

CAN A “PERSONS UNKNOWN” INJUNCTION BE DEPLOYED IN THE SINGAPORE COURTS?

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In 2017, the English Commercial Court granted a first-of-its-kind “Persons Unknown” worldwide freezing injunction over the assets of unknown fraudsters who had allegedly committed large-scale international financial fraud via the Internet. On the back of this injunction, the claimant was able to take out interlocutory orders to ascertain the identities of the alleged fraudsters and details of onward transfers and to freeze the assets of the fraudsters and stolen funds, before the proceeds of fraud were totally dissipated. Given the utility of a “Persons Unknown” injunction, this article considers whether such an injunction can be deployed in the Singapore courts.

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I. Introduction

1 In October 2017, the English Commercial Court granted a worldwide freezing injunction over the assets of “Persons Unknown” who were accused of committing large-scale, international financial fraud via the Internet. It was widely reported that this injunction, as reported in *CMOC v Persons Unknown*¹ (“*CMOC (No 1)*”) and *CMOC Sales & Marketing Ltd v Persons Unknown*² (“*CMOC (No 2)*”), was the first of its kind to be

1 [2017] EWHC 3599 (Comm).

2 [2017] EWHC 3602 (Comm).

Can a “Persons Unknown” Injunction be Deployed in the Singapore Courts?

granted against alleged perpetrators who had not been identified.³

2 The utility of such an injunction was made clear by the time the matter went to trial. In *CMOC Sales & Marketing Ltd v Persons Unknown*⁴ (“*CMOC (No 3)*”), HHJ Waksman QC revealed that, over the course of legal proceedings, the claimant had obtained interlocutory orders against 50 banks in 19 different jurisdictions to freeze the assets of the fraudsters and the stolen funds, and to reveal the identity of the alleged fraudsters and the details of any onward transfers.⁵ As a result, by the time of the trial, the claimant was able to identify and had added 30 actual persons as defendants to the action.⁶ Significantly, the claimant also retained the prospect of recovering some of the traceable proceeds of fraud by freezing them before they could be dissipated.⁷

3 Given the utility of a “Persons Unknown” injunction, the question arises as to whether a victim of cyber fraud can similarly deploy such an injunction in Singapore. This article will look closely at the *CMOC* cases, the jurisprudential basis in England for obtaining such a “Persons Unknown” injunction and flesh out the legal issues that may arise when such an injunction is sought in civil proceedings in Singapore. The author envisages that an injunction of this nature may be deployed soon given the sharp rise in cybercrime occurring in Singapore in recent years.⁸

3 See, for example: Litigation Futures Admin, “High Court Issues Ground-Breaking ‘Persons Unknown’ Injunction in Fraud Case” (26 November 2018); Martin Shobbrook & Stephanie Silverston, “Fraud Insights: Worldwide Freezing Injunction Granted Against Persons Unknown” *International Fraud Group* (22 October 2018).

4 [2018] EWHC 2230 (Comm).

5 *CMOC Sales & Marketing Ltd v Persons Unknown* [2018] EWHC 2230 (Comm) at [11].

6 *CMOC Sales & Marketing Ltd v Persons Unknown* [2018] EWHC 2230 (Comm) at [2].

7 *CMOC Sales & Marketing Ltd v Persons Unknown* [2018] EWHC 2230 (Comm) at [87].

8 Lester Hio, “Tenfold jump in local phishing web links, increase in cybercrime: CSA Report” *The Straits Times* (19 June 2018).

II. The CMOC cases

4 In the CMOC cases, the claimant, an English subsidiary of a major international resources company, fell victim to a sophisticated business e-mail compromise fraud.

5 The cyber fraudsters infiltrated the e-mail account of one Mr Chen, who was part of the senior management of the claimant. They then sent payment instructions purporting to come from Mr Chen to the administration of the company, but not in fact coming from him. As a result, US\$6.91m and €1.27m were transferred from the claimant's bank account at Bank of China in London to various other banks around the world by means of 20 separate transfers.⁹

6 As the identities of the fraudsters were unknown at the outset, the claimant filed a claim form containing a variety of claims against "Persons Unknown", namely (a) proprietary claims involving the use of tracing; (b) a claim for compensation for dishonest assistance; (c) a claim in damages for unlawful means conspiracy; (d) a claim in knowing receipt; and (e) a claim in unjust enrichment.¹⁰

7 In support of its claim, the claimant also sought worldwide freezing and proprietary orders against "Persons Unknown" as a springboard to obtain internationally enforceable disclosure orders against foreign banks (*ie*, Non-Cause of Action Defendants ("NCADs")). The claimant's objective was to notify the NCADs of the freezing injunction so that they could freeze the relevant bank accounts where the fraud proceeds had been channelled towards, and on the basis of that, obtain vital information from the various NCADs which may assist in positively identifying some or all of the defendants.¹¹

9 *CMOC Sales & Marketing Ltd v Persons Unknown* [2018] EWHC 2230 (Comm) at [4].

10 *CMOC Sales & Marketing Ltd v Persons Unknown* [2018] EWHC 2230 (Comm) at [69].

11 *CMOC v Persons Unknown* [2017] EWHC 3599 (Comm) at [4].

Can a “Persons Unknown” Injunction be Deployed in the Singapore Courts?

8 As there were no named defendants at this juncture, HHJ Waksman QC considered the threshold question of whether the English courts had jurisdiction to permit the service of a claim form when there was no actual defendant.¹²

9 He held that the English courts had jurisdiction in general against “Persons Unknown” under English civil procedure rules. This was previously affirmed in the cases of *Bloomsbury Publishing Group Ltd v News Group Newspapers Ltd*¹³ (“*Bloomsbury*”) and *Hampshire Waste Services Ltd v Persons Unknown*¹⁴ (“*Hampshire*”).¹⁵ He noted that the key criterion was that the description of the “Persons Unknown” defendant had to be sufficiently certain as to identify both those who are included and who are not within the class.¹⁶

10 In granting the injunction, HHJ Waksman QC was persuaded that the descriptions provided by the claimant were sufficiently clear to anyone affected by the claim, regardless of whether they fall within the category of defendant or not.¹⁷ He observed that the claimant had clearly identified at least two species of defendants: the first category referred to those involved in the activities said to have constituted the fraud by reference to particular transfers from the Bank of China accounts to other bank accounts as set out in a schedule, while the second category referred to those who are the legal or beneficial holders of those accounts.

III. English jurisprudence

11 In *CMOC (No 1)*, HHJ Waksman QC cited the two cases of *Bloomsbury* and *Hampshire* as authority for his decision to grant the “Persons Unknown” injunction in favour of the claimant.

12 *CMOC v Persons Unknown* [2017] EWHC 3599 (Comm) at [2].

13 [2003] 1 WLR 1633.

14 [2003] EWHC 1738 (Ch).

15 *CMOC v Persons Unknown* [2017] EWHC 3599 (Comm) at [2]–[3].

16 *CMOC v Persons Unknown* [2017] EWHC 3599 (Comm) at [2].

17 *CMOC v Persons Unknown* [2017] EWHC 3599 (Comm) at [5].

Both *Bloomsbury* and *Hampshire* were delivered by the same judge, Vice-Chancellor Sir Andrew Morritt, and are of jurisprudential interest as they explain why the English courts have the power to grant a “Persons Unknown” injunction. As the reasoning behind both decisions is similar, it suffices for the purposes of this article to review one judgment.

12 In *Bloomsbury*, the claimants had made arrangements to publish the fifth book in the *Harry Potter* series under conditions of exceptional security.¹⁸ Unfortunately, the arrangements were unsuccessful as at least three copies of the book were taken away from the printers and offered to the press at varying prices.¹⁹ In the circumstances, the claimants sought an order against “[t]he 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”, requiring the said defendant(s) 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.

13 Vice-Chancellor Sir Andrew Morritt noted that there were two earlier cases which posed obstacles to the grant of such an order.

14 First, the English Court of Appeal in *Friern Barnet UDC v Adams*²⁰ (“*Freirn*”) had refused to make an order against unknown defendants as (a) the prescribed form under the English civil procedural rules required names and addresses of the defendant to be provided and (b) the descriptions of the unknown defendants were too vague. In respect of the latter objection, Lawrence LJ noted that the writ was “bad” because it

18 *Bloomsbury Publishing Group Ltd v News Group Newspapers Ltd* [2003] 1 WLR 1633 at [1].

19 *Bloomsbury Publishing Group Ltd v News Group Newspapers Ltd* [2003] 1 WLR 1633 at [2].

20 [1927] 2 Ch 25.

Can a “Persons Unknown” Injunction be Deployed in the Singapore Courts?

did not state “whether any one of the defendants [was] a lunatic, or an infant, or is residing abroad, or is under any kind of disability, in each of which cases some special directions or some special procedure might be required”.²¹

15 Second, in the case of *Re Wykeham Terrace*²² (“Wykeham”), Stamp J refused to make an order against unknown defendants as (a) natural justice required that the person against whom relief is sought have the opportunity of appearing before the court and putting forward his answer to the claim and (b) the order sought would have no effect given that an order of the court only binds those who are parties to or attend the proceedings in which the order was made.²³

16 However, Sir Morritt was not too troubled by the two cases. He held that *Freirn* could be distinguished on the basis that the English civil procedure rules were different in the *Bloomsbury* case.²⁴ There was no requirement that a defendant must be named, merely a direction that he “should” be. Further, there should not be undue reliance on form over substance. He noted the English civil procedure rules gave the court the power to “take any other step or make any other order for the purpose of managing the case and furthering the overriding objective [of enabling the court to deal with cases justly]”.²⁵ The rules also conferred on the court a general power of dispensation where there has been a procedural error and separately provides that such error does not invalidate any step taken in the proceedings unless the court so orders. Further, the rules also permit a variation in the claim form “if required by the circumstances of a particular case”.

21 *Bloomsbury Publishing Group Ltd v News Group Newspapers Ltd* [2003] 1 WLR 1633 at [5]–[7].

22 [1971] 1 Ch 204.

23 *Bloomsbury Publishing Group Ltd v News Group Newspapers Ltd* [2003] 1 WLR 1633 at [8]–[9].

24 *Bloomsbury Publishing Group Ltd v News Group Newspapers Ltd* [2003] 1 WLR 1633 at [19].

25 *Bloomsbury Publishing Group Ltd v News Group Newspapers Ltd* [2003] 1 WLR 1633 at [15].

17 Sir Morritt also distinguished *Wykeham* on the same grounds, and added that in *Bloomsbury*, there was a defendant which had been properly described (which meant that actual defendants could be joined to the action in due course after being identified) and an order of court could still be held against a person falling within the description of the defendant in contempt proceedings if he acted inconsistently with it.²⁶

18 In the final analysis, Sir Morritt opined that the crucial point is that the description used for “Persons Unknown” must be sufficiently certain as to identify both those who are included and those who are not. This was the *ratio* which HHJ Waksman QC relied upon in the *CMOC* cases.

IV. Singapore

19 Do the Singapore civil procedure rules permit a plaintiff to commence a “Persons Unknown” injunction in support of an underlying claim against unidentified cyber fraudsters? It appears to be possible.

20 In Singapore, a plaintiff may take the position that an action should not be defeated even if there was no identified defendant at the start of the action, as long as there are actual defendants identified and properly joined to the action by the time of the trial.

21 A plaintiff can point to the High Court’s general power in para 5(a) of the First Schedule of the Supreme Court of Judicature Act²⁷ (“SCJA”) to grant interim injunctions in support of legal proceedings at any time. It states that the High Court has:

5. Power *before* or *after* any proceedings are commenced to provide for —

26 *Bloomsbury Publishing Group Ltd v News Group Newspapers Ltd* [2003] 1 WLR 1633 at [20].

27 Cap 322, 2007 Rev Ed.

Can a “Persons Unknown” Injunction be Deployed in the Singapore Courts?

(a) the interim preservation of property which is the subject-matter of the proceedings [...] by injunction [...] or in any manner whatsoever;

[emphasis added]

22 Significantly, there is no express requirement in the First Schedule of the SCJA that an actual defendant be identified before such a power can be invoked. It appears to be a standalone power by itself.

23 However, it must be borne in mind that the invocation of this power is merely a temporary one. Ultimately, for the High Court to hear and determine the dispute, a defendant must be identified. This is made clear in s16(1) of the SCJA, which requires a defendant to be served in a manner prescribed by the Rules of Court²⁸ or to submit to the jurisdiction of the High Court before the High Court has “jurisdiction to hear and try any action in personam”.

24 What this means in practical terms is that actual defendants will need to be named by the time of trial. This would be similar to the *CMOC* cases, where a plaintiff would gradually join additional parties as defendants once their identities had been ascertained pursuant to any ancillary disclosure orders against NCADs, and then proceed to trial when the matter is ready to be determined as against the said defendants.

25 A plaintiff may also find Sir Morritt’s responses to the objections raised in *Freirn* and *Wykeham* helpful as they also apply in the Singapore context.

26 First, there is no specific requirement under Singapore’s civil procedure rules that an actual defendant must be named at the outset. While the prescribed forms for commencing a writ or originating summons in Singapore (*ie*, Forms 2, 4 and 5 of Appendix A of the Rules of Court) contain standard wording which indicates that the name and address of a defendant need

28 Cap 322, R 5, 2014 Rev Ed.

to be included, there is nothing in the Rules of Court which provides that the writ or originating summons is “bad” if no actual defendant is named. To the contrary, O 1 r 7 of the Rules of Court makes it clear that “the Forms in Appendix A to [the Rules of Court] shall be used where applicable *with such variations as the circumstances of the particular case require*” [emphasis added].

27 Second, the Singapore courts have the power to cure procedural defects, in particular those relating to the identity of parties. Order 2 r 1(1) of the Rules of Court provides that where there has been a failure to comply with the requirements of the Rules of Court “whether in respect of ... manner, form or content or in any other respect”, the failure shall be treated merely as “an irregularity and shall not nullify the proceedings”. More importantly, O 15 r 6(1) of the Rules of Court makes it clear that “no cause or matter shall be defeated by reason of the misjoinder or nonjoinder of any party”. The court can always exercise its power under O 15 r 6(2) to make an order to join defendants at a subsequent stage when they have been identified.

28 Thirdly, Singapore’s civil contempt rules apply to non-parties to an action, which suggests that an order of court could be held against a person falling within the description of “Persons Unknown”. This can be inferred from s 4 of the Administration of Justice (Protection) Act 2016²⁹ which states that:

A person who is not a party to an action commits contempt if he or she causes or abets the breach of any ... order ... or other process of a court, with the intention of causing such breach or knowing that it would cause such breach.

V. Conclusion

29 In the light of the above, in the appropriate case, a victim of cyber fraud may wish to consider instructing counsel to test out a “Persons Unknown” injunction in the Singapore courts.

29 Act 19 of 2016.

Can a “Persons Unknown” Injunction be Deployed in the Singapore Courts?

30 After all, as Anderson J aptly put in the New Zealand case of *Tony Blain Pty Ltd v Splain*:³⁰

[I]n circumstances where it is plain that persons are infringing proprietary interests which the law recognises, or deceiving the public by way of trade in a manner which may indirectly affect the commercial interests of others, the law should, if it reasonably can, provide a remedy.

31 This principle certainly applies in cases of fast-moving cyber fraud where slow action would likely result in unrecoverable dissipation of the proceeds of fraud.

30 [1994] FSR 497 at 499.