

Case No: CL-2024-000220

Neutral Citation Number: NCN is [2024] EWHC 1514 (Comm)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT
KING'S BENCH DIVISION

7 Rolls Building
Fetter Lane
London
EC4A 1NL

Friday, 17 May 2024

BEFORE:

HIS HONOUR JUDGE PELLING KC
(Siting as a Judge of the High Court)

BETWEEN:

TAI MO SHAN LIMITED

Claimant

- and -

PERSONS UNKNOWN

Defendants

MR N YEO with MR N TAYLOR (instructed by Kobre & Kim UK (LLP)) appeared on behalf of the Claimant

JUDGMENT
(Approved)

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JUDGE PELLING:

1. This is an application in the terms of an application notice dated 15 April 2024 for an order that the claimant has permission to serve the claim form and Particulars of Claim in these proceedings on the defendant out of the jurisdiction and by an alternative means, namely the transmission of non-fungible tokens containing an appropriate hyperlink to the claim form and Particulars of Claim and response documents to a number of wallets identified in the application notice.
2. The underlying proceedings in respect of which permission is sought is to enforce a judgment of the New York state court in favour of the claimant in relation to an underlying and very substantial cryptocurrency fraud. The judgment of the New York court is a judgment which includes, among other things, a declaration in proprietary terms in relation to the claimant's claim, ultimately against assets held in a wallet maintained by the claimant's solicitors and pursuant to undertakings by those solicitors in other proceedings commenced last year.
3. There are a number of issues which arise. I do not propose to take up time describing at any length the underlying factual dispute. That has been covered in earlier judgments.
4. As is well-known, in relation to a service out application the applicant must establish first of all a good arguable case, otherwise described as a plausible evidential basis, that the claim falls within one or more of the gateways identified in Practice Direction 6B, paragraph 3.1. The only gateway which the claimant relies upon for present purposes is Gateway 10 which is to this effect, "A claim is made to enforce any judgment or arbitral award."
5. There is no particular problem in relation to reliance on this gateway as long as the proceedings are a claim to enforce any judgment or arbitral award. In the course of discussions during the argument, it became clear that the claimant claims not merely a declaration that the New York judgment to which I referred earlier in this judgment should be recognised and enforceable in England and Wales in relation to the declaration element within the New York judgment but also, at paragraphs (b) and (c), further and apparently freestanding relief for declarations as to the substance of the claimant's claim

to be a beneficial owner of the assets held by the Claimant's solicitors in the solicitors' wallet pursuant to earlier order in related proceedings. . Those are not claims that come within the scope of Gateway 10 even on a plausible, evidential basis analysis. In those circumstances, I suggested that if permission to serve out were to be granted, then it should be limited to the claim for a declaration that the New York judgment is recognised and enforceable in England and Wales and, as I understand it, the claimant accepts that that is an appropriate way to proceed. That is, of course, entirely without prejudice to any further application to serve out that may hereafter be made by the claimant in relation to the claim at (b) and (c) if, upon analysis, the claimant considers it appropriate to maintain those claims. For the reasons that I touched upon in the course of the argument, I am sceptical as to whether it is necessary to have either of those declarations in order to achieve what the claimant ultimately wishes to achieve. However in light of the position adopted by the claimant, I need say no more about that in this hearing or about the jurisdictional gateway issue.

6. The third requirement, namely, that England is clearly the most appropriate forum for the proceedings, is also an issue that I need not take up much time considering. The only assets which have been identified as being the traceable proceeds of the fraudulent activities of the defendants is the cryptocurrency held in the wallet in the name of the claimant's solicitors. I need not explain how it was that those assets were identified and transferred. It is sufficient to say that they were in circumstances which show that those were either assets belonging to the claimant or the traceable proceeds of such assets. Those are located, or at least it is realistically arguable or there is a plausible evidential basis for concluding that those are to be treated as located in England, but in any event, the solicitors concerned are based in England and therefore the English court is the appropriate court, and clearly the most appropriate court, for these proceedings because of the connection with the earlier proceedings and of the desire of the claimant to seek orders in the proceedings, releasing the solicitors from the undertakings given.
7. The real issue which arises is what is usually treated as the first and threshold issue on an application of this sort namely whether there is a reasonable prospect of success on the claim. So far as that is concerned, there were two issues which surfaced. The first was whether or not the judgment of the New York court was sufficiently final and

enforceable to enable it to be the subject of an enforcement claim in England, applying the common law principles that apply to such claims

8. So far as that is concerned, I am satisfied that the New York judgment, to the extent it is based on equitable subrogation, contains a declaration as to the proprietary interests of the claimant and so is a judgment *in rem*. That is sufficient to lead to the conclusion that in seeking to enforce the declaration made by the New York court, the claimant is seeking to enforce a judgment **in rem** in England. Indeed, the New York judgment itself, I think refers to the fact that the claimant has a proprietary right to the assets that are within the claimant's solicitors' wallet, that I referred to earlier in this judgment. In those circumstances, as it seems to me, there is no particular difficulty in treating the part of the New York judgment that the claimant seeks to enforce as a judgment **in rem**.

9. To be enforceable in England at common law, a foreign judgment must satisfy what is often referred to as Dicey Rule 47 which is that to be enforceable in England such a judgment must be in relation to subject matter which is situate in the relevant foreign state. If this refers to the whole of the United States no particular problem arises. However the judgment is of a New York state court and it might be argued that state for these purposes means the state of New York rather than the federal state of the United States. In my judgment even if that is correct the test is nonetheless satisfied to the evidential and legal level required on an application of this sort. Applying English law principles it is at least arguable that New York was the situs of cryptocurrency stolen from the claimant at the time it was stolen, applying English law principles at any rate because although the claimant is a Cayman registered company at all material times its central management and control was located in New York. In any event, I am satisfied that looking at New York rather than the federal United States for the purposes of Dicey Rule 47 is at least realistically arguably wrong. My attention, quite rightly, was drawn to some **dicta** in earlier cases which might suggest this creates a difficulty. I am satisfied however to the relevant threshold standard for an application of this sort that it is appropriate to look to the United States as a whole because the United States as a whole as the relevant international law unit. To decide otherwise is to introduce an unnecessary level of complexity.

10. The further question is whether or not the judgment is sufficiently final and conclusive on its merits as to enable the judgment to be enforced by English law proceedings. So far as that is concerned, although this is a default judgment, it is enforceable as a judgment unless and until an application is made in the United States to set aside that judgment. Therefore, as it seems to me, at least to the level required for present purposes, this judgment is to be regarded as final and conclusive because it is the New York court's last word on the issue, subject to any application being made to set aside the judgment. As was submitted on behalf of the claimant by reference to both academic writing and authority as well, the fact that a foreign court has power to reopen the decision on an application by a defendant to those proceedings does not render it non-final if the judgment has not in fact been reopened as long as it is subject to immediate enforcement in New York. As Professor Briggs puts it in *Civil Jurisdiction and Judgments*, on these issues:

"The fact that the foreign default judgment may be later set aside by the court which gave it, cannot in practice be allowed to deprive the default judgment of its claim to finality."

There was a significant amount of debate in the expert evidence about this particular topic but it is not necessary for me on an application of this sort to go into that level of granular detail. I am satisfied that the judgment is sufficiently conclusive and final to enable it to be enforced in England, there, of course, having been no application to set aside the New York judgment.

11. Therefore and in those circumstances, I am satisfied that the New York judgment is final, conclusive and immediately enforceable in relation to the declaration. Within the order itself, there was a direction from the New York court that parts of the judgment were not to be enforced without further order of the New York court, including two injunctions, and I think a personal claim in damages, but neither of those arise in the circumstances of this case because all that the claimant is seeking to do is to enforce the declaratory part of the judgment, and in relation to that part of the judgment, the New York judgment makes it clear that the New York court anticipated that that part would be enforced without further order of the New York court, and the fact that other parts of the judgment are conditional seems to me to be completely irrelevant.

12. The only other issue concerns service. As will be apparent from the way in which this claim has been structured and the defendants identified, the actual defendants are not known to the claimant and therefore by definition their location is unknown as well. In those circumstances, an application is made for an order permitting service by an alternative means, the alternative means proposed being service by NFTs placed into the blockchain by use of the various addresses, or perhaps wallet addresses is the correct way of describing them, identified in the order.
13. I am entirely satisfied, first of all, that that is in accordance with a growing body of authority permitting service by that alternative means in cryptocurrency frauds of this nature and by necessary incremental development to the enforcement of foreign judgments relating to such claims. In relation to crypto currency fraud claims before the courts of England and Wales, This approach has been adopted by Lavender J in *Osborne v Persons Unknown* [2023]WHC 39, by Trower J in *d'Aloia v Persons Unknown* [2022] WHC 1723 and by me in a number of cryptocurrency cases in the last year.
14. However, there was one issue which did trouble me in relation to service by this means which is something that needs to be considered. CPR Rule 6.40(4) provides that nothing in paragraph 3 or any court order authorises or requires any person to do anything which is contrary to the law of the country where the claim form or other document is to be served. The question which arises, therefore, since service could theoretically take effect in any country on earth where someone is able to connect a laptop or other device to the internet, as to whether or not an express qualification is required. The submission which Mr Yeo made on behalf of the claimant was that it was unnecessary or inappropriate to impose any qualification because the act of service by a non-fungible token in the way that is intended is not service in any particular country, since the transfer takes place in the blockchain which is accessible anywhere in the world. It seems to me that that misses the point since, even accepting as I do, that there is no obligation to open an NFT, by definition, a defendant will be located somewhere geographically at the time when it is opened by the defendant if the defendant chooses. There is a potential risk therefore that such a person may be located in a country where it is contrary to the law of that country to serve process by means other than that authorised by the law of the country concerned. Although this is a relatively rare, it can arise.

15. I am certainly prepared to make the order sought but it seems to me that on the face of the order there ought to be a qualification which makes clear that service will not be effective in any country where service by the alternative means I am authorising is contrary to the law of the country where the defendant is located at the time when service is effected or deemed to be effected. This is necessary because this issue goes to the comity of the English court with other courts around the world and it could be a source of difficulty unless an express qualification to that effect was not imposed.
16. The only two other issues which arise concern, first of all, the time period for responding to the claim and secondly, the degree to which, if at all, there should be security imposed by password protection in relation to some or all of the documents that are to be served.
17. So far as the time period for responding to the claim is concerned, on entirely pragmatic grounds, Mr Yeo proposes a figure of 31 days on the basis that that is longer than the period that applies to most of the jurisdictions that are identified in the table in Practice Direction 6B with the exception of a very limited number of obviously outlying jurisdictions. The point which he makes is it is quite impossible to decide specifically by reference to the table what is the appropriate period because by definition, the claimant does not know and cannot know where the relevant defendants are located. I agree with that submission. Therefore he has adopted 31 days on the basis it is longer than most of the jurisdictions that are identified in the table and is longer than the period which applies to North Korea in circumstances where there is a limited evidential basis for thinking that there may be some connection with North Korea so far as the defendants are concerned. I agree with all of that. I accept that normally it is mandatory to use the timings identified in the table, but at a level of practicality, it seems to me to be very difficult to adopt any course other than that proposed by Mr Yeo and I am prepared to accept that 31 days is the appropriate period to use.
18. The final issue to be resolved therefore is whether or not the documents which are to be served need protection by passwords. There is a significant amount of full and frank disclosure which is contained in the material inevitably and the point which is made by Mr Yeo is that the Civil Procedure Rules distinguish between documents which are available to non-parties on demand and documents which can only be obtained by further order of the court. The risk, in serving by the method proposed, is that non-parties may

be tempted to open or gain access to the documentation. I agree with the approach adopted by the claimant, therefore, which is to distinguish between documents which are available on demand, for which no relevant protection is necessary, and those which could only be obtained by further order, for which password protection is appropriate, providing the order includes within it directions which make clear how with relative ease access to the password can be obtained. The order has catered for that point.

19. In those circumstances, subject to the qualifications I have identified, I propose to make the order sought.

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This transcript has been approved by the Judge