Neutral Citation Number: [2023] EWHC 3069 (Comm)

Case No: LM-2023-000190

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
KING'S BENCH DIVISION
LONDON CIRCUIT COMMERCIAL COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 01/12/2023

Before :

MS CLARE AMBROSE
SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

- -

Between :

THE KINGDOM BANK CORPORATION	**Claimant**
- and -	
MOORWAND LTD	**Defendant**

- -
- -

Simon Harding (instructed by **Gunnercooke LLP**) for the **Claimant**
Craig Ulyatt (instructed by **Keystone Law**) for the **Defendant**

Hearing dates: 21 November 2023

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MS CLARE AMBROSE SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Friday 01 December 2023 at 10:30am.

Ms Clare Ambrose :

A. Introduction

1. The Claimant is a company registered in the Commonwealth of Dominica as an off-shore bank. In May 2021 it entered into a business agreement with Safe Payment Solutions s.r.o, ("SPS") an electronic money issuer based in the Czech Republic. Under that agreement SPS opened accounts and the Claimant gave instructions to transfer money in and out. Payments out stopped in around February 2022. At around that time SPS provided the Claimant with the Defendant's address and the details of an account with the Defendant said to be used for receiving and sending electronic payments. SPS then stopped trading and later went into liquidation. The Claimant says that around EURO 1.4 million of its money (and that of its customers) has been paid into the account with the Defendant but the money has now gone missing.

2. This is the trial of the Part 8 claim by which the Claimant seeks an order against the Defendant requiring disclosure of information relating to the account held by the Defendant ("the Master Account"), into which the Claimant and its customers have made significant payments. The Claimant is asking the court to make a Norwich Pharmacal order ("an NPO") under the equitable jurisdiction named after a case called *Norwich Pharmacal Co v Customs and Excise Comrs* [1974] AC 133. It claims that it needs the information in order to determine where its monies are and what claims are to be pursued.

3. The Defendant is an English company that is authorised as an electronic money institution ("EMI") by the Financial Conduct Authority ("FCA") to issue electronic money and to provide payment services. It had initially not objected to the Claimant's application but now opposes it on grounds that:

    a) the court lacks jurisdiction since any claim against SPS is subject to an exclusive Czech Republic jurisdiction clause, and to the extent any claim is against the Defendant it should be brought under CPR 31.16;

    b) the threshold conditions for Norwich Pharmacal relief are not made out;

    c) the Court should refuse to exercise its discretion in favour of the Claimant.

B. The procedural background

4. There is a somewhat lengthy procedural background, and a bundle going to over 1100 pages, with 6 statements from the defendant's solicitor and 7 statements coming from the Claimant's side. I only summarise the main procedural aspects.

5. On 16 November 2022 the Claimant issued a Part 8 Claim together with the witness statement of its director, Mr Nebil Zubari. This hearing was originally listed on 12 January 2023 but an application for security for costs intervened. It was listed again for 18 April 2023 but this hearing was ineffective because one counsel had COVID 19. The matter came back for a hearing on the security for costs application on 14 June 2023.

6. The trial was then due to be heard on 19 July 2023 but Master Stevens adjourned the hearing because of the late notification that SPS had gone into liquidation on 12 April 2023 and also because the time estimate was insufficient. Master Stevens ordered the

Claimant to make contact with SPS's liquidator (then Mr Daniel Buzu) to request transactional material, and such requests were made on 25 July 2023. On 16 August 2023 Mr Buzu responded indicating that he was no longer appointed as liquidator, a new liquidator would be appointed and that he had twice advertised for creditors to make claims within a published time limit.

7. On 21 August 2023 HHJ Pelling KC made an order transferring the matter to the London Circuit Commercial Court.

C. The factual background

8. As explained above, the Claimant provides offshore banking services. Mr Zubari is its director. He referred to 32 customers who are all corporate entities, with client addresses in a wide range of jurisdictions including Canada, Curacao, Cyprus, Hong Kong, Malta, and many in the UK. He says the Claimant and its customers wanted banking facilities in the UK but they found it impossible or difficult to do so with a mainstream bank. They wanted to transfer funds in and out of the UK efficiently and without bureaucracy.

9. In May 2021 Mr Zubari attended a foreign exchange trade exhibition in Dubai with suppliers from the digital and e-banking industry. He met representatives of SPS and they suggested a solution. SPS traded under the name KoalaPays. At the time SPS was authorised by the Czech National Bank to operate as a small-scale electronic money issuer. It had also previously been registered with the FCA as an EMD[1] agent of a separate UK based EMI, namely CFS-ZIPP Limited, that was formerly authorised by the FCA.

10. On 28 May 2021, the Claimant entered into a Business Agreement ("the Business Agreement") with SPS under which SPS agreed to provide services to the Claimant including the issue of e-wallets. The Business Agreement is governed by Czech law and is subject to the exclusive jurisdiction of the Czech courts.

11. Under the Agreement, SPS is described as the Company and the Claimant as the Merchant, and the customers of the Merchant are described as the Customer.

12. Clause 1 provided that "*Safe Payments Solutions s.r.o…is registered by the Czech National Bank ("NCB) as an electronic money issuer, trading as "KoalaPays" and is the issuer of the electronic money to you, in the future referred to as Merchant".*

13. The following definitions provide some explanation of the services agreed.

    a) ***"Account"*** *means an Account that is provided by the Company, through its Regulated Provider, which includes at least one e-wallet and may include multiple e-Wallets".*

    b) *"**Account Holder**" or "**Holder**" means an individual or an organisation that is rightfully in possession of an Account."*

[1] EMD is used here as an abbreviation of the Electronic Money Directive, Directive 2009/110/EC of the European Parliament and of the Council of Europe of 16 September 2009. The Defendant's position was that this registration ended on 31 December 2020 when the UK left the EU.

c) *"**API**" means an Application Program Interface which the Company may supply to the Merchant or which the Company and the Merchant may work together to develop and implement to allow program-to program communications between the Company and the Merchant.*

d) ***"Merchant account"** means the Account that is to be provided to the Merchant by the Company. Such Merchant Account will consist of one (1) or more e-Wallet(s)".*

e) ***"e-Wallet"** means the Account that is provided to each Account Holder into which funds can be loaded, transferred or spent using methods provided by the Company. e-Wallets may be provided in different currencies".*

f) ***" Regulated Provider"** means KoalaPays and any appropriately regulated company or companies selected by the Company to provide payment services and/or issue electronic money (which services/issuance, notwithstanding anything herein, shall be subject to the law of the jurisdiction of such company) on behalf of the company who are also principal members of the relevant Card Organisation for issuing payment instructions and/or acquiring payment transactions."*

g) ***"Services**" means the standard e-Wallet Account, all Account maintenance functionality, all transaction processing functionality and all other functionality provided by the Company. Directly or through its Regulated Provider all Services are presented and branded with the Company logos and other product/services identifications. The Services include currency exchange."*

h) ***"Segregated Account"** means the Account in which are deposited Account Holder funds. The Merchant's funds are deposited in this Segregated Account until they are paid out to the Merchant".*

i) *"**Transaction(s)**" means an exchange or transfer of funds from a Customer or an Account Holder to the Merchant for the purchase of goods and/or services offered by the Merchant to Customers. The Customer will, under the terms of this Agreement, have the ability, via conducting a Transaction, to redeem its electronic money."*

14. Clause 4(a) provided that:

> *"**Services.** The Company will, following provision and approval of Know Your Customer documentation, provide the Merchant the Merchant Account and allow the Merchant to commence utilisation of the Services as are presently operational to process Transactions."*

15. Clause 5(a) provides that:

> *"**Merchant Account**.*
>
> *(a) Merchant Account receipt of funds via a "Request Payment Users' transaction" ("RPU transaction") or through the dedicated SEPA IBAN. Through this process the Merchant shall have the ability to receive funds into its*

Merchant Account from Customers Transactions where their Customer does not hold an Account.

(i) The Merchant may provide a payment reference number to their Customer and the Company will allow the Customer to instruct the Customer's bank to transfer the funds identified by that payment reference number to the Company and the Company will transfer such funds directly to the Merchant's Account.

(ii) The Merchant may also utilise an API, as agreed between the Company and the Merchant, to initiate an incoming RPU transaction.

(iii) The Merchant's Customer does not have to hold an Account for the Merchant to receive payment by the RPU or SEPA transaction services, but is required to comply with the information requirements of EU Regulation 2015/847 and the Company's AML Policy, and provide the necessary information and documents to accompany transfers of funds as required by the Company before the deadline specified by the Company's representative."

16. Clause 21 provides:

> *"(a) Relationship Between Parties. The Parties to this Agreement are independent contractors and nothing in this Agreement shall make them joint venturers, partners, employees, agents or other representatives of the other Party here."*

17. Mr Zubari explains how when the Claimant's customers wanted to open accounts, they would send a request to SPS and SPS would send an IBAN number for each individual customer containing the letters MOOW. Separate IBAN numbers were issued for around 32 customers via an online portal, and each customer had access to the portal. Mr Zubari says that all these numbers were linked to the Master Account.

18. Mr Zubari's evidence was that communications with SPS were informal and usually made via a social media messaging platform (called Telegram). The individuals he was dealing with at SPS did not give their surnames. He exhibited messages showing that the Claimant would put forward the details of a new customer seeking an account and SPS would send an IBAN number for that customer to use for transfers in and payments out to third parties. He says that the Claimant and its customers were free to send and withdraw money at any time by making a withdrawal request from the online portal via API. While Mr Zubari said the Claimant and its customers had wanted banking services, the Business Agreement offered use of an e-wallet and the issue of electronic money, and Mr Zubari's evidence was that they made use of these services.

19. However, from February 2022 problems started and SPS stopped withdrawals even after much chasing. In February 2022 SPS provided the Claimant with a document headed "to whom it may concern" with the Defendant's details including the account number used for payment transfers within Europe (termed as SEPA) and describing the Defendant as a bank. This was the first mention of the Defendant by SPS.

20. The Claimant contacted the Defendant directly seeking return of funds in March 2022, and later instructed solicitors who contacted the Defendant on 10 August 2022.

21. In April 2022 the Claimant continued unsuccessfully to seek withdrawals by sending Telegram messages to SPS. On 26 May 2022 SPS's authorisation to operate as an electronic money issuer was revoked and it is common ground that SPS ceased to trade at some stage in 2022. Mr Zubari reports that SPS stopped answering the telephone and deleted their messaging account. The online portal for monitoring the accounts was deactivated but the Claimant extracted a transaction report dated July 2022.

22. On 12 April 2023 SPS entered into liquidation in the Czech Republic and a liquidator, Mr Daniel Buzu, an attorney in the Czech Republic, was appointed as liquidator. This was apparent from the Czech Commercial Registry (and the Defendant had discovered this shortly before the hearing listed in July 2023). An extract from the Czech Commercial Register for SPS dated 27 October 2023 stated that the insolvency proceedings were stopped by a resolution dated 1 August 2023 due to non-payment of the advance payment for the costs of the insolvency proceedings.

23. The Defendant's evidence was provided by its solicitor, Mr Robert Harvey. He says that it provides payment services (not banking services) and its accounts are intended to lower the cost to account holders of making international payments. He acknowledges that the Defendant is obliged to safeguard funds received in exchange for electronic money and says it does so by segregating funds and holding them in a bank account which is not UK based.

24. Mr Harvey says that SPS was the Defendant's customer and held an e-wallet with it. He says that SPS was able to use the electronic money in its e-wallet to make payments to third parties. His evidence is that the IBAN numbers relied on by the Claimant (i.e. those provided by Telegram messenger and listed in the transaction reports) were generated by SPS as the holder of a Moorwand e-wallet without any input from the Defendant. The Claimant maintains that the IBAN numbers were issued by the Defendant.

25. Mr Harvey acknowledges that the Claimant may have paid funds to SPS, and that funds were received by the Defendant and paid into a pooled bank account held by it with a bank based outside the UK. He also acknowledges that payments can be made to a pooled account held by it by providing the payer with an IBAN which can be generated by a holder of a Moorwand e-wallet without its intervention. Such funds received from SPS were pooled with funds received from other third parties who are not the Claimant or its customers.

26. There is common ground that the Defendant provided SPS with an e-wallet but there is an issue between the parties as to whether SPS acted as agent on behalf of the Defendant, and as to whether the Claimant's funds (and those of its customers) were received by the Defendant directly (the Claimant's case) or on behalf of SPS (the Defendant's case).

D. The Claim

27. By the date of the hearing the Claimant was seeking disclosure of the following categories of information:

    a) a list confirming which transactions listed on the extract from the online portal appear in the records of the e-wallet of SPS with the Defendant;

b) a statement of the balance of SPS's e-wallet with the Defendant, and the bank name and account number in which that balance is held;

c) documentation showing payment out of sums confirmed under (a) and the identities and contact details of transferees, including the details of accounts into which payments were made, and instructions for such payments;

d) the agreement between the Defendant and SPS for any e-wallet held by SPS and documentation specifying the manner in which SPS was required to provide instructions for payments to or from that e-wallet.

28. It was common ground that the Defendant offers e-wallets to its customers, and that SPS held an e-wallet with the Defendant that stored information as to payments and the balance. Neither party attempted to define what they meant by an e-wallet and the definition in the SPS Agreement was not decisive.

A. The legal requirements for Norwich Pharmacal Relief

29. There was much common ground on the conditions for Norwich Pharmacal relief. The authorities make clear that the essential purpose of the remedy is to do justice and there is a need for flexibility and discretion in considering whether to grant a remedy (*RFU v Consolidated Information Ltd* [2012] 1 WLR 3333). The authorities also emphasise that the remedy is exceptional, will only be granted where necessary and should not be used as a fishing expedition to establish whether or not the claimant has a good arguable case (*Ashworth Hospital Authority v MGN Ltd* [2002] 1 WLR 2033 and *Ramilos Trading Ltd v Buyanovsky* [2016] EWHC 3175 (Comm)).

30. Both parties relied on *Mitsui & Co Ltd v Nexen Petroleum UK Ltd* [2005] EWHC 625 (Ch) at [21].

> *"The three conditions to be satisfied for the court to exercise the power to order Norwich Pharmacal relief are:*
>
> *i) a wrong must have been carried out, or arguably carried out, by an ultimate wrongdoer;*
>
> *ii) there must be the need for an order to enable action to be brought against the ultimate wrongdoer; and*
>
> *iii) the person against whom the order is sought must: (a) be mixed up in so as to have facilitated the wrongdoing; and (b) be able or likely to be able to provide the information necessary to enable the ultimate wrongdoer to be sued."*

31. The parties also relied on other cases which build on that test. For instance, *Collier v Bennett* [2020] EWHC 1884 (QB) makes clear that the applicant has to demonstrate "*a good arguable case that a form of legally recognised wrong has been committed against them by a person"*. In *Ramilos Trading Ltd v Buyanovsky* [2016] EWHC 3175 (Comm) [14] Flaux J explained that the good arguable case test is whether the case is more than barely capable of serious argument, and yet not necessarily one which the Judge believes to have a better than a 50% chance of success.

32. In *Ashworth Hospital Authority v MGN Ltd* [2002] 1 WLR 2033 Lord Woolf CJ said that a claimant must identify "*clearly the wrongdoing on which he relies in general terms*". The type of wrong may include a crime, tort, breach of contract, equitable wrong or contempt of court. It is not necessary that the claimant intends to bring civil proceedings against the underlying wrongdoer. There has been debate (including in *Burford Capital Ltd v London Stock Exchange* [2020] EWHC 1183 (Comm)) as to whether the wrong must be actionable but the Claimant was unable to show that an NPO would be available where the wrong alleged was solely a breach of financial regulations.

F. EMIs and electronic money

33. The Defendant is an electronic money institution ("EMI") and some aspects of EMIs and electronic money were uncontroversial. In 2009 the EU made a directive ("the EMD") governing electronic money (also described as e-money). The UK implemented this by the making the Electronic Money Regulations 2011 (SI 2011 / 99) ("the EM Regulations") and these remain the governing law.

34. Following the EMD, the EM Regulations define "*electronic money"* as

> *"electronically (including magnetically) stored monetary value as represented by a claim on the electronic money issuer which–*
>
> *a) is issued on receipt of funds for the purpose of making payment transactions;*
>
> *b) is accepted by a person other than the electronic money issuer; and*
>
> *c) is not excluded by regulation 3."*

35. Electronic money's definition shows that it is typically used in products for making payments. For example, the monetary value stored on a prepaid payment card would fall within the definition. When the customer of an EMI sends funds to an EMI and electronic money is issued then the funds are exchanged for electronic money. Under English law (and the regulations governing their authorisation), an EMI such as the Defendant is not a bank or regulated as such and it is not permitted to take deposits (see e.g. *In re ipagoo LLP (in liquidation)* [2022] EWCA Civ 302, [10]).

36. EMIs are regulated by the FCA and subject to the EM Regulations. Pursuant to regulations 20 to 22 of the EM Regulations, EMIs are required to safeguard funds received from customers by (i) segregating the funds from any other funds that it holds pursuant to regulation 21; or (ii) ensuring that the funds are covered by an insurance policy or guarantee pursuant to regulation 22. Regulation 24 provides that segregated funds and the proceeds of an insurance policy or guarantee are treated as an asset pool ("the asset pool") against which the claims of electronic money holders are to be paid on the insolvency of the EMI.

37. There was some debate as to the effect of the decision in *Re ipagoo LLP*. The decision is clearly authority that the proper construction of the EM Regulations means that relevant funds received by an EMI from electronic money holders (typically these are the customers to whom the EMI issue electronic money) were not subject to a statutory

trust on the EMI's insolvency. The Court of Appeal also held that the EM Regulations override some aspects of insolvency and property law because the electronic money holders are granted rights over the asset pool in priority to other creditors.

38. Counsel for the Claimant suggested that the decision in *Re ipagoo LLP* only related to an insolvency situation and did not touch on a fraud situation or where there has been unconscionable conduct (referring by analogy to *LMN v Bitflyer* [2022] EWHC 2954 (Comm) relating to cryptocurrency obtained by fraud). However, this submission was of limited relevance where there is no allegation of fraud and cryptocurrency can be distinguished because it has been recognised under English law as an asset.

39. The Defendant claimed that as a matter of law, a payment from the Claimant into the Defendant's bank account was a payment by the Claimant to SPS which resulted in the issuance of electronic money by the Defendant to SPS and then by SPS to the Claimant. It maintains that as between the Claimant and SPS, SPS did not have any equitable or proprietary interest in the funds paid to it, and the Claimant and its customers have no greater interest. Upon receipt (whether from SPS or the Claimant and its customers) the funds became the Defendant's absolute property.

40. I need not decide whether the Defendant has absolute property rights over funds in the pooled bank account (or segregated funds, if different) or whether it issued electronic money to the Claimant or SPS. However, the Defendant was correct to suggest that the Court of Appeal decided that an electronic money holder does not retain a proprietary or equitable interest over funds paid in exchange for electronic money. The Claimant's argument failed properly to recognise that *Re ipagoo LLP* is not solely a decision on the consequence of insolvency but is based on a broader explanation of the effect of the EM Regulations.

41. The decision in *Re Ipagoo LLP* reflects the stated purpose of the EMD and EM Regulations in providing a regulated regime within the EU for new electronic payment products with specific supervision and safeguards. Asplin LJ explained [paragraphs 78-80] that a statutory trust is not imposed on such funds because this is not required by the purpose of the EMD and would be inconsistent with the provisions of the EM Regulations. The statutory definition of electronic money was not decisive in itself but she found it was more apt to describe contractual rights. Looking at the whole scheme of the EMD and the language of the EM Regulations including the safeguarding provisions, the Court of Appeal concluded that funds provided to an electronic money issuer are not held on trust and no equitable interest is retained. Equally, they are not subject to a beneficial or proprietary interest giving rise to tracing remedies. These are common law concepts that are unlikely to have been intended under a European directive intended to provide a uniform regime.

The Czech Republic Regime

42. The court was not provided with evidence of the law of the Czech Republic. The Defendant fairly suggested that there would be similarities in approach to the EM Regulations because the Czech Republic had also implemented the EMD. The Claimant suggested that SPS was an EMI and this was not disputed. Correspondence from the Czech National Bank suggested that SPS was authorised as a small-scale electronic money issuer which is treated as an EMI under the EMD. SPS would be subject to the

Czech legislation implementing the EMD, including its provisions for safeguarding funds and insolvency.

G. Discussion

43. The main issues in dispute went to the court's jurisdiction to grant relief and whether the first two conditions for Norwich Pharmacal relief were met. There was also a dispute as to whether it was appropriate for the court to exercise its discretion to make an NPO. The discussion is covered under separate headings but all the conditions for relief are closely linked and some matters, for instance the relevance of recourse against SPS, were relevant to all these issues.

H. Jurisdiction

44. The Defendant suggested that the court did not have jurisdiction to grant an NPO because the only candidates as wrongdoers were SPS or itself. If SPS were the wrongdoer, then the court's jurisdiction is unavailable since the information sought is intended to be used by the applicant in foreign civil proceedings and such relief must be brought under the Evidence (Proceedings in Other Jurisdictions) Act 1975 ("the 1975 Act"), as found in *Ramilos Trading Ltd v Buyanovsky* [2016] EWHC 3175 (Comm).

45. As regards any future claim against the Defendant, it argued that any application for pre-action disclosure should be made under CPR 31.16. It maintained that the *Norwich Pharmacal* jurisdiction is ousted where an alternative procedure is available. For this purpose it relied on *Mitsui v Nexen* where Lightman J explained that:

> *"In my view CPR 31.18 merely preserves the Norwich Pharmacal jurisdiction - CPR 31.18 provides that CPR 31.16 and CPR 31.17 in no way limit the court's pre-existing jurisdiction under Norwich Pharmacal . It in no way modifies the established principles governing the exercise of that jurisdiction. Those established principles require regard to be had to the existence of other means available for obtaining the information needed and accordingly require regard to be had to CPR 31.16 and 17 . It is entirely in accord with CPR 31.18 that, if CPR 31.16 provides an alternative means of obtaining the information required by the Claimant, the Norwich Pharmacal jurisdiction should not be exercisable. The power to grant Norwich Pharmacal relief continues to subsist but in accordance with the established principles governing its exercise in cases where its exercise is no longer necessary, it no longer should be invoked."*

46. The Defendant argued that this point had been reinforced in *Towergate Underwriting Group Ltd v Albaco Insurance Brokers Ltd* [2015] EWHC 2874 (Ch) at [6] & [24] per Master Matthews; *Zenith Insurance Plc v LPS Solicitors Ltd* [2020] EWHC 1260 (QB) at [31] per Freedman J; *Zeus Investors v HSBC Bank Plc* [2020] EWHC 3273 (Comm) at [3] per Bryan J; *Umbrella Legal Solicitors Ltd v Affirm Legal Ltd* [2022] EWHC 1510 (Comm) at [31].

47. The Claimant contended that it could seek *Norwich Pharmacal* relief relying on dicta in the case of *AQR Capital v LME* [2022] EWHC 3313 (Comm) and *Sarayiah v Williams* [2017] EWHC 2915 (Ch) where the court concluded that there is no formal bar to the making of an NPO where the wrongdoer is the defendant. The Defendant argued that

these cases emphasized the *"very exceptional nature"* of an order for pre-action disclosure.

Conclusion

48. The 1975 Act would have been a decisive reason precluding the grant of an NPO if the Claimant had been suggesting that it was seeking the relief in order to pursue SPS in the Czech Republic (*Ramilos Trading Ltd v Buyanovsky* [2016] EWHC 3175 (Comm)). However, the Claimant maintained that it was not seeking to pursue SPS in the Czech Republic so this was not a decisive consideration. However, as discussed below, the availability of alternative proceedings is relevant to whether an NPO should be granted as it was goes to necessity.

49. The authorities emphasise that the *Norwich Pharmacal* jurisdiction is exceptional and must be justified by way of necessity so that an alternative means to obtain the information will be a relevant consideration. However, there is no jurisdictional bar to the court granting an NPO where the information might be obtained under CPR 31.6. The wording of CPR 31.16 and the approach in *Mitsui* does not suggest that the court's jurisdiction to grant an NPO is ousted where the party being asked to provide the information may be the ultimate wrongdoer.

50. The court should not allow the Claimant to circumvent the requirements of CPR 31.16. The Claimant did not attempt to establish that its application fell within CPR 31.16. However, the outcome on an application for the two sorts of relief may be the same and there may be grounds (typically for case management reasons or because there is a strong case for an NPO) when the court may be willing to allow the application to be pursued on both grounds (see *Zeus Investors v HSBC Bank Plc* [2020] EWHC 3273 (Comm). Here the Claimant's case for an NPO was not sufficiently strong to justify an exceptional order on the basis that it would enable the Claimant to pursue the Defendant's wrongdoing.

I. Good arguable case on wrongdoing

51. The Claimant says that it and its customers transferred funds into the Master Account and it does not know where the money now is. It claims that all monies held in the Master Account are its property (or that of its customers) and once it has the requested information it will make the necessary proprietary claims for its return. It claimed that SPS wrongfully failed to perform and procure that funds held in the Master Account would be repaid to it or its customers, but it denies that its claim can only be against SPS. It says that it cannot sue the ultimate wrongdoer until it knows where the money actually is. Thus if the Defendant has transferred its money to a third party then the Claimant needs to know who that third party is. Alternatively, if the Defendant still holds the Claimant's monies then it will seek their return from the Defendant.

52. The Claimant argued that it need not establish a wrongdoing against a named party, indeed the reason for seeking relief is that the wrongdoer and the precise legal wrongdoing may not be known. Based on *Mitsui,* it need only show that a wrong must have been carried out by an ultimate wrongdoer. It argued that it could rely on the wrongdoing of SPS to satisfy the gateway requirement of an established wrongdoing, and there was no need for it to establish an additional wrongdoing against another potential wrongdoer.

Conclusion

53. The Claimant did not present a consistent or detailed position as to the wrong and wrongdoer that it relied upon as justifying the granting of an NPO. It claimed that "all it knows is that its money has gone", and it need not establish a wrongdoing against a named party. Initially it had suggested that it was not seeking relief against the Defendant and that SPS's wrongdoing was sufficient. However, its broader arguments suggested that heads of claim against the Defendant would be the main basis for the claims it envisaged making.

54. The Claimant was wrong to suggest that it could rely simply on SPS's wrongdoing in order to justify an NPO. This is because it is common ground that SPS wrongfully failed to follow instructions to make payments and return the money the Claimant now seeks. The Claimant does not need an NPO in order to pursue SPS for recovery of the sums in question; it already has sufficient information to pursue SPS for its wrong and an NPO would not be available solely on the basis of SPS's wrongdoing.

55. The Claimant needed to establish a separate wrong to that of SPS although that wrong could be closely related. The Claimant's counsel referred to a catalogue of potential heads of claim against the Defendant based on the following cases against the Defendant:

    a) SPS entered into the Business Agreement as the Defendant's agent, and SPS provided the IBAN numbers and sold services on behalf of the Defendant (as identified in the definition of Regulated Provider in the Business Agreement) such that it was directly obliged to follow the Claimant's instructions and repay funds;

    b) regulatory offences, as breach of the EM Regulations;

    c) negligent breach of a duty of care to comply with lawful instructions and safeguard the Claimant's funds, keep records and carry out money laundering checks;

    d) proprietary and tracing claims because the funds in the Defendant's account are the Claimant's property and held on trust for it, relying in particular on the definition of Account Payment and Merchant Bank Account in the Business Agreement since these suggested that funds paid into its account were the Claimant's property;

    e) a resulting or constructive trust where the Defendant is a trustee on the basis that SPS owed fiduciary duties to act in good faith and in breach thereof had failed to procure compliance with the Business Agreement, such trust was necessary in the event of an unconscionable wrong; the Claimant suggested that otherwise the regime would be a fraudster's charter, although counsel made clear that the Claimant was not making an allegation of fraud, but was relying on default;

    f) a Quistclose Trust arising because funds in the Master Account were held for the specific purpose of receiving funds owned by the Claimant and its customers;

    g) unjust enrichment because the Defendant has been enriched at the Claimant's expense by the receipt of funds within the Master Account, and because the

Claimant mistakenly believed that the funds held were owned by it.

56. Counsel for the Claimant suggested in submissions that the information provided might show that a director of SPS or even one of the Defendant's directors had given instructions or received payments so as to give rise to a claim. The Claimant put forward no concrete basis for a case of wrongdoing against such third parties or others more generally. Its position against third parties was wholly speculative (and the question of necessity of the relief for pursuing such claims does not arise).

57. The burden of proof lay upon the Claimant to establish a good arguable case of a relevant wrongdoing on grounds of SPS acting as agent for the Defendant. However, it failed to meet this standard or spell out the intended claim.

58. The wording of the Business Agreement that the Claimant relied on did not support its argument. These provisions suggested that funds would be paid by the Claimant and in return they would have the benefit of an e-wallet and electronic money to make payments. This reflected the Claimant's own evidence and the express wording. The other provisions, including clause 21(a), suggested that SPS was providing services or using regulated providers to provide them on its behalf.

59. The argument on agency appeared to be mainly based on Mr Zubari's evidence as to how SPS's representatives introduced themselves as acting as agents for a digital banking solution company in the UK who could provide the Claimant with bank account services. However, this was not sufficient to show that SPS was authorised to act on behalf of the Defendant, not least as the Defendant is not a bank and does not provide banking services. There was no evidence to suggest that it holds itself out as providing such services (and indeed the Business Agreement did not suggest that bank account services would be provided).

60. There was no evidence that SPS was authorised by the Defendant to offer services on its behalf, or that there was any basis for ostensible authority or agency by way of an undisclosed principal. The terms of the Business Agreement showed that SPS could use a regulated provider for the provision of its services but this did not establish an agency relationship.

61. The Defendant's evidence on its relationship with SPS was somewhat unsatisfactory in that Mr Harvey had not identified the source of the information he provided. However, the Defendant cannot be criticised for not providing its agreement with SPS since this would have been confidential.

62. Mr Harvey stated unequivocally that SPS was the Defendant's customer rather than its agent, that SPS held an e-wallet, and that payments can be made into a customer's account by providing the payer with an IBAN number that can be generated by the holder of an e-wallet. This was consistent with the Claimant's own evidence of SPS's conduct and the terms of the Business Agreement. There was an issue as to who was responsible for issuing IBAN numbers but even if this was the Defendant this would not have shown a good arguable case that the Claimant was in a contractual relationship with the Defendant. In setting up an e-wallet for SPS the Defendant would owe contractual obligations to SPS and there was no obvious basis for direct personal rights owed by the Defendant to the Claimant in contract or unjust enrichment.

63. The Claimant's counsel correctly did not press the suggestion that the Defendant was liable in negligence or under a Quistclose trust, or that an alleged breach of the EM Regulations would justify an NPO.

64. The Claimant did rely on tracing remedies and obligations by way of resulting trust, constructive trust and unjust enrichment, as set out above. However, its case as to as to how these remedies would arise was speculative. It lacked substance both on the facts and the law. The Claimant also failed properly to grapple with the authority of *Re Ipagoo LLP* suggesting that an electronic money holder does not have a proprietary or beneficial or equitable interest in the funds that it provides in exchange for the issue of electronic money. While *Re Ipagoo* may not have answered all questions regarding remedies available against an electronic money issuer in relation to funds received, it reflects English law on the effect of the issue of electronic money, not merely the consequence of an EMI's insolvency. The absence of a proprietary or equitable right to funds paid to an EMI meant that tracing claims and those based on a resulting or constructive trust (including unjust enrichment claims as such) did not meet the threshold of good arguable case.

J. Necessity

65. The Claimant failed to show that the information sought was necessary for it to pursue the claims it suggested would be available. It knows that the Defendant holds SPS's e-wallet, is required to segregate funds received in exchange for the issue of electronic money and that SPS failed to follow its customers' instructions. The Claimant has had sufficient information all along to seek recourse from SPS, both before and after it went into liquidation.

66. If, contrary to my conclusions above, the Claimant has a good arguable case against the Defendant, then the available information would also be sufficient to allow the Claimant to put forward such a claim, whether by way of contract, proprietary claim, tracing, or breach of obligations under a resulting trust, a constructive trust or arising in unjust enrichment. While it would be useful for the Claimant to know the balance held in SPS's e-wallet that is not sufficient to justify an NPO. The Claimant does not need to know the amount that remains (or the sums of payments out or the identity of payees) in order to pursue its case against the Defendant.

67. The Claimant's case on necessity was fatally undermined by its failure to make any claim against SPS before or after its liquidation, or even now. It provided no adequate explanation as to why it had not investigated whether SPS was in liquidation or instructed Czech lawyers to consider the relief available, including recovery of funds but also an account of sums paid and production of documentation belonging to its account. It obviously had contractual remedies against SPS. Indeed, it had been repeatedly told by the Defendant that measures could be taken against SPS to recover the sums in question. It was also given notice that recourse could be sought against SPS by the Czech National Bank in an email to its solicitors dated 23 January2023. The liquidator stated it had made public calls for creditors in the Czech Republic, as also recorded in the Czech Commercial Register. Even when the Claimant had been ordered by the English court to obtain information from the liquidator it had taken no further steps when informed on 16 August 2023 that a new liquidator could be appointed.

68. The Claimant failed to justify its decision not to bring an action against SPS, apparently on grounds that SPS was not cooperating and "seems to have disappeared". There was no basis for the Claimant's suggestion that it would have served no purpose to initiate a legal case against SPS. The Defendant fairly submitted that information as to SPS's account, e-wallet and dealings in relation to the Claimant's funds could properly have been sought from SPS's liquidator or by commencing an action.

K. Is the Claimant mixed up in the wrongdoing? Can it provide the information

69. The Defendant accepted that it was mixed up in SPS's breach of contract but maintained that this was irrelevant since the Claimant had no interest in pursuing a contractual claim against SPS. It also argued that the relief sought was too wide and that it cannot determine whether funds attributable to the Claimant remain on SPS's account (or e-wallet) or if funds paid out were attributable to the Claimant.

70. The Defendant's solicitor gave evidence of the time required to provide the information requested. He explained that the Defendant could confirm the balance on SPS's e-wallet, and its legal officer and accounts team could search and check all of the e-wallets that were issued to SPS, and verify the details of each of the listed IBANS and confirm the bank provider they relate to and their status. It would produce an excel file of the individual transactions verified on its records matching the transaction records that the Claimant was able to produce before its portal with SPS was deactivated. It suggested that it could not identify whether outward payments were attributable to the Claimant since these would have different IBAN numbers. He suggested that the exercise would take around 80 hours for the legal officer plus more time for the accounts team.

71. If the Claimant had established a good arguable case of a relevant wrong then I would probably have found that the Defendant was sufficiently mixed up in the wrong (since it would have been linked to payments from the e-wallet) and that it could provide most of the information required (even though outward payments attributable to the Claimant may not have been fully identifiable). I would also have considered that the relief would have been proportionate since the scope of disclosure was not unduly wide or onerous.

L. Overall justice and proportionality

72. The Defendant opposed the application as a matter of discretion. It relied on:

    a) its duties of confidentiality to SPS as its customer and also other third parties (in particular, other customers of SPS, one of whom had made a claim against it). It suggested that confidentiality should not be breached where the information could have been provided by SPS's liquidator without any such breach.

    b) The fact that the case has little connection with England and the Claimant contracted with a Czech company subject to Czech jurisdiction, and has failed to take steps to participate in SPS's liquidation. Pursuant to the principle of "modified universalism" the English court should seek to ensure that SPS's assets are distributed to its creditors in an orderly fashion under a single system of distribution.

c) The Claimant's delay in seeking Norwich Pharmacal relief when SPS ceased making outgoing payments in February 2022 while the application was only issued in November 2022.

73. If the Claimant had been able to establish a good arguable case of a relevant wrong (including a wrong by the Defendant) then the discretionary factors raised by the Defendant would not have precluded the granting of relief. The Claimant had almost immediately asked the Defendant for the information sought after SPS provided its details in February 2022. There was no substantial delay in pursuing the claim or evidence of prejudice so caused.

74. Duties of confidentiality owed to SPS would not have precluded relief being granted. Confidentiality is generally in play in any application for an NPO and its usual purpose is to prevail over such obligations. The mere existence of a relationship of confidentiality would generally not tip the balance of discretion against an NPO. Here, confidentiality was not a strong factor since there was no personal data and no evidence of commercially sensitive information, especially since SPS is no longer trading.

75. Interfering with the process of the Czech Republic liquidation would have been a strong consideration if the Claimant had been seeking relief for the purpose of making a claim against SPS. This would also have been a decisive jurisdictional argument based on the 1975 Act. On the basis that SPS was not the target wrongdoer then an NPO would not have been interfering with the Czech liquidation process. It would have been a permissible use of the remedy since it was unclear whether information would now be provided by a liquidator. Similarly, the argument that the matter had little connection with UK would not have been a strong factor if the other conditions had been established since the information was held by an English company.

M. Overall conclusions

76. The Claimant's claim is dismissed because it failed to establish the basic threshold conditions for the grant of Norwich Pharmacal relief. It had no need for an NPO in order to pursue SPS so SPS's wrong would not justify relief. In addition, it could not establish a good arguable case against another wrongdoer or that the information requested was needed in order to enable action to be brought against such wrongdoer.