptocurrency concerned to reduce the assets of the applicant materially to the level where the ability to comply with an undertaking to meet the expenses of the third party could not be complied with. In those circumstances, I consider it right and proper to make an order in the *Bankers Trust* form as against the second respondent.

39 So far as the third respondent is concerned, the same principles apply if and to the extent the third respondent is involved in managing the affairs of the claimant. Whether that is so or not is, as I have said, opaque having regard the way in which the second and third respondents choose to operate their business. If and to the extent there is no information available to the third respondent, the third respondent will be able to say so. The alternative order sought against the third respondent is an order for *Norwich Pharmacal* relief. The criteria that must be satisfied if an order in those terms is to be made are those which were summarised in *Mitsui & Co v Nexen Petroleum UK Limited* [2005] EWHC 625 (Ch), 3 All ER 511 at para.21 and are themselves simply repetitions of the principles to be derived from all the relevant authorities going back to *Norwich Pharmacal* itself.

40 First of all, it must be shown that a wrong has been carried out by an ultimate wrongdoer. That is satisfied for the reasons that I have identified earlier in this judgment and is set out in the evidence in support of the application.

41 Secondly, there must be need for an order to enable action to be brought against the ultimate wrongdoer. I am satisfied that is fulfilled as well because, unless and until the information which is being sought from the second and third respondents is supplied, it will be impossible to identify who was involved in the wrongdoing and, more particularly, what has become of

the assets wrongly taken from the claimant. Therefore, clearly, the second requirement in the *Norwich Pharmacal* jurisdiction is made out.

42 The third issue is whether or not the person against whom the order is sought is mixed up so as to have facilitated the wrongdoing. The answer to that is that the second and third respondents were administering the accounts into which the fraudsters were able to gain access and, in those circumstances and to that extent, they are mixed up in the wrongdoing and they are certainly likely to be able to provide information necessary to enable the ultimate wrongdoer to be sued for the reasons I have already identified; that is to say, by reference to the know your customer information that the respondents will have to hand, it would be possible to identify the individuals responsible, or at least the individual who control the account or accounts to which the assets were transferred. In those circumstances, this requirement is plainly satisfied as well.

43 The final requirement is that, before a court makes an order in *Norwich Pharmacal* terms, it must be satisfied that is the necessary and proportionate response in all the circumstances to what has happened. So far as that is concerned, the claimants have lost a sum of in excess of $2.6 million. That is a sum which plainly it is necessary that they should take all reasonable steps to recover. They are unable to recover, or even attempt to recover, what has been lost unless they have the information which is exclusively in the possession of the second and third respondents. In those circumstances, it is plain that it is necessary and proportionate to make the order sought. |

44 There was also, as I have said, an order sought under CPR 25.1(g). I am not sure whether that is technically persisted with because it covers precisely the same ground as the orders I have already made and it is maybe unnecessary for me to say anything further about that at this stage.

45 The next question is whether or not there should be permission to serve the claim form, application notice and order on the second respondent out of the jurisdiction. I have indicated why I have concluded that is an appropriate order to make, having regard to the reasoning of Butcher J in the *Ion Science* case referred to earlier.

46 The final question is whether or not alternative service ought to be ordered. So far as the second respondent is concerned, it is located in a Hague Service Convention state. As is well known, therefore, before an alternative service order can be made, the court must be satisfied that there are special or exceptional circumstances for departing from the machinery which the Convention adopts for its signatory countries: see *Russian Commercial Bank (Cyprus) Limited v Khoroshilov* [2020] EWHC 1164 (Comm) per Cockerill J at para.97. There is, however, an increasing body of case law in which various judges of the Commercial Court have held in various terms that orders which involve either prohibitory injunctions or mandatory orders (including, in particular, freezing orders and the like) should be served by alternative means if that is the only means by which the orders can be drawn speedily to the attention of the respondent concerned because, if the alternative is service by a means which will take weeks and perhaps months to satisfy, then the orders which are made and the reasons for the making of those orders will be defeated. In those circumstances, I am entirely satisfied that it is appropriate to make an alternative service order in respect of the order made against the second respondent.

47 So far as the first respondent is concerned, they could or could not be, depending on the circumstances, in a Hague Service Convention country: it is impossible to say. But, because of the nature of the orders being sought, which, as I have already indicated, are proprietary freezing orders in relation to all of the unknown respondents and worldwide freezing orders in respect of those directly involved in the fraud or knowingly receiving the proceeds of the

fraud, that is appropriate for service by an alternative means to the extent that that is appropriate. But it may well be, as Ms Davies says, that the course that the claimants prefer to adopt would be to hold fire on that for now, wait and see what information is forthcoming from the second and third respondents before deciding that steps ought to be taken by way of alternative service in respect of the currently unknown respondents concerned.

48 But, in those circumstances, the next question I have to decide is whether or not it is appropriate to make orders against the unknown person respondents at this stage or only make an order in respect of the second or third respondents. In essence, applications for both *Bankers Trust* and *Norwich Pharmacal* relief are conventionally sought in Part 8 proceedings brought before the commencement of proceedings against the individuals concerned. However, there is a particular problem in the circumstances of this case, which is that the second and third respondents have given mixed messages concerning what they propose to do in relation to an account which they claim to have frozen and which apparently contains the proceeds or some of the proceeds of the assets lost to the applicants as a result of the fraud referred to earlier. There is a real possibility, therefore, that, unless an order is made against the persons unknown, the second and third respondents might be tempted to unfreeze the account, as at one stage they threatened might be the case; and, if that step is taken, then the result would be that much, if not all, of the purpose of commencing and running this litigation in the way it has been run would be defeated. Given the sums involved, that would be entirely inappropriate and I am satisfied in the particular circumstances of this case, therefore, that it is appropriate to make the orders against the unknown respondents as well as the second and third respondents.

49 Finally, I record for the purposes of this judgment that I gave permission to the claimant to rely upon a skeleton longer than the length fixed by the Practice Guide for the Commercial Court because I am entirely satisfied, and was satisfied when I pre-read the material in this

case, that the length of skeleton was justified in the circumstances, having regard to the complexities of the issues that arise. Secondly, I am satisfied that this was an application which should have been made without notice since I am satisfied that if it was not the purpose of bringing the application would, or at least there was a very strong risk that it would, be defeated. For like reasons, it is appropriate that the hearing should take place in private. The individual respondents to the application will no doubt see a note of this judgment and/or a transcript of it, if one is being taken, and so will not be prejudiced by any of the orders that I have made.

50 In those circumstances and as a matter of principle, I am prepared to make the orders sought and I will now hear Ms Davies on the terms of the order.

CERTIFICATE

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