



Neutral Citation Number: [2023] EWHC 39 (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: 13/01/2023

Before :

MR JUSTICE LAVENDER

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: 12 September 2022

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10.30a.m. on 13 January 2023.

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MR JUSTICE LAVENDER

Mr Justice Lavender:**(1) Introduction**

1. The Claimant, Lavinia Deborah Osbourne, applied for, and I granted, an extension of the injunction first granted by HHJ Pelling QC (as he then was), sitting as a High Court Judge, on 10 March 2022. I also made a number of associated orders. I agreed to hold the hearing without notice to the Defendants and in private (pursuant to CPR 39.2(3)(a), to prevent any risk of the defendants being tipped off about the application, which would defeat the object of the hearing), but I said that I would give judgment in public.

(2) Background

2. 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").
3. 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 entitled its holder to attend exclusive virtual events and conferred other benefits on its holder. The Two NFTs are said to be worth between £3,000 and £5,000.
4. 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.
5. 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".
 - (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”.
6. On 10 March 2022 HHJ Pelling KC 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 KC’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.
 7. 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.
 8. 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.
 9. HHJ Pelling KC continued his injunction on the return date, 31 March 2022.
 10. 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 South African email address (“the Email Address”). There is evidence linking the Email Address with an individual by the name of Thembani Dube. Various social media posts suggest that Thembani 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.
 11. It is not suggested that BB#680 has been removed from the E29269 User Wallet.

(3) The Application

12. 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 (following a hearing before Heather Williams J on 2 September 2022) for:
 - (1) permission to amend the Claim Form and Particulars of Claim by adding the Third Defendants and pleading a cause of action against the Third Defendants, namely an equitable proprietary claim;

- (2) an order permitting service of the Amended Claim Form out of the jurisdiction;
- (3) an interim injunction against the Third Defendants; and
- (4) an order permitting service of the Amended Claim Form and the injunction and related documents by an alternative means, namely:
 - (a) by the transfer of NFTs containing embedded hyperlinks which direct to the documents being served to:
 - (i) the E29269 User Wallet;
 - (ii) the Wallet ending Cd32; and
 - (iii) Wallet 8f3C; and
 - (b) by email to the Email Address.

(4) Amendment

13. The Claimant proposed various minor and consequential amendments to the Claim Form and Particulars of Claim, but the principal amendments sought were the addition as a party of the person or persons who had possession or control of each of the Two NFTs and the addition of a proprietary equitable claim against that person or those persons. Subject to the question of jurisdiction, to which I will return, and to certain questions as to the identity of the proposed new defendants, I considered that it was appropriate to allow the proposed amendments and that I had power pursuant to CPR 19.2(2)(b) to order the person or persons who had possession or control of each of the Two NFTs to be added as a new party because there was an issue (namely whether the Third and Fourth Defendants hold the Two NFTs on constructive trust for the Claimant) which involved them and the Claimant and which was connected to the matters in dispute in the proceedings and it was desirable to add them so that the court could resolve that issue.
14. By her Application Notice, the Claimant identified the Third Defendants as, “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” knowing or having reasonable grounds to believe that these assets belong to the Claimant)”. In the course of the hearing:
 - (1) I questioned whether it was appropriate to include the words “knowing or having reasonable grounds to believe that these assets belong to the Claimant” in the definition of the proposed Third Defendants. It seemed to me that the better course in this case was to omit those words. In the case of each of the Two NFTs, the person or persons who had possession or control of them at the time of the hearing was a person or category of persons who, although currently unknown to the Claimant, was capable of identification without reference to their state of mind.

(2) I also questioned whether the Claimant alleged that Them bani Dube was the person who had possession or control of BB#691 and, if so, whether the Claimant ought not to name him as a Defendant.

15. In the event, the Claimant decided to revise her proposed amendments so as to remove the words “knowing or having reasonable grounds to believe that these assets belong to the Claimant” from the definition of the proposed Third Defendants and to add Them bani Dube as a Fourth Defendant.

(5) Injunction

16. In form, the order which I was asked to make included injunctions against both the First Defendants and the Third and Fourth Defendants, prohibiting them from dealing with either of the Two NFTs in any way. In substance, however, I was really being asked to extend the injunction made by HHJ Pelling KC against the First Defendants so as to apply to the Third and Fourth Defendants.

17. I concentrate, therefore, on the application for an injunction against the Third and Fourth Defendants. Subject to the issue as to jurisdiction, to which I will return, 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.

18. I see no reason to depart from HHJ Pelling KC’s conclusion, in paragraph 13 of his judgment of 10 March 2022 (cited as [2022] EWHC 2021 (Comm)), 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* [2020] 4 W.L.R. 35, 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).

19. I am satisfied that there is a serious issue to be tried whether the Third and Fourth Defendants 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 Third and Fourth Defendants in circumstances which are, as yet, unexplained.

20. In paragraph 18 of his judgment of 10 March 2022, HHJ Pelling KC said as follows:

“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.”

21. I agree. I also agree with what HHJ Pelling KC 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 Court subsequently, then it would be a material non-disclosure to reveal that fact.”

22. I add 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.
23. 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 HHJ Pelling KC that the balance of convenience also favours the grant of the injunction.

(6) Service Out of the Jurisdiction

24. Ms Muldoon’s skeleton argument contained a section entitled “Jurisdiction” which was in fact concerned with the issue of choice of law, rather than jurisdiction. 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 Fourth 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.
25. 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 Third and Fourth 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 Third and Fourth Defendants, not least 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.

26. 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.

(6)(a) The Gateways Relied on

27. Ms Muldoon relied in her skeleton argument on 6 gateways, namely gateways (4A)(c), (9), (11), (15), (16) and (21). However, four of these gateways can be discounted:

- (1) Gateway (4A)(c) only applies to a further claim made against a party who is already a defendant.
- (2) Gateways (9) and (21) are only relied on in respect of the claim against the First Defendants for misuse of private information.
- (3) Gateway (16) is only relied on in respect of the claim against the First Defendants in unjust enrichment.

28. As for gateway (11), this is in the following terms:

“The claimant may serve a claim form out of the jurisdiction with the permission of the court under rule 6.36 where –

- (11) The subject matter of the claim relates wholly or principally to property within the jurisdiction, provided that nothing under this paragraph shall render justiciable the title to or the right to possession of immovable property outside England and Wales.”

29. Gateway (15) is in the following terms:

“The claimant may serve a claim form out of the jurisdiction with the permission of the court under rule 6.36 where –

- (15) A claim is made against the defendant as constructive trustee, or as trustee of a resulting trust, where the claim—
 - (a) arises out of acts committed or events occurring within the jurisdiction;
 - (b) relates to assets within the jurisdiction; or
 - (c) is governed by the law of England and Wales.

30. I will consider first gateways (11) and (15)(b), then gateway (15)(a) and finally gateway (15)(c).

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

31. Ms Muldoon’s primary submission was that the Two NFTs constituted property or assets within the jurisdiction, because the Claimant was domiciled in England

and Wales. She relied on the fact that Butcher J held in paragraph 16 of his judgment in *Ion Science Ltd v. Persons Unknown* that he was satisfied that there was at least a serious issue to be tried that the lex situs of a cryptoasset was the place where the person who owned it was domiciled and HHJ Pelling KC said in paragraphs 15 and 16 of his judgment of 10 March 2022 that “it has been consistently held that crypto assets are to be treated as located at the place where the owner of them is domiciled” and that “This approach has been adopted in any number of cases, including at least two, if not three, decided by me.” (It appears that the other cases referred to by HHJ Pelling KC include his judgment in *Fetch.ai Ltd v Persons Unknown*.)

32. I accept that there is a good arguable case that the Two NFTs were located in England and Wales when they were in the MetaMask Wallet. I was not referred to Dicey, Morris & Collins on *The Conflict of Laws* (“Dicey”), but I note that the editors say as follows in paragraph 23.50 of the 16th edition (which was launched on 1 November 2022, i.e. after the hearing in the present case):

“The law is still in its infancy in confronting the problems raised by these technological developments, although cases are beginning to emerge which require these questions to be addressed. In *AA v Persons Unknown, Re Bitcoin*,¹³³ the court held that cryptocurrencies are a (novel) form of property capable of being the subject of a proprietary injunction. In *Ion Science v Persons Unknown*,¹³⁴ the court determined that there was a serious issue to be tried that the lex situs of cryptocurrency would be the “domicile” of its owner.¹³⁵ Given the ascertainability and control justifications for the lex situs rule, it may tentatively be suggested that a solution based around the owner’s location is indeed the best fit with underlying principle. The location of the owner is reasonably objectively identifiable, although given the uncertainties around identification of domicile in difficult cases, a habitual residence or place of business test would be preferable. In addition, even though direct control over a cryptocurrency might be beyond any individual state, the owner of the cryptocurrency has control over the property, generally through their control over a private encryption key which is required to transfer the property, and the state of location of the owner thereby has the strongest indirect control over the property.¹³⁶ The “owner” should generally be understood to refer to the party in possession¹³⁷ of the private encryption key giving access to the cryptocurrency at the time of the relevant transaction. If an encryption key is duplicated, the “owner” should generally be understood as the party who in fact exercises control over the cryptocurrency, for example, through effecting a sale to a third party.”

33. However, the Claimant’s case is that each of the Two NFTs was removed from the MetaMask Wallet and transferred 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. I questioned in the hearing whether it could be said in those circumstances that England and Wales remained the situs of the Two NFTs. Neither of the authorities cited by Ms Muldoon address that situation.

34. I referred in the hearing to the potential analogy with an item of tangible moveable property, such as a valuable motor car. If A's car is in London when it is obtained by B by fraud, but it is subsequently transported by B to Paris, it would no longer be property (or an asset) within the jurisdiction. Extending that to address what may be the position of the Third and Fourth Defendants in the present case, if B then transferred the car to C in Paris and C transported it to Berlin before he was sued by A, then the car was not property (or an asset) within the jurisdiction either when C acquired it (which was the earliest point at which any cause of action against C accrued) or when A sued C.
35. This highlights another issue in relation to gateways (11) and (15)(b), namely the question when the property or asset has to be located in the jurisdiction in order for the gateway to apply. As to that, in paragraph 23 of his judgment in *Fetch.ai Ltd v Persons Unknown*, HHJ Pelling KC said, in relation to gateway (15)(b), that "The test for whether assets are within the jurisdiction, for the purpose of deciding whether a claim relates to such assets, must focus on where the assets were located before the justiciable act occurred." See also paragraph 22 of Trower J's judgment in *D'Aloia v Persons Unknown* [2022] EWHC 1723 (Ch), in which he said that he thought that it was quite likely that gateway (11) applied in respect of property which was no longer in the jurisdiction, but which was in the jurisdiction at the time of its misappropriation.
36. With great respect to HHJ Pelling KC and Trower J, I consider that there is room for doubt whether HHJ Pelling KC's proposition is correct. The wording of the introduction to paragraph 3.1 of Practice Direction 6B suggests that the question whether property (or an asset) is within the jurisdiction is to be determined when the application is made for permission to serve the claim form out of the jurisdiction, rather than when the cause of action arose.
37. This is a matter which may arise for decision in due course in a contested and fully-argued case. For present purposes, I merely note that, although these materials were not cited to me:
- (1) None of the illustrations concerning gateways (11) and (15)(b) in paragraphs 11-212 and 11-224 of the 16th edition of *Dicey* concern cases in which the property (or asset) in question was out of the jurisdiction when permission to serve the claim form out of the jurisdiction was granted.
 - (2) In paragraph 159 of his judgment in *Pakistan v Zardari* [2006] EWHC 2411 (Comm), Collins J said (of what was then CPR 6.20(10)), "The intention of that head of jurisdiction is to confer a discretionary jurisdiction on the English court to hear disputes relating to property in England."
 - (3) Although they concern a different gateway, paragraphs 148 to 153 of the judgment of Collins J in *Chellaram v Chellaram (No. 2)* [2002] EWHC 632 (Ch) provide some support for the proposition that gateways (11) and (15)(b) require that the property (or asset) is within the jurisdiction when the application is made for permission to serve the claim form out of the jurisdiction.

38. 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 Third or Fourth Defendants.

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

39. 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.
40. 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 Third and Fourth 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 Third and/or Fourth Defendants. It cannot be assumed that those transfers took place within the jurisdiction.
41. 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. I was not addressed on this question, so I say no more about it, save to note that:

- (1) The obiter discussion in paragraphs 81 to 87 of Collins J's judgment in *NABB Brothers Ltd v Lloyds Bank International (Guernsey) Ltd* [2005] EWHC 405 (Ch) may be helpful, although it is only addressed to claims against the immediate recipient, rather than subsequent recipients, of trust assets.
- (2) Likewise, the obiter discussion in paragraphs 166 to 170 of Collins J's judgment in *Pakistan v Zardari*, although potentially helpful, was addressed to a factual situation which was different from the present case.

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

42. In my judgment, there is a strongly arguable case that the Claimant's claim against the Third and Fourth Defendants is governed by the law of England and Wales.
43. I note that the editors of the 16th edition of *Dicey* state, in paragraph 29-81 (which was not cited to me), 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 in my judgment 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 and, consequently, that the question whether the Third and Fourth Defendants in turn became constructive trustees when they received the trust property was also governed by English law.

44. 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

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

46. 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.”

47. In the present case, the evidence was that, with the exception of service by email on the Fourth Defendant, the Claimant had no other available method of service on the Defendants of the Amended Claim Form, the Amended Particulars of Claim and my order and supporting documents except service by NFT sent to the relevant wallets. 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 the transfer to Wallet ending Cd32 of an NFT containing an embedded hyperlink which directs to the documents;
- (2) on the Third Defendants:
 - (a) in the case of the current possessor of BB#680, by the transfer of such an NFT to the E29269 User Wallet; and
 - (b) in the case of the current possessor of BB#691, by the transfer of such an NFT to Wallet 8f3C; and
- (3) on the Fourth Defendant:
 - (a) by the transfer of such an NFT to Wallet 8f3C; and
 - (b) by email to the Email Address.

48. Although Trower J had in *D’Aloia v Persons Unknown* authorised service by email and NFT, I was told that the present case was understood to be the first occasion on which service by NFT had been approved by a court in England and Wales as the sole method of service of documents. I note that *Jones v Persons Unknown* [2022] EWHC 2543 (Comm) is another case, decided on 5 September 2022, in which service by NFT was approved and there may well be now be others.

49. One feature of service by NFT in the present case, since the NFT was to be “on the blockchain”, was that the NFTs used to effect service would be open to the public and the hyperlinks contained in them could be used by anyone to view the documents served. In those circumstances, I was asked to sanction the redaction of the documents to be served in order to prevent access to personal data. I did so, but only on condition that:
- (1) the Defendants would be offered access to unredacted versions of the documents; and
 - (2) the only redactions which would be made were those which were approved by the court.
50. To this end, I directed that the Claimant must file 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.