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

13th December 2019 (reporting restrictions lifted on 17th January 2020)

AA

- and -

(1) PERSONS UNKNOWN WHO DEMANDED BITCOIN ON 10TH AND 11TH OCTOBER 2019

(2) PERSONS UNKNOWN WHO OWN/CONTROL SPECIFIED BITCOIN

(3) iFINEX trading as BITFINEX

(4) BFXWW INC trading as BITFINEX

BEFORE: MR. JUSTICE BRYAN

CASE SUMMARY

In an application for ex parte relief pursuant to recovery of ransom monies paid in Bitcoin, Bryan J considered the several matters. Firstly, the applications were ordered to be heard in private pursuant to CPR 39(3), the ransom demands being analogous to blackmail. Secondly, the claimant was granted a proprietary injunction: Bitcoin were property and could be subject to claims against the Defendants in restitution and/or in constructive trust. Consequential orders were also made: information was to be provided to identity the unknown Defendants, and permission for alternative service and service out of the jurisdiction was granted.

Factual Background

1. The Claimant ("AA") is a company providing insurance against cyberattacks. The application relates to a cyberattack against AA's Customer, in which a hacker encrypted the Customer's computer systems and demanded ransom be paid in bitcoin to the address provided in exchange for a decryption tool. The First Defendant (D1) is the fraudster(s) demanding the bitcoin. AA (through an Incident Response Company) agreed to pay US$950,000 in Bitcoins as ransom, and transferred 109.25 bitcoins to an address provided by D1. AA discovered that 96 of those bitcoins were then transferred to a specified address linked to the Bitfinex exchange: the Second Defendant (D2) is the person (s) currently controlling bitcoins, and the Third and Fourth Defendants operate the Bitfinex exchange. AA could not identify D2 from that address: their identity is likely known by D3 and D4. Bryan J considered AA's ex parte applications: for the hearing to be held in private (granted), for a Bankers Trust and/or Norwich Pharmacal Order and a freezing injunction (adjourned), for a proprietary injunction in respect of the 96 bitcoins (granted); and for certain consequential orders.

Application for Hearing to be held in Private and to Anonymise Parties

2. Bryan J held that there were compelling grounds supported by credible evidence for the hearing to be held in private pursuant to CPR r.39.2(3): such a step was necessary for the proper administration of justice, which could not be achieved by a lesser measure or combination of measures. This was for, *inter alia*, the following reasons. Firstly, publicity would defeat the object of the hearing: it could tip off the unknown fraudsters, who might dissipate the bitcoins. Secondly, publicity risked further retaliatory or copycat cyber-attacks on AA and the Customer, in circumstances where confidential information on the AA and the Customer's system vulnerabilities may be revealed. Thirdly, the hearing concerned without notice applications: it would be unjust to publicly name the Defendants, particularly as D3 and D4 were merely mixed up in the wrongdoing. Further, the ransom demands were viewed as analogous to blackmail: the interests of freedom of expression were tempered by the criminal nature of that conduct (*LJY v Persons Unknown* [2018] EMLR 19): those considerations applied even if ransom funds had already been paid (*NPV v QEL* [2018] EMLR 20). Further, and for the same reasons, the requirements of s.12 Human Rights Act 1998 were met. Bryan J considered it appropriate to anonymise AA and the Customer, again due to the risk of retaliatory cyber-attacks. Further, Bryan J noted that if D1 and D2 were served, or the property was protected, he would lift privacy in respect of this judgment.

Proprietary Injunction

3. Bryan J granted a proprietary injunction over the 96 bitcoins against the Defendants, applying *Polly Peck International Plc v Nadir No. 2 [1992]* 4 All ER 769. There was a serious issue to be tried as to whether AA should recover the bitcoins as property in restitution and/or as beneficiary of a constructive trust[1]; the balance of convenience was in favour of the injunction, and damages would be an inadequate remedy if the 96 bitcoins were dissipated.

4. For the purposes of granting a proprietary injunction, Bryan J was satisfied that the bitcoins were property, drawing from the reasoning in the UK Jurisdictional Task Force statement on Crypto Assets and Smart Contracts (November 2019) ("UKJT"). This was for two main reasons. Firstly, the bitcoins met the criteria for property set out in *National Provincial Bank v Ainsworth* [1965] 1 AC 1175: they were definable, identifiable by third parties, capable of assumption by third parties, and had some degree of permanence. This was in agreement with the UKJT's conclusions, and the Singapore ICC in *B2C2 Limited v Quoine PTC Limited* [2019] SGHC (I) 03 at [142]. Bryan J also noted that in the cases of *Vorotyntseva v Money 4-Limited t/a Nebeus.com* [2018] EWHC 2596 (Ch) and *Liam David Robertson v Persons Unknown* (unrep 15.07.19) cryptocurrencies were assumed to be property, albeit those decisions were not fully reasoned. Secondly, Bryan J concluded that the bitcoins were property, despite not being choses in action in the narrow sense of that term. Bitcoins do not fit neatly into either of the two categories of property set out in *Colonial Bank v Whinney* [1885] 30 Ch. D 261 and affirmed by the House of Lords ([1886] 11 App. Cas. 426): they are not choses in possession (as they are not tangible goods), and they are not choses in action in the narrow sense (as they do not embody a legal right enforceable by a cause of action). According to the conventional understanding of *Colonial Bank*, those are the only two categories recognised by English law: therefore, an intangible thing is not property if it is not a chose in action. However, this conclusion was not intended by the House of Lords or Fry LJ's judgment in the Court of Appeal: further, both courts adopted a very broad understanding of "chose in action", meaning any property which was intangible. Moreover, English courts have treated new intangible 'assets' as property – *Dairy Swift v Dairywise Farms Ltd* [2000] 1 WLR 1177 (milk quotas) and *Armstrong v Winnington* [2012] EWHC Civ 37 (an EU carbon emissions allowance). Bryan J adopted the reasoning in the UKJT report on this point.

Consequentials – disclosure, service out of jurisdiction and alternative service.

5. Bryan J made consequential orders supporting the proprietary injunction. Firstly, information was to be provided in relation to the address and identity of all the Defendants: the idea was that D3 and D4 would identify D2, and D2 would then identify D1. Secondly, service out of the jurisdiction was permitted for the proprietary injunction and the underlying claims. The proprietary injunction fell within PD6B3.1(5), and the claims fell within *inter alia* PD 6B 3.1(9) – they constituted a claim in tort where damage was sustained within the jurisdiction, as AA bought the bitcoins using an English bank account and is registered in England. Thirdly, Bryan J ordered alternative service pursuant to CPR r.6.15 on all Defendants. It was not then known who or where D1 and D2 were: therefore, AA was given permission to serve the order by email, or by delivery to any physical address in relation to the Bitcoin account provided by D2 or D3. If D1 and D2 could not be identified, Bryan J indicated that the court would provide for AA to serve by filing the order at court (adopting the solution in *LYL v Persons Unknown*). Bryan J also ordered that D3 and D4 be served by email -- the application was urgent, as it was a proprietary claim for Bitcoin which could be dissipated at any moment.

Bankers Trust/Norwich Pharmacal Order and Freezing Injunction

6. No orders for a Norwich Pharmacal/Bankers Trust order or Freezing Injunction were made at the hearing, as those applications were adjourned. Bryan J noted *obiter* the conflicting authorities on whether an English court has jurisdiction to make and serve out a Bankers Trust and/or Norwich

[1] AA claimed to enforce its own proprietary rights, (although it also had the benefit of an assignment as well as rights of subrogation) – in this regard AA paid out US$950,000 of its own money which was used to purchase the 109.25 bitcoins: this was traced into the 96 bitcoins.

Pharmacal orders requiring an institution outside of the jurisdiction to provide information pursuant to an English court order. In *CMOC v Persons Unknown* [2017] EWHC 3599 (Comm), it was assumed that such an order could be served out under the "necessary and proper party" gateway (PD6B 3.1(3)); in *AB Bank v Abu Dhabi Commercial Bank PJSC* [2016] EWHC 2082 (Comm), Teare J held that such an order did not fall into any of the PD 6B 3.1 jurisdictional gateways.

7. In the result, AA's applications for the hearing to be in private and for a proprietary injunction over bitcoins succeeded; consequential orders were made to identify unknown Defendants and for service of all Defendants with the injunction and underlying claims.