

TWENTY
ESSEX

BREAKING GROUND IN FRAUD RECOVERY CLAIMS

The CMOG litigation – International pursuit of cyber fraudsters

A seminar for The LSLA Summer/Autumn Lecture Series

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The facts of the fraud

BUSINESS EMAIL COMPROMISE (BEC) FRAUD

- FBI report: as of May 2017, 40,000 known attacks → losses of \$5.3 bn
- CMOC suffered a sustained 'brazen' BEC hack
- Approximately 20 payments – all sent abroad – many jurisdictions
- CMOC based in Arizona, BUT:
 - The **branch** of CMOC that suffered the loss was in London
 - The **bank account** from which the payments were taken was in London



Two categories of facts

THE KNOWN FACTS

- Source bank and account
- Destination banks and account numbers
- Payee names – but probably fictitious

THE UNKNOWN FACTS

- Who had **perpetrated** the fraud?
- Who had initially received the proceeds of the fraud?
- Where the money was now?
- Who had received any onward payments?
- Who might have assisted?
- Whether any innocents were involved
 - e.g. innocent joint account holders

The problems

1. Who to sue – whose accounts to be frozen?
2. How to obtain information from foreign banks about:
 - The identity of the perpetrators AND
 - Where the funds are now?
 - *Norwich Pharmacal* disclosure process cannot presently be served out of the jurisdiction: no jurisdictional gateway for free-standing action for disclosure:
 - *AB Bank, Offshore Banking Unit (ABU) v Abu Dhabi Commercial Bank PJSC* [2017] 1 WLR 810

Three step solution: *CMOC v Persons Unknown**

FIRST: Claim form

- Issued and authorised for service out of the jurisdiction against a single initial defendant: ‘Person(s) Unknown’
- Key requirement: definition of the ‘class’
- In *Cameron v Liverpool Victoria* [2019] UKSC 6; [2019] 1 W.L.R. 1471 the Supreme Court approved CMOC, drawing a distinction between
 - legitimate ‘Persons Unknown’ claims against anonymous but identifiable defendants and
 - illegitimate claims against anonymous unidentifiable defendants

SECOND: Worldwide Freezing and Proprietary Order, also against ‘Person(s) Unknown’

- Fusing established injunction jurisdiction against Persons Unknown** with the freezing order jurisdiction
- CMOC trial judgment at [178] – [189]
- The jurisdiction is now “...clearly established... It reflects the need for the procedural armoury of the court to be sufficient to meet the challenges posed by the modern electronic methods of communication and of doing business.”
- C.f. Cyanamid injunctions and ‘Spartacus Orders’ granted against persons unknown in the Media and Communications list in data ransom etc cases***

* *CMOC v Persons Unknown* [2018] EWHC 2230 (Comm) (trial judgment)

Interim judgments at [2017] EWHC 3599 (Comm) (ex parte) and [2017] EWHC 3602 (Comm) (return date)

** e.g. *Bloomsbury Publishing Group and JK Rowling v News Group Newspapers Ltd* [2003] 1 WLR 1633 and *Hampshire Waste Service v Persons Unknown* [2003] EWHC 1738 (Ch)

*** *PML v Person(s) Unknown* [2018] EWHC 838 (QB) and *Clarkson Plc v Person or Persons Unknown* [2018] EWHC 417 (QB)

Three step solution: *CMOC v Persons Unknown*

THIRD: Use the action against Persons Unknown as a springboard to obtain internationally enforceable disclosure orders against foreign 'NCAD's

- *Bankers Trust v Shapira* [1980] 1 WLR 1274
- *Mackinnon v Donaldson, Lufkin and Jenrette Securities Corp* [1986] 1 Ch 482
- CPR 25.1(1)(g)

Subsequent authority

- *Cameron v Liverpool Victoria* (above) – basis of CMOC approved
- *World Proteins KFT v Persons Unknown* [2019] EWHC 1146 (QB) – CMOC followed

Service issues

THE PROBLEM: the need to serve court proceedings, injunctions, orders, and other documents on:

- Class of 'Persons Unknown'
- 30 Named defendants, three of whom were (until late in the case) persons unknown
- 51 NCADs - mostly banks, but several non-banks
- In 19+ jurisdictions

SERVICE COMPLICATED BY:

- A hearing approx. every 1½ weeks, on short notice (so F&F duties)
- Ds and many NCAD banks not represented by English solicitors
- Confidentiality ring to be mindful of

Service solutions – court flexibility

Multiple service methods for each defendant and NCAD, including service by alternative means:

- Standard service
 - courier/post (but multiple addresses)
 - email (but volume restrictions)
 - fax (old school!)
- Novel forms of service by alternative means:
 - 1 Facebook messenger
 - 2 WhatsApp messenger
 - Trial judgment at [190]: “...*the short point, in my view, is that the court will consider proactively different forms of alternative service where they can be justified in the particular case.*”

3 Service by access to data room

- Service permitted by previously approved method (usually email or letter) with link to secure online data room plus further email or letter with password
 - For the Defendants, such service (generally) allowed after initial service using paper
 - For the NCAD banks (generally) prior service by paper not required by the end of the litigation
- Trial judgment at [190]: “...*certainly an innovative feature of this litigation. it can clearly be justified and appropriate in such cases...*”
- Enormous savings of cost and time
- Data room partitioned for confidentiality
- Updated regularly
- Judge had access

Other developments re WFO / Proprietary injunctions

CMOC's 'exemplary' conduct allowed the lifting of requirement to comply with 'Dadourian' guidelines

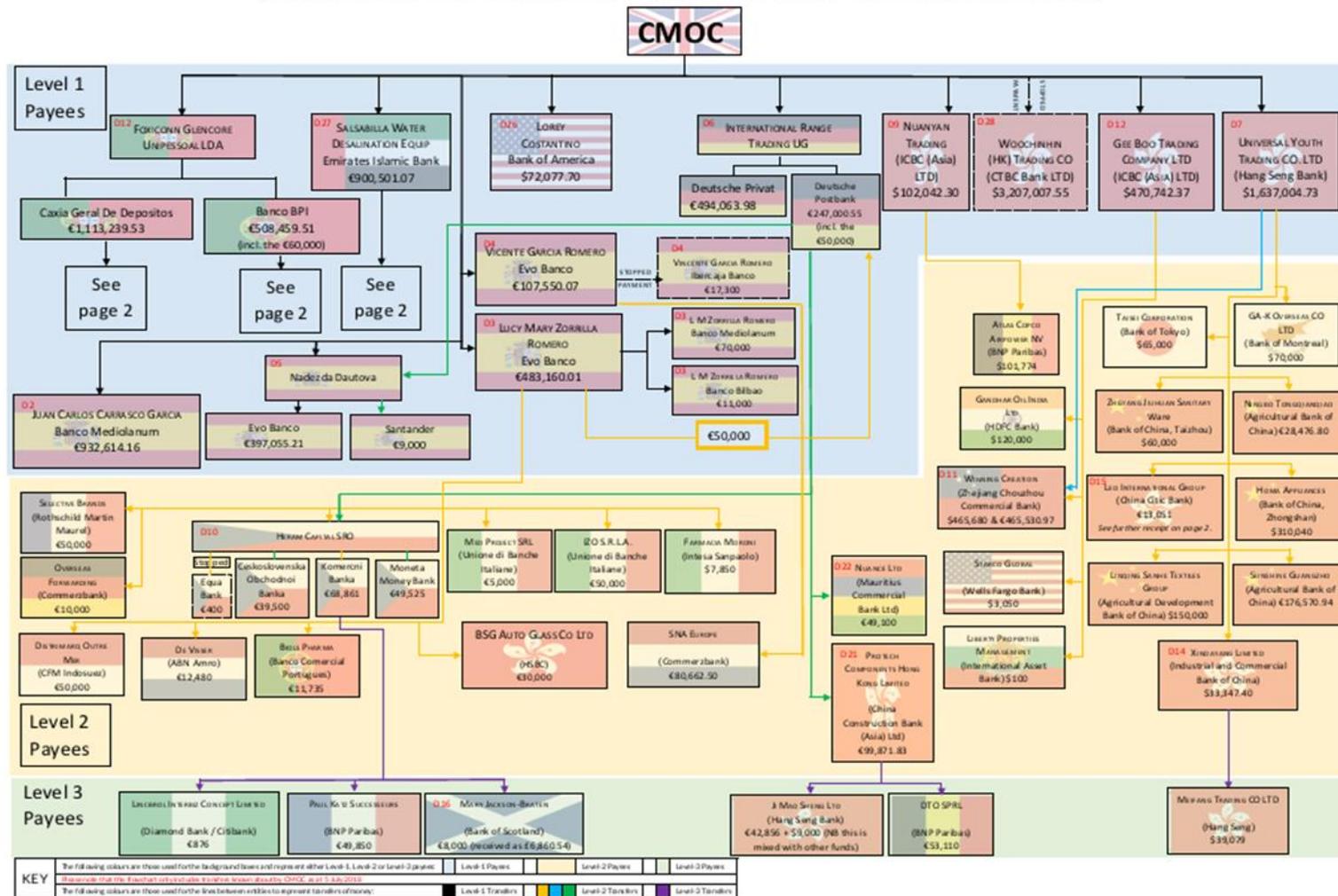
- Usual requirement to seek permission before applying for recognition / enforcement abroad slow and expensive: Dadourian requirements
- For the WFO and Proprietary injunctions: Dadourian requirements lifted after approximately three months of regular applications, initially, on terms:
 - Undertaking not to seek to obtain security
 - Undertaking not to seek to obtain superior relief
 - Reports to the Court, by affidavit, every two weeks
- Disclosure Orders: Later also lifted on same undertakings
 - No authority that Dadourian guidelines apply to Disclosure Orders, but CMOC accepted that they did

Modification of the requirement that a pool of assets be identified before a WFO issues in a fast-moving international fraud case

- Usual rule is the assets to be frozen must be identified
 - White Book 2018, Vol.2 at 15.65 & 15.83
- BUT here, (1) the evidence was that the target respondents had received money, but it could not be said that they still had the funds and (2) there was no evidence that they did not still have CMOC's money, or its product
- Held: this was sufficient for WFO relief in this type of case
 - **CMOC v Persons Unknown** (interim judgment on this point pending)

The fraud as presented to the Court - 1

CMOC SALES & MARKETING LTD V PERSONS UNKNOWN & ORS – CL-2017-000652 – ‘FLOWCHART OF KNOWN TRANSFERS’



Legal developments – causes of action 1

Proprietary claims

- *Westdeutsche Landesbank v Islington LBC* [1996] AC 669
 - Trial Judgment at [77]

Dishonest assistance and unlawful means conspiracy

- Three classes of Defendant – (1) perpetrator, (2) participant with knowledge of the fraud and (3) participant with knowledge of a fraud (or other illicit activity)
- Unlawful means conspiracy: is it a requirement that the Defendant knows the identity of the target of the fraud?
 - Trial Judgment at [124]-[126]

Legal developments – causes of action 2

Unjust enrichment

- Pleaded against all recipients (initial and subsequent)
- Application of the 'at expense of' element when claiming against multiple Defendants
 - *Investment Trust Companies v Revenue and Customs Commissioners* [2018] AC 275
- On judgment, CMOC elected to seek restitution from initial recipients only
 - Trial judgment at [158] & [161]

Analysis of claims by Defendant – as presented to the Court

CMOC Sales & Marketing Ltd v Persons Unknown & Ors – CL-2017-000652

Table B - Analysis of claims by Defendant

Def	A Proprietary Claim AND Knowing receipt Defendants ("Receiving Defendants")	B Receiving Defendant who is <u>not</u> a Participation Defendant	C Sum received	D Unjust Enrichment Defendant	E All UMC/DA Defendants (F + G + H + J)	F UMC/DA "Perpetrators" i.e. Defendants who perpetrated the fraud	G UMC/DA "Participation Defendants" with knowledge of the Fraud Cat 1 – Level 1 recipients + Core Facts	H UMC/DA "Participation Defendants" with knowledge of the Fraud Cat 2 – common directorship or control + Core Facts	I NOT F, G or H	J UMC/DA "Participation Defendants" with knowledge of a Fraud ('likely' candidates) Unusual facts + Core Facts	K No UMC or DA claim i.e. NOT F, G, H or J	Def
1					✓	✓						1
2	✓		€932,614.16	✓	✓		✓					2
3	✓		€483,160.01	✓	✓		✓					3
4	✓		€107,550.07	✓	✓		✓					4
5	✓		€406,055.21	✓	✓		✓					5
6	✓		€741,064.53	✓	✓		✓					6
7	✓		\$1,637,004.72	✓	✓		✓					7
8	✓		\$470,742.37	✓	✓		✓					8
9	✓		\$102,042.30	✓	✓		✓					9
10	✓		€157,886.00	✓	✓			✓				10
11	✓		\$1,010,584.00	✓	✓				✓	✓		11
12	✓		€1,561,699.04	✓	✓		✓					12
13					✓			✓				13
14	✓		\$33,347.40	✓					✓		✓	14
15	✓	✓	€13,051.00 and \$38,230.00	✓					✓		✓	15
16	✓	✓	£ 6,860.54	✓					✓		✓	16
17	✓		€12,825.00	✓	✓			✓				17
18	✓	✓	€336,561.63	✓					✓		✓	18
19	✓	✓	€98,454.98	✓					✓		✓	19
20	✓		€40,000.00	✓	✓				✓	✓		20
21	✓	✓	€99,539.84	✓					✓		✓	21
22	✓	✓	€49,100.00	✓					✓		✓	22
23	✓		€10,571.00	✓	✓			✓				23
24	✓	✓	€165,746.00	✓					✓		✓	24
25	✓	✓	€17,000.00	✓					✓		✓	25
26	✓		\$72,077.70	✓	✓		✓					26
27	✓		€900,501.07	✓	✓		✓					27
28					✓		✓					28
31					✓					✓		31

Core facts:

- Received stolen money
- No evidence of any consideration being given for the receipt
- Have not repaid any of it
- Have been served with injunctions but have not given disclosure

- Have been served with process but have neither acknowledged service nor filed a defence

Notes:

- D29 and D30 excluded because the action against them has been compromised

Legal developments – damages

Foreign legal expenses recoverable as damages – part of the cost of mitigation

- *Thai Airways International Public Company Ltd v KI Holdings Co Ltd* [2015] EWHC 1250 (Comm)
- Trial Judgment at [173] & [176]

Compound interest

- Yes for knowing receipt: Trial Judgment at [165]
- No for unjust enrichment: *Prudential Assurance Company Ltd v Commissioners for HMRC* [2018] UKSC 39



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