Neutral Citation Number: [2018] EWHC 2230 (Comm)

Case No: CL-2017-000652

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 26th July 2018

Before :

HHJ Waksman QC (sitting as a Judge of the High Court)

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Between :

CMOC Sales & Marketing Limited — **Claimant**

- and –

Person Unknown and 30 others — **Defendants**

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Paul Lowenstein QC, Philip Hinks, Matthew McGhee (instructed by **Cooke, Young & Keidan LLP**)

Hearing dates: 10th - 11th July 2018

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JUDGMENT APPROVED

INTRODUCTION

1. This is the trial of an action where none of the present defendants have engaged in the litigation process at all, bar a few sporadic communications from some of them or their lawyers, which came to nothing.

2. The first defendant is a generic group of defendants whose identities are unknown. The second to 31st defendants are named individuals or companies. The claims made against the 29th to 30th defendants, who did engage, have now been settled.

3. The bare bones of the claim can be stated very swiftly. CMOC is an English company. It is managed by its sister company, CMOC Mining USA, operating from Phoenix, Arizona. Its business is the sale and purchase of Niobium, which is a soft metal predominantly found in Brazil and used in alloys such as special steel and gas pipelines.

4. In October 2017 CMOC discovered it was the victim of a business email compromise fraud whereby the perpetrators of the fraud had hacked into its email system and caused its bank, Bank of China in London, to pay US$6.91 million and €1.27 million out of its bank account by means of twenty separate transfers.

5. Mr Chen, who was one of the directors and authorised signatories, in particular had his email account hacked into and as a result of that, the perpetrators were able to send emails purporting to come from him enclosing purported payment instructions to the relevant people at the Bank of China in London to make the payments and they were to debit CMOC's bank account in London to the extent that I have indicated.

6. CMOC discovered the fraud between 12 and 13 October and then took the action to which I shall refer later on, which led to these substantive proceedings and ultimately this trial.

7. The 23 October 2017 was the first of some 14 pre-trial hearings in this case, 11 of which have been before me. There was a large number of paper applications as well, most of which equally were dealt with by me.

8. While the fact of the fraud is obvious from what I have already said, the identity of the perpetrators and the actual recipients of the funds was not. However, I was invited at the first hearing to grant -- and I did grant -- a world-wide freezing order against "persons unknown", which have now become known as the collective first defendant.

9. As amended, those "persons unknown" are defined by reference to the following classes, that is to say those perpetrators of the Fraud (as particularised in the Particulars of Claim) whose identities are currently unknown, 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; in either case, other than (i) by way of the provision of banking facilities, and/or (ii) the Non Cause of Action Defendants named in Schedule 2 to the Claim Form.

10. The process of identifying particular named defendants was undertaken essentially by obtaining information and disclosure orders against the banks into which the funds were originally paid from the CMOC accounts, the CMOC accounts, as I say, being with Bank of China in London.

11. The number of such banks and their location around the world has steadily increased so that to date there are 50 such banks in 19 different jurisdictions. They have been known from the outset as "no cause of action defendants" because, of course, no substantive

relief is claimed against them; they were joined simply as respondents to the numerous third party information and disclosure orders which I made.

PRELIMINARY OBSERVATIONS

12. I make a number of preliminary observations. First of all, none of the present defendants have engaged so as to file a defence, or even an acknowledgement of service, or to put in evidence. As CMOC recognises, I still have to be satisfied on the balance of probabilities that the claim is made out, and as the underlying allegation is one of fraud, as always, cogent evidence is required in order to satisfy that burden of proof. Indeed, in that regard I have been referred to the well known observations of Lord Hoffmann in *Re B (Children)* [2009] 1 A.C. 11 at [14] to [15]:

> "The court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability."

13. It follows, particularly in this case but often in cases of fraud, that much of CMOC's case depends on the drawing of inferences, and it's important to note, as I have been reminded by CMOC, that an inference of fraud or dishonesty should only be drawn where it's the only reasonable inference to be drawn; see the observations of Mr Justice Teare at paragraph 8 of his judgment in *JSC BTA Bank v Mukhtar Ablyazov* [2012] EWHC 237 (Comm).

14. Where the trial is not attended by one of the parties, there is still an obligation of fair presentation which is less extensive than the duty of full and frank disclosure on a without notice application. Mr Justice Cresswell in *Braspetro Oil Services v FPSO Construction Inc* [2007] EWHC 1359 (Comm) said as follows, that he required the claimant to draw to the attention of the court: "*points, factual or legal, that might be to*

the benefit of [the defendant]." He noted that claims which were considered not to be sustainable were not in fact pursued. He said that the claimant brought to the attention of the court points which the defendant had taken before it decided to play no further part. He said that the claimant brought to his attention points which had never been taken by the defendant but which might have been had it decided to defend the proceedings, and it had taken all steps to bring to the attention of the defendant what has been happening here. The court had, in that case, through the eight-day hearing, carefully examined and tested the claimant's case. I adopt those observations and I consider that the injunctions of Mr Justice Cresswell have been fully followed here. I also did not regard this trial as merely an exercise of rubber-stamping but tested and considered all aspects of the case.

15. Another feature of this case which follows on is that, in my judgment, this litigation brought by CMOC has been marked by (a) scrupulous attention to detail and to the requirements of the very many applicable procedural rules, and (b) rigorous observance of the obligations of material disclosure on the many without notice applications on the part of solicitors and counsel involved for the claimant, and the obligations of fair presentation otherwise, to which I have referred. There have been no short cuts taken and no glossing over of any problematic points. This is also the case for the trial itself.

16. Thirdly, there have been a number of innovative features of this case which I'm going to refer to at the end of the judgment in some supplemental observations, but I should say that so far as service is concerned, these include alternative service by way of Facebook Messenger and WhatsApp. There have been numerous applications before me to ensure that the method of service that is proposed is authorised by the court, and I have received throughout these proceedings updates on how the service has in fact been effected.

SERVICE

17. It is not necessary or proportionate for me to go through the service history of each particular defendant, but I have read carefully paragraph 27 of the skeleton argument which sets out in summary form when each defendant was served and how they were served and the underlying witness statement or affidavit which actually sets out the evidence for that.

18. In addition to that, I have a defendant summary for each of the defendants, each of which has a section concerned with service, and that again sets out by reference to the underlying evidence precisely how and on what occasions the defendant has been served and the reaction of those defendants, if any.

19. The same is true for notification of this trial. Indeed, CMOC has gone to the trouble of producing a table dealing with that matter by reference to each of the defendants, stating the method of service, address or Facebook account details, what the outcome was, when the step was taken, when it is deemed to be served, and where I might find the evidence on it, and in some cases that is done by hard copy.

20. So for example, in relation to the second defendant, Mr Juan Carlos Carrasco Garcia, there was personal service which was accepted by Mr Garcia in relation to Spanish translations but not in relation to the English underlying documents. Then there are Facebook Messenger, email and courier modes of service as well, running through from February until early July in relation to the date of the trial. The date when most defendants were first notified of trial is 21 February.

21. It follows that the decision of the defendants not to participate in these proceedings has been both voluntary and informed.

22. As with all other hearings in this case, I have been provided with a very detailed and meticulously prepared skeleton argument which summarises all of the relevant evidence as well as making the legal submissions. Given that summary and the absence of any arguments on evidence to the contrary, I make no apologies for making extensive reference, where appropriate, to that skeleton.

THE EVIDENCE

23. As the case has progressed, so has the volume of evidence. Prior to trial, and for the purpose of the various interlocutory stages, there were numerous affidavits which I read at the time. They included 12 affidavits from Mr Stewart, 14 from Mr Young and 16 from Mr Burton-Wills of the claimant's solicitors' firm, which is CYK, as I shall call them.

24. For the purpose specifically of the trial there was one affidavit and five witness statements of Mr Christopher Flood. He was a financial analyst at CMOC at all material times until February 2018 when he became a management accountant, and I have heard from him.

25. There is also an affidavit of Andrea Campbell. She was the interim head of finance at CMOC until December 2017. Her evidence was read pursuant to a Civil Evidence Act hearsay notice. It largely confirmed the evidence of Mr Flood and there is no reason not to accept it in full.

26. I also heard from Mr Ching-Yung Chen, a director of CMOC and the person whose email account was hacked into by the fraudsters. He was also a senior vice president of CMOC Mining USA Limited, which is the sister company to CMOC based in Arizona, to which I shall refer to as "CMOC USA".

MONEY FLOWS - GENERAL

27. Before dealing with the particular legal claims made against the defendant, it is worth setting out in some more detail the facts of the payments, receipts and identities of those involved. I have been supplied with a very helpful two-page flow chart of the stolen funds. This forms Appendix 1 to this judgment.

28. Those who were the account holders of the bank accounts into which the CMOC monies, as I shall call them, were paid from the CMOC Bank of China accounts are called "Level 1 payees". The next onward payees, that is the recipients of payments from the Level 1 payees, are called "Level 2 payees" and they are then followed by the Level 3 payees.

29. The figures from the flow chart are taken from the figures originally set out in appendix 2 to the particulars of claim. There were some amendments made to correct some errors which were made known to me in the course of the hearing, and also to take account of some recent information. Appendix 2 itself has now been amended. I am going to append to my judgment the flow chart and I am going to ask that it be corrected so that it is entirely up to date.

30. I will say more about individual payments later, but I now turn to the fraud in more detail.

THE FRAUD

31. CMOC USA manages CMOC. Both are subsidiaries of a Hong Kong company, CMOC Limited, itself a subsidiary of China Molybdenum Company Limited.

32. There were only two authorised signatories on the CMOC Bank of China accounts in London. One was Mr Chen and the other was Mr Kalidas Madhavpeddi. Both are based in Arizona.

33. CMOC's principal business as I have indicated is the purchase and sale of Niobium. CMOC purchased its supplies of Niobium for onward sale mainly to third parties from a company called NioBras based in Brazil, where the Niobium comes from. NioBras itself is another member of the CMOC group.

34. Up to about US$10 million to US$15 million would be spent by CMOC each month on its purchases from NioBras. Because the two companies are associated, NioBras in addition kept consolidated accounts which included those of CMOC. This meant that NioBras would, from time to time, check CMOC's balance sheet position, among other things.

35. The process of paying for purchases was essentially as follows: Mr Flood would check an incoming invoice and confirm or not that it was due for payment. He would then pass it to Ms Campbell. If she approved the payment, the invoice would be emailed to Mr Chen along with a payment instruction.

36. As Mr Chen explained, CMOC would always have a supply of headed company paper, which was otherwise blank save for the signature of Mr Chen and Mr Madhavpeddi. They would sign 20 or 30 blank sheets at a time. A Ms Gavin would then create the payment instruction for a particular invoice and payee and put it on the headed and signed sheets. It would then be sent across to Mr Chen by email, having been scanned in first. Assuming that Mr Chen approved the payment, he would personally send the email to Bank of China in London requesting the payment, which would then be carried out. An example of a genuine payment instruction is at C1, tab 1, page 24.

37. Once the perpetrators of the fraud had hacked into Mr Chen's email account, they used it to send what were in fact fake payment instructions to Bank of China but which were processed as genuine requests for the funds to be paid out.

38. The genuine payment instruction headed, "Payment request", at page 24, is addressed to the Bank of China. It says:

> "*Dear sirs, please debit our USD account [account details] to make the payment as per the below instruction*"

It indicates the name of the beneficiary, the bank that they banked at, the account, the SWIFT code, the routing number, and then it contained the signatures of Mr Madhavpeddi and Mr Chen.

39. Of course, what the bank would see would not be an original, because this was by then a scanned copy rather than a document containing an original signature. The fake payment request looked very similar and was obviously taken from a genuine payment request that the fraudsters had intercepted. It said more or less the same thing and of course contained the signatures at the bottom. One can understand why the bank would have regarded it as a genuine request.

40. So far as the bank is concerned, because in the case of both genuine and fake payment requests they would have been scanned in, the signature on the fake would have looked genuine. In one sense, of course, it was a genuine signature because it would have been lifted from a genuine payment request. The point is, however, it was not authorised, nor at the time was it even known about by Mr Chen. There was no reason for him to suspect anything was amiss in it, unless someone else told him of a problem. He could still use his email account as normal and was unaware of its concurrent fraudulent misuse.

41. At one point, he did see that some emails intended for him from Ms Charlton (another Director of CMOC USA) had gone straight into his recycle bin, but this single incident was put down to a glitch. His Outlook account was recreated, and the matter was left

there. The later investigation following the fraud showed that someone, obviously the perpetrators, had created a 'rule' in Outlook to divert Ms Charlton's emails probably so it would take much longer before he was alerted to any problems.

42. When, as they did, Mr Flood and Ms Campbell queried what turned out to be the fake payment instructions on the basis they could not recall having approved the underlying invoices and did not know the intended payee, they emailed Mr Chen. However, those emails were intercepted, so he never saw them, and instead the fake Mr Chen replied giving a reason for these substantial payments. This was to the effect that Mr Chen was involved in some sort of acquisition for CMOC USA which was using CMOC as a conduit for payment, and very shortly, it was said, CMOC USA would reimburse CMOC.

43. On that footing they did not take the matter any further. In CMOC's books, the payments out ostensibly for the benefit of CMOC USA then gave rise to an equal and opposite receivable from CMOC USA which would be shown as an asset on CMOC's balance sheet.

44. The emails purporting to come from Mr Chen were all the more believable since they appeared to be copied to other officers of CMOC, including Ms Charlton. In fact, they were not. The fraudsters had created dummy email addresses similar to the officers' actual email addresses, in fact slightly misspelt, but in a way which would not come to the notice of an observer unless they were looking for discrepancies, and the domain name was spelt differently so that it was cmocintermatlonal.com, not cmocinternational.com.

45. It was also noticed after the event that the perpetrators signed emails ostensibly from Mr Chen by typing the word "Ching.", whereas in fact the genuine emails that came from him had no full stop.

46. In early October NioBras started to query why CMOC's own ledger showed payments out of what was then US$5.2 million, with a reimbursement receivable from an associated company in the same amount, which was not reflected in any particular inter-company trading figures. This was important, because the only items purchased with such large payments were Niobium from NioBras, otherwise payments were very much smaller: for example, up to US$60,000 in respect of freight or warehousing costs. These enquiries led to the discovery of the fraud because Mr Chen was contacted and for the first time he became aware of the fake payment instructions. This led to a cessation of the payments, including a large one for US$3.2 million, which was stopped just in time.

47. All of this then led, predictably, to the preparation of urgent applications for freezing relief which, as I indicated, came before the court first on 23 October 2017. That is all that needs to be said about the facts of the fraud.

48. It incontestably occurred, as explained in considerable detail in the witness statements and affidavits of Mr Flood, in particular, and by Mr Chen in both his oral and written evidence, and in the oral evidence of Mr Flood. The total sums extracted from CMOC from its Bank of China accounts were, as indicated, US$6,913,503.90 and €1,270,679.30 and I refer to these collectively as "the CMOC monies".

THE FLOW OF THE CMOC MONIES - DETAILED EXAMPLES

49. The evidence as to the destination of the CMOC monies has been set out in the flow chart to which I have already referred. There is no question that this is a clear and

accurate document which draws on CMOC's own bank records and the detailed evidence procured from the no cause of action defendants and acquired by CMOC in the nine months or so since the first hearing. There is absolutely no reason to doubt its accuracy since it is based principally on banking documents. No useful purpose would be served by my attempting to reinvent the wheel, and therefore the flow chart will form part of this judgment, as I have already indicated.

50. CMOC's evidence provides the documentary back up for each of the payments and their various destinations. Every single payment has been documented carefully. The core bundles 3 to 6 contain the summaries for each of the defendants showing the payment flows to and from them, and behind the summaries are the underlying bank statements and other relevant documents, for example the fake payment instructions.

51. The summaries for each of the defendants also set out all the details that have been obtained for them, including the date and place of their birth, passport number and associated addresses, telephone, email addresses, and Facebook or WhatsApp accounts, if these were known. The email, telephone and WhatsApp details are particularly important, because as already indicated in a number of cases I permitted service to take place by these alternative means.

52. CMOC proposed, and I agreed, that a convenient way to deal with all of this evidence at trial was for me to audit it, as it were, by being addressed on some examples. Where, in particular, an action of this kind is not defended, that seems to me to be a reasonable and proportionate approach, and so I look now at some examples.

Example 1: the 12th defendant

53. The first one is the 12th defendant, which is Foxiconn Glencore Unipessoal LDA, "Foxiconn". This is a Portuguese company. Its sole director and shareholder is

Francisco Manuel Corral Carrillo, the 13th defendant. Mr Carrillo is also sole director and shareholder of Alfa Altantis SL, which is the 17th defendant. In addition, Mr Carrillo is a director of FJF Finansal Danismanlik SAN, the 23rd defendant, a Turkish company, along with Mr Garcia, the second defendant.

54. In early June 2018, Mr Garcia was arrested in Spain on money-laundering charges and pursuant to an EU arrest warrant. He has since been extradited to Germany, where he is presently awaiting trial in prison in Würzburg.

55. Foxiconn received a total of £1.561 million from CMOC, most of which went into its account with Caixa Geral de Depositos ("**Caixa Bank**") and the rest into its account with Banco BPI.

56. Immediately prior to the payment from CMOC there was €408 in the Caixa Bank account. After payments on the 15 and 18 and 27 September there was €1.13 million in that account. Between 15 September and 17 November, €1.41 million was paid out to 12 different bank accounts in different countries, including bank accounts belonging to five other defendants, being the 17th to 19th defendants and the 23rd and 24th defendants.

57. As for the Banco BPI account, it received a total of €448,458 from CMOC on 26 September and 5 October, and an inter-bank transfer of €60,000 from Caixa Bank. Before then it had €124 in the account.

58. From that account, €428,649 were paid out to 19 different accounts in various countries, of which four belonged to defendants, namely the 18th and 23rd to 25th defendants.

59. Foxiconn is a good example of the speed and international character of the monies flowing following the initial receipt of the CMOC monies.

Example 2: the 6th defendant

60. I now turn to the sixth defendant. This is International Range Trading UG, a German company whose director and shareholder again was Mr Garcia. Mr Garcia was also a direct recipient of CMOC monies. He incorporated International Range at a notary office in Germany on the same day as Mr Carrillo incorporated another company, Luxury Range Avant UG. Mr Garcia is also connected to Vicente Garcia Romero, the fourth defendant. According to Mr Romero's lawyer in Spain it was Mr Garcia who persuaded Mr Romero to take in and then pay out of his bank account some of the CMOC monies, about €107,000.

61. One of the International Range bank accounts was with Deutsche Bank Privat und-Geschäftskunden AG (the "DB Account"). The account opening form gave, as the email address, juancarlosdautova13@gmail.com. This is an address known to be used by Mr Garcia, but there is a Nadezda Dautova who lives in Spain and is herself the fifth defendant. The overwhelming probability is this is the same Ms Dautova whose name appears as part of Mr Garcia's email address. She herself received over €300,000 of the CMOC monies. Indeed, Ms Dautova signed for a letter sent by CYK to Mr Garcia at the address that was held for him. It is also likely that these two individuals are or were partners; see the information at CB3/2A/3.

62. On 9 October 2017, €494,063 came into International Range's DB Account from CMOC. A further €247,000 was paid into its Deutsche Postbank AG account on 12 September 2017. €197,000 of this money came from CMOC whilst €50,000 came from Lucy May Zorilla Romero, the third defendant. She lives in Spain. She had received over €400,000 from CMOC on 11 and 12 September. The Deutsche Postbank account previously had a credit of only €1,416. After receiving the CMOC monies, the account was effectively cleared out by payments to the 2nd, 5th, 10th and 22nd defendants. The

account was closed on 19 January 2018. As for the other bank account, the monies paid into it from CMOC effectively stayed there because they were caught by this order.

Example 3: the 11th defendant

63. I now turn to Winning Creation Company Limited, the 11th defendant. This is a Samoan company incorporated in February 2016. Its bank account was in China. This was one of the countries where the banks holding relevant accounts of payees have not responded to the orders to disclose documents and provide information. Indeed, one of the banks there appear to have been actively trying to block communications from CYK. Accordingly, in these instances, the information has come from the bank accounts of the paying entities, being in this particular case Universal Youth Trading Company Limited and Gee Boo Trading Company Limited, the 7th and 8th defendants, who are both Level 1 payees, and the relevant sums were €465,531 and US$118,500 and then US$347,180 respectively.

64. They were paid out to Winning Creation from Universal Youth Trading on 11 and 12 October. Winning Creation also received US$347,180 from Gee Boo Trading Company Limited.

65. There was some limited correspondence from a firm of lawyers in the BVI called Forbes Hare. Initially, they wrote to CYK denying that Winning Creation was involved in the fraud and explaining Winning Creation's business. When asked by CYK for details about all of this, and from whom they were taking instructions, they replied that they were not taking instructions from Winning Creation, but rather a Chinese lawyer. After that, communication stopped.

Example 4: the 10th defendant

66. Heram Capital SRO is the tenth defendant. This is a Czech company and again Mr Garcia is the sole director and shareholder. It had accounts with three different Czech banks: Moneta Money Bank AS, Ceskoslovenská obchodní Banka AS and Komercní Banka AS. Only the last, however, provided information, so any information about the other payments comes from the paying bank.

67. On 14 and 11 September, it received a total of €68,861 from Ms Romero into the Komercní account. Previously on that account the balance was €89. There were subsequent debits of €58,726 in total to Ms Mary Jackson-Braten, the 16th defendant, who lives in Scotland, and two other payees located in different countries.

Conclusions upon these examples

68. Having been taken to the underlying documents in these cases it is clear that the flow chart is an accurate summary of the payment flows, as are the individual summaries for the defendants involved in relation to these matters. There is therefore no reason not to take the whole of the flow chart at face value. Of course, this only explains what monies were transferred and where, not the responsibility or otherwise of the recipients. But a further feature which emerges from the flow chart and the examples is that it appears that the relevant bank accounts which received the CMOC monies were: (a) located in various different countries, as were the account holders; and (b) typically these accounts had little in them prior to the receipt of the CMOC monies; and (c) once the CMOC monies came in, they were rapidly transferred out again, but to a larger number of payees, again who were located in many different places; and (d) the monies moved on very quickly. In addition, the examples show certain individuals, in particular Mr Garcia, who are clearly involved in directing where the monies are to come in and go out.

LEGAL ANALYSIS

Introduction

69. CMOC has made a variety of different claims against the defendants. Those claims are: (1) proprietary claims involving the use of tracing; (2) a claim for compensation for dishonest assistance; (3) a claim in damages for unlawful means conspiracy, "UMC"; (4) a claim in knowing receipt; and (5) a claim in unjust enrichment.

70. Table A sets out by cause of action the defendants against whom the relevant claim is made. Table B then sets out by defendant what claims are made by them. I append Tables A and B to this judgment as Appendices 2 and 3 respectively.

71. A "receiving defendant" is defined as a defendant who has received CMOC monies, either directly or indirectly, that is to say all Level 1, 2 and 3 payees. That encompasses all the defendants, apart from the first defendant; the 13th defendant, Mr Carrillo; the 28th defendant, which is the company Woochinhin HK Trading Company Limited; and the 31st defendant being, Mr Luis Yanguela Concepción.

72. The "participation defendants" are the second to 13th defendants, the 17th defendant, the 22nd defendant, and the 25th to the 31st defendants. It will be seen that there is a substantial but not complete overlap between these two classes of defendant.

73. If a receiving defendant is a Level 1 payee, it is assumed that they knowingly participated in the fraud. This is on the not surprising inference that if they have been paid directly from CMOC, they must have been a knowing player in the fraud. The defendants who are participation defendants but not receiving defendants as well are the 13th defendant, Mr Carrillo, who is, however, the sole director of and shareholder in Foxiconn, the 12th defendant, and Alfa Altantis, the 17th defendant. Because he

owns and operates these companies it is assumed that he must have participated in the fraud, although he did not receive any of the funds himself.

74. The same is true for the 31st defendant, Mr Yanguela, who is the sole director of and shareholder in the 20th defendant, Doral Investments GmbH, also a receiving defendant.

75. The 28th defendant, Woochinhin, is also a participation defendant. It would have been a Level 1 recipient but for the fact that the US$3.2 million which was intended to be paid into its account was stopped just in time.

The proprietary claim

76. I turn first to the proprietary claim. This is made against all receiving defendants at whatever level. The starting point is the treatment of all monies procured from CMOC, ie. stolen from it, as trust monies. The basis for this is that the thief is treated as a fiduciary for these purposes so as to impress a proprietary character on these monies by way of a constructive trust; see in particular the dicta of Lord Browne-Wilkinson in *Westdeutsche Landesbank v Islington LBC* [1996] A.C. 669 at 716C-D, and also Lord Justice Potter in *Twinsectra v Yardley* [1999] Lloyd's Rep. Bank 438 at paragraph 99.

77. That principle is also stated to be the law in Lewin on Trusts at 7-029 and in McGrath on Commercial Fraud in Civil Practice at 6.249-6.255. McGrath makes the point that while the dicta of Lord Browne-Wilkinson has in the past attracted criticism, few appear willing to depart from his view. I agree, and I take the view that this principle is now well entrenched in English law. Accordingly, I am in no doubt that the CMOC monies were impressed with a trust which allows them to be traced.

78. The flow chart shows how far down the line, as far as the defendants are concerned, the CMOC monies can be traced. All of these monies went into mixed bank accounts. That

being so, the traceable proceeds are limited to what is known as the lowest intermediate balance in the relevant accounts following payment into them. Three examples of how the process of reaching the lowest intermediate balance has been arrived at will suffice.

79. First, in the case of the third defendant, which is Ms Romero, she received a total of €483,000-odd into her bank current account with Evo Banco and then there were transfers from the current account into other accounts by her of €341,000-odd to a savings account, €11,000 to another account, and €70,000 to a yet further account.

80. So far as the Evo current account was concerned, the first receipt of CMOC monies in the sum of €397,000-odd came in on 11 September 2017 and there was a low balance beforehand of €2,277. A further payment of €85,000 of CMOC's funds was paid in on 19 December. The account was frozen on 20 December when the credit balance was €3,000. In between final receipt of CMOC monies and the freezing account, the lowest intermediate balance therefore was €3,000 and that is the amount which can be traced into as forming part of the still traceable proceeds of the trust monies.

81. As far as the Evo savings account is concerned, €259,000-odd was paid in from the Evo current account on 12 September when the account previously had €9,000-odd in it. A further €82,000 was received from the EVO current account on 20 September 2017, and previously that account had €860.64. The account was frozen on 20 September and at that time the credit balance was €22,900; accordingly that is the lowest intermediate balance there.

82. I then refer to International Range, the sixth defendant. The total amount received here into the, Deutsche Postbank account and DB account was €741,064. CMOC funds of €50,000 went into the Postbank account from the third defendant Ms. Romero. Before that there was a credit of €1,416.46 and then a further payment of €197,000.55 of

CMOC monies was paid in. The credit balance before the first payment of CMOC's monies was €2,210. The account was closed and the credit balance was nil. It followed that the lowest intermediate balance there was nil as well.

83. On the DB account, €97,000-odd came in, and then a further payment of €397,000-odd was paid in. Immediately prior to that receipt, the account was in credit of €101,000. The account was frozen on 20 October and at that date the credit balance was €498,944.86. The lowest intermediate balance on that account was €498,944.86, but the traceable proceeds is €494,063.98. That is because it has to be in relation to the CMOC monies, and that's done by adding the first CMOC monies and the second CMOC monies together.

84. Then in the case of Foxiconn, in the Caixa Bank account, €25,157 came in on 15 September. Before that the account had a balance of €408.37. A further payment of €480,423.76 came in on 18 September, and a final payment of €607,658.77 on 28 September. The account was frozen on 7 November and the balance of the account then was €326,163. The balance did drop lower than that to €118,295.49 between receipt and freezing of the accounts, but that is because three payments had gone out. However, those payments were returned and therefore CMOC says, and I agree, that the returned payments can be viewed as merely redepositing the CMOC monies which were already there. So the lowest intermediate balance is €326,163.05.

85. As to Foxiconn's Banco BPI account, CMOC funds amounting to €60,000 were received in September from the Foxiconn Caixa Bank account. A further payment came in on 26 September being €270,658.94 directly from CMOC. The prior balance was €5,766.54 to give a final payment of €177,800.57 of the CMOC funds on 5 October 2017. The account was frozen and at that time the balance was €82,759 and that again was the lowest intermediate balance.

86. All of those facts which I have recited can be taken from the summaries applicable to those defendants which themselves are taken from the underlying documentary evidence. There is no reason to doubt the accuracy of CMOC's figures on the lowest intermediate balances for all the relevant defendants. In some cases the balance cannot be ascertained at all, which gives rise to a rather different form of declaratory relief. But where the traceable amounts are known, it must follow that CMOC is entitled to a declaration that the relevant defendant holds that sum on trust for CMOC along with an order for payment out. The relevant declaration where the sum is unknown is to declare that the relevant defendant holds the traceable proceeds of the CMOC monies on trust for CMOC.

87. The position for all of the relevant defendants in terms of the traceable amounts is set out in the following table:

Receiving Defendant	**Lowest Intermediate Balance**	**Traceable proceeds**
D2 – Juan Carlos Carrasco Garcia	Unknown	Unknown
D3 – Lucy Mary Zorrilla Romero	Evo Current: EUR 3,000 Evo Savings: EUR 22,900.73	Evo Current: EUR 3,000 Evo Savings: EUR 22,900.73
D4 – Vicente Garcia Romero	Evo Current: EUR 0 Evo Savings: EUR 203.08	Evo Current: EUR 0 Evo Savings: EUR 203.08
D5 – Nadezda Dautova	Unknown	Unknown
D6 – International range Trading UG	DB Account: EUR 498,944.86 Postbank Account: EUR 0	DB Account: EUR 494,063.98 Postbank Account: EUR 0
D7 - Universal Youth Trading Co Limited	EUR 19.86 and USD 659.46	EUR 19.86 and USD 659.46
D8 – Gee Boo Trading Co Limited	USD 322.77	USD 322.77
D9 – Nuanyan Trading Co	USD 250.36	USD 250.36

Receiving Defendant	Lowest Intermediate Balance	Traceable proceeds
Limited		
D10 – Heram Capital SRO	EUR 8,884.09	EUR 8,884.09
D11 - Winning Creation Co Limited	Unknown	Unknown
D12 – Foxiconn Unipessoal LDA	CGD Account: EUR 326,163.05 BPI Account: EUR 82,759.57	CGD Account: EUR 326,163.05 BPI Account: EUR 82,759.57
D13 – Francisco Manuel Corral Carrillo	Unknown	Unknown
D14 – Xindayang Limited	USD 3.63	USD 3.63
D15 – Leo International Group Company Limited	Unknown	Unknown
D16 – Mary Jackson-Braten	GBP 4,699.18	GBP 4,699.18
D17 - Alfa Altantis SL	Unknown	Unknown
D18 – Favoured Lucky Enterprises Co Limited	USD 14	USD 14
D19 – Hong Kong Zhenlong Trade Co Limited	EUR 0	EUR 0
D20 – Doral Investment GmbH	Unknown	Unknown
D21 – Protech Components Hong Kong	EUR 0	EUR 0

Receiving Defendant	Lowest Intermediate Balance	Traceable proceeds
Limited		
D22 – Nuance Limited	Unknown	Unknown
D23 - FJF Finansal Danismanlik SAN	Unknown	Unknown
D24 – FJF S.A.R.L.	Unknown	Unknown
D25 – HK Villa Group Limited	Unknown	Unknown
D26 – Lorey A Costantino	Unknown	Unknown
D27 – Salsabilla Water Desali Equip	EUR 0	EUR 0
D28 – Woochinhin (HK) Trading Limited	N/A	N/A
D31 – Luis Miguel Yanguela Concepcion	Unknown	Unknown

Dishonest assistance and UMC

88. I now turn to dishonest assistance and UMC. It's convenient to deal with both of them together. These claims are alleged against the perpetrators, ie. the first defendant, and the participation defendants. I deal first with the law.

(1) Dishonest assistance - the law

89. The first two requirements of the claim in dishonest assistance, that there is a trust and that monies are transferred in breach of trust, are clearly established by virtue of the character given to the stolen monies in my analysis above.

90. Then, the defendants must have assisted in that breach of trust, ie. in procuring the CMOC monies, and they must have done so dishonestly.

91. The assistance required has got to be something which is more than minimal and which enables the breach of trust to be committed. A few points should be noted here:

(1) It does not have to be shown as a separate requirement that the assistance actually caused or was the main cause of the breach of trust, ie here the removal of particular monies.

(2) For that reason, if liability is made out, that is a personal liability on the part of the person who is being liable for dishonest assistance which is coextensive with the trustee, which would be the obligation to restore all of the stolen money. For this reason, those who have assisted can be taken to have materially assisted the fraud because they played their part in the receipt and disposal onwards of the various funds.

(3) Finally, there is no separate dishonest state of mind which is required over and above the general dishonesty requirement here.

(2) Unlawful means conspiracy - the law

92. So far as unlawful means conspiracy is concerned, I take this from a paragraph 148 of the skeleton argument. There must be: (a) a combination or understanding between two or more people, (b) an intention to injure another individual or separate legal entity, (c) concerted action consequent upon the combination or understanding, and (d) use of unlawful means as part of the concerted action.

93. As to (a), there must be some form of agreement or common design between the defendants, but that does not mean that it has to be express. As Mr Justice Briggs, as he

then was, put it in *Bank of Tokyo-Mitsubishi UFJ Ltd v Baskan Gida Sanayi* [2009] EWHC 1276 (Ch) at [847], there must be:

> "a painstaking analysis of the extent to which the particular defendant shared a common objective with the primary fraudster and the extent to which the achievement of that objective was to the particular defendant's knowledge to be achieved by unlawful means intended to injure the claimant."

94. In addition, parties to a conspiracy can join it after its original inception.

95. The intent to injure in requirement (b) need not be a dominant intention; it can be inferred if the defendant has acted deliberately and with knowledge of the consequences, ie. that it would cause or could cause damage to the claimant.

96. Requirement (c), "concerted action", requires some active participation, and on (d), there has to be some unlawful means. Here the CMOC monies were obtained by deceit, they involved breaches of fiduciary duty, and on any view constituted criminal offences. All or any of these would be sufficient to amount to unlawful means.

The Facts

97. On analysis of the facts here, some general points. First, of course, no evidence or submissions against this claim have been served by any defendant. Secondly, the starting point has to be that this was a fraud. The question is: who dishonestly assisted it, and/or who were parties to it so as to be liable in dishonest assistance or UMC? Thirdly, CMOC has broken down the liable defendants here into three categories: (1) the perpetrators; (2) the participation defendants who had knowledge that the CMOC monies were the proceeds of the fraud against CMOC; and (3) participation defendants who had knowledge that the CMOC monies were the proceeds of a fraud.

98. Dealing with each of these in term.

Perpetrators

99. This concerns the first defendant as a general class of as yet unknown defendants. It is possible that some of the named defendants are also perpetrators themselves, but this degree of involvement cannot be established on the evidence at present.

100. By "perpetrator", one is referring to those who devised the original plan to hack into Mr Chen's email account and then operated the email account so as to send the fake emails and payment requests with the purpose of procuring CMOC to pay out the CMOC monies.

101. As far as dishonest assistance is concerned, by definition the perpetrators would have dishonestly assisted the breach of trust because they instigated the breach in the first place by setting up the fraud and then giving effect to it by ensuring the removal of the trust monies from CMOC and their onward transmission. This was dishonest because they knew there was no basis for removing the money; they in any event did so and they made knowingly untrue statements to CMOC about why the payment instructions were valid.

102. By the same token, the perpetrators would have conspired to use unlawful means, including deceit, breach of trust, theft, or obtaining pecuniary advantage by deception, or indeed fraud under section 2 of the Fraud Act 2000, and indeed by virtue of the hacking offences under sections 1 and 2 of the Computer Misuse Act 1990.

Participation defendants with knowledge of the fraud

103. I then turn to participation defendants with knowledge of the fraud. The core facts which apply to all of these defendants are set out at the base of table B, which explains which defendant is said to be liable for which claim.

104. The core facts are these: they received stolen money; there is no evidence of any consideration being given for the receipt; they have not repaid any of it despite being put on notice of the claim and despite demands; they have been served with injunctions but not given disclosure; and they have been served with process but have neither acknowledged service or filed a defence.

105. The first class of participation defendants under this head are all the Level 1 payees. They received money directly from CMOC, and indeed CMOC as the payer is often identified in the receiving bank's statements. There is no suggestion for them that they received it for an innocent purpose, nor can any innocent purpose be imagined. It is therefore inconceivable that they did not know that they were assisting in a fraud and were part of a fraudulent conspiracy.

106. These defendants are the 2nd to 9th defendants, the 12th defendant, and the 26th to 28th defendants.

107. In addition, there are those participation defendants who did not receive CMOC monies directly, ie. they were not Level 1 payees, but their ownership and/or association with those that did mean that they must have the requisite knowledge and involvement as well. Those additional defendants are 10th, 13th, 17th and 23rd. In the last case, defendant 23, Danismanlik, that is a company, but its directors include Mr Garcia and Mr Carrillo, so their knowledge is imputed to the company. As indeed for defendant 17, Alfa, whose sole shareholder and director is defendant 13, Mr Carrillo. The others are Heram, defendant 10, whose sole shareholder and director is the second defendant Mr Garcia, and Mr Carrillo, the 13th defendant. All of these defendants were dishonest because they knew of the fraud, made no attempt to repay on demand, and undoubtedly assisted in the speedy onward transmission of the monies.

108. In respect of dishonest assistance, therefore, the necessary elements of assistance and dishonesty are clearly made out.

109. In respect of UMC, it can properly be inferred in the absence of any contrary evidence that all of them acted together to give effect to the fraud of which they knew. They obviously knew that even if the predominant aim was to enrich themselves, in doing so they would inevitably be causing injury to CMOC by depriving it of money. Accordingly, there was the necessary intention to injure. Their participation in the fraud by receiving the CMOC monies and passing them on is more than sufficient activity in pursuit of the conspiracy.

110. Moreover, the examples given above in respect of the flow of monies show how the defendants are connected to each other in many cases through a few human beings, in particular Mr Garcia and Mr Carillo. In addition, the presence of companies around the world with bank accounts that had usually little or no money in them, both before and after the transfers in and out of CMOC monies, and the lack of any evidence of any corporate activity goes to the fact of knowingly committing the fraud.

111. If one takes the example of the third defendant, Ms Romero, she received €483,000 and then between 12 and 29 September she spent €4,000 in various shops and took €34,000 in cash and made numerous distributions to other entities.

112. So that deals with the category which is participation defendants with knowledge of the fraud, and I am satisfied that that is made out.

Participation defendants with knowledge of a fraud

113. I then turn to participation defendants with knowledge of a fraud. There are only three defendants here. They neither received any CMOC monies directly, nor were they owned or controlled by others, but it is said that there are particular features to show

that they at least had knowledge of the payment of monies from a fraud. The first is the 11th defendant who is a Level 2 payee, Winning Creation. It is a Samoan company, as already noted, with Samoa being an offshore jurisdiction where there is little corporate information available. Winning Creation was incorporated by Mossfon Subscribers, which is associated with Mossack Fonseca which came to prominence in the Panama Papers and who acted as a company agent, largely in offshore jurisdictions. Winning Creation was also a company where lawyers initially came on the scene and then disappeared.

114. Winning Creation also received payments from another entity, the 21st defendant, Protech Components HongKong Limited, which cannot be shown to have received CMOC monies directly, but it is noteworthy that it has a financial connection with one of the other defendants. The Protech payments were of US$56,870 and US$7,800 going to Winning Creation on the 12th and 26th of September 2017.

115. There is then the 20th defendant, Doral Investments GmbH. This is a Swiss company incorporated shortly before it received €40,000 from Foxiconn. Its sole shareholder and president of management is Mr Yanguela, the 31st defendant. Both Doral and Mr Yanguela were represented by the same German attorney, Mr Thomas Beute, who had some limited correspondence with CYK in the early stages. As with the other defendants Doral has not engaged with these proceedings.

116. The 31st defendant, Mr Yanguela, was arrested on 27 September 2017, pursuant to an Interpol RED Notice for charges relating to "fraud, forgery, and association with criminals", when trying to board a flight from the Dominican Republic to Switzerland, which is the location of Doral. This information came from an article published by the Dominican National Police on 11 January 2018. The UK police subsequently informed CYK that the RED Notice was issued at the behest of the Dominican police.

Knowledge

117. On the basis of all the above evidence, I am satisfied that there is a sufficient inferential basis to say that on the balance of probabilities these defendants knew of, in fact, the actual fraud and took part in it. But if I was wrong about that, it is plain that they must have known that they were receiving illicit monies even if they did not know the identity of the actual victim.

118. More specifically, so far as dishonest assistance is concerned, I note the dicta of Lord Millett in *Twinsectra Ltd v Yardley* [2002] 2 A.C. 164 at [135] to [137] where he said that:

> "It is obviously not necessary that he should know the details of the trust or the identity of the beneficiary. It is sufficient that he knows that the money is not at the free disposal of the principal. In some circumstances it may not even be necessary that his knowledge should extend that far. It may be sufficient that he knows that he is assisting in a dishonest scheme."

119. As far as UMC is concerned, this submission is developed from paragraph 172 of the skeleton argument. It says that a defendant's lack of knowledge as to the precise identity of the victim does not mean the defendant did not intend to injure the victim by his conduct. It is sufficient if the defendant knows that there is a victim targeted by the conspiracy.

120. CMOC refers to a number of points to make that good. First of all, in *The Dolphina* [2012] 1 Lloyd's Rep 304, Lord Nicholls' approach in *OBG Ltd v Allan* [2008] 1 A.C. 1 was cited with approval and the High Court of Singapore added:

> "A conspirator need not know all the details of the plot as long as he is aware of the common objective and what his role in bringing it about involves."

121. Secondly, in *Kuwait Oil Tanker Co SAK v Al-Bader (No 3)* [2000] 2 All E.R. (Comm) 271 at [120] to [121], Lord Justice Nourse said:

> "In the case of a conspiracy to defraud by wholesale misappropriation it would be absurd to argue that the conspirators did not intend just that."

122. Third, in *OBG Ltd v Allan* [2008] 1 A.C. 1, Lord Nicholls stated at [167] that if

> "a defendant seeks to advance his own business by pursuing a course of conduct which he knows will, in the very nature of things, necessarily be injurious to the claimant"

then that would be sufficient.

123. Similar points were made by Mr Justice Briggs in *Bank of Tokyo-Mitsubishi UFJ Ltd v Baskan Gida Sanayi* [2009] EWHC 1276 (Ch) at [832] to [833].

124. Fourth, in Lord Bridge's judgment in *Lonrho plc v Fayed* [1992] 1 A.C. 448 at 467 it is said: "*It is sufficient if the conspiracy is aimed or directed at the plaintiff, and it can be reasonably foreseen it may injure him.*" The submission made by CMOC is that although the language there is consistent with the requirement that a defendant should know the identity of the claimant himself, the better interpretation is that it is sufficient that the defendant should appreciate the conspiracy is aimed at a target without necessarily knowing that target's identity. I agree.

125. In this case, it is said that with those defendants who participated with knowledge that the monies were the proceeds of a fraud, but where the evidence does not establish that they knew of the fraud, it is in the very nature of things that they knew of the existence of a victim of fraud and that their gain from the fraud would be the injury of the victim. It is said that there is no principled reason why the precise identity of the victim should be part of the legal test, particularly in the age of cyber-fraud where conspirators can readily conspire together to conceal and then move the money of the victim on without any of the traditional engagements seen in more traditional forms of fraud.

126. I agree. Suppose that the residual three defendants in this last class knew that they were handling and assisting in the moving of illicit proceeds in a scheme to defraud a company by using false orders enabled by the hacking of its email accounts. Suppose they further agreed to do all of this knowing that their gain is the company's loss. I do not believe that they could avoid liability by saying they did not know the actual identity of the company defrauded or the precise methodology of the conspiracy. It is surely sufficient that they knew that there was a victim and that monies would be procured illicitly from that victim and that they had agreed to play their part.

127. I therefore conclude that all of the participation defendants are liable to CMOC in damages, both on the basis of dishonest assistance and UMC, as pleaded. The damages, for reasons given above, will constitute the full amount of CMOC's loss from the fraud, because this is a case of accessory liability. These are then the principal sums of US$6,913,053 and €1,270,679.

Knowing receipt

128. I now turn to knowing receipt. This claim is made against all of the defendants except the 1st, 13th, 28th and 31st. In the case of those defendants it cannot be shown that any of them received any CMOC monies, which is why they are excluded.

129. The principal difference between the defendants here and the defendants to the dishonest assistance and UMC claims is that the defendants here include payees at all levels, ie Level 1, Level 2 and Level 3. That said, the core facts referred to above and set out at the base of Table B apply to all the defendants here.

130. The requirements for establishing liability in knowing receipt are: there should be assets held under a trust or fiduciary duty; there has been disposal of those assets in breach of trust or fiduciary duty; there has been a beneficial receipt of those assets by

the defendant; and the defendant had sufficient knowledge to render it unconscionable for him to retain the assets.

131. The first two requirements are already made out for reasons given in connection with the proprietary claim.

132. As to the third requirement, there is no evidence to displace the assumption that each of the relevant defendants received the CMOC monies beneficially. It has not been asserted, for example, that any defendant was in truth receiving the monies only as an agent or nominee or something of that kind.

133. As for knowledge sufficient to render it unconscionable for the defendant to have received the CMOC monies, in the case of the participation defendants who are also receiving defendants, that has in effect been established; see the evidence above concerning the participation defendants and the claims against them in dishonest assistance and UMC, which I have upheld.

134. The non-participation receiving defendants have still the core facts applicable to them (other than the 16th defendant, who was not made the respondent to an injunction). In the absence of any evidence or explanation from such defendants, the core facts themselves are sufficient, in my view, to establish unconscionable receipt. The irresistible inference from the core facts is that they knew perfectly well that these were trust monies in the sense that they had been fraudulently obtained by deceit and illegal hacking. Again, whether they knew the actual identity of the victim, ie. the true underlying beneficiary of the trust monies, is in this context immaterial.

135. But in addition, the summaries and supporting documents for all of these defendants reveal additional features that support the required level of knowledge. I do not refer to

each summary, which are themselves then summarised at paragraph 184 of the skeleton argument, but instead I set out the sort of additional features found:

(1) Monies paid in and then swiftly paid out;

(2) No evidence of any real trading or business carried on by the companies concerned;

(3) Modest amounts of share capital for the companies concerned;

(4) Payment to or from other defendants;

(5) In some cases, Hong Kong companies whose directors live in China; and

(6) In some cases, directors who are common directors with other defendant companies.

136. When further information (ie. other than simply the banking or corporate documents) has been obtained, it has been revealing.

137. For example, in the case of the 16th defendant, Mary Jackson-Braten, who received £6,860 from Heram, the 10th defendant, she told CYK this was consideration for a gold ring that she had sold and that she had supporting documents. But when CYK asked to see them, that was the end of the contact. CYK then received an email dated 29 May 2018 from a Mr Omokaro, a Dutch national, who had received indirectly some CMOC monies. He said that the monies were for the purchase and shipment of a truck to a company based in Ijebu, Nigeria called Lincbrol Interbiz Concept. He also said that Ms Jackson-Braten's husband's address was at Lincbrol, though he also said that he (Mr Jackson-Braten) lived in Spain. Mr Omokaro said that some years ago Ms Jackson-Braten had come to his office to arrange to ship two cars to Nigeria. He also said that her husband had transferred monies to his account. When Mr Omokaro queried whether the monies had been fraudulently obtained, Mr Jackson-Braten said that this was not

the case and Mr Omokaro later received a letter from a 'Francisco' - possibly the 13th defendant, Mr Carrillo - to say that it was for a commercial purpose. None of this makes much sense, but it certainly seems on any view to be inconsistent with normal trading activities. Further, Lincbrol also received some monies from Heram, and Ms Jackson-Braten had also received a payment from Foxiconn. Both of these, of course, are, or are controlled by, Level 1 payees.

138. In the case of the 18th defendant, Favoured Lucky Enterprises Co Ltd, according to Mr Flood's witness statement of 6 July 2018, it received €13,424 from Mr Garcia, the second defendant, on 23 September 2017. That is in addition to the monies it received from Foxiconn.

139. Overall, I consider that the pleaded claims in knowing receipt against all the relevant defendants have been clearly made out. Each is therefore liable to restore the payment which it received.

Unjust enrichment

140. The final substantive claim is made in unjust enrichment against all of the receiving defendants save, again, the 1st, 13th, 28th and 31st defendants. It is therefore a further claim to the ones made against the receiving defendants in knowing receipt, which have been successful. It will also be for the same sums.

141. Given my findings on the knowing receipt claims, and indeed on the dishonest assistance and UMC claims, it is strictly unnecessary to consider this further claim. However, I will say something about it since it was argued before me.

The Law

142. The relevant requirements for a claim in unjust enrichment have been summarised at paragraph 187 of the skeleton argument taken from the judgment of Lord Reed in

Investment Trust Companies v Revenue and Customs Commissioners [2018] A.C. 275, namely that the defendant was enriched, the defendant's enrichment was at the expense of the claimant, the enrichment was unjust, and there are no defences available to the claim.

143. As pleaded, and as put in argument, it seemed to me there was one fundamental difficulty with this, which is that CMOC sought judgment against the Level 1 payees in unjust enrichment for the CMOC monies received by those payees, as well as against Level 2 payees for the CMOC monies received by them, even though those payments came from the Level 1 payees. This does not cause a problem in the knowing receipt claim because it is founded upon the unconscionable receipt of trust monies where there could be more than one receiver of such monies, and the only issue would arise on enforcement to avoid double recovery.

144. The context for the question here, however, is the need to fulfil the second requirement, which is that the relevant defendant was enriched "*at the expense of*" the claimant. But in unjust enrichment, the question arises where the recipient of the benefit - here the monies - did not receive it directly from the claimant. To that end I refer to the dicta of Lord Reed in the *Investment Trust* case where he said this at paragraphs 47 to 50:

> "47 There are, however, situations in which the parties have not dealt directly with one another, or with one another's property, but in which the defendant has nevertheless received a benefit from the claimant, and the claimant has incurred a loss through the provision of that benefit. These are generally situations in which the difference from the direct provision of a benefit by the claimant to the defendant is more apparent than real.
>
> 48 One such situation is where the agent of one of the parties is interposed between them. In that situation, the agent is the proxy of his principal, by virtue of the law of agency. The series of transactions between the claimant and the agent, and between the agent and the defendant, is Another situation is where, as in the Relfo case [2015] 1 BCLC 14, an intervening transaction is

> between the claimant and the defendant, it is disregarded when deciding whether the latter was enriched at the former's expense. … There have also been cases, discussed below, in which a set of co-ordinated transactions has been treated as forming a single scheme or transaction for the separately would be unrealistic. …
>
> …
>
> 50 It has often been suggested that there is a general rule, possibly subject to exceptions, that the claimant must have directly provided a benefit to the defendant. The situations discussed in the two preceding paragraphs can be reconciled with such a rule, if it is understood as encompassing a number of situations which, for the purposes of the rule, the law treats as equivalent to a direct transfer, in the sense that there is no substantive or real difference. So understood, the suggested rule is helpful. It may nevertheless require refinement to accommodate other apparent exceptions, and it would be unwise at this stage of the law's development to exclude the possibility of genuine exceptions, or to rule out other possible approaches."

145. The logic of those dicta is this: the apparent direct recipient is to be disregarded in favour of another indirect recipient because the latter is the "true" or the "real" recipient. The claim thus passes through the apparent direct recipient, as it were. That can be because the apparent recipient, by dint of the law of agency, is no more than a proxy channel to the principal, the indirect recipient, or because in cases of sham the law simply disregards the direct recipient as no more than an artificial construct.

146. The tracing example has instead a proprietary connotation but it obeys the same rationale. The benefit which is claimed back in order to reverse the unjust enrichment can be shown to have ended up somewhere other than in the hands of the direct recipient. In all of those cases it follows that there is only one true recipient against whom the claim can be made. The notion that there could be claims against both the direct and the indirect recipients for receipt of the same benefit cannot work because one is then not disregarding one in favour of the other.

147. As for sets of co-ordinated transactions, to which Lord Reed also refers, this was developed further by him in paragraphs 61 to 66. He begins in paragraph 61 by summarising those transactions as being:

> "These are cases in which, for the purpose of answering the "at the expense of" question, the court has treated a set of related transactions, operating in a co-ordinated way, as forming a single scheme or transaction, on the basis that to answer the question by considering each of the individual transactions separately would be unrealistic."

148. In each of the cases he refers to, namely the *Banque Financière* case ([1999] 1 AC 221) and the *Menelaou* case ([2016] AC 176), what happened was the court disregarded the apparent first or direct recipient in favour of the defendant who was the indirect recipient because the several transactions which led to a conferring of a benefit on the latter had to be viewed realistically together, one after the other. In both cases only that analysis would reflect the objective intention of the parties to the transactions.

149. In *Relfo* at first instance, Mr Justice Sales as he then was, found that the director of a claimant company who had acted in breach of duty by transferring sums out to a company called Intertrade had the objective of conferring a benefit in fact upon the defendant by effecting an onward payment from Intertrade to him. On the basis of that finding, the defendant conceded that for the purpose of an unjust enrichment claim there was sufficient directness or proximity between the claimant and the defendant and therefore the payment had been made to the defendant at the expense of the claimant.

150. It should also be noted that the claim in unjust enrichment was strictly unnecessary since the judge had already upheld the claim against the defendant on the basis of knowing receipt. On appeal, the defendant's then counsel's concession was withdrawn. The point was taken that the unjust enrichment claim could not succeed because there was no direct payment from the claimant to the defendant. However, the Court of

Appeal agreed that the unjust enrichment claim did succeed, as found by Mr Justice Sales. On the particular facts it was enough that Mr Gorecia's objective had been to confer a benefit with the claimant's money upon the defendant "*by a circuitous route*". As Lady Justice Arden put it: "*As a matter of substance and economic reality the defendant was a direct recipient.*" Or as Lord Justice Floyd put it: "*The payment concerned was the equivalent of a direct payment.*"

151. Beyond that, as Lord Justice Floyd and Lady Justice Gloster made clear, it was not necessary to go. That case was not the occasion on which to decide how far the so-called direct payment rule should be liberalised, or how much more than a simple "but for" relation between the claimant and the defendant was required in order to show that the claimed enrichment of the defendant was at the expense of the claimant. Lady Justice Arden was more disposed towards recognising a broader principle based on "sufficient link", but in fact upheld the judge's findings on the same factual basis as Lord Justice Floyd and Lady Justice Gloster.

152. Accordingly, it is not possible to derive some wide principle from the Court of Appeal's decision in *Relfo*, and in any event, no such principle was laid down by the Supreme Court in the later case of *Investment Trust*.

Analysis

153. In the light of all that, I turn to applying the law as summarised above to the claims here. CMOC makes a personal claim at each Level 1 recipient for the entirety of the sums which were mistakenly transferred to them by it. Those claims seem to me to be well-founded. Each of those defendants were enriched at the expense of CMOC and they were the direct payee. The enrichment was unjust because the payments were made by mistake and by reason of fraudulent misrepresentation made by the

perpetrators to the effect that the payments were valid and proper ones to make. Since no defendant has engaged with this litigation, none of the applicable defences to a claim in unjust enrichment arise.

154. But, as noted above, CMOC also claims in unjust enrichment against the other defendants who received CMOC monies indirectly in the sense that they were Level 2 or Level 3 payees and those monies had come through the Level 1 payees, and it is said that they can be supposed to have received those monies from the Level 1 payees, though not in the strict tracing sense. That they were recipients in a broad sense of the CMOC monies is said to be clear from the fact that the payments to them came shortly after the receipt of the CMOC monies by the Level 1 payees and in smaller amounts.

155. But the fundamental problem with this is that it goes against the principle which I identified above. This can be seen as follows:

(1) If it is said that the claim against the Level 2 recipient, for example, is because the Level 1 recipient acts as agents only, it is hard to see why there should be any claim against a Level 1 recipient as well;

(2) Equally, if the interposition of the Level 1 recipient is said to be a sham or other device which should then be ignored in favour of the real recipient, again, there can be no claim against the Level 1 recipient;

(3) Further, this case is not, in my view, within the co-ordinated transactions category enunciated by Lord Reed and is not analogous to the two decided cases he refers to.

156. This difficulty is reflected in the fact that there is in truth no positive case that any particular Level 1 recipient is actually no more than agent for any of the Level 2 recipients of the relevant money. I am not able to say that any of them were. Equally,

the mere fact that an offshore company is used does not necessarily mean that its interposition is a sham.

157. I see how arguments of these kind could be made as set out in paragraphs 198 to 203 of the skeleton argument, but it is inconsistent for CMOC to claim against the Level 1 recipients and Level 2 recipients and indeed Level 3 recipients all at the same time. I understand why CMOC would like to have, as it were, its unjust enrichment cake and eat it in an abstract sense. That is because it may be unclear against which of these numerous defendants any judgment can be meaningfully enforced and for how much, but that is not a valid reason for giving judgment against both Level 1 and Level 2 recipients which, in my judgment, is inconsistent and, in any event, they have achieved that by dint of my decision so far as knowing receipt is concerned.

158. CMOC has chosen not to elect between Level 1 and other level payees, or even sought a judgment against a Level 2 payee, for example, for the whole of its receipt from the Level 1 payee and then a judgment against the Level 1 payee for what it received from CMOC net of its onward payment to Level 2. Even if this was workable as a matter of legal analysis, I cannot see how I can find this element of the unjust enrichment claim is established against any defendant. Had there been any election, I would accept that it would then be possible to see how the requirement of enrichment at the expense of the claimant could be made out, but as it is this claim must then fail.

Postscript on unjust enrichment

159. Having made the reference to the fact that there had been no election as between Level 1 and other payees, following the delivery of this judgment, but before anything else was done, Mr Lowenstein QC asked whether it would be permissible for him now to elect and to confine the claim in unjust enrichment to the Level 1 payees.

160. Had the claim been so confined at the outset, I would have had no hesitation in granting it. The fact that he asks for it now should not make a difference, in my view. In particular, this is because none of the defendants have engaged with this process at all. None of the defendants have chosen to listen to the judgment and I do not consider in the circumstances that there can be any prejudice to any of the Level 1 defendants by me permitting Mr Lowenstein to make an election now.

161. Arguably, I could have concluded that section of the judgment by saying that no election had been made but it was now time for an election to be made. For those brief reasons, therefore, I have allowed Mr Lowenstein to make the election, that election having been made against the most obvious candidates, namely the Level 1 payees. There can be no defence to them in the unjust enrichment claim, because they are all direct recipients and the monies which they have received for their benefit were clearly at the expense of the direct payor, the claimant.

Conclusions on liability

162. Accordingly, save for unjust enrichment, all of the claims against all of the relevant defendants succeed as pleaded. The unjust enrichment claims succeed only against the Level 1 payees, namely the 2nd to 9th, 12th, 26th and 27th defendants.

RELIEF

163. I first of all turn to interest. Mr Lowenstein has properly advised me that there has been a recent Supreme Court decision concerning compound interest in relation to unjust enrichment claims: *Prudential Assurance Company Ltd v Commissioners for Her Majesty's Revenue and Customs* [2018] UKSC 39. In light of that clarification of the law, CMOC only seeks simple interest in respect of its unjust enrichment claim.

164. Otherwise, as to interest, CMOC claims interest as follows:

(1) In respect of the proprietary claims and claims for knowing receipt in dishonest assistance, compound interest at 2.5% per annum before compounding on 6-monthly rests;

(2) In respect of the claim for UMC, simple interest pursuant to section 35(a) of the Senior Courts Act 1981 at 2.5% per annum.

165. An award of compound interest is well established for proprietary claims and knowing receipt. It is not in the case of dishonest assistance. However, in principle, it seems to me that it should be available since, although the requirements are different from knowing receipt claims, it is an accessory liability to the liability of the relevant trustee, which is why the defendant in a dishonest assistance claim is liable for the entirety of the loss caused by the breach of trust along with the trustee. It is consistent with that principle that compound interest should be likewise available. Recent writings and dicta support this.

166. To that end, at paragraph 220 of the skeleton argument, the statement in McGrath is relied upon that: "*the remedies against any assistant are identical to those against the trustee.*" In Lewin on Trusts, it is said that: "*A third party held liable for dishonest assistance can expect to be in no better position as regards the measure of liability than the trustee.*" And in Underhill & Hayton: "*A person who dishonestly assists in a breach of trust of other fiduciary duty is personally liable to compensate to the same extent as the trustee.*" And that is also reflected in *Re Bell's Indenture* [1980] 1 WLR 1217 (Ch), where Mr Justice Vinelott said that a third party liable for assistance "*can be in no better position.*" Those are the general principles.

167. Then Lewin says that: "the court may award compound interest against the defendant but not the trustee." And in Underhill & Hayton that: "compound interest will be

payable on top of the capital sum found to be due" in the context of dishonest assistance. Impliedly, in the New South Wales Supreme Court decision of *Re Orix Australia Corp v Moody Kiddell & Partners Pty Ltd* [2005] NSWSC 1209 where it was said that equitable compensation would be due but "*Orix may be entitled to interest at a different rate on a compounding basis under the latter cause of action.*" And that cause of action was knowing assistance.

168. Accordingly, I will award compound interest as claimed.

169. As for the rate of 2.5% per annum, which is the same rate as that claimed in respect of the simple interest claimed under the Act, I consider that that is appropriate. It is, in my experience, a rate often applied in cases in this court. And finally as for the compounding period, I consider that compounding every six months is appropriate here, as sought.

COSTS

170. Subject to any argument from any defendant following hand down of this judgment - and there does not appear to be any - it is irresistible that CMOC should have its costs of the action incurred in this jurisdiction. It is also irresistible that they must be on an indemnity basis due to the conduct of the defendants.

171. This case is well out of the norm, in my view, and because of the failure of the defendants to engage at all. CMOC is entitled to be compensated fully for all of the costs incurred in making good their claims, pursuing them and proving them.

MITIGATION DAMAGES

172. So far as costs outside England, but for the purpose of seeking further security for CMOC's claims here, including the costs of obtaining orders from local courts, they

can be claimed here as damages. It is common ground that they cannot be claimed here as costs.

173. I agree with CMOC that they can be considered as part of CMOC's attempts to mitigate its losses since their ultimate purpose is to enable CMOC to recover what monies it can which have been paid away and therefore diminish its losses.

174. On that footing, such costs should be treated as coming within the second rule of mitigation of loss as enunciated by Mr Justice Leggatt, as he then was, in *Thai Airways International Public Company Ltd v KI Holdings Co Ltd* [2015] EWHC 1250 (Comm), [2016] 1 All E.R. (Comm) 675, where he said that:

> "where the claimant does take reasonable steps to mitigate the loss to him consequent upon the defendant's wrong, he can recover for loss incurred in so doing; this is so even though the resulting damage is in the event greater than it would have been had the mitigating steps not been taken. Put shortly, the claimant can recover for loss incurred in reasonable attempts to avoid loss."

175. Such costs are analogous to those awarded by Mr Justice Cooke, though this was in respect of the arrest of a vessel as security in *CHS Inc Iberica SL, CHS Europe SA v Far East Marine SA* [2012] EWHC 3747 (Comm), and that is when he found at paragraph 94(iv) of his judgment. That case distinguished *The Ocean Dynamic* [1982] 2 Lloyd's Rep 88, which was distinguishable because that was the cost of parallel substantive proceedings to the underlying substantive mitigation here, but brought in the US, which in fact were discontinued.

176. There is a question as to whether any assessment of the reasonableness of those foreign costs is required. Mitigation costs generally are subject to that criterion. I will hear counsel on this matter together with all consequential matters at the end of this judgment.

177. That concludes my judgment on liability and quantum, as it were, but let me make the further supplementary remarks, which are contained in a document which I will supply for inclusion in the judgment later on.

SUPPLEMENTARY REMARKS

World-wide freezing order against persons unknown

178. At the very first hearing on 23 October 2017 I was asked to, and did, grant a world-wide freezing order, WFO, against persons unknown, ie there is no named defendant. So far as I am aware, this was the first occasion on which such an order was made. I have already referred above to how this class of defendant has been defined.

179. I explained why I consider that the court had jurisdiction to make such an order at the time. That the court has jurisdiction in general against persons unknown had been confirmed for the purpose of the CPR regime by Sir Andrew Morritt VC in the case of *Bloomsbury Publishing Group Limited and JK Rowling v News Group Newspapers Ltd and Others* [2003] 1 W.L.R. 1633. At paragraph 21 he says that:

> "the description used must be sufficiently certain as to identify both those who are included and those who are not. If that test is satisfied then it does not seem to me to matter that the description may apply to no one or to more than one person or that there is no further element of subsequent identification whether by way of service or otherwise."

180. That case concerned an application for an interlocutory injunction against those who had been responsible for removing copies of an unpublished *Harry Potter* book without authority and then offering them for sale to the press. Thus it is authority that an interlocutory injunction can be granted against persons unknown.

181. The thinking behind that was repeated by the Vice Chancellor in a later injunction case, *Hampshire Waste Service v Persons Unknown* [2003] EWHC 1738 (Ch), where the

court made an order enjoining unknown trespassers from entering incinerator sites belonging to the claimant.

182. The novel aspect here is that the injunction concerned is a freezing injunction. At this stage I can see no reason in principle in saying that this jurisdiction should not extend to a freezing injunction. If there are potential problems down the line concerning contempt or there is a need to ensure there has been proper notification to any relevant defendant of the injunction, that potential difficulty applies as much to cases where other forms of injunction against unidentified third parties have already been granted. That, therefore, is not a good reason not to extend the principle.

183. Conversely, there is a strong reason for extending the principle in this context, which is that the freezing injunction can often be a springboard for the grant of ancillary relief in respect of third parties which arguably could not get off the ground unless there had been a primary freezing injunction. That is very much the case in international fraud litigation and is very much the case here where the first object is, of course, to notify the banks of the freezing injunction so they can freeze the relevant bank accounts. That can be done, and is done, irrespective of whether and when it comes to the attention of the defendants.

184. Secondly, vital information is likely to be obtained from banks in particular as to the identity of the account holders pursuant to the principles in *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] A.C. 133 and/or *Bankers Trust v Shapira* [1980] 1 W.L.R. 1274. This may result in the claimant then being able to name and investigate particular defendants, which is what happened here. I note that the latest edition of Gee on Commercial Injunctions (6th Edition) takes the same view; see in particular paragraph 17-019 at page 601 at the top of the page.

185. Finally, I note that in the Media and Communications list of the Queen's Bench Division, it's not uncommon to have injunctions granted against persons unknown who have been involved in gaining unauthorised access to claimants' IT systems and thus their data. They then obtain a substantial amount of information which they threaten to publicise unless they were paid a ransom; see, for example, the decision of Mr Justice Nicklin in *PML v Person(s) Unknown (responsible for demanding money from the Claimant on 27 February 2018)* [2018] EWHC 838 (QB) and that of Mr Justice Warby in *Clarkson Plc v Person or Persons Unknown (who has or have appropriated, obtained and/or may publish information unlawfully obtained from the Claimant's IT systems)* [2018] EWHC 417 (QB).

186. Indeed, in that list the court often grants self-identification orders requiring the unidentified defendant to identify themselves and provide an address for service. That would not have assisted here since I have no doubt that the defendants would not comply with that part of the injunction any more than other aspects of the injunction, but it does illustrate how developed the persons unknown jurisdiction has become.

187. On 23 October 2017, I concluded that there was at least a good arguable case that the court had jurisdiction to grant a WFO against persons unknown, but as it seems to me now, I can go further and say this jurisdiction is clearly established by reference to the principles underlying existing cases and the recognition in cases such as *PML* and *Clarkson* that injunctive relief against persons unknown will be particularly apposite where the reason they are unknown is because of their activities as hackers, just as the perpetrators in this case were hackers.

188. It reflects the need for the procedural armoury of the court to be sufficient to meet the challenges posed by the modern electronic methods of communication and of doing business.

189. The conclusion that as a matter of principle the court has jurisdiction to grant a WFO or any freezing order for that matter against persons unknown constitutes, in my view, an extension of the present law. Therefore, although this has arisen in hearings attended by one party only, it can be cited in future cases; see paragraph 6.1 and 6.2 of *Practice Direction (Citation of Authorities)* [2001] 1 W.L.R. 1001 per Lord Woolf CJ.

Service by Facebook Messenger and WhatsApp Messenger platforms

190. These days it is not uncommon where alternative modes of service are justified to find examples of service by posting the relevant materials on a public Facebook platform. But here what was used was the Facebook Messenger service, which is a private service channel. In addition, on 11 May 2018, Mr Justice Knowles permitted service by WhatsApp messenger. This has had the particular virtue that the service will show the sender of the message when the message has been sent by the addressee and when it has been read by the addressee. As the judge noted on that occasion, he was not setting any precedent, but the short point, in my view, is that the court will consider proactively different forms of alternative service where they can be justified in the particular case.

Service by access to data room

191. As the amount of material in this case expanded, but given that alternative service by email had often been granted, the question then arose as to the most convenient way of serving banks, and later named defendants as they were joined, with all the background evidence that had been deployed in obtaining the various interlocutory orders. CMOC proposed a system for the defendants, which I approved, which involved sending the relevant party by a previously approved Court method (e.g. email or hard copy) a link to a data room, and by a separate email, an access code to the data room. If the code

was used, it would enable the user to view all of the evidence thus far adduced together with all applications and orders made. Processes were adopted which required CMOC first to serve each defendant by another Court approved method before it could serve by data room. For the banks, CMOC was not required first to serve them by another Court approved method before it could serve by data room. One cannot tell the extent of the access since the named defendants have not engaged substantively with the litigation, but certainly, as reported to me and as set out in the evidence, banks around the world which have been joined as no cause of action defendants, for the purpose of supplying information, have found this a most useful facility and have not required service of all of the underlying documents by hard copy or email only.

192. That is certainly an innovative feature of this litigation. As with other forms of alternative service, it can clearly be justified and appropriate in such cases.

193. That concludes my judgment. I am indebted to Mr Lowenstein and other counsel in this case for the clear way in which the case has been presented at all stages.