IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND & WALES
COMMERCIAL COURT (QBD)

No. CL-2020-000840

Royal Courts of Justice
Strand
London, WC2A 2LL

Monday, 21 December 2020

Before:

MR JUSTICE BUTCHER

(In Private)

B E T W E E N :

(1) ION SCIENCE LIMITED — First Claimant/Applicant
(2) DUNCAN JOHNS — Second Claimant/Applicant

- and -

(1) PERSONS UNKNOWN
(being the individuals or companies, describing themselves as being or connected to 'Neo Capital', some of whom gave the aliases Marilyn Black, Claire Jones, Robert Welsh, Carey Jones, Mia Davis and Grant Ford, who participated in a scheme to induce the Applicants to transfer Bitcoins between March-October 2020 in the belief that they were investing in Dimecoin and/or Ethereum and/or Uvexo and/or Oileum)
First Defendant/Respondent

(2) BINANCE HOLDINGS LIMITED
(a company registered in the Cayman Islands)
Second Defendant/Respondent

(3) PAYMENT VENTURES INC.
(a company incorporate in the United States of America)
Third Defendant/Respondent

J U D G M E N T

(Ex Parte)

A P P E A R A N C E S

MR S. GOODMAN (instructed by Rahman Ravelli Solicitors) appeared on behalf of the Applicants.

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

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MR JUSTICE BUTCHER:

1 This is an urgent *ex parte* application which has been brought by the claimants for the following relief. Firstly, a proprietary injunction, a worldwide freezing order and an ancillary disclosure order against what has been called the first respondent, which are persons unknown, being individuals or companies describing themselves as being or connected to Neo Capital; secondly, a disclosure order pursuant to the *Bankers Trust* jurisdiction and/or pursuant to CPR 25.1(g) against the second and third respondents, Binance Holdings Ltd and Payment Ventures Inc; and, thirdly, permission to serve out of the jurisdiction and by alternative means. This hearing has been heard in private because of the risk of tipping off and/or that a public hearing might frustrate the object of the relief sought.

2 The claimants, in summary, believe that they have been the victims of a cryptocurrency initial coin offering or ICO fraud. By way of introduction, the first claimant is a company registered in England and Wales which specialises in gas detection products and the second claimant is an individual domiciled in England and Wales who is Ion Science's - that is to say the first claimant's - sole director and the sole shareholder of that company's holding company.

3 Over the period February to October 2020 the applicants say that they were induced by the persons unknown, who as I have said are called on this application the first respondent, who described themselves as being connected to a supposed Swiss entity called Neo Capital, to transfer £577,002 in the form of some 64.35 bitcoin in the belief that they were making investments in real cryptocurrency products. The applicants say that Neo Capital itself is not a real company. They have, they say, established that it does not appear on the Swiss version of the Companies House register, that the Swiss financial services regulator has issued a warning that it may be providing unauthorised services, and that it has no presence online beyond a website. The second respondent, Binance Holdings, is a Cayman company that the applicants say is believed to be the parent of the group of companies that operates the Binance Cryptocurrency Exchange; and the third respondent, Payment Ventures, is a US entity that it is believed is the parent of the group of companies that operates the Kraken Cryptocurrency Exchange.

4 What the applicants are seeking on this application is to secure the assets, namely the bitcoin or traceable proceeds thereof, which they believe to have been misappropriated and to preserve the assets of the Neo Capital individuals - in other words, those persons who are within what has been called the first respondent - pending enforcement; and to discover the true identity of those individuals so that an effective remedy can be sought against them.

5 The facts which have been presented on this application to me are set out in an affidavit of Syedur Rahman. I will deal with them in brief. I have read that affidavit and clearly have relied on it on this application. What is said is that in the early part of this year Mr Johns received a call from someone claiming to be from a company called Neo Capital who asked Mr Johns whether he was interested in investing in Cryptocurrency. Although Mr Johns stated that he was not, the man said that he would put Mr Johns in touch with a senior adviser at Neo Capital called Marilyn Black or Ms Black, as I will refer to her. She made contact with Mr Johns a few days later by phone and told him that she worked for Neo Capital, a company based in Zurich that specialised in investments for high net worth clients. In early March 2020 Ms Black persuaded Mr Johns to make a small personal investment into two cryptocurrencies called Ethereum and Dimecoin which are genuine cryptocurrencies. Those investments were successful, producing a return of some £15,000. The investments had been made by Ms Black herself who had convinced Mr Johns to give

her remote access to his computer. He had watched her make the trades live on the screen. The apparent success of those investments gave Mr Johns confidence in both Ms Black and services that Neo Capital could offer.

6 Subsequently, in the period between May and July 2002 Ms Black continued to grow close to Mr Johns and sought to persuade him to invest in an initial coin offering called Uvexo. She said that she had worked for Uvexo and she introduced him to a woman called Carey Jones who supposedly currently worked for Uvexo. Ms Jones told Mr Johns that Uvexo would be launching its own cryptocurrency following the ICO and that Mr Johns had the chance to buy in early and achieve a high return. Mr Johns decided that any investment in Uvexo would be made by Ion Science rather than by him personally, but Ms Black said that the investment should not be made in the company's name. What accordingly happened was that moneys were transferred from the company's account at HSBC to Mr Johns' personal account at Barclays; and the evidence is that in reliance on the implied representation that Uvexo was a genuine investment and the specific representations about Uvexo which had been made by Ms Black and by Carey Jones, Mr Johns granted Ms Black remote access to his computer. A total of £45,002 was transferred by Mr Johns from his personal bank account to his Coinbase account. That was converted into bitcoin by Ms Black and the resulting bitcoin (5.244 bitcoin) were transferred by Ms Black purportedly to a wallet address held by Uvexo.

7 Thereafter on about 3 August 2020 Ms Black called Mr Johns with a view to selling him another investment in an ICO. She then called him again and put him through to a woman called Claire Jones who described an ICO in something called Oileum which related, apparently, to a business of reclaiming muds that are a waste from drilling operations. Mr Johns was persuaded to make an investment in an ICO for Oileum and, again, Mr Johns granted Ms Black remote access to his computer. On dates between 6 and 20 August a total of £218,000 was transferred by Mr Johns from his personal bank account to his Coinbase account, that was converted by Ms Black into bitcoin (23.717 bitcoin) and those bitcoin were transferred by Ms Black supposedly into Oileum.

8 The third aspect is that in September 2020 Ms Black informed Mr Johns that the profits from Oileum amounted to some $15 million and that was now due, but that commission needed to be paid in order to release that amount. Ms Black repeatedly sought to persuade Mr Johns to make those commission payments. Ms Black persuaded Mr Johns to make payments in respect of those commissions in the following way, namely that Mr Johns again granted Ms Black remote access to his computer and between 14 and 16 September a total of £250,000 in the form of 29.083 bitcoin were transferred by Ms Black supposedly into an escrow account for commission payments.

9 The total, therefore, in summary, was that Ms Black had converted £577,000 of the funds deposited into Mr Johns's personal Coinbase account into 64.35 odd bitcoin and although £8,741 of that £577,000 was paid by way of transaction fees to Coinbase, the remainder was transferred away. Neither of the applicants have transferred any further sums, neither has been paid any part of the profits supposedly made in relation to the Oileum ICO and neither has received back any of the funds which were invested. The evidence was that Mr Johns has continued to maintain cordial contact with Ms Black, but she continues to state that the further commission payments need to be made before Oileum profits can be released.

10 I have also read as part of the application an expert report of Marlon Pinto for which I give formal permission. He is an expert in relation to cryptocurrency frauds and he gives evidence that a substantial part of the bitcoin to which I have referred as having been transferred or their traceable proceeds appears to have ended up at accounts held by the

Binance and Kraken exchanges. Mr Pinto gives evidence that the exchanges are likely to hold information about the customers to whom those accounts belong.

11 That being a summary of the evidence which has been put before me in relation to the facts, I turn to the basis in law on which this application is made. There are two preliminary matters which should be dealt with. First of all, I am satisfied that there is at least a serious issue to be tried that cryptoassets such as bitcoin are property within the common law definition of that term. There are a number of decisions, albeit on interim applications, which have come to that view, those being based, at least in part, on the analysis in the UK Jurisdiction Task Force statement on Cryptoassets and Smart Contracts. It is also right to mention that the same conclusion was reached in New Zealand in the case of *Ruscoe v Cryptopia Ltd (in liquidation)* [2020] NZHC 782. The other aspect is that there have been a number of cases which have recognised that it is possible for the court to issue claims and to make injunctions against persons unknown, the critical feature being that the description used must be sufficiently certain as to identify both those who are included and those who are not.

12 The first substantive issue which requires consideration is as to whether there is jurisdiction over the first defendant / respondent; in other words, the persons unknown. Of course, the applicants do not know where the individuals are located. They are, accordingly, seeking permission to serve them out of the jurisdiction on the basis that some or all of those individuals may neither be present nor domiciled in England and Wales. In order to obtain leave to serve out, the court has to be satisfied that there is a serious issue to be tried on the merits, that there is a good arguable case that the claims fall within one of the gateways under CPR PD 6B, and that England is the appropriate forum for the trial of the dispute.

13 As to the first of those, whether there is a serious issue to be tried on the merits, I am satisfied that the applicants can show at least a serious issue to be tried on the merits of their claims, those claims being brought or intimated in deceit, unlawful means conspiracy and by way of an equitable proprietary claim. As to the first of those, deceit, it is important to consider at the outset the question of what would be the governing law of the claim. I am satisfied that there is at least a serious issue to be tried that it is English law pursuant to Article 4.1 of Rome II on the basis that England was the place where the damage occurred, either on the simple basis that the bank account which funded the Coinbase account was an English account or that the asset was taken from the claimants' control in England and Wales, because Mr Johns granted remote access to his computer which was in England and Wales; or alternatively because the relevant bitcoin were located in England and Wales prior to the transfer. The second of those aspects is on the basis that the *lex situs* of a cryptoasset is the place where the person or company who owns it is domiciled. That is an analysis which is supported by Professor Andrew Dickinson in his book **Cryptocurrencies in Public and Private Law** at para.5.108. There is apparently no decided case in relation to the *lex situs* for a cryptoasset. Nevertheless, I am satisfied that there is at least a serious issue to be tried that that is the correct analysis.

14 As to the elements of a claim in deceit, I am satisfied that there is a serious issue to be tried that the relevant defendant, the first respondent, as they have been called, made representations which were false, which they knew were untrue or were reckless as to their truth, intending that those representations would induce the claimants and which did in fact induce the claimants to act by way of making or allowing the payments to be made, as a result of which the claimants suffered loss. I am also satisfied that there is a serious issue to be tried that the claimants have a claim in unlawful means conspiracy; and that there is a serious issue to be tried as to an equitable proprietary claim in respect of the bitcoin which were transferred on the basis that the property was obtained by fraud and was held on trust

for the victim of the fraud, or on the basis that there was a Quistclose trust in that the moneys were paid for a specific purpose which has failed. The transferors were, at least on the basis of the material which has been put before me, told that the moneys to be paid would be held and applied for a specific purpose only and the relevant sums were transferred on that basis. I also consider that in relation to the question of the availability of a gateway within PD 6B that the applicants can show a good arguable case that the tort claims fall within Gateway 9 as either the damage was sustained within the jurisdiction or was sustained as a result of acts committed within the jurisdiction, namely the making of representations to Mr Johns, the transfer of funds and the granting of remote access to Mr Johns' computer in England.

15 The equitable proprietary claim can be said to fall within Gateway 15 as being a claim made against the defendant as constructive trustee or as trustee of a resulting trust where the claim arises out of acts committed or events occurring within the jurisdiction or relates to assets within the jurisdiction, the relevant acts on this basis occurring within the jurisdiction, namely the making of or the reliance on representations and the transfer of funds or the granting of access to Mr Johns's computer, and the claim relates to assets which, on the basis of the argument which I have mentioned, have their *lex situs* within the jurisdiction.

16 Finally in relation to the proper forum, in a case of a persons unknown claim it is obviously difficult to identify another forum, but here in addition to that simple point that the claimants are domiciled in England and Wales, the relevant funds were transferred from England and Wales, the relevant bitcoin are or certainly were located in England and Wales and also the documents are in English and the witnesses are based in England, at least on the claimants' side. For all of those reasons, I am satisfied for the purposes of this application that it has been shown that England is the proper forum for the trial of the claimants' claims.

17 As to the claim for a proprietary injunction against the first respondent, the persons unknown, a proprietary injunction requires the claimant to show that there is a serious issue to be tried. That, I am satisfied, has been shown on the basis of the facts which I have already summarised. It requires the showing of a balance of convenience in favour of the grant of an injunction which, of course, involves a consideration of whether damages are an adequate remedy. Here, it seems to me, on the material I have at the moment, that the balance of convenience is in favour of granting an injunction, given that there is a *prima facie* case of wrongdoing and that there is no evidence that the individuals in question will be able to satisfy a monetary judgment for what is a significant sum. Thirdly, such an injunction involves a consideration of whether it is just and convenient to grant the order, and in this case I consider that it is on the basis of the material which is before me as it appears that the applicants have been the victims of an extensive cyber fraud.

18 The applicants also seek a worldwide freezing order and an ancillary disclosure order against the first respondent, the persons unknown. That requires that the court have jurisdiction, which I have already dealt with, and that the claimants have a good arguable case on the merits. I have already dealt with the facts. It appears to me that they do indicate a good arguable case on the merits. It is also necessary that there is a real risk of dissipation. Here I consider that the material before me indicates that there is a real risk of dissipation, given the nature of the underlying claim; the defendants' conduct which involves, if the claimants' evidence is accurate, the use of aliases and apparently false documents; and thirdly, the nature of Neo Capital which is not a registered entity and is on a regulator's warning list. There is in this case, unlike the ordinary case, no showing that there are assets which could be caught by the order. That is a typical feature of a persons unknown case. Nevertheless, it does not seem to me that it can be a bar to the grant of this type of freezing order in this type of case. Finally, the grant of a worldwide freezing order of this sort

requires that it should be just and convenient to grant the injunction and I am satisfied that it is in order to assist the victims of what appears to have been a significant and prolonged cyber fraud. Accordingly, I am willing to make the orders for proprietary injunctions and a worldwide freezing order and an ancillary disclosure order against the first respondents.

19 I turn then to the orders sought against the second and third respondents, Binance Holdings and Payment Ventures. What is sought here is disclosure orders pursuant to the *Bankers Trust* jurisdiction and/or CPR 25.1(g). This is an aspect on which the claimants place considerable importance in that they say that without such an order the true identity of the individuals who they contend were involved in this fraud may never be known, such that they would be left without any effective remedy. Mr Goodman submits that it would be highly inconvenient in a case like this if there were not the ability to obtain relief of the sort which the claimants are seeking against the exchanges in this case. I have been satisfied that there is a basis on which the court can permit service out of a claim for a *Bankers Trust* order on a party outside the jurisdiction, even where no positive remedy is sought against that respondent other than information. I have been satisfied of that to the extent of a good arguable case. The basis on which I have been satisfied is that there is a good arguable case that such respondents would be necessary or proper parties within the meaning of CPR PD 6B para.3.13 to the anchor claim. The way in which that was put and which I accept gives rise to a good arguable case is that the test for whether a party is a necessary or proper party is that established a long time ago in *Massey v Haynes* [1888] 21 QBD 330, namely if one supposes that both parties had been within the jurisdiction, would they both have been proper parties to the action? The question, therefore, is whether a claim for a *Bankers Trust* order could be brought in the same proceedings as the anchor claim. That depends on CPR 7.3 which permits the commencement of more than one claim in a claim form if they can be conveniently disposed of in the same proceedings. Here a claim for disclosure pursuant to a *Bankers Trust* order could be conveniently disposed of in the same proceedings and, indeed, it would be just and convenient in many cases, of which this would be one, for that to be the case in order to facilitate the identification of the persons unknown.

20 It is accepted by the claimants that there is authority in the form of the decision in *AB Bank Ltd v Abu Dhabi Commercial Bank PJSC* [2016] EWHC 2082, which is a case involving *Norwich Pharmacal* orders, that there was no gateway which permitted service out of the jurisdiction against a third party for the purposes of a *Norwich Pharmacal* order. The claimants contend that that decision was wrongly decided on the basis that the judge considered that it was necessary for the third party to be liable in respect of the same cause of action. That, the claimants say, was ill-founded, and that there was no necessity for that for the purposes of a party being a necessary or proper party. It is said by the claimants that the judge in the *AB Bank* case was wrong not to follow the decision in *Lockton v Google Inc* [2009] EWHC 3243 (QB) in which Eady J permitted service out of the jurisdiction of a *Norwich Pharmacal* claim.

21 I am not going on this interim application in circumstances where I have only heard one side of the argument to express a view as to whether the case of *AB Bank Ltd* was correctly decided. It seems to me that it is distinguishable on the basis that it related to *Norwich Pharmacal* orders, whereas what is here sought is a *Bankers Trust* order and on the basis that in *MacKinnon v Donaldson, Lufkin and Jenrette Securities Corporation* [1986] Ch 482 what was envisaged was that a *Bankers Trust* order might be one where there can be service out of the jurisdiction in exceptional circumstances, and that those exceptional circumstances might include cases of hot pursuit. That is this type of case. As I say, I consider that there is a good arguable case that there is a head of jurisdiction under the necessary or proper party gateway. I should also say that it seems to me that there is a good arguable case that the *Bankers Trust* case can be said to relate wholly or principally to

property within the jurisdiction on the basis of the argument which I have already identified which is that the bitcoin are or were here and that the *lex situs* is where the owner resides or is domiciled. Accordingly, I consider that there is a basis on which jurisdiction can be established.

22 The test for relief in relation to a *Bankers Trust* order is whether there have been shown to be good grounds for concluding that the property in respect of which disclosure is sought belongs to the claimant; that there is a real prospect that the information sought will lead to the location or preservation of those assets; that the order should not be wider than necessary; that the interests of the applicant in getting an order have to be balanced against any detriment to the respondent; and the applicant should provide undertakings only to use the documents for the purpose specified and, of course, to pay the respondent's expenses of compliance and to compensate the respondent for loss if the order was wrongly made. Here, as I have already said, there are grounds for concluding that the assets, the bitcoin, are the applicants' property and that there is a real prospect that the information sought from Binance Holdings and Payment Ventures will lead to the location and preservation of the applicants' property. I have already referred to the expert report of Marlon Pinto and I have already said that in fact the applicants say that the order which they seek here is really their only hope of locating and preserving the property in question. At least, they say, the disclosure will enable them to learn who received the property.

23 The question of whether the order goes wider than necessary is one which can be dealt with by looking at the terms of the order more precisely. In relation to the question of whether the interests of the applicants in getting the order outweigh the detriment to the respondents, the interests of the applicants here in obtaining the order are clear. As to detriment to the respondents, those are likely to be limited to the costs and the intrusion into the confidentiality of the identities of the alleged wrongdoers and possibly of innocent third parties. As to the first of those, costs, an undertaking will be given by the claimants. In relation to an intrusion into privacy or confidentiality, the report of Mr Pinto concludes that it is extremely unlikely that the relevant bitcoin have passed through the hands of innocent parties on the way to the Binance and Kraken exchanges, but if there is information revealed in relation to innocent parties, it will be protected by undertakings as to the use of documents. Accordingly, it appears to me that this is a case in which it is appropriate for there to be a *Bankers Trust* order in respect of the two exchanges.

24 The applicants also seek orders for alternative service pursuant to CPR 6.15 and 6.27 against all the respondents. Given that the United States and the Cayman Islands, which are the relevant domiciles for the second and third respondents, are signatories to the Hague Service Convention, the applicants have to show exceptional circumstances in order to obtain such an order. Here I consider that there are exceptional circumstances for essentially the same reasons as Bryan J considered that there were exceptional circumstances in the case of *AA v Persons Unknown* [2019] EWHC 3556 (Comm), namely that the application concerns urgent injunctions, given that the relevant bitcoin could be dissipated at any moment, the whole nature of bitcoin meaning that they can be moved at the click of a button, and that this claim involves a proprietary claim where it is important that the relief is obtained as soon as possible to preserve proprietary rights. Accordingly, I will give permission for there to be service by alternative means.

25 That concludes my reasons for saying that there should in principle be the orders sought. It will now be necessary to look at the terms of the orders in rather more detail.

CERTIFICATE

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