

TRENDS IN FRAUD 2021



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This year has seen a number of cases in which the courts have had to grapple with novel issues arising in fraud disputes. This article explores three trends to have emerged: (1) limits to the Serious Fraud Office's (SFO) extraterritorial reach; (2) the interaction between criminal restraint orders (CROs) and worldwide freezing orders (WFOs); and (3) the, perhaps unsurprising, continuing rise in cases involving cryptocurrency and crypto fraud.



1. The SFO's Extraterritorial Reach

The scope of the SFO's extraterritorial investigative powers came under scrutiny by the Supreme Court in *KBR, Inc. R (on the application of) v Director of the Serious Fraud Office* [2021] UKSC 2 with judgment handed down in February this year.

The Supreme Court held that the SFO could not require a foreign company to produce documents held overseas under section 2(3) of the Criminal Justice Act 1987 (a notice which can be used by the SFO to compel companies and individuals to produce documents

relevant to an investigation), as part of an investigation into one of the foreign company's UK subsidiaries.

The decision overturned a Divisional Court decision, in which the court had "read in" extraterritorial application to section 2(3) powers, provided that a "sufficient connection" could be drawn between the company which was the recipient of the notice and the UK.

The decision limits the SFO's investigative reach as the SFO cannot compel a foreign company or individual to comply with a section 2 notice in respect of documents and/or evidence it holds abroad that may be relevant to the SFO's investigation.



1.1 Comment

The judgment is narrow in scope as it focuses only upon the position of a foreign company with no current or historic business presence in the UK. However, this means that there are outstanding issues which are likely to play out in the courts in the future or may result in a change to the applicable legislation. These include:

1. In the absence of other case law or detailed wording in the statute, whether section 2(3) might have some extraterritorial effect in other scenarios.
2. The impact the decision may have on other UK investigatory and enforcement agencies (e.g. the FCA) and the reach of their investigative powers.
3. Whether the SFO will start to use other mechanisms to investigate and compel document production (e.g. Overseas Production Orders) or continue to use Mutual Legal Assistance agreements and rely on co-operation between countries, which can be slow and cumbersome.
4. The KBR decision made it clear that any extension to the international reach of such powers would be a matter for Parliament rather than the courts. So, this could be an area of change.



2.CROs and WFOs

The interaction between CROs and WFOs came under the spotlight in the

Court of Appeal in March this year.

In *AA v BB* [2021] EWCA Civ 1017, the appellants were two directors of a company in administration who were subject to WFOs. They appealed against the WFOs on the grounds that CROs preventing the dissipation of their assets were already in place and there was therefore no material risk of dissipation. Their appeal was dismissed and the WFOs remained in place.

This followed *London Capital & Finance Plc & Ors v Thomson & Ors* [2020] ECHW 2463 (Ch), which was heard by the High Court in September 2020 and held that WFOs against two respondents (who were already subject to CROs obtained by the SFO) had to continue.

On a similar basis to *London Capital & Finance* the Court of Appeal's reasoning in *AA v BB* was that:

1. There was insufficient provision for the administrators (who were the beneficiaries of the WFOs) to be given notice if the CRO was varied or discharged. They may therefore not have been able to apply in time for a WFO if that happened.
2. The administrators may have separate and well-founded reasons to object to any requested use of the subject assets which would not be considered by the SFO when deciding whether to consent. The CRO therefore might not protect the legitimate interests of the claimant administrators to the extent required.



1.2 Comment

These cases illustrate the interaction between asset preservation in civil and criminal proceedings.

The burden of having to comply with both a WFO and CRO might be raised by respondents. But both may be necessary where the CRO does not deal comprehensively with the risk of asset dissipation. In principle, there is no reason why both a CRO and WFO

cannot be ordered in respect of the same assets, but this will depend on the facts of the case.

There might be cases where a CRO is so watertight that it could remove the need for a WFO. But there are pragmatic and systemic reasons which mean that is unlikely. As illustrated by these cases, claimants in civil proceedings have no control over CROs obtained by other parties in criminal proceedings, which can leave them vulnerable to changes to the CRO by other parties or the court. This can result in claimants being left in the dark or finding out when it is too late to obtain a WFO.

The courts recognise that there is a fundamental difference between criminal proceedings and WFOs available in civil proceedings. The trend in the case law makes clear that the existence of a CRO will not necessarily stand in the way of the grant of a WFO or, in itself, remove the risk of asset dissipation.



3.Cryptocurrency and Crypto Fraud

2021 has seen the courts consider, amongst other things, two important legal issues: (1) how to define persons unknown and (2) the *lex situs* of crypto assets. The case of *Fetch.AI Ltd & Anor v Persons Unknown Category A & Ors* [2021] EWHC 2254 (Comm) (15 July 2021) presented the opportunity for the Commercial Court to examine both issues.

In *Fetch.AI*, the unknown fraudsters gained access to the claimants' cryptocurrency trading accounts and were then able to trade the crypto assets at an undervalue. The crypto assets were ultimately transferred to third party accounts, which the claimants alleged were operated by or on behalf of the fraudsters. The claimants issued proceedings against numerous categories of persons unknown and the cryptocurrency exchange involved. They were granted

a proprietary injunction, WFO and various disclosure related orders.



1.3 How to define persons unknown

One of the issues for the court was how to define the persons unknown against whom the order was being made. The court found that there were different categories of persons unknown, being those who:

1. were involved in the fraud;
2. received assets without having paid full price for them; and
3. innocent receivers (i.e. those who did not know or have reasonable ground to believe that assets belonging to

the claimant had been credited to their account).

The court focussed on the relief being sought against each category of persons unknown and was keen to ensure that innocent receivers did not find themselves in breach of the order granted. The proprietary injunction was therefore drafted to restrict the scope of the proprietary relief against innocent receivers so that the fraudsters were subject to the freezing orders, but innocent receivers were not.



1.4 The lex situs of crypto assets

The court also considered where crypto assets were situated (for an application

for permission to serve out of the jurisdiction on persons unknown). The court followed the reasoning in *Ion Science Ltd v Persons Unknown* and others (unreported), 21 December 2020 (Commercial Court) and re-confirmed that the *lex situs* (i.e. the law of the place where the property is situated) of a crypto asset is the place where the person or company who owns the crypto asset in question is domiciled (in this case, in England).

This is helpful for victims of fraud as they will be able to use their local courts for relief and, for the purposes of jurisdiction, will not have deal with the likely complex and costly issue of identifying where the crypto assets have been dissipated to.

1.5 Comment

Fetch.AI illustrates how the courts are continuing to develop their response to crypto fraud and helping to lay the legal foundations for future cases, which will no doubt follow given the growth of cryptocurrency and the evolving nature of the related legal framework.

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