

Transcending the Challenges of Crypto Assets

by Joseph Lewin

Summary

In *Lavinia Deborah Osbourne v Persons Unknown, Ozone* [2022] EWHC 1021 (Comm), the High Court (His Honour Judge Pelling QC) confirmed that there is “*at least a realistically arguable case*” that non-fungible tokens (“**NFTS**”) are capable of being treated as legal property under the law of England and Wales (at [13]).

The case confirms that it is possible for victims of NFT fraud to access the English courts for legal recourse, including in situations where the defendants are unknown – a common feature of the seemingly anonymous world of crypto assets.

The facts

Ms. Osbourne (the “**Claimant**”), based in England, opened and maintained a crypto asset account with OpenSea, the trading name of Ozone Networks Incorporated (“**Ozone**”), a US-based peer-to-peer NFT marketplace.

On or around 24 September 2021, the Claimant was gifted various NFTs (representing digital artworks) to her OpenSea wallet. Thereafter, without the Claimant’s knowledge or consent, the NFTs were transferred from her account to two other OpenSea wallets held by other users. Whilst the Claimant was able to trace the NFTs to the two wallets in question, the pseudonymous nature of the accounts meant that the individual owners – who would have been the defendants in any fraud claim – could not be identified.

The Claimant accordingly brought a claim seeking two forms of relief: (1) an interim proprietary injunction against persons unknown, to freeze the NFTs and prevent them from being dissipated; and (2) a “Bankers Trust” order against Ozone, compelling the provision of contact information for the unknown individuals who controlled the wallets holding the misappropriated NFTs.

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Related Capabilities

- Commercial Litigation
- Securities & Financial Services Litigation & Enforcement
- Europe

The Claimant was successful in obtaining both heads of relief.

The applications

The Court considered three principle issues: (1) whether to grant the injunction; (2) whether to grant the Bankers Trust order; and (3) whether to grant permission for the Claimant to serve the claim out of the jurisdiction.

1. Granting the injunction The Claimant had to satisfy the Court that: (i) there was a serious issue to be tried on the merits of the case; (ii) damages would not be an adequate remedy; and (iii) on the balance of convenience, it would be appropriate to grant the injunction.

As to (i), the Court held that the Claimant had demonstrated “*a good arguable case that she has been defrauded of the NFTs*” and, whilst no reasoning was explicitly provided, that NFTs were arguably capable of having proprietary status under English law (at [13]).

It was further confirmed that, in considering the location of the NFTs, “*crypto assets... are to be treated as located in the place where the owner of them is domiciled*” (at [14], following the judgment of Butcher J in *Ion Science Ltd v Persons Unknown and others (unreported)*, 21 December 2020 (Commercial Court)).

As to (ii), damages were inadequate for two reasons: firstly, there was no security that any sum awarded could be paid by the persons unknown; and, secondly, the NFTs had a “*particular, personal and unique value to [the Claimant] which extend[ed] beyond their mere Fiat currency value*” (at [18]). Part of this value came from the nature of the NFTs in question. The Claimant had founded ‘Women in Blockchain Talks’, described as a “*community of like minded individuals who are excited about delving into the world of Blockchain and bridging the equality gap*”, and the misappropriated NFTs in question were part of the “*Boss Beauties’ 10,000-NFT collection*” – “*digital portraits [which] capture the empowered women [the Boss Beauties community] want to see and be in the world*”.

As to (iii), the Court held that without an injunction, there was a “*very real risk*” that the NFTs would be re-transferred multiple times and at great speed, rendering the Claimant’s ability to trace and retrieve them “*very difficult, or possibly even impossible*” (at [20]).

- 2.

Granting the order A Bankers Trust order is reserved for clear-cut cases of fraud, and can be used to obtain confidential documents from a defendant’s bank in support of a proprietary claim to trace assets.

Here, the Claimant sought to obtain information from Ozone about the identity of the OpenSea account holders.

In the event, the judge concluded that it was likely Ozone held ‘know your client’ documentation identifying the persons in control of the wallets in question.

Notably, Ozone was given an express right to apply to vary or discharge the order, and would not have to comply with the same until the disposal of any such application (if one were made). The judge reasoned this to be a key safeguard against the

potential risks of Ozone providing the information. Whilst not a novel outcome in applications for Bankers Trust orders generally, in the crypto context it pays sentiment to the fact that crypto exchanges and digital platforms – in much the same way as traditional banks – may need to shield themselves against the compulsory provision of confidential client information.

3.

Granting permission for service out of the jurisdiction

As the Claimant is based in England, she argued that the claim should be tried within the jurisdiction of England and Wales. Ozone is based in the US (with “*no connection whatsoever to the English jurisdiction*” (at [13])); and there were no grounds for establishing the location of the unknown persons responsible for misappropriating the NFTs.

Accordingly, in order to obtain permission to serve the claim out of the jurisdiction, the Claimant was required to show that: (i) there was a serious issue to be tried on the merits of the case; (ii) a good, arguable case had been shown and fell within one of the jurisdictional gateways set out in Practice Direction 6B; and (iii) England was the appropriate forum for the claim.

The injunction

As to (i), this had already been satisfied (as above).

As to (ii), the judge concluded that, because the property had been transferred away from the Claimant by fraud, the NFTs were held by the persons unknown on a constructive trust, which arose as soon as the NFTs had been removed from the Claimant’s wallet. Gateway 15, which permits service out of the jurisdiction with the Court’s permission where the defendant is a constructive trustee, was thus engaged.

As to (iii), this appears to have turned on the pseudoanonymity of the persons unknown: their location, and therefore jurisdictional grounding, was impossible to state. In contrast, the Claimant was domiciled in England and the NFTs were accordingly located (and then misappropriated) in England.

The order

As to (ii), the Court held that the claim against Ozone fell within gateway three; that there was, between the Claimant and persons unknown (the anchor defendant), a “*real issue which is reasonable for the Court to try*”, and that Ozone was a “*necessary or proper party to that claim*” because it would be joined in the proceedings if it was domiciled in England. By extension, (i) was therefore clearly also satisfied.

As to (iii), whilst it was acknowledged that Ozone had “*no presence in the English jurisdiction*”, and that it would decline to make “*futile*” orders, the Court remained satisfied that England was the appropriate forum (at [53]).

Conclusion

This case helpfully brings the treatment of NFTs in line with the existing legal treatment of cryptocurrencies.

Most notably, there is now clear authority for NFTs to be treated as: (i) legal property in the English courts; (ii) situated where the owner is domiciled; and (iii) subject to a constructive trust.

Whereas novel technologies have long presented jurisdictional and legislative issues, it is promising to see the English courts confirm that the legal treatment of proprietary assets can transcend the unique challenges presented by the world of crypto.