

High Court grants restraining order over NFTs confirming them to be “property” under English law

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United Kingdom

- Financial services disputes and investigations
- Litigation and dispute management - Other

Lavinia Deborah Osbourne v (1) Persons Unknown and (2) Ozone Networks Incorporated [2022] EWHC 1021 (Comm)

Facts of the Case

- Lavinia Deborah Osbourne (“C”) made various without notice applications following the apparent theft of certain of her crypto assets:
 - as against persons unknown (“D1”), C applied for (i) a restraining order preventing the dissipation of non-fungible tokens (“NFTs”) alleged to have been stolen by D1 from a crypto account maintained by C (the “Restraining Order”), (ii) for permission to serve the Restraining Order out of the jurisdiction to the extent that D1 are persons outside of the jurisdiction and (iii) for permission to effect such service by alternative means; and
 - as against Ozone Networks Incorporated (“D2”), which controlled the wallets into which D1 transferred the NFTs, C applied for (i) an order under the *Bankers Trust Order* jurisdiction directing D2 to provide information enabling C to trace or identify D1 (the “BTO”) and (ii) for permission to serve the BTO on D2 out of the jurisdiction in the United States of America where D2 is located.
- It was relevant to the Court’s analysis and decisions that C is domiciled in England and that D2 has no presence in England.

The Decision

The Court granted all of the orders sought. Its decisions rest largely on settled authority, but contain the following points of interest:

- In granting the Restraining Order: (i) there is a realistically arguable case that NFTs are property for the purposes of English law, (ii) on the basis of C’s domicile in England, the NFT’s were also to be treated as located in England and (iii) damages were not an adequate remedy for C due, in part, to the unique, particular and personal value the NFTs had to her;
- In granting permission to serve the Restraining Order out of the jurisdiction: to the extent D1 are persons outside of the jurisdiction, the claims available to C enabled her to pass serve out under paragraph 15 of Practice Direction 6B, on the basis (i) she had demonstrated a strong arguable case that the NFTs had been stolen from her and (ii) accordingly were held by D1 on constructive trust;
- In granting C permission to effect service of the Restraining Order on D1 by alternative means: while it was at least possible that D1 was located in jurisdictions which are subject to the Hague Service Convention (the “Convention”), departure from the mechanism of the Convention was appropriate because of the need to bring the terms of the injunction speedily to the attention of the respondent;
- In granting the BTO against D2: the Court ordered D2 to provide contact details of the owners of the wallets into which the NFTs were transferred and, if available, the ultimate beneficial owners, as this information was found to be “necessary” for C to trace the NFTs. The Court also granted C permission to serve the BTO on D2 out of the jurisdiction under paragraph 3 PD 6B on the basis that (i) D2 was a necessary and proper party to the claim against D1 and (ii) despite the risk of D2 not engaging with the process and the order being ultimately pointless, the Court was content to assume that D2 would wish to cooperate for the purposes of supplying information which enables the proceeds of fraud to be traced.

Analysis and practical advice

The decision is a further example of the English Courts' willingness to develop and apply existing case law to contemporaneous disputes, in this case in relation to crypto assets and persons unknown who might be out of the jurisdiction (a common feature of such cases) to ensure victims have a timely means of tracing and recovering stolen assets.

In relation to its granting of the BTO, the Court observed that an “*unsatisfactory dichotomy*” had arisen whereby the Courts are inclined to permit the service of BTOs out of the jurisdiction, but not *Norwich Pharmacal Orders* (“**NPOs**”). Effective from 1 October 2022, Practice Direction 6B will therefore be amended to provide for a new gateway (paragraph 3.1(25)) for claims or applications for disclosure in order to obtain information regarding:

- (i) the true identity of a defendant or a potential defendant; and/or
- (ii) what has become of the property of a claimant or applicant.

This will clarify the position around the service out of the jurisdiction of NPOs and BTOs, although parties will still need to seek permission. In the meantime, where such disclosure is sought from a respondent outside of the jurisdiction, consideration should be given as to whether the applicant's claim can be framed as proprietary rather than personal one.

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