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Cyber Fraud: Injunction Against Persons Unknown

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Online scams have become increasingly prevalent, particularly since the cryptocurrency "boom". When one is scammed and the scammer can be identified or traced, one may want to commence proceedings against the scammer to recover one's losses. In this regard, a plaintiff would often seek proprietary injunctions and Mareva injunctions to prevent a fraudster from dealing with the stolen assets (e.g., hiding or spending it) before the case is concluded. But in cases of cyber fraud, it is usually difficult to know the true identity of the fraudster. This raises the question, can one obtain an injunction against an unknown fraudster?

Zschimmer & Schwarz GmbH & Co KG Chemische Fabriken v Persons Unknown & Anor [2021] 7 MLJ 178 is the first Malaysian case dealing with this issue, adopting the English position that injunctions can be granted against persons unknown.

Brief Facts

The plaintiff is a German company with business arrangements with their representative company in South Korea, known as KoWorks. KoWorks sells the plaintiff's products and earns commission in return.

A fraudster managed to hack and access into emails between plaintiff and KoWorks. The fraudster then deceived plaintiff to pay the commission into the 2nd defendant's bank account. The court described this as an increasingly common type of fraud known as a 'push payment fraud', where a payment is made for a legitimate transaction but into a different bank account controlled by the fraudster.

Injunctions: Proprietary and Mareva

Proprietary injunctions restrain a defendant from dealing with the plaintiff's assets, or assets in which the plaintiff has an existing proprietary interest in. The English case of *AA v*

Persons Unknown [2020] 4 WLR 35 sets out the 3 requirements for a proprietary injunction:

a. The applicant must show that there is a serious issue to be tried on the merits.

b. The balance of convenience is in favour of granting an injunction.

c. It is just and convenient to grant the injunction.

A Mareva injunction is a temporary order restraining the defendant from disposing of its assets until the case against it is determined. The law on Mareva injunctions is settled. The Supreme Court in *Aspatra Sdn Bhd & 21 Others v Bank Bumiputra Malaysia Bhd & Anor* [1988] 1 MLJ 97 sets out the 3 requirements as follows:

a. The applicant must show that it is a good arguable case.

b. The defendant must have assets within jurisdiction.

c. There is a risk of the assets being removed before judgment could be satisfied. In its determination of this issue, the court stated that a risk of dissipation can be found based on *'a lack of probity and honesty'*.

Injunctions Against Persons Unknown

The defendants are not often described as 'persons unknown'. As a starting point, the Court took note that:

- English case law allows for similar injunctive orders against 'persons unknown'.

- There is nothing in the Rules of Court 2012 that prevents a writ of summons and applications from being filed against persons unknown. In fact, the Court went on to remark that Order 89 of the ROC on summary proceedings for possession of land allows for a defendant reference to persons unknown.

The court then drew parallels to a similar English High Court decision: *CMOC Sales & Marketing Limited v Persons Unknown and 30 others* [2018] EWHC 2230 (Comm). In that case, the court had defined 'persons unknown' as a particular class of persons including:

> *'(1) any person or entity who carried out and/or assisted and/or participated in the Fraud; and*
>
> *(2) any person or entity who received any of the monies misappropriated from the Claimant (including the traceable proceeds thereof) other than in the course of a genuine business transaction with either another defendant or a third party…'*

The court also went into the process taken in identifying particular named defendants, stating that this was done through obtaining information and disclosure orders against the banks into which the funds were originally paid.

The court in *CMOC* further confirmed that it has jurisdiction to grant injunctions against persons unknown. This was later referred to approvingly by the Supreme Court in *Cameron v Liverpool Victoria Insurance Co Ltd* [2019] 3 All ER 1. The court there identified 2 categories of anonymous defendants. The first category is anonymous defendants who were identifiable but whose names were unknown. For example, squatters occupying a property can be identified by their location, even if not specifically named. The second category comprises anonymous defendants who were not only anonymous but cannot be identified. The example given was hit and run drivers.

The court only has jurisdiction to grant orders and/or injunctions against persons unknown of the first category. For the court to exercise the persons unknown jurisdiction, the plaintiff only needs to establish a good arguable case.

Commentary

As noted above, the crypto boom has brought forth a wave of cyber fraud. The advent of technology allows scammers to have an ever-increasing arsenal of tools at their disposal.

This is particularly so in the cryptocurrency industry which is largely unregulated. This alongside the novelty of the industry has led to many unsuspecting people falling victim to fraud.

This move by the Malaysian court in adopting the English position is welcomed as it has opened up a new avenue of recourse to hapless victims in order to recover their assets. This is especially so since – despite popular belief – some cryptocurrencies (such as Bitcoin) are traceable and are not completely anonymous. Therefore, this decision is one which will allow law enforcement to keep pace with those who would seek to evade it.

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