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IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
LONDON CIRCUIT COMMERCIAL COURT (QBD)
[2022] EWHC 2543 (Comm)

No. LM-2022-000125

Rolls Building
Fetter Lane
London, EC4A 1NL

Monday, 5 September 2022

Before:

MR NIGEL COOPER QC
(Sitting as a Judge of the High Court)

B E T W E E N :

GARY JONES

Applicant/Claimant

- and -

(1) PERSONS UNKNOWN

(being the individuals or companies who obtained access to the First Applicant's BTC accounts between about 22.1.2019 and 10.1.2020 and carried out the transactions [on or about the same dates] as a result of which the crypto currencies held in those accounts were transferred to other accounts ("Transferred Assets"))

(2) PERSONS UNKNOWN

(Being the individuals or companies who own or control the accounts into which the Transferred Assets were transferred other than purchasers for full value)

(3) PERSONS UNKNOWN

(Being the individuals or companies who are innocent receivers who have no reasonable grounds for thinking that what has appeared in their account belongs to the Applicant/Claimant)

(4) HUOBI GLOBAL LIMITED (a company registered in the Seychelles)

Respondents/Defendants

J U D G M E N T

A P P E A R A N C E S

MR A. MAGUIRE (instructed by Harrison Clark Rickerbys) appeared on behalf of the
Applicant/Claimant.

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

THE JUDGE:

- 1 This is an application for summary judgment, for an order for the delivery of 89.61616088 Bitcoin belonging to the claimant and an order for costs. The application is made in an action where the applicant claims against the first and second defendants for deceit and unjust enrichment, and against the fourth defendant as constructive trustee of the applicant's Bitcoin because the fourth defendant is the controller of the wallet in which the claimant's Bitcoin are to be found. The claimant also makes claims against the third defendant but those claims are not material for today's purposes.
- 2 The claimant, Mr Jones, has previously obtained a without notice worldwide freezing injunction against the first and second defendants and a proprietary injunction against the first and second defendants and against the fourth defendant, initially from HHJ Pelling QC on 28 June 2022, and on the return date a continuation order for both injunctions from Mr Simon Birt QC (sitting as a Judge of the High Court) on 22 July 2022. The purpose obviously of these injunctions was to seek to recover Mr Jones' stolen Bitcoin or to recover their value against the first and second defendants and against the fourth defendant.
- 3 Service of the original orders and a statement of case took place in accordance with the order of HHJ Pelling QC by email and first class post on the fourth defendant, and by filing at court via the CE system as against the first to third defendants. Initial service took place on 30 June 2022 and the service of the return date order took place on 27 July 2022.
- 4 No contact has been made by the first and second defendants, or by the fourth defendants. The time for filing a defence has now elapsed but the claimant seeks summary judgment rather than judgment in default. That is summary judgment for relief including delivery up as sought against the first and second defendants and against the fourth defendant.
- 5 In terms of evidence, I have before me the affidavit of Mr Jones, the claimant, and the exhibits thereto, which include reports from a company known as CiRO, a cyber investigation consultancy. I also have in front of me the first and second witness statements of Mr Steven Murray of Harrison Clark Rickersby. Mr Murray is a partner with that firm who had conduct of this matter on behalf of the claimant. What follows by way of factual matrix is taken from that evidence, which I accept in the absence of any contrary evidence.
- 6 Mr Jones is the victim of a large scale cyber fraud perpetrated by a group of online cyber criminals located overseas. There is a suggestion that they are based in Russia. That fraud targeted individuals through a website known as www.extickpro.com, which is a fake crypto investment company promising high returns and persuading clients to set up cryptocurrency accounts on Extick Pro, the EP platform and to transfer cryptocurrency to this fake online trading platform, which I understand has now been shut down.
- 7 Mr Jones initially responded to an online advertisement on the EP platform in January 2019 and having contacted the fraudsters opened an online account the following week. Mr Jones became a regular investor in cryptocurrencies, in particular Bitcoin, between 22 January 2019 and 10 January 2020. During that period he invested a total of £480,206, purchasing Bitcoin from three cryptocurrency exchanges which was then transferred to the EP platform. Mr Jones stated that he bought 89.61616088 Bitcoin, which I understand at today's value has a value of approximately £1.536 million.
- 8 Mr Jones did not operate the funds on the EP platform himself. Any trades he made were actioned by a so-called representative of the EP platform, while on a phone call with

Mr Jones using remote desktop software. It appears that none of the so-called trades in fact took place. The EP platform simply showed that the trade had occurred and appeared to show large profits accruing in Mr Jones's account. That profit was entirely fictional and subsequently the persons operated the EP platform took control of the Bitcoin and dissipated the funds across the Bitcoin blockchain.

- 9 Mr Jones did make several attempts to recover the money by telephone and email and eventually asked to withdraw his funds from the EP platform. Perhaps unsurprisingly, Mr Jones has been unable to obtain his money and was repeatedly given false explanations for why the repeated request to withdraw the funds were delayed. Eventually in early 2020 Mr Jones sought to close his account on the EP platform. He did apparently receive a small return of \$2,100 on 31 December 2019 but has otherwise not been able to recover his monies from the EP platform.
- 10 On 1 May 2020 Mr Jones instructed lawyers and investigators to attempt to recover his money. The CiRO expert report of 5 April 2022 provides evidence of a wallet connected to this fraud, which is associated with the Huobi Exchange and which as at 1 April 2022 contained 488.71693660 Bitcoin. A report provided to me today highlights that that quantity of Bitcoin has in fact decreased, notwithstanding the proprietary freezing order previously made.
- 11 The claimant has available to him the wallet deposit address for the wallet with the Huobi Exchange. I do not propose to repeat the whole address in this judgment but will simply adopt the claimant's definition and call it the "tHEL wallet." As at 20 July 2022 I understand that the tHel wallet held a balance of 14,986 Bitcoin, which was apparently equivalent to US \$345,148,288. I am informed by Mr Maguire that the Bitcoin held in that wallet can only be Bitcoin which has been transferred to the wallet by individuals connected with the fraud on the claimant.
- 12 As I have already said neither the first or second defendant, nor the fourth defendant, has sought so far to engage in this litigation despite being served, and the claimant now seeks summary judgment both against the first and second defendants and against the wallet provider, the fourth defendant, Huobi Global Limited and for a delivery up order against the fourth defendant.
- 13 The claimant seeks permission to serve the order out of the jurisdiction on the first and second, and fourth defendants pursuant to CPR Rule 6.38. He submits that his causes of action, deceit, unjust enrichment and an equitable proprietary claim are sufficient to establish that the relevant gateways have been satisfied. Of course he has already satisfied HHJ Pelling QC that his claim met sufficient gateways to justify service out of the jurisdiction of the claim form and associated documents. The claimant also seeks alternative service against the first and second defendants, and against the fourth defendant pursuant to CPR Part 6, Rule 15 and CPR Part 6, Rule 27.
- 14 Finally service by alternative means is sought against the first and second, and fourth defendants by way of a non-fundable token ("NFT") by means of an air drop into the tHEL wallet deposit address. That is a method of service that has previously been approved by this court on an application for interim relief in the case of *D'Aloia v. Persons Unknown* [2022] EWHC 1723 (Ch) [38 - 40].
- 15 Turning briefly to the nature of the claimant's claims, as against the first and second defendant the claimant says simply that there has been a theft of his property, namely the

Bitcoin, in what he describes as a compellingly stark and simple case of deceit and unjust enrichment. He says that in the absence of any evidence, in rebuttal of his claims by the defendants he is entitled to judgment on his claims. Likewise as against the fourth defendant the claimant submits that he had equitable proprietary claim in relation to the Bitcoin which were ultimately transferred in whole or in segments from the fake website account into the wallet on the Huobi electronic trading platform.

- 16 The claimant also seeks a continuation of, on a final basis, of the interim proprietary and non-proprietary injunctions granted by HHJ Pelling QC and continued by Mr Simon Birt QC, sitting as a Deputy High Court Judge.
- 17 Turning first to deal with the issue of summary judgment, summary judgment can be given against a defendant on the whole of a claim or on a particular issue if the court considers that the defendant has no real prospect of successfully defending the claim or issue - that is CPR Part 24, Rule 2(a)(ii) - and there is no other compelling reason why the case or issue should be disposed of at trial.
- 18 The test for summary judgment is well-known and is conveniently summarised by Lewison J, as he then was, in *Easyair Ltd v. Opal Telecom Ltd* [2009] EWHC 339 (Ch) [15]. That summary has subsequently been approved by the Court of Appeal in, for example, *AC Ward & Son v. Catlin (Five) Ltd & Ors* [2009] EWCA Civ. 1098. In *Easyair* Lewison J, as he then was, was dealing with an application by a defendant, accordingly references in the first two subparagraphs of his citation at para.15 should be read as referring to the defendant rather than the claimant. In other words:

"(i) The court must consider whether the [defendant] has a 'realistic' as opposed to a 'fanciful' prospect of success;

(ii) A 'realistic' [defence] is one that carries some degree of conviction. This means a [defence] that is more than merely arguable."

It is not appropriate for the court to conduct a mini trial but equally:

"(iv) This does not mean that the court must take at face value and without analysis everything that a [defendant] says in his statements before the court ...

(v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial."

I do not consider it necessary to address the remainder of the factors identified by Lewison J. because they do not arise in this case.

- 19 In essence, as Mummery LJ summarised, the test for summary judgment in relation to a defence:

"Everyone would agree that the summary disposal of rubbishy defence is in the interests of justice. The court has to be alert to the defendant, who seeks to avoid summary judgment by

making a case look more complicated or difficult than it really is."

Of course in this case the defendants have not sought to put any evidence before the court in rebuttal of the evidence provided by the claimant and the claimant's evidence is, it seems to me, compelling and sufficient to establish each of the claims that the claimant seeks to make against the first and second defendants, and indeed against the fourth defendant.

- 20 In short I am satisfied on the evidence, that I have already summarised previously in this judgment, that the claimant is entitled to judgment against the first and second defendant for deceit an unjust enrichment, such that he is entitled to the return of the Bitcoin that he transferred to the first defendant through the EP platform, or their equivalent either in Bitcoin or tHEL currency.
- 21 I am also satisfied that the fourth defendant does sit in the position of a constructive trustee as against the claimant, because it is the fourth defendant who is the controller of the wallet into which the Bitcoin was apparently paid. There is no evidence that either the fourth defendant nor any other party has any proprietary interest in respect of the claimant's Bitcoin, which would override the claimant's beneficial interest in that Bitcoin. Accordingly I am satisfied that the claims made by the claimant against the fourth defendant as constructive trustee for the return of his Bitcoin should also succeed.
- 22 It therefore also follows in relation to both the first, second and fourth defendants that the claimant is entitled, alongside any other remedy, for the restitution of his Bitcoin to an order for delivery up of his Bitcoin, either pursuant to the common law rule in *Saunders v. Vautier* (1841) 4 Beav 115 or pursuant to s.37 of the Senior Courts Act 1981.
- 23 The claimant also seeks a proprietary injunction preventing the disposal of his Bitcoin. One issue that arises in this respect is whether or not the Bitcoin is property for the purposes of making the application. While I appreciate that is still a contentious issue, it seems to me that there is now sufficient authority under English case law that that Bitcoin is to be treated as property, that the claimant makes good his case that he is the owner of the property in the Bitcoin. To the extent I need to refer to the authorities the position is dealt with in some detail by Bryan J in *AA v. Persons Unknown* [2019] EWHC 3556 (Comm).
- 24 Otherwise the Claimant relies on the well-established principle of property or money stolen or obtained by fraud are traceable in equity and in which his proprietary interest can be enforced by way of the imposition of a constructive trust. Again I am satisfied in relation to both the first and second defendants, and the fourth defendant, that the claimant is entitled to his proprietary injunction. I am also satisfied that the claimant is entitled to a continuation on a final basis of the freezing injunction previously granted HHJ Pelling QC, sitting as a High Court Judge.
- 25 Now at the time HHJ Pelling granted that injunction it was of course to prevent the risk of dissipation pending trial of the claimant's claims. However, freezing injunctions can and routinely are continued post judgment in order to aid the process of execution. I am satisfied that there is a continuing risk of dissipation such that it is appropriate to continue the non-proprietary freezing injunction as well as continuing the proprietary injunction.
- 26 That leaves only the question as to whether there are any other variations to the terms of the injunctions previously granted. As discussed with Mr Maguire, he will embody both the proprietary injunction and the non-proprietary freezing injunction into further orders for this

court to make. Given that the injunctions are now being made following judgment in the claimant's favour, it seems to me that it is appropriate to release the claimant from his cross-undertaking in damages given in support of both injunctions.

- 27 I should add this. In relation to both of the injunctions, as already noted, I am of course now making them on a final basis and in that regard I am satisfied that simply to order the payment of damages to Mr Jones would not be an adequate remedy. If he is going to make any recovery in this case, it seems to me that it is very likely to be because of the combination of injunctive relief binding on the first and second defendants, and on the fourth defendants, and by the transfer of either the claimant's Bitcoin back to him or by the transfer of an equivalent number of Bitcoin.
- 28 That deals with the summary judgment application, the application for the continuation of the proprietary and non-proprietary freezing injunctions, as well as the order for delivery up. It leaves only the question of what orders I should make in terms of the service of the orders.
- 29 Of course as already noted, HHJ Pelling QC has previously granted permission to serve overseas, out of the jurisdiction, in respect of the claim form and other documents. It seems to me that it is appropriate, however, to make a further order providing for service of this final order, not least to ensure that there can be later no argument as to whether or not the order was adequately served.
- 30 To the extent it is necessary for the claimant to establish that he comes within the relevant gateways found in Practice Direction 6B, I am satisfied that as against the first and second defendants both Gateway 9, which relates to tort, and Gateway 16, which relates to unjust enrichment, are satisfied. Not least because the claimant's claims in tort are claims where the damage is sustained, or will be sustained, within the jurisdiction, the claimant being domiciled in this jurisdiction. To the extent authority is needed for this proposition, I refer to the case of *Ion Science & Anor v. Persons Unknown, Binance Holdings Ltd and payment Ventures Inc.* [2020] EWHC (QB), a decision of Butcher J.
- 31 Likewise the claimant's claim for restitution arises out of acts committed within the jurisdiction such that, as against the first and second defendants, he also satisfies Gateway 16. As against the fourth defendant the claim is made against the fourth defendant as constructive trustee, or as a constructive trustee in circumstances where the claim arises out of acts committed or events occurring within the jurisdiction or relating to assets within the jurisdiction. Again in circumstances where the claimant is domiciled within this jurisdiction I am satisfied that against the fourth defendant Gateway 15 is satisfied. Accordingly, to the extent it is necessary to make an order for permission to serve the order out of the jurisdiction on the first and second defendants, and on the fourth defendant, pursuant to CPR Rule 38, I do so.
- 32 That therefore leaves only the question of alternative service and the claimant seeks an order for alternative service against the first and second defendants, and against the fourth defendant pursuant to CPR Part 6, Rules 15 and 27. Mr Murray has previously filed a short witness statement setting out the reasons why service overseas is required and why alternative service is also sought. In summary both the first and second defendants are likely to be outside the jurisdiction and the fourth defendant is registered in the Seychelles. No traditional means of service are likely to be effective in relation to the first and second defendants, and it does therefore seem to me to be appropriate to make an order for alternative service.

- 33 This is an exceptional case. In circumstances not dissimilar to those considering by Bryan J in *AA v. Persons Unknown*, the citation for which I have previously given, it is not currently known where the first or second defendants are, or indeed who they are. There is no jurisdiction being identified where they are domiciled. Service by email and service of the claim form by the alternative method of filing it at the court, or by WhatsApp, or by way of the non-fundable token are the means most likely to bring the proceedings and this order to the attention of the first and second defendants and therefore meet the justice of this application.
- 34 Likewise as against the fourth defendant - it is the fourth defendant who is registered in the Seychelles - service pursuant to the Hague Convention would be too slow. Service by email and indeed by non-fundable token is appropriate because it is important that the order comes to the attention of the defendants quickly, not least because 89.61616088 Bitcoin could be dissipated at any moment simply at the flick of a mouse. Ultimately the Bitcoin belong to the claimant and this court should assist, insofar as it is properly able to do so, in ensuring that the court's orders are enforced, and to enable the return of his property to him if that is possible.
- 35 Accordingly, as I have said, this is a case of exceptional circumstances such as to justify service by alternative means. In those circumstances I give judgment for the claimant on terms that are to be embodied in the draft orders to be drawn up by the claimant and submitted to me for approval.
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CERTIFICATE

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This transcript has been approved by the Judge.