

Crypto tracing: status of the new service out gateway following *LMN v Bitflyer*

The judgment of the English Commercial Court in *LMN v Bitflyer Holdings Inc* [2022] EWHC 2954 (Comm) (available here: <https://www.bailii.org/ew/cases/EWHC/Comm/2022/2954.html>) received substantial coverage at the end of 2022, as the first reported use of the new Gateway 25 in Practice Direction 6B of the Civil Procedure Rules (“**PD6B**”).

The facts of the case have been extensively recited elsewhere and are not repeated here. It has rightly been pointed out that this case is a further example of the English court adapting to new technologies and international cyber-fraud. However, there are other points to glean from the judgment that are of interest to those seeking to recover cryptocurrency assets. In particular, the judgment suggests that the major crypto exchanges are prepared to provide disclosure pursuant to an English court order that is unenforceable in their home jurisdiction.

Background: the new Gateway

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

1. That there is a serious issue to be tried on the merits;
2. That there is a good arguable case that one of the Gateways in PD6B applies; and
3. That the English court is the appropriate forum in which to hear the dispute.

The new Gateway 25 enables service on an overseas respondent of an application for ‘Norwich Pharmacal’ or ‘Bankers Trust’ relief: that is, an application for disclosure of information as to either the identity of the wrongdoer, or what has become of the claimant’s property.

This innovation was argued for in my article published last year (available here: https://thoughtleaders4.com/images/uploads/news/TL4_FIRE_Magazine_Issue_9_DIGITAL_VERSION_%282%29_1.pdf) in response to a line of authorities where the courts had granted Bankers Trust orders in crypto tracing cases. In each of these cases, as in *Bitflyer*, the Claimants could trace their stolen crypto on the blockchain, but only as far as a crypto exchange incorporated offshore.

Before the new Gateway, the legal basis for permitting service out of the jurisdiction in these circumstances was questionable for the reasons explained in my article.

Potential problems with the new Gateway

The new Gateway resolves this legal uncertainty but creates others. Doubts have been raised as to whether it is: i) useful; and ii) principled.

As to i): an interim disclosure order of the English court is likely not be enforceable in the overseas jurisdiction and so many commentators have questioned whether any crypto exchange would actually comply.

As to ii): relatedly, if the order is not going to be complied with, it raises a question as to whether the English Court is indeed the appropriate forum (for the purposes of the third limb of the test above). This is particularly so where the foreign court would itself grant the same disclosure order in support of English proceedings - as in some of the common law offshore jurisdictions where exchanges are incorporated (eg. the BVI and Cayman).

My colleague Andy James and Hannah Daly of 4 New Square addressed these issues in more detail in the following article: <https://www.4newsquare.com/searching-for-assets-in-cyberspace-a-new-gateway-opens/>.

The disclosure applications in *LMN v Bitflyer*

Aside from its status as the first reported use of the new Gateway, this case is perhaps significant because the disclosure applications were heard *on notice* to the exchanges (following the grant of permission to serve out at an earlier hearing). This meant that the exchanges adopted a position publicly before the court on the proposed disclosure. By contrast, in each of the cases that served as forerunners to the new Gateway, the disclosure applications were heard *without notice*.

Butcher J decided it was inappropriate to make the disclosure orders without notice to the exchanges, in light of several factors, including that the unknown wrongdoers were not parties to the proceedings. That is presumably because they do not need to be under the new Gateway, which appears to be a free-standing jurisdictional basis. In the older cases, the Gateway relied upon required it to be shown that the respondent was a necessary and proper party to a claim against an ‘anchor defendant’, being the unidentified fraudster.

The response of the exchanges

In summary, the judgment records that the exchanges took the following positions:

1. Bitflyer attended personally through a representative and did not oppose the order.
2. Binance, through English solicitors, adopted a neutral stance despite questioning the legal basis of the order. It said the Claimants had sued the wrong Binance company but did not identify the correct entity. The Binance company sued claimed not to have an unfettered legal right to information held by other Binance entities but said it would make a request for such information if the court granted the order. The Claimants’ workaround, seemingly approved by the court, was to add a ‘Persons Unknown (Binance)’ defendant, to ensure whichever Binance entity held the relevant information would be bound. This approach was also followed for other exchanges.
3. Kraken said that it would comply with the order, notwithstanding its position that the Claimant’s application constituting a breach of the exchange’s contract.
4. Luno stated that it would comply with the order, subject to identified local law issues.
5. Coinbase, represented at the hearing by English counsel, said it would comply with the order, subject to confidentiality points relating to the order that are dealt with in the judgment.

Conclusions

As set out above, four of the largest exchanges indicated they would comply with the disclosure order. This is reassuring in terms of the practical utility of the new Gateway, but it does not address all the concerns alluded to above.

We might speculate that the exchanges were so amenable for reputational / commercial considerations. If that is right, it may have helped the Claimant that the disclosure applications were held on notice and recorded in a public judgment.

Interestingly, none of the exchanges appeared to question whether England is the appropriate forum even where the local court would make a disclosure order in support of foreign proceedings. That certainly could have been argued by Binance (incorporated in the BVI).

Butcher J addressed the forum question by looking at the substantive claim, brought by an English claimant as the victim of a fraud perpetrated (in broad terms) in England. But this approach may be questionable where there is no substantive Defendant to the action; indeed, Butcher J assessed whether there was a serious issue to be tried by reference to the disclosure applications, rather than the underlying fraud.

It therefore seems that some fundamental questions remain unanswered. In the meantime, in deciding where to seek relief, it is certainly a point in favour of the English Court that the major crypto exchanges seem prepared to comply with a disclosure order served under the new Gateway.