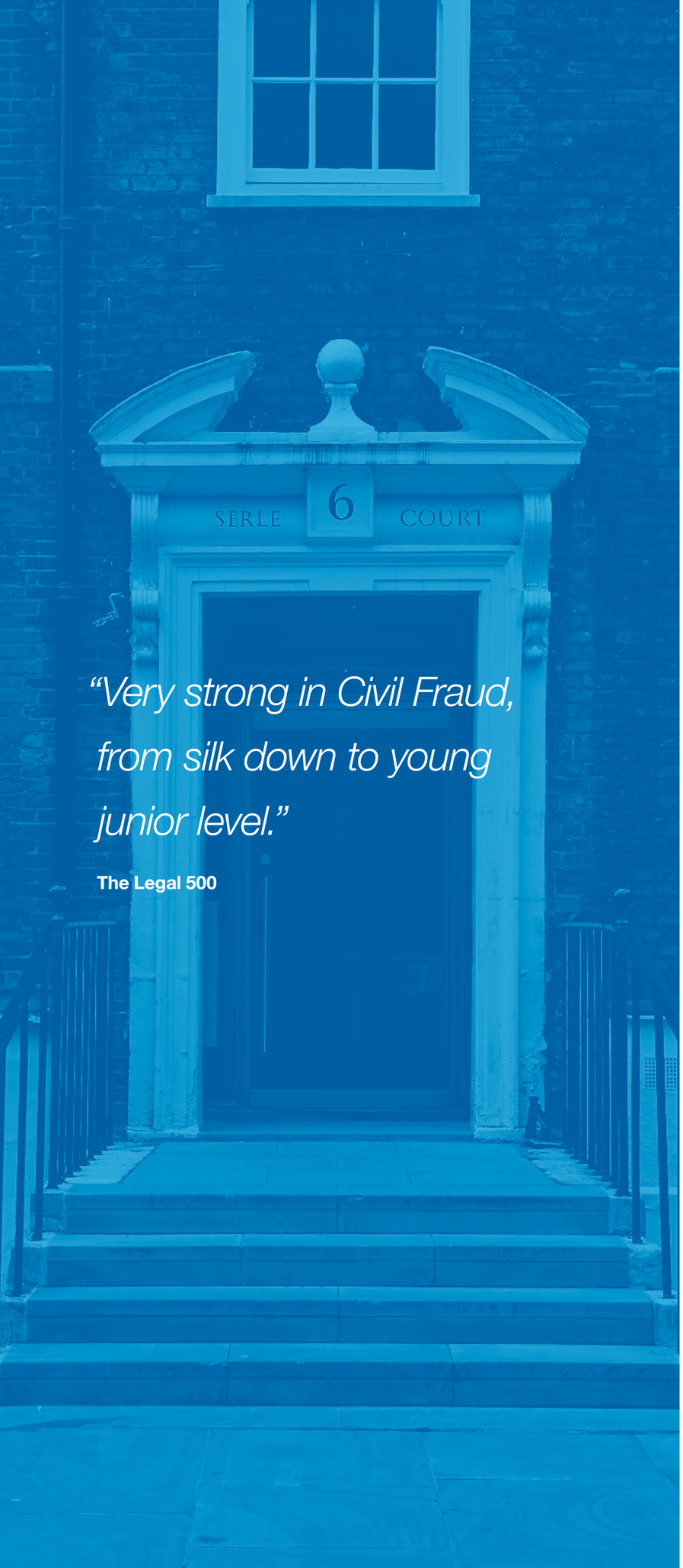
ISSUE **26**

serlespeak

RAISING THE BAR IN CHANCERY AND COMMERCIAL

Civil Fraud



"Very strong in Civil Fraud, from silk down to young junior level."

The Legal 500

I am delighted to introduce this new edition of Serlespeak on topics in civil fraud. I begin the edition by considering a recent application of the law of bribery. Simon Hattan then focusses on the potential liability of financial institutions in misappropriation claims after *Singularis*. Sophia Hurst examines how the courts have approached applications for interim relief in the context of cryptocurrency fraud. Finally, James Mather and Oliver Jones both discuss aspects of freezing injunctions – James looks at the court's approach to requiring a risk of dissipation while Oliver discusses the availability of funds for legal expenses where the underlying claim has a quasi-proprietary character.

Justin Higgo QC

Chambers News & Events

People

We send our best wishes for the future to Frank Hinks QC and Richard Walford who have retired from practice after many years with Serle Court.

Serle Court has offered tenancy to both of our pupils this year and is delighted to welcome Timothy Benham-Mirando and Maximus Marenbon as members of chambers.

We are extremely pleased to welcome Russell Hopkins to chambers. Russell has a strong international practice concentrating on fraud disputes at the intersection between criminal and civil wrongdoing. He has worked on large-scale commercial disputes, corruption, white collar crime including money laundering and proceeds of crime, and regulatory investigations on financial cases.

DIFC Courts Practice

We are pleased to announce the publication of *DIFC Courts Practice*, the definitive guide to the practice and procedure of the Court of Dubai International Finance Centre (DIFC) (Edward Elgar Publishing). The DIFC Courts endorse this major work which is co-authored by Rupert Reed QC (Serle Court) and Tom Montagu-Smith QC (XXIV Old Buildings) as the official companion to the rules of the DIFC. Contributors from Serle Court include James Weale, Dan McCourt Fritz, Jonathan McDonagh and Gregor Hogan.

Serle Court Online Dispute Resolution

Serle Court's Online Dispute Resolution, established by John Machell QC, Jennifer Haywood, and James Mather has been highlighted in The Global Legal Post. Described as an 'off-the-shelf' service, our barristers offer to resolve disputes within 8 days at a fixed arbitration fee. Please contact our Head Clerk Steven Whitaker if you would like to find out more about this service.

Remote events programme

To meet the challenges that the global pandemic has presented, Serle Court has repositioned its business development programme and instead of in-person seminars and conferences we have been delivering an extensive bespoke webinar programme across practice areas and jurisdictions.

To date, we have completed more than 50 webinars with more planned in autumn.

We delivered a series of webinars across all of our practice areas to our London clients, covering topics such as Shareholder Disputes, English Civil Jurisdiction Post-Brexit, Getting Through the Part 6 Gateway and service out of the jurisdiction, Trustee Exoneration Clauses and *Sofer v Swiss Independent Trustees* as well as litigation sessions from our barristers under 10 years call in our Juniors' Litigation Series.

Our Property team has delivered webinars to firms across the UK. The webinars have included topics such as restrictive covenants, claims against trespassers, 'encroachments' and remedies in light of *Beaumont v Florala.*

Our Property team will be delivering a second series of webinars in the Autumn titled *Practical Property Litigation in our first Covid Winter*. Please get in touch with Daniel Wheeler, Senior Clerk if you would like to receive further details regarding the sessions on offer.

International and Offshore events

Due to the travel restrictions presented by COVID-19, Serle Court made the decision to deliver the 5th International Trusts and Commercial Litigation Conference, usually hosted in New York City, virtually. The event will take place on the afternoon of Monday, 9th November 2020, coming to a screen near you. More details will follow soon.

For our offshore clients, including the Cayman Islands and the British Virgin Islands, a series of roundtable discussions on Trusts and Company Law topics have been delivered. A series on those topics is also planned for our Hong Kong clients. A virtual 'roadshow' will be delivered to our clients in the Channel Islands and, in Cyprus, a series of bespoke webinars on Cross-Border issues.

Five webinars have been delivered to our clients in Dubai as part of a series of live webinars discussing recent developments in DIFC.

All of the above events are supported by our Business Development team and Clerks who organise and deliver the events. The success of this programme has been such that webinars will continue to be part of the business development programme in the post-COVID world.

Awards and Directories

In September we have been very fortunate to receive finalist recognition for the following awards:

- Chambers Bar Awards: Chancery Set of the Year
- The British Legal Awards: Chambers of the Year
- The Lawyer Awards: Chambers of the Year

We would like to congratulate Philip Marshall QC who has been shortlisted for Chancery Silk of the Year, and Emma Hargreaves who has been shortlisted for Chancery Junior of the Year, both at the Chambers Bar Awards 2020. The 2020 Chambers Bar Awards will be held virtually on 19 November 2020.

We are delighted that Gregor Hogan is now registered in Part II of the DIFC Academy of Law's Register of Practitioners. Gregor has established a busy practice in the DIFC and, along with instructions involving allegations of fraud, breach of duty and contractual disputes, has acted in some of the leading cases on freezing and provision of information orders before the DIFC CFI and Court of Appeal over the past year. Gregor joins Rupert Reed QC, James Weale and Jonathan McDonagh who are already registered in the DIFC Court with full rights of audience.

We are delighted to have been recommended as a Band 1 set for Chancery: Traditional by Chambers and Partners High Net Worth directory 2020.

We congratulate our members William Henderson who is highlighted as a Star Individual, Andrew Bruce for his ranking in the Art and Cultural Property Law section, Beverly-Ann Rogers for her recognition as a 'Spotlight' trusts mediator, and Oliver Jones who is recognised as a 'Up and Coming' barrister.

We also receive high praises in relation to the administrative operation of chambers: *"They are very easy to work with,"* observes a commentator, adding: *"It's such a slick operation - they always provide a safe pair of hands.*

We are delighted to announce that Alan Boyle QC, Elizabeth Jones QC, Philip Jones QC, Khawar Qureshi QC, John Machell QC, Richard Wilson QC, Justin Higgo QC, William Henderson, David Drake and Andrew Bruce have been recognised in the 2021 edition of Best Lawyers directory. Richard Wilson QC has been awarded Lawyer of the Year, and Philip Jones QC and Andrew Bruce have been recognised for the first time as Best Lawyer under Insolvency and Restructuring, and Real Estate Litigation respectively.

We congratulate Rupert Reed QC and James Weale who have been recognised in The Legal 500 (Legalease) Commercial EMEA-UAE Guide.

Dakis Hagen QC, James Brightwell and James Weale have been included in the top 10 Trust Litigation Barristers in the Citywealth Leaders List 2020. Citywealth Leaders List is a curated directory of the leading individuals in international private client and wealth management.

Social Media

We have six designated discussion groups on LinkedIn to enable Serle Court members and clients to discuss topical issues. These groups are Competition Law, Contentious Trusts and Probate, Fraud and Asset Tracing, Intellectual Property, Middle East and Arab Law, and Partnership and LLP Law. Please join us.

Please also follow us on Twitter @Serle_Court.

***Serlespeak* is edited by Jonathan Fowles**

It's not always about money

The dividing line between a legitimate activity reflecting a desire to cement good business relations and show appreciation to one's commercial counterparties and an unlawful inducement which engages the English law of bribery is not always an easy line to draw, not least for business people used to a pre-Bribery Act 2010 corporate entertainment culture and operating in an entrepreneurial environment where a premium is placed on developing personal relations with potential counterparties.

The legal test as to whether conduct of a particular kind falls foul of the law is now well established; it is founded on the fiduciary obligations of those who have undertaken or been entrusted to act on behalf of another and are in a position to influence the affairs of their principal (as the CA has most recently re-confirmed in *Prince Eze v Conway & Anor* [2019] EWCA Civ 88 at [38]-[43] and [63]): the principal is entitled to disinterested service from his agent and to be confident that the agent will act wholly in his interests when discharging the duties that have been entrusted to him. The law of bribery is engaged when an agent permits what should be his single-minded duties to his principal to conflict with his own interests. In *Imageview v Jack* [2009] EWCA Civ 63, where a football agent obtained an undisclosed benefit from the club which agreed to employ his principal, Jacob LJ identified (at [6]) that anyone who undertakes to act for another must do so 100% and must not permit his own interest to get in the way of the obligation to act for another without telling that other. He expressed the view, with which the CA agreed, that an undisclosed but realistic possibility of a conflict of interest is a breach of the agent's duty of good faith to his client. Once that duty is breached, the full range of legal presumptions and remedies are engaged to ensure that the principal is not unknowingly disadvantaged by the absence of disinterested commitment on the part of his agent.

That statement has come to be accepted as the boundary mark for a claim in bribery. In *Fiona Trust v Privalov* [2010] EHWC 3199 (Comm) Andrew Smith J identified that whilst the courts have accepted that some gifts or benefits are simply too small to be treated as bribes (citing The *Parkdale* [1896] P 53, where the Divisional Court characterized small gratuities customarily paid (and known by the principal to have been paid) to a ship's Master for the efficient discharge of cargo as "a small present, not in any sense antagonistic to his owners"), the question in each case, following *Imageview,* required an assessment of whether the payment or conduct in question was sufficient to create a "real possibility" of a conflict between interest and duty. Similarly, in *Novoship v Mikhaylyuk* [2012] EWHC 3586 (Comm) at [106], Christopher Clarke J (as he then was) expressed the essential characteristic of a bribe as being "a secret payment or inducement that gave rise to a realistic prospect of a conflict between the agent's personal interest and that of his principal" and that definition has now been endorsed by the CA in *Prince Eze v Conway* (supra) at [35]).

One of the less publicised issues in *Glenn v Watson* [2018] EWHC 2016 (Ch) demonstrates that the line between a *de minimis* present and conduct which realistically may create a conflict may be very far from what ordinary commercial people might consider to fall within the law of bribery. In *Glenn* the defendant, whilst in the process of a negotiation with the director of his putative joint venture partner (the claimant), struck up a personal relationship with and took various steps which at trial he contended were no more than he would do by way of seeking to cement good business relations with any existing or future contract counterparty. He assisted with the presentation of a potential private investment being promoted by the relevant director (this being the defendant's stock in trade); and, when learning of the difficulties she was facing, he made efforts to assist the daughter of that director to obtain a training contract at a law firm. The latter assistance involved the use of contacts to obtain interviews, and interview practice; it involved no transfer of monetary value to the director or to his daughter and was in the event unsuccessful. There was no suggestion at trial that the director was in fact influenced in his decision-making in any way by the efforts that had been taken by the defendant to help him or his daughter.

The defendant contended that the assistance fell within the *de minimis* principle, or in the circumstances simply did not attract the law of bribery at all, it being assistance involving neither the transfer nor offer of money or monetary value to the relevant fiduciary, which resulted in no material benefit being provided to the claimant's director. In support of these arguments the defendant prayed in aid *Libyan Investment Authority v Goldman Sachs International* [2016] EWHC 2530, where Rose J held that the grant of a prestigious internship at Goldman Sachs to the younger brother of the deputy chairman of the LIA did not on the facts amount to actual undue influence by the bank.

To the defendant's no doubt considerable surprise, although Nugee J dismissed the inducement claim founded on personal assistance to the fiduciary with his investment proposition as insufficient at the time the joint venture agreement was executed, the learned judge found that the efforts which the defendant had taken to assist the daughter of the claimant's fiduciary to obtain a training contract were, in context, sufficient to create a real possibility of conflict, such as to entitle the claimant to set aside (independently of other grounds on which the claimant also succeeded) the joint venture agreement that had been reached.

In reaching this decision, Nugee J dismissed the reliance placed on the LIA case, which for reasons that are not clear from the judgment, was only advanced as an actual undue influence claim (thus requiring proof of influence), and not as a claim based on the possibility of conflict that might have been found in the grant of the prestigious internship to the fiduciary's relative. The judge also dismissed as too narrow a view of the law the submission by the defendant in Glenn that the absence of financial value to the fiduciary in the provision of the relevant assistance took the case outside the principles applicable to bribery. Applying *Imageview,* Nugee J identified that the question was whether the agent had been offered or provided with something that gave rise to a realistic possibility of a conflict (see [427] to [428]): it was not necessary that a monetary value be placed on this. The judge did not doubt that seeing their child take the first steps in their chosen profession was something that most parents would consider to be one of the things that was most important to them. Assistance with that goal by the defendant was found by the judge, in itself, to be realistically capable of having the effect of undermining the single-minded loyalty of the fiduciary to the claimant. And that was enough to unwind months of negotiation for a multi-million pound joint venture.

Justin Higgo QC *is recognised in the directories as a leading practitioner in civil fraud, commercial dispute resolution and commercial chancery; he appeared in* Fiona Trust *with Dominic Dowley QC, who was also lead counsel in* Novoship. *Justin was one of the team of chambers counsel led by Elizabeth Jones QC in* Glenn v Watson, *alongside Gareth Tilley, Paul Adams and Oliver Jones.*

Quincecare reborn, *Stone & Rolls* is finally no more

In 1992 the High Court held that it is an implied term of the contract between a bank and its customer that the bank will not execute a customer order if it has reasonable grounds for believing that the instruction is an attempt to misappropriate the funds of the company: the so-called *Quincecare* duty *(Barclays Bank plc v Quincecare Ltd* [1992] 4 All ER 363 per Steyn J at 376G).

Since then, not a single financial institution had been found liable for breaching the *Quincecare* duty – until that fate befell Daiwa Capital Markets in *Singularis Holdings Limited (in liquidation) v Dalwa Captial Markets Ltd* [2019] 3 WLR 997*,* the final act of which was reached when the Supreme Court dismissed Daiwa's appeal at the end of last year.

Singularis was a Cayman company established to manage the personal assets of Mr Al Sanea, its sole shareholder, a director and also its chairman, president and treasurer. Although there were six other directors, they took no active role in the company's management. Daiwa provided the company with banking facilities and, by early June 2009, some $204 million was held to Singularis' account. In the two-month period thereafter, Daiwa received, and acted on, instructions from Mr Al Sanea to make payments out to other companies within his wider business group for which (as was common ground) there was no proper basis.

In September 2009, Singularis went into liquidation and the liquidators brought proceedings against Daiwa alleging, amongst other things, breach of the *Quincecare* duty. Daiwa contended that Singularis was, in effect, a 'one man company', with Mr Al Sanea as its directing mind and that his fraudulent conduct was to be attributed to the company, which was therefore precluded from relying on the *Quincecare* duty due to its own illegality and/or deceit.

Rose J. rejected Daiwa's defence and upheld Singularis' claim, noting that Daiwa had failed to act on *"many obvious, even glaring, signs that Mr Al Sanea was perpetrating a fraud on the company".* The Court of Appeal unanimously dismissed Daiwa's appeal.

In the Supreme Court, argument focussed on attribution and its consequences, Daiwa having chosen not to appeal the finding that it had acted in breach of its *Quincecare* duty. Despite extensive judicial and extra-judicial controversy in recent years concerning the doctrines of both attribution and illegality, Lady Hale observed that the case was one *"bristling with simplicity"* and dismissed Daiwa's appeal in a judgment running to just fourteen pages. In doing so, she finally laid to rest the authority of the House of Lords decision in *Stone & Rolls Ltd (in liquidation) v Moore Stephens* [2009] AC 1391, which had already been largely disapproved by the Supreme Court in *Bilta (UK) Ltd v Nazir (No.2)* , expressly agreeing with Rose J. that *"…there is no principle of law that in any proceedings where the company is suing a third party for breach of duty owed to it by that third party, the fraudulent conduct of a director is to be attributed to the company if it is a one-man company."*

To the contrary, she emphasised that questions of attribution are always to be answered by reference to the context and the purpose for which the attribution is relevant. In *Singularis,* the context was the breach by the bank of its *Quincecare* duty, the very purpose of which is to protect the company against the sort of misappropriation perpetrated by Mr Al Sanea. That duty would be denuded of value if his fraudulent conduct was to be attributed to the company.

In short order, the *Singularis* case has breathed new life into the previously much overlooked *Quincecare* duty and, at the same time, finally consigned *Stone & Rolls* to the annuls of history. Quite a feat in just fourteen pages. Litigants and their professional advisors are likely to take advantage in the months and years to come.

Simon Hattan *has a broad commercial chancery practice, with a particular emphasis on civil fraud and banking & finance litigation. He has been recommended by the directories in the top tier in civil fraud (Legal 500) and banking & finance (Legal 500 and Chambers & Partners).*

Interim relief decrypted?

April 2020 marked 10 years since Bitcoin was invented, but until recently its legal status had not been scrutinised in any common law jurisdiction. The last few months have marked a period of significant development in the legal response to frauds involving cryptocurrencies, highlighting in the process that the familiar interim remedies for fraud needed rapid re-thinking in order to be fit for purpose in this digital sphere.

Where a fraudster dissipates traditional currency away through bank accounts, there is a ready arsenal of remedies available to the victim to locate, freeze and trace the funds: freezing, *Norwich Pharmacal* and *Bankers Trust* relief can all be utilised, including against intermediary banks, who are often a vital source of information. However, when cryptocurrency is fraudulently diverted, there is no obvious middleman owing to the de-centralised nature of the currency. If the cryptocurrency can be traced to a wallet held with a cryptocurrency exchange, orders for information may be sought against the exchange to disclose the identity of wallet holders and the onward destination of funds.

However, *Bankers Trust* requires that the applicant show, to the good arguable case standard, a proprietary claim over the assets to establish a right to trace.

In a first for the English Courts, judges have recently grappled with the question of whether cryptocurrencies could be considered property for the purpose of granting interim relief in *Robertson v Persons Unknown* (16 July 2019, unreported) and *Vorotyntseva v Money-4 Ltd & ors* [2018] EWHC 2596 (Ch), (not reported until November 2019). In both cases, the judges were willing to classify cryptocurrency as property. November 2019 also saw the release of the UK Jurisdiction Taskforce's Legal Statement on Cryptocurrencies and Smart Contracts, in which it was argued that, notwithstanding the technical classifications of the old case law and the difficulty of situating cryptocurrency within the traditional distinction between choses in possession and choses in action, cryptocurrencies had the necessary indicia of property and should be classified as such. The Legal Statement emphasised the English common law's ability to adapt and respond flexibly to new technologies and commercial innovations.

The Legal Statement was cited with approval in *AA v Persons Unknown* [2019] EWHC 3556 (Comm) (17 January 2020) and it now appears settled that cryptocurrencies are property under English law. This provides welcome certainty for cryptocurrency investors as to their rights in transferring and using cryptocurrency. However, the *AA* case also demonstrated that there is a good deal still to do in order to make the traditional interim remedies effective against crypto-frauds.

AA involved an (anonymised) insurance company that suffered a hacking attack, where the hackers infiltrated and bypassed the company's firewall and installed encrypting malware on one of its insured customer's systems. The hackers demanded a ransom of £950,000 payable in Bitcoin. Once the insurer had paid the ransom, the fraudsters sent decryption software. The insurer tracked the ransom bitcoin to a wallet operated by a cryptocurrency exchange called Bitfinex. On an application against Bitfinex and the persons unknown who had demanded the ransom, Bryan J approved the analysis in the Legal Statement and granted proprietary injunctions against all defendants.

However, he adjourned the question of freezing and *Norwich Pharmacal/ Bankers Trust* relief because the Bitfinex defendants were out of the jurisdiction, in BVI. Bryan J explored *"in some considerable detail"* the problem that a *Bankers Trust* or *Norwich Pharmacal* order would involve requiring a respondent out of the jurisdiction to provide information pursuant to an English court order, and whether there was a jurisdictional gateway to serve Bitfinex out of the jurisdiction. Bryan J explained that although in *CMOC v Persons Unknown* [2017] EWHC 3599 (Comm), Waksman J had held that service out of the jurisdiction of a *Bankers Trust* application was permissible under the necessary and proper party gateway, it appeared that Waksman J had not been referred to earlier case law casting doubt on this, including the decision of Teare J in *AB Bank Ltd v Abu Dhabi Commercial Bank PJSC* [2016] EWHC 2082 (Comm). In that case, Teare J held that *Norwich Pharmacal/Bankers Trust* relief was not interim but final relief against a non-cause of action defendant ('NCAD') and so did not fall within the jurisdictional gateway in paragraph 3.1.5 of Practice Direction 6B. Neither was the necessary and proper party gateway met because no substantive claim was advanced against the bank. The effect of Teare J's decision is to significantly confine the circumstances in which interim relief can be sought against a foreign NCAD.

Whilst the uncertainty in this area is not confined to cases involving cryptoassets, the problem is particularly acute since crypto-fraud is very likely to involve parties located abroad, and the potential sources of information are much more limited. The issue needs to be revisited if the Legal Statement's aims of encouraging the use of English law and jurisdiction in cryptocurrency transactions are to be met. It is worth noting in that regard that in BVI, a known crypto-friendly jurisdiction where Bitfinex and other crypto firms are incorporated, the courts have recently declined to follow the English case law and confirmed that *Norwich Pharmacal* relief is available in support of foreign proceedings and arbitrations (and is conceptually distinct from, and unaffected by the current uncertainty over, the Black Swan injunction: *K&S v Z&Z BVIHC* (COM) 2020/0016 (10 March 2020) and A Foreign Representative in *Foreign Insolvency Proceedings v Five Registered Agents* (15 June 2020)).

Sophia Hurst *has a broad commercial chancery practice encompassing a range of commercial litigation, civil fraud and asset recovery, shareholder/ joint venture disputes, banking and financial services, and contentious trusts litigation.*

Reassessing risk on freezer applications

"A cautious approach is appropriate before deployment of what has been called one of the court's nuclear weapons." So said Mrs Justice Carr (as she then was) of freezing injunctions in *Tugushev v Orlov* [2019] EWHC 2031 (Comm). Although such observations are hardly new, caution has increasingly been the hallmark of the courts' attitude towards granting the remedy (or, more particularly, continuing it at a contested return date hearing).

Whether the applicant can adequately establish a real risk of dissipation is the most frequent battleground. In the majority of cases, that will necessarily be a matter of inference from objective facts alleged. The trend apparent from recent cases, however, is an increasingly granular focus on what inferences can truly be drawn from given facts. As made clear in the summary of the relevant principles provided by Popplewell J (as he then was) in *Fundo Soberano de Angola v Jose Filomeno dos Santos* [2018] EWHC 2199 (Comm), general allegations of bad behaviour will not suffice: the matters alleged must specifically evidence a risk of unjustified dissipation.

In fraud claims, particular danger arises from the instinct to assume that allegations of dishonesty in the substantive claim will be sufficient to establish the risk of dissipation. Claimants cannot pull themselves up by their own bootstraps in this way, as the Court of Appeal held in *Thane v Tomlinson* [2003] 1272. Establishing a good arguable case in relation to an allegation of dishonesty for purposes of satisfying the merits threshold therefore does not of itself also establish the necessary risk of dissipation. The court will scrutinise the evidence to see whether the dishonesty in question points to the conclusion that assets may be dissipated and also consider any properly arguable answers to the allegation made.

Another matter from which the courts have recently shown themselves unwilling to infer the existence of a risk of dissipation, at least in isolation, is the use of offshore structures for the holding of assets. That the existence of such structures creates the possibility of their being used by the respondent for purposes of dissipation is insufficient. The onus remains squarely on the applicant to evidence a risk that they may be used in that way on the particular facts: *Holyoake v Candy* [2018] Ch 297, per Gloster LJ at 356C-D.

Most recently of all, the question has arisen of what can be inferred from evidence of a lack of commercial probity (as opposed to dishonesty) as regards the risk of dissipation. Such allegations may be relevant in the context of other matters evidencing the risk. However: *"Just as dishonesty does not necessarily prove a real risk of dissipation, how much more so where the case is some lack of commercial probity falling short of dishonesty": Les Ambassedeurs Club Ltd v Albluewi* [2020] EWHC 1313 (QB), per Freedman J at [43].

There is nothing new in the proposition that the risk must be established by *"solid evidence adduced to the court."* Yet the tendency for that principle to be honoured as much in the breach as the observance has disappeared. The balance between strategic advantages and risks for the would-be applicant for injunctive relief has altered correspondingly.

James Mather's *practice focuses on insolvency, fraud, partnership and company law.*

Whose money are you spending?

The High Court has recently recognised the concept of a "quasi-proprietary" claim and held that, where a freezing order is made over assets subject to such a claim, the principles which apply when the Court is deciding whether a defendant should be permitted to spend frozen assets on legal expenses are the well-established principles that apply in the context of proprietary injunctions, and not those that apply in the context of ordinary freezing orders.

In *Kea Investments v Ivory Castle & Ors* [2020] EWHC 472 (Ch), the High Court has recently recognised the concept of a "quasi-proprietary" claim and held that, where a freezing order is made over assets subject to such a claim, the principles that apply when the Court is deciding whether a defendant should be permitted to spend frozen assets on legal expenses are those that apply in the context of proprietary injunctions, and not those that apply in the context of ordinary freezing orders.

In February 2019, Kea had obtained an injunction against Ivory Castle which comprised a freezing injunction over one pot of money and a notification injunction over other assets. After granting the injunction, Nugee J heard brief argument on the form of the exceptions and permitted Ivory Castle to spend a reasonable amount on legal expenses out of the funds subject to the notification injunction.

In doing so, Nugee J followed an unreported decision of Richards J in *HMRC v Begum* [2010] EWHC 2186 (Ch) which Ivory Castle's counsel had handed up during the hearing, in which Richards J had drawn a "clear line" between proprietary and non-proprietary claims. Nugee J held that, since Kea did not have a proprietary claim to the funds in Ivory Castle's name as such, the principles which applied to the legal expenses exception were those which applied to (non-proprietary) freezing injunctions. Kea had contended that its claim was akin to a proprietary claim because, on its case, the assets belonged not to Ivory Castle but to Mr Watson and Kea was therefore entitled to execute its judgment against them.

The funds available for legal expenses were depleted during 2019 and, in February 2020, the parties were back in court on an application by Ivory Castle to vary the injunction so as to be permitted to use the assets that were subject to the freezing injunction to discharge its (and Mr Gibson's) legal expenses. This provided the opportunity for the court to hear full argument on the principles to be applied to the legal expenses exception in such a case.

Kea relied on the decision in *JSC BTA Bank v Ablyazov* [2015] EWHC 3871 (Comm) in which Popplewell J applied the stricter test used in proprietary situations to an application by a judgment debtor's son to use monies held in his own name but which the Bank contended were held beneficially for the judgment debtor.

Nugee J held that the parallel between *Ablyazov* and Kea's case was exact, and had "no hesitation" in following *Ablyazov.* Nugee J distinguished *Begum* on the basis that there HMRC had had a purely personal claim.

Nugee J held that there is a *"clear distinction in principle"* between the position of a claimant such as HMRC in *Begum* which has an ordinary non-proprietary claim with no present claim to the defendant's assets at all, and that of the Bank in *Ablyazov* (or Kea) where the frozen assets are not the undisputed property of the ostensible owner but are assets the beneficial ownership of which is disputed. The latter case was, Nugee J held, "very close" to a proprietary claim, and it was difficult to see why a defendant should be at liberty to spend what may be someone else's money on defending himself.

The practical effect of this decision was that Nugee J applied the four-stage test used in proprietary situations, as set out in *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2009] EWHC 161 (Ch). Crucially, therefore, although he accepted that Ivory Castle had no other funds available to it with which to fund the litigation, Nugee J was required to exercise a "careful and anxious judgment" as to where the balance of justice lay. On this question, the balance of justice lay in refusing Ivory Castle permission to access the frozen funds unless and until Mr Gibson provided adequate security to Kea (which, at a subsequent hearing, Nugee J found Mr Gibson had failed to do: [2020] EWHC 750 (Ch)).

This may prove a useful decision for judgment creditors who wish to preserve assets that are suspected of being held under nominee arrangements for the defaulting judgment debtor.

Oliver Jones' *practice focuses on civil fraud, commercial litigation and trust disputes. Elizabeth Jones QC, Paul Adams and Oliver represented Kea at the hearing (instructed by Farrer & Co). Together with Justin Higgo QC, Gareth Tilley and Zahler Bryan, they continue to represent Kea in its efforts to enforce judgment against Mr Watson's assets both in England and internationally.*

6 New Square
Lincoln's Inn
London WC2A 3QS

T: +44 (0)20 7242 6105
F: +44 (0)20 7405 4004

Serle_Court

www.serlecourt.co.uk

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chancery & commercial