



Neutral Citation No. [2022] EWHC 2982 (SCCO)

Case No: SC-2022-BTP-000030

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Thomas More Building
Royal Courts of Justice
London, WC2A 2LL

Date: 23/11/2022

Before:

COSTS JUDGE ROWLEY

Between:

DR CRAIG STEVEN WRIGHT

Claimant

- and -

**THE PERSON OR PERSONS UNKNOWN
RESPONSIBLE FOR THE OPERATION AND
PUBLICATION OF THE WEBSITE**

**www.bitcoin.org (INCLUDING THE PERSON OR
PERSONS USING THE PSEUDONYM “CØBRA”)**

Defendant

Shaman Kapoor (instructed by **ONTIER LLP**) for the **Claimant**
Erica Bedford (instructed by **Mackenzie Costs Limited**) for the **Defendant**

Hearing date: 6 October 2022

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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COSTS JUDGE ROWLEY

Costs Judge Rowley:

Introduction

1. The parties first came before me in this case on 26 May 2022 for a detailed assessment of the claimant's bill of costs. At the outset of that hearing, Mr Kapoor, who appeared on behalf of the claimant, raised a fundamental point regarding the participation of the defendant in that assessment. I took the view that the point needed to be dealt with on notice and consequently gave directions for the claimant to file and serve an application notice together with witness evidence, for the defendant to serve any evidence in response and for a hearing to take place on 6 October 2022.
2. The terms of the application are as follows:

“The claimant seeks an order:

 1. Pursuant to CPR 3.1(2)(m) that, unless the Defendant reveals their identity (which should be verifiable) to the Court and the Claimant within 7 days, the Defendant shall be debarred from participating in the Detailed Assessment and the Defendant's Points of Dispute shall be disregarded by the Court.
 2. That the Defendant do pay the Claimant's costs of this application, such costs to be summarily assessed on the indemnity basis.”
3. A witness statement of Mr Simon Cohen was served in support of the application. No witness evidence was served on behalf of the defendant.
4. At the hearing of the application, Mr Kapoor appeared once more for the claimant and Ms Bedford, who had also been present on 26 May 2022, appeared on behalf of the defendant. Having heard the persuasive submissions of both counsel, I reserved judgment.

Background

5. The substantive proceedings involved a default judgment obtained by the claimant against the operators of the website www.bitcoin.org. The claim alleged an infringement of copyright in a literary work entitled “Bitcoin: a Peer-to-Peer Electronic Cash System” which had become known as “the White Paper.” The claimant alleged that the defendant had infringed his copyright by making a copy of the White Paper available on the website.
6. The defendant declined to confirm its name and postal address in electronic correspondence with the claimant's solicitors. Consequently, the proceedings were brought with the defendant described as in the heading of these detailed assessment proceedings. The pseudonym Cøbra is used on the website to describe the domain owner. It was also used at a hearing as I describe below.
7. The claimant gained the impression that the defendant was based in the United States of America. The only method by which service of the claim form could be achieved

was by use of an email address. In order to serve proceedings out of the jurisdiction, and also to use an alternative method of service, an application was made to the High Court. This application was heard by Mann J on 21 April 2021. He made the order sought but refused to make an order requiring the defendant to identify itself. During the hearing Mann J said:

“I don’t have any point to raise on the principle of whether the order itself should be made. I do, continue to have misgivings about the requirement to identify at this stage, because it involves an order for identification against somebody out of the jurisdiction and sort of presupposes that they are going to be subject to the jurisdiction. My present view is, and I say this to you so that you can knock it down if you think it needs to be knocked down, is it would not be appropriate to make the identification order at this stage, because it does presuppose the other to be subject to this jurisdiction or are subject to the jurisdiction and circumstances in which they may just not wish to be, and there are difficulties in actually enforcing such an order in any event, but to reserve the position of that or to say that actually in the event of them acknowledging service or challenging jurisdiction they will identify themselves and provide an address to service. I think they have got to provide an address for service in any event, but they will actually have to identify themselves if they are going to challenge. I think they would have to do that anyway in an acknowledgement to service but I can see the merits in making that clear in the order, but I have misgivings at this stage about all that’s happening is permission to serve out and we don’t know what’s going to happen. We don’t know whether they will challenge service out. We don’t know whether they will participate at all. They may choose to do absolutely nothing. I have misgivings at this stage about making a without notice order that they identify themselves. Do you want to rise to that? I would be content with an order which made it clear that in any acknowledgement of service that they – or any challenge to the jurisdiction they must identify themselves. That I think almost goes without saying, but that would be obviously right, beyond that I have misgivings.”

8. The order made following the hearing before Mann J said, at paragraph 9:

“If any person who is a Defendant shall file (i) an acknowledgement of service (ii) an admission or (iii) a defence, that person shall also forthwith serve on the Claimant (via his solicitors) a document setting out that person’s full name.”

9. No-one filed any of the documents in the order and consequently the claimant made an application for a default judgment which came before HHJ Hodge QC on 28 June 2021. That hearing was conducted remotely. In addition to the barrister representing the claimant, there were numerous other attendees and one of whom was identified by the judge from the description on the video as “a representative called Cøbra.” The judge assumed that that person was there to speak on behalf of the persons unknown who

were the defendants to the litigation. The judge also indicated at the outset of the hearing that the court had received an email from Cøbra at the email address “domain@bitcoin.org which attached a four page PDF document, which had then been forwarded to the judge. According to HHJ Hodge QC, that document contained a series of bullet points which began with the sentence “We are writing as the defendants in this matter, the entity responsible for the operation of the bitcoin.org website”. The claimant’s counsel then went through the requirements for a default judgment. During the course of those submissions, the judge indicated that in the recital to the order, there should be reference to there being an individual present bearing the Cøbra name and also that during the hearing, that person had sent a message saying “I don’t wish to speak, everything I’ve said is within the email” that the judge had already read. The judge gave Cøbra a further opportunity to say something on the defendant’s behalf. A question was asked via the chat facility which was addressed by the claimant’s counsel and then the person identifying themselves as Cøbra indicated that they did not wish to add anything further, having heard the claimant’s counsel. According to the extempore judgment given by the judge, the four page note raised doubts about the authenticity of the claim but accepted that the claimant was entitled to a default judgment, presumably on the basis of there being no acknowledgement of service or defence.

10. Having obtained a default judgment, the judge declined to carry out any summary assessment of the costs and ordered that they should go for detailed assessment. The claimant then sought an interim payment of his costs pending the detailed assessment. The judge described the amount claimed as “staggering” and awarded what appears to be a relatively low percentage of the costs claimed under CPR 44.2(8). The total sum ordered was £35,000 including VAT.
11. Detailed assessment proceedings were commenced on 7 October 2021. The defendant served points of dispute and the claimant served replies to those points of dispute in November 2021 before requesting a detailed assessment hearing using form N258 on 5 January 2022. No point was taken in those replies as to the entitlement of the defendant to be involved in these detailed assessment proceedings notwithstanding that the defendant, whether that is Cøbra or anyone else, had not identified themselves. It was only in Mr Kapoor’s skeleton argument served shortly before the detailed assessment hearing that the issue between the parties arose. By that time, Mr Mackenzie, a costs lawyer, had placed himself on the court record as acting for the defendant (not simply Cøbra). He instructed Ms Bedford and I have treated her submissions throughout as being made on behalf of the defendant as described in the title to these proceedings.

Submissions

12. The tenor of Mr Kapoor’s submissions was that it was obvious a party who wished to be involved in proceedings needed to set out their name and address. This was made clear in Part 7 when a party commenced proceedings. Proceedings might be brought against unnamed defendants where the claimant did not know who the defendants were at all, or simply could not identify them by name. But there appeared to be no reported cases where proceedings had been brought by persons unknown rather than against them.
13. Mr Kapoor’s skeleton argument set out a number of reasons why the claimant said a party must identify themselves which included “open justice”, fair and just proceedings and the receiving party’s ability to enforce any judgment or award (against the paying

party). The reasons also avoided litigation being conducted for a collateral purpose; the risk of litigation being conducted by someone who had no title to bind the defendant (whoever or whatever they may be.) The list of reasons also indicated that furthering the overriding objective would not be possible absent that identification.

14. It was Mr Kapoor's submission that, although someone attended at the hearing before HHJ Hodge QC, the judgment recorded the claim as not being defended. The points raised in the PDF were not open to the paying party as they had failed to acknowledge service or file any defence (and thereby having to disclose their identity). A failure to submit to the jurisdiction, in Mr Kapoor's submission, should be interpreted as meaning a failure to comply with the requirements of the CPR.
15. The fact that the defendant had seemingly instructed a costs lawyer and counsel did not change the position that a party had to identify itself if it wished to be involved in the proceedings. The situation was the same in the detailed assessment proceedings as it was in the substantive proceedings.
16. Ms Bedford's written and oral submissions challenged the comparatively broad arguments of the claimant. For example, she pointed to there being no reference to a breach of, for example, the Human Rights Act 1998 nor, perhaps more importantly, any alleged breach of a rule in the CPR. Nonetheless, the claimant sought a Draconian order preventing the defendant from being heard at a hearing where the costs had previously been described by a judge as "staggering."
17. Ms Bedford pointed to the fact that the documents for these detailed assessment proceedings had been successfully served by email. The defendant had served points of dispute and the claimant had then responded with replies. The defendant had attempted to make the interim payment of costs but it had been refused by the claimant's solicitors owing to alleged money-laundering concerns. The defendant had complied with the procedural requirements of the detailed assessment proceedings and there was no reason or evidence to suggest that any assessed figure for the costs following a detailed assessment would not also be met by the defendant.
18. The nature of a detailed assessment hearing was one of submissions rather than a party giving evidence (or at least the paying party). The examination of the receiving party's entitlement to the costs claimed could quite properly be carried out notwithstanding the non-identification of the defendant. The claimant was content to bring the proceedings against persons unknown and to continue to pursue proceedings in order to quantify the costs notwithstanding there being no realistic prospect of enforcement of those costs, at least as matters stood.
19. In the absence of any breach of any specific provision of the CPR, the claimant was reduced to relying on the broadest of the court's case management powers namely rule 3.1(m) regarding the taking of any other step and making any other order for the purpose of managing the case and furthering the overriding objective.
20. Ms Bedford queried which part of the overriding objective the claimant said was being furthered by this application? No particular provision was put forward albeit that the claimant's skeleton argument listed various factors within that overriding objective. The only purpose of this point being taken at the beginning of the detailed assessment hearing was, she submitted, a further attempt by the claimant to seek to identify the

identity of the defendant. There are other proceedings involving this subject matter and so the situation is more nuanced than it might first appear. It was conspicuous, in Ms Bedford's submission, that any real, or perceived, past, present or future prejudice to the claimant by continuing against Cøbra was entirely absent.

21. Ms Bedford referred to the case of Porter v Freudenberg [1915] 1 KB 857 regarding the comment of Lord Reid that once an "alien enemy" could be sued, then he could appear and be heard in his defence and take all such steps as may be deemed necessary for the proper presentation of his defence. To do otherwise would be to deny him justice. This would be the position, in Ms Bedford's submission, if the defendant was prevented from making submissions via their legal team before the court.
22. Similarly, Ms Bedford relied on dicta from Fairclough Homes Ltd v Summers [2012] UKSC 26 concerning the court's power to strike out a statement of case. Such a power should only be exercised when it was just and proportionate to do so, which meant inevitably, therefore, it would only be exercised in very exceptional circumstances. Whilst the paying party's points of dispute were not a statement of claim as such, the analogy applied to them and suggested that the points of dispute should not be struck out unless the claimant could demonstrate some exceptionality.
23. As Ms Bedford pointed out, the CPR did not require a paying party to set out their name or address for service when serving points of dispute upon the receiving party. Accordingly, the position was not the same as where a claimant commenced proceedings or indeed a defendant filed a defence. The defendant here had plainly followed the requirements of the CPR both procedurally and in terms of complying with orders for payment. The case could be dealt with justly and at proportionate expense by allowing the detailed assessment hearing to take place in the manner that had originally been expected in May.

Discussion and decision

24. I have been relatively sparing in setting out the numerous cases referred to by counsel in their submissions. They confirmed that they had not been able to find any reported decisions where persons unknown had taken an active role in proceedings. The cases referred to by counsel were therefore not directly relevant to the situation before me. Having reflected at some length on the submissions of counsel, I have come to the conclusion that the authorities relied upon do not really bear upon this particular case.
25. Most of the cases referred to by the parties related to proceedings brought against persons unknown where they had taken no part in the proceedings whatsoever. That lack of engagement is not surprising since the activities of the defendant or defendants often involve potentially criminal activity. The purpose of the proceedings was generally to obtain some form of injunction and the question of damages was a secondary consideration. To that extent, these proceedings are in line with those reported cases.
26. However, the defendant in this case appears to have taken exception to the extent of the costs incurred by the claimant, according to his bill of costs, and felt obliged to counter that claim. That is in contrast to the substantive proceedings where the defendant seemed to be rather sanguine about the effect of the injunction, namely the removal of the relevant document from the website. Consequently, the defendant served points of

dispute upon the claimant and, rather surprisingly to me, the claimant simply responded with a reply to those points of dispute.

27. Such activities are essentially pre-proceedings since they do not involve the court until a request for a detailed assessment hearing is made. Prior to that point, the documentation is simply served between the parties.
28. The defendant's apparent decision to be involved in the detailed assessment of the claimant's costs, but not in the substantive proceedings, leads to an odd procedural position. As Ms Bedford pointed out, a party who serves points of dispute does not have to set out their name and address for service in order to comply with Part 47. It is true that Precedent G contains the phrase "Served on.....[date] by.....[name] [legal representative of] the Defendant" but that frankly raises more questions than it answers. In this case it could have been completed with the pseudonym Cøbra or, if Mr Mackenzie had been instructed earlier, by his name. In neither situation would any identification have been required by the defendant. Mr Kapoor suggested that the defendant ought to have amended the title of the proceedings when serving the points of dispute but that seems to me to be a point of little weight. I do not think the defendant can be criticised for simply utilising the existing heading when serving points of dispute particularly since at the time the defendant was not legally represented.
29. The difficulty for the defendant, in my view, is that the rules, taken as a whole, clearly expect a party to identify themselves at the outset of proceedings. It is rare in the extreme that a party will only get involved in relation to the costs of the proceedings. Where a default judgment has been obtained it must almost always be the case that a default costs certificate would also be obtained if indeed the costs were not summarily assessed or limited to fixed costs when the default judgment was entered.
30. I do not think therefore that the absence in Part 47 of any requirement to provide the name and address for service is any pointer when considering the expectation of the rules regarding identification. In my view, it is plain that a party is expected to identify themselves when first actively involved in the proceedings. That requirement is clear from the rules concerning the commencement of a claim and the filing of a response to that claim.
31. Furthermore, at the hearing before Mann J, his comments regarding the need for the defendant to "have to identify themselves if they are going to challenge" indicates to me that any active involvement on the part of the defendant would have come at the price of self-identification. The terms of paragraph 9 of the order brook no alternative to that course of action in the substantive proceedings.
32. Once it is accepted that identification is required to be involved in the proceedings, the difficulties identified by Ms Bedford fall away. There would be no question of the points of dispute being struck out and the defendant would be entitled to attend the hearing whether in person or by legal representation. But until that identification has occurred, in my judgment, the defendant cannot say that they have submitted to the jurisdiction of the court.
33. Ms Bedford suggested that the serving of the points of dispute showed that the defendant had submitted to the jurisdiction. That would be correct if the defendant had provided the court with a name and address. But absent that information, there is no

way that the court, for example, could sanction the defendant in the various ways provided for by the rules. I consider that the most that could be said is that the defendant is participating within the jurisdiction of the court. But that is not enough in my view. The limitation in the court's power to control proceedings can be seen by considering what would happen if the defendant decided to change their view about that participation. At the most, the court might make an order for costs against the defendant but in the knowledge that any such order was almost certainly not going to be enforceable.

34. Consequently, I have come to the conclusion that if the defendant wishes to challenge the claimant's bill of costs, then they will have to identify themselves in the manner indicated in the application notice. Until that has occurred, the court cannot take notice of the points of dispute that have been served. The procedural position is the same as if no points of dispute have been served at all and the claimant would be entitled to seek a default costs certificate.
35. Upon confirmation that neither counsel could locate any authority that was directly relevant to this case, I indicated that I was likely to give permission to appeal, whatever conclusion I subsequently reached. Upon reflection, I have concluded that the reason there are no such cases is because the point is in fact a simple one. If a party is not prepared to name itself, then it cannot take part in the proceedings. Where a party has concerns about the publication of its identity, an application to anonymise its name and address can be made. I accept that that does not generally prevent the opponent from knowing who the party is, but that is the extent to which a party can be involved in proceedings and limit their identification.
36. Having found against the defendant, the defendant's difficulty in bringing an appeal is obvious. I suspect no appeal is going to be heard until such time as the defendant makes itself known (but that ultimately would be a matter for another judge). Consequently, although I will give permission to appeal this decision, that may be rendered nugatory by the defendant's approach.
37. Nevertheless, that is a matter for the defendant, and they must be given time in which to bring an appeal should they wish to do so. If no such appeal is brought, then the claimant will be entitled to request a default costs certificate if the defendant does not provide their name and an address for service.
38. In order to make sure that matters do not drift, I would expect any appeal to be brought within 21 days of this judgment being handed down. If no such appeal is brought then the defendant should have a further 14 days in which to identify themselves if they are going to do so. In the absence of either an appeal or an identification, the claimant will be at liberty to seek a default costs certificate in five weeks' time.
39. The upshot of this is that there is no purpose in the detailed assessment hearing listed for hearing on 28 to 30 November continuing to be listed and I will vacate those dates.

Postscript

40. Mr Kapoor emphasised on several occasions that he was not impugning the professionalism of either Mr Mackenzie or Ms Bedford. I endorse that view and, to avoid any difficulties, confirm that dealing with the consequential matters from this

judgment, including advising upon and, if appropriate, drafting appeal documents, is not in my view “active engagement” in the detailed assessment proceedings. As such, there is nothing improper in either Mr Mackenzie or Ms Bedford interacting with their opponents or the court on such matters.