Zi Wang v Graham Darby

No Substantial Judicial Treatment

Court
Queen's Bench Division (Commercial Court)

Judgment Date
29 October 2021

No. LM-2021-000172

High Court of Justice Business and Property Court of England & Wales London Circuit Commercial Court (QBD)

[2021] EWHC 3125 (Comm), 2021 WL 05045695

Before: His Honour Judge Pelling QC (Sitting as a Judge of the High Court)

Friday, 29 October 2021

Representation

Mr T. Penny QC appeared on behalf of the Claimant.
Mr P. Jones appeared on behalf of the Defendant.

Judgment

His Honour Judge Pelling:

1. This is the hearing of the defendant's application for an order varying the freezing order I made against the defendant on 2 August last which I varied by a further order of 16 August last, the effect of which is to freeze the assets of the defendant in relation to a claim by the claimant that crypto coin assets entrusted to the defendant by the claimant had not been returned as they should have been and, in consequence, the claimant has a claim for a sum which is quantified at various sums between about £900,000 and about £1.3m.

2. The application for a variation arises in this way: the order that I made originally capped the legal expenses that could be paid for out of the funds that were available and which apparently had been frozen to £50,000. The reason for this was that the claimant has a, or maintains it has, a viable proprietary claim in relation to assets held by the defendant and, therefore, it was necessary to control the expenditure of the funds which were said to be subject to a Constructive, Resulting or Quistclose trust, if they were not to be exhausted rather than returned to the claimant.

3. The short point which arises on this application is that the solicitors who act for the defendant has spent the £50,000 that had been permitted to be spent under the terms of the order and incurred costs which, inclusive of VAT, comes to very close to £100,000. The variation which is sought is designed to enable the defendant to fund the costs that remain down to a hearing next month listed, for two days, which will be the hearing of an application by Mr Jones to vary or discharge the freezing order and for summary judgment in relation to the proprietary claim.

4. Mr Jones' submission is that on the only assets that in truth it can be said the defendant has access to, a substantial sum (in fact probably all of it near enough) is required in order to fund the legal costs that are to be incurred in order to defend

the claims that have been brought against him by making the applications I have identified. In those circumstances, an order is sought which permits further sums to be drawn down to be expended on legal costs.

5. The applicable principles are not in doubt. Both parties rely upon the summary in *GFH Capital Ltd. v Haig & Ors. [2018] EWHC 1187 (Comm.)* , Bryan J. at 34:

> "1. before there can be any question of using funds to which a claimant has a strong proprietary claim, the defendant must show that he has an arguable case for denying they belong to the claimant.
>
> 2. where there are assets which may belong to the claimant, the defendant should not be entitled to use those funds unless the court is convinced that the defendant has no other assets to use for this purpose."

The onus is firmly on the defendant to satisfy the court as to this –

> "… and, where there are [other assets available to the respondent], they should be expended before there is any question of expending funds subject to a proprietary claim."
>
> 3. If the court [is] satisfied that there are no assets other than those subject to a proprietary claim, the court must nevertheless…weigh whether the balance of justice militates in favour of permitting or refusing the payment."

6. Against that background, the focus of attention in the submissions that have been made in support of the application has been on whether or not it can properly be said that there are funds available to the defendant other than those which are specifically frozen which would be available for use if liquidated in order to defend the claim.

7. At five to five in the evening I hope I will be forgiven for not embarking on a detailed exposition of how it is alleged that there are assets available to the defendant. In summary, the point made by the defendant throughout these proceedings is that he is not in a position to identify what cryptocurrency assets he has because all the access codes and other information needed to access his various cryptocurrency wallets is contained in a hard drive protected by a password and that he has forgotten the password. His case is that is so by reason of a medical condition which has affected his cognitive abilities.

8. In support of that proposition reliance is placed by the defendant on notes to be found on his GP records. No attempt has been made to obtain a report from a consultant psychiatrist and the notes which appear in the GP's records consist of, either exclusively or very substantially, self-reported symptoms with no attempt having been made, even by a GP report, to credit the suggestion that the condition that the defendant suffers from is such as to make it credible that he has forgotten the relevant passwords.

9. I remind myself that this is not a question of me coming to a conclusion as to whether or not the defendant is to be disbelieved because that is not the function of a hearing of this sort and would be plainly inappropriate other than following a trial. What I have to be satisfied of is that this defendant has proved to the standard required that he has no other assets apart from those in respect of which he seeks the variation.

10. The contents of the GP's record is a self-reported history that in the course of a telephone conversation the defendant expressed concern that over "the last few years" his memory is not what it used to be; he forgets words; feels his vocabulary is not as good despite reading a lot; struggles to hold conversations; cannot think of the word and also has problems with people's names, people he has known for years, family, work colleagues. He says he cannot remember what he has been

reading, what he has read recently; that he has become more aware of it; otherwise feels well but the condition makes him feel anxious and is not aware of a family history of memory issues.

11. The points which I take away from that summary is that, first of all, the memory loss issues of which complaint is being made appear to have been developing over "the last few years" and the one thing that does not feature in the self-reported symptoms identified there is specifically forgetting passwords in relation to hard drives containing information critical to his assets and/or his business life.

12. The other entry to which my attention was drawn was one in January 2021 where he reported that his range of topics of conversation had reduced; he repeats things sometimes; will not pay attention to where he is going when he is driving and finds he has gone the wrong way; similarly when shopping he may forget one thing he had to get; he also finds he cannot do computer programming anymore. The reference to computer programming aside, there is no reference there to forgetting specifically passwords in relation to computers; indeed, his suggestion that he cannot do computer programming is, if anything, slightly inconsistent with that since it implies that he is able to obtain access to his computer but is not able to carry out the programming that he wanted to do having gained access to it.

13. This is not evidence on which someone bearing the onus of proof that a medical condition justifies his assertion that he has forgotten a critical password can sensibly rely even on an application of this sort. The material to which my attention was drawn to in the course of hearing is very largely self-reported symptoms. The material suggests at most that the defendant is suffering from mild depression with cognitive difficulties secondary to that. There is no reference anywhere in the self-reported symptoms specifically to the loss of knowledge in relation to passwords. Therefore, in my judgment the material currently available falls short of what is required to satisfy the burden that rests on the defendant.

14. However, even if I am wrong about that, the evidence which was available to the claimant and which has been deployed consistently in this case is entirely inconsistent with the defendant's case that he had forgotten the relevant passwords. The expert that the claimant relies upon is Mr Saunders. Mr Saunders provided a report which was relied upon at the first hearing. In para.80 of that first report Mr Saunders said this:

> "Activity on the blockchain suggests that between April and May 2019 Mr Darby obtained a different type of crypto wallet as funds flow out of the Darby cluster into Bech32 addresses. The transition of address type…is a poor indicator of utilising new wallet software. Some of these Bech32 addresses transact more recently. As just one example, wallet… [is shown] receiving BTC on 2nd October 2020 and bc1…receiving 50 BTC on 30th April 2021."

15. The key point that arises from this is that the transactions that were taking place on 30 April 2021 postdate the date at which it is suggested by the defendant that he had suffered a cognitive condition and had forgotten the password relevant to accessing the hard drive on which all the information concerning his various wallets was stored.

16. On the face of it, this evidence contradicts the suggestion that the password relevant to the hard drive had been lost because the transactions that are referred to by Mr Saunders could not have been carried out by the defendant had the password been lost because he could not obtain access to the information necessary to enable those transactions to take place. As I have said, these transactions postdate the date when it is alleged the password had been forgotten.

17. There are a number of possible answers to this. It could have been said that the information concerning the wallets identified by Mr Saunders had been stored separately by the defendant. It could have been said, as was submitted by Mr Penny

QC on behalf of the claimant, that this was hacking transaction activity or activity in which the defendant was transacting on a commercial basis with a bona fide third party.

18. However, these points have not been deployed by the defendant. if there was a third party involved, then it would not be difficult for the defendant to deploy evidence which makes that point in a few lines of evidence; and if the answer was that these were wallets which had access codes which exceptionally were not contained within the hard drive in respect of which the password has been lost, then that could have been asserted as well. The reality is, as Mr Jones accepts and as is obvious, there has been no attempt whatsoever by the defendant to demonstrate that any of those possibilities exist.

19. I do not propose at this stage to go through the detailed evidence contained primarily in the second report of Mr Saunders, which demonstrates why the evidence contained in the report has been strengthened by further information becoming available and showing that 100 bitcoins at least has been in the control of the defendant and is in the control of the defendant. It is not necessary that I do so.

20. The key point for present purposes is the defendant needed to answer the point concerning receiving 50 bitcoin on 30 April 2021 if he was to avoid the conclusion that he had available to him assets which could fund his defence. As to that, 50 bitcoin is worth, so I am told, something of the order (depending on what the value is from day to day) of about $3m.

21. I leave to one side as immaterial for present purposes Mr Saunder's conclusions as to the credibility of the defendant because it is not relevant or necessary for me to consider them. What matters is that on the material which is currently available to me, first of all, it is clear (absent it being answered by the defendant) that some 55 bitcoins were transacted by him on 30 April 2021 and it is equally clear on the evidence that is available (absent it being answered by the defendant) that these transactions could not have taken place if, as the defendant maintains, he does not have access to the relevant credentials to enable these transactions to take place because they are in a hard drive protected by a password that he has forgotten. That in combination with the wholly inadequate nature of the medical evidence the defendant has sought to rely on means that the defendant cannot discharge the onus that rests upon him to satisfy the court that het has no other assets available for use in funding, amongst other things, his defence.

22. I make it clear for the avoidance of all doubt for the future, that I am not reaching any decided conclusions as to the truth or otherwise of the various assertions made. This is an interlocutory application. It is an interlocutory application I am bound to decide on the material that is available to me on the day. In those circumstances this application fails and is dismissed.