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set out in the security document effectively granted the chargee a significant level of control over the assets. The judge further considered it to be important that the (heavily circumscribed) exceptions to the restrictions on asset disposals did not allow for any disposal to be made in the ordinary course of its business. The judge therefore concluded that the essential point was that the company was not free to deal with the relevant assets.

The judge accepted that it may be helpful in considering the question of whether a charge is fixed or floating to look at the range of possibilities as a spectrum, with total freedom of management at one end of the spectrum and a total prohibition on dealings of any kind at the other end of the spectrum, but held that it would be wrong to consider that a charge would only be fixed if it was located at the total prohibition end of the spectrum.

Edwin Johnson J declined to set out his own description of the characteristics of a fixed charge and a floating charge and also did not wish to try to identify the location of the point on the spectrum of possibilities where a floating charge gives way to a fixed charge, or vice versa.

COMMENT

The decision offers a detailed review and clear analysis of the relevant case law and sets out a reasoned approach as to the considerations that need to be taken into account when characterising a security as fixed or floating. The judge appears to have endorsed and adopted the passage in *Lightman & Moss, The Law of Administrators and Receivers of Companies* (Sixth Edition), at 3-021 that the critical issue is the nature and extent of the chargee's control of the assets in question, which requires analysing the nature and extent of the restrictions placed by the charge documents upon the dealings by the chargor with the charged assets.

The judge's rejection of the position advanced in various other textbooks and commentary that effectively total control by a chargee would be required for a charge to be fixed will probably be welcomed by chargees, but at the same time is likely to lead to an increase in litigation on this subject. As the judge himself acknowledged, the characterisation of a charge may well be finely balanced, requiring careful analysis of the assets and the security documents, by reference to the relevant case law. It will therefore now be much more difficult for parties to determine where the balance between fixed and floating charges lies. ■

Lara Kuehl of **Selborne Chambers** reports on a recent banking law case

INTERIM PROPRIETARY INJUNCTIONS AGAINST CRYPTOCURRENCY EXCHANGES

Piroozzadeh v Persons Unknown and Others

[2023] EWHC 1024 (Ch)

SUMMARY

The High Court has discharged an interim proprietary injunction against a cryptocurrency exchange (Binance) because the claimant failed in his duty to make a fair presentation of the case at a without notice hearing.

FACTS

The claimant claimed to have been a victim of a scam whereby (among other things) he was persuaded to transfer an amount of cryptocurrency, USD Tether (Tether), to blockchain addresses nominated by the fraudsters. The claimant's Tether was subsequently traced to deposit addresses for accounts on the Binance cryptocurrency exchange.

At a without notice hearing, Sir Anthony Mann made various orders including a proprietary injunction requiring Binance to preserve the claimant's Tether or the traceable proceeds thereof. There was no allegation by the claimant that Binance was guilty of any wrongdoing. It was alleged that Binance was a constructive trustee because it had received property obtained as a result of the fraudsters' wrongdoing.

DECISION

At the return date hearing, on Binance's application, Trower J discharged the injunction against Binance. The claimant was ordered to pay Binance's costs on the indemnity basis.

Applying without notice

The judge agreed with Binance that the claimant should have distinguished between the positions of the various defendants when justifying the need to apply without notice. This was a significant failing given that there was no evidence that Binance would itself have taken any steps to the claimant's detriment if it had been forewarned of the application.

The judge also agreed that it would have been more appropriate to proceed without notice against the alleged fraudsters and then to serve any order on Binance as a non-respondent. However, the failure to give notice alone would not have justified the discharge of the injunction once granted.

The *bona fide* purchaser defence

Binance's evidence was that when a user deposited cryptoassets into a deposit address, the user's Binance account was credited with the amount of the deposit and they would then be permitted to draw against any credit balance as in a conventional banking arrangement. The cryptoassets in the deposit address were periodically swept into a central, unsegregated pool address, where they were treated as Binance's general assets.

Accordingly, in this case, what had happened was that all the claimant's Tether allegedly deposited in Binance deposit addresses

had been swept into one of two central pools. Since then, hundreds of transactions an hour had passed through the pools. In those circumstances, any attempt to trace the Tether swept into the pools would (at the date the injunction was granted, over nine months later) have been futile.

Binance's case was that the consequence of the pooling and the users' right to receive substitute assets in the amount of the value swept constituted Binance a purchaser for value of the stolen Tether, such that (provided Binance had acted *bona fide*) any proprietary rights of the claimant would not survive.

While Sir Anthony Mann had been told at the without notice hearing that the claimant's Tether had been transferred into a pool, the possible legal consequences had not been mentioned to him, which they should have been.

This failing was made more acute by the fact that the same legal representatives acted for another claimant in unconnected proceedings, *D'Aloia v Person Unknown and Others*,[1] in which Binance was also a defendant. The claimant's legal representatives were aware from their involvement in *D'Aloia* that Binance was likely to assert a *bona fide* purchaser defence.

Adequacy of damages

The judge agreed with Binance that the issue of whether damages would be an adequate remedy should have been presented more comprehensively. Adequacy of damages against Binance was not addressed at all in the claimant's skeleton argument for the without notice hearing and, at the return date, it remained unclear why the claimant said damages were not an adequate remedy.

Practical compliance with the injunction

The claimant had failed to explain how, practically, Binance would be able to identify or freeze the traceable proceeds of the relevant Tether in light of the pooling structure. The judge considered that this was an important failure, particularly where Sir Anthony Mann had indicated at the outset of the without notice hearing that he was concerned that the application was an exercise in futility because of the lapse of time.

Discharge of injunction and exercise of discretion

The judge held that the matter had not been fairly presented by the claimant at the without notice hearing. The consequence was that the injunction against Binance should be discharged unless the court exercised its discretion to continue or regrant the order.

The judge concluded that there was no basis on which it would be right to remake the order, having regard to the following:

- The claimant's failure to inform the court of likely defences and the failure to distinguish between the separate position of the various defendants were important failures.
- The need to encourage compliance with the duty of fair presentation was acute in the context of such cases, given that exchanges often find themselves joined as respondents. It was particularly important that the nature of the claims against an exchange and whether there was a substantive claim or merely a claim seeking *Norwich Pharmacal/Bankers Trust* relief was properly differentiated.
- There was some level of culpability on the part of the claimant's legal representatives, who had made a deliberate decision not to disclose a possible defence of which they were aware. (There was no suggestion that this decision was motivated by anything other than a misapprehension of the nature of the duty to make full disclosure on a without notice application.)
- There was no risk of significant injustice to the claimant if the injunction were discharged because it remained unclear why damages would not be an adequate remedy. In any event, the injunction served no useful purpose where it was clear that the claimant's Tether had long since been mixed and dissipated in the pooled addresses.

COMMENT

The decision in *Piroozzadeh* raises important issues in relation to the approach that should be taken by potential claimants seeking substantive interim relief against cryptocurrency exchanges.

As a starting point, those advising potential claimants should consider carefully whether it is appropriate to seek substantive relief (rather than *Norwich Pharmacal or Bankers Trust* relief). In many such cases, even if a substantive claim against an exchange exists and is ultimately successful, damages are likely to be an adequate remedy.

Even if it is appropriate to seek substantive relief against an exchange, it may not be appropriate to do so without notice, unless there is actual evidence that the respondent would take any steps to the detriment of the applicant if forewarned of the application. If there is a concern that there may be inadvertent tipping off, the "obvious solution" (of which the judge expressed approval) of proceeding without notice against the fraudsters and then serving any order on the exchange as a non-respondent is likely to be a better course in many cases.

If seeking an interim proprietary injunction without notice against a cryptocurrency exchange, potential claimants should consider whether the *modus operandi* of the exchange involves pooling users' assets in exchange for a grant of credit. If so, then the claimant's duty of fair presentation may involve anticipating and drawing to the court's attention a potential *bona fide* purchaser defence (particularly now that the availability of this defence has been identified in *Piroozzadeh*, a widely reported judgment). That is not to say that, whenever cryptoassets are pooled, it cannot be argued that the claimant's proprietary interests would remain effective and enforceable, but such arguments are only fairly presented if combined with a full explanation of the likely defences. *Piroozzadeh* is a helpful reminder that, in all cases, the *quid pro quo* for proceeding in the absence of a respondent is that the court must be told what arguments might have been raised if the respondent were present. ■

1 A case in which the same judge, Trower J, granted interim relief on a without notice application against, amongst others, *Binance*: [2022] EWHC 1723 (Ch).