HCZZ / 2025

(For ex parte hearing before Duty Judge)

YAN Yu Ying v

D1: Person(s) unknown who received cryptocurrency originating from the Bitcoin Addresses stated at Paragraph 4 of the indorsement of claim up to 26 March 2025

D2: Persons Unknown being the individuals or companies or other entities who are identified in the Binance.com platform's terms and conditions as Binance Operator

D3: Persons Unknown being the individuals or companies or other entities that operate Coinbase.com

D4: Persons Unknown being the individuals or companies or other entities that operate okx.com

D5: Persons Unknown being the individuals or companies or other entities that operate gemini.com

D6: Bitcoinforme S.L. trading as Bit2Me of Calle Germán Bernacer, 69, 03203, Elche, Alicante, Spain

P's Skeleton Submissions for
(a) service out of jurisdiction against all Ds
(b) injunctive relief against D1
(c) *Bankers Trust* relief against D2-6

Legend: [1] means Tab 1 of the hearing bundle

P#1 means item 1 of P's List of Authorities

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Note: other Judges with previous experience of related case

1. The background facts of this case has been extensively litigated in HCA 2295 of 2019 which has been docketed to Lok J for trial.

2. Previous judges who dealt with different aspects of HCA 2295 of 2019 include Barnabus Fung J, Keith Yeung J, DHCJ Kent Yee and DHCJ Phoebe Man. If any of their Lordships/Ladyship (or Lok J) are available, it may be a saving of judicial resources for the matter to be placed before him/her.

Papers before the Court

3. This is P's urgent *ex parte* summons for the following substantive orders:-

    3.1. Leave for P to use information disclosed by Mr LEUNG Wing Hei ("**Mr Leung**") in HCA 2295 of 2019 to recover her Bitcoins.

3.2. Various orders as per the draft order.

3.3. Leave be granted to serve the draft concurrent writ (to be issued) and the orders out of jurisdiction.

3.4. Leave be granted to serve the concurrent writ, the order and subsequent court documents by substituted service as per the draft order.

4. The factual background is explained in the Signed Draft First Affirmation of P, YAN Yu Ying ("**Yan 1**"), and the technical background is explained in the Signed Draft First Affirmation of CHOW Kam Pui ("**Chow 1**").

5. P's solicitors undertake to issue this action and file the affirmed affirmations as soon as practicable.

6. A draft order is annexed to the summons, with differences to the standard worldwide *Mareva* form highlighted in red.

7. It is recommended the Honourable Court peruse the technical explanation in Chow 1 first before reading the draft order.

Need to proceed *ex parte*

8. The present application is taken out *ex parte* on the grounds of both urgency and secrecy:

8.1. The application is intended to stop the dissipation of Bitcoins that have been misappropriated despite being subject of an injunction in a separate action (HCA 2295 of 2019).

8.2. As explained in Chow 1, cryptocurrency can be transferred away very quickly, and it is commonly accepted that it is essential to take steps to stop dissipation as soon as possible.

8.3. Furthermore, in this case, there is a "*complex and vast layering scheme*" involving 365 identifiable transfers in less than 2 weeks. The prospect of recovery is growing dimmer as the fraudsters move the 361 Bitcoins to evade recovery.

9. The value of the 361 Bitcoins in question is significant. As of 12 March 2025 (date of misappropriation), they were worth USD 30,260,680.6 / HKD 235,281,330.77 (see Yan 1).

Factual background

10. The background may be shortly stated.

10.1. P is the plaintiff in ongoing civil action (HCA 2295 of 2019). In that action, P has obtained a proprietary injunction ("**pre-trial Injunction**") over (among others) the 361 bitcoins ("**361 bitcoins**") in the hands of Mr Leung.

10.2. Pursuant to a court order, Mr Leung has made disclosures enabling P's solicitors to monitor the 3 bitcoin addresses where the 361 bitcoins are held.

10.3. On 12.03.2025, P's solicitors discovered that the 361 bitcoins were transferred away.

10.4. They contacted Mr Leung's solicitors who denied responsibility for this and claims that the 361 bitcoins are likely stolen. **[7]**

10.5. Immediately after the incident, P made a report to the Hong Kong Police and to CYBERA, a free online service for reporting theft of cryptocurrency.

10.6. Investigators were contacted and an investigator was then instructed. A "*complex and vast layering scheme*" was uncovered, together with the fact that parts of the 361 Bitcoins flowed to/through Bitcoin addresses associated with D2-D6.

How Bitcoin tracing works

11. As explained by Dr Chow, Bitcoin tracing works by investigators collecting data correlating recipients with Bitcoin addresses.

12. For example, suppose someone wants to transfer Bitcoin to an exchange. The exchange gives him an address to send the bitcoin to. The person can now correlate that exchange with that Bitcoin address.

13. By repeating the process and applying other techniques, investigators can map different legal entities to different bitcoin addresses.

14. One of the tools enabling Bitcoin tracing is that provided by Chainalysis, which was mentioned in a 2019 English court judgment *AA v Persons Unknown* (QBD) [2020] 4 WLR 35 **[P#6]**.

The Defendants

15. Relevant to this application, the Defendants fall in two categories

Persons unknown who are recipients/accessories

15.1. D1 is/are persons unknown who are identifiable only by way of their association with bitcoin addresses.

15.2. P is seeking a proprietary and worldwide *Mareva* injunction against D1.

Centralised exchanges

15.3. D2-D5 are centralised cryptocurrency exchanges with apparent "**Know your custome**r" ("**KYC**") measures. Against them only a *Bankers Trus*t application is made at this stage.

First issue: release from express and implied undertaking

Prospective release

16. P derived the 3 bitcoin addresses (which her solicitors then monitored) from information disclosed in the 2nd Affidavit of LEUNG Wing Hei, where Mr Leung disclosed "*extended public keys*" pursuant to the order of the Hon. Keith Yeung J on 8 October 2021 **[2].**

17. Schedule 2(5) of **[2]** lists the following undertaking by the Plaintiff

> "The Plaintiff will not without the leave of the Court begin proceedings against the Defendant in any other jurisdictions **or use information obtained as a result of an order of the Court in the jurisdiction for the purpose of civil** or criminal **proceedings in any other jurisdiction**." (Emphasis added)

18. There is also an implied undertaking on the part of the plaintiff that the information obtained under the disclosure order should not be used other than for the purpose of the present proceedings: *Unicredit Bank Austria AG v Dragon Wise Trading Ltd* [2013] 2 HKLRD 169 at §6. **[P#1]**

19. Thus, release from undertaking from this Court is required. Without Mr Leung's disclosure, P would not have been able to know that 3 bitcoin addresses where the 361 Bitcoins were held, or not notice its theft.

20. The relevant principles were recently summarised by DHCJ Maurellet SC in *Jewish Federation of Greater Washington Inc v Aiwo Trading Co Ltd & Anor* [2021] HKCFI 1381 at §7. **[P#2]**

21. To enable P to bring the present proceedings, P respectfully invites the Court to exercise its discretion to release P from both undertakings because

    21.1. The clear case of fraud, involving the misappropriation of Bitcoins under injunction.

    21.2. Unless Mr Leung (who disclosed this information) is implicated in the theft of the 361 Bitcoins (in which public interest in policing the injunction in HCA 2295/2019 is of overwhelming consideration), Mr Leung is not prejudiced.

    21.3. In fact, Mr Leung benefits from P taking active steps to recover the Bitcoins. On Mr Leung's case, the 361 Bitcoins are his and (on that theory) he is the true victim of Bitcoin theft.

Retrospective release

22. P's duty of full and frank disclosure requires her to report that she is at present in breach of her implied undertaking when reporting the theft of 361 Bitcoins:-

    22.1. The loss was reported to the Police on 14.03.2025. The 3 Bitcoin addresses disclosed by Mr Leung were given to the Police.

22.2. The loss was also reported to CYBERA, which provides a free scam report service recommended by Chainalysis, a well-known tool for tracing cryptocurrency (see Chow 1). To assist CYBERA's assessment of the incident, a redacted version of Mr Leung's Affidavit was provided to CYBERA.

22.3. The information and the redacted Affidavit was also provided to investigators to assist with tracing of the 361 Bitcoins.

23. There is a discretion for the Honourable Court to grant retrospective leave to use documents obtained in proceedings for a collateral purpose: *Allied Group Ltd & Allied Properties (H.K.) Ltd v Secretary for Justice & Nicholas Charles Allen* [2003] 4 HKC 359. **[P#3]**

24. The grant of retrospective permission will be "*rare*"; but it may be appropriate to grant it if no prejudice has been caused to any other litigant by the unauthorised use. It will also be relevant to consider whether the breach was inadvertent, whether if a proper application had been made timeously it would have been granted and the proportionality of debarring the applicant from use of the documents: *Lakatamia Shipping Co Ltd v Su* (QBD) [2021] 1 WLR 1097. **[P#4]**

25. It is respectfully submitted this is a rare case where retrospective leave should be granted.

25.1. There was an extreme urgency in reporting the matter to the Police and CYBERA. As explained on the CYBERA website, reporting the theft in time would enable it to alert relevant exchanges. This may well have played a key role in stopping or slowing down the dissipation of the 361 Bitcoins (See Chow 1). Likewise the disclosure of information for investigators for the purpose of tracing.

25.2. The extent of the breach was minor. Only the necessary information required to stop or slow down the dissipation was provided. Irrelevant information was redacted from the Affidavit.

25.3. If an application was made timeously, it is unlikely the court would have declined leave for the limited collateral use.

25.4. In any event, refusing leave and debarring P from pursuing the 361 Bitcoins would be disproportionate.

26. P therefore respectfully prays the Honourable Court for retrospective leave.

Second issue: service out of jurisdiction

As regards D1

Legal principles

27. In order to obtain leave to serve originating process out of the jurisdiction, the plaintiff must demonstrate three things in his *ex parte* affidavit: the first goes to the existence of jurisdiction; the second and third go to its exercise.

27.1. The plaintiff must show a "*good arguable case*" that all his claims fall within the chosen head or heads of RHC O.11 r.1(1).

27.2. As regards the underlying merits of the plaintiff's case, however, the plaintiff need only show, at this stage, a serious issue to be tried.

27.3. In substance, the approach to forum conveniens in RHC O.11 cases is the same as to the grant of a stay where the defendant has been served in Hong Kong, save that the burden to establish that the Hong Kong court is the forum conveniens lies on the plaintiff in RHC O.11 cases, whereas in cases

where service has been effected in Hong Kong, the burden rests on the defendant to show that the forum conveniens is a foreign court.

See *Conflict of Laws in Hong Kong*, Third Edition, 2017, sections selected from pp.90-99. **[P#5]**

28. Relevantly HKCP 2025 § 11/1/36 states,

> "**Persons unknown / location unknown**—Where loss would be suffered within the jurisdiction and conduct was threatened within the jurisdiction, the court granted leave to serve out and a "self identification order", P*ML v. Person(s) Unknown* [2018] EWHC 838 (QB).
>
> **Leave to serve proprietary injunctions over crypto-assets affecting various parties including unknown parties was granted in an early case, *AA v. Persons Unknown who demanded Bitcoin on 10th and 11th October 2019* [2019] EWHC 3556 (Comm) [73], where it was not even known what jurisdiction they were in (gateway (f) applied). Leave to serve by email was also granted.** It may be more appropriate to identify the foreign defendants by reference to ownership of specific wallets located abroad rather than as persons unknown, *ChainSwap v. Persons* Unknown [2022] BVIHC (COM) 0031. A similar order was granted in *Osbourne v Persons Unknown Category A* [2023] EWHC 39 (KB) (nb, permission was granted on modern English gateways that do not exist in Hong Kong)." (Emphasis added)

29. The English courts have in a number of previous cases granted leave to serve out of jurisdiction in respect of persons unknown who misappropriated cryptocurrency. See the following first instance cases:

29.1. *AA v Persons Unknown* (QBD) [2020] 4 WLR 35 **[P#10]** at §75 "*it is not currently known where the first and second defendants* [i.e. persons unknown who demanded ransom in Bitcoin] *are. I should say the first and second defendants are potentially one and the same person*. and §85 (permission for service out granted)

29.2. *Gary Jones v Persons Unknown* [2022] EWHC 2543 (Comm) **[P#11]** at §33 "*This is an exceptional case. In circumstances not dissimilar to those considering by Bryan J in* AA v. Persons Unknown*, the citation for which I have previously given, it is not currently known where the first or second defendants are, or indeed who they are. There is no jurisdiction being identified where they are domiciled*" and §13 (service outside of jurisdiction previously granted)

29.3. *Osbourne v Persons Unknown and Ozone* [2022] EWHC 1021 (Comm) **[P#12]** at §§21-31.

29.4. *Piroozzadeh v Persons Unknown* [2023] EWHC 1024 (Ch) **[P#13]** "*Orders were also made for service of the claim form, the order and other documents in the case on the first, second, third, eighth and ninth defendants out of the jurisdiction and by alternative means*" (§1)

29.5. *Tuppawan Boonyaem v. Persons Unknown Category (A) and ors* [2023] EWHC 3180 (Comm) **[P#14]** §§47-48 (previous order for substituted service out of jurisdiction)

29.6. *Mooij v Persons Unknown* (KBD) [2024] 1 WLR 3800 **[P#15]** (summary judgment). Service outside of jurisdiction previously granted (3802H) in respect of persons unknown (see §§10-12)

30. In Hong Kong, a similar order appears to have been made in a case called *Worldwide A-Plus v Holder of Wallet Addresses* (HCA 2417 of 2019):-

30.1. SCMP report dated 25.01.2025 (exhibited in Chow 1 and **[P#17]**)

30.2. a Chinese language blog post, with relevant screenshots and critical commentary on the decision (exhibited in Chow 1)

31. However, P's researches have not been able to identify a public judgment in Hong Kong dealing with arguments on the issue of service against persons unknown in cryptocurrency theft.

Good arguable case that P's case falls within Order 11 Rule 1(1)(f)

32. Regarding gateway O.11 r.(1)(f), HKCP §11/1/337 **[P#6]** states that

> "Leave to serve a claim for a proprietary injunction over property in the form of Bitcoin obtained by blackmail was granted under the tort gateway *in A.A. v. Persons Unknown who demanded Bitcoin on 10th and 11th October 2019* [2019] EWHC 3556 (Comm), [68] where the money was paid out by an English insurer to buy the Bitcoin which ended up "wherever it is kept by" the exchange."

33. In discharge of P's duty of full and frank disclosure, it may be argued that *AA v Persons Unknown* (QBD) [2020] 4 WLR 35 **[P#10]** is distinguishable because

33.1. in that case, the plaintiff paid the blackmailers directly.

33.2. in the present case, P's Bitcoins were first held by Mr Leung under an injunction, and then were stolen in unclear circumstances.

33.3. it is even said that Mr Leung was "*located in Europe*" at the time **[7]**, which may support to the contention that the theft of 361 Bitcoin did not take place in Hong Kong but in Europe.

34. However, it is respectfully submitted that there is a strong case that the 361 Bitcoins arises out of acts committed in Hong Kong, thereby satisfying the requirement of O.11(1)(f).

35. P and Mr Leung were parties to Hong Kong proceedings, in a dispute where the material disputed events took place in Hong Kong. In fact, the 361 Bitcoins were disclosed to P under an injunction over "*assets in Hong Kong*" and was subject to an injunction by the Hong Kong Court. **[2], [3]**

36. Applying these principles, it is respectfully submitted that a good arguable case for service out under O.11 r.(1)(f) is made out.

Good arguable case that P's case falls within Order 11 Rule 1(1)(i)

37. Relevantly, HKCP § 11/1/344.1 **[P#6]** (p.259) states,

> "… Bitcoin is property: *A.A. v. Persons Unknown who demanded Bitcoin on 10th and 11th October 2019* [2019] EWHC 3556 (Comm) [59], following *B2C2 Ltd. v. Quoine PTC Ltd.* [2019] SGHC(I.) 03, [142] (although *A.A.* did not invoke this gateway and was confined to gateways (b), (c) and (f)), also analysed in *CLM v. CLN* [2022] SGHC 46, … **There was a good arguable case that the lex situs of a crypto-asset was the place where the person who owned it was domiciled**, and there is a serious issue to be tried whether defendants held the NFTs on constructive trust for the claimant, *Osbourne*." (Emphasis added)

38. Applying these principles and given P is domiciled here (see Yan 1), there is also a good arguable case that this gateway is satisfied.

Other elements for service out of jurisdiction

39. It is respectfully submitted that there being a good arguable case on a jurisdictional gateway being satisfied, the other elements for service out of jurisdiction are also satisfied:

    39.1. The location of the D1 is unknown and there is no reason to believe they are within jurisdiction or that P is able to effect service of any of the Ds in jurisdiction.

    39.2. The underlying facts disclose a serious issue to be tried against D1.

    39.3. Hong Kong is the forum conveniens for trying the issues raised in this action.

40. In the premises, the Honourable Court is respectfully invited to grant leave to serve out of jurisdiction.

As regards D2-D6

41. On the face of it, D2-D6 are centralised cryptocurrency changes. On publicly available materials, some measure of KYC protocols appear to be in place for D2-D6.

42. It follows that, at this stage, there is no clear-cut good arguable case against D2-D6 under either the tort (f) or the constructive trust (p) gateways.

43. Instead, P is needs to rely on gateway (i) (above) and (c), i.e.

> "the claim is brought against a person duly served within or out of the jurisdiction and a person out of the jurisdiction is a necessary or proper party thereto"

44. But HKCP 2025 §11/1/27 states that,

> "**Bankers Trust / Norwich Pharmacal orders**—An application for Norwich Pharmacal relief against a party outside the jurisdiction **cannot be served under any gateway in O.11**: *AB Bank Ltd. v Abu Dhabi Commercial Bank PJSC* [2016] EWHC 2082 (Comm) **[P#6]**. **An application for a Bankers Trust order was permitted to be served out under the "*necessary and proper party*" gateway (c) seemingly in ignorance of *AB Bank*** in *CMOC v. Persons Unknown* [2017] EWHC 3599 (Comm) **[P#7]**. However, that was doubted inconclusively in *AA v. Persons Unknown who demanded Bitcoin on 10th and 11th October 2019* [2019] EWHC 3556 (Comm). Gateway (c) would not be available in a standalone application." (Emphasis added)

45. In England and Wales, the matter has now been resolved by statute: see (Hong Kong) HKCP 2025 p.124, explaining that "*Following a Working Group report in June 2015 the following reforms have been made in England and Wales which could be adopted in Hong Kong:… (14) A new gateway for Norwich Pharmacal and Bankers Trust applications."*

46. In Hong Kong, however, the conflict between *AB Bank Ltd. v Abu Dhabi Commercial Bank PJSC* **[P#6]** and *CMOC v. Persons Unknown* **[P#7]** remains a live issue to be resolved.

47. The resolution of the conflict of two well-known English first instance authorities is not a straightforward exercise.

48. At this *ex parte* stage, the Honourable Court is respectfully invited to take the approach taken in *Ion Science v Persons Unknown* (unreported), 21 December 2020 (Commercial Court) **[P#9]**, which was decided before the new English gateway came into effect,

> "21. I am not going on this interim application in circumstances where I have only heard one side of the argument to express a view as to whether the case of AB Bank Ltd was correctly decided. It seems to me that it is distinguishable on the basis that it related to Norwich Pharmacal orders, whereas what is here sought is a *Bankers Trust* order and on the basis that in *MacKinnon v Donaldson, Lufkin and Jenrette Securities Corporation* [1986] Ch 482 **[P#8]** what was envisaged was that a *Bankers Trust* order might be one where there can be service out of the jurisdiction in exceptional circumstances, and **that those exceptional circumstances might include cases of hot pursuit.** That is this type of case. As I say, I consider that there is a good arguable case that there is a head of jurisdiction under the **necessary or proper party gateway**. I should also say that it seems to me that there is a good arguable case that the *Bankers Trust* case can be said to relate **wholly or principally to property within the jurisdiction** on the basis of the argument which I have already identified which is that the bitcoin are or were here and that the lex situs is where the owner resides or is domiciled. Accordingly, I consider that there is a basis on which jurisdiction can be established." (Emphasis added)

49. The Honourable Court is respectfully invited to follow this approach and exceptionally grant service out of jurisdiction to D2-D6 on the basis that the *Bankers Trust* orders sought relates to P's 361 Bitcoins in Hong Kong in circumstance of a "*hot pursuit*" against the culprits.

Third issue: substituted service

Legal principles

50. RHC O.65 r.4 provides,

> "(1) If, in the case of any document which by virtue of any provision of 6 these rules is required to be served personally or in the case of a document to which Order 10, rule 1, applies, **it appears to the Court that it is impracticable for any reason** to serve that document in the manner prescribed on that person, the Court may make an order for substituted service of that document.
>
> (2) An application for an order for substituted service may be made by an affidavit stating the facts on which the application is founded.
>
> (3) Substituted service of a document, in relation to which an order is made under this rule, is effected by taking such steps as the Court may direct to bring the document to the notice of the person to be served." (Emphasis added)

Relevant principles as against all Ds

51. Relevant to this context, HKCP 2025 §11/5/14-15 (p.291-291) states,

> *"***Substituted service out of the jurisdiction**—This is permissible for both originating process and subsequent documents under O.11 rr.5 and 9 and O.65 rr.4 and 5. Separate leave must be obtained (which can be on the same occasion) for both the service out and the substituted mode… See generally paras. 6/6/6, 65/3/12 and 65/4/8, and as to claiming costs of such service, see paras. 6/2/13 to 6/ 2/18. Under the English CPR 6.8 the "*impracticability*"

test from O.65 has been replaced with a "*good reason*" test and the rule additionally authorises service "*at a place not otherwise permitted*", so **subsequent English authorities on the merits of granting substituted service out of the jurisdiction must be treated with caution in Hong Kong**, *Knauf UK GmbH v. British Gypsum Ltd.* [2002] 1 WLR 907 (CA); *Marconi Communications v. PT Pan Indonesia Bank* [2005] 2 All ER (Comm) 325 **although the modern approach may be the same despite the slightly different wording.**

11/5/15

…

Substituted service out of the jurisdiction by electronic means on "persons unknown" alleged to have been involved in the theft of crypto-assets was permitted on the basis that it was the only practical means, *CLM v. CLN* [2022] SGHC 46. See also *Jones v. Persons Unknown* [2022] EWHC 2543 (Comm) **[P#11]** and *Osbourne*) **[P#12]**." (Emphasis added)

52. The binding authority in this area is *Chan Yeuk Mui v Ng Shu Chi* [1999] 2 HKLRD 376) **[P#16]**. In HKCP 2025 §65/4/8, a **more restrictive** test than *Chan Yeuk Mui* seems to be described,

> "If personal service or other alternative mode of service prescribed by O.10, r.1(2) of a writ issued under order for service out of the jurisdiction cannot be effected, it is sometimes necessary to obtain leave for substituted service (*Tillemont Shipping Corp. SA v. Taitexma Enterprise Corp. [*1993] 2 H.K.C. 129, CA). After efforts to serve have failed, application to a court may then be made for substituted service, upon an affidavit. The application should not be granted unless the master is satisfied that a practical impossibility of actual service exists, and that "**the method of substituted**

service asked for by the plaintiff is one which in all reasonable probability, if not certainty, will be effective to bring knowledge of the writ or the notice of the writ (as the case may be) to the defendant" (*Porter v. Freudenberg* [1915] 1 K.B. 857 at 889, CA). See also *Re A Judgment Debtor* [1937] Ch. 137; [1936] All E.R. 767, and *Re Cespedes* [1937] 2 All E.R. 572." (Emphasis added)

53. But it is respectfully submitted the "*reasonable probability, if not certainty*" test is too stringent when read alongside the discussion *Chan Yeuk Mui* (380 D-H) **[P#16]** which is binding authority, in particular

> "The court in granting an order for substituted service must then take into consideration **the requirement of bringing the particular document to the notice of the person being served**. It is, after all, not an order that service be dispensed with. The first consideration must be where the person is likely to be found. **If the person to be served is likely to be found abroad,** then obviously different considerations will apply and this is recognised in the notes in the White Book (The Supreme Court Practice 1999). Then, consideration must be given as to **what practical steps can be taken to bring the documents to be served to the attention of the relevant party. Often, advertisements will be the only practical way.**
>
> Orders for substituted service are doubtless not uncommon. An order that substituted service should be effected by a single advertisement in a paper widely distributed within the jurisdiction is not unusual in the exercise of this jurisdiction. Our attention has been drawn to a standard form used, for example, in the District Court. In this case, there is no reason to doubt that the Registrar made an order which was in a standard form. **Unarguably, there could be no certainty that a single advertisement in any newspaper would come to the attention of the party proposed to be served. Neither,**

however, could any number of advertisements guarantee such a result." (Emphasis added)

54. See further *Chan Yeuk Mui* 379G-380B **[P#16]**, where Rogers JA (the two other JAs agreeing) held that *Porter v. Freudenberg* [1915] 1 K.B. 857 (cited by the White Book) does not go "*any further than the general rule that in considering the exercise of the discretion to permit substituted service, the court must consider whether the form of service proposed would be effective. Sub-rule (3) seems, to my mind, to go no further than that.*"

55. In the premises, it is submitted that contrary to what HKCP 2025 §65/4/8 may suggest at first sight, the "*reasonable probability, if not certainty*" test is not a separate requirement, but a factor the Court takes into consideration in considering substituted service.

Relevant principles as against D2-D5

56. HKCP 2025 §11/5/16 states that,

> "**Substituted service out of the jurisdiction: desire for speed**—In *Knauf UK GmbH v. British Gypsum Ltd.* [2002] 1 WLR 907 the Court of Appeal observed that a mere desire for speed is not a ground for permitting substituted service abroad. If it were otherwise, substituted service would become the norm. Also in *Cecil v. Bayat* [2011] 1 WLR 3086 (CA) [66] in the Hague Convention context where permitting service by substituted service / "*alternative means*" may be an interference with sovereignty. Where the destination jurisdiction is party to the Hague Convention (and does not allow postal or informal service within its territory) substituted service out with leave may be made either within Hong Kong (if there is reason to think service on someone or at some place in Hong Kong will reach the defendant)

or even within the other territory but only in **"*exceptional*" circumstances,** *Cecil* [65]; *Deutsche Bank AGv. Sebastian Holdings Inc, Alexander Vik* [2014] EWHC 112 (Comm) and *Marashen Ltd. v. Kenvett Ltd.* [2017] EWHC 1706 (Ch). The *Cecil* "exceptional circumstances" do not apply where there is no convention, *Abela v. Baadarani* [2013] 1 WLR 2043 (UKSC). Note the different wording in the English rules from O.65 in Hong Kong." (Emphasis added)

Submissions

57. Similar cases in the USA and England and Wales have been exhibited to Chow 1 and will not be repeated here. It is respectfully submitted that

57.1. It is practically impossible to discover the identity and address of D1, and therefore practically impossible to serve them in person or by post.

57.2. Dr Chow's explanations of the different proposed method of service there is cogent and should be accepted.

57.3. In particular, regarding the exchanges on which substituted service is sought (D2-D5), the Court's attention is drawn to Dr Chow's evidence that (a) it is unclear exactly which legal entity operates the relevant exchange, and (b) previous cases (esp. in relation to Binance) where there was difficulty serving the correct exchange (esp. the discussion in the English cases of *LMN* and *Fetchai*).

57.4. In the circumstances of this case, substituted service for Ds should be ordered because (1) there is no other practical means of reaching D1 and (2) the necessary "*hot pursuit*" for the 361 Bitcoins (and their traceable proceeds) are exceptional circumstances justifying substituted service for D2-D6.

58. **Full and frank disclosure**:

58.1. D2-D5 may seek to argue that they should be served by person or by post in accordance with the relevant local laws.

58.2. However, it is not even clear at this stage whether D2-D5 are the correct entities holding the relevant information: see *LMN v Bitflyer Holdings Inc* [2022] EWHC 2954 (Comm) [**P#20]** (see also Chow 1), where service by alternative means was granted at the *ex parte* stage.

58.3. Requiring P to serve D2-D5 according to the laws and customs of the entities that P has uncovered to the best of her ability may therefore add unnecessary delay, especially considering that cryptocurrency exchanges are first and foremost websites operators who may reasonably be expected to check and be responsive to digital communication.

58.4. Taking into account the clear *prima facie* case of fraud and the need to urgently bring the action to the attention to the parties, it is respectfully submitted that substituted service against D2-D5 is justified.

59. The Honourable Court is therefore respectfully invited to order substituted service as per the draft order.

Fourth issue: proprietary injunction against D1

60. The well-known test for the grant of a proprietary injunction has been stated in (among others) *AA v Persons Unknown* [2020] 4 WLR 35 **[P#1]**,

> "*First there must be **a serious issue to be tried**, secondly, if there is a serious issue to be tried, the court must consider whether **the balance of convenience lies in granting the relief sought**. The balance of convenience*

involves consideration of the efficacy of damages as an adequate remedy, the adequacy of the cross-undertaking as to damages, and the overall balance of convenience, including the merits of the proposed claim." (Emphasis added)

61. It is respectfully submitted that the present case clearly merits a proprietary injunction. There is a strong *prima facie* case of theft; the defendants have taken steps to evade detection; damages would not be an adequate remedy.

Fifth issue: worldwide *Mareva* injunction against D1

62. Finally, it is also submitted that a worldwide *Mareva* injunction should be granted against D1.

62.1. There is a good arguable case for fraud, conversion, dishonest assistance and/or knowing receipt.

62.2. There is a real risk of dissipation as demonstrated by their theft.

62.3. It is unknown where D1's assets are located within Hong Kong or not.

62.4. The balance of convenience lies in favour of granting the injunction.

63. There is strong evidence that D1 participated in the theft of the 361 Bitcoins. The Honourable Court is respectfully to follow the line of authority granting a worldwide *Mareva* injunction against him/them.

Sixth issue: *Bankers Trust* Order against D2-D6

64. The Court's power in *Bankers Trust Co. v. Shapira*[1980] 1 W.L.R. 1274 appears to have developed under the inherent jurisdiction of the Court, as opposed to on any specific statutory foundation. But *Bankers Trust* Orders are also closely

connected to s.21 of the Evidence Ordinance, set out in HKCP Vol.2 p.711 (legislation also annexed to this skeleton)

> "(*1) On the application of any party to any proceedings, the court or a judge may order that such party be at liberty to inspect and take copies of any entries in a banker's record for any of the purposes of such proceedings. (Amended 37 of 1984 s. 6)*
>
> *(2) An order under this section may be made either with or without summoning the bank or any other party, and shall be served on the bank 3 clear days before the same is to be obeyed, unless the court or judge otherwise directs.*
>
> *(3) The costs of any application to the court or judge under or for the purposes of this section, and the costs of anything done or to be done under an order of the court or judge made under or for the purposes of this section, shall be in the discretion of the court or judge, who may order the same or any part thereof to be paid to any party by the bank, where the same have been occasioned by default or delay on the part of the bank.*
>
> *(4)Any such order against a bank may be enforced as if the bank were a party to the proceeding.*"

65. "*Party*" is defined widely to include every person served with notice of attending any proceedings, although not named on the record (White Book Vol.2 pp.202, 697) (legislation also annexed to this skeleton).

66. But whether under statute or in its exercise of inherent jurisdiction, the Honourable Court does have jurisdiction to make an order against D2-D6, even though for reasons explained in *MacKinnon v Donaldson, Lufkin and Jenrette*

Securities Corporation [1986] Ch 482 **[P#8]** and *Ion Science* **[P#9]** exceptional circumstances are required.

67. The principles on granting an order in similar cases are set out in *Ziba Ltd v Persons Unknown Category A (As Defined In Paragraph 1 Of Schedule 1 Of The Indorsement Of Claim) And Others* [2024] HKCFI 3572 **[P#19]**, where the relevant respondent (who remained neutral was) Binance. In that case, Binance did not contest the grant of the *Norwich Pharmcal*/*Bankers Trust* Order.

68. (For the avoidance of doubt, P's submission is that **the terms** of *Norwich Pharmcal*/*Bankers Trust* orders are highly similar. P relies on the *Bankers Trust* analysis as per *Ion Science* for the purpose of service out, but accepts that in practice the terms of the order (granted under whichever legal authority) are highly similar.)

69. There is Hong Kong authority to the effect that a *Norwich Pharmcal*/*Bankers Trust* Order should not be granted at the *ex parte* stage, but instead be reserved to the *inter partes* stage: *Asiya Asset Management (Cayman) Ltd v Dipper Trading Co Ltd* [2019] 3 HKC 145 **[P#21]**. A similar decision was made by the English first instance court in *LMN*.

70. The Honourable Court is invited to depart from that practice in the present case in light of the clear case of fraud and the "*hot pursuit*" over the lost Bitcoins. Time is of the essence, and in light of the clear case of theft (of Bitcoins subject to a Court order), it is submitted that the consideration for investigation of fraud outweighs any unfairness to the exchanges and their customers.

71. For the same reasons as explained by the plaintiff in *Ziba* and in the case of *Yaron Brown & Ors v Lexinta Ltd & Ors* [2018] HKCFI 2302 **[P#22]**, P respectfully pray for a *Bankers Trust* Order.

Terms of the order

72. Given the likelihood that P need to use the information obtained in disclosure orders to further trace the 361 Bitcoins "*in hot pursuit*", P seeks prior release from the undertaking as per the terms of the order in *Carmon Reestrutura-Engenharia v Carmon Restrutura Ltd and Another* [2024] HKCFI 435 **[P#19]**.

Full and frank disclosure

73. Apart from the matters above, there is one last point P should raise to the Honourable Court.

Leung is not joined or notified of this application

74. Mr Leung was not named as a party in this action.

75. This avoids duplicity of proceedings because P is already suing Mr Leung to recover 1,000 Bitcoins (of which the 361 Bitcoins are only a part) in HCA 2295/2019.

76. In the fullness of time, P may be able to obtain judgment in the absence of some defendants. In that event, Mr Leung may object to the terms of the order, especially the declaration that P is the owner of the recovered Bitcoins.

77. But it is respectfully submitted that any such complaints can be dealt with at the entry of judgment stage: the Court in exercising ***that*** discretion would be alert to the problem not least due to Mr Leung's prominent role in the background facts pleaded in the indorsement of claim.

Dated 26 March 2025

JASPER WONG

Counsel for P

raises a strong inference that assets may be removed from the jurisdiction; and I agree that this appeal should be allowed.

DUNN L.J. I also agree.

Appeal allowed.
Injunction granted until further order.
Costs in action.
Leave to appeal refused.

Solicitors: *Peter T. James & Co; Joynson-Hicks & Co.*

A. H. B.

[COURT OF APPEAL]

* BANKERS TRUST CO. *v.* SHAPIRA AND OTHERS

[1980 B. No. 3116]

1980 June 4

Lord Denning M.R., Waller and Dunn L.JJ.

Practice—Discovery—Motion for Bank's customers obtaining moneys by forgery—Injured party's action seeking reimbursement—Interlocutory claim for bank to disclose confidential information concerning customers—Customers neither within jurisdiction nor served with notice of motion—Whether obligation on bank to assist in tracing action

On September 20, 1979, two men presented to the plaintiff bank in New York two cheques, each for half a million dollars purportedly drawn on a bank in Saudi Arabia and made payable to one of the men. The bank paid over the million dollars and on instructions from the two men credited $600,000 and later $108,203 to accounts of the two men at the London branch of the D bank, the third defendants. In April 1980, the bank in Saudi Arabia informed the plaintiff bank that the cheques were obvious forgeries. The plaintiff bank reimbursed the bank in Saudi Arabia in the sum of one million dollars, and on May 20, 1980, issued a writ in London with statement of claim in an action to trace and recover the moneys, and on the same date, by a notice of motion against the two men (who were by then outside the jurisdiction) and against the D Bank in the Commercial Court, asked, inter alia, for injunctions to prevent any dealings with the funds in the D bank. They obtained a Mareva injunction from Robert Goff J. on May 21; and before Mustill J. sought, inter alia, an interlocutory order that the D bank should disclose and permit the plaintiff bank to inspect and take copies of (i) all correspondence between the two men and the D bank relating to any account in either of the two men's names, (ii) all cheques drawn on such accounts, and (iii) all debit vouchers, transfer applications and orders and internal memoranda relating to any account standing in the names of either of the two men at the D bank, all as from September 20, 1979, onwards. Mustill J. refused the relief by way of disclosure of confidential banker/customer information at the

early interlocutory stage, a fortiori because the two men had not been served with notice of the motion.

On appeal by the plaintiff bank: —

Held, allowing the appeal and granting the order sought against the D bank, that though the court would not lightly use its powers to order disclosure of full information touching the confidential relationship of banker and customer, such an order was justified even at the early interlocutory stages of an action where plaintiffs sought to trace funds which in equity belonged to them and of which there was strong evidence that they had been fraudulently deprived and delay might result in the dissipation of the funds before the action came to trial; and that in the new and developing jurisdiction where neutral and innocent persons were under a duty to assist plaintiffs who were the victims of wrongdoing, the court would not hesitate to make strong orders to ascertain the whereabouts and prevent the disposal of such property; but that the plaintiffs should be correspondingly bound to undertake that such information would be used only for the purposes of the action to trace the funds and not for any other purpose.

Norwich Pharmacal Co. v. *Customs and Excise Commissioners* [1974] A.C. 133, H.L.(E.) applied.

Decision of Mustill J. reversed.

The following cases are referred to in the judgments:

A v. *C* (unreported), March 18, 1980, Robert Goff J.

Anton Piller K.G. v. *Manufacturing Processes Ltd.* [1976] Ch. 55; [1976] 2 W.L.R. 162; [1976] 1 All E.R. 779, C.A.

Banque Belge pour L'Etranger v. *Hambrouck* [1921] 1 K.B. 321, C.A.

Initial Services Ltd. v. *Putterill* [1968] 1 Q.B. 396; [1967] 3 W.L.R. 1032; [1967] 3 All E.R. 145, C.A.

London and Counties Securities Ltd. (In Liquidation) v. *Caplan* (unreported), May 26, 1978, Templeman J.

Mediterranea Raffineria Siciliana Petroli S.p.a. v. *Mabanaft G.m.b.H.* December 1, 1978, Court of Appeal (Civil Division) Transcript No. 816 of 1978, C.A.

Norwich Pharmacal Co. v. *Customs and Excise Commissioners* [1974] A.C. 133; [1973] 3 W.L.R. 164; [1973] 2 All E.R. 943, H.L.(E.).

Upmann v. *Elkan* (1871) L.R. 12 Eq. 140; 7 Ch.App. 130.

The following additional cases were cited in argument:

Chase Manhattan Bank N.A. v. *Israel-British Bank (London) Ltd.* [1980] 2 W.L.R. 202; [1979] 3 All E.R. 1025.

E.M.I. Ltd. v. *Pandit* [1975] 1 W.L.R. 302; [1975] 1 All E.R. 418.

Third Chandris Shipping Corporation v. *Unimarine S.A.* [1979] Q.B. 645; [1979] 3 W.L.R. 122; [1979] 2 All E.R. 972, Mustill J. and C.A.

Tournier v. *National Provincial & Union Bank of England* [1924] 1 K.B. 461, C.A.

INTERLOCUTORY APPEAL from Mustill J.

The plaintiffs, the Bankers Trust Co. of New York, a company incorporated under the laws of the United States and having a place of business at 9, Queen Victoria Street, London E.C.4, issued a writ on May 20, 1980, against one Walter Shapira and one Max Frei, as first and second defendants, and against the Discount Bank (Overseas) Ltd. ("Discount Bank"), a Swiss bank having a London branch at 63, Hatton Garden, London E.C.1, as third defendants. They claimed relief against all three defendants in their statement of claim in an action to trace

funds of $1,000,000 as money had and received by Shapira and Frei to the use of the plaintiffs, or alternatively paid to them under a mistake of fact, and damages for deceit and/or conspiracy as against Shapira and Frei to defraud the plaintiffs. By a motion of the same date they applied ex parte in the Commercial Court for relief (A) as against Shapira and Frei for (1) an injunction restraining them from removing from the jurisdiction or otherwise disposing of or dealing with any of their assets within the jurisdiction including and in particular any credit balance or balances in any account in either of their names at Discount Bank save and in so far as such assets did not exceed in value the sum of U.S. $1,000.000; and (B) as against all three defendants (2) an order that each of the defendants disclose to the plaintiffs forthwith the sums or balances at present standing in any account in either of the names of Shapira and Frei at Discount Bank; (C) as against Discount Bank, the third defendants (3) an order that they disclose to the plaintiffs forthwith and permit the plaintiffs to take copies of the following documents (i) all correspondence passing between Discount Bank and Shapira and Frei relating to any account at Discount Bank in the names of either Shapira and/or Frei from July 15, 1979, onwards, (ii) all cheques drawn on any account at Discount Bank in the names of either Shapira and/or Frei from July 15, 1979, onwards, (iii) all debit vouchers, transfer applications and orders and internal memoranda relating to any account at Discount Bank in the names of either Shapira and/or Frei from July 15, 1979, onwards; (4) an injunction restraining Discount Bank from making any payment or transfer out of any account in the name or names of Shapira and/or Frei at Discount Bank's branch at 63, Hatton Garden, London E.C.1, or otherwise dealing with such accounts save for payment to the plaintiffs of any sum found due to them or otherwise pursuant to order of the court.

The motion was supported by an affidavit of the legal adviser to the London branch of Bankers Trust Co. setting out the allegations as to the matters set out in the judgment of Lord Denning M.R. and adding that it appears (i) that Shapira was now in jail in Switzerland as a result of a fraud investigation by the Swiss police; and (ii) Frei was presently believed to be in Liechtenstein.

On May 21, 1980, Robert Goff J. in chambers granted *Mareva* injunctions to the plaintiffs ex parte (subject to an undertaking to amend the writ to include a claim for the injunctions being granted by Robert Goff J. and to abide by any order the court or a judge might make as to damages in case it should be held that the defendants or any of them should have sustained any damages by reason of the orders) as follows: (i) that the first and second defendants be restrained from removing from the jurisdiction or otherwise disposing of or dealing with any of the assets within the jurisdiction, including any credit balance or balances in any account in either of their names at Discount Bank (Overseas) Ltd. save and in so far as such assets did not exceed in value the sum of U.S. $1,000,000 until after trial of the action or further order, with liberty to apply; and (ii) as against Discount Bank (Overseas) Ltd. as third defendants an injunction restraining the bank from making any payment or transfer out of any account in the name or names of Shapira or Frei at their Hatton Garden branch or otherwise dealing with such accounts until after the hearing of a summons returnable on May 22, 1980.

Mustill J. on May 23, 1980, on the hearing of the summons declined

A to make any order under paragraphs (2) and (3) of the statement of claim. His reasons, as noted by counsel for the parties before him, were:

> " First, it is a very extreme form of relief and should only be ordered where it is necessary to prevent injustice. This is plain from the judgment of Robert Goff J. in *A* v. *C* (unreported). March 18, 1980. Secondly, although a banker can properly be a respondent to such an application care should be taken not unnecessarily to put at risk that confidentiality which is an essential part of banking. The question is where, as here, the true defendants have not been served is it necessary to grant relief against the bank at the present stage? There is no risk of the bank destroying documents. There is no need to make an order for disclosure to forestall the disposition of money onwards since the events in question happened eight months ago. The money would have vanished long since. Nor is there any need to grant pre-emptive discovery to support the plaintiff's action against the true defendants or the bank. The actions can proceed in a normal manner, no doubt marked by default on the part of the first two defendants. It may be difficult to serve the first two defendants, but substituted service can be granted if necessary. There is no reason why discovery against them should not take place at the normal time. Similarly, in regard to the bank, since the action against it is not necessarily at all a foregone conclusion. It may take the plaintiffs some time to get their money—Discount Bank have disclosed there is some money—but the suggested order would not accelerate the process, and even if it would, a court should be very careful not to order a banker to disclose the state of a customer's account unless it is urgently necessary to prevent injustice (which is not the case here), or if the customer is present before the court to make representations. Unlike *A* v. *C* the true defendants are not yet before the court. This is a very important distinction. Accordingly, I propose to make no order on the present application at this stage; the plaintiffs can renew their application when the first and second defendants can be present and bound by any decision of the court.
>
> " Leave to appeal to raise questions of principle involved in decision in *A* v. *C*. Costs reserved. Liberty to apply."

The plaintiff bank appealed from so much of the order of Mustill J. whereby he made no order on the application of the plaintiffs (a) for an order against all three defendants that each of them disclose to the plaintiffs forthwith the sums or balances at present standing in any account in either of the names of the first or second defendants at the third defendants; (b) for an order against the third defendants that they disclose to the plaintiffs forthwith and permit the plaintiffs to take copies of the documents specified in the order sought in paragraph (2) of the notice of appeal, as follows: (1) against the first, second and third defendants that each of them disclose to the plaintiffs forthwith the sums or balances at present standing in any account in either of the names of the first or second defendants at the third defendants; (2) against the third defendants that they disclose to the plaintiffs forthwith and permit the plaintiffs to take copies of the following documents: (i) all correspondence passing between the third defendants and the first and second defendants relating to any account at the third defendants in the names

of either the first and/or second defendants from September 20, 1979, onwards; (ii) all cheques drawn on any account at the third defendants in the names of either the first and/or second defendants from September 20, 1979, onwards; (iii) all debit vouchers, transfer applications and orders and internal memoranda relating to any account at the third defendants in the names of either the first and/or second defendants from September 20, 1979, onwards.

The grounds of the appeal were that the judge, in making no order on the plaintiffs' application (a) exercised his discretion wrongly in disregard of principle and/or (b) misdirected himself in law and/or (c) thereby produced a result leading to injustice to the plaintiffs in support whereof the plaintiffs would rely, inter alia, upon the following matters—(i) the plaintiffs' claim, inter alia, to trace, follow and recover such proportion of the U.S. $1,000,000 paid to the first and/or second defendants on September 20, 1979, and remitted by the first and/or second defendants to the third defendants within the jurisdiction of the court and/or thereafter disposed of by the first and/or second defendants elsewhere; (ii) the books, papers and records of the third defendants would disclose what happened to such proportion of the U.S. $1,000,000 remitted as aforesaid and thereafter disposed of by the first and/or second defendants elsewhere; (iii) the judge in requiring the first and/or second defendants to be served with the proceedings as a pre-requisite to the making of the order sought by the plaintiffs was thereby giving the first and/or second defendants even more time to ensure that any dispositions by them or either of them from any account with the third defendants could not be capable of being traced, followed and recovered by the plaintiffs; (iv) as a matter of principle the court should be astute to provide all such assistance as it properly could to persons in the position of the plaintiffs to enable them to obtain such information as was reasonable and proper at the earliest practicable opportunity to enable them to discover the whereabouts of and/or to follow and recover a trust fund or any remaining part thereof; (v) the approach of the judge in determining that the principle of the decision of Robert Goff J. in *A* v. *C* (unreported), March 18, 1980, only applied where persons such as the first and/or second defendants had been served with a notice of an application such as that made to the judge by the plaintiffs on May 23, 1980, was unnecessarily restrictive of such decision and/or was wrong in law.

Michael Crystal for the plaintiffs.
Nicholas Elliott for the third defendants.

LORD DENNING M.R. This is a new case. It illustrates something that happens from time to time—frauds made upon banks. It appears that last September—on September 20, 1979—two men (Walter Shapira and Max Frei) went into a bank in New York, the Bankers Trust Co. They went into the Middle East section. They presented two apparent cheques—each for a half a million dollars—for payment. The cheques purported to be drawn on the Mecca branch of the National Commercial Bank in Saudi Arabia to the Bankers Trust Co. of 16, Wall Street, New York. One of them was for $500,000 to be paid to Mr. Shapira. The other was also for $500,000 to be paid to Mr. Shapira.

The Bankers Trust Co. of New York honoured the cheques. They

A let these men have $1,000,000. They acted on the instructions of the two men. I will not go into detail: but I will mention two particular matters: $600,000 was credited to Mr. Shapira's account at the London branch of a Swiss bank in Hatton Garden—the Discount Bank (Overseas) Ltd. They asked that another sum of $108,203 should be credited to Mr. Frei's account at a bank in the Cayman Islands. But as he had no such account there, that sum was also transferred to the Discount Bank B (Overseas) Ltd. in Hatton Garden. So, on the face of it, $708,203 was sent over to the Discount Bank in Hatton Garden. That was in September 1979.

In some way those cheques got over to the Mecca branch of the Saudi Arabian bank. They apparently honoured them at the time. But six months later, on April 10, 1980, the head office of the National C Commercial Bank in Saudi Arabia found that those two cheques were forgeries. They immediately took the matter up with the Bankers Trust Co. of New York. I will read part of the letter they wrote:

> " On looking into these drafts you will find that signatures do not conform in any way to the signatures number 140 and 141 of our officers in our Mecca Branch, that the validating numbers in red do D not compare in any way to our validity machine which has the name of our bank on it, that the draft forms are on poor quality paper while our drafts are printed on safety paper with our logo water mark. We therefore consider these drafts are clearly forged and you should have exercised care in encashing them."

When the Bankers Trust Co. of New York received that letter, they E felt that they were not free from blame themselves. It appears that they did re-credit the Saudi Arabian Bank with the money. So the Bankers Trust Co. of New York have lost $1,000,000.

They then looked round to see if they could find these rogues. (I call them " rogues " although it has not been proved yet: but the prima facie evidence against them is strong). On May 20, 1980, the Bankers Trust Co. of New York brought an action. The first defendant was F Mr. Walter Shapira: the second defendant was Mr. Max Frei: and the third defendant was the Discount Bank (Overseas) Ltd., with which the moneys were deposited. They did not serve the documents on either Mr. Shapira or Mr. Frei. We are told, on the evidence, that they investigated the matter. Mr. Shapira is now in jail in Switzerland as a result of a fraud investigation by the Swiss police. Mr. Frei is presently G believed to be in Liechtenstein. So they have not served those two. But they have served the Discount Bank (Overseas) Ltd. The action they have brought is quite clearly to trace and follow these funds which the Bankers Trust Co. have been fraudulently deprived of. It operates in common law and in equity as a right to follow and trace the moneys. So they brought this action on May 20, 1980.

The Bankers Trust Co. obtained a *Mareva* injunction in the usual H form to stop the bank from disposing of any of the moneys which they had at that time—which Shapira and Frei had paid into the bank. That is common form nowadays in the Commercial Court when it is desired to prevent money being abstracted from the true creditor.

But this case brings out a new point which we have not had before: because the Bankers Trust Co. of New York want more information from the Discount Bank (Overseas) Ltd. They want information as to these accounts. They want to know how much money is now in the

accounts. Money has been taken out in the last six months. They want to know what has happened to the money in the accounts. It may have been paid over to third persons: and they may want to follow the money into the hands of those third persons. So they have asked for discovery of the documents relating to the moneys which the bank had, and what has happened to them.

As the question of the form of order has come into question in some of the cases, I would like to read the actual form of order which is sought in this regard by the Bankers Trust Co. of New York:

> "For an order (1) Against the first, second and third defendants that each of them do disclose to the plaintiffs forthwith the sums or balances at present standing in any account in either of the names of the first or second defendants at the third defendants. (2) Against the third defendants"—that is, the bank—"that they do disclose to the plaintiffs forthwith and permit the plaintiffs to take copies of the following documents: —(i) all correspondence passing between the third defendants and the first and second defendants relating to any account at the third defendants in the names of either the first and/or second defendants from September 20, 1979, onwards: (ii) all cheques drawn on any account at the third defendants in the names of either the first and/or second defendants from September 20, 1979, onwards: (iii) all debit vouchers, transfer applications and orders and internal memoranda relating to any account at the third defendants in the names of either the first and/or second defendants from September 20, 1979, onwards."

That is what they applied for in addition to the ordinary *Mareva* injunction.

The matter came before Mustill J. He refused to make any such order, his reason being that he thought it should not be made while the first and second defendants (Mr. Shapira and Mr. Frei) had not been served.

Mr. Crystal has come here today on behalf of the Bankers Trust Co. of New York, and asks us to reverse that decision. He has brought to our attention—very usefully—three recent cases (none of them reported) in which a similar point has arisen. The first one was on May 26, 1978, before Templeman J.: *London and Counties Securities (In Liquidation)* v. *Caplan.* The plaintiff company had been defrauded by a Mr. Caplan in the sum of £5,000,000. Mr. Caplan was said to have embezzled it. It was desired to obtain information as to the whereabouts of the moneys and what had been done with them. The plaintiffs wanted to trace the moneys to see where they had gone. Templeman J., having considered the matter very carefully, made an order under which the bank was to disclose all the documents and accounts showing where the money had gone.

Then there was a case before this court on December 1, 1978— *Mediterranea Raffineria Siciliana Petroli S.p.a.* v. *Mabanaft G.m.b.H.* Court of Appeal (Civil Division) Transcript No. 816 of 1978. It was not a fraud on a bank. Nor a fraud at all. Owing to a mistake in a commercial transaction, moneys payable to the plaintiffs were paid to other people. It was desired to trace them. A *Mareva* injunction was granted and also an order for discovery of documents to discover where the money had gone. Templeman L.J. said:

A " As Lord Denning M.R. said, it is a strong order, but the plaintiffs' case is that there is a trust fund of $3,500,000. This has disappeared, and the gentlemen against whom orders are sought may be able to give information as to where it is and who is in charge of it. A court of equity has never hesitated to use the strongest powers to protect and preserve a trust fund in interlocutory proceedings on the basis that, if the trust fund disappears by the time the action B comes to trial, equity will have been invoked in vain."

The last of the three cases was on March 18, 1980, before Robert Goff J., entitled *A* v. *C.* That was a case again of a fraud on a bank. A very large sum of money was involved. It seems to be a case very similar to the present, but in which the fraudulent rogues—as they may well turn out to be—had been served. It is on that ground distinguishable C from the present case. The rogues were served together with the bank. Robert Goff J. after considering the two cases which I have mentioned, said:

" There is no doubt that this jurisdiction is in a process of development; and that it is still in the course of throwing up problems which have yet to be solved."

D

He granted a *Mareva* injunction: but in addition he made an order for discovery of documents. He did so in order to enable the plaintiffs to trace what had happened to the moneys.

Mustill J. had *A* v. *C.* case before him. He thought it was distinguishable on the ground that in that case the " rogues " had been served. He refused to order discovery in this case: but he gave leave to appeal E in order that the questions of principle could be discussed.

We have had the matter fully argued before us. I would like to express our gratitude to Mr. Crystal for all the submissions he has made in support of the order. Equally to Mr. Elliott, for the bank, who has taken a very proper attitude. He said that the bank are neutral in this matter: but they felt it right to put forward to the court various con- F siderations, such as the confidential relationship between the bank and their customers.

Having heard all that has been said, it seems to me that Mustill J. was too hesitant in this matter. In order to enable justice to be done—in order to enable these funds to be traced—it is a very important part of the court's armoury to be able to order discovery. The powers in this G regard, and the extent to which they have gone, were exemplified in *Norwich Pharmacal Co.* v. *Customs and Excise Commissioners* [1974] A.C. 133. The Customs authorities were perfectly innocent: but they had to disclose the names of infringers of patents whose goods had passed through their hands. Lord Reid said, at p. 175:

" They seem to me to point to a very reasonable principle that if through no fault of his own a person gets mixed up in the tortious H acts of others so as to facilitate their wrong-doing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers "

referring to the views expressed by Lord Romilly M.R. and Lord Hatherley L.C. in *Upmann* v. *Elkan* (1871) L.R. 12 Eq. 140; 7 Ch.App. 130.

So here the Discount Bank incur no personal liability: but they got mixed up, through no fault of their own, in the tortious or wrongful acts of these two men: and they come under a duty to assist the Bankers Trust Co. of New York by giving them and the court full information and disclosing the identity of the wrongdoers. In this case the particular point is "full information."

This new jurisdiction must, of course, be carefully exercised. It is a strong thing to order a bank to disclose the state of its customer's account and the documents and correspondence relating to it. It should only be done when there is a good ground for thinking the money in the bank is the plaintiff's money—as, for instance, when the customer has got the money by fraud—or other wrongdoing—and paid it into his account at the bank. The plaintiff who has been defrauded has a right in equity to follow the money. He is entitled, in Lord Atkin's words, to lift the latch of the banker's door: see *Banque Belge pour l'Etranger* v. *Hambrouck* [1921] 1 K.B. 321, 355. The customer, who has prima facie been guilty of fraud, cannot bolt the door against him. Owing to his fraud, he is disentitled from relying on the confidential relationship between him and the bank: see *Initial Services Ltd.* v. *Putterill* [1968] 1 Q.B. 396, 405. If the plaintiff's equity is to be of any avail, he must be given access to the bank's books and documents—for that is the only way of tracing the money or of knowing what has happened to it: see *Mediterranea Raffineria Siciliana Petroli S.p.a.* v. *Mabanaft G.m.b.H.* (unreported). So the court, in order to give effect to equity, will be prepared in a proper case to make an order on the bank for their discovery. The plaintiff must of course give an undertaking in damages to the bank and must pay all and any expenses to which the bank is put in making the discovery: and the documents, once seen, must be used solely for the purpose of following and tracing the money: and not for any other purpose. With these safeguards, I think the new jurisdiction—already exercised in the three unreported cases—should be affirmed by this court.

Applying this principle, I think the court should go to the aid of the Bankers Trust Co. It should help them follow the money which is clearly theirs: to follow it to the hands in which it is: and to find out what has become of it since it was put into the Discount Bank (Overseas) Ltd.

If the courts were to wait until these two men were served, goodness knows how many weeks might elapse. Meanwhile, if some of it has got into the hands of third persons, they may dispose of it elsewhere. It seems to me that the fact that these two men have not been served does not deprive the court of its power to make such an order. These two men have gone out of the jurisdiction in circumstances in which it is clear that the court should do all it can to help the innocent people to find out where their money has gone.

In those circumstances—while expressing our indebtedness to both counsel—I would allow the appeal and make the order as asked in the notice of appeal.

WALLER L.J. I agree. I only add a word or two about three points which were made by Mr. Elliott, appearing on behalf of the bank and taking, so far as he could, a neutral attitude in this matter. He first of all emphasised that where the other two parties had not been served, it

A was very strong action on the part of the court to order the bank to break their duty of confidentiality. It was going further, he said, than an *Anton Piller* order [*Anton Piller K.G.* v. *Manufacturing Processes Ltd.* [1976] Ch. 55], because when an *Anton Piller* order is made, there remains the opportunity of disobeying it or appealing against it.

Clearly it is undesirable that an order such as this should be lightly made. But the answer to this part of Mr. Elliott's submission, in my B judgment, is that here there is very strong evidence indeed of fraud on the part of the other two defendants—the first and second defendants. They presented two forged cheques, each for half a million dollars, and as a result a total of $1,000,000 was transferred to accounts in their names or from which they would benefit.

Secondly, Mr. Elliott submitted that, having regard to the amount C of time which had gone by, there was no case for making this order now; it could wait until the normal time for discovery; and indeed Mustill J. in his decision adverted to that. But again, in my opinion, where you have a fraud of this nature, although it may be late and although much or perhaps all of the money may be now gone, the sooner that steps are taken to try and trace where it is the better. If steps are going to be taken, it is important that they should be taken at the earliest D possible moment.

Thirdly, Mr. Elliott expressed concern at the wideness of the order which it was sought to make—one which required the bank to permit the plaintiffs to take copies of all correspondence, for example, all debit vouchers, transfer applications and orders, and internal memoranda. He submitted that the breadth of that order went far beyond the disclosure E which would have to be made under the Bankers' Books Evidence Act 1879. Again, in my opinion, an order of that breadth is completely justified in a case of this sort because, unless there is the fullest possible information, the difficulties of tracing the funds will be well-nigh impossible.

On the other side of the coin in relation to that, there must be an implied undertaking on the part of the plaintiffs that the information F which they obtain will only be used for the purposes of this action and of course will not be disclosed otherwise.

DUNN L.J. I agree for the reasons given by Lord Denning M.R. and Waller L.J. that this appeal should be allowed.

G *Appeal allowed.*
No order for costs as between plaintiffs and third defendants.
Costs in action reserved.

Solicitors: *Linklaters & Paines; Dawson & Co.*

H M. M. H.

2. 釋義

在本條例中，除文意另有所指外 ——

一方、方 (party)包括每一名就任何法律程序獲送達通知書或出席法律程序的人，即使其姓名或名稱並非列於有關紀錄之上；

人身保護令狀 (writ of habeas corpus)指解交被拘押者並說明其拘押日期及原因令狀； *(由1997年第95號第2條增補)*

上訴 (appeal)就向行使民事司法管轄權的上訴法庭提出的上訴的情況而言，包括 ——

(a) 要求重新審訊的申請；及

(b) 要求將曾由陪審團審訊的原訟法庭的訟案或事宜的裁決、裁斷或判決作廢或將有爭論點曾由陪審團審訊的此等訟案或事宜的裁決、裁斷或判決作廢的申請； *(由1987年第52號第2條增補。由1998年第25號第2條修訂)*

上訴法庭法官 (Justice of Appeal)包括根據第5(2)條以上訴法庭額外法官身分行事的原訟法庭法官； *(由1987年第52號第2條增補。由1998年第25號第2條修訂；由2020年第21號第3條修訂)*

土地 (land)包括 ——

(a) 有水淹蓋的土地；

(b) 任何土地或其上的任何產業權、權利、權益或地役權；及

(c) 附連於土地的東西或永久緊繫在附連於土地的任何東西的東西； *(由1987年第52號第2條代替)*

司法常務官 (Registrar)指高等法院司法常務官； *(由1998年第25號第2條修訂)*

判決 (judgment)包括判令；

事宜 (matter)包括每一項不在訟案內的法律程序；

政府證券 (Government stock)指由政府發行的任何證券或政府的任何基金或政府授予的任何年金； *(由1987年第52號第2條增補)*

訂明 (prescribed)指由法院規則訂明；

原告人 (plaintiff)包括所有以任何形式的法律程序(不論是藉訴訟、起訴、呈請、動議、傳票或其他形式的法律程序)針對任何其他人要求任何濟助的人(以被告人身分藉反申索要求濟助的人除外)；

原訟法庭 (Court of First Instance)指高等法院原訟法庭； *(由1998年第25號第2條增補)*

特委法官 (recorder)指根據第6A條委任的原訟法庭特委法官； *(由1994年第80號第2條增補。由1998年第25號第2條修訂)*

被告人 (defendant)包括獲送達任何傳訊令狀或法律程序文件的人，或就任何法律程序獲送達通知書的人，或有權出席任何法律程序的人；

聆案官 (Master)具有第37、37AC、37A及37B條給予該詞的涵義； *(由1987年第52號第2條增補。由1997年第1號第3條修訂；由2005年第10號第164條修訂)*

訟案 (cause)指任何訴訟或任何刑事法律程序； *(由1987年第52號第2條代替)*

登記處 (Registry)指高等法院的任何登記處； *(由1998年第25號第2條修訂)*

訴訟 (action)指藉傳訊令狀或以任何法律訂明的其他方式展開的民事法律程序；

暫委法官 (deputy judge)指根據第10(1)條委任的原訟法庭暫委法官； *(由1983年第49號第2條增補。由1998年第25號第2條修訂)*

羈留 (detention)包括每一種形式的對人身自由的約制。 *(由1997年第95號第2條增補)*

(由1983年第49號第2條修訂；由1997年第95號第2條修訂；由1998年第25號第2條修訂；編輯修訂——2017年第1號編輯修訂紀錄)

2. **Interpretation**

In this Ordinance, unless the context otherwise requires—

action (訴訟) means a civil proceeding commenced by writ of summons or in such other manner as may be prescribed by any law;

appeal (上訴) in the context of appeals to the Court of Appeal in its civil jurisdiction includes—

(a) an application for a new trial; and

(b) an application to set aside a verdict, finding or judgment in any cause or matter in the Court of First Instance which has been tried, or in which any issue has been tried, by a jury; *(Added 52 of 1987 s. 2. Amended 25 of 1998 s. 2)*

cause (訟案) means any action or any criminal proceeding; *(Replaced 52 of 1987 s. 2)*

Court of First Instance (原訟法庭) means the Court of First Instance of the High Court; *(Added 25 of 1998 s. 2)*

defendant (被告人) includes any person served with any writ of summons or process, or served with notice of, or entitled to attend, any proceedings;

deputy judge (暫委法官) means a deputy judge of the Court of First Instance appointed under section 10(1); *(Added 49 of 1983 s. 2. Amended 25 of 1998 s. 2)*

detention (羈留) includes every form of restraint of liberty of the person; *(Added 95 of 1997 s. 2)*

Government stock (政府證券) means any stock issued by the Government or any funds of or annuity granted by the Government; *(Added 52 of 1987 s. 2)*

judgment (判決) includes decree;

Justice of Appeal (上訴法庭法官) includes a judge of the Court of First Instance acting as an additional judge of the Court of Appeal under section 5(2); *(Added 52 of 1987 s. 2. Amended 25 of 1998 s. 2; 21 of 2020 s. 3)*

land (土地) includes—

(a) land covered by water;

(b) any estate, right, interest or easement in or over any land; and

(c) things attached to land or permanently fastened to anything attached to land; *(Replaced 52 of 1987 s. 2)*

Master (聆案官) has the meaning given to it by sections 37, 37AC, 37A and 37B; *(Added 52 of 1987 s. 2. Amended 1 of 1997 s. 3; 10 of 2005 s. 164)*

matter (事宜) includes every proceeding not in a cause;

party (一方、方) includes every person served with notice of or attending any proceeding, although not named on the record;

plaintiff (原告人) includes every person asking any relief (otherwise than by way of counter-claim as a defendant) against any other person by any form of proceeding, whether the proceeding is by action, suit, petition, motion, summons or otherwise;

prescribed (訂明) means prescribed by rules of court;

recorder (特委法官) means a recorder of the Court of First Instance appointed under section 6A; *(Added 80 of 1994 s. 2. Amended 25 of 1998 s. 2)*

Registrar (司法常務官) means the Registrar of the High Court; *(Amended 25 of 1998 s. 2)*

Registry (登記處) means any Registry of the High Court; *(Amended 25 of 1998 s. 2)*

writ of habeas corpus (人身保護令狀) means a writ of habeas corpus ad subjiciendum. *(Added 95 of 1997 s. 2)*

(Amended 49 of 1983 s. 2; 95 of 1997 s. 2; 25 of 1998 s. 2; Amended E.R. 1 of 2017)

21. 法庭或法官可指示將銀行紀錄記項製取副本

21. **Court or judge may direct copies of entries in banker's record to be taken**

(1) 法庭或法官可應任何法律程序的任何一方的申請，命令該一方可為該法律程序而自由查閱銀行紀錄內的任何記項並製取副本。 *(由1984年第37號第6條修訂)*

(2) 本條所指的命令，可在傳召或不傳召有關銀行或其他任何一方的情況下作出，而除非法庭或法官另有指示，否則須在該命令必須服從前3整天送達有關銀行。

(3) 對根據本條或為施行本條而向法庭或法官提出任何申請的訟費，以及對根據法庭或法官根據本條或為施行本條所作出的命令而進行或須進行的任何事情的費用，法庭或法官均有酌情決定權，並可在該等訟費或費用是因有關銀行的失責或延誤所引起的情況下，命令有關銀行向任何一方支付該等訟費或費用或其中任何部分。

(4) 任何上述針對銀行的命令，可予強制執行，猶如有關銀行是該法律程序的其中一方一樣。

(由1998年第25號第2條修訂)

[比照 1879 c. 11 ss. 7 & 8 U.K.]

(1) On the application of any party to any proceedings, the court or a judge may order that such party be at liberty to inspect and take copies of any entries in a banker's record for any of the purposes of such proceedings. *(Amended 37 of 1984 s. 6)*

(2) An order under this section may be made either with or without summoning the bank or any other party, and shall be served on the bank 3 clear days before the same is to be obeyed, unless the court or judge otherwise directs.

(3) The costs of any application to the court or judge under or for the purposes of this section, and the costs of anything done or to be done under an order of the court or judge made under or for the purposes of this section, shall be in the discretion of the court or judge, who may order the same or any part thereof to be paid to any party by the bank, where the same have been occasioned by default or delay on the part of the bank.

(4) Any such order against a bank may be enforced as if the bank were a party to the proceeding.

[cf. 1879 c. 11 ss. 7 & 8 U.K.]