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The granting of a without notice freezing injunction against ‘persons unknown’

The English Commercial Court granted on 23 October 2017 what is apparently the first without notice freezing injunction against ‘persons unknown,’ in a case involving an alleged fraud in which persons unknown infiltrated the email of a member of the senior management of the claimant organisation, leading to instructions being sent to the claimant’s finance team authorising payments of around £6.3 million in total to be sent to a number of bank accounts. William Christopher, Partner at Kingsley Napley LLP, comments on this case, providing in doing so the legal background to the injunction, and outlining why in his view remedies such as that granted in this case will prove invaluable in protecting the rights of victims of fraud.

On 23 October 2017 in the case of *CMOC v. Persons Unknown* [2017] EWHC 3599 (Comm), the English Commercial Court granted what was apparently the first without notice freezing injunction against ‘persons unknown.’ It is not particularly surprising that this sort of order has been granted - previous injunctions having been obtained against persons unknown - but rather that it has taken so long for the jurisdiction to be extended to freezing order relief. The fact that it has now been so extended is to be welcomed and almost certainly reflects the significant rise in cyber related fraud, which makes the identification of fraudsters much more difficult than the identification of a bank account into which fraudulently obtained funds are transferred.

The legal background to the injunction

In 2003 the first injunction against persons unknown caused quite a stir, and put the possibility of a without notice freezing injunction against ‘persons unknown’ firmly on the radar of civil fraud practitioners. It was sought by Bloomsbury, the publisher of the *Harry Potter* novels, against the “person or persons who have offered the publishers of *The Sun*, *The Daily Mail*, and *The Daily Mirror* newspapers a copy of the

book ‘*Harry Potter and the Order of the Phoenix*’ by JK Rowling” following the theft of at least three copies of the book from the printers. The order also required the unnamed respondents to deliver up all copies of the book, any notes recording any part of it, or any information derived from it and restraining them from disclosing to any person all or any part of the book or any information derived from it. The judgment of the Vice Chancellor on 23 May 2003 described in some detail the history of previous (failed) attempts to seek relief against persons unknown and why it was appropriate now to do so (*Bloomsbury Publishing Group Ltd v. News Group Newspapers Ltd* (Continuation of Injunction) [2003] 1 W.L.R. 1633).

The problem as identified by the Court was revealed by the decision of the Court in *Friern Barnet Urban DC v. Adams* [1927] 2 Ch. 25. This decision referred to the statutory requirements for a writ to be found in the Judicature Act 1873, which made the naming of a particular defendant of a specified address mandatory for the writ to be valid. In addition, on the facts of this case, the Court was of the view that the description of the defendants was too vague. A similar problem arose in another case

cited, *Re Wykeham Terrace, Brighton* [1971] Ch. 204. This case involved squatters who had broken into and were in occupation of vacant properties belonging to the plaintiff, who did not know their names. The plaintiff sought possession by *ex parte* originating summons, to which there was no defendant. The summons was served by putting it through the letter box of the property. The objections in this case were different. First, that the person against whom the relief was sought should have an opportunity to appear before the Court and put forward their answer to the claim. The second objection was that, as there was no defendant, the order would bind no-one and therefore would have no effect. Similar problems have been encountered in relation to people selling pirate copies of copyright goods. In those cases if one defendant is able to be identified by name the Court had been prepared to make an order against all of them (*EMI Records Ltd v. Kudhail* [1983] Com. L.R. 280).

The Court recognised that even before the introduction of the Civil Procedure Rules (‘CPR’), which proved to be crucial in the *Bloomsbury* case, the law was anomalous. A claimant could obtain

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an injunction against all defendants by description if one could be identified, but against none if none of them could.

The judgment went on to contrast the approach other common law jurisdictions had taken to similar problems. British Columbia had allowed proceedings to be amended to change the name on proceedings from John Doe to the real name of the defendant once this had been established. New Zealand had also taken a different approach and not followed *Friern* and *Wykeham Terrace* in the context of a case brought against unlicensed sellers of merchandise at concert venues.

The Court then went on to note that the CPR had changed the requirements in relation to the naming of the defendant. Instead of it being mandatory, it was instead desirable. The Court had been given wide powers of case management and, in particular, in Rule 3.10, a general power of dispensation where there has been a procedural error. In considering whether the Court had the power to make an order, it decided that the effect of the changes in the CPR were that the failure to give the name of the defendant cannot invalidate the proceedings, “both because they are started by the issue of the claim form at the request of the claimant and because, unless the court thinks otherwise, Rule 3.10 so provides.” It decided that *Friern* did not apply to proceedings brought under the CPR.

Wykeham Terrace was similarly distinguished, together with additional grounds. In *Wykeham Terrace* the objection was that there was no

defendant. In *Bloomsbury* there was, but the question was whether they had been properly described. The second objection was that the order would not bind on anyone. In *Bloomsbury* a person within the description of the defendant could be liable for contempt of court if he acted inconsistently with it, as could any other person who assisted in a breach. The Court decided that it could and should grant the order sought, stating that the crucial point was that “the description used must be sufficiently certain as to identify both those who are included and those who are not.”

Shortly after the *Bloomsbury* case was decided another injunction was granted against ‘persons unknown,’ but in very different circumstances. Once again the application was heard by the Vice Chancellor. In this case (*Hampshire Waste Services v. Persons Unknown* [2003] EWHC 1738 (Ch)) the injunction was sought against persons intending to trespass and/or trespassing upon incinerator sites at various named properties in connection with the ‘global day of action against incinerators’ (or a similarly described event) on or around 14 July 2003. Having referred to the *Bloomsbury* case and his conclusions in it, the Vice Chancellor decided that, subject to the description of the respondents being amended to “persons entering on or remaining without the consent of the Claimants, or any of them, on any of the incinerator sites at [the named sites]” he would grant the order sought. This avoided two potential problems, namely the description should not involve a legal conclusion by the use of the word ‘trespass’ or the injunction

being dependant on the subjective intention of an individual to do so.

The development of the jurisdiction and CMOG

Since the grant of those first two injunctions in 2003 the jurisdiction has been used on several occasions. Most often it has been used in relation to trespassers or protesters. It has also been used in a case of harassment by the paparazzi, a defamation case, and in privacy injunctions. In the latter cases this has been in the context of publication on the internet, where often it is very difficult to identify individuals to whom the order is directed.

This situation is very similar to the one where perpetrators of fraud using the internet are similarly difficult to identify, particularly at the early stages of a case, which is precisely when an urgent without notice injunction to freeze assets is required.

In *CMOG* the claim arose from an alleged fraud which had been committed by persons unknown by infiltrating the email account of one of the senior management of the claimant. Those persons were then able to send payment instructions purporting to come from that senior manager to the finance function of the claimant, but which were not actually from him. As a result payments totalling around £6.3 million were sent in a number of large payments from the claimant’s bank account to various other bank accounts around the world. Whilst this is a relatively common fraud, the unusual aspect is the size of the loss. This may provide a clue as to

why this relief has not been granted before, as the loss suffered by other victims was insufficiently large to justify expensive injunction proceedings.

Having identified that the Court had jurisdiction generally to grant injunctions against persons unknown, as set out above, the judge said that he could see no reason why this should not extend to a freezing injunction. The judge did not consider that potential problems in the future concerning contempt and whether a particular defendant had been properly notified of the injunction were any more prevalent with regard to a freezing injunction than any of the other types of injunctions granted against persons unknown. These were not, therefore, good reasons not to extend the principle.

Conversely, the judge recognised that the grant of an injunction would act as a springboard for ancillary relief in respect of third parties, which may not be possible without the grant of a freezing injunction first. This would include an injunction against banks, who would be required to freeze identified accounts, irrespective of whether and when the defendants were notified of the injunction, and for disclosure orders which might assist in identifying some or all of the defendants.

There is always the possibility that it will still be difficult to identify defendants even with the grant of disclosure orders. Often the funds are paid into a bank account which has been established by the fraudster, using false documents, or where the bank is in breach of its obligations to comply with anti-

money laundering regulations. This has the effect that disclosure orders seeking details of the individuals who opened the bank account provide no more clue to their true identity. Following the crucial point identified in the *Bloomsbury* case, that the defendants needed to be properly identified, the judge, having made some unspecified amendments, was satisfied this had been done correctly. The order made reference to those who had been involved in the activities which were said to have constituted the fraud and by reference to the particular transfers from the claimant's bank accounts to other bank accounts. These had been identified and listed in a schedule. Other defendants were identified as the legal and beneficial owners of the recipient bank accounts.

Other frauds to which this may apply

There are many frauds which utilise a similar method: that is, to persuade the victim themselves to authorise payments out of their account to the account of the fraudster. This might be 'CEO fraud' as in *CMOC*. It might be mandate fraud, where a purchaser of services is persuaded through deception to change a supplier's bank details before a payment is made to discharge an invoice. Vishing is where a bank customer is persuaded to make payments out of their account following a call from the fraudster pretending to be a bank fraud investigator. It might be where an email account is hacked to intercept emails and change account details contained in it to the account of the fraudster, before the email is then forwarded to the victim, purporting to come from a legitimate source, and,

importantly, which the victim is expecting. In all these cases the fraudster is actively concealing their identity, making identifying them difficult. Conversely, the other mainstay in the fraud lawyer's toolbox - follow the money - is much easier to comply with. The fraudster has provided the bank details into which the money has been paid, and, if the victim acts quickly enough, they may sometimes find they are able to freeze some or all of their money still in that account. Another common feature in all of these cases is that the victim will find it very difficult to bring claims against its bank for allowing the fraud to take place. The general response of the bank to its customer is to say that it will not refund the losses from the fraud, as it was the customer who authorised the payments in accordance with the mandate on the account.

Conclusion

This case is an excellent example of the courts being very willing to extend the jurisdiction to grant orders in fraud cases, where there is a need to do so to provide a victim with effective relief. There clearly is a growing need to be able to freeze an identified bank account without delay, which would be caused by the need to first obtain disclosure orders to identify defendants, even if it is possible to do so bearing in mind the difficulties highlighted above. Until banks are more easily held to be liable for any failings in relation to anti-money laundering requirements in relation to the identity of their account holders, it is remedies such as this which will prove invaluable in protecting the rights of victims of fraud.