



3 VERULAM BUILDINGS  
B A R R I S T E R S

Freezing injunctions against persons unknown and other innovations:

*CMOC Sales & Marketing Ltd v Persons Unknown*  
[2018] EWHC 2230 (Comm)

Phil Hinks

28 November 2018

 3 Verulam Buildings  
Gray's Inn London WC1R 5NT  
DX: LDE 331

 : + 44(0)20 7831 8441  
 : + 44(0)20 7831 8479

 : [chambers@3vb.com](mailto:chambers@3vb.com)  
 : [www.3vb.com](http://www.3vb.com)



3 VERULAM BUILDINGS  
B A R R I S T E R S



📍 3 Verulam Buildings  
Gray's Inn London WC1R 5NT  
DX: LDE 331

☎ : + 44(0)20 7831 8441  
📠 : + 44(0)20 7831 8479

✉ : chambers@3vb.com  
🌐 : www.3vb.com



# CMOC: the facts

- Unidentified group hacks into CMOC's email systems
- Discovers unsophisticated relationship with bankers
- US\$10m paid out to 20 different bank accounts around the world
- Fraudulent emails to allay concerns
- Then someone picks up the phone...





# Jurisdiction to make prohibitory injunctions against Persons Unknown

- Issuing of claim form: CPR PD7 para 4.1 – the title of the proceedings “*should state the full name of each party*”
- *Bloomsbury Publishing Group Ltd and JK Rowling v News Group Newspapers* [2003] 1 WLR 1633 at [21] *per* Sir Andrew Morritt VC:
- “The crucial point, as it seems to me, is 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 nor that there is no further element of subsequent identification whether by service or otherwise.”





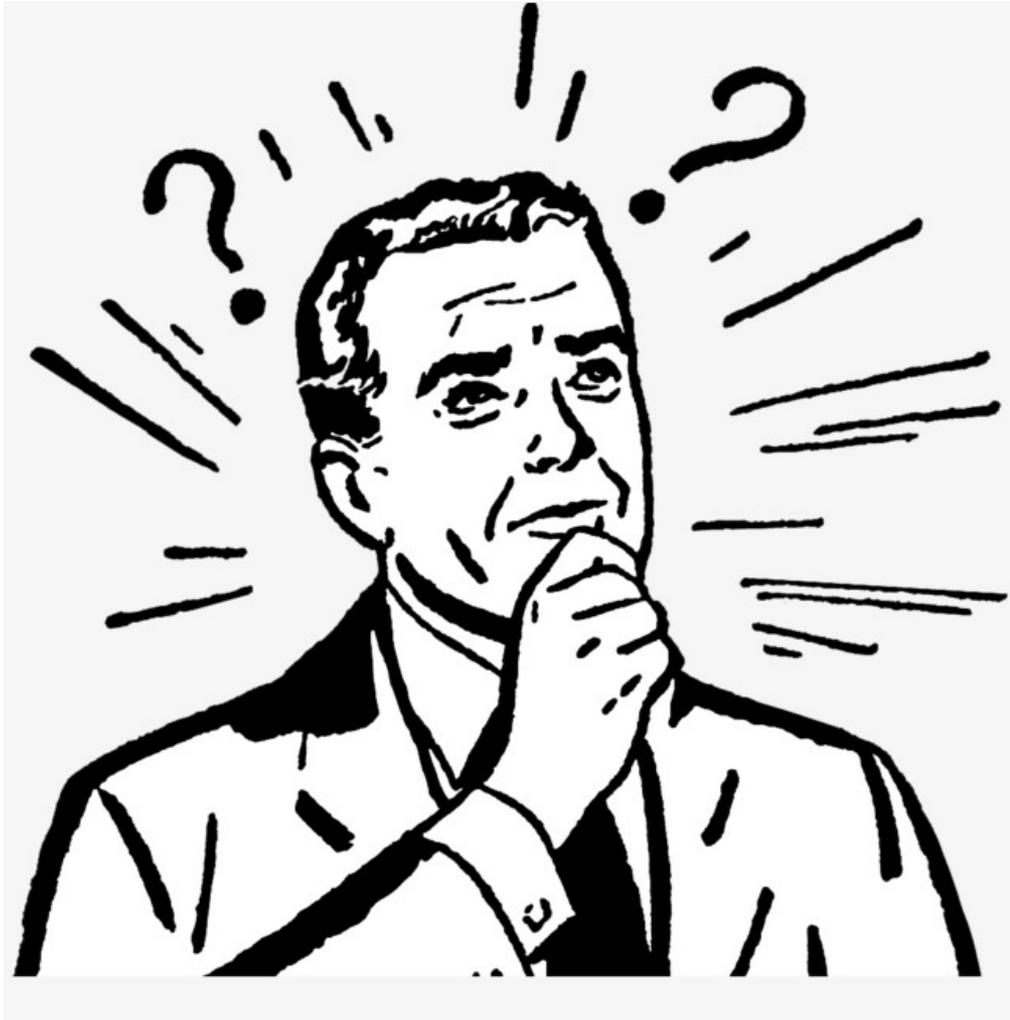
## Definition used in CMOC

- Persons Unknown, “being 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...”





3 VERULAM BUILDINGS  
B A R R I S T E R S



3 Verulam Buildings  
Gray's Inn London WC1R 5NT  
DX: LDE 331

☎ : + 44(0)20 7831 8441  
☎ : + 44(0)20 7831 8479

✉ : chambers@3vb.com  
🌐 : www.3vb.com



## Ancillary disclosure: CPR 25.1(1)(g)

- CPR 25.1(1)(g) (disclosure orders in support of freezing injunctions)
- *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2016] 1 W.L.R. 160 at [47] *per* Lewison LJ:
- “So far as judicial precedent is concerned we can say with some confidence that the jurisdiction to make a freezing order also carries with it the power to make whatever ancillary orders are necessary to make the freezing order effective: *AJ Bekhor & Co Ltd v Bilton* [1981] QB 923.”





# Ancillary disclosure: *Bankers Trust*

- *Bankers Trust Co v Shapira* [1980] 1 WLR 1274
- “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 [...]. 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 [...]. 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 [...]. 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 need to domesticate

- Overseas banks may well ignore the orders
- Beware the form of cross-undertaking given re: overseas enforcement
- *Dadourian Group International v Simms* [2006] 1 W.L.R. 2499 at [26]: “It should be emphasised at the outset that the grant of permission to take proceedings abroad to enforce a WFO is a discretionary exercise. The court must exercise the discretion in the way that seems to it most just and convenient. It is not possible to foresee all the circumstances in which applications of this kind can arise, and, accordingly, justice is most likely to be achieved if judges have the maximum flexibility as to the circumstances in which, and the terms on which, an order will be made.”





## The need to domesticate (2)

- *Dadourian* guideline 4: superior relief
- Undertaking: “The Applicant will not, without the Court’s permission, seek as against the Respondents, in any jurisdiction outside of England and Wales, orders and/or ancillary relief of a similar nature to the WFO which would result in the Applicant obtaining a security interest in the Respondents’ assets or any superior relief.”
- And: “The Applicant is to file with the Court a short confidential affidavit every 14 days to summarise what steps (if any) have been taken in other jurisdictions since the Court was last informed of the same.”





**3 VERULAM BUILDINGS**  
B A R R I S T E R S

**RETURN TO SENDER**

**SORRY, THE RECIPIENT IS  
UNKNOWN AT THIS ADDRESS**



3 Verulam Buildings  
Gray's Inn London WC1R 5NT  
DX: LDE 331



: + 44(0)20 7831 8441



: + 44(0)20 7831 8479



: chambers@3vb.com



: www.3vb.com





# Service on Persons Unknown

- Alternative service: CPR 6.15 / 6.37(5)(b)(i)
- Principles summarised in *Société Générale v Goldas* [2017] EWHC 667 (Comm) *per* Popplewell J
- *CMOC* [2017] EWHC 3599 (Comm) at [7]: “I also consider that there is good reason for there to be alternative service so far as service out of the jurisdiction is concerned, and that principally relates to service on the recipient banks at some particular email addresses which have been obtained, and at one physical address.”





## Other means of service: WhatsApp and Facebook

- CMOC discovered that certain recipients had Facebook / WhatsApp accounts
- Instantaneous transmission with facility for attachments
- *CMOC* [2018] EWHC 2230 (Comm) at [190]: “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.”





## Other means of service: Online data room

- 50+ NCARs
- Confidentiality orders as between banks
- Use of an online data room (Tresorit) to effect service
- “The Claimant has permission to serve any document to be served in these proceedings via a web-based data room by sending to the Defendants (at the service addresses indicated for them on schedule 2 to the Claim Form) one or more secure web-links to the data room, and such service shall be deemed good service by the Court.”
- *CMOC* at [192]: “That is certainly an innovative feature of this litigation. As with other forms of alternative service, it can clearly be justified and is appropriate in such cases.”





3 VERULAM BUILDINGS  
B A R R I S T E R S

- Any questions?



3 Verulam Buildings  
Gray's Inn London WC1R 5NT  
DX: LDE 331

☎ : + 44(0)20 7831 8441  
📠 : + 44(0)20 7831 8479

✉ : [chambers@3vb.com](mailto:chambers@3vb.com)  
🌐 : [www.3vb.com](http://www.3vb.com)