TRACING CRYPTOCURRENCY AND THE ENGLISH COURT'S POWER TO COMPEL DISCLOSURE FROM FOREIGN RESPONDENTS

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Recent cases in the cutting-edge field of cryptocurrency illustrate the limits of the English court's powers to compel disclosure from parties outside the jurisdiction.

Often the proceeds of fraud can be traced into a cryptocurrency wallet account, but it is not possible to identify the wrongdoer without disclosure of information from the crypto exchange that is invariably held by an overseas company. In a recent line of cases the Court has ordered such disclosure, but the scope of this jurisdiction remains uncertain.

Norwich Pharmacal Orders (NPOs)

NPOs may be granted against innocent third parties mixed up in the arguable wrongdoing of another, so that they are more than a 'mere witness'. In such cases the court will order disclosure of information necessary to enable the substantive claims to be brought. Classically, this is the identity of the wrongdoer, but it can include information regarding proprietary assets.

Whether or not an NPO application can succeed against a foreign respondent effectively turns on whether it can satisfy one or more of the jurisdictional gateways in Practice Direction 6B. Relief was granted against US companies in two cases:

- *Lockton Companies International v Persons Unknown* [2009] EWHC 3423 (QB), where the Court held that Google was a necessary and proper party (Gateway 4) to a claim against unknown persons involving allegations of defamation, harassment and data protection infringement by email.
- *Bacon v Automatic Inc* [2011] EWHC 1072 (QB), where the Court held that the relief sought required the respondents to do an act within the jurisdiction (Gateway 2). This decision has been criticised by commentators on the basis that the place of compliance with an NPO is incidental, and that this aspect is not explained in the judgment.

In *AB Bank Limited v Abu Dhabi Commercial Bank PJSC* [2016] EWHC 2082, Teare J declined to follow these authorities and concluded that there is no gateway applicable to an NPO, since:

- An NPO respondent is not a necessary and proper party (Gateway 4) where no substantive cause of action is advanced against them.
- As to Gateway 2, the steps required to disclose the information would take place in the respondent's local jurisdiction and the witness evidence could be provided there, as opposed to being provided to the Claimants' solicitors in England.

The Claimants also relied on Gateway 5, on the basis that the claim was for an interim remedy under section 25(1) of the Civil jurisdiction and Judgments Act 1982. The judge found that a NPO is a substantive rather than interim order, since it fully disposes of the relief sought against the respondent, who will play no further part in the proceedings.

Banker's Trust Orders (BTOs)

BTOs have developed into a separate but related category of equitable relief. They are available against entities who hold or have held the proceeds of arguable fraud where there is a real prospect that the information sought might lead to the location or preservation of proprietary assets.

The test for BTOs is expressed slightly differently from that applicable to NPOs, but they may be seen as a different application of the same jurisdiction. It is therefore perhaps surprising that the authorities below suggest that a BTO, unlike an NPO, may be available against a foreign respondent.

Ion Science Ltd v Persons Unknown and others (unreported), 21 December 2020 (Commercial Court)

Having traced the proceeds of a cryptocurrency Initial Coin Offering fraud to Bitcoin exchanges incorporated in Cayman and the US, the Claimants sought, *inter alia*, disclosure by means of a BTO. Mr Justice Butcher was satisfied that there was a good arguable case for service out of the jurisdiction of a claim for a BTO, applying the following reasoning:

- Gateway 4 permits service out where the respondent would be a necessary or proper party to the 'anchor' claim.
- The test for whether a party is a necessary or proper party is whether both the anchor and foreign defendants would have been proper parties had they both been in the jurisdiction (*Massey v Haynes* [1888] 21 QBD 330).
- That test was satisfied because CPR r7.3 permits the commencement of more than one claim in a claim form if they can be 'conveniently disposed of in the same proceedings'.

Butcher J declined to express a view on the correctness of AB Bank's treatment of Gateway 4 but said that case was arguably distinguishable as it related to an NPO rather than a BTO. He also noted that in *MacKinnon v Donaldson, Lufkin and Jenrette Securities Corporation* [1986] Ch 482 it was envisaged that a BTO may be served out of the jurisdiction in exceptional circumstances, including in cases of 'hot pursuit'.

Subsequent cases

In the following subsequent cases, the Courts have followed the judgment of Butcher J in Ion Science by granting a BTO over a cryptocurrency exchange holding proprietary bitcoin:

- *Fetch.ai Ltd v Persons Unknown* [2021] EWHC 2254, where HHJ Pelling QC expressed reservations as to the NPO/BTO distinction but felt obliged to follow *Ion Science* unless he considered that Butcher J was 'plainly wrong'.
- Most recently, *Sally Jayne Danisz v Persons Unknown and Huobi Global Limited* [2022] EWHC 280 (QB)., where Lane J made express reference to Butcher J's 'hot pursuit' criterion.

In *Mr Dollar Bill Limited v Persons Unknown* [2021] EWHC 2718, the Court went further and ordered an NPO as well as a BTO against the foreign exchanges holding proprietary bitcoin. This appears inconsistent with the authorities above, but it is not clear whether this was drawn to the Court's attention by the applicant at the *ex parte* hearing.

Conclusion

The Court has left the door open to BTOs against overseas respondents, even if Mr Dollar Bill is wrongly decided and NPOs are not available. As matters stand therefore, claimants can seek disclosure orders from crypto exchanges overseas that hold the proceeds of fraud.

This seems an odd result. It is not clear why banks, and quasi-banks (like crypto exchanges), should be more susceptible to such disclosure than other third parties that are innocently mixed up in wrongdoing.

All the decisions granting BTOs above were heard *ex parte*, as the judges were at pains to point out. By contrast, in AB Bank the represented respondent resisted the NPO. It may be that when Ion Science is tested in this context, extra-territorial BTOs will go the way of extra-territorial NPOs and the dodo.

Whatever the outcome, it would seem there is a real issue here for consideration by the Civil Procedure Rules Committee, which we understand is considering the gateways in PD6B. On the one hand, the English Court should be slow to exercise jurisdiction over third parties abroad against whom no substantive relief is sought. On the other, crypto assets illustrate the global challenges of asset recovery in the information age; in principle, fraudsters should not be able to maintain anonymity by parking traceable assets overseas. Perhaps it is time for a bespoke third-party disclosure gateway in 'hot pursuit' cases where there is a real need to identify proprietary assets or defendants subject to the English Court's jurisdiction