IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)
Neutral Citation Number: [2022] EWHC 1021 (Comm)

Case No. CL-2022-000110

The Rolls Building
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Fetter Lane
London
EC4A 1NL

Thursday, 10th March 2022

Before:
HIS HONOUR JUDGE PELLING QC

B E T W E E N:

LAVINIA DEBORAH OSBOURNE

and

(1) PERSONS UNKNOWN
(2) OZONE

MISS R MULDOON appeared on behalf of the Applicant
NO APPEARANCE by or on behalf of the Respondents

JUDGMENT
(Approved)

HHJ PELLING QC:

1. This is an application made without notice in proceedings originally issued in the Queen's Bench Division but later transferred into the Commercial Court apparently by an order made by a judge of the Commercial Court, although no such order is available to me.
2. I proceed on the assumption that these proceedings have been validly transferred into the Commercial Court by an order of a judge of the Commercial Court.
3. The application is for an order restraining the dissipation of non-fungible assets alleged to have been stolen by persons unknown from a crypto asset account maintained by the claimant.
4. In addition, the claimant seeks an order under the Bankers Trust jurisdiction directed to an entity called Ozone Networks Incorporated, a corporation incorporated in accordance with the laws of the United States of America, requiring it to provide information enabling the claimant to trace or identify the persons unknown who control the wallets to which the non-fungible tokens which are the subject of these proceedings have apparently been transferred.
5. This being an application made without notice, I intend to keep this judgment relatively short.
6. The background to the claim as set out in the evidence filed in support of the application and summarised in the skeleton argument filed in support of the application. In essence it comes to this. The applicant opened an account on the second defendant's, that is Ozone's, peer-to-peer NFT marketplace,
7. On or about 24 September 2021, a third party entity indicated that it wished to transfer to the applicant's wallet address a gift of various non-fungible tokens in connection with some support provided by the claimant to that entity. With that in mind the various non-fungible tokens, representing digital works of art, were transferred into the account controlled by the claimant.
8. What appears to have happened thereafter is that persons unknown removed the non-fungible tokens from the claimant's account without her knowledge or consent, in circumstances which are at present a little unclear. I am satisfied, however, that the claimant first discovered the loss on or about 27 February 2022, when she discovered that the NFTs had been removed from her wallet without her consent.
9. Following enquiries it became apparent that the NFTs belonging to the claimant were traceable to two other accounts opened by the second defendant. .
10. In those circumstances, the claimant seeks to commence proceedings against persons unknown for the purposes of freezing in the hands of the persons unknown the non-fungible assets that have been removed from her without her agreement, and also an order directed to Ozone requiring it not to permit any further transfers of the assets concerned.
11. The difficulty about that is that the claimant has no knowledge of where the persons unknown are located, and it is clear that Ozone is an American corporation with, as far as I can see from the evidence, no connection whatsoever to the English jurisdiction.
12. In those circumstances the issues which arise are whether or not a good cause of action has been demonstrated by the claimant against the persons unknown, and secondly, if and to the extent such a cause of action has been demonstrated, whether she is able to demonstrate that it is appropriate for an order to be made permitting service of proceedings against persons unknown out of the jurisdiction wherever they might be located, in circumstances where, if I make an information order as against the second defendant, the information, if provided, will enable the location of the persons unknown and possibly their identity to become known.
13. I am satisfied on the basis of the evidence available that the claimant has demonstrated a good arguable case that she has been defrauded of the non-fungible tokens to which she

refers in her evidence. There is clearly going to be an issue at some stage as to whether non-fungible tokens constitute property for the purposes of the law of England and Wales, but I am satisfied on the basis of the submissions made on behalf of the claimant that there is at least a realistically arguable case that such tokens are to be treated as property as a matter of English law.

14. The other factor which is material to this claim is where such tokens are to be treated as being located as at the time when they were lost. As is apparent from the limited description I have already given, non-fungible tokens are in effect a stream of electrons resulting in a credit item to a crypto account. As such, insofar as they have a physical manifestation at all, that is likely to be where the servers relevant to the account are maintained. However, attempting to litigate issues such as this by reference to a concept as ethereal as that would be difficult or impossible.

15. Unsurprisingly, therefore, in a series of cases relating to crypto currency fraud, it has been consistently held that crypto assets, are to be treated as located at the place where the owner of them is domiciled. There is no reason at any rate at this stage to treat non fungible tokens in any other way, assuming for present purposes as I do that they are to be treated as property as a matter of English law.

16. This approach has been adopted in any number of cases, including at least two, if not three, decided by me. All these cases follow what Butcher J said in *Ion Science Ltd v Persons Unknown and others (unreported)* [2020] (Comm), a judgment delivered on 21 December 2020 in the Commercial Court, where at paragraph 15, Butcher J held that the *lex situs* of a crypto asset is the place where the person or company who owns it is domiciled, adopting the analysis contained in Professor Andrew Dickinson's book on crypto currencies and public and private law. I consider I should follow these cases in relation to the asset the subject of these proceedings. Therefore, and for these purposes, the claimant is to be treated as having had the non-fungible tokens in her possession in England by operation of that principle.

17. I turn first to the question of whether or not it is appropriate to grant the injunction which is sought as against persons unknown, and I am entirely satisfied that it is appropriate to grant an injunction in the terms sought, essentially for all the reasons which are identified in the skeleton argument filed in support of the application. In particular because I am satisfied, for the reasons already identified, that there is a serious issue to be tried as between the claimant and persons unknown concerning what amounts to the theft of her assets from her crypto asset account.

18. The next question that then arises is whether or not damages would be an adequate remedy so far as the claimant is concerned. I am satisfied that damages would not be an adequate remedy for two reasons. First, as things currently stand there is no information available concerning the standing of the persons unknown, and therefore, there can be no confidence that they have the means to meet even the relatively modest damages claim that is likely to arise in the circumstances of this case. The second reason why I am satisfied that damages are not an adequate remedy derive from the nature of the assets themselves. They are given a modest value in these proceedings of about £4,000, give or take. The evidence demonstrates, however, that these are assets which have a particular, personal and unique value to the claimant which extends beyond their mere Fiat currency value. The Court will readily grant injunctions to protect assets in such circumstances. In those circumstances, I am satisfied that the claimant has demonstrated to a realistically arguable level required that damages would not be an adequate remedy so far as she is concerned.

19. As far as the persons unknown are concerned, I am satisfied that damages would be an adequate remedy in the sense that a cross-undertaking in damages is offered by the claimant,

and they have no reason to suppose that she does not have the means to meet any liability that might arise, because, of course, if there were any reasons to suppose that the cross-undertaking could not be honoured in full against any orders made by the Court subsequently, then it would be a material non-disclosure to reveal that fact.

20. That therefore takes us to the balance of convenience, and for the reasons which were discussed in the course of submissions, I am entirely satisfied that it is appropriate on the balance of convenience to grant the injunction sought. I am satisfied that that is so because if the order is not granted then there is a very real risk that these assets will be transferred through multiple different accounts at great speed, and in a way which will make it practically either very difficult, or possibly even impossible, for the claimant to trace and retrieve her assets.
21. I turn now to the question of whether or not it is appropriate that I should direct that these proceedings be served out of the jurisdiction to the extent that the persons unknown are out of the jurisdiction.
22. As is well known, this engages the tri-partite test summarised by Lord Collins in *AK Investment CKSC v Kyrgyz Mobile Tel Ltd* [2012] 1 WLR 1804, consisting of a) a requirement in relation to the proposed defendant, that is to say the persons unknown in the circumstances of this case, that there is a serious issue to be tried as between the persons unknown and the claimant. I need say no more about that. I have already identified in earlier paragraphs of this judgment why I am satisfied that it is appropriate, and why there is a serious issue to be tried.
23. The second question that arises is whether a good arguable case has been shown and that the claims available to the claimant pass through one of the relevant Practice Direction 6B gateways.
24. The third requirement is that in all the circumstances England is clearly the most appropriate forum.
25. In order to address the gateway issue it is necessary to characterise the causes of action which are available to the claimant. As far as that is concerned, various alternatives were identified by Miss Muldoon in the course of her submissions. In my judgment, the strongest cause of action which is available to the claimant in the circumstances of this case is the assertion that the assets, the subject of these proceedings, are held by the persons unknown on a constructive trust. I reach that conclusion because these are assets which have been stolen from the claimant on her case, and she has demonstrated a strong arguable case that that is so.
26. Applying the principles identified in *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 and 716, property obtained by fraud in this manner is impressed with a constructive trust immediately the property concerned comes into the hands of those responsible for removing the assets concerned.
27. Therefore, and in these circumstance as it seems to me, at the moment at which the non-fungible assets were removed from the claimant's wallet in the way I have described they were impressed with a constructive trust.
28. It is against that background that I then turn to the relevant gateways. As far as that is concerned gateway 15 provides as follows:

> "The claimant may serve a claim form out of the jurisdiction with the permission of the Court under rule 6.36 where…a claim is made against the defendant as a constructive trustee, or trustee of a resulting trust where the claim arises out of acts committed or events occurring within this jurisdiction or relates to assets within the jurisdiction".

29. As far as that is concerned, as I have already explained earlier in this judgment, there is at least a realistically arguable case for saying that the assets removed from the claimant's account in the way I have described are to be treated as located in England, because England is where the claimant is domiciled. In those circumstances I am satisfied that at least a realistically arguable case has been demonstrated in relation to the claim against persons unknown by reference to gateway 15.
30. It is necessary now to turn to the third question that therefore arises, of whether England is clearly the appropriate jurisdiction for dealing with this claim. As far as that is concerned, as matters currently stand, I have no information as to where the persons unknown are located, or the jurisdictions in which they are to be found. On the other hand, what I do know is that the claimant is located in England and English law treats the assets as having been removed from her in England. In those circumstances, on balance, and at this stage in the enquiry, I am satisfied that England is the appropriate forum. I am satisfied in those circumstances that permission should be granted to serve the persons unknown out of the jurisdiction.
31. As far as alternative service is concerned I am satisfied that it is appropriate to make an order in the terms sought by the claimant applying the principles identified in paragraph 75 of Bryan J's judgment in *AA v Persons Unknown* [2019] EWHC 3556 (Comm). As far as that is concerned, I take account of the fact that there is at least a possibility that the persons unknown are located in jurisdictions which are subject to the Hague Service Convention. In those circumstances I have to ask myself what the exceptional circumstances are that justify departure from the Convention scheme. As far as that is concerned, I am satisfied applying that what is now a fairly substantial body of Commercial Court jurisprudence, that it is appropriate to direct service by an alternative means, because it is the mechanism by which the making of and the terms of an injunction can be brought speedily to the attention of the respondent to the injunction in a way which might be defeated if the more leisurely methods of service permitted by the Hague Service Convention were to be adopted. It is not every case where it is appropriate to adopt this approach but it is appropriate to do so where injunctive relief has been granted, and where therefore someone might be placed in contempt of Court by failing to comply with the relevant order.
32. I turn now to the application as against Ozone. As far as that is concerned, the application which is made is an application for a Bankers Trust Disclosure order. As far as that is concerned, it is important to note at the outset that there were other courses of action which were relied upon by Miss Muldoon as being available to the claimant, including deceit, restitution, and possibly other torts as well.
33. The key point about these courses of action, however, is that they are personal in nature rather than proprietary which means that if information is to be sought from a third party, that would have to be done generally speaking using the Norwich Pharmacal jurisdiction, rather than the Bankers Trust jurisdiction.
34. The difficulty about that is that there is some first instance authority which suggests that orders for service out of proceedings seeking Norwich Pharmacal relief against a foreign-based defendant is not or ought not to be permitted.
35. That has led to a pragmatic distinction being drawn in the authorities between Bankers Trust orders where starting with Butcher J in *Ion*, permission has been granted to serve such orders out of the jurisdiction; and Norwich Pharmacal where the Courts have generally speaking declined to permit service out of the jurisdiction.
36. For the purposes of this case, I propose to continue with that rather unsatisfactory dichotomy. At some stage it will be necessary for a Court to grapple with the question of whether or not it is a matter of principle either both Bankers Trust and Norwich Pharmacal-

type claims should be permitted to be served out of the jurisdiction, usually adopting the necessary or proper party gateway; or whether neither should be permitted. However, as I have said, this case is not the time to attempt to resolve this, and this application without notice is not the time to attempt to resolve it either.

37. As far as the Bankers Trust application is concerned, the first question which arises is whether or not there is, as between Ozone and the claimant, a real issue to be determined, and I am satisfied that there is, applying the substantive principles that apply to Bankers Trust applications.

38. Those principles were identified in *Kyriakou v Christie, Manson, and Woods Ltd* [2017] EWHC 487 (QB), paragraph 12 and following, by Warby J. They summarised down to five propositions. Firstly, that in order to obtain relief under the Bankers Trust jurisdiction it is necessary to demonstrate good grounds for concluding that assets belonging to the claimant have been removed from the claimant. I am satisfied that that ground is satisfied for the reasons explained earlier in this judgment.

39. Secondly, I have to be satisfied there is a real prospect that the information sought will lead to the location or preservation of the asset. I am satisfied in relation to that because as I have explained, the wallets to which the claimant's were apparently transferred are wallets controlled or administered by Ozone.

40. It is likely therefore that Ozone will have "Know your client", or "Know your customer" information in relation to those who control those wallets; and that information if provided will enable the proceedings brought against the persons unknown to be served on those individuals, and therefore for the assets hopefully to be recovered.

41. The third issue which arises is that a Court granting a Bankers Trust order must be satisfied that the order sought is no wider than necessary to trace the relevant asset. As I made clear in the course of the argument, I regard this as a critical protection and therefore any order granted must specifically identify the information required.

42. As I indicated in the course of the argument, the only information that I am prepared to direct should be provided, is information concerning the name, address, email addresses, and any other contact details available to Ozone concerning those in whose name the relevant wallets are maintained; or if available, the ultimate beneficial owners of such accounts.

43. The fourth issue I have to consider before granting an order is whether or not I have appropriately balanced the rights of the claimant as against the potential infringement of rights to privacy and confidentiality by others. As far as that is concerned, there are two interconnected issues.

44. The first is whether or not the rights to privacy or confidentiality of those controlling the accounts are violated. As to that, a balance must be struck between the rights of the claimant and the rights of those who control the accounts.

45. Where the accounts are being used apparently as a mechanism for defrauding the claimant of assets that belong to her that balance is to be struck by directing that the information be provided. However, I recognise that there is a risk that there will have been an insufficient appreciation of the potential infringement issues that arise. That is best balanced, in my judgment, by giving Ozone an express right to apply to vary or discharge the order within a fixed future period; and delaying the obligation to comply with the terms of the order until after expiry of the time by which that application has to be made and thereafter until final disposal of the application if made. .

46. Finally, it is necessary if an order is to be made for various undertakings to be given by the claimant in order that Ozone's interests can be protected. As to that, it was unfortunate that the draft orders that have been provided do not contain the undertakings that the case law identifies as required. However, the undertakings that are required are threefold: first of all,

an undertaking to meet the expenses incurred by Ozone in complying with the order; secondly, to compensate Ozone in damages that it becomes liable to pay as a result of complying with the order; and third, an undertaking to use any information supplied only for the purposes of attempting to trace the assets, the subject of these proceedings.

47. Subject to those qualifications, I am in principle prepared, or would be prepared to grant an order against Ozone applying the substantive principles identified or summarised by Warby J in the authority that I have referred to. The question which remains is whether or not it would be appropriate, or possible, for such an order and for such an application to be served on Ozone out of the jurisdiction.

48. Ozone is located in the United States of America. Therefore, if service is to be achieved, then the application must be brought within one of the gateways identified in practice direction 6B. As far as that is concerned, there is, in practical terms, only one gateway which is potentially available, and that is gateway three. That is that the claim against Ozone is:

> "a claim made against a person, the defendant, on whom the claim form has been, or will be served, otherwise than in reliance on this paragraph and a) there is between the claimant and the defendant a real issue which is reasonable for the Court to try; and b) the claimant wishes to serve the claim form on another person who is a necessary or proper party to that claim".

49. As far as that is concerned, as I have already indicated, a claim can be served on the persons unknown otherwise than by relying upon gateway three, namely by relying on gateway 15 as I have summarised earlier in this judgment. Therefore, and to that extent, I am satisfied there is an anchor defendant for the purposes of gateway three.

50. The second question that arises is whether there is between the claimant and the defendant, that is the anchor defendant, a real issue that is reasonable for the Court to try. Plainly, for the reasons identified earlier in this judgment, I am satisfied that that is so.

51. Therefore, the third requirement is whether or not Ozone is a necessary or proper party to that claim. Now is not the time to set out a comprehensive summary of the principles that apply in identifying whether someone is the necessary or proper party to other litigation. The general threshold test is, however, to ask whether or not if all defendants were located in England and Wales they would all be sued.

52. Applying that test, I am entirely satisfied that if Ozone were in the English jurisdiction, then they would be joined in at the proceedings commenced against the persons unknown for the purposes of obtaining the information which is sought.

53. In those circumstances, the only other question I have to ask myself, is whether or not England is clearly and distinctly the more appropriate place for the claim against Ozone to be resolved. This is a much more difficult point because as I have explained, Ozone has no presence in the English jurisdiction, and therefore the ability of the Court to enforce any order it makes against Ozone is, by definition, a limited one, and the Court will decline to make orders which are, by their nature, futile.

54. I have hesitated long and hard on this basis about making the order sought, because it will be punitively expensive for the claimant to police. It is likely to generate significant litigation if Ozone engage with the process at all; and there is a real prospect that Ozone will not engage with the process, and therefore, the order will ultimately turn out to be pointless.

55. As I have said, I have hesitated long and hard about this but consistent with the approach which had been adopted in earlier cases, and on the assumption that Ozone would wish to cooperate with the English Courts for the purposes of supplying information which enables

the proceeds of fraud to be traced, I am satisfied it is appropriate to make the order sought, subject to the qualifications I identified earlier in this judgment.

56. As far as costs are concerned, costs will be reserved.

End of Judgment.

Transcript of a recording by Ubiqus
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This transcript has been approved by the judge.