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IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
LONDON CIRCUIT COMMERCIAL COURT (QBD)
[2022] EWHC 835 (Comm)

No. LM-2021-000172

Rolls Building
Fetter Lane
London, EC4A 1NL

Tuesday 15 March 2022

Before:

HIS HONOUR JUDGE MARK PELLING QC

(Sitting as a Judge of the High Court)

B E T W E E N :

ZI WANG — Claimant

- and -

GRAHAM DARBY — Defendant

MR A. ARSHAD (instructed by Curzon Green Solicitors) appeared on behalf of the Claimant.

MR R. GREEN (instructed by Mackrell Solicitors) appeared on behalf of the Defendant.

J U D G M E N T

(v i a M i c r o s o f t T e a m s)

(Please note this transcript has been prepared without access to documentation)

JUDGE PELLING QC:

1 This is the hearing of an application by the claimant for an order varying the terms of a freezing order made against the defendant so as to remove the two exceptions that usually appear in non-proprietary freezing orders made before rather than after judgment has been obtained. The basis of the application is that the freezing order is a maximum sum freezing order and the evidence suggests to a high level of probability that the defendant has access to cryptocurrency with a current value that is well in excess of the maximum sums the subject of the freezing order and so is available to meet both his living and legal expenses.

2 This application was heard as part of the costs and case management conference for this claim. The argument finished at about 1620 hours and after dealing with the outstanding case management and costs budgeting issues, there was no time for a judgment. Accordingly, I said I would deliver it on either Monday or Tuesday of the week after the case management hearing. This is the judgment I promised.

3 Turning first to the procedural background, the world wide freezing order, which the claimant seeks to vary, was made by me on 2 August 2021. The order as made originally contained a proprietary order that in the result was set aside by an order of Mr Stephen Houseman QC, sitting as a Deputy High Court Judge, made on 18 November 2021 following a contested hearing. The worldwide freezing order as made on 2 August 2021 was confirmed however. It prevented the defendant from removing from England and Wales or otherwise dealing with his assets up to a value of £1 million. The order was the subject of two exceptions set out in para.15 of the order being an exception which permitted the defendant to spend up to £500 a week on living expenses and a reasonable sum on legal expenses. The exception was itself subject to a proviso which precluded those expenses from coming from either the cryptocurrency or the traceable proceeds of the cryptocurrency that the claimant maintains had been taken from him by the defendant without his licence or consent. . It is common ground that the effect of Mr Houseman's order was to remove this proviso from the exception.

4 This judgment is not the place to set out in detail the nature of the substantive dispute. It is set out in the judgment of Mr Houseman given when setting aside the proprietary order and I can safely adopt it as an accurate summary of the dispute (see [13] - [50]). In summary, however, the claimant maintains that he transferred to the defendant a quantity of cryptocurrency on terms that the defendant will grow the funds supplied by a process known as "*baking*" and return the cryptocurrency so transferred, together with the profits made, by an identified future date. The cryptocurrency was not returned as the claimant alleges it should have been and this claim was commenced to recover either the cryptocurrency that had been transferred by the claimant to the defendant, or its traceable proceeds, or damages or equitable compensation for its loss

5 By its application notice of 25 October 2021, the claimant seeks a variation of the worldwide freezing order removing the exception I have referred to for the reasons I have identified, namely that the defendant has significant assets in excess of the sums frozen out of which he can and should be required to fund both his legal and living expenses. That application was listed to be heard before Mr Houseman. In the end, he concluded that the worldwide freezing order should continue but the application to remove the exception should be adjourned to be determined at the costs and case management conference. It is important to note why that was so.

6 In relation to the continuation of the worldwide freezing order, Mr Houseman noted that the defendant conceded the threshold issue that arises on such applications and in relation to the risk of dissipation said at [102]:

> "102. I conclude without serious hesitation that such risk of dissipation exists in the present case. The position before HHJ Pelling QC at the without notice hearing for injunctive relief on 2 August 2021 has become more difficult for Mr Darby as a result of (i) his own incomplete and inconsistent asset disclosure pursuant to the injunction order, (ii) his own evidence (including conspicuous omissions) contained in four witness statements served in the meantime, and (iii) the expert evidence of Mr Sanders on behalf of Mr Wang, including the second report served in support of the [worldwide freezing order] variation application and admitted for the purposes of the other applications at this hearing.
>
> 103. The available evidence shows that Mr Darby is an experienced and sophisticated cryptocurrency trader with current or potential means of control over many digital wallets and access to different trading exchanges or platforms. The two reports of Mr Sanders demonstrate that Mr Darby holds or held substantial quantities of Bitcoins worth, at current values, far in excess of his disclosed net worth. I make allowance for Mr Darby's mental state and memory impairment, said to have resulted in loss of passwords and inaccessibility of digital wallets or platforms. The inconsistencies, omissions and conspicuous obscurities in some of his explanations raise justifiable doubts about whether the correct or complete position has been disclosed or explained. No application has yet been made for contempt of court, but Mr Darby must know by now that this is in prospect."

7 At [106] of his judgment, Mr Housman referred to conduct consistent with a risk of dissipation in these terms:

> "106. What matters for present purposes is that Mr Darby immediately or very soon moved the 400,000 Tezos elsewhere and traded them for his own gain. He took advantage of the rising value of Tezos. The trading profit he made was at the expense of Mr Wang in so far as Mr Darby was under an obligation to seek to generate baking rewards or stake bonding profits for Mr Wang's benefit from the 400,000 Tezos. Mr Darby also removed his social media presence at about the same time, according to forensic investigative evidence served by Mr Wang."

8 Overall, Mr Housman concluded at [108]:

> "I conclude without serious hesitation that there is, at least, a real risk of unjustified dissipation by Mr Darby if not restrained by continuation of the WFO. Such risk existed at the time of grant of the injunction order. It persists today. Mr Wang deserves asset-freezing protection to the extent of his personal claims against Mr Darby. There is no manifest injustice or inconvenience to Mr Darby in continuing the WFO at this level, given the

> evidence as to his ownership of Bitcoins with a value far in excess of such frozen sum. The grant and continuation of such relief is and remains just and convenient in all the circumstances."

This led Mr Housman to rule that the worldwide freezing order should continue but in relation to the claimant's application to vary its terms, to direct that it be adjourned to the CCMC and that:

> "...the defendant has permission to adduce expert evidence if so advised responding to the two reports of Mr Sanders served on behalf of the claimant."

9 The reasons for this direction are plainly apparent from the context. Mr Sanders's reports proved in the view of Mr Housman and, for what it is worth, my view when making the orders originally that the defendant holds or held substantial quantities of Bitcoin worth at current values far in excess of his disclosed wealth. This conclusion was obviously highly damaging to the defendant evidentially on this application and Mr Houseman wanted to give the defendant the opportunity to adduce expert evidence to counter the evidence of Mr Sanders if such evidence could be obtained. In fact, notwithstanding that opportunity and the time that has elapsed since the order made by Mr Houseman, no such expert evidence has been adduced by the defendant. This leads to a submission by Mr Scott on behalf of the claimant that this absence should lead to the conclusion on the evidence that the claimant has established an overwhelming case that the defendant has such assets available to him and that the application made by the claimant should succeed therefore.

10 Against that background, I turn to the principles that apply on an application of this sort. Mr Scott submits and Mr Jones does not dispute that they are as summarised by Nugee J (as he then was) in *JSC Mezhdunarodniy Promyshlenniy Bank & Anor v Pugachev & Ors* [2015] EWHC 3263 (Ch). That was an application by trustees for the variation of a worldwide freezing order so as to permit funds under their control to be used to meet the legal and living expenses of various discretionary beneficiaries. The claimant's case in those proceedings was that the trust fund was effectively controlled by Mr Pugachev. As Nugee J said at [33], he proceeded, initially at least, on the basis that the application was an application by Mr Pugachev and that in such a context, it was for Mr Pugachev to satisfy the court that it was appropriate to vary the terms of the order as sought by Mr Pugachev, that is to say so as to permit the funds the subject of the trust to be used to fund his defence.

11 In that context, of course, it would be the defendant applying for a variation so as to permit him to spend frozen sums whereas here, it is the claimant that is applying for a variation to prevent such expenditure. Subject to that difference, Nugee J held by reference to earlier Court of Appeal authority and principally that of *Halifax Plc v Chandler* [2001] EWCA Civ 1750 that:

(1) In order to be permitted to spend frozen monies, the defendant must show that he has no other assets which he can use - see [35] of Nugee J's judgment;

(2) Once a freezing order has been made, the court has already considered that the defendant's freedom to dispose of his assets as he chooses should be restrained - see [37]. In this case, not merely did I reach that conclusion when making the order without notice but, more importantly, Mr Houseman has decided that the injunction should be continued for the reasons he gave, quoted earlier in this judgment;

(3) The burden demonstrating the absence of other assets rests on the defendant - see [37(5)];

(4) Given the conclusions already reached of the risk of dissipation, the court was entitled to adopt a healthy scepticism about assertions by a defendant concerning that defendant's wealth - see [37(6)] of Nugee J's judgment. This reflects the more general approach of courts to assertions by parties on interlocutory applications concerning the wealth that is available to them where all the relevant information is ultimately in the hands of the party making the assertion - see by way of example *Goldtrail Travel Ltd v Onur Air Tasimacilik AS* [2017] UKSC 57; but

(5) Ultimately, in every case, it is necessary to arrive at a conclusion as to what was just and convenient in the circumstances of the case - see [37(7)] of Nugee J's judgment.

12 The important points to take away from this and other authorities in this area is that where a non-proprietary freezing order has been granted the funds the subject of the freezing order remain the defendant's funds so that he is entitled to have recourse to the frozen funds to pay for his defence and, for that matter, his living expenses subject only to him showing that he has no other funds with which to fund the litigation or his living expenses. However, as Warren J said in *Parvalorem v Olivera & Ors* [2013] EWHC 4195 (Ch) at [52], where there is a worldwide freezing order over all of the defendant's assets, the starting point is to include the living and legal expenses exception. The same applies where there is a domestic freezing order that bites on all the assets of the defendant. However, in distinction to that, if the freezing order is only, for example, over the English assets of a defendant known to have valuable assets elsewhere, then the balance of justice is likely to come down in favour of there being no exclusion. This reflects two extremes on a continuum. Where any particular case fits on that continuum will be highly fact sensitive applying the general principles to which I have referred earlier.

13 I now turn to the evidence in this case. The original application was supported by an expert report of Mr Sanders as I mentioned to earlier in this judgment. He carried out what appeared to be a careful and comprehensive analysis of the available technical evidence which consisted principally of Blockchain entries for wallets controlled by the defendant before concluding at para.81(2) of his report:

> "What is concludable, even at this early stage, is that Mr Darby seems to have Bitcoin holdings in excess of the likely quantum of Mr Wang's claim against him and this is identifiable on the basis of a review of what likely constitutes a single digit percent, if even that, of the relevant data. There are wallets assessed as quite likely to belong to Mr Darby that presently have balances. Even just the wallets with funds sitting in them identified above are well over 100 BTC and even the data available to review now has not been fully explored."

"BTC" is a shorthand way of referring to Bitcoin. As is well known, Bitcoin has a variable value but 100 Bitcoin, at all material times, has been a sum well in excess of the value of the claim made by Mr Wang.

14 Following service of the without notice order made by me, the defendant instructed solicitors. At that stage, that is to say immediately after the service of the order upon him, his case was that he was suffering from early onset dementia that had affected his long-term memory. His position was that he stopped trading in crypto currency on behalf of third

parties in May 2019, that he had liquidated his holdings at that time, and had not traded since. The total sum resulting from that liquidation process was a sum slightly in excess of £1 million.

15 The defendant's case is, as I have said, he stopped trading on behalf of others and after 2019 traded only occasionally on his own account. His case is that he had kept records of his activities which he stored on an encrypted hard drive and that he had forgotten the passwords, in consequence of which he could not access the information stored in the way I have described. He maintained that the only way that Mr Sanders's evidence in his first report could be tested was by gaining access to the hard drive but he was unable to do so.

16 The claimant consulted Mr Sanders again in the light of this material and that resulted in his second report. The second report is what is primarily relied on by the claimant to make good the point that the defendant has access to bitcoin with multiple sums well in excess of the value of this claim and that, therefore, the defendant is unable to discharge the burden that rests on him on this application demonstrating he has no funds other than those which are frozen by the freezing order.

17 Mr Sanders's conclusion, following a lengthy technical analysis, is set out in the summary of his conclusions in his second report in these terms:

> "3. As a result of the forensic Blockchain analysis carried out in my first report and my further analysis using Mr Darby's Coinbase records, I now assess the likelihood that Mr Darby is the owner of the 100 BTC as certain and beyond any reasonable doubt.
>
> 4. As I set out in para.80 of my first report, there are a number of transactions which took place on 30 April 2021 ('the 30 April 2021 Transactions') between self-custodial wallets which I assess as belonging to Mr Darby, the transactions total 55.47753121 Bitcoin ('the 55 BTC') and the 55 BTC comprises over half the 100 BTC that I assess as currently being owed by Mr Darby. My further analysis in this second report means I am certain that Mr Darby executed the 30 April 2021 Transactions and that he owns the 55 BTC. My conclusions in my first report have been strengthened by Mr Darby's disclosure of the Bitcoin transfers from his account at Coinbase exchange.
>
> 5. The timing of the 30 April 2021 Transactions leads me to the conclusion that Mr Darby's narrative in the disclosure letter concerning his inability to access his cryptocurrency records and wallet credentials has to be false:
>
> 5.1 Mr Darby needed to use and, in fact, used the wallet credentials for both the sending and receiving wallets in order to carry out the 30 April 2021 Transactions.
>
> 5.2 There is no evidence that the 30 April 2021 Transactions involved a hack of Mr Darby's wallets and Mr Darby has not claimed that these transactions were a hack of his wallets. Further, Mr Darby has not alleged that the 30 April 2021 Transactions involved an OTC trade.

5.3 In those circumstances, this can only lead to the conclusion that as at 30 April 2021, Mr Darby possessed and utilised the relevant wallet credentials not only for the sending wallets but also for the receiving wallets in order to carry out the 30 April 2021 Transactions.

5.4 As at 30 April 2021, Mr Darby was therefore able to access and, in fact, utilise BTC wallet addresses which held a very significant amount of BTC belonging to him. This means that his narrative that all such credentials were stored in an encrypted hard drive, the passwords of which have been forgotten, cannot be factually accurate as at 30 April 2021."

18 The effect of this material is that as at 30 April 2021, that is after the defendant says he ceased all meaningful dealings and was unable to access his wallets, passwords, and so on, he entered into multiple transactions relating to 55-odd Bitcoin with a value of about, depending on what date is chosen, in excess of £1.5 million. In the result, Mr Darby has 100 Bitcoin, or had, or its traceable equivalent and thus funds well in excess of what is claimed in these proceedings.

19 By November 2021, the defendant's explanation for the points made by Mr Sanders was that the defendant had used to hard wallet to access his crypto wallets but that he was unable any longer to access these because the wallet reset to factory settings following a firmware update.

20 In the course of the hearing, in answer to the point that it was highly improbable that a reputable manufacturer would engineer an update that took effect in such a way, the explanation offered was that the defendant had been warned by the manufacturer that this might be the outcome of the update but that the relevant codes to access the material were available, he thought, to him. These explanations are, in my judgment, highly unsatisfactory and mutually contradictory. The opportunity to deploy technical evidence to answer Mr Sanders has not been taken, I infer because there is no answer to it. Instead, an inherently improbable explanation is offered in effect for the first time that contradicts what has gone before, is entirely self-serving, and is largely uncorroborated and put forward in answer to what is otherwise an almost incontestable case.

21 All that said, Mr Jones on behalf of the defendant submits that nothing should be permitted to impede the defendant's ability to defend himself and that, in truth, the order that has been made has frozen all his assets, including the 100 Bitcoin referred to by Mr Sanders and thus the case is one that falls on the defendant's side of the line as identified by Warren J in *Parvalorem* referred to earlier. However, as Mr Jones accepted and was, I think, bound to accept, if Mr Sanders is right then the defendant has assets far in excess of the value of the claimant's claim. However, Mr Jones says that the claimant should accept that in the circumstances, they are protected because they will be monitoring the relevant Blockchain identified by Mr Sanders and so will be able to see any movement of funds and therefore take action.

22 In my judgment, that would be an unreal approach for the court to take in the context of crypto assets which can quite literally be moved on the click of a button. Given the materially contradictory and self-serving nature of the explanations offered. I am not satisfied that the defendant has discharged the burden on him of showing that he does not have access to assets in excess of the value of the claim. To the contrary, the unchallenged evidence suggests that the contrary is the case. His initial disclosure is untrue on the basis

of what Mr Sanders says and, as I have explained, Mr Sanders's evidence has gone entirely unchallenged, despite a more than adequate opportunity for doing so having been provided. The evidence shows that he executed very substantial transactions in April 2021, long after when he had said he had stopped trading in any material way and long after he had said he had lost access to the code which enabled him to access his various wallets. The transactions undertaken were for in excess of 50 Bitcoin which has a value, as I have said, of in excess of the claimant's claim.

23 I have so far said little about the medical evidence but for the reasons given by me in my earlier judgment, that of itself is unconvincing.

24 I fully accept that if the claimant could demonstrate that he had no assets in excess of the value of the claim, permitting the exceptions to be removed would be a wrong exercise of discretion and would be a failure to carry into effect the requirement to make orders that are just and reasonable in all the circumstances. However, on the current state of the evidence, it would be wrong to conclude that the defendant has discharged the burden on him. Although Mr Jones submitted that it was to be inferred that the defendant was correct because, otherwise, it would make no sense for him not to have recourse to the assets the claimant alleges he has, I do not accept the two points as inconsistent. There may be all sorts of family or personal reasons for adopting such a course. It is sufficient to say that the onus rests on the defendant and his explanation, in particular in his fourth witness statement, is as I have described it contradictory with what has gone before, is self-serving, and is in many material respects entirely uncorroborated. That is not good enough in the circumstances.

25 I accept that it may be possible to more minutely engineer the order to expressly exclude any Bitcoin in excess of the value of the claim after taking account of what remains credited to the bank accounts controlled by the defendant. However, there is no application to that effect and it would be wrong for me to attempt to engineer such an outcome in the absence of an application supported by full and frank evidence as to the nature and location of the assets available to the defendant.

26 In the result, the defendant has not discharged the onus that rests on him and, in consequence, the claimant's application succeeds.

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