

# Fraud Injunctions 2023 Review

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# Duty of fair presentation – case 1

## **Piroozzadeh v Persons Unknown & Binance** [2023]

EWHC 1024 (May) (Trower J)

- C victim of a crypto scam – crypto traced to five wallets held by two exchanges (including Binance).
- Proprietary injunction restraining all Ds from dealing with crypto.
- Bankers Trust orders against two exchanges identified the users of the accounts, but accounts at Binance had long been emptied.
- C alleged that all Ds held traceable crypto as constructive trustees.

The challenge:

- Binance applied to set aside the injunction on grounds that (i) it should never have been made without notice, and (ii) C's legal representatives failed in their duty of fair presentation.

## Piroozzadeh – the issues

**Issue 1:** Should the injunction have been made without notice to Binance?

- No. Risk of inadvertent tipping off could have been avoided by proceeding against the fraudsters and serving the order on Binance as a non-respondent.
- Not sufficient to discharge injunction on this ground alone.

**Issue 2:** Did C fail in its duty to make a fair presentation of the case?

- Yes, and injunction discharged.

# What does fair presentation involve?

- Fair presentation involves obligation to anticipate defences and put them before the court:

*"That is a fundamental requirement, and safeguard."*

**Pugachev case** [2014] EWHC 4336 (Mann J)

- Not sufficient for the applicant to rely on the judge:

*"... impossible to read all the documentary evidence... It is essential to the efficient administration of justice that the judge can rely on having been given a full and fair summary of the available evidence and competing considerations which are relevant to the decision."*

**Fundo Soberano De Angola v Jose Filomeno Dos Santos**

[2018] EWHC 2199 (Popplewell J)

# Piroozzadeh - the judgment

Order discharged for failure to make fair presentation. C did not explain:

(1) Defences likely to be available to Binance in respect of its liability as constructive trustee:

- C had explained that crypto swept from user accounts into a pool and users granted credit for the amount of the value swept (facts disclosed)
  - Did not explain that this could constitute Binance a purchaser for value without notice, so long as acting bona fide.
  - Significance of pooling distorted by false evidence & mistaken submissions that crypto “*in Exchange Defendant’s control*”.

(2) Why sufficient risk of breach of trust to justify an injunction.

(3) Why damages not an adequate remedy against Binance.

(4) How Binance could freeze the traceable proceeds of the crypto in the pooling structure (“*an essentially futile and close to impossible and possibly impossible exercise*”)

## Duty of fair presentation – case 2

### Hunt v Ubhi [2023] Bus LR 1827 (April) (CA)

- Hunt appointed PL and obtained a £19m FO with cross-undertaking in damages “*limited to the amount of monies and the net realizable value of the unpledged assets of Black Capital (in provisional liquidation) taken into the custody or under the control of the Applicant in the course of the liquidation less the costs, expenses or other disbursements of the liquidation.*”
- CA: wrong because (1) no sufficient reason to depart from “**default position**” that an unlimited undertaking is required (*Pugachev* 2016), and (2) no fair presentation because counsel misled the Judge by stating it was “usual” for the undertaking of a PL to be limited to the assets in the estate.

## Fair presentation – the lessons

- Be warned - read the judgments! They set out what should have been explained to the Court.
- Ensure ***evidence and/or skeleton argument*** fairly presents facts and identifies any defences / relevant adverse points for court's discretion.
- Note - Piroozzadeh is not the only crypto case that failed to explain basis for constructive trust - **Scenna v Persons Unknown & Banks** [2023] EWHC 799 (April)

## Norwich Pharmacal – the benchmark

Three pre-requisites:

“(i) a **wrong** must have been carried out, or arguably carried out, by an ultimate wrongdoer;

(ii) there must be the **need for an order** to enable action to be brought against the ultimate wrongdoer; and

(iii) the person against whom the order is sought must: (a) be **mixed up** in so as to have facilitated the wrongdoing; and (b) **be able or likely to be able to provide the information** necessary to enable the ultimate wrong-doer to be sued.”

**Mitsui & Co Ltd v Nexen Petroleum UK Ltd** [2005] 3 All E.R. 511  
(Lightman J)



# A new test emerges? Collier v Bennett [2020] 4 WLR 116 (July)

"(i) The application has demonstrated a good arguable case that form of legally recognised wrong has been committed against them by a person ("***the Arguable Wrong Condition***").

(ii) The respondent to the application must be mixed up in, so as to have facilitated the wrongdoing ("***the Mixed Up In Condition***").

(iii) The respondent to the application must be able or likely to be able to provide the information or documents necessary to enable the ultimate wrongdoer to be pursued ("***the Possession Condition***").

(iv) Requiring disclosure from the respondents is an appropriate and proportionate response in all the circumstances of the case, bearing in mind the exceptional but flexible nature of the jurisdiction ("***the Overall Justice Condition***")."

**Note:** Conditions (i) – (iii) are threshold hurdles before the court considers the Overall Justice Condition.

# The new test gets the seal of approval

- **Hickox v Simon Dickinson** [2020] EWHC 2520 (Sept) (Clare Ambrose)
- **Zeus Investors v HSBC Bank Plc** [2020] EWHC 3273 (Comm) (Nov) (Bryan J)
- **AQR Capital Management LLC v London Metal Exchange** [2022] EWHC 3313 (Comm) (Dec) (Adrian Beltrami QC)
- **Stanford Asset Holdings Ltd v AfrAsia Bank Ltd (Mauritius)** [2023] UKPC 35 (Oct)
  - Privy Council appeal from Supreme Court of Mauritius.
  - *"The Board is content to adopt the helpful summary analysis at para 35 of Saini J's judgment in Collier v Bennett ... fourfold test"*.

# Enforcement – Injunction to deliver up

## Joseph Law v Persons Unknown & Huobi Global [2023] (Jan) (HHJ Pelling QC)

- Undefended crypto fraud. WFO against persons unknown respect of crypto in two wallets deriving from fraud – proprietary and personal claims against different wallets - judgment entered.
- Novel three-stage mandatory order against crypto exchange:
  - to convert crypto into fiat currency held overseas
  - to transfer currency to England
  - to be paid into Court Funds Office or C’s solicitors to be paid into Court Funds Office.
- C could then enforce against fund under CPR 72.10.

# Enforcement - Injunction to delegate

## Bacci v Green [2023] Ch.201 (CA)

- Fraudster undischarged bankrupt with £8.5m pension fund. Had claimed “enhanced protection” from lifetime allowance. If revoked, lump sum would increase from £375k (tax-free) to over £3m (but taxable at c.55%).
- Cs sought injunction delegating to their solicitors (i) D’s **power** to notify HMRC that he was revoking his EP, and (ii) D’s **right** to elect to draw down on pension by taking the lump sum.
- No challenge to court’s power to authorise someone to make an election on D’s behalf (Blight v Brewster [2012] 1 WLR 2841).
- Issue: whether power to notify HMRC was **property, or tantamount to property**, to engage Court’s power under s.37 Senior Courts Act 1981 to grant an injunction.

## Bacci v Green – the judgment

**Held:** Court has power under s.37 Senior Courts Act 1981 (two options):

- To grant an **injunction** requiring a person to:
  - **delegate his right** to draw down his pension (not in dispute);
  - **delegate his power** to revoke even if the power to revoke was not property or “tantamount to property”.
- To appoint a **receiver** over D’s contingent right to claim a lump sum, if it was property or “tantamount to property”.

## Enforcement – practice points

- Don't forget the **value of injunctions** when enforcing.
- In respect of D's assets, consider:
  - Whether existing assets are **where you want them** (in jurisdictions where they can be frozen and made amenable to enforcement).
  - Whether there are assets that can be **converted** from one form to another to make eventual enforcement more likely.
  - Whether there are potential assets that could be **created, called in, or crystallised**, were D to choose (or be ordered) to do so.

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