



Neutral Citation Number: [2023] EWHC 340 (KB)

Case No: KB-2022-001266

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22 February 2023

Before:

MR HEALY-PRATT
(sitting as a Deputy High Court Judge)

Between:

LAVINIA DEBORAH OSBOURNE

Claimant

-- and --

(1) PERSONS UNKNOWN CATEGORY A
(being the natural and/or legal persons who on 17
January 2022 unlawfully gained access to and
removed from the Claimant's cryptoasset wallet
ending 7456 Non-Fungible Tokens titled 'Boss
Beauties #680' and/or 'Boss Beauties #691')

(2) PERSONS UNKNOWN CATEGORY B
(being the natural and/or legal persons who
are in possession and/or control of the
Non-Fungible Tokens titled 'Boss
Beauties #680' and/or 'Boss Beauties #691')

(3) THEMBANI DUBE

Defendants

Racheal Muldoon (instructed by Duane Morris) for the Claimant

Hearing date: 10 October 2022

Approved Judgment

This judgment was handed down remotely at 10.30am on 22 February 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

Mr Healy-Pratt:**(1) Introduction**

1. The Claimant, Lavinia Deborah Osbourne, applied for, and I granted, an extension of the injunction first granted by HHJ Pelling QC, sitting as a High Court Judge, on 10 March 2022. This was a return date hearing following the ex-parte hearing in front of Lavender J on 12 September 2022, where a previous extension of that judgment was granted, together with a number of associated orders. The Claimant was unable to attend in person, and I granted approval for her attendance remotely. I provided an oral ex-tempore ruling at the hearing on 10 October 2022 in the knowledge that Lavender J would be providing a reserved judgment in due course relating to the 12 September application. Accordingly I decided it would be appropriate also to provide a concise written judgment.
2. The judgment of Lavender J dated 13 January 2023 is of great assistance on a number of matters, and is required reading.

(2) Background

3. The Claimant describes herself as a Blockchain, Fintech and Welltech specialist consultant and thought leader, whose work entails speaking, training and consulting internationally. In November 2020 the Claimant opened an account with the cryptoasset management platform, MetaMask. Her account included four wallets, one of which I will refer to as the MetaMask Wallet. This wallet was linked to the Claimant's account with Ozone Networks Inc, an online cryptoasset marketplace trading as Opensea ("Opensea").
4. This case concerns non-fungible tokens ("NFTs"). The Claimant was given two NFTs, entitled "Boss Beauties #680" ("BB#680") and "Boss Beauties #691" ("BB#691"), which I will call "the Two NFTs". They were part of a set of 10,000 NFTs representing unique digital works of art depicting inspirational women, each of which also entitles its holder to attend exclusive virtual events and confers other benefits on its holder. The Two NFTs are said to be worth between £3,000 and £5,000.
5. The Two NFTs were deposited in the MetaMask Wallet on 25 September 2021, but on 17 January 2022 the Two NFTs were transferred out of the MetaMask Wallet without the Claimant's knowledge or consent by an unidentified person or persons, whom I will call "the Alleged Hackers", and who had deposited approximately £150 worth of the cryptocurrency Ethereum in the MetaMask Wallet. It is suggested that a failure in the system architecture may have enabled this unauthorised transaction.
6. The Claimant discovered this on 17 February 2022 and retained an investigator, Robert Moore, of M to M (Mitmark) Limited, to trace the Two NFTs. As set out in a report dated 4 March 2022, his findings were as follows:
 - (1) The Two NFTs were initially transferred to a wallet which has been referred to as "the Wallet ending Cd32".

Approved Judgment

- (2) Each of the Two NFTs was then transferred two or three more times to wallets which were linked to separate accounts with Opensea.
 - (3) By 4 March 2022:
 - (a) BB#680 was in a wallet which has been referred to as “the E29269 User Wallet”; and
 - (b) BB#691 was in a wallet which has been referred to as “the jawwn.eth User Wallet”.
7. On 10 March 2022 HHJ Pelling QC granted an interim injunction to restrain the First Defendants (then described as “PERSONS UNKNOWN (being the individuals or companies who on 17 January 2022 unlawfully gained access to and removed from the Claimant’s wallet ending 7456 Non-Fungible Tokens titled “Boss Beauties #680” “Boss Beauties #691”)”) from dealing with or disposing of the Two NFTs. HHJ Pelling’s order also provided that the Claimant could serve the Claim Form and his order on the First Defendants out of the jurisdiction and by an alternative means, namely service by email on Opensea, the Second Defendant, addressed to various Opensea email addresses.
8. Also on 10 March 2022 HHJ Pelling made a *Bankers Trust* disclosure order against Opensea. Opensea disclosed some email addresses, but the Claimant has received no answer to emails sent to those addresses. On 25 April 2022 Master Cook made an order by consent dismissing the Claimant’s claim against Opensea.
9. The Claimant’s Particulars of Claim are dated 28 March 2022. The causes of action pleaded against the First Defendants were unjust enrichment, misuse of private information and constructive trust.
10. HHJ Pelling continued his injunction on the return date, 31 March 2022. Lavender J granted an extension to that injunction on 12 September 2022.
11. As set out in three more reports, Mr Moore subsequently found evidence that:
 - (1) At some point before 26 August 2022 BB#691 was transferred out of the jawwn.eth User Wallet and through several intermediary wallets into the wallet referred to as “Wallet 8f3C”, which is associated with a certain social media handle and a certain email address (“the Email Address”). There is evidence linking the Email Address with an individual by the name of Them bani Dube. Various social media posts suggest that Them bani Dube lives in South Africa.
 - (2) As at 26 August 2022, BB#691 was being advertised for auction on the Looksrare cryptoasset market place, with the auction set to remain open until 24 September 2022.
12. On 20 September 2022, Mitmark, on the instruction of Duane Morris, minted NFTs to be airdropped into the Wallet ending Cd32, E29269 User Wallet and Wallet 8f3C (the “Service NFTs”). The URL (which linked to a website hosting the redacted version of the service documents) can be seen in the front page of the cover letters which were tokenised to create the Service NFTs, being accessible by the custodians of each

Approved Judgment

wallet into which the Service NFTs were airdropped (i.e only the front page of each letter was tokenised). The documents for service and full copies of the cover letters (noting that the same URL was used for each of the Service NFTs) were uploaded in folders specific to each wallet custodian. Where further documents were to be added, a new folder would be created thereafter. Prior to facilitating the airdrop, Mitmark had uploaded the redacted documents listed in the cover letter (including the order granted previously by Lavender J and the full cover letter) to the document repository.

13. The Service NFTs were airdropped into the Wallet ending Cd32 (at 14:50 UTC/15:50 BST), E29269 User Wallet (at 14:59 UTC/15:59 BST) and Wallet 8f3C (at 14:59 UTC/15:59 BST).
14. Also on 20 September 2022, the Claimant's solicitors served the Third Defendant, Mr Dube, with an unredacted version of the cover letter already served on Persons Unknown Category B by way of NFT along with the following unredacted documents via email: a) the order granted by Lavender J on 12 September 2022; b) the signed (but unsealed) Amended Claim Form (as lodged at Court); c) the signed Amended Particulars of Claim (as approved by Lavender J); d) the signed (but unsealed) Amended Application Notice (as lodged at Court); e) a Response Pack; and f) a Note of the Hearing on 12 September 2022. Mr Dube was also served with the following unredacted documents, via secure transfer: a) the Bundle from the Hearing on 12 September 2022; b) the skeleton Argument from the Hearing on 12 September 2022; and c) the authorities Bundle from the Hearing on 12 September 2022. The Claimant's solicitors had not received any response or contact from the custodians of the Wallet ending Cd32, E29269 User Wallet and/or Wallet 8f3C in advance of the hearing on 10 October 2022.
15. The Claimant's solicitors received sealed copies of the Amended Application Notice and Amended Claim form on 22 September 2022 and 26 September 2022. These documents, along with the Amended Particulars of Claim (as approved by Lavender J and filed at Court) were sent to Mr Dube via email by way of service on 26 September 2022. On 27 September 2022, the sealed Amended Application Notice, sealed Amended Claim Form and approved Amended Particulars of Claim were also uploaded (by Mitmark) to the website hosting the documents to which the URL in the Service NFTs directed in a new folder entitled "Service Documents – 26 September 2022". These further documents were therefore made available to the custodians of the Wallet ending Cd32, E29269 User Wallet and Wallet 8f3C by way of service.
16. It is not suggested that BB#680 has been removed from the E29269 User Wallet. Mr Recker (one of the Claimant's solicitors), in his second witness statement of 4 October 2022 confirmed that the NFTs appeared to still be located in the same wallets that they were in at the time of order granted by Lavender J – the E29269 User Wallet and Wallet 8f3C.
17. In the same witness statement, Mr Recker also confirmed that NFT BB#691 was listed for auction on the Looksrare platform, due to expire on 25 September 2022, and was held by the custodian of Wallet 8f3C. There was some unusual activity surrounding BB#691 with three bids to purchase that NFT by the custodian of Novastar1 Wallet, notable since the Novastar1 Wallet held BB#691 for a short time on 13 July 2022, prior to transfer to Wallet 8f3C.

Approved Judgment

18. It should be noted that given the uncertainty around the recovery of the Two NFTs, the Claimant has been forced to consider as to whether or not she should bid or buy back her NFTs (via one of the various platforms) to the extent there is no positive response to this litigation. The Claimant considers that the provision in the draft order, which permitted the transfer back to the Claimant, is sufficient for this to take place. The Claimant may at some stage amend her claim with a view to recovering that financial amount incurred as a damages claim (if appropriate).
19. NFTs are a type of cryptoasset that represent an underlying asset, whether tangible or intangible. In that sense, they are digital representations of value. The value of an NFT is, in large part, governed by the provisions of the underlying smart contract that conveys rights to, and in some instances, imposes obligations on the holder. There are low barriers to entry. Users merely need an internet-connected device and knowledge of the relevant private key to transact with cryptoassets. Moreover, users need not identify themselves by anything other than a user name such that this transactional activity is conducted anonymously. Given these characteristics, it is therefore no surprise that this technology can be exploited to unscrupulous ends, notwithstanding that cryptoasset transactions are recorded on the publicly available immutable digital ledger that is the Blockchain. Bryan J noted in *AA v Persons Unknown* [2020] 4 W.L.R. 35 that such assets are at risk of being moved at “...the click of a mouse.” Perhaps another contemporary risk of movement would be at the tap of a smart phone.

(3) The Application

20. In the light of those developments, the Claimant applied by a notice which was issued on 30 August 2022, and amended on 9 September 2022 for:
- (1) an interim injunction against the Defendants; and
 - (2) an order permitting service of the injunction and related documents a) out of the jurisdiction and b) by an alternative means, namely:
 - (a) by the transfer of NFTs containing web links / URLs which direct to the documents being served to:
 - (i) the E29269 User Wallet; and
 - (ii) Wallet 8f3C; and
 - (b) by email to the Email Address.

(4) Injunction

21. In form, the order that I was asked to make included injunctions against the Defendants, prohibiting them from dealing with either of the Two NFTs in any way. In substance, I too was being asked to extend the injunction made by HHJ Pelling and extended by Lavender J.
22. I considered that it would be appropriate to grant the injunction sought, applying the principles laid down in *American Cyanamid Co v Ethicon Ltd* [1975] A.C. 396.

Approved Judgment

23. I see no reason to depart from Lavender J's conclusion in paragraphs 18-23 of his judgment of 13 January 2023, that there is at least a realistically arguable case that NFTs are to be treated as property as a matter of English law. I note that, amongst others, Bryan J reached a similar conclusion in relation to cryptoassets such as Bitcoin in paragraph 61 of his judgment in *AA v Persons Unknown*, as did Butcher J in paragraph 11 of his judgment in *Ion Science Ltd v. Persons Unknown* (unreported) 21 December 2000 and HHJ Pelling in paragraph 9 of his judgment in *Fetch.ai Ltd v Persons Unknown* [2021] EWHC 2254 (Comm).
24. I am satisfied that there is a serious issue to be tried whether there is a claim against the First Defendant for restitution and unjust enrichment and against the Second and Third Defendants whether they hold one or more of the Two NFTs on constructive trust for the Claimant. There is evidence that the Two NFTs are property which was obtained by the First Defendants by fraud and which has been transferred by them in breach of trust and has been transferred into the hands of the remaining Defendants in circumstances that, at this time, are unexplained.
25. As to damages being an adequate remedy, I agree and adopt the rationale of Lavender J and HHJ Pelling; in particular at paragraph 18 of the latter's judgment of 10 March 2022:

“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.”

26. I agree. I also agree with what HHJ Pelling said in paragraph 19 of his judgment:

“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

Approved Judgment

Court subsequently, then it would be a material non-disclosure to reveal that fact.”

27. I agree with the observation by Lavender J that the evidence from Mr Moore that BB#691 was being offered for sale suggests that whoever then possessed or controlled it did not regard it as having a value which extended beyond its financial value.
28. Applying the *American Cyanamid* principles, what I have said so far is sufficient to justify the grant of the injunction sought without considering the balance of convenience, but I agree with Lavender J and HHJ Pelling that the balance of convenience also favours the grant of the injunction.

(6) Service Out of the Jurisdiction

29. In circumstances where the Claimant does not know either the identity or the location of the person or persons who possess or control the Two NFTs (save that she believes and asserts that BB#691 is in the possession of the Third Defendant, who is thought to live in South Africa), the jurisdiction of the Court can only be established by service of the claim form out of the jurisdiction.
30. This in turn requires the Claimant to satisfy the Court of three matters. The first and third of those matters are, on the facts of this case, relatively straightforward:
 - (1) As to the first, I have already held that there is a serious issue to be tried between the Claimant and the Defendants.
 - (2) As to the third, England and Wales is clearly the most appropriate forum for the trial of the dispute between the Claimant and the Second and Third Defendants because that dispute is closely linked to the dispute between the Claimant and the First Defendants, for which HHJ Pelling has already held that England and Wales is the most appropriate forum.
31. The second matter, however, is more complicated. The Claimant must show that there is a good arguable case that the claim falls within one of the “gateways” set out in sub-paragraph 3.1 of Practice Direction 6B. Lavender J conducted a meticulous, considered and comprehensive review at paragraphs 27-44 of his judgment. In short, the issue relates to the location of the NFTs at various points in their transfer out of the control of the Claimant.
32. For reasons of judicial economy and proportionality, I need not rehearse the specifics of all the gateways relied upon by Ms Muldoon, save that she relied upon gateways (4A)(c), (9), (11), (15), (16) and (21).

(6)(b) Gateways (11) and (15)(b)

33. I agree with the opinion of Lavender J and his raising of certain doubts at paragraphs 31-38 of his judgment of 13 January 2023. At this time, these doubts remain unresolved and may arise in a contested and fully argued case in due course.
34. I agree that there is a good arguable case that the Two NFTs were located in England and Wales when they were in the Metamask Wallet. However, the Claimant’s case is that each of the Two NFTs were removed from the Metamask Wallet and transferred

Approved Judgment

to a wallet in the possession or control of an unknown person or persons, who may have been domiciled outside the jurisdiction, and was then subjected to at least two more such transfers.

35. In any event, on the facts of the present case it appears that the Two NFTs may well have left the jurisdiction before any cause of action accrued against the Second or Third Defendants.

(6)(c) Gateway (15)(a)

36. It is clear that there is a strong arguable case that this gateway applies to the Claimant's claim against the First Defendants, which arises out of the removal of the Two NFTs from the Metamask Wallet. On the basis that the Two NFTs were located within the jurisdiction until their removal, their removal constituted an act or acts, or an event or events, within the jurisdiction.
37. The removal of the Two NFTs from the Metamask Wallet is also an important part of the basis for the Claimant's claim against the Second and Third Defendants, but it is not the whole basis for that claim, since a necessary part of that claim is the transfer of the Two NFTs by persons unknown in places unknown to wallets in the possession or control of the Second and/or Third Defendants. It cannot be assumed that those transfers took place within the jurisdiction.
38. In those circumstances, there is a question as to the construction of gateway (15)(a) and, specifically, which acts or events need to occur or be committed in England and Wales for the gateway to apply. Lavender J refers to two interesting obiter authorities at paragraph 37 of his 13 January 2023 judgment. Again, this is an issue that may arise later in a fully argued and contested hearing.

(6)(d) Gateway (15)(c)

39. In my judgment, there is a strongly arguable case that the Claimant's claim against the Second and Third Defendants is governed by the law of England and Wales.
40. I agree with Lavender J, and his citation the 16th edition of *Dicey*, in paragraph 29-81, that, "*There seems to be no clear English or Commonwealth authority on the choice of law rules relating to constructive and resulting trusts.*" Nevertheless, it is strongly arguable that the constructive trust alleged to have been created when the Alleged Hackers transferred the two NFTs from the Metamask Wallet was governed by English law. Consequently, that the question whether the Second and Third Defendants in turn became constructive trustees when they received the trust property was also governed by English law.
41. Accordingly, if only on the basis of gateway (15)(c), I was satisfied that this was an appropriate case in which to permit service of the claim form out of the jurisdiction.

(7) Service by an Alternative Means

42. In relation to service of the claim form, CPR 6.15(1) provides as follows:

“Where it appears to the court that there is a good reason to authorise service by a method or at a place not otherwise

Approved Judgment

permitted by this Part, the court may make an order permitting service by an alternative method or at an alternative place.”

43. Rule 6.27 then provides as follows:

“Rule 6.15 applies to any document in the proceedings as it applies to a claim form and reference to the defendant in that rule is modified accordingly.”

44. In the present case, the evidence continues to be that, with the exception of service by email on the Fourth Defendant, the Claimant had no other available method of conventional service on the Defendants of my order and supporting documents except service by NFT sent to the relevant wallets. This was proposed by way of non-fungible token airdrop, which had already been agreed by Lavender J and executed by the Claimant in relation to his order and supporting and related documents. In my judgment, that was a good reason for authorising service of these documents by NFT. Accordingly, I ordered that the Claimant could serve these documents:

- (1) on the First Defendants, by updating the document repository located at the original web link/URL contained within the relevant Service NFT previously airdropped into that Wallet;
- (2) on the Second Defendants:
 - (a) in the case of the current possessor of BB#680, by updating the document repository located at the original web link/URL contained within the relevant Service NFT previously airdropped into the E29269 User Wallet; and
 - (b) in the case of the current possessor of BB#691, by updating the document repository located at the original web link/URL contained within the relevant Service NFT previously airdropped into Wallet 8f3C; and
 - (c) in the case of any future possessor of BB#680 and/or BB#691 by transfer of an NFT containing a web link/URL which directs to a document repository to the relevant future possessing wallet; and following service of that future NFT on a future possessor of BB#680 and/or BB#691 by updating the document repository located at the original web link/URL contained within that relevant future NFT.
- (3) on the Third Defendant, service by
 - (a) updating the document repository located at the original web link/URL contained within the relevant Service NFT previously airdropped into Wallet 8f3C; and
 - (b) by email to the Email Address.

45. Lavender J was made aware at the 12 September 2022 hearing that the present case was the first occasion on which service by NFT had been approved as the sole method of service of documents. This is a rapidly developing area of legal specialism. A

Approved Judgment

specific feature of service by NFT was their ability to be open to the public and viewed through the hyperlinks contained within them. This gave rise to a protocol approved by Lavender J for certain redactions relating to personal data requiring approval by the Court. This was naturally conditional upon the Defendants being offered access to unredacted versions of the documents.

46. To that end, the Claimant filed a full set of the documents to be served, showing all proposed redactions, and I determined which of those proposed redactions were, and were not approved.