

BIT BY BIT:

INFORMATION ORDERS IN CRYPTO FRAUD DISPUTE FLY THROUGH GATEWAY 25

ANALYSIS OF LMN V BITFLYER & ORS [2022] EWHC 2954 (COMM)



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In recent months, cryptocurrency exchanges have been seldom far from the news. The sudden collapse of FTX caught the world's attention, with the company filing for Chapter 11 bankruptcy protection in early November 2022. More recently, in January 2023, the Securities and Exchange Commission charged Genesis Global Capital, LLC and Gemini Trust Company, LLC for the unregistered offer and sale of securities to retail investors.¹

Aside from the enhanced regulatory scrutiny likely to be faced by cryptocurrency exchanges, for practitioners acting in cases of crypto fraud, the information held by such exchanges can be vital in tracing misappropriated digital assets. It is for that reason that the recent decision of Mr Justice Butcher in *LMN v Bitflyer and Ors* [2022] EWHC 2954 (Comm) is particularly pertinent since, in the context of an application for information orders against six cryptocurrency exchanges, the High Court considered, for the first time, the new gateway for information orders pursuant to Practice Direction 6B para.3.1 (25).

In granting the relief sought by the Claimant, the judgment in *LMN v Bitflyer and Ors* [2022] EWHC 2954 (Comm) adds to an impressive body of case

law which has emerged since *AA v Persons Unknown* [2019] EWHC 3556 (Comm) whereby the English courts have evinced a willingness and capacity to adapt to the challenges posed by digital assets, particularly in the context of crypto fraud.



What was in dispute?

The Claimant, LMN, is a cryptocurrency exchange incorporated in England and Wales. Approximately two years prior to the court proceedings, hackers breached its systems and removed cryptocurrencies including Bitcoin ("BTC") and Bitcoin Cash ("BCH"). The misappropriated cryptocurrencies were worth millions of dollars. A range of regulatory and law enforcement agencies worked with the exchange in their investigations but having failed to provide further assistance, civil proceedings were commenced.

Relying upon blockchain analysis, LMN identified 26 addresses on the

BTC and BCH public blockchains to which the relevant BTC and/or BCH had been transferred by the hackers or those facilitating the fraud in question. These 26 addresses were distributed amongst the six crypto exchanges who, through various entities, were named defendants to the application.

Before the Court, LMN argued that its investigations could go no further without assistance of the relevant crypto exchanges. Accordingly, the Claimant sought information orders against the Defendants to assist in identifying the individuals behind the exchange addresses.



What did the Court decide?

The Claimant sought information orders against the exchanges coupled with permission to serve the Defendants out of the jurisdiction, and permission to serve by alternative means.

¹ <https://www.sec.gov/news/press-release/2023-7>

The Court declined to hear the substantive application without notice being given to the Defendants and the substantive application was heard at a second hearing on 11 November 2022. The Court allowed both hearings to proceed in private (so as not to tip off the alleged fraudsters).

As to the question of service out of the jurisdiction, the Court followed the well-known approach found in *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7 at [71] per Lord Collins:

- (1) Was there a serious issue to be tried on the merits?
- (2) Was there a good arguable case that the claim fell within one of the 'gateways' in CPR PD 6B §3.1?
- (3) Was England and Wales the appropriate forum for the claim to be tried?

As to the merits under the Bankers Trust and Norwich Pharmacal jurisdictions, the Court concluded that there was a good arguable case that:

- a. cryptocurrencies are a form of property as had been recognised by Bryan J. in *AA v Persons Unknown* [2019] EWHC 3556 (Comm);
- b. cryptocurrencies could be subject to a constructive trust whereby the property is recoverable and traceable in equity; and
- c. the transfer of digital assets such as BTC could be the subject of tracing on the basis of the relevant substituted asset.

The Court concluded that there was a good arguable case that the law of England and Wales was applicable law relying on the fact the Claimant was resident within the jurisdiction for the purposes of determining the *lex situs* of the assets notwithstanding the location of the Claimant's servers in Romania.



Having applied the five principles for the grant of a Bankers Trust order considered in various cases including *Marc Rich v Krasner* [1999] EWCA Civ 581, the Court concluded that there was a good arguable case to grant the relief sought.

As to Bankers Trust relief more generally, the Court also addressed a point raised by one of the Defendants who cited the authority of *Mackinnon v Donaldson, Lufkin & Jenrette Corp* [1986] Ch 482 so as to contend that making a Bankers Trust order against foreign defendants was an infringement of the sovereignty of a foreign jurisdiction and should only be made in exceptional circumstances. Mr Justice Butcher concluded that the approach in *Mackinnon* was inapplicable given the location of the documents sought was unknown and may be of little significance. Irrespective and in any event, the circumstances of the present case were exceptional.

Given that there appeared to be no doubt that the defendant exchanges were, without any wrongdoing or fraud on their part, "mixed up" in the fraud, there was a good arguable case that relief could be granted under the Norwich Pharmacal jurisdiction as well.

The Court was then required to consider whether there was a good arguable case as to the availability of the new gateway in Practice Direction 6B section 3.1(25) ("Gateway 25") which provides as follows:

"A claim or application is made for disclosure in order to obtain information:

- (a) regarding: (i) the true identity of a defendant or a potential defendant; and/or (ii) what has become of the property of a claimant or applicant; and
- (b) the claim or application is made for the purpose of proceedings ... which, subject to the content of the information received, are intended to be commenced either by service in England and Wales or CPR rule 6.32, 6.33 or 6.36."

On the basis of the information available to the Court, England and Wales appeared to be the appropriate forum. The Court took a flexible approach, highlighting that LMN is an English company, that there were good grounds for considering the *lex situs* of the cryptocurrencies to be in England and Wales, that relevant documents were in the jurisdiction, and that there was an arguable case that the law of

the England and Wales governed the proprietary claim.

As to the question of service by alternative means, the Court was satisfied that there was good reason to grant such permission, given the nature of the claim and the need to quickly identify the potential defendants and property.

Ultimately, the Court was content to make the relevant orders requiring provision of the information and documentation sought. Further, the Claimant was required to give undertakings to cover the Defendants' expenses and losses in the usual terms and an undertaking as to collateral use.



What does it mean for clients and for future cases?

The decision in *LMN v Bitflyer & Ors* provides a further welcome reminder of the flexibility shown by the courts in England and Wales to adapt legal principles to aid victims of crypto fraud.

Further, the Court provided helpful clarity as to the applicability of relief under the Bankers Trust jurisdiction in the context of information held by cryptocurrency exchanges.

Finally, and perhaps most significantly, the utility of the new Gateway 25 to obtain information from third parties as to the identities and whereabouts of those who perpetrate pernicious frauds is particularly welcome news for civil fraud lawyers and asset recovery professionals.

