Neutral Citation Number: [2022] EWHC 3057 (Ch)

Case No: FL-2022-000006

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
FINANCIAL LIST (ChD)

7 Rolls Buildings
Fetter Lane
London
EC4A 1NL

Tuesday, 25 October 2022

BEFORE:

MR JUSTICE MILES

BETWEEN:

CHECHETKIN

Claimant

- and -

PAYWARD LTD & ORS

Defendants

MS C BELL and **MR H REID** (instructed by Blake Morgan LLP) appeared on behalf of the Claimant
MS L WALKER (instructed by Squire Biggs Ltd) appeared on behalf of the Defendants

---

JUDGMENT

(Approved)

Digital Transcription by Epiq Europe Ltd,
Unit 1 Blenheim Court, Beaufort Business Park, Bristol, BS32 4NE
Web: www.epiqglobal.com/en-gb/ Email: civil@epiqglobal.co.uk
(Official Shorthand Writers to the Court)

Mr Justice Miles:

1. This is the hearing of an application dated 21 June 2022 brought under Part 11 of the CPR that the court should conclude that it lacks jurisdiction in respect of the claimant's claim against the defendants.

2. The claimant's claim in broad outline is that he undertook various trading activities on a platform provided by the defendants for the trading of digital currencies and that he lost substantial sums through that trading.

3. He makes claims based on the UK legislation, in particular the Financial Services and Markets Act 2000, and claims the repayment of sums which he says he lost in breach of various requirements of that Act.

4. The defendants have relied on an arbitration clause contained in the terms and conditions which they say governs the claimant's trading on the platform.

5. It is accepted that the application concerning jurisdiction was commenced under Part 11 of the CPR.

6. The defendants contend that by reason of the arbitration clause, which was in favour of what is known as the JAMS arbitration system, the claimant agreed to submit the disputes to arbitration, that the arbitration clause was binding and that the claimant is therefore prevented by that clause from bringing proceedings in this or any other court.

7. Since the application was commenced, there has been first a partial award in June 2022 in which the arbitrator confirmed her jurisdiction. More recently, on 18 October 2022, the arbitrator who has been appointed under the JAMS rules has issued a final award in which she has concluded that the claims of the claimant fail and that the defendants are under no liability to him.

8. In paragraph 2 of that final award, the arbitrator included the following determination:

> "Pursuant to the contract, the respondent [the claimant] is bound to arbitrate his disputes with Payward [the defendant]. He is enjoined from filing or prosecuting a claim against Payward in court whether in the UK or other jurisdiction."

9. The defendants have very recently commenced enforcement proceedings in this jurisdiction on that award on the footing that it is a New York Convention award within the scope of section 101 of the Arbitration Act.

Adjournment?

10. The defendants submit that in the circumstances the jurisdiction application either must be or, as a matter of case management, should be adjourned pending the

determination of the enforcement proceedings. I will come back in a moment to the reasons they give for that submission.

11. The claimant has accepted that he will not take any further steps in the UK proceedings pending the determination of the enforcement proceedings and the determination in those proceedings of such defences as may be available to him under section 103 of the Arbitration Act.

12. However, the claimant says that the jurisdiction challenge, being before the court, should be determined.

13. The defendants submit that in the light of paragraph 2 of the final award, there can be no question of the court proceeding with the jurisdiction challenge. They say that to do so would breach paragraph 2 of the award as it would involve the claimant prosecuting his claim in this court. They say that by resisting their application based on the jurisdictional challenge, the claimant must by definition be pursuing or prosecuting his claim.

14. In the alternative, the defendants submits that the court should adjourn their application. They say that if the challenge to the enforcement of the award is unsuccessful, they will be able to rely on the award and the proceedings, including the jurisdiction challenge, will effectively become academic. They are unable to say conversely what position they would take in the event that the final award is not upheld in the context of the enforcement proceedings.

15. The defendants contend that there is an overlap between the issues raised on the jurisdiction challenge and the issues that would be raised in the enforcement proceedings and that, as a matter of sensible case management, it would be better for those arguments to be heard once and for all at the enforcement hearing.

16. The claimant says that the jurisdiction challenge should be dealt with here and now. He contends that the parties have prepared for it and have incurred costs in doing so. He does not accept that by resisting the application for an adjournment of the jurisdiction application he would be prosecuting a claim contrary to paragraph 2 of the final award. He says that he would simply be resisting an application brought by the defendants as the other party. He contends that there is in any case an obstacle towards treating the award as final, namely, that under the JAMS rules, the award only becomes final 14 days after publication, which will be on 1 November.

17. The claimant also contends that the issues raised by the jurisdiction challenge are not the same issues as will be raised in the enforcement proceedings and that therefore there is little risk of wasted time spent on overlapping arguments.

18. He says that the parties are ready to argue the point, that it would be helpful for them to know where they stand in relation to the jurisdiction of this court and that to put matters off would potentially be to waste costs, because the parties may have to come back and reargue a point which they are already ready to argue.

19. I have concluded that I should not adjourn the application. I agree with the claimant that the issues raised by the jurisdiction challenge are largely separate from those that

will be raised in relation to the enforcement proceedings. I agree with the claimants that the parties have already incurred costs and are ready to argue the jurisdiction application and that there is a real risk if matters are put off further costs will be incurred because the parties will have to pay additional brief fees and so forth. I do not think that by determining the defendants' application now there is any question that the respondent, who is simply resisting an application, could be said to be taking steps to prosecute his claim in the UK courts. All he is doing is resisting an application which the defendants have chosen to bring, and I think it is far-fetched to regard that as doing anything in breach of paragraph 2 of the final award. I also think that on the evidence before me it is not clear that the final award is even yet to be treated as final for the purposes of enforcement or recognition.

20. For all of these reasons, I have decided that I should go ahead and hear the application.

Relief from sanctions

21. Before I do so, there is an application for relief against sanctions in relation to the service of the second statement of Mr Squire, which was served seven days late on 17 October 2022. Mr Squire has put in a third witness statement, also dated 17 October 2022, in which he sets out the grounds on which relief is sought. He explains in his third witness statement that the delay or default arose from an oversight. He says that the defendants' legal team were concentrating on the trial of the JAMS arbitration in California, which took place between 5 and 7 October 2022 and that it was his firm's error that led to them missing the deadline. The second witness statement substantially exhibits documents from the arbitration and updates the court in that regard. It does not contain information which was not known to the claimant.

22. The hearing window was between 25 and 27 October 2022, so the witness statement was served some eight days or so before the start of the window. The parties have been able to maintain the window, serve skeleton arguments and prepare for the hearing and have taken into account the contents of the second witness statement in doing so. Applying the *Denton v White* principles, the default cannot be considered to be entirely trivial or immaterial. On the other hand, I do not regard it as a particularly serious or significant delay in the context and against the background that I have described. The explanation given is that the deadline was overlooked. That is not a very good explanation, but it is at least some explanation. I am satisfied that there was no question of a deliberate breach on the part of the defendants and that it was always their intention to update the court as to the progress of the JAMS arbitration.

23. As regards the overall circumstances and the demands of justice, these favour the witness statement being admitted. It does not involve the introduction of further contentious evidence, and addresses events known to both parties. It has been possible for the parties to prepare for this hearing notwithstanding the late service of the statement. I will give relief from sanctions.

The substantive application

24. As already noted, the defendants apply for a declaration that the court has no jurisdiction in respect of the claim and that the claim be dismissed.

25. The underlying claim was commenced by a claim form dated 23 February 2022. The claim concerns dealings on a cryptocurrency platform maintained by the defendant between March 2020 and September 2020. The claimant contends that he made a series of trades on that platform and ended up losing a sum of more than £600,000 in relation to various trades in cryptocurrencies.

26. The claimant contends in his Particulars of Claim that the various trades and transactions between the parties involved breaches of section 26 or 138D(2) of the Financial Services and Markets Act 2000, so that he is entitled to reclaim the amounts that he lost in relation to the trades.

27. It is common ground that the trades were entered into pursuant to contractual terms and conditions. These were pleaded in the Particulars of Claim, and for present purposes the claimant does not seek to say that the terms are not binding on him.

28. By part of clause 23 of the terms and conditions, the parties agreed to arbitrate any dispute arising from the terms or the claimant's use of the services except for disputes in which either party seeks equitable or other relief for various forms of IP claim. The parties by that clause also agreed to arbitration in San Francisco, California under the rules of an organisation known as JAMS and also agreed that the state or federal courts of San Francisco, California have exclusive jurisdiction over any appeals of an arbitration award and over any suit between the parties not subject to arbitration. The clause also included a provision concerning the application of the laws of the state of California.

29. The defendants to these proceedings commenced arbitration proceedings under that clause under the rules of JAMS, and the arbitration has proceeded now to a final award.

30. The claimant contended before the arbitrator that the arbitrator lacked jurisdiction and raised a number of objections to the enforceability or validity of clause 23, but the arbitrator rejected those contentions. As already explained, the arbitrator made a partial final award on 29 July 2022 in which she affirmed that the matter was arbitrable and that she had jurisdiction over the dispute. She then more recently on 22 October made a final award in which she reaffirmed the jurisdiction of the arbitral tribunal and also decided that the defendants were not liable to the claimant.

31. The application before me was to dismiss the proceedings and declare that the court lacks jurisdiction over the claims brought in the proceedings.

32. It was accepted by counsel for the defendants that the application was brought under Part 11 of the CPR.

33. That provision enables a party who contests the jurisdiction of the English court to make an application including for a declaration that the court lacks jurisdiction.

34. The claimant contends that the application is misconceived. He says that the proceedings were served on the first defendant, which is the party with which the claimant says he had a contractual relationship, within the jurisdiction and that there was no need for service out. The claimant accepts that clause 23 of the terms and

conditions contains not only an arbitration clause but also an exclusive jurisdiction clause in favour of the courts of California in respect of disputes falling outside the scope of the arbitration agreement. The claimant therefore accepts that other things being equal, the provisions of Part 11 might well have allowed the defendants to contest the jurisdiction of the English courts in favour of those of California.

35. In outline the claimant contends however that the case falls within section 15B of the Civil Jurisdiction and Judgments Act 1982 on the basis that the proceedings have as their subject matter a matter relating to a consumer contract, where the consumer is domiciled in the United Kingdom. Under section 15B the parties may depart from that provision by an agreement but only by one which amongst other things has been entered into after the dispute has arisen. The claimant says that in the circumstances the English court clearly has jurisdiction over the dispute notwithstanding the exclusive jurisdiction clause contained in paragraph 23 of the terms and conditions. The claimant contends that in these circumstances, it is plain that the English court has jurisdiction and that the application under CPR Part 11 is misconceived.

36. The claimant accepts that it might have been possible for the defendants to seek a stay of the proceedings under section 9 of the Arbitration Act 1996 in reliance on clause 23 but that the defendants have made no such application. The claimant therefore says that the application should be dismissed.

37. In broad terms the defendants advance two arguments: first, that the case does not fall within section 15B because the claimant is not a consumer for the purposes of the CJJA; and, second, that the effect of the partial award of July 2022 or the more recent final award of the arbitrator have the effect under section 101 of the Arbitration Act that the court must decline any jurisdiction over the dispute.

38. I shall start with the dispute about the application of the CJJA.

39. The parties are agreed that although this is not a case involving the provisions concerning service out of proceedings of the jurisdiction, the court should follow the approach to the assessment of the parties' arguments explained in *Goldman Sachs International v Novo Banco SA* [2018] 1 WLR 3683 and should therefore decide which party has the better of the argument.

40. I have already outlined the effect of section 15B and explained that it applies where the subject matter relates to a consumer contract where the consumer is domiciled in the United Kingdom. The debate on this point concerned the question whether the claimant is a consumer within the meaning of section 15E of the CJJA, which is an interpretation section. By subsection (1), "consumer" in relation to a consumer contract means a person who concludes the contract for a purpose which can be regarded as being outside the person's trade or profession.

41. The defendants do not accept that the claimant is a consumer for that purpose. The defendants emphasise that there was no real dispute between the parties that the claimant accepted the terms of service. They observe that the claimant is a lawyer by profession who has been employed until recently by the European Bank for Reconstruction and Development and that he has some eleven years of experience working as a banking lawyer. He appears for several years to have traded substantial

amounts and indeed has incurred the significant losses claimed in these proceedings, including £600,000 odd in March and June 2020. The defendants note that the claimant opened what was called a pro account, which increased the margin trading facilities, and this enabled him to undertake increased leveraged trades. They say that he is and was a sophisticated person with a banking and finance background and that in the circumstances he was not dealing as a consumer.

42. The claimant says he was a consumer within the definition contained in section 15E of the Act. The defendants accept that his trade or profession is that of a lawyer. The contract was for placing digital asset trades, and that has nothing to do with his profession. The claimant points out that there is nothing in the section which suggests that the definition of "consumer" turns on the sophistication, expertise or knowledge of the relevant person. It creates a binary test: that is whether the person who concludes the contract has done so for a purpose which can be regarded as being outside the person's trade or profession. The claimant relied in this regard on *Soleymani v Nifty Gateway LLC* [2022] EWCA Civ 1297, *Bitar v Banque Libano-Française SAL* [2021] EWHC 2787 (QB) at [8] and *Ang v Reliantco Investments Ltd* [2022] EWHC 879 (Comm) at [62] and [63].

43. Even without reference to those authorities (which support my conclusion), it is clear that the claimant falls within the definition of consumer within section 15E. He was a lawyer, and the purpose of the contract, which was for dealings with digital assets, was outside his trade or profession. The sophistication, expertise or knowledge of the person is irrelevant for the purposes of the statutory definition. It was clear from the account opening documents that he was a lawyer and that was the only description he gave himself. The reference to the account being a pro account means no more than he had higher trading limits. It does not mean that he was in any way an investment professional. At any rate, the section does not depend on what the parties said about themselves. It requires an objective ascertainment of whether the contract was for a purpose which can be regarded as being outside the relevant person's trade or profession. I have reached the clear view that the claimant is a consumer within that definition. Accordingly, the first basis of the application fails.

44. The second basis on which the application has been advanced before me is section 101 of the Arbitration Act. That is part of a group of sections in a part of the Act concerning the recognition and enforcement of New York Convention awards (as defined in section 100 of the Act).

45. There is no dispute between the parties for present purposes that the two awards which are relied upon are New York Convention awards.

46. Section 101 reads as follows:

> "101 Recognition and enforcement of awards.
>
> (1) A New York Convention award shall be recognised as binding on the persons as between whom it was made, and may accordingly be relied on by those persons by way of defence, set-off or otherwise in any legal proceedings in England and Wales or Northern Ireland.

(2) A New York Convention award may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect.

As to the meaning of 'the court' see section 105.

(3) Where leave is so given, judgment may be entered in terms of the award."

47. Section 102 provides for the evidence that is to be produced by the parties seeking recognition or enforcement. Section 103 sets out the circumstances in which the court may refuse recognition or enforcement. Subsection (1) states that recognition or enforcement of a New York Convention award shall not be refused except in the following cases. Subsection (2) then sets out a number of grounds. Subsection (3) provides that recognition or enforcement of the award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration or if it would be contrary to public policy to recognise or enforce the award.

48. The argument of the defendants is that where an award is made which is a New York Convention award and which concludes that the arbitral tribunal has jurisdiction in relation to a dispute, by virtue of the mandatory requirement of recognition the English court is deprived of any jurisdiction in relation to the dispute which is the subject matter of the award. Counsel was unable to furnish any authority for that proposition but argued that it is a self-evident consequence of section 101(1).

49. The claimant disputes that. Counsel for the claimant observes, first, that there is a marked difference between disputes as to the jurisdiction of the English court and questions about the impact of an arbitration, including an arbitration award, on the exercise of such jurisdiction by the court.

50. Counsel relies on *Bilta (UK) Ltd (In Liquidation) v Nazir* [2010] EWHC 1086 (Ch), where Sales J explained that there is a distinction between the scheme set out in the Arbitration Act and that contained under Part 11 of the CPR. At [22] he explained that section 9 of the Arbitration Act is part of a code contained in primary legislation regulating proceedings concerning disputes covered by arbitration agreements and that that was entirely separate from the provisions of CPR Part 11, which concerns the court's jurisdiction. Counsel for the claimant submits that the existence of an award, including one which states that the arbitrator has jurisdiction, does not in general deprive the court of jurisdiction.

51. I have concluded that the claimant is right.

52. First, an arbitration clause (or indeed an award) does not deprive this court of jurisdiction. The Arbitration Act sets out, as Sales J said, a code. Among other things, it enables the court to stay proceedings where the parties have entered into a binding arbitration agreement. The relevant provision, section 9, applies to both domestic and international arbitrations. Where a party applies for a stay under the section and the court accedes to the application, that does not remove the court's jurisdiction over any existing proceedings. It enables a party to the arbitration agreement or award apply to stay them and to give effect to the contract between the parties by doing so.

53. Second, it seems to me that the effect of a New York Convention award is set out in section 101 itself. Where the award is recognised, then it may be relied upon by the parties by way of defence, setoff or otherwise in any legal proceedings in England and Wales or Northern Ireland. It may, for example, be that a binding award of non-liability would provide a party to it with a defence to a claim brought in respect of the same subject matter in legal proceedings in England and Wales. Equally, it may give rise to issue estoppels. But the section does not, either according to its terms or as a matter of obvious implication, deprive the court of jurisdiction in relation to the dispute.

54. Third, it is possible that there might be different considerations where the jurisdiction of the court is dependent on some sort of merits threshold, as in cases where to serve out of the jurisdiction is required under Part 6 of the CPR, and the defendant contends that an arbitration award shows that there is no merit in a claim brought by the claimant. However, the current case does not involve service out of the jurisdiction. It is case of service of proceedings against a party domiciled within the jurisdiction. Moreover, it is not clear to me that even in such a case the defendants' argument would be correct. It seems to me that even in such a case, the court may well have jurisdiction but that the award may be relied upon by way of defence, set-off or otherwise, including by way of estoppel.

55. Fourth, the question can be tested in this way. Suppose that a NYC award has been made but that it is subject to challenge in the courts of the seat of the arbitration. On the defendants' argument the defendant could apply as of right for the dismissal of English proceedings on the grounds of want of jurisdiction, and it would seem on the defendants' argument that there would be no answer to such an application. But that creates great difficulties in a case where the award might be liable to be set aside in proceedings in the seat. It seems to me more natural to conclude that the English court has jurisdiction (if there are otherwise good grounds for jurisdiction) but that the award may have an important, indeed critical effect on the outcome of the legal proceedings.

56. Fifth, it seems to me that the arguments about the effect of section 101 fall into the same category as the view taken by Sales J in the *Bilta* case. They are part of a code concerning arbitration agreements and awards but are not concerned with questions of jurisdiction under Part 11.

57. Sixth, as to the defendants' arguments about the effect of mandatory recognition of NYC awards under section 101, I note that the English court may refuse recognition, just as it may refuse enforcement, on the grounds set out in section 103. Here the claimant has indicated that he will seek to oppose enforcement of the award on grounds under section 103(2) and/or (3), and he says that he is entitled to rely on the same grounds under section 103. It does not appear to me that in those circumstances an argument based on section 101 is an appropriate way of seeking to have the underlying legal proceedings in England and Wales dismissed.

58. For all of these reasons the second ground on which the application is brought also fails.

Disposal

59. The jurisdiction application is dismissed.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

Unit 1 Blenheim Court, Beaufort Business Park, Bristol BS32 4NE
Email: civil@epiqglobal.co.uk

This transcript has been approved by the Judge