CRYPTO TRACING:
THE STATUS OF THE NEW SERVICE OUT GATEWAY FOLLOWING SCENNA & ANOR V PERSONS UNKNOWN

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The recent High Court case of Scenna & Anor v Persons Unknown [2023] EWHC 799 (Ch) ("Scenna") illustrates the limits of the new service out Gateway 25 in compelling disclosure from overseas parties. This has implications in particular for the developing line of cases relating to the recovery of crypto assets.

Background

To serve proceedings out of the jurisdiction it is necessary for a claimant to show that:

1. there is a serious issue to be tried on the merits;
2. there is a good arguable case that one of the Gateways in Practice Direction 6B of the Civil Procedure Rules ("PD6B") applies; and
3. the English court is the appropriate forum in which to hear the dispute.

The new Gateway 25 in Practice Direction 6B permits service overseas of an application for 'Norwich Pharmacal' or 'Bankers Trust' relief: i.e. for third-party disclosure of information regarding the identity of the wrongdoer and/or what has become of the claimant's property. It was introduced following a line of cases where the courts ordered offshore crypto exchanges to disclose information to the victims of crypto fraud seeking to trace their stolen assets on the blockchain.[1]

The issue for the English Court is that its interim disclosure order is unlikely to be enforceable in the respondent's local Court. This has inevitably led to doubts as to whether crypto exchanges would comply with such disclosure orders. This has implications for the exercise of the Court's discretion in granting disclosure and for the forum test (i.e. 3 above), particularly where the foreign court would grant the same relief in support of English proceedings.[2]

1 See further our previous article which argued for this introduction of such a gateway here: https://thoughtleaders4.com/images/uploads/news/TL4_FIRE_Magazine_Issue_9_DIGITAL_VERSION_%282%29_1.pdf)

2 As in the BVI and the Cayman Islands with respect to Norwich Pharmacal Orders

In LMN v Bitflyer [2022] EWHC 2954 (Comm) ("Bitflyer"), the first reported case decided under the new Gateway, the Court granted a Bankers Trust Order ("BTO") against a number of crypto exchanges, most of whom had indicated a willingness to comply with the order once made.

Scenna

In this case, the proceeds of fraud were traceable to two Australian banks (the "Banks"). The Claimants obtained ex parte BTOs against the Banks, for disclosure of information to establish the whereabouts of the stolen monies, which the Banks subsequently challenged.

The Court discharged the BTOs on the following grounds:

i. The detriment to the Banks in providing the disclosure outweighed the interests of the applicants for the purposes of the balancing exercise that the Court conducts in deciding whether to grant a BTO[3]. The Court noted that, where the respondent is a foreign bank, special considerations apply and the order should only be granted in exceptional circumstances, such as in cases of 'hot pursuit'[4] – whereas here the trail was only 'luke warm'. This is because of the strong likelihood that the disclosure will conflict with the Banks' legal duties in their home jurisdiction – here the Court found that there was a real risk that the disclosure could place the Banks in breach of Australian law and expose them to financial and reputational damage. It was also common ground that the same disclosure relief was available in the Australian Courts.

ii. There was no serious issue to be tried for the purposes of the test for service out of the jurisdiction (point 1 above), given the finding on the merits of the disclosure application.

iii. The English Court was not the appropriate forum for the purposes of the service out test (point 3 above), given that the proceedings concerned disclosure by Australian banks of information in Australia.

The Court distinguished Bitflyer on the basis that, in that case, the location of the documents was unknown and so the only alternative to an English order was speculative applications in multiple jurisdictions. The Claimants in Scenna expressed reluctance at commencing proceedings in up to three jurisdictions (England, Australia and potentially Hong Kong) but the Court was not persuaded that this outweighed the detriment to the Banks identified above.

However, in some respects it is difficult to reconcile these cases. For example, the Court in Bitflyer did not appear to consider whether the overseas courts would grant disclosure in support of the English proceedings.

One respondent in Bitflyer did raise a foreign law objection, but the Court considered this could "be sufficiently dealt with by the provision that the order did not require the defendant to do anything prohibited by local law".

In Scenna, the Court also allowed the Banks' application to set aside service of the substantive claims against them for lack of jurisdiction. This followed from the Court's findings that the English court was not the appropriate forum for claims to recover the proceeds of fraud from the Banks, and that none of the various claims advanced by the Claimants against the Banks amounted to a serious issue to be tried.

Conclusions:

Scenna illustrates the limitations of the new Gateway and the inherent difficulties of seeking extraterritorial interim disclosure orders. Even where the Gateway applies, it will be difficult to persuade the English Court to grant disclosure orders against overseas respondents where there are local law impediments that could be overcome by seeking relief in the foreign court.

Although Scenna did not involve crypto, it will be highly relevant where BTOs are sought in respect of stolen digital assets that are traceable to an overseas exchange. If the legal entity holding the documents can be identified, victims of crypto fraud will need to take local law advice in the home jurisdiction of the exchange before deciding how to proceed.

Each case will turn on its facts and there are certainly elements prevalent in crypto cases that may well tip the balance in favour of applicants, such as: multiple jurisdictions, opaque legal structures underpinning crypto exchanges, the unknown location of relevant documents, and the 'hot pursuit' of stolen assets.

3 The 'fourth limb' of the BTO test; Kyriakou v Christie Manson and Woods Ltd [2017] EWHC 487 (QB)
4 Mackinnon v Donaldson, Lufkin & Jenrette Corp [1986] Ch 482